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

Recourse to Article 21.5 of the DSU by Mexico (DS381)

(AB-2015-6)

Appellant Submission
of the United States of America

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SERVICE LIST

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TABLE OF ACRONYMS

Acronym	Full Name
2013 Final Rule	Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997 (July 9, 2013)

AIDCP	Agreement on the International Dolphin Conservation Program
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
C.F.R.	Code of Federal Regulations
DML	Dolphin Mortality Limit
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
EPO	Eastern Pacific Ocean
ETP	Eastern Tropical Pacific Ocean
EEZ	Exclusive Economic Zones
FAD	Fish Aggregating Device
FAO	United Nations Food and Agriculture Organization
FCO or Form 370	NOAA Fisheries Certificate of Origin
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IDCP	International Dolphin Conservation Program
IDCPA	International Dolphin Conservation Program Act
IOTC	Indian Ocean Tuna Commission
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration

RFMOs	Regional Fishery Management Organizations
RPT	Reasonable Period of Time
SPS	Sanitary and Phytosanitary
TBT Agreement	Agreement on Technical Barriers to Trade
TTF	Tuna Tracking Form
U.S.C.	United States Code
WCPFC	Western and Central Pacific Fisheries Commission
WTO	World Trade Organization

TABLE OF REPORTS

Short title	**Full Citation**

Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Aircraft (Article 21.5 – Brazil) (AB)	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
Canada – Dairy (Article 21.5 – New Zealand and US II) (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
Canada – Wheat Exports and Grain Imports (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
Chile – Price Band System (Article 21.5 – Argentina) (Panel)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report WT/DS207/AB/RW
China – Auto Parts (AB)	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009
China – Auto Parts (Panel)	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R
China – Rare Earths (AB)	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 (AB)	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
Dominican Republic – Import and Sale of Cigarettes (Panel)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
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EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Seal Products (AB)	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 – Seal Products (Panel)	Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R / and Add. 1, adopted 18 June 2014, as modified by Appellate Body Reports, WT/DS400/AB/R / WT/DS401/AB/R
EC – Steel Fasteners (China) (AB)	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

India – Patents (AB)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
Japan – Apples (AB)	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Various Measures on Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Mexico – Corn Syrup (Article 21.5 – US) (AB)	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
Mexico – Soft Drinks (Panel)	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
Thailand – Cigarettes (Philippines) (AB)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
Thailand – H-Beams (AB)	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
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Certain EC Products (AB)	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012

US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – COOL (Article 21.5 – Canada/Mexico) (AB)	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
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US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Large Civil Aircraft (Second Complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)	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
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US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US – Shrimp (Article 21.5 – Malaysia) (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Shrimp (Article 21.5 – Malaysia) (Panel)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report WT/DS58/AB/RW
US – Shrimp II (Viet Nam) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Tuna II (Article 21.5 – Mexico) (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, circulated 14 April 2015
US – Tuna II (Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
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US – Upland Cotton (Article 21.5 – Brazil) (AB)	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
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

US – Zeroing (EC) (Article 21.5 – EC) (AB)	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

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. This proceeding is unusual, if not unique, among compliance proceedings. Here, it is *uncontested* that the measure taken to comply directly addressed the concerns identified by the Appellate Body in the original proceeding, a point the Panel itself confirms.[1] Instead, the Panel faulted the United States for not fundamentally altering its measure in ways that either were not contemplated by the Dispute Settlement Body (DSB) recommendations and rulings or that implicitly reject those recommendations and rulings.

2. In the original proceeding, Mexico challenged a particular aspect of the U.S. dolphin safe labeling measure – the eligibility criteria for access to the dolphin safe label. The Appellate Body ultimately found that the eligibility criteria were, in fact, inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement). Specifically, the Appellate Body found that the "lack of access to the 'dolphin-safe' label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market."[2] The Appellate Body then found that this detrimental impact did not stem exclusively from a legitimate regulatory distinction because one of the criteria – whether a dolphin had been killed or seriously injured – was not "even handed" in the sense that it was not "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[3]

3. The United States amended its measure by regulation in July 2013 to ***directly address*** the DSB recommendations and rulings by requiring "a captain's statement certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught using any fishing gear type in all fishing locations."[4] Indeed, the 2013 Final Rule so clearly addressed the concern of the Appellate Body that Mexico *did not even challenge* the revised aspect of the U.S. measure as discriminating against Mexican tuna product.[5]

4. Instead, Mexico reasserted its challenge that the denial of the "dolphin safe" label to tuna product produced by "setting on dolphins" – *i.e.*, the intentional encirclement of dolphins in purse seine nets – discriminates against Mexican tuna product, as well as bringing new challenges, never made before, against different elements of the U.S. dolphin safe labeling requirements. Mexico's legal strategy of staggering its arguments between the original and compliance proceedings unnecessarily extends the dispute and undermines the functioning of the WTO dispute settlement system.

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[1] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.141 ("In the Panel's view, [the] 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.").

[2] *US – Tuna II (Mexico) (AB)*, para. 235.

[3] *US – Tuna II (Mexico) (AB)*, para. 297.

[4] *See Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997, 40,998 (July 9, 2013) (2013 Final Rule) (Exh. MEX-7).

[5] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.142.

5. At the same time, Mexico's strategy and the Panel's response to it have threatened to turn what is a very straightforward case of a Member directly amending its measure to bring it into compliance with the Appellate Body's findings into something more complex. This has forced the United States in its appellant submission to systematically walk through the errors that the Panel repeated many times in its report in order to demonstrate clearly the Panel's legal errors. While this has resulted in a somewhat lengthy submission, it should not detract from the very straightforward issue of compliance that now stands before the Appellate Body.

6. But Mexico's strategy and the fact that the measure taken to comply undisputedly addressed the Appellate Body's findings are not the only unusual aspects of this dispute.

7. As discussed below, the import of the Panel's analysis under Article 2.1 is that the Panel *agreed* that Mexico had established a *prima facie* case that the eligibility criteria result in a detrimental impact but *disagreed* that Mexico had established a *prima facie* case that: 1) this detrimental impact does not stem exclusively from a legitimate regulatory distinction; 2) the certification requirements result in a detrimental impact; and 3) the tracking and verification requirements result in a detrimental impact.[6] Under a proper application of the burden of proof, the Panel would have found against Mexico on *all three elements* of its Article 2.1 claim (as well as the parallel elements of its claims under the *General Agreement on Tariffs and Trade 1994* (GATT 1994)). But the Panel did not correctly apply these rules and examine the evidence and arguments brought forward by Mexico. Instead, it created new arguments on Mexico's behalf, with the result that the Panel found that the certification requirements and tracking and verification requirements accord less favorable treatment to Mexican tuna product.[7] The Panel fundamentally erred in this regard, and that error requires reversal of *all* of the Panel's findings that the amended measure is inconsistent with the TBT Agreement and the GATT 1994.

8. Moreover, the Panel fundamentally misunderstood the legal analysis under Article 2.1 for determining whether a detrimental impact stems exclusively from a legitimate regulatory distinction. The Panel found, in essence, that the question of whether a measure is "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean is not relevant to whether the certification and tracking and verification requirements are even-handed. But the even handedness of these requirements is, in fact, the central question for this dispute. And, as the Panel's own factual findings make clear, these challenged requirements are so "calibrated." Moreover, the Panel's heavy reliance on one piece of the Article XX chapeau legal analysis to determine whether the measure accords less favorable treatment under Article 2.1 was incorrect and led directly to the Panel's errant findings that these requirements do not constitute legitimate regulatory distinctions, as well as similarly errant findings that the requirements were not consistent with the GATT 1994.

9. The Panel's failure to take into account whether the measure is calibrated to the different risk profiles for dolphins of the ETP large purse seine fishery, on the one hand, and all other

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[6] These same agreements (and disagreements) flowed through the Panel's GATT 1994 analysis as well.

[7] For purposes of brevity, the United States refers to "tuna product" throughout this submission as opposed "tuna and tuna product."

fisheries, on the other, would, if upheld, have significant consequences. The Panel's analysis suggests that, in order for the United States to meet its WTO obligations, it would have to impose the requirements of the *Agreement on the International Dolphin Conservation Program* (AIDCP) – both in terms of the education and training of the certifier of the "dolphin safe" status of tuna and the tracking and verification regime – on itself and all of its trading partners.

10. As discussed below, the AIDCP is a unique agreement concluded among 14 Members to address the unparalleled harms to dolphins occurring in the purse seine fishery of the eastern tropical Pacific Ocean (ETP). As a party to the AIDCP, Mexico agreed that its tuna industry would adhere to many requirements that the industries of other WTO Members are not subject to. Of course, there is nothing unusual about this – there are many different regional and plurilateral agreements in the world, on many different subjects, including in trade.

11. What *is unusual* is the Panel's suggestion that, because it (apparently) considered the AIDCP approach to be "better" than the alternative provided in the U.S. measure, and because it does not matter whether the dolphin safe labeling requirements are "calibrated" to the risks to dolphins in different areas, the United States must impose the AIDCP requirements on itself and all of its trading partners, *regardless of the risks to dolphins in any particular fishery*. In other words, the United States must impose the type of "rigid and unbending requirement" that was so criticized in *US – Shrimp*[8] in order to meet its WTO obligations. In effect, to avoid discriminating against one AIDCP party, the United States must "globalize" the AIDCP for all its trading partners, *even if the evidence does not support doing so*. And, to be clear, the evidence *does not* support doing so. The Panel's factual findings in light of the evidence on the record are clear: the risks that dolphins face in the ETP large purse seine fishery (where the AIDCP is applicable) are substantially different from the risks in all other tuna fisheries.

12. The United States considers that the Panel's findings that these two aspects of the measure are WTO-inconsistent are fundamentally flawed. The U.S. dolphin safe labeling measure is a legitimate environmental measure that provides protection to dolphins by informing U.S. consumers of whether the tuna in the tuna product they purchase was harvested in a dolphin safe manner. The measure simply does not discriminate against Mexico, whose chosen fishing method of setting on dolphins is the *only known fishing method in the world* that systematically and intentionally targets marine mammals to capture a commercially valuable fish. As such, the United States respectfully requests the Appellate Body to reverse the Panel's findings that the certification and tracking and verification requirements are inconsistent with the TBT Agreement and the GATT 1994.

B. Executive Summary

13. 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

[8] *See US – Shrimp (AB)*, para. 163.

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.[9] Under the amended measure, this condition applies to all tuna product, regardless of the fishery in which the tuna was caught.[10] 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.

14. 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.

15. 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.

16. Sections III through VI then set out the U.S. appeals of the Panel's findings.

1. Article 2.1 of the TBT Agreement

17. 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

[9] *US – Tuna II (Mexico) (AB)*, paras. 289-292, 298.

[10] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.142.

18. 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.

19. 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 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.[11]

20. 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[12] whereby a complainant must establish a *prima facie* case for all the elements of its claims.[13] 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.[14] The Panel made no "definitive finding" on this issue.[15] 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.

21. 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.[16] 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

[11] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[12] *US – Tuna II (Mexico) (AB)*, para. 216 (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).

[13] *US – Gambling (AB)*, para. 140.

[14] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.152.

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

[16] *See, e.g., Korea – Various Measures on Beef (AB)*, paras. 141, 144.

conditions of competition to the detriment of Mexican tuna product. As such, the Panel's finding of detrimental impact was in error.

22. 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.

23. 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.[17]

24. 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 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.[18]

25. 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."[19]

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[17] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.170, 7.179, 8.2(b).

[18] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[19] *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.

26. 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.

27. 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.

28. 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.[20]

b. The Panel Erred in Finding that the Tracking and Verification Requirements Are Inconsistent with Article 2.1

29. 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.

30. 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

[20] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.233-234, 7.263, 8.2(b).

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 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.[21]

31. 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.[22] The Panel made no "definitive finding" with regard to this argument.[23] 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."[24] 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.

32. 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."[25] 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.

33. 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

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[21] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).

[22] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288.

[23] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382; *see also id.* para. 7.372.

[24] *Japan – Agricultural Products II (AB)*, para. 129.

[25] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.354 (emphasis omitted).

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.

34. 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*.

35. 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.[26]

36. 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."[27]

37. 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.[28]

38. 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.

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[26] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.372, 7.382, 8.2(c).

[27] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92; *US – COOL (AB)*, para. 271

[28] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).

39. 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.

40. 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."

41. 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.[29]

42. 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.[30]

2. The GATT 1994

43. 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.[31]

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[29] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.392, 7.400, 8.2(c).

[30] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b)-(c).

[31] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.3(b), 8.3(c).

44. 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.

45. 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.[32]

46. 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.'"[33] 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."

47. 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."[34] 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.

48. 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

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[32] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).

[33] *EC – Seal Products (AB)*, para. 5.303 (quoting *US – Shrimp (AB)*, para. 165).

[34] *EC – Seal Products (AB)*, para. 5.300; *see also id.* para. 5.317.

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."[35] 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 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.

49. 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.

50. 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.[36] 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.[37]

51. 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."

52. 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

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[35] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169.

[36] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.605, 7.610-611.

[37] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).

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.[38]

53. 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.

54. 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 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.

55. 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.

56. 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

[38] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.5(b).

the Article XX chapeau[39] and respectfully requests that the Panel's findings that the amended measure is not consistent with the Article XX chapeau should be reversed.[40]

II. THE PANEL'S FACTUAL FINDINGS AND UNCONTESTED FACTS ON THE RECORD

A. Different Fisheries Management Regimes

57. The governance of the harvest of fish throughout the world is unlike the governance of international trade. Instead of one international organization that has one set of rules, there are many national, regional, and international regimes that divide and share responsibility for managing the world's fisheries, with different sets of rules that apply to different fisheries.[41]

58. For tuna fisheries, the principle management bodies at the supra-national level are the five regional fisheries management organizations (RFMOs) – the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Inter-American Tropical Tuna Commission (IATTC), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), and the Western and Central Pacific Fisheries Commission (WCPFC).[42]

59. Each of these individual RFMOs have established their own set of requirements to address the management challenges in the particular fisheries for which that the organization has responsibility. These requirements, of course, primarily address the management of tuna and tuna-like species in the fisheries within the respective convention areas,[43] although some RFMOs

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[39] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.605, 7.610-611.

[40] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).

[41] For purpose of this appeal, a "fishery" is defined by location, gear type (or fishing method), and target species, such as the Hawaii deep-set longline tuna fishery. *See* U.S. Response to Question 21, para. 135; *id.* Question 52, para. 272; *see also* Mexico's Response to Question 52, paras. 139-140 ("[A] fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life.") (quoting the FAO Fisheries Glossary (Exh. MEX-132) as stating that a "fishery" is "a unit determined by an authority or other entity that is engaged in raising and/or harvesting fish. Typically, the unit is defined in terms of some or all of the following: people involved, species or type of fish, area of water or seabed, method of fishing, class of boats and purpose of the activities.").

[42] *See, e.g.*, U.S. First Written 21.5 Submission, para. 51. In addition to the RFMOs, countries can have their own regulations that cover particular tuna fisheries or vessels bearing their flag. *See, e.g.*, U.S. Answer to Panel Question 29, para. 164 (describing the U.S. observer program for the Hawaii Deep-set and American Samoa Longline fisheries, which go beyond the WCPFC requirements) (citing NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013" (Exh. US-163); NMFS, "American Samoa Longline Annual Reports – 2006-2013" (Exh. US-164)).

[43] *See, e.g.*, IOTC, Resolution 11/04 on a Regional Observer Scheme, at 1 (2011) (Exh. MEX-124) (referring to the IOTC's objective of "improve[ing] the management of tuna and tuna-like species fished in the Indian Ocean."); WCPFC, "About WCPFC," at 1 (2014) (Exh. MEX-136) (explaining that the WCPFC "seeks to address problems in the management of high seas fisheries resulting from unregulated fishing, over-capitalization, excessive fleet capacity, [etc.] …"); IATTC, William H. Bayliff, *Organization, Functions, and Achievements of the Inter-American Tropical Tuna Commission*, at 1 (2001) (Exh. US-21) (stating that the IATTC convention "states that the principles duties of the IATTC are (1) to study the biology of the tunas, tuna baitfishes, and other kinds of fish taken by tuna vessels in the ETP and the effects of fishing and natural factors upon them and (2) to recommend

have recently also begun to focus on issues regarding bycatch.[44] In that regard, two RFMOs have recently banned intentionally encircling cetaceans (*i.e.*, dolphins, porpoises, and whales) in purse seine nets, and another is considering such a ban.[45] It is undisputed, however, that no mandatory, comprehensive program exists for documenting and mitigating marine mammal bycatch that is required by – or associated with – an RFMO, save one – the AIDCP.[46]

B. The AIDCP

60. The AIDCP is an agreement among 14 of the 21 members to the IATTC.[47] It is a unique agreement in the fishery world in that it was concluded specifically to address dolphin mortality in a particular fishery – the ETP large purse seine fishery.[48]

61. The total number of dolphins killed in the ETP large purse seine fishery since the late 1950s is estimated to be over 6 million – *the highest known mortality for any fishery*.[49] Although annual estimated mortality declined over time, as recently as 1986, over 130,000 dolphins were

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appropriate conservation measures, when necessary, so that these stocks of fish can be maintained at levels which will afford the maximum sustained catches").

[44] The term "bycatch" generally refers "the retained catch of non-targeted but commercially viable species (referred to as 'incidental catch') plus all discards." *See* Eric L. Gilman & Carl Gustaf Lundin, IUCN Global Marine Programme, *Minimizing Bycatch of Sensitive Species Groups in Marine Capture Fisheries: Lessons from Tuna Fisheries*, at 2 (2011) (Exh. US-69). With regard to the fisheries discussed in this dispute, dolphins are not commercially viable animals and are discarded when killed or seriously injured.

[45] *See* U.S. Answer to Panel Question 16, para. 86 (citing WCPFC, Conservation and Management Measure 2011-03 (Mar. 2013) (Exh. US-11); IOTC, Resolution 13/04 on the Conservation of Cetaceans (2013) (Exh. US-12); and ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014) (Exh. US-13)).

[46] *See* Mexico's First Written Submission, para. 110 (comparing the features of marine mammal protection in the RFMOs); Mexico's Second Written 21.5 Submission, para. 56 ("None of those three [RFMOs] [*i.e.*, ICCAT, IOTC, and WCPFC] has adopted, or has plans to adopt, measures to protect dolphins that are *remotely comparable* to those of the AIDCP. None of them has even proposed a comprehensive program involving use of special equipment, training, monitoring, tracking, verification, and certification.") (emphasis added); Mexico's Response to Question 13, para. 78 (same).

[47] Belize, Colombia, Costa Rica, Ecuador, El Salvador, European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, United States, and Venezuela are parties to the AIDCP. Bolivia and Vanuatu apply the AIDCP provisionally.

[48] A purse seine net is a type of fishing gear consisting of a large wall of netting with floats along the top line and a lead line threaded through the bottom. A purse seine net is deployed as follows: when a school of fish is located, the purse seiner releases the net and smaller boats encircle the entire school with the net; the lead line is then pulled in "pursing" the net closed at the bottom and preventing the fish from escaping. *See* U.S. First Written 21.5 Submission, para. 82; *see also* Barbara E. Curry, *Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean*, at 6 (1999) (Exh. US-36); Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1193 (Exh. US-29).

[49] Gerrodette 2009, "The Tuna-Dolphin Issue," at 1192 (Exh. US-29).

killed in a single year, and in the late 1980s and early 1990s, annual dolphin mortality was in the tens of thousands.[50]

62. The reason behind this unparalleled level of dolphin mortality is the fact that large purse seine vessels are taking advantage of a unique association that occurs in part of the ETP between certain species of dolphins and yellowfin tuna. This association is so frequent and intense that large purse seine vessels are able to catch tuna by "setting on dolphins."[51] Setting on dolphins is the fishing method by which ETP large purse seine vessels locate schools of dolphins (often numbering in the hundreds), chase them for up to two hours, herd them with speedboats and helicopters, and eventually capture the dolphins (and the tuna swimming below) in a purse seine net.[52] *It is the only known fishing method in the world* that systematically and intentionally targets marine mammals of any kind to capture a commercially valuable fish.

63. The AIDCP does not prohibit, as certain other RFMOs do, the practice of setting on dolphins, which is considered a highly economically beneficial method of harvesting tuna in this part of the world.[53] In exchange, however, the parties to the AIDCP have agreed that their large purse seine vessels and the related industries that purchase fish from them will comply with unique requirements that are not imposed on tuna producers operating in other fisheries inside or outside the ETP. Setting on dolphins remains a widespread commercial practice in the ETP, with large purse seine vessels engaging in, on average, over 10,000 intentional dolphin sets per

[50] Michael L. Gosliner, "The Tuna Dolphin Controversy," in Twiss & Reeves (eds.) *Conservation and Management of Marine Mammals* 120, 124 (1999) (Exh. US-34); Mexico's Comments on U.S. Response to Panel Question 14, para. 64.

[51] U.S. Response to Panel Question 20, para. 122; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239, 7.242 (maj. op.); *see also* U.S. Response to Panel Question 3, para. 9 (discussing in what part of the ETP the association occurs) (citing IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-123)).

[52] U.S. Response to Panel Question 20, para. 122 (citing Gerrodette 2009, at 1192 (Exh. US-29)); *see US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-240 (maj. op.).

As discussed in U.S. Response to Question 30, para. 167, at the end of a chase, speedboats have herded the dolphins into a tight group. The purse seiner then deploys the net around the dolphins, and speedboats circle the net's opening to prevent dolphins from escaping until the net is closed completely. At that point, dolphins cannot escape, other than by jumping over the net's floating corks, until the "backdown" process is initiated. The backdown procedure is intended to allow the dolphins to escape the net alive without the tuna also having a chance to escape. It takes approximately 40 minutes before the vessel can begin the backdown procedure to release the captured dolphins, and thus dolphins can be confined for over an hour and half during a set. Curry 1999, at 6 (Exh. US-36).

[53] *See, e.g.*, Mexico's Response to Panel Question 57, para. 146 (stating that "it is neither economically or ecologically feasible for the Mexican tuna fleet to change its fishing methods or move to another ocean region").

year in the years 2009-2013.[54] There is no evidence of the widespread use of this fishing method in any other fishery, as an equivalent tuna-dolphin association does not exist elsewhere.[55]

64. The first agreement aimed at limiting the harms of setting on dolphins was the Agreement for the Conservation of Dolphins of 1992 ("La Jolla Agreement"). The La Jolla Agreement set an overall Dolphin Mortality Limit (DML) for each year and allocated individual DMLs to each participating government based on the size of the government's large purse seine fleet.[56] Only vessels assigned a DML were permitted to set on dolphins, and such vessels had to stop setting on dolphins once their DML was reached.[57] All participating governments committed to require their large purse seine vessels operating in the ETP to carry an observer from the IATTC or their national program and to permit the observer to collect information pertinent to carrying out the agreement.[58] In 1995, the parties to the La Jolla Agreement signed the Panama Declaration, which pledged the parties to conclude a legally binding instrument. The AIDCP, which entered into force in 1999, was this instrument.[59]

65. In contrast to the RFMOs, the AIDCP's primary objective is dolphin protection – "to progressively reduce incidental dolphin mortalities."[60] The AIDCP's various unique requirements and programs reflect this unique objective.[61] These requirements and programs include:

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[54] Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127) (noting that IATTC data shows that there were 52,130 dolphin sets from 2009-2013, where a total of 31.3 million dolphins were chased and 18.6 million dolphins were encircled in purse seine nets).

[55] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7. 242 (reviewing Mexico's evidence and concluding that "[t]hese statistics confirm for the Panel that although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically,' in the words of the original Panel").

[56] Agreement for the Conservation of Dolphins, at 1 (1992) (Exh. US-40).

[57] Agreement for the Conservation of Dolphins, at 2 (1992) (Exh. US-40).

[58] *See* U.S. Comments on Third Parties' Response to Panel Question 2, para. 308, n.441; Agreement for the Conservation of Dolphins, at 2 (1992) (Exh. US-40).

[59] *See* Agreement on the International Dolphin Conservation Program (AIDCP), at 1 (Exh. MEX-30).

[60] *See* U.S. Response to Panel Question 27, para. 158 n.265 (citing AIDCP, art. II (Exh. MEX-30), stating that the goals of the AIDCP are: 1) "to progressively reduce incidental dolphin mortalities"; 2) "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 3) ensuring the fishery's long-term sustainability); *see also* Mexico's Opening 21.5 Statement, para. 32; Mexico's First Written 21.5 Submission, paras. 76-79.

[61] The AIDCP and its precursor agreements apply to purse seine vessels in the ETP. *See* AIDCP, art. I, Annex I (Exh. MEX-30). The AIDCP divides these vessels into two categories – vessels with a carrying capacity greater than 363 metric tons ("large purse seine vessels") and vessels with a carrying capacity of 363 metric tons or less ("small purse seine vessels"). Small purse seine vessels are prohibited from setting on dolphins, and are not generally subject to the AIDCP operating, observer, or tracking requirements. *See* U.S. Response to Panel Question No. 7, para. 49; U.S. Response to Panel Question No. 30, para. 166 (citing AIDCP, Annex VIII(6) (Exh. MEX-30)). Large purse seine vessels may be permitted to set on dolphins (with a DML) and are subject to the requirements described above. *See* AIDCP, at Annex II, Annex IV, Annex VIII (Exh. MEX-30). The AIDCP does not apply to

- Gear and Equipment Requirements. Vessels that are permitted to set on dolphins must comply with certain safety gear and equipment requirements, including: (a) having a dolphin safety panel that meets certain specifications; (b) having at least three operable speedboats equipped with operable towing bridles or poses and tow lines; (c) having an operable raft; (d) having at least two operable facemasks suitable for underwater observation; and (e) having an operable long-range, high-intensity floodlight.[62]

- Operating Requirements. Vessels must comply with certain operational requirements, including: (a) performing a "backdown" procedure in every set in which a dolphin is captured, including deploying "at least one crewman"; (b) continuing to try to release "any live dolphins remaining in the net after backdown" prior to sack-up; (c) completing backdown no more than thirty minutes after sunset; (d) not using any explosives during any phase of a fishing operation involving dolphins; (e) not intentionally setting on dolphins without a DML or after the vessel's DML has been reached; and, (f) performing periodic net alignment based on criteria established by the International Review Panel.[63]

- Onboard Observer Coverage Requirement. During the entirety of every fishing trip in the ETP, vessels must have onboard an AIDCP-approved observer, either from the International Dolphin Conservation Program (IDCP) On-Board Observer Program or from a qualified national program.[64]

- Observer Qualification and Training Requirements. All AIDCP-approved observers must meet certain qualifications, including being a university graduate with a degree in biology or a related subject[65] and having completed the required technical training program, which includes training on purse seine fishing, identification of certain species, filling out the required data forms, and how "to identify, deal with, and document" instances of "interference" by vessel crew.[66]

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other fishing vessels in the ETP, such as longline vessels, and pole and line vessels, as these vessels are not capable of setting on dolphins. *See* IATTC, Quarterly Report (April-June 2013), at 7 (Exh. MEX-29).

[62] *See* AIDCP, art. V.1.e., Annex VIII, para. 2 (Exh. MEX-30).

[63] *See* AIDCP, art. V.1.e., Annex VIII, para. 3 (Exh. MEX-30).

[64] *See* Mexico's First Written 21.5 Submission, para. 70 (citing Inter-American Tropical Tuna Commission, Quarterly Report (April-June 2013), p. 14 (Exh. MEX-29); AIDCP, annex II (Exh. MEX-30).

[65] *See* Mexico's Response to Panel Question 61, para. 10 (citing AIDCP, Guidelines for the Selection of Candidates for Observers of the AIDCP (2007) (Exh. MEX-165)); U.S. Response to Panel Question 61, para. 22.

[66] *See* U.S. Response to Panel Question 61, para. 23 (citing AIDCP, Guidelines for Technical Training of Observers, Doc. OBS-2-03b (Oct. 27, 2007) (Exh. US-242)); Mexico's Response to Panel Question 61, para. 10 (citing AIDCP, Guidelines for Technical Training of Observers, Doc. OBS-2-03b (Exh. MEX-164); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.214 ("Both parties have also provided evidence indicating that observers under the IATTC Observer Program 'Are biologists trained to collect a variety of data on the mortalities

- Observer Duties. Observers must "gather all pertinent information on the fishing operations of the vessel to which the observer is assigned," as necessary to implement the AIDCP. This includes compiling a "record of dolphin mortality."[67]

- Tuna Tracking Form (TTF) Requirement. Observers on all vessels must maintain and certify two TTFs – one recording all sets in which a dolphin mortality or serious injury occurred and one recording all sets without a dolphin mortality or serious injury.[68]

- Segregation Requirements. Tuna caught in sets where a dolphin mortality or serious injury occurred must be kept separate from tuna caught in sets where no dolphin mortality or serious injury occurred on board the fishing vessel, on any carrier vessel, and during unloading and processing.[69]

- Government Oversight. At the end of a fishing trip, the competent national authority of the AIDCP party under whose jurisdiction the tuna caught on that trip is processed must receive the original TTF(s).[70] When a vessel returns to port to unload part of all of its catch, the captain, owner, or agent of a vessel must provide notice to the relevant national authority of the vessel's intended schedule and place of unloading to "allow for preparations to be made for monitoring the unloading."[71]

- Periodic Audits and Spot Checks. The national programs established by the AIDCP parties to implement the agreement "shall include periodic audits and spot checks for caught, landed, and processed tuna products."[72]

66. It is uncontested that the requirements and programs of the AIDCP have significantly reduced observed dolphin mortalities in the ETP large purse seine fishery, with observed annual mortality dropping from the hundreds of thousands to an average of 1,011 observed dolphin deaths annually in the years 2009-2013.[73] This number of dolphin mortalities is still high, however, and, as indicated, an unparalleled level of dolphin interaction continues unabated, with

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of dolphins associated with the fishery, sightings of dolphin herds, catches of tunas and by catches of fish and other animals. . . .'").

[67] *See* Mexico's First Written 21.5 Submission, para. 72 (citing AIDCP (Exh. MEX-30)).

[68] AIDCP, Revised System for Tracking and Verifying Tuna, art. 3 (Exh. MEX-36).

[69] AIDCP, Revised System for Tracking and Verifying Tuna, art. 5 (Exh. MEX-36).

[70] AIDCP, Revised System for Tracking and Verifying Tuna, art. 3 (Exh. MEX-36).

[71] AIDCP, Revised System for Tracking and Verifying Tuna, art. 5 (Exh. MEX-36).

[72] AIDCP, Revised System for Tracking and Verifying Tuna, art. 7 (Exh. MEX-36).

[73] Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 2 (Exh. US-127) (noting that IATTC data indicates that there were 5,053 observed mortalities from dolphin sets by ETP large purse seine vessels in the years 2009-2013).

6.3 million dolphins chased and 3.7 million dolphins captured in purse seine nets each and every year, on average.[74]

III. THE PANEL ERRED IN FINDING THAT THE AMENDED DOLPHIN SAFE LABELING MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

A. Introduction and Overview

67. As noted above, the United States considers the Panel's analysis and resulting findings to be fundamentally flawed.

68. First, there is no basis for finding that either the certification requirements or the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. The fact that the Panel felt it was necessary to improperly allocate the burden of proof by making the case for Mexico with respect to both of these aspects of the amended measure highlights how flawed the Panel's findings regarding detrimental impact are.

69. Second, the Panel erred in finding that any detrimental impact that does flow from these two aspects of the amended measure does not stem exclusively from legitimate regulatory distinctions. In particular, the Panel erred in failing to find that both the certification requirements and the tracking and verification requirements are even handed because they are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean.

70. In Section III, the United States develops these arguments and explains the Panel's errors as follows:

- In Sections III.B-F, the United States explains the Article 2.1 analysis, the burden of proof in WTO proceedings, the DSB recommendations and rulings in this

[74] Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127). In any given year, on average, each northeastern offshore spotted dolphin is chased 10.6 times and captured 3.2 times; each eastern spinner dolphin is chased 5.6 times and captured 0.7 times; and each coastal spotted dolphin is chased 2.0 times. *See* U.S. First Written 21.5 Submission, para. 97; Stephen B. Reilly et al., *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, at 26 (2005) (Exh. US-28).

It is important to distinguish between observed mortalities and serious injuries and the broader category of "interactions." Observed dolphin mortalities and serious injuries occur when a dolphin is seen to be killed or seriously injured in a fishing set. Dolphin "interactions" include observed mortalities and serious injuries but also include other contacts between dolphins and fishing vessels, such as depredation (in longline fisheries), chasing dolphins, encircling a dolphin in a purse seine net, entanglement in a net, etc. *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.224 (stating that setting on dolphins "interact[s] with dolphins 'in 100 per cent of dolphin sets'"); Mexico's First Written 21.5 Submission, para. 109 (stating that "nearly all of the RFMOs have reports of interactions with longline fishing" including "depredation events" and "hooking and/or entangling of mammals") (citing Kobe II Bycatch Workshop Background Paper, at 2 (Exh. MEX-39)); U.S. Response to Panel Question 7, para. 55 (describing reports of "interactions," including where marine mammals were caught in purse seine nets and released alive); U.S. Response to Panel Question 21, para. 137-138 (showing that "dolphin interactions occur in only a tiny percent of sets" in the U.S. western Pacific longline fisheries).

dispute, and the changes made by the 2013 Final Rule to implement those rulings and recommendations, and provides an overview of the U.S. appeals of the Panel's analysis and findings.

- In Section III.G, the United States explains that the Panel erred in finding that the certification requirements accord less favorable treatment to Mexican tuna products than that accorded to like products from the United States and other Members.

- In Section III.H, the United States explains that the Panel erred in finding that the tracking and verification requirements accord less favorable treatment to Mexican tuna products than that accorded to like products from the United States and other Members.

B. What Article 2.1 Requires

71. To establish a breach of Article 2.1, the complainant must prove three elements:

> (i) that the measure at issue constitutes a 'technical regulation' within the meaning of Annex 1.1; (ii) that the imported products must be like the domestic product or the product of other origins; and (iii) that the treatment accorded to imported products must be less favourable than that accorded to like domestic products or like products from other countries.[75]

72. For the challenged measure to accord less favorable treatment, and therefore discriminate *de facto* against Mexico imports, the complainant must prove that the challenged measure: 1) "modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country"; and 2) that "the detrimental impact on imports [does not] stem[] exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[76]

73. As the Appellate Body recently reaffirmed, the question a panel must examine determining whether the "detrimental impact stems exclusively from legitimate regulatory distinctions" is whether the regulatory 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."[77]

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[75] *US – Tuna II (Mexico) (AB)*, para. 202 (citing *US – Clove Cigarettes (AB)*, para. 87).

[76] *US – Tuna II (Mexico) (AB)*, para. 215.

[77] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92 ("Thus, if a panel finds that a technical regulation has a *de facto* detrimental impact on competitive opportunities for like imported products, the focus of the inquiry shifts to whether such detrimental impact stems exclusively from legitimate regulatory distinctions. This 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 be considered 'legitimate' for the purposes of Article 2.1.");

74. In its report in *US – Tuna II (Mexico)*, the Appellate Body was clear that the "even-handedness" of any particular requirement of the dolphin safe labeling measure depends on whether that 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."[78] In the original proceeding, the Appellate Body found that the regulatory distinctions of the original measure were not, in fact, "even-handed" because tuna products containing tuna caught outside the ETP could be labeled dolphin safe if a dolphin was killed or seriously injured in the set in which the tuna was caught, but that allowance was not provided to tuna products containing tuna caught inside the ETP even though there was evidence that many different fishing methods cause dolphin mortalities throughout the world.[79] In other words, the eligibility criterion as to whether a dolphin was been killed or seriously injured was not "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[80]

75. As discussed below, the Panel's Article 2.1 analysis deviated in significant respects from the Appellate Body's guidance.

C. The Applicable Burden of Proof in WTO Proceedings

76. The Appellate Body has been clear that nothing in its Article 2.1 analysis alters the traditional allocation of the burden of proof,[81] whereby a complainant, in the first instance, must

see also US – Tuna II (Mexico) (AB), n.461 ("The Appellate Body also stated that a panel must examine, in particular, whether the technical regulation is even-handed.") (citing *US – Clove Cigarettes (AB)*, para. 182); *US – COOL (AB)*, para. 271 ("[W]here a regulatory distinction is not designed and applied in an even-handed manner . . . the detrimental impact will reflect discrimination prohibited under Article 2.1.").

[78] *US – Tuna II (Mexico) (AB)*, para. 232 ("Our analysis will scrutinize, in particular, whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the US measure 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."); *see also id.* paras. 297-298.

[79] *See US – Tuna II (Mexico) (AB)*, para. 297.

[80] *US – Tuna II (Mexico) (AB)*, para. 297.

[81] *US – Tuna II (Mexico) (AB)*, para. 216 ("With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall 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.'") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14); *see also US – COOL (AB)*, para. 272 ("Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing. If, for example, the complainant adduces evidence and arguments showing that the measure is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed, this would suggest that the measure is inconsistent with Article 2.1.").

establish a *prima facie* case for all the elements of its claims.[82] Only where a complainant has done so would it then be up to the respondent to rebut that case.[83]

77. To establish a *prima facie* case with respect to a particular claim, a complainant must present "evidence and legal arguments" sufficient to establish a presumption that the challenged measure is inconsistent with the covered agreements.[84] In doing so, a complaining Member must connect the relevant evidence it provides with particular provisions of the covered agreements by using legal argumentation to explain the measures' alleged WTO-inconsistency.[85] It is not sufficient, for example, for a complainant simply to submit a municipal law without explaining how that law is inconsistent with particular WTO obligations.[86] Where a complainant does not meet the standard of supplying evidence and argumentation connecting the challenged measure with particular agreement provisions, the complainant does not satisfy its burden of proof, and its

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[82] *US – Gambling (AB)*, para. 140 (A "*prima facie* case must be based on 'evidence and legal argument' put forward by the complaining party in relation to each of the elements of the claim.") (quoting *US – Wool Shirts and Blouses (AB)*, p. 16).

[83] *US – Tuna II (Mexico) (AB)*, para. 216 ("With respect to . . . Article 2.1 of the *TBT Agreement*, we recall 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 defense.' 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.'"); *US – COOL (AB)*, para. 272; *EC – Hormones (AB)*, para. 98 ("The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision ... on the part of ... the measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.") (citing *US – Wool Shirts and Blouses (AB)*, p. 14).

[84] *India – Patents (US) (AB)*, para. 73 ("We agree with the Panel that it was up to [the complainant] to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Articles 2 and 6 of the *ATC*.") (quoting *US — Wool Shirts and Blouses (AB)*, p. 16); *see also US – COOL (AB)*, para. 286 ("[W]here a technical regulation does not discriminate de jure, a panel must determine whether *the evidence and arguments adduced by the complainant* in a specific case nevertheless demonstrate that the operation of that measure, in the relevant market, has a *de facto* detrimental impact on the group of like imported products.") (emphasis added).

[85] *See, e.g., US – Gambling (AB)*, para. 140 ("A *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."); *id.* para. 144 ("The evidence and arguments underlying a *prima facie* case . . . must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."); *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 50 ("[T]he burden of explaining the relevance of evidence, in proving claims made, naturally rests on whoever presents that evidence."); *US – Certain EC Products (AB)*, para. 113 ("The Panel record does show that the European Communities made several references to what it termed the 'unilateral determination' of the United States. However, in those references, the European Communities did not specifically link the alleged 'unilateral determination' to a claim of violation of Article 23.2(a) *per se*. . . . At no point did the European Communities link the notion of a 'unilateral determination' on the part of the United States with a violation of Article 23.2(a).").

[86] *See, e.g., Canada – Wheat Exports and Grain Imports (AB)*, para. 191 ("[I]t is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation – the evidence – on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position."); *see also US – Gambling (AB)*, para. 140 ("A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency.").

claim fails.[87] The fact that this may be a difficult task for a complainant does not alter its burden – "the complainant must prove its claim" regardless of the "degree of difficulty" of doing so.[88]

78. The allocation of the burden of proof reflects that a Member that brings a complaint is not entitled to have the WTO presume an inconsistency by another Member.[89] Similarly, if a panel were to make findings for the complaining party based on evidence or argumentation that the panel itself developed, the responding party would be denied the opportunity to respond to the arguments and evidence that are the basis for an adverse decision.[90] A responding party should have the "opportunity to present [its] case," including addressing the facts and arguments that are asserted against it.[91]

79. As discussed below, the Panel's analysis deviates from these "well-established" rules in a number of different parts of its report.

D. The DSB Recommendations and Rulings

80. In the proceeding before the original panel, Mexico limited its Article 2.1 claim to whether the original measure's eligibility criteria provided less favorable treatment to Mexican

[87] *See, e.g., Japan – Agricultural Products II (AB)*, para. 126; *US – Gambling (AB)*, para. 153; *US – Certain EC Products (AB)*, para. 114.

[88] *EC – Sardines (AB)*, para. 281.

[89] *See US – Carbon Steel (AB)*, paras. 156-157 (quoting the rule on the burden of proof from *US – Wool Shirts and Blouses* and concluding that "a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.") (emphasis in original); *Canada – Dairy (Article 21.5 – New Zealand and US II) (AB)*, para. 66 ("[U]nder the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary.") (emphasis in original).

[90] *See, e.g., EC – Steel Fasteners (China) (AB)*, para. 566 ("Where a complainant has failed to set forth arguments in its submissions before a panel sufficient to substantiate its claims, a panel may not use its interrogative powers to make good the absence of relevant substantiating arguments and evidence."); *id.* paras. 573-574 ("[T]he Panel record clearly shows that the only time China used the term 'good cause' was in its response to Panel Question 71, and there it was used in a cursory manner that only asserted a claim, without providing substantiating arguments or evidence. . . . We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with . . . the requirements of due process of law.").

[91] *Thailand – Cigarettes (Philippines) (AB)*, para. 150 (in dispute settlement, "each party [should] be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party"); *Thailand – H-Beams (AB)*, para. 88 ("A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.").

tuna products by denying the dolphin safe label to tuna product containing tuna caught by setting on dolphins.[92] The original panel found that Mexico had failed to prove its claim.[93]

81. Mexico appealed that finding, arguing before the Appellate Body that the original panel had erred by not finding that the original measure provided less favorable treatment for the reason Mexico had previously asserted – the measure denied access to the dolphin safe label to tuna was caught by setting on dolphins.[94] As to the first part of the less favorable treatment analysis, the Appellate Body agreed with Mexico that "the lack of access to the 'dolphin-safe' label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market."[95] The Appellate Body then proceeded to the second part of its analysis to determine whether the detrimental impact stemming from the eligibility criteria "reflects discrimination."[96]

82. The Appellate Body determined that it did. The Appellate Body noted that, while the original measure designated tuna products containing tuna caught by setting on dolphins inside and outside the ETP as ineligible for the label, the measure made a distinction as to when a certification that no dolphin was killed or seriously injured during the capture of tuna was necessary. Specifically, the measure prohibited tuna product from being labeled dolphin safe if it contained tuna caught inside the ETP large purse seine fishery and a dolphin was killed or seriously injured in the set in which the tuna was caught, but allowed tuna product containing tuna caught outside the ETP large purse seine fishery to be so labeled even if a dolphin had been killed or seriously injured.[97] The Appellate Body found that this distinction rendered the measure not even-handed because it was not "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[98] According to the Appellate Body, "[i]n these circumstances," the measure is not even-handed "in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins."[99]

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[92] *See, e.g., US – Tuna II (Mexico) (Panel)*, para. 7.280 ("As we understand it, therefore, Mexico does not challenge any differences in treatment arising from different regulatory categories for tuna caught in different fishing zones. Rather, Mexico's discrimination claim is based on the requirement of 'no setting on dolphins' that conditions access to the US dolphin-safe label, wherever the fish is caught, and its implications in practice for Mexican tuna products.").

[93] *See US – Tuna II (Mexico) (Panel)*, paras. 7.374-7.378.

[94] *See, e.g., US – Tuna II (Mexico) (AB)*, paras. 90, 241.

[95] *US – Tuna II (Mexico) (AB)*, para. 235; *see also id*. para. 284.

[96] *See US – Tuna II (Mexico) (AB)*, paras. 240, 284.

[97] *US – Tuna II (Mexico) (AB)*, paras. 289-292.

[98] *US – Tuna II (Mexico) (AB)*, para. 297.

[99] *US – Tuna II (Mexico) (AB)*, para. 297.

E. The 2013 Final Rule Directly Addresses the Concerns Identified by the Appellate Body

83. The 2013 Final Rule directly addresses the Appellate Body's concerns regarding the eligibility criteria. The relevant regulations of the U.S. National Oceanic and Atmospheric Administration (NOAA) already required, as a condition of the dolphin safe label, that tuna caught by purse seine vessels operating outside the ETP be accompanied by a captain's statement certifying "that no purse seine was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested."[100] The 2013 Final Rule amended this provision to now require "a captain's statement certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught using any fishing gear type in all fishing locations."[101]

84. Under the amended measure, the revised eligibility criteria now ensure that *all* tuna product containing tuna caught where a dolphin was killed or seriously injured is ineligible for the label, *regardless of the fishery, gear type, nationality of the vessel, and nationality of the processor*. Therefore, the ineligibility of tuna products in relation to dolphin mortality or serious injury is now entirely even-handed and cannot support a finding of inconsistency with Article 2.1. Indeed, Mexico *did not even challenge* in this proceeding that the 2013 Final Rule brought the amended measure into compliance with Article 2.1 as to this particular aspect,[102] and the Panel likewise found that this aspect of the eligibility criteria is consistent with Article 2.1.[103]

85. Rather, Mexico rested its challenge of the amended measure *elsewhere – i.e.*, the eligibility criterion regarding setting on dolphins, the observer requirements for tuna caught in the ETP large purse seine fishery and elsewhere, and the tracking and verification requirements for tuna caught in the ETP large purse seine fishery and elsewhere,[104] all of which remain unchanged, in relevant part, from the original measure.

86. Of course, the reason that these requirements *remain unchanged* is that the DSB recommendations and rulings *did not find that there was any need to change them*. Following the release of the Appellate Body report, the parties negotiated a 13 month reasonable period of time (RPT) for the United States to come into compliance.[105] The United States made full use of

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[100] 50 C.F.R. § 216.91(a)(2)(ii) (Exh. US-2).

[101] 2013 Final Rule, 78 Fed. Reg. at 40,998 (Exh. MEX-7); *see also* 50 C.F.R. §§ 216.91(a)(2)(i), (a)(2)(iii), (a)(4)(i)-(iii) (Exh. US-2).

[102] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.142 (stating that "Mexico has not challenged the new substantive certification requirements").

[103] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.141 ("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.").

[104] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.98-105 (summarizing Mexico's three part challenge of the amended measure).

[105] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 1.12.

that time, studying the Appellate Body's Article 2.1 analysis carefully, and designing the 2013 Final Rule to respond to that analysis, treating the report as "final resolution to that dispute."[106]

87. Thus, it is no surprise that the United States did not change other aspects of the measure. In particular, the United States did not change the eligibility criterion regarding setting on dolphins – that issue was resolved in the original proceeding, as the Panel correctly found.[107] Moreover, the United States did not amend its measure to impose, as conditions for access to the label, education and training requirements for captains of vessels operating outside the ETP large purse seine fishery or AIDCP-equivalent tracking and verification requirements for tuna product produced outside the ETP large purse seine fishery, neither of which was required by the Appellate Body's analysis. And the United States did not amend the so-called "determination provisions" regarding when NOAA may require an observer certificate to accompany tuna product to be marketed as "dolphin safe" in the United States, which, again, was not required by the Appellate Body's analysis. None of these issued played any part in the Appellate Body's conclusion under Article 2.1, which was based on its finding that the eligibility criterion regarding whether a dolphin had been killed or seriously injured was "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[108]

F. Overview of the Panel's Analyses and Findings and the U.S. Appeals of Those Analyses and Findings

88. The Panel began its analysis of the merits of Mexico's claim by recognizing that Mexico had challenged three "regulatory distinctions whose design and application give rise to the detrimental treatment":

- "[t]he disqualification of setting on dolphins in accordance with AIDCP as a fishing method that can be used to catch tuna in the ETP in a dolphin safe manner and the qualification of other fishing methods to catch tuna in a dolphin safe manner," which the Panel refers to as "eligibility criteria";

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[106] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body 'shall be' adopted by the DSB, by consensus, but also that such Reports 'shall be … unconditionally accepted by the parties to the dispute. …' Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, '… unconditionally accepted by the parties to the dispute,' and, therefore, *must be treated by the parties to a particular dispute as a final resolution to that dispute*. In this regard, we recall, too, that Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO'") (emphasis added); *US – Upland Cotton (AB)*, para. 210 (citing same); *EC – Bed Linen (AB)*, para. 90 (quoting same).

[107] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.125-126 ("[I]n the Panel's opinion, the original proceedings have settled the question whether the disqualification of tuna caught by setting on dolphins, together with the qualification of tuna caught by other fishing methods, is inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body found that it is not.").

[108] *US – Tuna II (Mexico) (AB)*, para. 297.

- "[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," which the Panel refers to as the "different certification requirements"; and

- "[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," which the Panel refers to as the "different tracking and verification requirements."[109]

89. The Panel then acknowledged the "develop[ment]" of Mexico's claim throughout the compliance proceeding. As the Panel noted, Mexico initially tried to tie the certification and tracking and verification requirements to the detrimental impact that the Appellate Body had already determined to exist as a result of the eligibility criteria.[110]

90. Thereafter, the Panel understood Mexico as claiming that the certification and tracking and verification requirements result in "a distinct type of detrimental impact" from the one resulting from the eligibility criteria (and reflected in the DSB recommendations and rulings).[111] And while the Panel recognized that Mexico has alternatively, and inconsistently, characterized its Article 2.1 claim as an analysis of the three distinct regulatory distinctions "together," Mexico did not, in fact, structure its Article 2.1 claim in that manner, instead "present[ing] its arguments on a distinction-by-distinction basis."[112] Accordingly, the Panel analyzed Mexico's claim in "three parts," separately analyzing the consistency with Article 2.1 of each of the three regulatory distinctions – that is, whether each of the distinctions resulted in a detrimental impact, and, if so, whether that detrimental impact stemmed exclusively from a legitimate regulatory distinction.[113]

91. As to the first challenged aspect – the eligibility criteria – the Panel began by referring to the Appellate Body's analysis as to whether the criteria cause a *de facto* detrimental impact on Mexican tuna product. The Panel, however, found that that detrimental impact does not reflect

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[109] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.98 (citing Mexico's First Written 21.5 Submission, para. 235). The United States observes that Mexico's own characterization of its argument is inaccurate as the certification requirements and tracking and verification requirements that Mexico now complains about do not depend on whether tuna was caught "inside" or "outside" the ETP. Rather, the regulatory distinctions rest on whether tuna was caught by a vessel subject to AIDCP requirements. The distinction is thus more accurately characterized as being between tuna harvested in the ETP large purse seine fishery and tuna harvested in all other fisheries, whether inside or outside the ETP. *See id.* paras. 7.146-147 (accurately characterizing the distinction Mexico complains of).

[110] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.101-103.

[111] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.105.

[112] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.107-108.

[113] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.108.

discrimination. First, the Panel considered that "the original proceedings *have settled the question* whether the disqualification of tuna caught by setting on dolphins, together with the qualification of tuna caught by other fishing methods, is inconsistent with Article 2.1 of the TBT Agreement. *The Appellate Body found that it is not*."[114] The Panel further considered the harm to dolphins caused by other fishing methods outside the ETP large purse seine fishery.[115] In this regard, the Panel reviewed Mexico's evidence as to the harm to dolphins of fishing methods other than setting on dolphins and found it lacking. Specifically, the Panel found 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."[116] The Panel thus found that Mexico had failed to prove that the eligibility criteria are not even-handed.[117] To the contrary, the Panel found that "the new evidence presented in these proceedings merely supports the conclusion reached by the panel and the Appellate Body in the original proceedings that this aspect of the amended measure is not inconsistent with Article 2.1."[118]

92. As to the second two parts of the Panel's analysis, the Panel found that the certification requirements and the tracking and verification requirements each independently modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product.[119] The Panel further found that each of these detrimental impacts did not stem exclusively from legitimate regulatory distinctions.[120] The United States considers that the Panel erred in its analysis of both steps of both of these aspects of the amended measure and, consequently, in its conclusion concerning these aspects. As such, the United States respectfully requests the Appellate Body to reverse the Panel's ultimate finding that the amended measure is inconsistent with Article 2.1.

93. Specifically, the Panel erred in finding that:

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[114] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.126 (emphasis added).

[115] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.128 (considering that the question before the Panel "is *not* whether the United States can, consistently with Article 2.1 of the TBT Agreement, disqualify all tuna caught by setting on dolphins from accessing the dolphin safe label while qualifying all other methods," but "whether the amended tuna measure, including through or by way of the modifications made by the 2013 Final Rule, sufficiently addresses the risks posed to dolphins from methods of tuna fishing other than setting on dolphins ...") (emphasis in original).

[116] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.135.

[117] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.135; *see also id.* para. 7.137 ("We explained above that the eligibility criteria were found by the Appellate Body in the original proceedings not to violate Article 2.1 of the TBT Agreement.").

[118] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.135.

[119] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.179, 7.382.

[120] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.246, 7.263, 7.400.

1) the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product;[121]

2) any detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction;[122]

3) the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product;[123] and

4) any detrimental impact caused by the tracking and verification requirements does not stem exclusively from a legitimate regulatory distinction.[124]

G. The Panel Erred in Finding that the Certification Requirements Accord Less Favorable Treatment to Mexican Tuna and Tuna Products than that Accorded to Like Products from the United States and Other Members

1. Introduction

94. The second set of requirements the Panel examined were the certification requirements, which comprise requirements for captain and observer certifications. As discussed above in Section II.B, the AIDCP requires 100 percent observer coverage on all large purse seine vessels operating in the ETP.[125] Large purse seine vessels that set on dolphins in the ETP constitute "virtually" the entirety of the Mexican tuna fleet.[126] For tuna product harvested in the ETP large purse seine fishery to be eligible for the dolphin safe label, the United States requires a captain certificate and proof of an observer certificate to confirm that the tuna was caught in a manner meeting the standards of the amended measure.[127] Tuna product that is not eligible for the label

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[121] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162.

[122] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.246, 7.263.

[123] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382.

[124] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras 7.400.

[125] *See* AIDCP, Annex II(2) (Exh. MEX-30).

[126] Mexico's Response to Question 57, para. 155 (contending that the facts relied upon by the Appellate Body in paragraphs 233-235 of its report "remain unchanged, *except* that Mexico has established that virtually its entire purse seine fleet fishes in the ETP by setting on dolphins") (emphasis added); *see also id.* para. 147 ("[I]n 2013 the Mexican tuna fishing fleet operating in the ETP was comprised of 36 large purse seine vessels that applied for and were assigned vessel-specific Dolphin Mortality Limits (DMLs), and four small purse seine vessels (below 363 MT carrying capacity). The small vessels represent less than five percent of the capacity of the Mexican fleet fishing for tuna in the ETP.") (citing Exhibit MEX-135, and stating that "[o]ne of the four Mexican small vessels, although not identified as such in the table, is actually a larger vessel that has sealed some of its wells and therefore has a smaller capacity; it is nonetheless required to carry an observer because of its potential capabilities")).

[127] 50 C.F.R. 216.92(b)(2)(iii) (Exh. US-2); 50 C.F.R. 216.24(f)(2) (Exh. US-9); NOAA Form 370, para. 5.B(5) (Exh. MEX-22) ("The tuna or tuna products described herein are certified to be dolphin safe: … Tuna harvested in the ETP by a purse seine vessel of more than 400 short tons (362.8 mt) carrying capacity, with valid documentation signed by a representative of the appropriate IDCP-member nation certifying that: (1) *there was an IDCP-approved observer on board the vessel during the entire trip; (2) no purse seine net was intentionally*

or is otherwise not intended to be marketed in the United States as "dolphin safe" *need not include either certification.*[128] For tuna product produced from all other fisheries, the amended measure only requires a captain certificate for such product to be marketed in the United States as "dolphin safe" (except for tuna product produced from certain U.S. fisheries where an observer certificate may be required).[129]

95. As discussed in section III.G.2, the Panel found that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product, and that this detrimental impact did not stem exclusively from a legitimate regulatory distinction. As such, the Panel ultimately found that the certification requirements "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."[130] As discussed below, the United States considers the Panel's findings as to both steps of the Article 2.1 analysis to be in error.

96. As discussed in section III.G.3, the Panel erred in finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. First, the Panel erred in not allocating the burden of proof properly, instead making the case for Mexico. Second, the Panel erred in determining that any difference in observer-related costs incurred by the Mexican tuna industry in producing tuna product from the ETP large purse seine fishery, on the one hand, and producers of tuna product harvested outside the ETP large purse seine fishery, on the other, modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Third, the Panel erred in finding that a "genuine relationship" exists between the certification requirements and the detrimental impact that the Panel found to exist.

97. As discussed in section III.G.4, the Panel erred in finding that any detrimental impact that does result from the certification requirements does not stem exclusively from legitimate

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deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught; and (3) listing the numbers for the associated Tuna Tracking Forms which contain the captain's and observer's certifications. **IDCP Member Nation Certification attached**.") (emphasis added and in original).

[128] *See, e.g.*, 50 C.F.R. 216.91(a) (setting out the dolphin safe labeling standards); NOAA Form 370, para. 5.A (Exh. MEX-22) ("The tuna or tuna products described herein are not certified to be dolphin safe and contain no marks or labels that indicate otherwise.").

[129] *See* 50 C.F.R. 216.91(a)(2) (Exh. US-2) (for purse seine vessels outside the ETP); 50 C.F.R. 216.91(a)(4) (Exh. US-2) (for tuna harvested in all other fisheries); NOAA Form 370, para. 5.A (Exh. MEX-22). Where tuna product is produced from tuna harvested in one of the seven U.S. fisheries that has an observer program deemed to be "qualified and authorized" to make such a certifications, an observer certificate is needed where the tuna product is intended to be marketed as "dolphin safe" and an observer was onboard during the trip when the tuna was harvested. *See* U.S. Response to Question 7, paras. 161-162 (citing Qualified and Authorized Notice, 79 Fed. Reg. 40,718 (Exh. US-113)). In addition, an observer certification potentially could be required under the so-called "determination provisions" of the amended measure, which are discussed below at section III.G.4.b. However, no fishery has ever been found to qualify under the determination provisions.

[130] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

regulatory distinctions. First, the majority of panelists erred in finding that the any detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction due to differences in the education and training of 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). Second, the Panel erred in finding that the determination provisions were a further basis on which to find that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions.[131]

98. In light of these appeals, the United States respectfully requests the Appellate Body to reverse the Panel's ultimate finding that the amended measure is inconsistent with Article 2.1 of the TBT Agreement because the certification requirements "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."[132]

2. The Panel's Analysis

a. The Relevant Regulatory Distinction

99. The Panel began its analysis of the certification requirements by providing two mutually exclusive descriptions of when the amended measure does and does not require proof of an observer certification. On the one hand, the Panel suggested (accurately) that because the certification requirements (and tracking and verification requirements) are only implicated when the tuna product is intended to be marketed as dolphin safe, such requirements "*are relevant only* to tuna eligible and intended to receive the dolphin safe label," and "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."[133] However, a mere four

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[131] *See infra*, sec. III.G.4.b.

[132] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[133] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.143 (emphasis added); *see also id.* para. 7.125 ("Secondly, and crucially for the question before us, the statement indicates that, in the view of the Appellate Body, the United States may bring its dolphin safe labelling regime into conformity with Article 2.1 of the TBT Agreement without disqualifying methods of tuna fishing other than setting on dolphins. *This is so because the question of observer certification only arises in respect of tuna fishing methods that are, in principle, qualified to catch dolphin safe tuna*. … *Certification*, which is the documentary precondition to accessing the label, *is thus only relevant in respect of tuna that is in principle eligible to be labelled dolphin safe*. … Put simply, we do not believe that the Appellate Body would even have touched upon the issue of certification, *which is only relevant to tuna fishing methods that are, at least in principle, eligible to catch dolphin safe tuna*, if it had considered that the United States must necessarily disqualify methods of fishing other than setting on dolphins in order to make its measure even handed.") (emphasis added and omitted); *id.* para. 7.177 ("It is the amended tuna measure that provides for two sets of rules *for access to the dolphin safe label* – one set for tuna caught by large purse seine vessels in the ETP, and another set for all other tuna.") (emphasis added); *id.* para. 3.44 ("For tuna caught by large non US purse seine vessels in the ETP, sections 216.92(b) and 216.24(f)(4) implement this provision by requiring that the NOAA Form 370 accompanying the tuna products contain the necessary observer certifications. *For tuna products to be labelled dolphin safe*, the accompanying Form 370 must be signed by a representative of an IDCP-member nation …")) (emphasis added).

paragraphs later, the Panel suggested (inaccurately) that "the amended tuna measure requires an observer certification for *all* tuna caught by large purse seine vessels in the ETP."[134] This inaccurate description of the amended measure thus led the Panel to wrongly describe the "relevant regulatory distinction" as being "[t]he mandatory independent observer certification requirements for ***all*** tuna caught in the ETP large purse seine fishery and the absence of such requirements (unless certain determinations have been made with respect to the fishery in which the tuna was caught) for ***all*** tuna caught in all other fisheries."[135]

b. Whether the Certification Requirements Modify the Conditions of Competition in the U.S. Market to the Detriment of Mexican Tuna Product

100. In summarizing the arguments of the parties, the Panel first noted that Mexico's argument "is not that these requirements in themselves block or hinder Mexican access to the dolphin safe label," but that the amended measure grants "a competitive advantage" to those tuna products produced outside the large ETP purse seine fishery for which proof of an observer certificate is not required.[136] The result, according to Mexico, is that "Mexican tuna products are losing competitive opportunities to tuna products *that may be inaccurately labelled as dolphin safe*."[137]

101. However, the Panel did not begin by examining the merits of Mexico's argument (and the U.S. response thereto), but rather by examining the merits of an argument *that Mexico did not make* – namely, whether *the cost* to Mexico of having observers on board its ETP large purse seine vessels modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product. In the Panel's view, "it is clear" that the difference between having observers onboard large purse seine vessels in the ETP and not having observers onboard other vessels "imposes a lighter burden on tuna and 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."[138] In coming to this conclusion, the Panel appears to focus entirely on what it would cost other countries to establish and maintain observer programs that do not

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[134] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.147 ("As we understand it, however, the amended tuna measure requires an observer certification for *all* tuna caught by large purse seine vessels in the ETP. What is decisive for the observer certification requirement is thus not the method actually used to catch tuna (e.g. setting on dolphins) but the type of vessel and the location of its fishing operation. Large purse seine vessels in the ETP are, under the amended tuna measure, required to present proof of an AIDCP-compliant observer certification (and therefore to carry observers) whether or not they intend to or actually do set on dolphins.") (emphasis added).

[135] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.148 (emphasis added and in original).

[136] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.152-153.

[137] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.152 (emphasis added).

[138] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162; *see also id.* para. 7.170 ("Accordingly, the Panel accepts Mexico's claim that the different certification requirements detrimentally modify the conditions of competition because they impose a *significantly lighter burden* on tuna and tuna products made from tuna caught outside the ETP large purse seine fishery than on tuna caught within it.") (emphasis added); *id.* para. 7.455 (noting in the context of GATT Article I:1, "[b]earing in mind *the significant expenditure* associated with observer certification, it seems clear to us that the observer certification requirement represents an additional 'condition' that detrimentally modifies the competitive opportunities of like tuna and tuna products") (emphasis added).

currently exist, rather than what the AIDCP observer program currently costs the Mexican tuna industry. The Panel thus appeared to ignore that it was *uncontested* by the parties that the costs of different observer programs differ widely.[139]

102. After making its finding as to detrimental impact, the Panel then addressed the argument that Mexico *actually made* – that tuna product produced outside the ETP large purse seine fishery has a "competitive advantage" over Mexican tuna product in the U.S. market because the lack of observers makes it easier for non-dolphin safe tuna product to be illegally marketed as "dolphin safe."[140] Although the Panel noted that it "see[s] some merit in Mexico's allegation," the Panel concluded 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," and that "[s]uch an analysis is not necessary in the context of the present dispute."[141]

c. Whether a "Genuine Relationship" Exists Between the Amended Measure and the Detrimental Impact

103. The Panel next addressed the question of whether a "genuine relationship" exists between the amended measure and the detrimental impact on the conditions of competition for Mexican tuna product sold in the U.S. market. In this regard, the Panel recalled the earlier statement by the Appellate Body that, in making such an assessment, "the relevant question is whether governmental action affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory."[142] From this, the Panel concluded that "the question [is] whether the detrimental impact is *attributable* to government action, or whether it stems from some other source."[143]

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[139] *See* U.S. Second Written 21.5 Submission, para. 177 n.338 (showing that, in 2012, the cost of the observer program for the U.S. Pacific longline fisheries was $655 per observer per day); New Zealand's Response to Third Party Question 2, paras. 9-10 (noting that the NZ vessels that carry observers incur a cost of up to US$450 per day to do so (not counting those costs relating to the observer's "food, water and other associated needs")); EU's Response to Third Party Question 2, para. 5 (stating that, in 2012, the EU's observer program for large purse seine vessels in the ETP cost $151,234 for 13 trips of approximately 40 days each (520 total days), which yields an approximate cost of $291 per observer per day).

[140] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.166 ("The core factual assertion underlying Mexico's allegation that the different certification requirements make it easier for tuna caught outside the ETP large purse seine fishery to be incorrectly labelled is that 'captains are neither qualified nor able to make' an accurate designation that no dolphins were killed or seriously injured in a particular gear deployment. Accordingly, in Mexico's view, 'it is both appropriate and necessary to have an independent observer requirement for tuna fishing outside the ETP.' According to Mexico, the incapacity of captains to accurately certify the dolphin safe status of tuna 'create[s] a very real risk that tuna may be improperly certified as dolphin safe,' with the consequence that 'tuna caught in the ETP, which is accurately certified as dolphin safe by independent observers, will lose competitive opportunities to tuna caught outside the ETP, which has received an inherently unreliable dolphin safe certification.'") (quoting Mexico's Second Written 21.5 Submission, paras. 167, 182).

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

[142] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.176 (quoting *US – Tuna II (Mexico) (AB)*, para. 236).

[143] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.176 (emphasis in original).

104. The Panel found that the detrimental impact is, in fact, attributable to the amended measure. Specifically, the Panel noted that the amended tuna measure:

> [I]mposes certain certification requirements on the ETP large purse seine fishery and certain, different certification requirements on other fisheries. It is the amended tuna measure that provides for two sets of rules for access to the dolphin safe label – one set for tuna caught by large purse seine vessels in the ETP, and another set for all other tuna. And it is therefore the amended tuna measure itself that sets up a distinction, within a single regulatory framework (i.e. the amended tuna measure) between large purse seine vessels in the ETP and other vessels.[144]

105. In this regard, the Panel considered it "somewhat beside the point" that the differences in certification requirements that Mexico complains of would still exist if the United States eliminated the certification requirements in their entirety.[145] In the Panel's view, "Mexico's complaint is based on the fact that the amended tuna measure does not require observer coverage on vessels other than large purse seine vessels fishing in the ETP."[146]

d. Whether the Detrimental Impact Stems Exclusively from a Legitimate Regulatory Distinction

106. After finding that the certification requirements do cause a detrimental impact on Mexican tuna product, the Panel proceeded to examine whether that detrimental impact stems exclusively from legitimate regulatory distinctions. For this examination, the Panel analyzed both Mexico's argument that the detrimental impact does not stem from a legitimate regulatory distinction because not all tuna product need to be accompanied by an observer certificate to have access to the dolphin safe label,[147] as well as an argument that Mexico did not make regarding the design of the so-called "determination provisions."[148]

107. The Panel ultimately based its finding with regard to the second step of Article 2.1 on two grounds. First, a majority of panelists (with one dissenting) found that the detrimental impact does not stem exclusively from a legitimate regulatory distinction in light of differences in the accuracy of certifications in the ETP large purse seine fishery, on the one hand, and all other fisheries, on the other, due to differences in education and training between AIDCP-approved observers and vessel captains. Second, the Panel found that the detrimental impact does not stem exclusively from a legitimate regulatory distinction in light of the design of the determination provisions.

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[144] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.177.

[145] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.178.

[146] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.178.

[147] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.195-246, 7.264-282.

[148] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.247-263, 7.283.

i. Whether the Differences in Education and Training Between Captains and AIDCP-Approved Observers Prove that the Detrimental Impact Does Not Stem Exclusively from a Legitimate Regulatory Distinction

108. The Panel began this part of the second step of the Article 2.1 analysis by again summarizing the parties' arguments. In particular, the Panel noted that "the essence of Mexico's argument is not that the United States should *remove* the certification requirements that exist in the ETP, but, conversely, that 'it is both appropriate and necessary to have an independent observer requirement for tuna fishing outside the ETP.'"[149] As recounted by the Panel, Mexico argues that captain certifications are "inherently unreliable" and "meaningless" because: 1) "captains have a financial incentive to certify that their catch is dolphin safe even when it is not"; and 2) "captains lack the technical expertise necessary to properly certify that no dolphins were killed or seriously injured in a given set or other gear deployment."[150]

109. Although Mexico initially asserted that whether an observer certification is required should depend on the relative amount of harm to dolphins in different fisheries,[151] Mexico subsequently altered its argument, eventually taking the position that the relative harm to dolphins in different fisheries is irrelevant to determining which vessels must carry AIDCP-equivalent observers.[152] As the Panel recounted, in Mexico's view it does not matter whether "one or 1,000 dolphins are killed" – the United States cannot "calibrate" its measure to the harms to dolphins occurring in different fisheries in order to come into compliance with Article 2.1.[153]

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[149] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.197 ("Accordingly, the essence of Mexico's argument is not that the United States should *remove* the certification requirements that exist in the ETP, but, conversely, that 'it is both appropriate and necessary to have an independent observer requirement for tuna fishing outside the ETP' – and, indeed, that without imposing an observer requirement for vessels other than large purse seiners in the ETP, the amended tuna measure cannot be even handed as required under Article 2.1 of the TBT Agreement.") (quoting Mexico's Second Written 21.5 Submission, para. 167) (emphasis in original).

[150] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.198.

[151] *See* Mexico's First Written 21.5 Submission, paras. 293-295 (noting that, in the original proceeding, the Appellate Body stated that an observer certification requirement "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury" and arguing that, in the original proceeding, "neither the Panel nor the Appellate Body had before it the facts regarding adverse effects on dolphins set out in section III of this submission. … The facts clearly establish that dolphins face very high risks of mortality and serious injury from tuna fishing outside the ETP (much higher than fishing within the ETP)").

[152] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.183-185.

[153] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.185 ("In other words, in Mexico's view, the differences in the nature and degree of risk to dolphins from setting on dolphins in the ETP or from other methods in the ETP or other fisheries in no way explain or justify the different certification requirements. The amended tuna measure is designed so as to disqualify from accessing the label any and every tuna catch as soon as even a single dolphin is killed or seriously injured. Both parties accept that dolphins are at some risk from all tuna fishing methods and in all fisheries. As such, the amended tuna measure should require the same level of accuracy in reporting regardless of whether one or 1,000 dolphins are killed. And for this reason, 'calibration' does not respond to Mexico's claim that the different certification requirements are inconsistent with the amended tuna measure's objectives.") (citing Mexico's Response to Question 11, paras. 51-52).

(A). The Panel's Intermediate Factual Findings

(1). The Financial Incentives of Captains

110. The Panel first examined Mexico's claim that captain's statements are unreliable because captains have a financial incentive to fraudulently certify non-dolphin safe tuna as "dolphin safe," finding that Mexico had failed to establish a *prima facie* case in this regard.[154] In particular, the Panel found the fact that captain statements of this type are routinely relied on in domestic, regional, and international regimes was "a highly relevant and probative fact,"[155] and the Panel was "not convinced" by Mexico's rebuttal evidence.[156]

(2). The Education and Training of Captains

111. The Panel then examined whether captains have the technical expertise necessary to properly certify that no dolphins were killed or seriously injured in a given set or other gear deployment. The Panel began its analysis by examining the education and training required for AIDCP-approved observers, noting, in particular, that the candidates are university trained biologists who have been instructed in the identification of certain fish and animals, including tuna and those dolphins that large purse seine vessels target in dolphin sets.[157] This, as well as

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[154] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.199, 7.211.

[155] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.208 ("In the Panel's opinion, Mexico's argument concerning the reliability – and, indeed, the integrity – of vessel captains has significant implications. *The Panel accepts the evidence submitted by the United States* that many regional and international organizations and arrangements rely on captains' certifications and logbooks both to monitor compliance with regulatory requirements and as a means of data collection. In the Panel's view, the fact that many domestic, regional, and international regimes rely on captains' self-certification raises a strong presumption that, from a systemic perspective, such certifications are reliable. RFMOs and other fisheries and environmental organizations are experts in their respective fields, and the fact that they have relied, and continue to rely, on captains' statements in a variety of fishing and environmental areas strongly suggests that, as a general matter, they consider such certifications to be reliable. Of course, the Panel must make its own 'objective assessment of the matter,' and in this regard the fact that a particular practice is accepted by one or more domestic, regional, or even international organizations is not, by itself, determinative. *But the Panel considers that such acceptance is a highly relevant and probative fact*.") (emphasis added).

[156] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.209 ("*The Panel is not convinced that the evidence submitted by Mexico* is sufficient to rebut this demonstration by the United States. The documents submitted by Mexico certainly suggest that there have been instances in which captains' certifications have been unreliable. Nevertheless, in the Panel's view, the fact that domestic, regional, and international regimes have continued to rely on captains' certifications and logbooks even though instances of non compliance have been reported suggests to us that such instances of non compliance should not be considered as seriously undermining the general reliability of captains' certifications, as Mexico would have the Panel find.") (emphasis added).

[157] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.215 ("We also take note of the evidence provided by both parties regarding the 'Guidelines for Technical Training of Observers,' which elaborate on the training requirements expected from observers qualifying for the IATTC Observer Program; such requirements include: (i) *candidates should be university graduates with a degree in biology or a related subject (zoology, ecology, etc.); (ii) training should include the identification of certain fish and animals, including tuna and those dolphins associated with tuna fishing*; (iii) information on how to accurately fill out data forms; and (iv) information on identification, dealing with, and documenting 'instances of interference (including bribery attempts), intimidation or obstruction by vessel crew during a trip.'") (emphasis added); *see also id.* para. 7.214 (observing that AIDCP-approved observers

statements made by NOAA in its "Qualified and Authorized" final rule, indicated to the Panel that "certifying whether a dolphin has been killed or seriously injured in a set or other gear deployment is a highly complex task,"[158] involving "highly specialized skill[s]."[159] In the Panel's view, "[n]one of the evidence" suggested "that captains (or, we would add, any other crew member) are always and necessarily in possession of those skills."[160]

112. However, from these intermediate factual findings – which the entire Panel agreed with – the majority panelists and the minority panelist *draw opposite legal conclusions* as to whether the certification requirements prove the amended measure inconsistent with Article 2.1.

(B). The Legal Conclusions of the Majority Panelists

113. From these intermediate factual findings the majority panelists concluded that captain certifications of whether a dolphin has been killed or seriously injured "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure."[161] As such, the majority found that the "certification requirements are not even-handed, and so cannot be said to stem exclusively from a legitimate regulatory distinction."[162] In this regard, the majority considered that they "are not finding that the only way for the United States to make its measure even-handed is to require observer coverage," but that captains do not "have at their disposal the skills necessary to ensure accurate certification."[163]

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are "*biologists trained to collect a variety of data* on the mortalities of dolphins associated with the fishery, sightings of dolphin herds, catches of tunas and by catches of fish and other animals, oceanographic and meteorological data, and other information used by the IATTC staff to assess the conditions of the various stocks of dolphins, study the causes of dolphin mortality, and assess the effect of the fishery on tunas and other components of the ecosystem") (emphasis added).

[158] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.218 ("The evidence above strongly suggests that certifying whether a dolphin has been killed or seriously injured in a set or other gear deployment is a highly complex task.").

[159] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.226 ("Ultimately, therefore, the evidence suggests to us that certifying dolphin mortality and serious injury is a highly specialized skill, and one that has so far generally not been required of captains.").

[160] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.226 ("None of the evidence before us suggests, nor has the United States explained why it believes, that captains (or, we would add, any other crew member) are always and necessarily in possession of those skills.").

[161] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.223 (maj. op.).

[162] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.223 (maj. op.).

[163] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.234 (maj. op.).

114. Importantly, the majority's finding appears to apply to *all* fisheries, regardless of the relative harm to dolphins in any particular fishery,[164] a point that the majority made clear in subsequent paragraphs.[165]

115. In these paragraphs, the majority accepted that the harms to dolphins from tuna fishing differ substantially from fishery to fishery. In particular, the majority "accept[s] 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."[166] As recounted by the majority, the United States had argued that the AIDCP parties had consented to 100 percent observer coverage for large purse seine vessels operating in the ETP in light of the unique intensity and length of the "interactions" between the dolphins, on the one hand, and the vessel, speed boats, helicopter, and purse seine net on the other, that occur during dolphin sets.[167] In this regard, the majority correctly understood the U.S. position to be that it is appropriate for observers to be onboard ETP large purse seiners but that they may not be necessary on other vessels:

> *not* because the risk of dolphin mortality or serious injury is somehow less important in other fisheries, *but rather* because the nature of the fishing technique used by ETP large purse seiners, which essentially involves the chasing and encirclement of many dolphins over an extended period of time, means that it is necessary to have one single person on board with the responsibility of keeping track of those dolphins caught up in the chase and/or the purse seine nets set.[168]

116. The majority (and minority) accepted this argument.[169] Indeed, the majority explicitly recognized that "because *the nature and degree of the interaction is different in quantitative and qualitative terms* (since dolphins are not set on intentionally, and interaction is only accidental),

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[164] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.233-234. Notably, the Panel did not even acknowledge that (as it noted earlier) the parties did not dispute that in some fisheries, including pole-and-line fisheries, dolphins are not at risk from tuna fishing. *See id.* para. 7.185, n.366.

[165] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.238-246 (maj. op.).

[166] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.238 (maj. op.).

[167] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.239 (maj. op.); *see also id.* (recalling that the United States argued that "it is those vessels [*i.e.*, large purse seine vessels] that are capable and permitted to take advantage of the unique association of yellowfin tuna and dolphins in the ETP by engaging in multi-hour chases and captures of huge herds of dolphins").

As discussed in section II.B, *supra*, the term "dolphin interactions" refers to more than mortality and serious injury but to other contacts between dolphins and fishing vessels, such as depredation (in longline fisheries), chasing dolphins, and encircling a dolphin in a purse seine net, entanglement in a net, etc. *See also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.224.

[168] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240 (maj. op.).

[169] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242 (maj. op.); *id.* para. 7.287 (min. op.).

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."[170]

117. Moreover, the majority explicitly *disagreed* with Mexico that the situation in the ETP is not unique or not different enough to justify different observer requirements.[171] "Most importantly," in the view of the majority, was the fact that *Mexico's own evidence* suggested that there is very little interaction (much less any actual harm) between tuna vessels and dolphins outside the ETP.[172] According to the majority, not only were the figures on the record "entirely consistent" with the DSB recommendations and rulings that "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP,"[173] but they stood in stark contrast to the *uncontested* AIDCP data, which states, among other things, there were 9,220 intentional dolphins sets by large purse seine vessels in the ETP in 2012 alone.[174] In other words, the evidence "confirm[ed] for the Panel that although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or systematically."[175] Indeed, the majority considered the

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[170] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240 (maj. op.) (citing U.S. Responses to Questions 20 (paras. 120-125), 21 (paras. 136-142), and 22 (paras. 147-149).

[171] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) ("The Panel notes that Mexico disagrees that the situation in the ETP is unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries. According to Mexico, 'tuna dolphin associations have been sighted and deliberately set on' outside of the ETP, and accordingly the absence of independent observers outside the ETP is unjustifiable. In the Panel's view, however, *the evidence submitted by Mexico is not sufficient to rebut the United States' argumentation on this point*.") (emphasis added) (citing Mexico's First Written 21.5 Submission, para. 113).

[172] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) ("Most importantly, the evidence submitted by Mexico suggests that, even though there may be some interaction between tuna and marine mammals, including dolphins, outside of the ETP, 'dolphins in the Atlantic, Indian, and western Pacific Oceans [do not associate with tuna] as systematically as they do in the Eastern Tropical Pacific.' [citing National Marine Fisheries Service, 'An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of the Eastern Tropical Pacific Oceans' (Nov. 1996) (Exh. MEX-40), p. 2.] Thus, even according to conservative estimates, it appears that, in the WCPFC, only '3.2 per cent of all purse seine nets are deliberately set on cetaceans.' [New York Times, 'A Small Victory for Whale Sharks' (Dec. 6, 2012) (Exh. MEX-44).] Similarly, a recent paper submitted by Australia to the IOTC stated that '[i]n observer data collected between 1986-1992 from Soviet vessels in the Western Indian Ocean, 494 purse seine sets were observed over the seven year period, with 27 intentionally set on whale sharks and cetaceans.' [citing Australia and Maldives, 'On the Conservation of Whale Sharks (Rhincodon Typus)' (IOTC-2013-S17-PropD[E]) (April 5, 2013) (Exh. MEX-45).]").

[173] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.520).

[174] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) (quoting AIDCP, "Fishing Mortality Limits 2012-2014" (Exh. US-22).

[175] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (maj. op.); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) ("In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery."); *id.* para. 7.281 (min. op.) (stating that "Mexico has not asked the Panel to find that the Assistant Administrator's failure to make a determination" that a regular and significant dolphin mortality or tuna-dolphin association was a violation of Article 2.1 and, in any event, had not "put forward evidence sufficient to make out such an argument").

evidence on the differences between the large purse seine fishery in the ETP, on the one hand, and all other fisheries, on the other, to be so strong as to be "compelling," and "sufficient to raise a presumption that the different certification requirements stem from a legitimate regulatory distinction."[176]

118. However, the majority did not consider that these differences between fisheries, ultimately, made a difference. Notwithstanding whether the interaction and harm to dolphins is great or small, the question of whether "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" was determinative, in the majority's view.[177]

(C). The Legal Conclusions of the Minority Panelist

119. The minority panelist rejected the majority's legal conclusion that the differences in education and training between captains and AIDCP observers prove the certification requirements inconsistent with Article 2.1.[178]

120. The minority began by noting that, "the overall goal or objective of the amended tuna measure is to minimize the risk that consumers who prefer dolphin safe tuna – that is, tuna

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[176] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (maj. op.) ("These statistics confirm for the Panel that although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically,' in the words of the original Panel. Thus the Panel find[s] the United States' position on this point compelling. Indeed, in our view, the United States' arguments on this point would be sufficient to raise a presumption that the different certification requirements stem from a legitimate regulatory distinction, assuming that other fishing methods are treated even-handedly."); *see also id.* 7.244-245 ("[A]s we understand it, the United States' invocation of the accidental nature of dolphin interactions with fishing methods other than setting on dolphins goes to difference *between fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins 'in 100 per cent of dolphin sets*.' This distinction is especially important where, as the United States argues is the case with setting on – the particular nature of the interaction is itself 'inherently dangerous' 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. *On the basis of the above, we would find that the United States has made a prima facie case that the different certification requirements stem exclusively from a legitimate regulatory distinction*.") (emphasis added).

[177] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.246 (maj. op.) ("Nevertheless, in light of the evidence submitted by Mexico concerning the complexity of certifying the dolphin safe status of tuna catch – which evidence was not rebutted by the United States – we would find that the United States has not explained sufficiently why it assumes that captains are capable of carrying out an activity that the amended tuna measure itself recognizes as highly complex and for which training and education are required. In the absence of such explanation, we would be compelled to find that while the United States may legitimately draw distinctions between the ETP large purse seine fishery and other fisheries, the lack of explanation concerning the technical capacities of captains means that the different certification requirements cannot be said to be even-handed, and as such to stem exclusively from a legitimate regulatory distinction.").

[178] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.265 (min. op.) ("While I agree with many of the intermediate factual findings made by the majority in respect of the different certification requirements, I do not agree with the legal reasoning or conclusions that my colleagues have developed on the basis of those findings. Most importantly, I do not agree that the different certification requirements lack even-handedness. On the contrary, in my opinion any detrimental treatment caused by the different certification requirements does stem exclusively from a legitimate regulatory distinction, and accordingly is not inconsistent with Article 2.1 of the TBT Agreement.").

caught in a manner not harmful to dolphins – will nevertheless end up consuming tuna that was, in fact, caught in sets or other gear deployments in which dolphins were killed or seriously injured."[179] In response to Mexico's argument that the detection mechanisms of the amended measure that apply to tuna caught by large ETP purse seine vessels are more "accurate or reliable" than those applied to all other vessels, the minority observed that:

> [T]he risk or likelihood that tuna is labelled dolphin safe even if it was caught in a set in which, as a matter of fact, dolphins were killed or seriously injured, depends not only on the sensitivity of the mechanism to detect dolphin mortality or injury, but also on the probability of such mortality or injury, i.e. the magnitude of the risk posed to dolphins either by a specific fishing method or because of the specific situation in a fishery such as close interaction between dolphins and tuna.[180]

121. Accordingly, the minority did not consider that the fact that a "captain[] certification is less likely to detect instances of mortality and serious injury" than a certification of an "independent, specially-trained observer[]" means that the certification requirements lack even-handedness.[181]

122. In the minority's view, "a certain degree or margin of error is necessarily tolerated" by both captain and observer certifications, as there will always be some "margin of error" as to whether any dolphin was killed or seriously injured in any particular set.[182] The relevant question for the minority, therefore, "is whether it is acceptable, under Article 2.1 of the TBT Agreement, for the United States to tolerate a greater margin of error in the mechanisms in place outside the ETP large purse seine fishery than inside it."[183]

123. The minority found that it was. In the minority's view, "where the probability of dolphin mortality or serious injury is smaller – because, for instance, the degree of tuna-dolphin association is less likely – the United States may accept a proportionately larger margin of error.

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[179] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.267 (min. op.).

[180] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.268 (min. op.).

[181] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.271-273 (min. op.).

[182] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.274-275 (min. op.); *see also id.* para. 7.275 ("The margin of error may be smaller in the case of observer certification than in the case of captain certification; but in both cases there is always some chance that a dolphin death or serious injury will go unobserved. Accordingly, we can talk of the difference between captain and observer certification not only in terms of *how accurate or sensitive* each one is, but also in terms of how *large a margin of error* each one allows.") (emphasis in original).

[183] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.). The minority further noted that "the mere fact that captains may not themselves have expertise or specialised knowledge about dolphin biology and safety does not necessarily render unreliable their certifications" where a crew member may have such expertise and specialized knowledge. *Id.* para. 7.272.

Conversely, where the risks are higher, it may be appropriate to tolerate only a smaller margin of error."[184]

124. And, in the minority's view, both the DSB recommendations and rulings from the original proceeding and the evidence on the record in this proceeding confirmed the even-handedness of the certification requirements. Specifically, "both the panel and the Appellate Body in the original proceedings found that setting on dolphins is 'particularly harmful' to dolphins. Setting on dolphins is the only tuna fishing method that deliberately targets dolphins, and so interacts with dolphins in a way that is uniquely intense, both in terms of the number of dolphins affected and the frequency of interaction."[185] Moreover, the minority correctly noted that "the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery."[186]

125. As such, the minority (correctly) concluded that "the general rule that captains' certifications are sufficient outside the ETP large purse seine fishery while observers are required inside the ETP large purse seine fishery is even-handed."[187] The minority further concluded: "I think that this distinction represents a fair response to the different risk profiles existing in different fisheries, as established by the evidence."[188]

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[184] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.). The minority further clarified its view with a hypothetical. *Id.* para. 7.277 ("Say a city imposes a speed limit of 80 km/h on all roads. Say also that to detect violations of this speed limit, the city has developed a system of police observation. Now, assume that suburb A has a higher incidence of speeding than does suburb B. As a result, the city requires police observation every day on major roads in suburb A with highly sensitive detectors, but only four days a week in suburb B with less sensitive machines. Could such a set-up be described as lacking even-handedness? In my view, it could not. As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection mechanisms in accordance with the historical incidence of and future potential for violations. Provided that there is a rational connection between the variation in intensity and the difference in risk, I would not find that the implementation of different detection mechanisms lacks even-handedness or is otherwise discriminatory.").

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

[186] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) (citing U.S. First Written 21.5 Submission, sec. II.C (paras. 70-167); Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127)); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) ("This, of course, is not to say that other fishing methods do not cause mortality or serious injury. They do, and that is why the United States requires captains in such fisheries to certify that no dolphin was killed or seriously injured. However, given the higher degree of risk in the ETP large purse seine fishery, it is in my opinion entirely even-handed for the United States to tolerate a smaller margin of error in that latter fishery, and accordingly to require observers in that fishery but not in others.").

[187] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op.).

[188] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op.).

ii. Whether the Determination Provisions Prove that the Detrimental Impact Does Not Stem Exclusively from a Legitimate Regulatory Distinction

126. The Panel next addressed the "determination provisions" of the U.S. measure. As discussed below, this was not an argument raised by Mexico in its case-in-chief for its Article 2.1 claim, but by the Panel on its own initiative in written questions following the Panel's meeting.

127. The "determination provisions" refer to the authority granted in the amended measure for NOAA to make two "regular and significant" determinations. This authority is granted by statute in the Dolphin Protection Consumer Information Act (DPCIA) at 16 U.S.C. §§ 1385(d)(1)(B)(ii) and 1385(d)(1)(D), and is reflected in NOAA's regulations at 50 C.F.R. §§ 216.91(a)(2)(i) and 216.91(a)(4)(iii).[189]

128. The determination provisions allow for the possibility that other fisheries may be found to exist (now or in the future) where the harms to dolphins from tuna fishing are such 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. Specifically, section 216.91(a)(2)(i) provides for NOAA to require proof of an observer certificate where NOAA determines that there exists a purse seine fishery outside the ETP where "a regular and significant association [is] occur[ing] between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)."[190] For all "other fisheries," section 216.91(a)(4)(iii) provides for NOAA to require proof of an observer certificate where NOAA determines that the particular fishery is "having a regular and significant mortality or serious injury of dolphins."[191] "Other fisheries" are all fisheries other than the ETP large purse seine fishery and non-ETP purse seine fisheries, and high seas large-scale driftnet fisheries (which do not exist).[192]

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[189] The statutory provisions entered U.S. law in 1997 with the enactment of the International Dolphin Conservation Program Act (IDCPA). The IDCPA amended the Marine Mammal Protection Act (MMPA), the DPCIA, and the Tuna Conventions Act. *See* U.S. Response to Question 60(a), paras. 1-19 (citing IDCPA, Public Law 105-42 (Aug. 15, 1997) (Exh. US-240)).

[190] 50 C.F.R. § 216.91(a)(2)(i) (Exh. US-2); 16 U.S.C. § 1385(d)(1)(B)(ii) (Exh. MEX-8). As explained to the Panel, the requirements contained within section 216.91(a)(2) apply to purse seine fisheries outside the ETP. U.S. Responses to Question 22, para. 146, and Question 60(a), para. 1.

[191] 50 C.F.R. § 216.91(a)(4)(iii) (Exh. US-2); 16 U.S.C. § 1385(d)(1)(D) (Exh. MEX-8). As explained to the Panel, the requirements contained within section 216.91(a)(4) applies to fisheries "other than one described in paragraphs (a)(1) through (3)." 50 C.F.R. § 216.91(a)(4) (Exh. US-2). Section (a)(1) describes the ETP large purse seine fishery, section (a)(2) describes non-ETP purse seine fisheries, and section (a)(1) describes large-scale driftnet fisheries. Accordingly, section (a)(4) covers non-purse seine fisheries *inside* and *outside* the ETP (other than large-scale driftnet fisheries), and the small purse seine vessel fishery *inside* the ETP. U.S. Responses to Question 21, para. 134, and Question 60(a), para. 1.

[192] 50 C.F.R. § 216.91(a)(4) (Exh. US-2). UN General Assembly Resolution 46/215 called for a moratorium on large-scale driftnet fishing on the high seas beginning December 31, 1992. *See* United Nations General Assembly Res. 46/215, "Large-Scale Pelagic Drift-net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas" (Dec. 20, 1991) (Exh. US-6); U.S. First Written 21.5 Submission, para. 28.

129. The Panel began its analysis by concluding that the determination provisions prove the certification requirements inconsistent with Article 2.1 for two separate reasons. First, the Panel considered that they "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)."[193] In particular, the Panel reasoned that the design of the determination provisions "open[s] up a gap" in the certification procedures, "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."[194] In the Panel's view, these "gap[s]" "represent a further way in which the amended tuna measure lacks even-handedness in its treatment of different tuna fishing methods in different oceans, and may also make it easier for tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin safe, thus modifying the conditions of competition in the US tuna market to the detriment of Mexican tuna and tuna products."[195] Second, the Panel considered the determination provisions "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."[196]

130. The Panel appeared to indicate that there are two particular "gap[s]" of concern. First, the Panel appeared to be concerned about the possibility of a non-ETP purse seine fishery where a regular and significant mortality and serious injury is occurring without a regular and significant association between tuna and dolphin.[197] Second, the Panel appeared to be concerned about the possibility of a non-purse seine fishery (inside or outside the ETP) where a regular and significant association between tuna and dolphins is occurring without a regular and significant mortality and serious injury of dolphins.[198]

131. The Panel provided no analysis of the first alleged "gap." As to the second "gap," the Panel reasoned that, "as a matter of common-sense," "the risk of mortality or serious injury is necessarily heightened where dolphins associate with tuna, even if the fishing method in question does not deliberately target that association, as does setting on dolphins," but cited to no

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[193] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.258.

[194] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.263, 7.258.

[195] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.258.

[196] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.259.

[197] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.620, 7.263.

[198] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.621-263. As discussed with the Panel, the regular and significant mortality and serious injury determination identified in section 216.91(a)(4)(iii) applies to all fisheries not covered in section 216.91(a)(1)-(3) (*i.e.*, all fisheries other than the ETP large purse seine fishery (216.91(a)(1)), non-ETP purse seine fisheries (216.91(a)(2)), and large-scale driftnet fisheries (216.91(a)(3)). In practice what this means is that the regular and significant mortality and serious injury determination applies to all non-purse seine fisheries (inside and outside the ETP) other than high seas large-scale driftnet fisheries (tuna from which would be *per se* ineligible for the dolphin safe label), as well as the ETP small purse seine fishery. *See* U.S. Response to Panel Question 53, para. 276; U.S. Response to Panel Question 60(a), para. 1.

evidence for this proposition.[199] Rather, as discussed below, the Panel appeared to rely on its "common-sense," an speculative statement from Mexico, and a misunderstanding of the U.S. argument as to why it is appropriate to have observers on large purse seine vessels in the ETP.[200]

132. Ultimately, the Panel concluded that, while the determination provisions are designed to "ensure that similar situations are treated similarly under the amended tuna measure,"[201] these provisions fall short of that goal. In the Panel's view, there may be "some cases" where a fishery "may be treated differently, and less stringently" than the ETP.[202] However, the Panel makes no such finding that any such "case" actually exists today, or is likely to exist in the future.

133. As noted above, the United States considers the Panel's findings with regard to the certification requirements to be in error. In section III.G.3, the United States explains how the Panel erred in finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. In section III.G.4, the United States explains how the Panel erred in finding that this detrimental impact does not stem exclusively from a legitimate regulatory distinction.

3. The Panel Erred in Finding that the Certification Requirements Modify the Conditions of Competition in the U.S. Market to the Detriment of Mexican Tuna Product

134. The United States considers that 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 is flawed in a number of different respects. Specifically:

1) The Panel erred in not allocating the burden of proof properly and instead making the case for Mexico.[203]

2) The Panel erred in determining that any difference in observer-related costs incurred by Mexican industry in producing tuna product from the ETP large purse seine fishery and producers of tuna product harvested outside the ETP large purse

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[199] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.261.

[200] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.261-262.

[201] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 ("[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. This would help ensure that similar situations are treated similarly under the amended tuna measure.").

[202] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 ("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.").

[203] *See infra*, sec. III.G.3.a.

seine fishery modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product.[204]

3) The Panel erred in finding that a "genuine relationship" exists between the certification requirements and the detrimental impact that the Panel found to exist.[205]

135. If the Appellate Body were to rule in favor of the United States on any one of these three appeals, the Appellate Body should, as a consequence, 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, in turn, that the Panel's ultimate finding that the certification requirements "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" would need to be reversed.[206] Moreover, and as discussed below, the United States considers that, for identical reasons, the Panel's findings that the certification requirements are inconsistent with Articles I:1 and III:4 of the GATT 1994 are in error, and requests reversal of those findings as well.[207]

a. The Panel Erred in Its Allocation of the Burden of Proof

136. The Panel properly recognized that a technical regulation can only be found to afford less favorable treatment to imported products under Article 2.1 if: (1) the requirements modifies the conditions of competition in the relevant market to the detriment of the imported products; and (2) such detrimental impact does not stem exclusively from a legitimate regulatory distinction.[208] And while the Panel appeared uncertain about how to properly allocate the burden of proof throughout its Article 2.1 analysis, the Panel did observe (correctly) that the complainant bears the burden of proving the first step of the analysis.[209]

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[204] *See infra*, sec. III.G.3.b. In this regard, the United States further explains why there is no basis to support a finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product under an alternative legal theory from the one that the Panel, in fact, used. *See infra*, sec. III.G.3.c.

[205] *See infra*, sec. III.G.3.d.

[206] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[207] *See infra*, secs. IV, V.

[208] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.47.

[209] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.50 ("We understand these passages as indicating that a complainant bears the burden of showing that a challenged measure modifies the conditions of competition in the relevant market (i.e. the relevant market in the responding Member) to the detriment of products from the complaining Member. As noted above, this criterion must always be satisfied before a violation of Article 2.1 can be found, regardless of whether that violation is claimed to be *de facto* or *de jure*.") (quoting *US – Tuna II (Mexico) (AB)*, para. 216; *US – COOL (AB)*, para. 272).

137. As recounted by the Panel, Mexico argued that the difference in observer coverage between what is required in the ETP large purse seine fishery versus in other fisheries "means that Mexican tuna products are losing competitive opportunities to tuna products that may be *inaccurately labelled* as dolphin-safe."[210] In Mexico's view, it is "[t]his difference" – *i.e.*, the difference *in accuracy* – that causes the detrimental impact. The United States was afforded an opportunity to respond to this argument, and, as recounted by the Panel, did so.[211] The Panel, however, made no "definitive finding" on this issue,[212] concluding that such a finding "would require a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled."[213] The Panel neither conducted such an analysis, nor did it – in the U.S. view – have sufficient evidence on the record to do so, as discussed below.[214]

138. Instead, the Panel found that a detrimental impact existed based on an entirely different theory from the one that Mexico had argued. In the Panel's view, it is the difference in *costs* related to observer programs that cause a detrimental impact; in particular, the Panel noted that the evidence indicated that "observer coverage involves the expenditure of significant resources."[215]

139. The Panel appeared to try to bridge the divide between its own finding and what Mexico had argued by characterizing Mexico's argument as being that the amended measure imposes a "lighter burden" on other countries' producers of tuna product than on Mexican producers.[216]

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[210] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.152 (emphasis added) ("[T]he absence of sufficient … observer requirements for tuna that it used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labelled as dolphin-safe. This difference is what is creating the detrimental impact.") (quoting Mexico's Second Written 21.5 Submission, para. 117 (emphasis omitted)).

[211] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.155-158.

[212] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169 ("In the Panel's view, however, it is not necessary to make a definitive finding on this point.").

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

[214] *See infra*, sec. III.G.3.c.

[215] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162 ("In the Panel's view, it is clear that by not requiring observer coverage outside of the ETP large purse seine fishery, the amended tuna measure imposes a lighter burden on tuna and tuna products made from tuna caught other than by large purse seine vessels in the ETP. The United States has recognized that observer coverage involves *the expenditure of significant resources*, and both parties in their oral responses at the Panel meeting and in their written responses to the Panel's questions made clear that *the costs* of implementing observer coverage can be significant. Indeed, the United States explicitly recognized that the resource expenditure required to establish and maintain observer programs 'impose[s] [an] enormous barrier to entry' into the US tuna market, *and may cost hundreds of millions of dollars*. In our view, these facts clearly point to the conclusion that the different certification requirements impose a lesser burden on tuna and tuna products made from tuna caught outside the ETP large purse seine fishery, and thus modify the conditions of competition to the detriment of Mexican tuna and tuna products.") (emphasis added).

[216] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.154 ("As we understand it, then, Mexico's claim is that by requiring observer certification for all tuna caught by large purse seine vessels in the ETP while not requiring the same for tuna caught other than by large purse seine vessels in the ETP, the amended tuna measure imposes a

But a review of the single citation to the Panel's characterization of Mexico's argument proves just how inaccurate that characterization was.[217] While it is true that Mexico stated in paragraph 193 of its second written submission that "the amended tuna measure imposes 'one standard for tuna caught inside the ETP, and a separate and lower standard for tuna caught outside the ETP,'"[218] that particular passage is contained in Mexico's even-handed analysis, not its detrimental impact analysis. Moreover, looking at the complete quote, it is clear that what Mexico was discussing was the alleged difference in the *accuracy* of the dolphin safe label, *not* the alleged difference in the *cost* of producing tuna product to be marketed with the label.[219]

140. Further, while it is true, as the Panel noted,[220] that the parties did discuss the costs of different observer programs, the parties did so in the context of the U.S. affirmative defense under GATT Article XX.[221] At no time did Mexico ever argue or introduce evidence showing that *the cost* Mexican producers incur in complying with the AIDCP observer program results in a detrimental impact on its exports to the United States for purposes of its Article 2.1 claim, or, for that matter, its claims under Articles I:1 and III:4 of the GATT 1994. As such, the United States was never afforded the opportunity to offer any rebuttal to such an approach (and, indeed, the Panel cites to none).

141. As discussed above, the burden of proof rests on the complaining party to prove its affirmative claims.[222] This "well-established" principle applies equally to Mexico's Article 2.1 claim, as the Appellate Body has already stated in this very dispute.[223] It would thus appear beyond dispute that Mexico, as the complainant, had the burden of putting forward "evidence and argument" sufficient to establish a *prima facie* case that the certification requirements

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lighter burden, in terms of accessing the dolphin safe label, on tuna caught in fisheries other than by setting on dolphins in the ETP.").

[217] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.317 (quoting Mexico's Second Written 21.5 Submission, para. 193).

[218] Mexico's Second Written 21.5 Submission, para. 193.

[219] Mexico's Second Written 21.5 Submission, para. 193 ("In effect, the difference in labelling conditions and requirements in the Amended Tuna Measure relating to independent observers and self-certification by captains imposes two distinct and conflicting standards *for the accuracy of information* regarding the dolphin-safe status of tuna: one standard for tuna caught inside the ETP, and a separate and much lower standard for tuna caught outside of the ETP.") (emphasis added).

[220] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162.

[221] *See, e.g.*, U.S. Second Written 21.5 Submission, para. 177, n.338; U.S. Response to Panel Question 49, para. 266 (citing U.S. Second Written 21.5 Submission, para. 177, n.338).

[222] *See supra*, sec. III.C.

[223] *US – Tuna II (Mexico) (AB)*, para. 216 ("With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall 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.'") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).

modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product,[224] a point that the Panel itself recognized.[225]

142. But that *never happened* – Mexico never put forward "evidence and argument" that *the costs* of complying with the AIDCP observer program versus the cost of not complying with the AIDCP observer program caused a detrimental impact on Mexican tuna product sold in the U.S. market. Indeed, Mexico never made such an argument at all, and the United States was not given a meaningful opportunity to respond. Rather, the Panel took it *upon itself* to establish an alleged *prima facie* case *on Mexico's behalf*, drawing on the evidence put forward by the United States in its GATT Article XX defense (and Mexico's response to that argument).[226]

143. As is well known, the Appellate Body has previously addressed this exact issue – whether a panel may make the case for the complainant – and, in that dispute, found that the panel had erred in doing so.[227]

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[224] *See US – Gambling (AB)*, para. 140 ("A *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency."); *US – Wool Shirts and Blouses (AB)*, at 16; *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 50 (noting that "the burden of explaining the relevance of evidence, in proving claims made, naturally rests on whoever presents that evidence").

[225] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.50 (quoted above).

[226] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162 (citing to evidence submitted in U.S. Response to Questions 48-50). Although the United States did make a brief reference to this issue in the U.S. analysis of whether the certification requirements are even-handed or not (which the Panel cites to), *see* U.S. First Written 21.5 Submission, paras. 265-266, the argument – and the entirety of the evidence – was developed in the U.S. analysis of why the amended measure is "necessary" for purposes of GATT Article XX (which the Panel does not cite to). *See* U.S. Second Written 21.5 Submission, para. 177, n.338 (concluding that "operating the observer coverage piece of Mexico's alternative on an annual basis would cost at the very least hundreds of millions of US dollars, if not significantly in excess of one billion US dollars") (emphasis omitted). And it is *this* argument – the U.S. GATT Article XX defense – that the United States was exploring in its response to the Panel's questions. *See* U.S. Response to Panel Question 49, para. 266 (citing U.S. Second Written 21.5 Submission, para. 177, n.338).

[227] *See supra*, sec. III.C (citing *Japan – Agricultural Products II (AB)*, para. 126 ("Pursuant to the rules on burden of proof set out above, we consider that it was for the United States to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6. Since the United States did not even claim before the Panel that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the 'determination of sorption levels' is an alternative measure within the meaning of Article 5.6."); *EC – Steel Fasteners (China) (AB)*, para. 566 ("Where a complainant has failed to set forth arguments in its submissions before a panel sufficient to substantiate its claims, a panel may not use its interrogative powers to make good the absence of relevant substantiating arguments and evidence.")); *see also US – Gambling (AB)*, para. 141 (stating that a panel request "must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits" and that "a *prima facie* case . . . demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, *and explain the basis for the claimed inconsistency of the measure with that provision*.") (emphasis added).

144. Because the Panel did not allocate the burden of proof properly, instead making the case for Mexico, the United States respectfully requests the Appellate Body to reverse the Panel's finding of detrimental impact and the related finding of a breach of Article 2.1.[228]

b. The Panel Erred in Finding that a Difference in Observer-Related Costs Modifies the Conditions of Competition in the U.S. Market to the Detriment of Mexican Tuna Product

145. As discussed above, the Panel found that a difference in requirements for observers modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product.[229] That is, the Panel considered the fact that Mexican producers harvesting tuna in the ETP large purse seine fishery incur a certain cost for having 100 percent observer coverage, whereas the vessels of other countries that produce tuna outside the ETP large purse seine fishery may not incur such a cost, constitutes an extra "burden" on Mexican tuna product producers.[230]

146. In the Panel's analysis – which constitutes a single paragraph (7.162) in its report – the Panel briefly referred to the fact that Mexico incurs an ongoing cost (without examining what that cost is), and, thereafter, focused entirely on the U.S. estimates of what it would cost another country to start up an observer program. Importantly, the Panel did not examine whether any difference in observer costs actually modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product. In the Panel's view, the finding that Mexican producers incur this observer-related cost that other producers may not incur was a sufficient basis to conclude that the first step to the Article 2.1 analysis was satisfied (and that the amended measure is inconsistent with GATT Articles I:1 and III:4).[231] The Panel's finding is in error because it failed to conduct the correct legal analysis finding.

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[228] *See, e.g., Japan – Agricultural Products II (AB)*, paras. 130-131 ("We, therefore, *reverse* the Panel's finding that it can be presumed that the 'determination of sorption levels' is an alternative SPS measure which meets the three elements under Article 5.6, because this finding was reached in a manner inconsistent with the rules on burden of proof.") (emphasis added and in original); *US – COOL (AB)*, para. 469 (reversing the panel's Article 2.2 finding where the panel had and stating that "we agree with the United States that, by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement without examining the proposed alternative measures, *the Panel erred by relieving Mexico and Canada of this part of their burden of proof*") (emphasis added); *US – Gambling (AB)*, paras. 151-154; *US – Certain EC Products (AB)*, paras. 114-115.

[229] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162 ("In the Panel's view, it is clear that by not requiring observer coverage outside of the ETP large purse seine fishery, the amended tuna measure imposes a lighter burden on tuna and tuna products made from tuna caught other than by large purse seine vessels in the ETP.").

[230] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162.

[231] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162 ("In our view, these facts clearly point to the conclusion that the different certification requirements impose a lesser burden on tuna and tuna products made from tuna caught outside the ETP large purse seine fishery, and thus modify the conditions of competition to the detriment of Mexican tuna and tuna products."); *see also id.* para. 7.455 (finding that the certification requirements are inconsistent with GATT Article I:1 on this same basis); *id.* para. 7.500 (finding that the certification requirements are inconsistent with GATT Article III:4 on this same basis).

147. The Appellate Body has long considered that a panel may not assume that a measure provides less favorable treatment merely because the treatment provided to the imported product is different from that accorded to the like domestic or other imported product.[232] Rather, a panel needs to conduct a further analysis of whether that difference modifies the conditions of competition in the respondent's market to the detriment of the imported product.[233] Such an "analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market."[234] And while the Appellate Body has said that "'*any* adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure may potentially be relevant' to a panel's assessment of less favourable treatment under Article 2.1,"[235] the Appellate Body has cautioned panels that "Article 2.1 should not be read to mean that any distinction would *per se* accord 'less favourable treatment' within the meaning of that provision."[236] Rather, "where a technical regulation does not discriminate *de jure*, a panel must determine whether the evidence and arguments adduced by the complainant in a specific case nevertheless demonstrate that the operation of that measure, *in the relevant market*, has a *de facto* detrimental impact on the group of like imported products."[237]

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[232] *See, e.g., Korea – Various Measures on Beef (AB)*, para. 141 ("[E]ven if we were to accept that the dual retail system 'encourages' the perception of consumers that imported and domestic beef are 'different,' we do not think it has been demonstrated that such encouragement *necessarily* implies a competitive advantage for domestic beef") (emphasis added); *id.* para. 144 ("However, that formal separation [of the selling of imported beef and domestic beef], in and of itself, *does not necessarily* compel the conclusion that the treatment thus accorded to imported beef is less favourable than the treatment accorded to domestic beef. To determine whether the treatment given to imported beef is less favourable than that given to domestic beef, *we must*, as earlier indicated, inquire into whether or not the Korean dual retail system for beef *modifies the conditions of competition in the Korean beef market* to the disadvantage of the imported product.") (emphasis added).

[233] *See, e.g., US – COOL (AB)*, para. 276 ("Rather, the Panel recognized that different treatment on the face of a measure does not necessarily constitute less favourable treatment, as indicated by the Appellate Body's findings in *Korea – Various Measures on Beef*. The Panel was correct, therefore, in going on to analyze whether, on the specific facts of this case, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock.").

[234] *US – Clove Cigarettes (AB)*, para. 206.

[235] *US – Tuna II (Mexico) (AB)*, para. 225.

[236] *US – Tuna II (Mexico) (AB)*, para. 226; *see also Thailand – Cigarettes (Philippines) (AB)*, para. 128 ("Accordingly, the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products.").

[237] *US – COOL (AB)*, para. 286 (emphasis added).

148. In other words, a panel charged with examining an Article 2.1 claim must do the work – it must actually analyze whether the conditions of competition in the respondent's market have been altered to the detriment of the imported product.[238]

149. And, indeed, past panels addressing *de facto* discrimination have done this work:

- In *Korea – Various Measures on Beef*, the panel made numerous findings regarding how the challenged measure affected the conditions of competition.[239] These findings included a finding that the challenged measure reduced "opportunities for imported products to compete directly with domestic products," limited the "potential market opportunities for imported beef," and increased the "costs on the imported product" because "imported beef will require new stores to be established."[240]

- In *Mexico – Soft Drinks*, the panel found that the challenged measure created an economic incentive for producers to use cane sugar as a sweetener in the production of soft drinks and syrups in lieu of imported non-cane sugar sweeteners, and that the imposition of the measures reverted the trend that was seemingly under way in the Mexican market towards the replacement of cane sugar as an industrial sweetener in the production of soft drinks and syrups with non-cane sugar sweeteners.[241]

- In *US – COOL*, the original panel found that the measure created compliance costs that increased where imported livestock were used,[242] the existence of a price discount on imported livestock, a reduction in the number of processing

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[238] *See, e.g.*, *Thailand – Cigarettes (Philippines) (AB)*, para. 130 ("Because, however, the examination of whether imported products are treated less favourably cannot rest on simple assertion, close scrutiny of the measure at issue will normally require further identification or elaboration of its implications for the conditions of competition in order properly to support a finding of less favourable treatment under Article III:4 of the GATT 1994.").

[239] *See Korea – Various Measures on Beef (AB)*, para. 139 ("The Panel went on, however, to examine the conditions of competition between imported and like domestic beef in the Korean market. The Panel gave several reasons why it believed that the dual retail system alters the conditions of competition in the Korean market in favour of domestic beef.").

[240] *Korea – Various Measures on Beef (AB)*, para. 139 (summarizing the panel's findings).

[241] *Mexico – Soft Drinks (Panel)*, para. 8.117 ("The challenged measures create an economic incentive for producers to use cane sugar as a sweetener in the production of soft drinks and syrups, instead of other non-cane sugar sweeteners such as beet sugar or HFCS. This incentive is created by conferring an advantage (the exemption from the soft drink tax, the distribution tax and the bookkeeping requirements) on those producers that use cane sugar instead of non-cane sugar sweeteners, such as beet sugar or HFCS. These measures do not legally impede producers from using non-cane sugar sweeteners, such as beet sugar or HFCS. However, they significantly modify the conditions of competition between cane sugar, on the one hand, and non-cane sugar sweeteners, such as beet sugar or HFCS, on the other. Indeed, there is evidence that the imposition of these measures reverted the trend that was seemingly under way in the Mexican market towards the replacement of cane sugar as an industrial sweetener in the production of soft drinks and syrups, for non-cane sugar sweeteners, such as HFCS.").

[242] *US – COOL (AB)*, paras. 261-262 (summarizing the original panel's findings).

plants that continued to purchase imported livestock, and other "significant financial disadvantages" for certain suppliers of imported livestock, including limits on access to credits and loans.[243] In light of these findings, the panel concluded that "'the COOL measure creates an incentive to use domestic livestock – and a disincentive to handle imported livestock – by imposing higher segregation costs on imported livestock than on domestic livestock,' thereby 'affect[ing] competitive conditions in the US market to the detriment of imported livestock.'"[244]

- In the original *US – Tuna II (Mexico)* proceeding, the original panel found that not only will major tuna processors not purchase tuna from vessels that set on dolphins, but that major U.S. grocery chains refuse to purchase such tuna product because they were unable to sell non-dolphin safe tuna product, all of which confirmed to the original panel that "the dolphin-safe label has a significant commercial value on the US market for tuna products."[245] The Appellate Body upheld this analysis.[246]

- Finally, even where the claim is one of *de jure* discrimination, such as was the case in *Thailand – Cigarettes (Philippines)*, where the difference in regulatory requirements for imported product "provide[d], *in itself*, a significant indication that the conditions of competition are adversely modified to the detriment of imported cigarettes,"[247] the panel analyzed whether the conditions of competition were actually affected. Specifically, the panel examined the evidence regarding whether the additional administrative burdens imposed on resellers of imported cigarettes could have a "negative impact on the competitive position of imported cigarettes in the Thai market" and whether an increase in operating costs "could limit business opportunities for imported cigarettes to the extent that cigarette suppliers seek to reduce costs by avoiding resales of imported cigarettes."[248] The panel made an affirmative finding on this issue based on evidence showing "a certain degree of price elasticity and switching patterns between imported and domestic cigarettes,"[249] and the Appellate Body *rejected* Thailand's contention

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[243] *US – COOL (AB)*, para. 263 (quoting the original panel).

[244] *US – COOL (AB)*, para. 263 (quoting the original panel); *see also id.* para. 291 (finding that "the Panel properly examined whether the COOL measure modifies the conditions of competition in the US market to the detriment of imported livestock" in its analysis of whether the challenged measure created an incentive to purchase domestic livestock).

[245] *US – Tuna II (Mexico) (Panel)*, paras. 7.288-291.

[246] *US – Tuna II (Mexico) (AB)*, para. 233.

[247] *Thailand – Cigarettes (Philippines) (AB)*, para. 138 (emphasis added).

[248] *Thailand – Cigarettes (Philippines) (AB)*, para. 131 (summarizing the panel's analysis); *see also id.* para. 136.

[249] *Thailand – Cigarettes (Philippines) (AB)*, paras. 131, 136 ("In addition, we observe that the Panel did identify further implications of the additional administrative requirements in the Thai market affecting the competitive position of imported and domestic cigarettes. In particular, the Panel observed that an econometric

> "that the Panel made its finding without making any factual findings other than to establish the existence of the different requirements themselves."[250]

150. The Panel's abbreviated analysis in paragraph 7.162 represents a significant departure both from the clear guidance of the Appellate Body and the approach of these (and other) previous panels. As discussed above, the Panel's analysis in paragraph 7.162 appears to be that the general lack of an observer certification requirement for tuna caught outside the ETP large purse seine fishery imposes "a lesser burden" on such tuna due to the cost of AIDCP observers, and that this *necessarily* modifies the conditions of competition to the detriment of Mexican tuna products.[251] However, it does not logically follow from the fact that the AIDCP observer program entails some cost to Mexican producers that not imposing observer-related costs *on the producers of other Members* means that the amended measure modifies the conditions of competitions to the detriment of *Mexican products in the U.S. market*.

151. The Panel's analysis in paragraph 7.162 seems to derive mainly from the U.S. affirmative defense under GATT Article XX(b), rather than from the observer-related costs that Mexico claims its tuna product producers incur to comply with the AIDCP, which the Panel only generally refers to in a brief footnote.[252] As part of the U.S. defense that the amended measure is "necessary" for purposes of GATT Article XX(b) – an issue that the Panel did not even reach – the United States provided rough estimates of what it would cost to start up an observer program (where none previously existed) based on the costs of a U.S. observer program.[253] And it is from that analysis that the United States concluded that, if accepted, Mexico's argument would impose an "enormous barrier to entry" on the products of those Members that do not currently have observer programs.[254]

152. In this regard, the Panel's logic is particularly faulty in light of the fact that it is *uncontested* that the costs of observer programs differ substantially from fishery to fishery and from Member to Member, and that the costs of such observer programs often greatly exceed the costs that Mexican tuna product producers must incur to comply with the AIDCP.[255] Thus, not

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study submitted by the Philippines suggested a certain degree of price elasticity and switching patterns between imported and domestic cigarettes, and that this was an indication that the additional administrative requirements can potentially have a negative impact on the competitive position of [imported] cigarettes in the market.") (internal quotations omitted).

[250] *Thailand – Cigarettes (Philippines) (AB)*, para. 138 (internal quotations omitted).

[251] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162.

[252] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.324 (citing Mexico's Response to Question 48, paras. 137-138 (explaining the costs borne by Mexico)).

[253] U.S. Second Written 21.5 Submission, para. 177, n.338 (basing estimate on 2012 costs of the U.S. Pacific Islands Regional Observer Program); U.S. Response to Panel Question 49, para. 266 (citing U.S. Second Written 21.5 Submission, para. 177, n.338).

[254] *See* U.S. Response to Question 49, paras. 265-266.

[255] *See* U.S. Second Written 21.5 Submission, para. 177, n.338 (discussing the 2012 costs of the U.S. Pacific Islands Regional Observer Program); U.S. Response to Question 48, para. 261 (discussing costs of U.S. observer program nation-wide); New Zealand's Response to Third Party Question 2, paras. 9-10 (noting that the NZ

only are the costs of other observer programs not an accurate proxy for the burden of the AIDCP program on Mexican producers, but certain other observer programs may actually be more of a burden on the tuna industries they cover than the AIDCP observer program is to Mexican producers.[256]

153. Rather, what the Panel should have focused on in determining whether the difference in observer-related costs modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product are the costs that Mexican producers incur. And while the Panel made a brief reference in a single footnote to the fact that Mexican producers incur observer-related costs,[257] it neither identified the amount of those costs nor analyzed whether they modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Moreover, Mexico appears to take the position that those costs on a per trip basis are not significant.[258]

154. Of course, the *reason* for Mexico's approach in this regard is that Mexico did not argue that the certification requirements *make it more expensive* for Mexican producers to market their tuna product in the United States. The Panel's flawed detrimental impact analysis and finding are thus a direct consequence of its decision to make the case for the complainant, inconsistent with the proper allocation of burden of proof in a WTO dispute proceeding, as discussed above.

155. As it stands, the Panel did not conduct an analysis on which to base a finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product, and, as such, the Panel's finding in paragraph 7.162 is in error. In essence, the Panel did what the panel was accused of doing in *Thailand – Cigarettes (Philippines)* – making a finding of less favorable treatment "without making any factual findings other than to establish the existence of the different requirements themselves."[259] In this proceeding, the Panel merely pointed out that there are different observer requirements in the ETP large purse seine fishery than there are other fisheries. And while the United States does not dispute that the Panel's analysis need not "be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned,"[260] the United

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vessels that carry observers incur a cost of up to US$450 per day to do so (not counting those costs relating to the observer's "food, water and other associated needs")); EU's Response to Third Party Question 2, paras. 5-6 (discussing observer-related costs for Spanish large purse seine vessels operating in the ETP).

[256] *See, e.g.* U.S. Second Written 21.5 Submission, para. 177, n.338 (showing that the cost, per observed day, of the U.S. observer program covering the Hawaii and American Samoa longline fisheries is $655); New Zealand's Response to Panel's Third Party Question No. 2, para. 9 (showing that the cost, per observed day, of the observer program in the New Zealand exclusive economic zone is up to $450).

[257] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.324.

[258] *See* Mexico's Opening Statement, para. 37 ("The average cost per observer for the AIDCP observer program is far lower than the United States claims"); *see also* Mexico's Response to Panel Question No. 48, paras. 137-138 (describing the cost sharing between vessels, the IATTC, and the Mexican government without suggesting that the costs incurred by Mexican industry are burdensome in any way).

[259] *Thailand – Cigarettes (Philippines) (AB)*, para. 138 (internal quotations omitted).

[260] *Thailand – Cigarettes (Philippines) (AB)*, para. 129.

States does contend that the Panel must actually conduct an analysis of whether the measure at issue modifies the conditions of competition in the importing Member's market to the detriment of the exporting Member's product.[261] The Panel erred in failing to conduct such an analysis.

c. No Evidence Exists on the Record to Support a Finding that the Certification Requirements Modify the Conditions of Competition in the U.S. Market to the Detriment of Mexican Tuna Product Under Any Other Legal Theory

156. The United States further observes that no evidence exists on the record to support a finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product under any other legal theory. In particular, the Panel was correct to not agree that Mexico established a *prima facie* case as to the argument it did, in fact, make – namely, that the amended measure confers a "competitive advantage" on other tuna product producers (whose vessels may not carry observers) over Mexican producers (whose vessels are required to do so) because this difference makes "it easier for tuna caught outside the ETP large purse seine fishery to be incorrectly labelled" as "dolphin safe" when it is, in fact, not.[262] In this regard, Mexico had alleged that its "tuna caught in the ETP, which is accurately certified as dolphin safe by independent observers, will lose competitive opportunities to tuna caught outside the ETP, which has received an inherently unreliable dolphin safe certification."[263]

157. As an initial matter, the United States notes that the factual predicate of Mexico's argument – that its tuna product is being "accurately certified as dolphin safe by independent observers" – is incorrect. Mexico does not produce dolphin safe tuna product because its vessels set on dolphins,[264] a regulatory distinction that the Panel found to be *WTO-consistent*.[265]

158. In any event, the Panel did not consider it "necessary to make a definitive finding" on Mexico's argument, stating only that the "certification requirements *may* make it more likely that

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[261] *See, e.g., US – COOL (AB)*, para. 276 (referring to *Korea – Various Measures on Beef (AB)*).

[262] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.166.

[263] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.166 ("The core factual assertion underlying Mexico's allegation that the different certification requirements make it easier for tuna caught outside the ETP large purse seine fishery to be incorrectly labelled is that 'captains are neither qualified nor able to make' an accurate designation that no dolphins were killed or seriously injured in a particular gear deployment. … According to Mexico, the incapacity of captains to accurately certify the dolphin safe status of tuna 'create[s] a very real risk that tuna may be improperly certified as dolphin safe,' with the consequence that 'tuna caught in the ETP, *which is accurately certified as dolphin safe* by independent observers, will lose competitive opportunities to tuna caught outside the ETP, which has received an inherently unreliable dolphin safe certification.'") (quoting Mexico's Second Written 21.5 Submission, paras. 167, 182) (emphasis added).

[264] Mexico's Response to Question 57, para. 155 ("Mexico has established that virtually its entire purse seine fleet fishes in the ETP by setting on dolphins"); *id.* para. 146 ("Mexico is not aware that *any* Mexican tuna products manufacturers have exported *any* products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure.") (emphasis added).

[265] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.2(a), 8.4(a), and 8.5(a).

tuna caught outside the ETP [large purse seine fishery] could be inaccurately labelled."[266] Ultimately, however, the Panel concluded 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," which the Panel did not conduct, and for which Mexico did not provide any evidence.[267]

159. The Panel's reasoning that a finding in Mexico's favor would require more evidence was sound. Simply asserting, in the abstract, that having an observer onboard may make it more likely that the dolphin safe certification is accurate does not establish a *prima facie* case as to the first step of the Article 2.1 analysis.[268] Among other things, Article 2.1 "requires WTO Members to accord to *the group* of imported products treatment no less favourable than that accorded to *the group* of like domestic products."[269]

160. For the Panel to determine whether any differences in accuracy in the dolphin safe label puts the group of Mexican tuna products marketed in the United States as "dolphin safe" at a competitive disadvantage to the group of tuna products produced from fisheries other than the ETP large purse seine fishery and marketed as "dolphin safe," the Panel would examine whether former group, as a whole, is more accurately certified than the latter. And to conduct such an examination, the Panel would need to understand not only how differences in expertise impact the rate of accuracy, but also how the differing conditions facing the AIDCP-observer on a vessel that is intentionally targeting large schools of dolphins, on the one hand, and the captain of a vessel that is only accidentally and occasionally interacting with a small number of dolphins, on the other, impact the overall margin of error.

161. That is to say, even if one were to accept, in the abstract, that an AIDCP-approved observer would be more likely than a captain in another fishery to certify accurately whether a dolphin has been killed or seriously injured, one could not necessarily conclude that the group of tuna product produced from the ETP large purse seine fishery, and certified as "dolphin safe" by an AIDCP-approved observer, is *necessarily* more accurately labeled than the other group of the tuna product. Any advantage in expertise that the observer has over the captain may well be eliminated where the difference in conditions facing the AIDCP-approved observer makes it

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

[267] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169 ("Ultimately, however, a definitive finding on this point would require a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled. Such an analysis is not necessary in the context of the present dispute.").

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

[269] *US – Clove Cigarettes (AB)*, para. 180 (emphasis added); *id.* para. 194 ("In sum, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, *the group* of products imported from the complaining Member and, on the other hand, the treatment accorded to *the group* of like domestic products.") (emphasis added); *US – Tuna II (Mexico) (AB)*, para. 215 ("As the Appellate Body has previously explained, when assessing claims brought under Article 2.1 of the TBT Agreement, a panel should therefore seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of *the group* of imported products *vis-à-vis the group* of like domestic products or like products originating in any other country.") (emphasis added).

much more difficult for that person to make an accurate certification as to whether a dolphin has been killed or seriously injured in a particular set than it is for the captain in another fishery.

162. Conditions that would impact the accuracy of certifications would include the frequency and degree of interaction between dolphins and tuna vessels in ETP large purse seine fishery versus other fisheries. This is so because the certifier does not even have the opportunity to make an inaccurate certification as to whether a dolphin has been killed or seriously injured unless there is first an interaction with the dolphin(s). As discussed above, such interactions include chasing (ETP large purse seine), encirclement (all purse seine), backdown (ETP large purse seine),[270] depredation (longline), and entanglement in line or net (all fishing methods).[271] And, as the Panel found, the evidence on the record unequivocally proves that the ETP large purse seine fishery differs dramatically from all other fisheries in terms of both the frequency and the degree of interaction with dolphins.[272]

163. Thus, in the years 2009-2013, there have been, on average, 10,426 intentional sets on dolphins in the ETP large purse seine fishery, all of which involve significant dolphin interaction.[273] In these sets, a total of 31.3 million dolphins have been chased, with 18.6 million of those dolphins being captured in purse seine nets.[274]

164. In other fisheries, by contrast, where the Panel found that "interaction is only accidental," the interaction data tells a far different story.[275] In the western and central Pacific purse seine fishery, for example, a dolphin interaction occurred in only 0.43 percent of observed sets between 2007 and 2010 (*i.e.*, in 171 out of 39,989 observed sets), and there were *no* reports of dolphins having been chased.[276] Even lower rates of dolphin interactions are reported in eastern

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[270] As noted above, "backdown" refers to maneuver following capture by which dolphins are concentrated in a narrow channel and tuna vessel crew attempt to move the dolphins over the top of the net and back out to sea. *See supra*, sec II.B.

[271] *See supra*, sec. II.B.

[272] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240 (maj. op.) (concluding that "the nature and degree of the interaction" of other fishing methods in other oceans "is different in quantitative and qualitative terms" than in the ETP large purse seine fishery "since dolphins are not set on intentionally, and interaction is only accidental") (citing U.S. Responses to Panel Questions 20-21); *id.* para. 7.278 (min. op.) ("Setting on dolphins is the only tuna fishing method that deliberately targets dolphins, and so interacts with dolphins in a way that is uniquely intense, both in terms of the number of dolphins affected and the frequency of interaction. In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.") (citing U.S. First Written 21.5 Submission, paras. 70-167; Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exhibit US 127)).

[273] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.224 (stating that setting on dolphins "interact[s] with dolphins 'in 100 per cent of dolphin sets'").

[274] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127).

[275] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240, 7.244.

[276] Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127).

tropical Atlantic and Indian Ocean tropical purse seine fisheries,[277] and interaction rates in longline fisheries are similar. In the U.S. western Pacific longline fisheries, for example, observer reports show that dolphin interactions have occurred in less than one percent of all observed sets over the past decade.[278] Studies of the EU and U.S. Atlantic longline fisheries have found that a cetacean interaction occurred in only 4.4 and 2.8 percent, respectively, of all observed sets.[279]

165. And, of course, *how* vessels interact with dolphins is different in the ETP large purse seine fishery than in other fisheries. Large purse seine vessels in the ETP, in coordination with speedboats and helicopters, engage in lengthy chases of large schools of dolphins to catch tuna.[280] Chases usually last 20-40 minutes but can take over two hours, and can involve chasing upwards of 600 dolphins and encircling 300-400 dolphins per set,[281] making it very difficult for a single observer to see every dolphin interaction throughout the entire process, which may last an additional one-to-two hours following the end of the chase.[282] By contrast, fishing vessels that

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[277] Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127). The data on a per set basis tells the same story. In the years 2009-2013, the average interaction per 1,000 sets for dolphin sets in the ETP large purse seine fishery was 280,741 dolphins. *Id.* The next highest rate of interaction took place in the WCPFC purse seine fishery in the years 2007-2009, where the average interaction per 1,000 sets was 41.70, and interaction in this fishery dropped by over half the following year (19.04). *Id.* Other purse seine fisheries show no or miniscule rates of interaction. *See id.*

[278] *See* U.S. Response to Panel Question No. 21, para. 138 (citing NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013" (Exh. US-163); NMFS, "American Samoa Longline Annual Reports – 2006-2013" (Exh. US-164)).

[279] *See* U.S. Response to Panel Question No. 21, paras. 140-141; Hernandez-Milian, et al., "Results of a Short Study of Interactions of Cetaceans and Longline Fisheries in Atlantic Waters," 612 *Hydrobiologia* 251, 254 (2008) (Exh. US-85); NOAA Fisheries, *2013 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species*, at 41, 44-46, Table 4.7 (2014) (Exh. US-166).

[280] *See, e.g.*, U.S. Response to Question 30, paras. 167-168; U.S. First Written 21.5 Submission, para. 82; U.S. Second Written 21.5 Submission, para. 12. As noted in response to Question 30, at the end of a chase, speedboats have herded the dolphins into a tight group. The purse seiner then deploys the net around the dolphins, and speedboats circle the net's opening to prevent dolphins from escaping until the net is closed completely. At that point, dolphins cannot escape, other than by jumping over the net's floating corks, until the "backdown" process is initiated. Helicopters are often flown extremely close to the water's surface during the chase and encirclement so that the air turbulence from their rotors creates a windstorm beneath the aircraft which, along with the loud noise from the engines, help deter dolphins from escaping. It takes approximately 40 minutes before the vessel can begin the "backdown" procedure to release the captured dolphins, and thus dolphins could be confined for over an hour and half during a set. U.S. Response to Question 30, n.282 (citing Curry 1999, at 6 (Exh. US-36)).

[281] U.S. Response to Question 30, paras. 167-168 (citing, among other things, Curry 1999, at 6 (Exh. US-36); Tables Summarizing Fishery-by-Fishery Evidence on the Record, Tables 1 and 2 (Exh. US-127) (showing that, between 2009 and 2013, 31,300,659 dolphins were chased and 18,581,597 dolphins were encircled in 52,115 dolphin sets, making for an average of 601 dolphins chased and 357 dolphins encircled per dolphin set).

[282] *See* U.S. Response to Panel Question No. 30, para. 167 n.282; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.274 (min. op.) ("First, neither captain nor observer certification is capable of detecting *every* instance of dolphin mortality or serious injury. The language of the certification notwithstanding, all that can really be certified, by either a captain or an observer, is that no dolphin mortality or serious injury was *detected* – that is, observed –in a set or other gear deployment. The capacity for human error being what it is, it is simply

are not intentionally setting on dolphins interact with dolphins only accidentally[283] and with only a few dolphins (at most) at a time.[284]

166. Simply put, it is far more difficult to make an accurate certification in the ETP large purse seine fishery, where there are exponentially more interactions with dolphins over a longer period of time (and thus exponentially more opportunity for a dolphin to be killed or seriously injured), than in other fisheries. As such, there is no basis in the evidence to conclude that any differences in the accuracy of the dolphin safe certifications give the *group* of tuna product produced in fisheries other than the ETP large purse seine fishery that are certified as "dolphin safe" a "competitive advantage" over the (mythical) *group* of Mexican tuna product certified as "dolphin safe."

d. The Panel Erred in Finding that a "Genuine Relationship" Exists Between the Amended Measure and the Detrimental Impact

167. As discussed above, the Panel found the difference in observer-related costs has caused a detrimental impact on Mexican tuna product.[285] The Panel further found that a "genuine relationship" exists between the amended measure and the detrimental impact.[286] In other words, the Panel found that the fact that Mexican producers incur observer-related costs, while other

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impossible for even the most highly qualified observer to say with certainty that *no* dolphin was killed or seriously injured during a fishing operation.") (emphasis in original).

[283] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-245 (maj. op.) (discussing the accidental nature of dolphin interaction in fishing methods other than setting on dolphins) (citing U.S. Response to Questions 20-22).

[284] U.S. Response to Panel Question No. 55, para. 281; WCPFC Cetacean Interactions Paper, at 6 (Exh. US-58) (showing that, in the WCPFC purse seine fishery in 2010, there were 37 sets with a dolphin encounter and a total of 144 dolphins encountered, making for an average of 3.9 dolphins encountered per dolphin interaction).

Not surprisingly, this significant difference between the ETP large purse seine fishery and other fisheries with respect to the number of dolphin interactions is consistent with significant differences between the ETP large purse seine fishery and other fisheries with respect to the number observed dolphin mortalities, even with the ETP large purse seine vessels adhering to the unique rules of the AIDCP. Thus, while observed mortality of dolphins due to dolphin sets by large purse seine vessels in the ETP was 96.96 animals per 1,000 sets from 2009 to 2013, it was 0.24 dolphins per 1,000 sets when large purse vessels in the ETP were fishing for tuna other than by setting on dolphins. *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127). And data from longline fisheries indicate similarly low mortality figures – ranging from 0.33 to 1.28 mortalities per 1,000 sets. *See id.*, Table 2 (noting that dolphin mortality per 1,000 sets in Hawaii Deep-Set Longline Fishery for 2009-2013 was 0.33; in the American Samoa Longline Fishery for 2009-2013 it was 0.55; in the Atlantic Highly Migratory Species Pelagic Longline Fishery for 2009-2012 it was 1.28; and in the WCPFC longline fisheries for 1995-2005 it was 0.58).

[285] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.162.

[286] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.177 ("In our view, although the observer coverage requirement for large purse seine vessels fishing in the ETP has its origin in the AIDCP, the different certification requirements – that is, the regulatory distinction between the requirements for tuna caught by large purse seine vessels on the one hand and the requirements for other vessels on the other hand – stem from the amended tuna measure itself.").

tuna producers may not, was "attributable" to the amended measure and did not "stem[] from some other source."[287] In the Panel's view, "[i]t is the amended tuna measure that provides for two sets of rules for access to the dolphin safe label – one set for tuna caught by large purse seine vessels in the ETP, and another set for all other tuna."[288]

168. The Panel's conclusion is in error. 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 the differences in observer-related costs incurred by Mexico is "attributable" to the amended measure. The amended measure does not require Mexican non-dolphin safe tuna products to be accompanied by proof of an observer certificate. Second, even aside from the fact that Mexican tuna product is ineligible for the label because it is produced by setting on dolphins, any difference in observer-related costs is still not "attributable" to the amended measure. The requirement to have the observer onboard Mexican ETP large purse seine vessels stems from Mexico's international legal obligation, not U.S. domestic law.[289] As such, whether the observer certification exists or not, the Mexican tuna product industry would bear the costs of observer.

i. Any Detrimental Impact Suffered by Non-Dolphin Safe Tuna Product Produced from the ETP Large Purse Seine Fishery (Which Mexico Does Produce) Is Not Attributable to the Amended Measure

169. As noted above, the Panel provided contradictory descriptions of when the amended measure does and does not require proof of an observer certification. On the one hand, the Panel (accurately) stated that the certification requirements "*are relevant only* to tuna eligible and intended to receive the dolphin safe label," and "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."[290] On the other hand, the Panel (inaccurately)

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[287] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.176.

[288] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.177; *see also id.* (concluding that "it is therefore the amended tuna measure itself that sets up a distinction, within a single regulatory framework (i.e. the amended tuna measure) between large purse seine vessels in the ETP and other vessels").

[289] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.178.

[290] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.143 (emphasis added); *see also id.* para. 3.44 ("For tuna caught by large non US purse seine vessels in the ETP, sections 216.92(b) and 216.24(f)(4) implement this provision by requiring that the NOAA Form 370 accompanying the tuna products contain the necessary observer certifications. *For tuna products to be labelled dolphin safe*, the accompanying Form 370 must be signed by a representative of an IDCP-member nation …") (emphasis added); *id.* para. 7.125 ("Secondly, and crucially for the question before us, the statement indicates that, in the view of the Appellate Body, the United States may bring its dolphin safe labelling regime into conformity with Article 2.1 of the TBT Agreement without disqualifying methods of tuna fishing other than setting on dolphins. *This is so because the question of observer certification only arises in respect of tuna fishing methods that are, in principle, qualified to catch dolphin safe tuna*. … *Certification*, which is the documentary precondition to accessing the label, *is thus only relevant in respect of tuna that is in principle eligible to be labelled dolphin safe*. … Put simply, we do not believe that the Appellate Body would even have touched upon the issue of certification, *which is only relevant to tuna fishing methods that are, at least in principle, eligible to catch dolphin safe tuna*, if it had considered that the United States must necessarily disqualify methods of

stated that "the amended tuna measure requires an observer certification for *all* tuna caught by large purse seine vessels in the ETP."[291]

170. Based on this latter (inaccurate) description of the measure, the Panel concluded that the "relevant regulatory distinction" is "[t]he mandatory independent observer certification requirements for ***all*** tuna caught in the ETP large purse seine fishery and the absence of such requirements … for ***all*** tuna caught in all other fisheries."[292] The Panel's "genuine relationship" analysis is premised on this (incorrect) conclusion that the amended measure requires proof of an observer certification for ***all*** tuna product produced from the ETP large purse seine fishery and sold in the United States, regardless of whether the tuna product is marketed as dolphin safe.[293]

171. Thus, the Panel committed legal error in concluding that there was a "genuine relationship" between the amended measure and the detrimental impact because the conclusion is without basis. Proof of an observer certification is only required for tuna product produced from the ETP large purse seine fishery that is intended to be marketed *as dolphin safe*. No certifications – observer or captain – are required for *Mexico's exports of non-dolphin safe tuna product to the United States*.[294]

172. The Panel's error appears to stem from confusion between what the amended measure requires and what the AIDCP requires. The AIDCP requires 100 percent coverage on all large purse seine vessels operating in the ETP, whether or not the vessel sets on dolphins.[295] Thus, it

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fishing other than setting on dolphins in order to make its measure even handed.") (emphasis added and omitted); *id.* para. 7.177 ("It is the amended tuna measure that provides for two sets of rules *for access to the dolphin safe label* – one set for tuna caught by large purse seine vessels in the ETP, and another set for all other tuna.") (emphasis added).

[291] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.147 (emphasis added); *see also id.* ("What is decisive for the observer certification requirement is thus not the method actually used to catch tuna (e.g. setting on dolphins) but the type of vessel and the location of its fishing operation. Large purse seine vessels in the ETP are, under the amended tuna measure, required to present proof of an AIDCP-compliant observer certification (and therefore to carry observers) whether or not they intend to or actually do set on dolphins.").

[292] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.148 ("Accordingly, the relevant regulatory distinction could, in our view, be more accurately articulated as being: The mandatory independent observer certification requirements for ***all*** tuna caught in the ETP large purse seine fishery and the absence of such requirements (unless certain determinations have been made with respect to the fishery in which the tuna was caught) for ***all*** tuna caught in all other fisheries.") (emphasis added and in original).

[293] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.177 (stating that, "the different certification requirements – that is, the regulatory distinction between the requirements for tuna caught *by large purse seine vessels on the one hand* and the requirements for other vessels on the other hand – stem from the amended tuna measure itself.") (emphasis added).

[294] *See* 50 C.F.R. 216.91(a) (setting out the dolphin safe labeling standards); NOAA Form 370, para. 5.A (Exh. MEX-22); Mexico's Response to Question 57, para. 155 ("Mexico has established that virtually its entire purse seine fleet fishes in the ETP by setting on dolphins"); *id.* para. 146 ("Mexico is not aware that *any* Mexican tuna products manufacturers have exported *any* products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure.") (emphasis added); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.2(a), 8.4(a), and 8.5(a) (affirming that the amended measure's eligibility criteria are WTO-consistent).

[295] *See* AIDCP, Annex II(2) (Exh. MEX-30).

is entirely accurate for the Panel to consider that *the AIDCP* makes distinctions based on "the type of vessel and the location of its fishing operation," and "not the method actually used to catch tuna (e.g. setting on dolphins)."[296] But the *amended measure* draws different distinctions than the AIDCP.

173. For purposes of whether proof of an observer certificate is required, the amended measure draws a distinction between whether "dolphin safe" status is claimed or not. Thus, pursuant to section 216.91 of NOAA's regulations, tuna product produced from the ETP large purse seine fishery cannot be marketed as "dolphin safe' unless "the documentation requirements for dolphin-safe tuna under sections 216.92 and 216.93 are met,"[297] including the requirement all imported tuna products be accompanied by "a properly certified FCO."[298] The FCO (*i.e.*, NOAA's Form 370) in turn requires that, to be labeled dolphin safe, tuna harvested in the ETP by a large purse seine vessel be accompanied by "valid documentation signed by a representative of the appropriate IDCP member nation certifying that: (1) there was an IDCP approved observer on board the vessel during the entire trip; [and] (2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught."[299]

174. However, there are *no* documentary requirements, aside from the Form 370, for tuna product *not* intended to be marketed as "dolphin safe." On the Form 370, the certification requirements described above are triggered only if the exporter/importer/signee checks Box 5.B, declaring that "[t]he tuna or tuna products described herein are certified to be dolphin safe."[300] If

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[296] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.147.

[297] 50 C.F.R. § 216.91 (Exh. US-2) ("Dolphin-safe labeling standards. (a) It is a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna products that are exported from or offered for sale in the United States to include on the label of those products the term ''dolphin-safe'' or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins if the products contain tuna harvested: (1) ETP large purse seine vessel. In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity unless: (i) the documentation requirements for dolphin-safe tuna under § 216.92 and 216.93 are met . . ."); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.38-3.39 (describing same).

[298] 50 C.F.R. § 216.93(f) (Exh. US-2); 50 C.F.R. § 216.24(f)(3) (Exh. US-9). As discussed with the Panel, U.S. caught and processed tuna product need not be accompanied by a Form 370 but must be accompanied by documentation that contains all the same information, as well as additional information. *See* U.S. First Written 21.5 Submission, para. 24 (citing 50 C.F.R. §§ 216.93(d)-(e) (Exh. US-2) and U.S. Answer to Original Panel Question No. 4); *id.* para. 34 n.61 (citing *US – Tuna II (Mexico) (Panel)*, para. 2.31; 50 C.F.R. §§ 216.93(d) and (e) (Exh. US-2).

[299] NOAA Form 370 Box 5.B(5) (Exh. MEX-22); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.44 (describing same).

[300] NOAA Form 370, Box 5.B(5) (Exh. MEX-22) ("The tuna or tuna products described herein are certified to be dolphin safe: Tuna harvested in the ETP by a purse seine vessel of more than 400 short tons (362.8 mt) carrying capacity, with valid documentation signed by a representative of the appropriate IDCP-member nation certifying that: (1) there was an IDCP-approved observer on board the vessel during the entire trip; (2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught; and (3) listing the numbers for the associated Tuna Tracking Forms which contain the captain's and observer's certifications. **IDCP Member Nation Certification attached**.") (emphasis in original); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.44 ("For tuna

the exporter/importer/signee checks Box 5.A, indicating that "[t]he tuna or tuna products described herein are not certified to be dolphin safe and contain no marks or labels that indicate otherwise," no documentation requirements are imposed.[301]

175. These facts are not contested. Indeed, Mexico *repeatedly* argued that the United States need not require observers to be on all tuna vessels outside the ETP large purse seine fishery to make the certification requirements WTO-consistent (under Mexico's legal theory), stating that only those "vessels that wish to sell tuna *that will be labelled dolphin-safe* for the U.S. market need to have observers."[302]

176. Of course, it is absolutely true that Mexican large purse seine vessels operating in the ETP carry AIDCP-approved observers, and it is absolutely true that the vertically integrated Mexican tuna companies that own those vessels incur a certain cost for doing so. But it is equally true that it is precisely *those vessels* that are setting on dolphins, and it is *those vessels* that are producing non-dolphin safe tuna product. And since *those vessels* make up "virtually" the entire Mexican tuna fleet,[303] it is not the amended measure that requires observers for Mexican tuna product exported to the United States.[304]

177. In other words, while Mexican tuna producers do incur an observer-related cost, it is not because of the amended measure, but because of Mexico's international legal obligations as a

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

[301] NOAA Form 370, Box 5.A (Exh. MEX-22); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.44 ("*For tuna products to be labeled dolphin-safe*, the accompanying Form 370 must be signed by a representative of an IDCP-member nation . . .") (emphasis added).

[302] Mexico's Opening Statement, para. 40 ("Finally, it is important to note that not every vessel needs to have observers. Only vessels that wish to sell tuna *that will be labelled dolphin-safe* for the U.S. market need to have observers.") (emphasis added); Mexico's Comments on U.S. Response to Question 50, para. 183 ("Mexico notes that the United States is incorrect to say that an observer statement would be required for all tuna from a designated fishery in the U.S. tuna product market; rather, the observer statement only would be required *to support a claim of dolphin-safe status*, and would not be needed if there was no dolphin-safe label.") (emphasis added); Mexico's Comments on U.S. Comments to Question 2 to the Third Parties, para. 203 ("Obviously the Spanish government would not provide observers for all the longline vessels in the Western Pacific, and not all longline vessels would need observers – just those catching tuna intended for the U.S. market and *intending to use the dolphin-safe label*.") (emphasis added).

[303] Mexico's Response to Question 57, para. 155 (stating that "Mexico has established that *virtually* its entire purse seine fleet fishes in the ETP by setting on dolphins").

[304] Mexico's Response to Question 57, para. 146 ("Mexico is not aware that *any* Mexican tuna products manufacturers have exported *any* products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure.") (emphasis added).

party to the AIDCP. To use the Panel's phraseology, the amended measure does not "incorporate" the AIDCP requirements *for Mexico's exports* of non-dolphin safe tuna product to the United States.[305]

178. As such, the Panel legally erred in finding that there is a detrimental impact "attributable" to the amended measure. There is, in fact, no "genuine relationship" between the amended measure and any difference in the observer-related costs that Mexican tuna producers incur in producing non-dolphin safe tuna product from the ETP large purse seine fishery and those observer-related costs their competitors incur producing tuna product outside the ETP large purse seine fishery.[306]

ii. Any Detrimental Impact Suffered by Dolphin Safe Tuna Product Produced from the ETP Large Purse Seine Fishery (Which Mexico Does Not Produce) Is Not Attributable to the Amended Measure

179. But even aside from the fact that Mexican tuna product is ineligible for the label because it is produced by setting on dolphins, the Panel's finding that a "genuine relationship" exists between the amended measure's certification requirements and the detrimental impact found by the Panel is still in error.

180. As noted above, while the Panel admitted that "the observer coverage requirement for large purse seine vessels fishing in the ETP has its *origin* in the AIDCP,"[307] the Panel insisted that "[i]t is the amended tuna measure that provides for *two sets of rules* for access to the dolphin safe label – one set for tuna caught by large purse seine vessels in the ETP, and another set for all other tuna."[308] Yet the Panel failed to properly take into account that the "two sets of rules" of the amended measure reflect 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.

181. The AIDCP draws distinctions between different types of vessels, requiring 100 percent observer coverage for large purse seine vessels operating in the ETP, and not requiring observers on other vessels, whether inside or outside the ETP.[309] And while RFMOs and national

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[305] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.178; *see also id.* para. 7.294.

[306] The United States considers that the Panel erred as a matter of law with respect to this conclusion. To the extent that this issue could be viewed as a mixed question of fact and law, the United States also considers that the Panel acted inconsistently with Article 11 of the DSU in concluding that the certification requirements apply to *all* tuna and tuna product. *Compare US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.148, *with id.* para. 7.143. *See also id.* paras. 3.44, 7.125, 7.177.

[307] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.177 (emphasis added).

[308] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.177 (emphasis added).

[309] *See also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.177 ("The AIDCP imposes certain certification requirements on large purse seine vessels fishing in the ETP, but it has nothing to say about other methods of fishing in the ETP or about fishing in other oceans.").

authorities do require differing levels of observer coverage to a certain extent, it was *uncontested* before the Panel that none of these other observer programs are equivalent to the AIDCP program for purposes of the amended measure's objectives (other than the seven U.S. observer programs designated as "qualified and authorized" to issue the dolphin safe certifications).[310] Indeed, Mexico repeatedly argued before the Panel that "no other [RFMO] has adopted, or has plans to adopt, measures to protect dolphins that are *remotely comparable* to those of the AIDCP."[311]

182. Thus, the amended measure does not itself create any difference in observer-related costs; rather, the parties to the AIDCP have already consented to unique rules that impose those costs. It is *uncontested* between the parties that the certification requirements of the amended measure *do not impose extra costs for vessels that already carry observers*.[312] As such, it is clear that the amended measure's certification requirements do not "affect[] the conditions under which like goods, domestic and imported, compete in the market within a Member's territory,"[313] as the vessels that produce Mexican tuna product *already carry observers*.[314] In short, the "conditions" with respect to observers (and their associated costs) *do* differ across tuna fleets and tuna processing industries, depending on the fisheries in which tuna vessels operate. The U.S. measure, however, does not cause or affect to the differences in these "conditions," neither adding to nor taking away from the costs that fleets and industries bear.

183. The Panel tries to side-step this conclusion by arguing that "*Mexico's* complaint is not directed at the existence of these AIDCP-mandated requirements under international law," but

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[310] *See* Mexico's Response to Question 38, para. 111 ("[T]he only reliable method of oversight is to have an independent observer onboard a vessel with the appropriate training and the mandate to monitor for harm to dolphins. The only fisheries where there are such independent observers are the ETP and the U.S. domestic fisheries recently designated by the United States."); Mexico's Response to Question 45, para. 135 ("[I]n the absence of trained independent observers with responsibility and authority for monitoring fishing practices and dolphin bycatch, there is no reliable method to investigate what happened onboard a vessel fishing on the high seas or in foreign waters, outside U.S. jurisdiction.").

[311] Mexico's Response to Question 13, para. 78 (emphasis added); Mexico's Second Written 21.5 Submission, para. 56 ("None of those three [RFMOs] [*i.e.*, ICCAT, IOTC, and WCPFC] has adopted, or has plans to adopt, measures to protect dolphins that are *remotely comparable* to those of the AIDCP. None of them has even proposed a comprehensive program involving use of special equipment, training, monitoring, tracking, verification, and certification.") (emphasis added); *see also* Mexico's First Written 21.5 Submission, para. 110 (comparing favorably the protections afforded by the AIDCP, on the one hand, and the protections afforded by the CCSBT, the ICCAT, the IOTC, and the WCPFC, on the other).

[312] Mexico's Comments on U.S. Response to Question 49, para. 181 ("Mexico notes that the United States agrees that there would *not be additional costs* where there are already observers.") (emphasis added); U.S. Response to Question 49, para. 265 ("[W]here an observer is on board the harvesting vessel, there is no additional cost to the observer, the vessel, or the U.S. Government for the observer to provide the dolphin safe certifications. Similarly, there is no cost to providing an already created observer certificate (or proof thereof) to the United States with regard to tuna product containing tuna harvested by large ETP purse seine vessels.").

[313] *US – Tuna II (Mexico) (AB)*, para. 236; *see also US – COOL (AB)*, para. 288.

[314] *See* Mexico's Response to Question 57, para. 155 (contending that the facts relied upon by the Appellate Body in paragraphs 233-235 of its report "remain unchanged, *except* that Mexico has established that virtually its entire purse seine fleet fishes in the ETP by setting on dolphins") (emphasis added).

"is based on the fact that the amended tuna measure does not require observer coverage on vessels other than large purse seine vessels fishing in the ETP."[315] But, of course, the fact that Mexico frames its complaint as "not directed" at the international legal requirements is not particularly pertinent here; the question is whether the amended measure causes a detrimental impact through certification requirements that already are being borne by the imported product by virtue of obligations its own government has undertaken.

184. While the Panel considers it "somewhat besides the point" that the differences in observer requirements would still exist even if the United States eliminated all references to the AIDCP (and its requirements) from the amended measure,[316] that is, in fact, *very much the point*. Indeed, *it is for this very reason* that the circumstances of the certification requirements are so dissimilar to the circumstances of past disputes where a "genuine relationship" was found to exist. In both *Korea – Various Measures on Beef* and *US – COOL*, for example, the Appellate Body found that a genuine relationship existed because the "challenged measure incentiv[ized] … market participants to behave in certain ways."[317] The fact that the differences in observer requirements would still exist even if the United States eliminated all references to the AIDCP (and its requirements) means that the amended measure does not, in fact, "induce[] or encourage[]" Mexican vessels to carry observers (or discourage vessels in other fisheries from carrying observers).[318] In other words, it simply cannot be said here that *had it not been for the amended measure*, the market participants would act differently than they do, as the Appellate Body found was the case in *US – COOL*.[319]

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[315] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.178 ("But as we have explained above, Mexico's complaint is not directed at the existence of these AIDCP-mandated requirements under international law, or at its own acceptance of these conditions as an adherent to the AIDCP. Rather, Mexico's complaint is based on the fact that the amended tuna measure does not require observer coverage on vessels other than large purse seine vessels fishing in the ETP.").

[316] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.178 ("[T]he certification requirements that the AIDCP imposes on large purse seine vessels fishing in the ETP exist, of course, in the AIDCP itself, and will continue to exist as a matter of international law regardless of whether they are incorporated into the domestic legal system of the United States.").

[317] *US – COOL (AB)*, para. 288 (noting that in *Korea – Various Measures on Beef (AB)*, para. 145, the Appellate Body had held that "the adoption of [the challenged] measure requiring … had the 'direct practical effect,' in that market, of denying competitive opportunities to imports"); *see also US – COOL (AB)*, para. n.530 (citing for the same proposition *China – Auto Parts (AB)*, paras. 195-196 and *US – FSC (Article 21.5 – EC) (AB)*, para. 212).

[318] *US – COOL (AB)*, para. 291 ("[W]here private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not 'independent' of that measure.").

[319] *US – COOL (AB)*, para. 291 ("In this case, the Panel expressly found that '[i]t is the result of the COOL measure … that in the circumstances of the US market, market participants, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported livestock, opted predominantly for the former.' *Had it not been for the COOL measure*, the Panel reasoned, '*market participants would not have opted this way*.'") (quoting *US – COOL (Panel)*, para. 7.403) (emphasis added).

e. Conclusion

185. Thus, as discussed above, the Panel: (1) erred in its allocation of the burden of proof; (2) erred in determining that any difference in observer-related costs modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product; and, (3) erred in finding that a "genuine relationship" exists between the certification requirements and the detrimental impact that the Panel found to exist.

186. In light of the above, the United States respectfully requests the Appellate Body to reverse the Panel's ultimate finding that the amended measure is inconsistent with Article 2.1 of the TBT Agreement because the certification requirements "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."[320] As discussed below, the United States considers that, for identical reasons, the Panel's findings that the certification requirements are inconsistent with Articles I:1 and III:4 of the GATT 1994 are in error and requests reversal of those findings as well.[321]

4. The Panel Erred in Finding that the Detrimental Impact Does Not Stem Exclusively from a Legitimate Regulatory Distinction

187. The United States considers that the Panel's finding that any detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions to be flawed. The United States appeals two aspects of the Panel's analysis:

1) The majority of 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).[322]

2) 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.[323]

188. Because these two aspects appear to form independent bases for the Panel's finding regarding whether the detrimental impact caused by the certification requirements stems exclusively from a legitimate regulatory distinction, if the Appellate Body were to rule in favor of the United States on both of these appeals, the Appellate Body should, as a consequence, reverse the Panel's finding. Such a reversal would mean, in turn, that the Panel's ultimate

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[320] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[321] *See infra*, secs. IV.B, V.B.

[322] *See infra*, sec. III.G.4.a.

[323] *See infra*, sec. III.G.4.b.

finding that the certification requirements "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" would need to be reversed.[324]

a. The Majority Erred in Finding that a Difference in Education and Training Between Captains and AIDCP-Approved Observers Proves that the Detrimental Impact Caused by the Certification Requirements Does Not Stem Exclusively from a Legitimate Regulatory Distinction

189. A majority of panelists found that the detrimental impact resulting from 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 (AIDCP-approved observers) and those that certify in other fisheries (captains). The majority did not appear to criticize the amended measure with regard to the certification of whether a purse seine vessel has intentionally set on dolphins.[325] Rather, the majority's criticism was limited to the other certification – whether dolphins have been killed or seriously injured. One panelist dissented.

190. As summarized above, the Panel found that "certifying whether a dolphin has been killed or seriously injured in a set or other gear deployment is a highly complex task,"[326] involving "highly specialized skill[s]," and that "[n]one of the evidence" suggests that captains "are always and necessarily in possession of those skills."[327] From these intermediate findings, the majority concluded that captain certifications "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure," and thus not cannot be said to be even-handed.[328] The majority makes this finding despite the fact that the evidence established that "the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction."[329]

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[324] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[325] *Compare US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.229 (noting the U.S. position in this regard) *with id.* paras. 7.233-234, 7.246 (maj. op.) (referring only to the certification that no dolphin was killed or injured in setting out the Panel's finding concerning even-handedness).

[326] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.218.

[327] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.226.

[328] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.233 (maj. op.); *see also id.* para. 7.246 (maj. op.).

[329] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.244-245 (maj. op.); *id.* para. 7.242 (maj. op.) ("Indeed, in our view, the United States' arguments on this point would be sufficient to raise a presumption that the different certification requirements stem from a legitimate regulatory distinction, assuming that other fishing methods are treated even-handedly."); *id.* para. 7.238 (maj. op.) ("Moreover, we accept the United States' argument that the 100 per cent observer requirement in the ETP is intricately tied to the special and, in some senses, 'unique' nature of the harms that the ETP large purse seine fishery poses to dolphins."); *see also id.* para. 7.278 (min. op.) ("Setting on dolphins is the only tuna fishing method that deliberately targets dolphins, and so interacts with dolphins in a way that is uniquely intense, both in terms of the number of dolphins affected and the frequency of

191. Thus, in the majority's view, the fact that different requirements are applied to fisheries that have different "risk profiles" cannot prove the certification requirements even-handed.[330] In other words, the majority appears to have accepted Mexico's argument that whether or not the certification requirements are "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean" is legally irrelevant as to whether the certification requirements are even-handed or not.[331] The minority rejected Mexico's argument.[332]

192. The majority erred by applying the incorrect legal standard. The question for the second step of the Article 2.1 analysis is not, as the majority (wrongly) presumes, whether "detrimental treatment is explained by, or at least reconcilable with, the objectives pursed by the measure at issue."[333] Rather, as the Appellate Body recently reaffirmed, 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 designed and applied in an even-handed manner such that they may be considered 'legitimate' for the purposes

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interaction. In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.").

[330] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.245-246 (maj. op.); *see also id.* para. 7.398 (recalling in the analysis of the tracking and verification requirements that "[t]he different *risk profiles* of different fisheries may, as we found above, explain regulatory differences concerning the eligibility criteria for fishing methods, as well as the need for an independent observer to monitor and certify during and immediately following the fishing activity itself") (emphasis added); *id.* (noting "the *special* risk profile of the ETP large purse seine fishery") (emphasis added); *id.* para. 7.282 (min. op.) ("As such, in my view, the general rule that captains' certifications are sufficient outside the ETP large purse seine fishery while observers are required inside the ETP large purse seine fishery is even-handed. I think that this distinction represents a fair response to the different *risk profiles* existing in different fisheries, as established by the evidence.") (emphasis added).

[331] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.185 (quoting Mexico as arguing that "the amended tuna measure should require the same level of accuracy in reporting *regardless of whether one or 1,000 dolphins are killed*. And for this reason, *'calibration' does not respond to Mexico's claim* that the different certification requirements are inconsistent with the amended tuna measure's objectives") (emphasis added).

[332] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.) ("Provided that the tolerated margin of error is, to use a term from the original proceedings, 'calibrated' to the risks faced by dolphins in a particular fishery, the mere fact that the detection mechanisms inside the ETP large purse seine fishery and outside of it are not the same does not deprive the amended tuna measure of even-handedness. Indeed, understood in this sense, 'calibration' of the acceptable margin of error to the degree of risk in a particular fishery seems to me to be *at the very heart* of the even-handedness analysis in this case.") (emphasis added).

[333] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.91 ("[W]e agree with Mexico that, in considering whether detrimental impact caused by a technical regulation reflects 'arbitrary discrimination,' we may consider, among other things, whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue."); *id.* para. 7.233 (maj. op.) (finding that certification requirements do not stem from a legitimate regulatory distinction because certifications by captains as to whether a dolphin was killed or seriously injured "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure"); *id.* para 7.559 ("Moreover, the Panel's findings that the different certification and tracking and verification requirements did not stem exclusively from a legitimate regulatory distinction were *all* based on the conclusion that those aspects are arbitrarily discriminatory because they are not reconcilable with the goal of the amended tuna measure.") (emphasis added).

of Article 2.1."[334] For purposes of this dispute, the Appellate Body has been clear that the even-handedness of a requirement depends on 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."[335]

193. And while this is not to say that the objectives of the measure are irrelevant to the analysis – indeed, the Appellate Body started its analysis by identifying the dual objectives of the original measure[336] – they are relevant as part of the analysis of whether regulatory distinction is "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[337] As such, the Panel erred by applying the incorrect legal analysis.

194. If the Appellate Body were to rule in favor of the United States on this appeal, the Appellate Body 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, in turn, that the Panel's ultimate finding that the certification requirements "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" would need to be reversed.[338]

195. There are two separate 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.

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[334] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92 ("Thus, if a panel finds that a technical regulation has a *de facto* detrimental impact on competitive opportunities for like imported products, the focus of the inquiry shifts to whether such detrimental impact stems exclusively from legitimate regulatory distinctions. This 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 be considered 'legitimate' for the purposes of Article 2.1."); *see also US – Tuna II (Mexico) (AB)*, n.461 ("The Appellate Body also stated that a panel must examine, in particular, whether the technical regulation is even-handed.") (citing *US – Clove Cigarettes (AB)*, para. 182); *US – COOL (AB)*, para. 271 ("[W]here a regulatory distinction is not designed and applied in an even-handed manner . . . the detrimental impact will reflect discrimination prohibited under Article 2.1.").

[335] *US – Tuna II (Mexico) (AB)*, para. 232 ("Our analysis will scrutinize, in particular, whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the US measure 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.").

[336] *See US – Tuna II (Mexico) (AB)*, para. 242.

[337] *US – Tuna II (Mexico) (AB)*, para. 297. Not surprisingly, the Appellate Body has not relied on this subset of the analysis of the chapeau to GATT Article XX in its Article 2.1 analysis in *US – Tuna II (Mexico)*, *US – COOL*, or *US – Clove Cigarettes*.

[338] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

- Second, the certification requirements are even-handed in that they can be 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.

i. The Certification Requirements Are Even-Handed Because They Are "Calibrated" to the Risks to Dolphins from Different Fishing Methods in Different Fisheries

196. The certification requirements are even-handed because they are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean, and the Panel erred in finding otherwise.

197. As discussed above, the majority did, in fact, conclude that the ETP large purse seine fishery has a different "risk profile" for dolphin harm than other fisheries do.[339] In particular, the majority found the ETP large purse seine fishery to be the only fishery where dolphins are "systematically" chased and captured (whereas in all other fisheries, dolphins "are not set on intentionally, and interaction is only accidental").[340] In light of the "compelling" evidence on the record, the majority stated that the United States would have made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction," *but for* the fact that captains do not have the same education and training as AIDCP-approved observers do.[341] In short, the majority considered that whether the certification requirements are "calibrated" to the different risk profiles is not determinative of whether the certification requirements are even-handed.

198. And on this point, the panelist in the minority dissented. As summarized above, the minority agreed with the majority's assessment of the factual record that the risk profile of the ETP large purse seine fishery for dolphins is significantly different than that of any other fishery.[342] Yet the minority considered that the analysis of whether the certification requirements

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[339] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-242 (maj. op.); *id.* para. 7.398 (recalling in the analysis of the tracking and verification requirements that "[t]he different *risk profiles* of different fisheries may, as we found above, explain regulatory differences concerning the eligibility criteria for fishing methods, as well as the need for an independent observer to monitor and certify during and immediately following the fishing activity itself") (emphasis added).

[340] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (maj. op.) ("These statistics confirm for the Panel that although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically,' in the words of the original Panel."); *id.* para. 7.240 (maj. op.) (noting that while "[o]ther fishing methods in other oceans may – and, as the United States recognizes, do – cause dolphin mortality and serious injury," "the nature and degree of the interaction [in these other fisheries] is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental).").

[341] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.245-246 (maj. op.).

[342] *Compare US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) ("In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery."), *with id.* para. 7.240 (maj. op.) ("Other fishing methods in other oceans may – and, as the United States recognizes,

are calibrated to the differing risk profiles of the different fisheries lay "at the very heart of the even-handedness analysis is in this case."[343] As such, the minority (correctly) found that the issue of calibration is determinative, and that any difference in education and training between captains and AIDCP-approved observers does not mean that the certification requirements lack even-handedness.[344]

199. The majority's analysis is in error for a number of reasons.

200. First, as discussed above, the majority's analysis is inconsistent with the Appellate Body's analysis. Under this analysis, the *central question* is whether the eligibility criteria are calibrated to the risk facing dolphins in different fisheries.[345] And, in fact, the entire Panel acknowledged that:

> [T]he Appellate Body accepted that, in principle, WTO law allows the United States 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. And insofar as it found that setting on dolphins is 'particularly harmful' to dolphins, it implicitly acknowledged that the United States need not impose the

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do – cause dolphin mortality and serious injury, but because the nature and degree of the interaction is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental), 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.").

[343] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.) ("Indeed, understood in this sense, 'calibration' of the acceptable margin of error to the degree of risk in a particular fishery seems to me to be at the very heart of the even-handedness analysis in this case.").

[344] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.265 (min. op.) ("While I agree with many of the intermediate factual findings made by the majority in respect of the different certification requirements, I do not agree with the legal reasoning or conclusions that my colleagues have developed on the basis of those findings. Most importantly, I do not agree that the different certification requirements lack even-handedness. On the contrary, in my opinion any detrimental treatment caused by the different certification requirements does stem exclusively from a legitimate regulatory distinction, and accordingly is not inconsistent with Article 2.1 of the TBT Agreement.").

[345] *US – Tuna II (Mexico) (AB)*, para. 232 ("Our analysis will scrutinize, in particular, whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the US measure 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."); *id.* para. 286 ("Bearing the different scope of these enquiries in mind, we need to examine carefully to what extent the Panel's findings under Article 2.2 bear 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, are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions."); *id.* para. 297 ("In the light of the above, we conclude that the United States has not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean. . . . In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.").

> same standards on all fishing methods in order to ensure that its dolphin-safe labelling regime is consistent with the Article 2.1 of the TBT Agreement.[346]

201. Moreover, even though Mexico's appeal only addressed the eligibility criteria, the Appellate Body appeared to make the same point with regard to *the certification requirements themselves*, noting that an observer requirement "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury."[347]

202. Of course, once that critical principle is accepted – that a WTO Member is not required to impose the *same* requirements for all Members – but may impose different requirements to address different risks, the analysis of how the certification requirements are even-handed is straightforward, as evidenced in the minority's opinion. Indeed, the factual findings of both the majority and the minority confirm that *the entire Panel* agreed that the evidence establishes that the risks faced by dolphins in the ETP from repeated chasing and capturing by large purse seine vessels are quantitatively and qualitatively distinct from the risks dolphins face in other fisheries.[348] Notably, the Panel squarely disagreed with Mexico's arguments in this regard.[349]

203. Moreover, the minority made clear why the majority's reasoning that any (alleged) difference in accuracy does not alter the conclusions that the certification requirements are "calibrated," stating:

> [W]here the probability of dolphin mortality or serious injury is smaller – because, for instance, the degree of tuna-dolphin association is less likely – the United States may accept a proportionately larger margin of error. Conversely, where the risks are higher, it may be appropriate to tolerate only a smaller margin of error.[350]

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[346] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.582 (quoting *US – Tuna II (Mexico) (AB)*, para. 286).

[347] *US – Tuna II (Mexico) (AB)*, n.612.

[348] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-244 (maj. op.); *id.* para. 7.278 (min. op.) ("In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.").

[349] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241-242 (maj. op.) (disagreeing with Mexico's argument "that the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries," and concluding that while "dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically,' in the words of the original Panel."); *id.* para. 7.278 (min. op.).

[350] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.). The minority further clarified its view with a hypothetical. *Id.* para. 7.277 ("Say a city imposes a speed limit of 80 km/h on all roads. Say also that to detect violations of this speed limit, the city has developed a system of police observation. Now, assume that suburb A has a higher incidence of speeding than does suburb B. As a result, the city requires police observation every day on major roads in suburb A with highly sensitive detectors, but only four days a week in suburb B with less sensitive machines. Could such a set-up be described as lacking even-handedness? In my view, it could not. As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection

204. In light of the Appellate Body's previous affirmation the original panel's factual findings as well as the clear facts on this record, the minority concluded that:

> [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.[351]

205. The minority's analysis is consistent with the Appellate Body's guidance in the original proceeding. Indeed, the United States relied on the calibration analysis when it designed its measure taken to comply, and the majority erred in not similarly taking the Appellate Body's guidance into account.[352]

206. Second, the changes to the measure that the majority's analysis suggests that the United States should have undertaken during the RPT highlights the erroneous nature of the majority's finding.

207. As noted above, the "key problem," in the majority's view, is that captains of vessels outside the ETP large purse seine fishery do not have sufficient education and training to make as accurate certifications.[353] Yet it was uncontested before the Panel that, like captains, *observers* do not generally have the education and training that AIDCP-approved observers (other than the seven U.S. programs designated as "qualified and authorized").[354] The majority's analysis thus suggests that what the United States should have done during the RPT was not just

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mechanisms in accordance with the historical incidence of and future potential for violations. Provided that there is a rational connection between the variation in intensity and the difference in risk, I would not find that the implementation of different detection mechanisms lacks even-handedness or is otherwise discriminatory.").

[351] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op.).

[352] The United States further observers that the majority's analysis is inconsistent with the Panel's *own* analysis. As discussed elsewhere, the Panel adopted the Appellate Body's analysis that the eligibility criteria regarding setting on dolphins is even-handed precisely because the criteria is, in fact, calibrated to the risks facing dolphins in the ETP large purse seine fishery *vis-à-vis* other fisheries. *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.125. Yet the majority provides no logical reason why the analysis as to why the even-handedness analysis of the eligibility criteria should differ so dramatically from the same analysis of the certification requirements. Indeed, a careful examination of the majority's analysis of the certification requirements reveals it to be not coherent. In the Panel's analysis of the scope of this proceeding, the Panel disagreed with the United States that "[t]he *only* regulatory distinction the Appellate Body found not to be even handed" related to whether a dolphin had been killed or seriously injured, noting the Appellate Body's "use [of] the plural throughout its reasoning." *Id.* paras. 7.32, 7.36-37. Yet, the majority provides no explanation as to why the three elements of Mexico's claim – the eligibility criteria, certification requirements, and tracking and verification requirements – are so closely *intertwined* with one another for purposes of determining the *content* of Appellate Body's Article 2.1 analysis, but so very *isolated* from one another in determining *what analysis actually applies* to them.

[353] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.234 (maj. op.).

[354] *See* Mexico's Response to Question 38, para. 111; Mexico's Response to Question 13, paras. 79-80; *see also* U.S. Comments on Mexico's Response to Question 13, paras. 54-57; U.S. Comments on Mexico's Response to Question 26, para. 85.

add an eligibility criteria as to whether a dolphin had been killed or seriously injured outside the ETP large purse seine fishery, but to undergo a wholesale reimagining of the type of person that should be deemed qualified to make a dolphin safe certification outside the ETP large purse seine fishery – an inquiry that goes well beyond what the DSB recommendations and rulings suggest is necessary.[355]

208. Moreover, whatever level of education and training would be required under the majority's analysis, it is clear that the majority considered it necessary for the amended measure to impose the *same standard* across all fisheries, *regardless* of the relative harm to dolphins in any particular fishery. The implication is thus that the United States should impose the same type of "rigid and unbending requirement" that the Appellate Body found to be so concerning in *US – Shrimp*.[356] And by tying this standard to the AIDCP observer program, the majority seeks make the AIDCP the "floor" that all other U.S. trading partners must meet, even though many of these trading partners are not, in fact, party to the AIDCP.[357] In this regard, the majority's analysis wrongly suggests that the United States may not take measures "at the levels that it considers appropriate," but must unilaterally "globalize" the AIDCP, regardless of the relative risk to dolphins in any particular fishery.

ii. The Certification Requirements Are Even-Handed Because They Reflect the Fact that the Parties to the AIDCP Have Consented to Impose a Unique Observer Program on Their Own Tuna Industries

209. In addition, there exists another legitimate, non-discriminatory basis for the certification requirements – *they reflect the differences that already exist in the world*. In particular, the certification requirements reflect the fact that the parties to the AIDCP have consented to impose on their industries a unique observer program, the primary purpose of which relates to the protection of dolphins from the harms of tuna fishing, while other regulatory authorities (national

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[355] The Panel's analysis regarding the training the United States would have to require could affect thousands, if not tens of thousands, of vessel captains. In the WCPFC convention area alone, there are nearly 5,000 active longline, purse seine, and pole and line vessel. *See* U.S. Second Written 21.5 Submission, para. 177 n.338 (citing WCPFC, *WCPFC Record of Fishing Vessels*, http://www.wcpfc.int/record-fishing-vessel-database (accessed July 21, 2014) (Exh. US-115); WCPFC, *Tuna Fishery Yearbook 2012*, Table 71 (2013) (Exh. US-82)). And, of course, the Panel's analysis would affect not only the vessels in the WCPFC but all vessels operating in all fisheries on the high seas and in waters of national jurisdiction that produce, or potentially could produce, dolphin safe tuna for the U.S. tuna product market.

[356] *US – Shrimp (AB)*, para. 163; *see also EC – Seal Products (AB)*, para. 5.305 ("In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. These factors included the fact that the discrimination resulted from: (i) a rigid and unbending requirement that countries exporting shrimp into the United States must adopt a regulatory programme that is essentially the same as the United States' programme; (ii) the fact that the discrimination resulted from the failure to take into account different circumstances that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles ...") (internal quotes omitted).

[357] TBT Agreement, sixth preambular recital; *see also US – Tuna II (Mexico) (AB)*, para. 316 (quoting same).

or international) have not imposed like requirements, including requiring captains to have the same education and training as AIDCP-approved observers.

210. As discussed above, observers have been on all large purse seine vessels in the ETP since 1992, and have been incorporated in the AIDCP since 1997 when that agreement took effect. And the AIDCP sets the minimum education and training standards for those observers.[358] The amended measure neither adds to, nor dilutes, those standards. Likewise, the amended measure neither adds to, nor dilutes, the standards that apply outside the ETP large purse seine fishery, including any standards required by national or international regulatory authorities as to the education and training of captains. But certainly the fact that the amended measure merely reflects the differences that already exist in the world means that those regulatory distinctions cannot be deemed to be "arbitrary" or "unjustified," and the majority erred in finding so.

211. And, of course, the reason for the underlying difference in the world *is itself not arbitrary*. The AIDCP parties consented to *different* requirements because the ETP large purse seine fishery *is different* – nowhere else in the world has tuna fishing caused the harm to dolphins that large purse seine vessels have caused in the ETP.[359]

212. The fact that the amended measure requires an observer certificate (or proof that one was done) to certify as to dolphin harm where an observer is already onboard the vessel *for that very purpose*, and does not impose such a requirement where no such certifier is already onboard, has a legitimate, non-discriminatory basis, and the majority erred in not finding this is so.

b. 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

213. The Panel also erred in finding that the so-called "determination provisions" "represent a further way in which the amended tuna measure lacks even-handedness in its treatment of different tuna fishing methods in different oceans."[360] This was not an argument raised by Mexico in its case-in-chief, but by the Panel on its own initiation in written questions following the Panel's meeting.

214. As discussed above, the "determination provisions" are those provisions in NOAA's regulations and the underlying statute that provide NOAA the authority to require an observer certificate to accompany tuna product produced from fisheries other than the ETP large purse seine fishery. Thus, 50 C.F.R. § 216.91(a)(2)(i) (which implements 16 U.S.C. §

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[358] *See supra*, sec. II.B.

[359] *See, e.g.*, U.S. Second Written 21.5 Submission, para. 210 (citing Gerrodette, "The Tuna Dolphin Issue," at 1192 (Exh. US-29)). Indeed, the evidence on this point is so "compelling" that the majority considered the evidence raised a "presumption that the different certification requirements stem from a legitimate regulatory distinction." *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (maj. op.).

[360] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.281

1385(d)(1)(B)(ii)) allows NOAA to require proof of an observer certificate where NOAA determines that there exists in a purse seine fishery outside the ETP "a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)." For all "other fisheries," 50 C.F.R. § 216.91(a)(4)(iii) (which implements 16 U.S.C. § 1385(d)(1)(D)) allows NOAA to require proof of an observer certificate where NOAA determines that a fishery is "having a regular and significant mortality or serious injury of dolphins."[361] As the Panel recognized, the determination provisions are designed to allow for the possibility that other fisheries exist that are, like the ETP large purse seine vessel fishery, so problematic in terms of dolphin harm 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.[362]

215. Nevertheless, the Panel found fault in the text of the provisions. Specifically, the Panel considered it problematic that the standard for non-ETP purse seine fisheries is "regular and significant association," while the standard for the other fisheries "regular and significant mortality." In the Panel's view, this difference creates a "gap" whereby NOAA could not impose an observer requirement for a non-ETP purse seine fishery that had regular and significant mortality (but not regular and significant association), or a longline fishery (for example) that had regular and significant association (but not regular and significant mortality).[363] Thus, the Panel found, it "may" be possible that "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."[364] From this, the Panel concluded that the certification requirements "lack even-handedness," and that the determination provisions themselves "appear to be arbitrary in the

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[361] As explained above, section 216.91(a)(4)(iii) covers all fisheries other than the ETP large purse seine fishery, non-ETP purse seine fisheries, and large-scale driftnet fisheries. *See* 50 C.F.R. § 216.91(a)(4) (Exh. US-2) (stating that the requirements contained within section 216.91(a)(4) applies to fisheries "other than one described in paragraphs (a)(1) through (3)"). Accordingly, section (a)(4) covers non-purse seine fisheries *inside* and *outside* the ETP (other than large-scale driftnet fisheries (which do not exist)), and the small purse seine vessel fishery *inside* the ETP. U.S. Responses to Question 21, para. 134, and Question 60(a), para. 1.

[362] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 ("These provisions appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter."); *see also id.* para. 7.280 (min. op.) ("[The determination] provisions allow the Assistant Administrator to make a determination that a particular fishery is causing 'regular and significant dolphin mortality' or has a 'regular and significant tuna-dolphin association' akin to that in the ETP. Where such a determination is made, independent observer certification will be required in those fisheries. In other words, the amended tuna measure contains sufficient flexibility to enable the United States to impose the same requirements in fisheries where the same degree of risk prevails.").

[363] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 ("However, 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. 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.").

[364] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

sense that they are difficult to reconcile with, or justify by reference to, the objectives pursued by the amended tuna measure itself."[365]

216. The Panel's analysis and findings with regard to the determination provisions are in error in two different respects:

- 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 in this regard.

- Second, the Panel erred in its reasoning and finding both by applying the incorrect legal analysis and by acting inconsistently with DSU Article 11.

If the Appellate Body were to rule in favor of the United States on either one of these appeals, the Appellate Body should, as a consequence, reverse the Panel's finding that the determination provisions prove that the detrimental impact resulting from the certification requirements do not stem exclusively from a legitimate regulatory distinction.

i. The Panel Erred in Its Allocation of the Burden of Proof

217. The Panel began its analysis by observing that this issue was "not discussed extensively by the parties."[366] Indeed, later in its analysis, the Panel further recognized that this issue "was not explicitly argued by Mexico as a separate ground of WTO-inconsistency prior to the Panel's raising this issue."[367]

218. The fact of the matter is that Mexico put forward *no affirmative argument* with regard to the determination provisions in its case-in-chief for its Article 2.1 claim. In particular, Mexico did not argue that the determination provisions, or any "gap" between the provisions, supported Mexico's contention that the certification requirements are not even-handed.[368] As such, the United States put forward *no rebuttal argument* in its first or second submission, or in its

[365] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.258-259.

[366] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.247.

[367] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.256. The Panel further acknowledged that "even in its response to the Panel's question Mexico did not ask the Panel to find that the determination provisions in themselves give rise to inconsistency with Article 2.1 of the TBT Agreement or Articles I and III of the GATT 1994." *Id.*

[368] *See generally* Mexico's First Written 21.5 Submission, paras. 283-303 (discussing Mexico's argument as to why the certification requirements lack "even-handedness"); Mexico's Second Written 21.5 Submission, paras. 176-195 (same); Mexico's Opening Statement Before the Article 21.5 Panel paras. 36-40 (same); Mexico's Closing Statement Before the Article 21.5 Panel paras. 9, 11(b) (same).

presentation to the Panel at the meeting. Rather, the issue was not raised until well after the Panel's meeting *when the Panel itself* raised the issue in written questions to the United States.[369]

219. Mexico, for its part, did not explicitly connect the determination provisions to its Article 2.1 argument until its Comments on U.S. Response to Question 60 – its eighth (and final) submission to the Panel – where it addressed the issue in a few brief rebuttal paragraphs, referring to its legal claim in a single conclusory sentence.[370] Mexico made this single conclusory statement over six months after it filed its first submission (which should have contained Mexico's case-in-chief),[371] and almost two months after the Panel held its one meeting.[372]

220. In response to the Panel's questions regarding the determination provisions, the United States repeatedly stressed that it would be in error for the Panel to assume a part of the complaining party's burden of proof by making a case for the complaining party.[373] The Panel, however, disregarded such an approach without comment. Instead, the Panel examined the determination provisions because they are, in the Panel's view, "an integral part of the certification system put in place by the amended tuna measure."[374]

221. As discussed above, the burden of proof rests on the complaining party to prove its affirmative claims.[375] This "well-established" principle applies equally to Mexico's Article 2.1

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[369] *See* U.S. Response to the Panel's Question 21, paras. 131-143.

[370] *See* Mexico's Comments on U.S. Response to Question 60, para. 5.

[371] *See Thailand – Cigarettes (Philippines) (AB)*, para. 149 ("We also recall that panel proceedings consist of two main stages, the first of which involves each party setting out its 'case in chief, including a full presentation of the facts on the basis of submission of supporting evidence,' and the second designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties.").

[372] Mexico's filed its first written submission on April 8, 2014. The Panel meeting took place on August 19-21, 2014. Mexico submitted its Comments on U.S. Response to Question 60 on October 14, 2014.

[373] *See* U.S. Response to Question 21, para. 132 ("It is well established that the complaining party must itself prove all the elements of its *prima facie* case through the evidence and arguments that it provides to the panel. It would thus be legal error for a panel to assume a part of the complaining party's burden of proof by making a case for the complaining party – the burden of identifying and providing the relevant evidence (including provisions of the measure) and of explaining their relevance to the alleged inconsistency with the covered agreements is for Mexico itself to sustain.") (citing *US – Gambling (AB)*, para. 140; *US – Wool Shirts and Blouses (AB)*, at 16; *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 50; *US – COOL (AB)*, para. 469); *see also* U.S. Response to Question 60(a), para. 16 ("Accordingly, it is clear that Mexico has made no *prima facie* case with regard to the determinations provided for either by section 216.91(a)(2)(i) or section 216.91(a)(4)(iii). As the United States has discussed previously, a complainant must itself prove all the elements of its *prima facie* case through the evidence and arguments that it provides to the panel, and a panel errs if it assumes any part of the complainant's burden of proof.") (citing same).

[374] *US – Tuna II (Article 21.5 – Mexico)*, para. 7.256.

[375] *See, e.g., US – Wool Shirts and Blouses (AB)*, p. 14; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134; *EC – Hormones (AB)*, para. 98; *see also US – Carbon Steel (AB)*, para. 156 ("We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. *In both cases, the complaining Member bears the burden of proving its claim*.") (emphasis added).

claim, as the Appellate Body has already stated in this very dispute[376] and as the Panel purported to accept, stating:

> [I]t is for Mexico to show, at least *prima facie*, that the different certification requirements do not stem exclusively from a legitimate regulatory distinction. Only if Mexico makes this showing will the burden shift to the United States to show that, contrary to Mexico's case, the detrimental impact does in fact stem exclusively from a legitimate regulatory distinction.[377]

222. Yet Mexico never put forward any affirmative argument or evidence as to this issue, *and the burden did not shift to the United States*.[378] In this regard, the Panel was certainly wrong to focus entirely on whether the United States had proved the determination provisions to be *WTO-consistent* where Mexico had made *no showing* that the determination provisions were *WTO-inconsistent*.[379]

223. As in the case of its detrimental impact analysis, the Panel erred by taking upon itself the burden of establishing (an alleged) *prima facie* case on Mexico's behalf when it is for the complainant to establish a *prima facie* case.[380] And a complainant only establishes such a *prima facie* case where it "identif[ies] the challenged measure and its basic import, identif[ies] the relevant WTO provision and obligation contained therein, *and explain[s] the basis for the*

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[376] *US – Tuna II (Mexico) (AB)*, para. 216 ("With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall 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.'") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).

[377] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.195 (emphasis added); *see also id.* para. 7.50.

[378] *See US – Gambling (AB)*, para. 140 ("A *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency."); *US – Carbon Steel (AB)*, para. 157 ("[A] responding Member's law will be treated as WTO-consistent *until proven otherwise*. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations *bears the burden of introducing evidence* as to the scope and meaning of such law to substantiate that assertion.") (emphasis added) (citing *US – Wool Shirts and Blouses (AB)*); *US – COOL (AB)*, para. 286 ("[W]here a technical regulation does not discriminate *de jure*, a panel must determine whether *the evidence and arguments adduced by the complainant* in a specific case nevertheless demonstrate that the operation of that measure, in the relevant market, has a *de facto* detrimental impact on the group of like imported products.") (emphasis added).

[379] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.260-263 (concluding that, "[t]he United States has not provided sufficient explanation as to why this aspect of the amended tuna measure is structured in this way, or how it relates to the objectives pursued by the labelling regime").

[380] *Japan – Agricultural Products II (AB)*, para. 126 ("Pursuant to the rules on burden of proof set out above, we consider that it was for the United States to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6.").

claimed inconsistency of the measure with that provision."[381] The fact that Mexico did not even make such an argument in its case-in-chief should have ended the matter there.[382]

224. And surely one of the reasons that Mexico never made an affirmative argument with regard to the determination provisions is that such an argument would contradict the argument Mexico did make. That is to say, the determination provisions are premised on the theory that the United States should impose an observer requirement *based on risk*.[383] But Mexico's argument to the Panel was *just the opposite*. Mexico argued that the Panel should find that the certification requirements lack even-handedness unless they impose an observer certificate on all fisheries, *regardless of the risk*.[384]

225. A panel may, of course, ask questions of the parties pursuant to its investigative authority, but only "to help it to understand and evaluate the evidence submitted and the arguments *made by the parties, … not to make the case for a complaining party*."[385] In other words, "[w]here a complainant has failed to set forth arguments in its submissions before a panel sufficient to substantiate its claims, a panel *may not* use its interrogative powers to make good

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[381] *US – Gambling (AB)*, para. 141 (stating that a panel request "must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits" and that "a *prima facie* case . . . demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, *and explain the basis for the claimed inconsistency of the measure with that provision*.") (emphasis added).

[382] *See Japan – Agricultural Products II (AB)*, para. 126 ("Since the United States did not even claim before the Panel that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the 'determination of sorption levels' is an alternative measure within the meaning of Article 5.6."); *see also Canada – Wheat Exports and Grain Imports (AB)*, para. 191 ("[I]t is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation – the evidence – on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.").

[383] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 ("These provisions appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the [the ETP large purse seine fishery]. This would help ensure that similar situations are treated similarly under the amended tuna measure.").

[384] *See* Mexico's Response to Panel Question 11, para. 46 (stating that a "comparative assessment of risks posed to dolphins in different fisheries … *would not be relevant* to the other two labelling conditions and requirements considered by Mexico, i.e., record-keeping, tracking and verification, and *observer coverage*") (emphasis added); *id.* paras. 55-56 (stating that for purposes of the certification requirements, "a comparison of the quantity of dolphins that are killed or seriously injured in 'raw numbers' or 'as a percentage of the known species population' *is irrelevant*") (emphasis added); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.185 (recounting that, in Mexico's view, the differences in the nature and degree of risk to dolphins from setting on dolphins in the ETP or from other methods in the ETP or other fisheries in no way explain or justify the different certification requirements. … [T]he amended tuna measure should require the same level of accuracy in reporting regardless of whether one or 1,000 dolphins are killed. And for this reason, 'calibration' does not respond to Mexico's claim that the different certification requirements are inconsistent with the amended tuna measure's objectives.").

[385] *Japan – Agricultural Products II (AB)*, para. 129 (emphasis added).

the absence of relevant substantiating arguments and evidence."[386] The fact that Mexico addressed this issue in rebuttal, months after the Panel's hearing, cannot cure the Panel's error.[387]

226. For these reasons, the Panel erred in using its authority "to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it."[388]

ii. The Panel Erred in Its Reasoning and Finding

227. The Panel erred in finding that the determination provisions provide an additional basis for concluding that any detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction.[389] The Panel gave two reasons for its conclusion. First, based on the Panel's reading of the text and its own "common-sense," the Panel reasoned 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."[390] Second, the Panel reasoned 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."[391]

228. The Panel erred in the following respects:

1) The Panel erred in applying the incorrect legal analysis. In particular, the Panel erred by not analyzing whether the determination provisions support a finding that

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[386] *EC – Steel Fasteners (China) (AB)*, para. 566 (emphasis added).

[387] *See EC – Steel Fasteners (China) (AB)*, paras. 573-574 ("[T]he Panel record clearly shows that the only time China used the term 'good cause' was in its response to Panel Question 71, and there it was used in a cursory manner that only asserted a claim, without providing substantiating arguments or evidence. . . . We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with . . . the requirements of due process of law."); *Thailand – Cigarettes (Philippines) (AB)*, para. 139 ("However, we observe that Thailand submitted this argument only in response to Panel questions following the first substantive meeting, and in a few other instances thereafter, and that Thailand produced no evidence to substantiate its assertion. Therefore, we do not see any basis for Thailand's contention on appeal that the Panel should have given greater consideration to this argument in conducting its substantive analysis.").

[388] *Japan – Agricultural Products II (AB)*, para. 129; *see also id.* paras. 130-131 ("We, therefore, *reverse* the Panel's finding that it can be presumed that the 'determination of sorption levels' is an alternative SPS measure which meets the three elements under Article 5.6, because this finding was reached in a manner inconsistent with the rules on burden of proof.") (emphasis added and in original); *US – COOL (AB)*, para. 469 (reversing the panel's Article 2.2 finding where the panel had and stating that "we agree with the United States that, by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement without examining the proposed alternative measures, *the Panel erred by relieving Mexico and Canada of this part of their burden of proof*") (emphasis added); *US – Gambling (AB)*, paras. 151-154; *US – Certain EC Products (AB)*, paras. 114-115.

[389] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.257-258, 7.263.

[390] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.258, 7.261, 7.263.

[391] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.259, 7.263.

the certification requirements "are designed and applied" in an even-handed manner.

2) The Panel acted inconsistently with DSU Article 11 by arriving at a finding that is unsupported by the evidence in the record.

3) The Panel erred by relying on the incorrect analysis of whether the determination provisions can be reconciled with the overall objectives of the amended measure.

If the Appellate Body were to rule in favor of the United States on any of these appeals, the Appellate Body should reverse the Panel's finding that the determination provisions prove that the detrimental impact resulting from the certification requirements do not stem exclusively from a legitimate regulatory distinction.

(A). 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

229. The Panel erred in applying the incorrect legal analysis as to whether any detrimental impact caused by the certification requirements for Mexican tuna product "stems exclusively from a legitimate regulatory distinction."[392] As the Appellate Body recently affirmed, "the legitimacy of such regulatory distinctions … is a function of whether they *are designed and applied* in an even-handed manner."[393] In assessing an allegation of *de facto* discrimination, the Appellate Body has cautioned that "[s]uch *de facto* discrimination against imported products *will not be immediately discernible from the text of a measure*, nor may it be discernible when its operation is assessed exclusively through the lens of one of its components."[394] Panels must assess technical regulations "as composite legal instruments through careful scrutiny of their design, architecture, revealing structure, operation, and application."[395] In this regard, the Appellate Body reaffirmed that, in examining a *de facto* discrimination claim, "a panel must base its determination on *the totality of facts and circumstances* before it."[396]

230. The Appellate Body's analysis in the original proceeding was consistent with this guidance. There, the Appellate Body addressed whether the fact that the original measure was designed such that tuna product produced in the ETP large purse seine fishery needed to be certified as having been caught without any dolphin mortality or serious injury while tuna

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[392] *US – Tuna II (Mexico) (AB)*, para. 215.

[393] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.93 (emphasis added).

[394] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.95 (emphasis added).

[395] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.95.

[396] *US – Clove Cigarettes (AB)*, para. 206 ("This is particularly so in the case of a *de facto* discrimination claim, where a panel must base its determination on *the totality of facts and circumstances* before it, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue.") (emphasis added); *see also US – COOL (AB)*, para. 286.

product produced from other fisheries was not required to be so certified meant that the eligibility criteria were not even-handed.[397] But the Appellate Body's review of the design of this "gap" – to use this Panel's word – was not the end of the analysis, but the beginning. Following its analysis of the design, the Appellate Body reviewed the uncontested facts and the panel's factual findings (both appealed and unappealed), concluding, ultimately, that other fishing methods employed in fisheries other than the ETP large purse seine fishery do, in fact, harm dolphins.[398] As such, the Appellate Body concluded that, as designed and applied, the eligibility criteria were not "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[399]

231. In contrast, the Panel's analysis of the determination provisions *deviated significantly* from this legal analysis. In particular, the Panel appears to have examined only how the determination provisions are *designed* without also examining how those provisions are *applied*.

232. And, unlike in the original proceeding, the Panel's findings as to how the certification requirements actually operate confirm that they are designed and applied in an even-handed manner. Specifically, the evidence on the record as to the differences in relative harm to dolphins presents a "compelling" case that imposing an observer requirement for tuna product produced by large purse seine vessels in the ETP to access the label and not similarly imposing an observer requirement for tuna product produced by all other vessels "stem[s] exclusively from a legitimate regulatory distinction."[400] Moreover, as the minority (correctly) pointed out, Mexico *did not even request* the Panel to find that a "regular and significant" association or "regular and significant" mortality or serious injury is occurring in a fishery (other than the ETP large purse

[397] *See, e.g.*, *US – Tuna II (Mexico) (AB)*, paras. 174, 250; *see also id.* para. 290 (quoting the original panel as stating that "under the DPCIA provisions that are currently applicable all tuna products containing tuna caught in a non-ETP fishery using a method other than setting on dolphins are eligible to be labelled dolphin safe without certifying that no dolphin was killed or seriously injured in the set").

[398] *US – Tuna II (Mexico) (AB)*, para. 288 ("The Panel also found, and the United States did not contest, that there are clear indications that the use of certain tuna fishing techniques other than setting on dolphins may also cause harm to dolphins.") (internal quotes omitted), para. 298 ("[W]e accept the Panel's conclusions that the use of certain tuna fishing methods other than setting on dolphins outside the ETP may produce and has produced significant levels of dolphin bycatch …") (internal quotes omitted).

[399] *US – Tuna II (Mexico) (AB)*, para. 297.

[400] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.245 (maj. op.) ("On the basis of the above, we would find that the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction."); *id.* para. 7.242 (maj. op.) ("These statistics confirm for the Panel that although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically,' in the words of the original Panel. Thus the Panel find the United States' position on this point compelling. Indeed, in our view, the United States' arguments on this point would be sufficient to raise a presumption that the different certification requirements stem from a legitimate regulatory distinction, assuming that other fishing methods are treated even-handedly.").

seine fishery).[401] Nor has Mexico "put forward evidence sufficient to make out such an argument."[402]

233. Further, the current fishery-by-fishery data clearly supports this conclusion. There is no evidence to establish that a "regular and significant" association or a "regular and significant" mortality and serious injury is currently occurring in any fishery other than the ETP large purse seine fishery,[403] a point that NOAA confirmed in 2013.[404]

234. As such, 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."[405] Thus, 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."[406]

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[401] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, 7.281 (min. op.) ("However, Mexico has not asked the Panel to find that the Assistant Administrator's failure to make a determination is itself a violation of Article 2.1 of the TBT Agreement. Nor, in my view, has it put forward evidence sufficient to make out such an argument."); *see also id.* 7.256 ("Indeed, even in its response to the Panel's question Mexico did not ask the Panel to find that the determination provisions in themselves give rise to inconsistency with Article 2.1 of the TBT Agreement or Articles I and III of the GATT 1994.").

[402] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, 7.281 (min. op.); *see also id.* para. 7.278 (min. op.) ("[T]he United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery."). The minority's conclusion is entirely consistent with the majority's analysis of the evidence. *See id.* paras. 7.241-242 (maj. op.) (rejecting Mexico's argument "that the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries," and finding the U.S. rebuttal to be "compelling" on this point).

[403] *See* U.S. Responses to Questions 21-22, paras. 136-143, 147-152; *see also* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127); U.S. First Written 21.5 Submission, paras. 70-167.

[404] 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exh. MEX-7) ("NMFS has 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. Therefore, the Secretary has not made a determination that another fishery has either a regular and significant association between dolphins and tuna or regular and significant mortality or serious injury of dolphins.").

[405] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.258.

[406] *See also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.281 (min. op.) ("Now, if it were shown that some other fishery is, as a matter of fact, causing 'regular and significant mortality or serious injury,' or that another fishery does, as a matter of fact, have 'a regular and significant tuna-dolphin association' akin to that in the ETP, then it might be argued that the failure of the Assistant Administrator to make the relevant determination foreseen in sections 216.91(a)(4)(iii) and/or 216.91(a)(2)(i) itself gives rise to a lack of even-handedness. This would be so because the failure to make a determination would have the result that fisheries in which the same risks exist are being treated differently.").

235. Rather, the Panel appears to ground its finding with regard to the determination provisions solely on its reading of the text coupled with the Panel's own "common-sense" view regarding the relationship between tuna-dolphin association and harm to dolphins without any regard for the evidentiary record. Such an analysis is inconsistent with the Appellate Body's guidance that *de facto* discrimination "will not be immediately discernible from the text of a measure,"[407] but that, in conducting a *de facto* discrimination analysis, "a panel must base its determination on *the totality of facts and circumstances* before it."[408]

(B). The Panel's Analysis Is Inconsistent with DSU Article 11

236. The Panel found fault with the determination provisions because the text "appear[s] 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)."[409] In particular, the Panel considered 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."[410] The Panel considered that the existence in these so-called "gaps" between the two determination provisions is significant because "[t]his 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."[411]

237. The Panel expressed concern over two particular "gap[s]" between the determination provisions.

238. The first "gap" the Panel identified would occur in a non-ETP purse seine fishery where a regular and significant mortality and serious injury of dolphins was occurring without a regular and significant tuna-dolphin association.[412] Although the Panel provided no analysis of this issue, the Panel appears to have considered that this "gap" has legal significance because there is *no correlation* between association and mortality in purse seine fisheries (*i.e.*, you can have the

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[407] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.95.

[408] *US – Clove Cigarettes (AB)*, para. 206; *see also US – Tuna II (Mexico) (AB)*, para. 225; *US – Shrimp II (Viet Nam) (AB)*, para. 4.36 ("These statements, read in isolation, might unfortunately give the impression that the Panel was drawing a conclusion regarding the meaning and effect of Section 129(c)(1) *on the basis of the text of that provision, taken alone*. Yet, as noted above, these statements form part of a paragraph that clearly indicates at the outset that, at this step of its analysis, the Panel was examining the text of Section 129(c)(1). In subsequent paragraphs, the Panel proceeded to examine the relevance and import of argumentation and elements – beyond the text of Section 129(c)(1) – submitted by the parties regarding the meaning and effect of Section 129(c)(1).") (emphasis added).

[409] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.258.

[410] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

[411] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 (emphasis added).

[412] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.620, 7.263.

second without the first), creating the situation where this particular non-ETP purse seine fishery would not have an observer requirement but the ETP large purse seine fishery would have such a requirement, despite the fact that both had regular and significant mortality and serious injury of dolphins.[413]

239. The second "gap" the Panel identified would occur in a non-purse seine fishery where a regular and significant association between tuna and dolphins was occurring without a regular and significant mortality and serious injury of dolphins.[414] The Panel appears to consider that this "gap" has legal significance because there is a *positive correlation* between association and mortality in non-purse seine fisheries (*i.e.*, if you have the first, you will have the second), creating the situation (as the Panel suggested) where this particular non-purse seine fishery would not have an observer requirement but the ETP large purse seine fishery would have such a requirement, despite the fact that both fisheries have a regular and significant association of tuna and dolphins.[415] The Panel suggested that this positive correlation between association and mortality in a non-purse seine fishery is "a matter of common-sense," as "the risk of mortality or serious injury is necessarily heightened where dolphins associate with tuna, even if the fishing method in question does not deliberately target that association, as does setting on dolphins."[416]

240. The Panel cited no evidence to corroborate its "common-sense" conclusion, simply referring to arguments from Mexico and the United States.[417] As to the latter, the Panel contended (erroneously) that the United States had argued that the observers are needed in the ETP large purse seine fishery due to "the intensity of the tuna-dolphin interaction."[418] As such, this logic must "apply equally" in other fisheries – "[i]nsofar as a 'regular and significant' tuna-dolphin association is likely to increase the chance of dolphin mortality or serious injury, it may make sense to require observers wherever a 'regular and significant' tuna-dolphin association exists, in order to ensure that consumers receive accurate dolphin-safe information."[419]

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[413] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

[414] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.621-263.

[415] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

[416] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.261. In the Panel's view, "[t]his is simply a question of numbers: the more dolphins there are in the vicinity, the more likely that one or more dolphins will be killed or seriously injured." *Id.*

[417] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.261-262.

[418] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.262.

[419] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.262 ("In the Panel's view, it is difficult to see why that logic does not apply equally in the cases of other fisheries where there is 'regular and significant tuna-dolphin association,' even if the fishing method used in that fishery does not intentionally target the association. Insofar as a 'regular and significant' tuna-dolphin association is likely to increase the chance of dolphin mortality or serious injury, it may make sense to require observers wherever a 'regular and significant' tuna-dolphin association exists, in order to ensure that consumers receive accurate dolphin-safe information.").

241. As discussed below, the Panel's finding is inconsistent with DSU Article 11 as it "lack[s] a basis in the evidence contained in the panel record."[420]

242. As to the first "gap," the evidence on the record establishes why section 216.91(a)(2)(i) focuses on whether a "regular and significant association" exists in purse seine fisheries, rather than on "regular and significant mortality and serious injury." Specifically, it is *uncontested* that the existence of "regular and significant association" between tuna and dolphins in a purse seine fishery creates a powerful financial incentive for vessels to take advantage of that association by intentionally chasing and encircling dolphins. Indeed, Mexico claims that it is simply not "commercially viable" for its fleet to harvest tuna in a manner other than setting on dolphins in light of the association between tuna and dolphins in the ETP.[421] And, of course, it is these multi-hour chases of dolphins by purse seine vessels, speedboats, and helicopters that cause significant harm to dolphins, both observable and unobservable.[422] It is for this reason that section 216.91(a)(2)(i) focuses on association rather than mortality – a focus on mortality would not take into account these unobservable harms to dolphins.[423]

243. Moreover, the evidence establishes that there is, in fact, a *direct positive correlation* between association and observed mortality and serious injury in purse seine fisheries. One only needs to look at the ETP itself where the number of dolphins killed in the ETP tuna purse seine fishery since the fishery began in the late 1950s *is the greatest known for any fishery*.[424] It is simply undeniable that even today, under the unique AIDCP requirements, this ETP tuna-dolphin

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[420] *US – Carbon Steel (AB)*, para. 142; *see also EC – Fasteners (China) (AB)*, para. 441 (stating that a panel "must base its findings on a sufficient evidentiary basis on the record"); *China – Rare Earths (AB)*, para. 5.178 (observing that pursuant to Article 11 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").

[421] *See* Mexico's Response to Panel Question No. 57, para. 148 (stating that "targeting juvenile yellowfin tuna not associated with dolphins" in regions where the tuna-dolphin association does not occur would not be "commercially viable"); *id.* para. 146 (stating that "it is neither economically or ecologically feasible for the Mexican tuna fleet to change its fishing methods or move to another ocean region"); U.S. Response to Question 57, paras. 147-150.

[422] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122 ("As the Panel reads it, then, the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins. However, as we understand it, what makes setting on dolphins *particularly harmful* is the fact that it causes certain unobserved effects beyond mortality and injury '*as a result of the chase itself*.' These harms would continue to exist 'even if measures are taken in order to avoid the taking and killing of dolphins on the nets.' It is precisely because these unobserved harms *cannot be mitigated by measures to avoid killing and injuring dolphins* that the original panel and the Appellate Body found that the United States is entitled to treat setting on dolphins differently from other fishing methods.") (emphasis added) (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.504).

[423] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.121 (stating that, if the United States, made tuna caught by setting on dolphins but in sets without an observe dolphin mortality or serious injury eligible for the dolphin safe label "the US objective . . . to minimize unobserved consequences of setting on dolphins would not be attainable" because the U.S. measure then "would not discourage [the] unobserved effects of setting on dolphins").

[424] *See* U.S. Second Written 21.5 Submission, para. 16 (citing Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-29)).

bond, and the ability of large purse seine vessels to take advantage of it, results in these vessels chasing and capturing *millions* of dolphins each year and killing *thousands*.[425]

244. This positive correlation is further confirmed by the stark contrast between the mortality figures in the ETP large purse seine fishery (where the association exists) and other purse seine fisheries (where no such association exists).[426] For example, over the past five years, the mortality rate of dolphin sets in the ETP large purse seine fishery has been nearly 100 dolphins per 1,000 dolphin sets.[427] Observer data from all other purse seine fisheries shows that the dolphin mortality rates are a mere fraction of the mortality rate due to dolphin sets in the ETP.[428]

245. In this regard, 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. And, not surprisingly, the Panel *made no finding* that any particular non-ETP purse seine fishery has a regular and significant tuna-dolphin association or regular and significant dolphin mortality and serious injury.[429]

246. As to the second "gap," where, in a non-purse seine fishery, a regular and significant association occurs without regular and significant mortality and serious injury, the Panel criticized the United States for potentially treating a non-purse seine fishery "less stringently" than the ETP large purse seine fishery in terms of association because "the risk of mortality or serious injury is necessarily heightened where dolphins associate with tuna, even if the fishing method in question does not deliberately target that association, as does setting on dolphins."[430] Again, the Panel erred in its reasoning.

247. First, the United States observes that the Panel's analysis appears to be a self-defeating proposition. If, indeed, 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 a "regular and significant" mortality and serious injury, and the non-purse seine fishery would not fall into a "gap" at all but would be designated under 216.91(a)(4)(iii).

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[425] U.S. Response to Question 7, para. 51 (citing earlier submissions and evidence cited therein).

[426] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

[427] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, at Table 1 (Exh. US-127).

[428] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, at Table 1 (Exh. US-127) (showing (i) in the Indian Ocean tropical purse seine fishery between 2003 and 2009, the dolphin mortality rate was zero dolphins per 1,000 sets; (ii) in the Eastern tropical Atlantic purse seine fishery between 2003 and 2009, the dolphin mortality rate was zero dolphins per 1,000 sets; and (iii) in the WCPFC purse seine fishery between 2007 and 2010, the dolphin mortality rate was 14.35 dolphins per 1,000 sets, although the rate for 2010 (the most recent year and the year with the highest rate of observer coverage) was 2.64 dolphins per 1,000 sets).

[429] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241-242 (maj. op.); *id.* para. 7.281 (min. op.).

[430] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.261, 7.263.

248. Second, the evidence on the record does not support the Panel's "common-sense" approach. The evidence, in fact, establishes that there is a single area of the world where such an association occurs – the ETP.[431] So the only place where such a "gap" would occur would be in the various fisheries operating *inside the ETP* – in particular, in the part of the ETP where the association occurs.[432] Yet there is *no* evidence on the record that longline, gillnet, and trawling – none of which target dolphins – have a higher rate of mortality and serious injury inside the ETP than outside (where the association does not exist). Indeed, Mexico put *zero* evidence on the record regarding dolphin harms in non-purse seine ETP fisheries.

249. Nor is there any reason to believe that such evidence, even if submitted, would support the Panel's speculation that there should be a higher rate of mortality and serious injury in these ETP fisheries that do not target dolphins. As the United States explained to the Panel, *the clear and uncontested* evidence is that even in the ETP large purse seine fishery, observed harm is very low where vessels *do not intentionally target dolphins*. Indeed, despite the fact that non-dolphin sets (*i.e.*, unassociated sets and sets on floating objects) constitute over half of all sets by large purse seine vessels in the ETP (54.4 percent), such sets account *for less than one percent* of observed dolphin mortalities in this fishery in any given year.[433] Moreover, between 2009 and 2013, dolphin mortality per 1,000 non-dolphin sets averaged between 0 and 0.83 dolphin mortalities, which compares favorably to dolphin mortality from purse seine fishing in areas where no such association exists (and, of course, is much lower than the dolphin mortality rate associated with dolphin sets in the ETP).[434] Yet under the Panel's "common-sense" approach, these numbers would be completely different – the dolphin mortality from non-dolphin sets inside the ETP would be *much higher* than non-dolphin sets in other parts of the world where the association does not exist.

250. Further, the Panel erred by relying on Mexico's unsupported argument that "it seems far more likely that dolphins will be killed or seriously injured by longlines in areas where there is a 'regular and significant' tuna-dolphin association, since in such circumstances dolphins will be in close physical proximity to the tuna that are attracted to the longlines and are thus more likely

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[431] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242 (maj. op.) (rejecting Mexico's argument "that the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries").

[432] As noted above, the tuna-dolphin association occurs only within a particular area of the ETP. *See* U.S. Response to Question 3, para. 9.

[433] *See* U.S. Response to Question 19, para. 113. Table 1. As noted in this table, dolphin mortalities occurring from *not* setting on dolphins averaged 2.7 dolphins per year over the past decade, compared to an average of 1,124.3 dolphin mortalities per year from dolphin sets. U.S. Response to Question 19, para. 111-112 (citing IATTC, EPO Dataset 2009-2013 (Exh. US-26); 2008 IATTC Annual Report (Exh. US-43)).

[434] In the years 2009-2013, dolphin mortality per 1,000 dolphin sets ranged from 74.5 to 113.4 dolphins. *See* U.S. Response to Question 19, para. 113. For non-ETP purse seine fisheries in the years for which data is available, the dolphin mortality rate ranged from zero dolphins per 1,000 sets (in the Eastern tropical Atlantic and Indian Ocean tropical purse seine fisheries) to 14.35 dolphins per 1,000 sets (in the WCPFC purse seine fishery, although data from 2010, the most recent year and the year with the highest rate of observer coverage, puts the figure at 2.64 dolphins per 1,000 sets). *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127).

to be hooked themselves."[435] There is *no evidence* to support such an assertion and the Panel wrongly ignored the Appellate Body's guidance in this very dispute that "the party that asserts a fact is responsible for providing proof thereof" in so relying on Mexico's unsupportable argument.[436]

251. Finally, the Panel erred in suggesting that the Panel's speculation as to a positive correlation between association and mortality in non-purse seine fisheries is consistent with the U.S. argument "that observers are needed in the ETP large purse seine fishery because the intensity *of the tuna-dolphin interaction* in that fishery."[437] That is *not* what the United States argued (or what the majority accepted).

252. Rather, as the majority recounted in paragraphs 7.239-240, the United States argued before the Panel that "the intensity and length of the interactions in a dolphin set between the dolphins, on the one hand, and the vessel, speed boats, helicopter, and purse seine net on the other" provided a sound basis to require 100 percent observer coverage on those vessels capable and permitted to set on dolphins (*i.e.*, ETP large purse seine vessels).[438] Thus, the "interaction" the United States is discussing is between the dolphins *and the fishing vessels and their gear*, not

[435] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.261.

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

Although uncited, the Panel appears to be referring to the argument Mexico makes in its final submission to the Panel where Mexico insists that "there is a correlation between harm to dolphins from non-purse seine fishing methods and an association between tuna and dolphins" despite providing no evidence to support such a "correlation." *See* Mexico's Comments on U.S. Response to Question 60, para. 4. The evidence that Mexico relies on relates to whether other longline and gillnet fishing causes harm to dolphins, not whether these fishing methods are more harmful to dolphins inside the ETP (where the association exists) than outside the ETP (where it does not). *See id.* ("For example, Mexico has presented uncontested evidence that dolphins are attracted to longlines to eat the fish on the hooks, and that this attraction results in dolphin mortalities and serious injuries. Mexico has also submitted evidence that many thousands of dolphins die in gillnets, indicating that dolphins are "associated" with that the tuna caught with that fishing method.").

[437] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.262.

[438] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.239 (maj. op.).

between dolphins and tuna, a point that the majority well understood.[439] And, indeed, the majority agreed with the U.S. argument based on this very understanding.[440]

253. To put it another way, the unique tuna-dolphin association that occurs in the ETP is not *per se* dangerous to dolphins. What *is* dangerous to dolphins is when purse seine vessels take advantage of that association and intentionally interact with dolphins by chasing, herding, and then encircling them with purse seine nets. Where vessels do not intentionally interact with dolphins in this manner, the harm to dolphins drops precipitously. Thus, the logic of the U.S. argument "does not apply equally" to non-purse seine vessels that do not intentionally target dolphins when fishing for tuna in the ETP (where the association exists).[441] The observers are needed where the vessels are intentionally interacting with the dolphins in this "particularly harmful" way, and are not needed where "the fishing method used in that fishery does not intentionally target the association."[442]

254. Accordingly, the Panel's reasoning and findings are not based on "sufficient" evidence, and the Panel acted inconsistently with Article 11 in making such findings.[443] The Appellate Body has observed that Article 11 requires a panel to "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."[444] Panels may not "make affirmative findings that lack a basis in the evidence

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[439] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.239 (maj. op.) ("Other *fishing methods* in other oceans may – and, as the United States recognizes, do – cause dolphin mortality and serious injury, but because the nature and degree of the *interaction* is different in quantitative 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.") (emphasis added); *see also id.* para. 7.278 (min. op.) ("Setting on dolphins is the only tuna *fishing method* that deliberately targets dolphins, and so *interacts* with dolphins in a way that is uniquely intense, both in terms of the number of dolphins affected and the frequency of interaction.") (emphasis added).

[440] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.244-245 (maj. op.) ("Rather, as we understand it, the United States' invocation of the accidental nature of dolphin *interactions with fishing methods* other than setting on dolphins goes to difference between fishing methods that cause harm to dolphins only incidentally and those, like setting on, *that interact* with dolphins 'in 100 per cent of dolphin sets.' This distinction is especially important where, as the United States argues is the case with setting on – the particular nature of *the interaction* is itself 'inherently dangerous' 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. On the basis of the above, we would find that the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction.") (emphasis added).

[441] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.262.

[442] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.262.

[443] *EC – Fasteners (China) (AB)*, para. 441 (stating that a panel "must base its findings on a sufficient evidentiary basis on the record"); *see also China – Rare Earths (AB)*, para. 5.178; *US – Carbon Steel (AB)*, para. 142.

[444] *China – Rare Earths (AB)*, para. 5.178; *see also US – Carbon Steel (AB)*, para. 142 (referring to *US – Wheat Gluten (AB)*, paras. 161 and 162); *EC – Seal Products (AB)*, para. 5.150 (quoting same).

contained in the panel record."[445] Thus the Panel erred in substituting its own "common-sense" for evidence on the record and in making a finding for which there was *no* evidentiary support.[446]

255. The Appellate Body has also noted that, to constitute an Article 11 violation, the evidence that a panel disregarded or misinterpreted must be "so material to [the] case" that the panel's failure to rely upon it bears on "the objectivity of that panel's factual assessment."[447] The evidence at issue here – *i.e.*, the evidence contradicting the Panel's findings that "gaps" existed in the determination provisions – meets that standard because the Panel's findings on this matter were the sole basis for its conclusion that the determination provisions rendered the certification requirements not even-handed under the second step of the Article 2.1 analysis.[448]

(C). The Panel Erred by Relying on the Incorrect Analysis of Whether the Determination Provisions Can Be Reconciled with the Overall Objectives of the Amended Measure

256. The Panel further erred by finding that the "gap" does not "stem[] exclusively from a legitimate regulatory distinction" because "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."[449]

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[445] *US – Carbon Steel (AB)*, para. 142 (referring to *US – Wheat Gluten (AB)*, paras. 161 and 162); *EC – Seal Products (AB)*, para. 5.150 (quoting same); *see also China – Rare Earths (AB)*, para. 5.178 (quoting same); *EC – Large Civil Aircraft (AB)*, para. 1317 (stating that panel findings must be based "on a sufficient evidentiary basis on the record").

[446] *See, e.g., US – Large Civil Aircraft (Second Complaint) (AB)*, para. 643 ("It is possible that the Panel believed that its view *represented common sense*, or its own conception of economic rationality. If this were indeed the case, *we would nevertheless consider the Panel's approach unsatisfactory*. We do not believe that panels can base determinations as to what would occur in the marketplace only on their own intuition of what rational economic actors would do. We recognize that a panel confronted with a measure … may have intuitions as to the consistency of the measure with the market, based on economic theory. However, we would expect that in such circumstances the panel would at least explain the economic rationale or theory that supports its intuition. The Panel in this case did not do so. More importantly, we are of the view that a panel should test its intuitions empirically, especially where the parties have submitted evidence as to how market actors behave. Indeed, in this case, both the European Communities and the United States submitted evidence as to how research transactions between two market actors are structured. Yes, while the Panel referenced some of that evidence in its summary of the parties' arguments, it did not discuss this evidence in its reasoning.") (emphasis added).

[447] *See EC – Fasteners (China) (AB)*, para. 442 (describing the standard for an Article 11 violation as follows: "[A] participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of that panel's factual assessment."); *China – Rare Earths (AB)*, para. 5.178 (quoting same).

[448] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.258-263.

[449] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.259 ("Moreover, in the Panel's opinion, the determination provisions appear to be arbitrary in the sense that they are difficult to reconcile with, or justify by reference to, the objectives pursued by the amended tuna measure itself."); *id.* para. 7.263 ("The United States has not provided sufficient explanation as to why this aspect of the amended tuna measure is structured in this way, or

257. Again, as discussed above, the Panel asked the wrong question here. The question is not, as the Panel wrongly presumed, whether "detrimental treatment is explained by, or at least reconcilable with, the objectives pursed by the measure at issue,"[450] but, rather, whether the relevant regulatory distinctions "are designed and applied in an even-handed manner such that they may be considered 'legitimate' for the purposes of Article 2.1."[451] As such, the Panel erred by applying the wrong legal analysis. While the objective of the amended measure may be relevant to the analysis, it is not relevant standing alone, but, rather, 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 ocean."[452]

iii. Conclusion on the Determination Provisions

258. For the above reasons, the United States respectfully requests the Appellate Body to reverse the Panel's analysis and findings in paragraphs 7.247-7.263. The determination provisions do not provide any support for the Panel's finding that the certification requirements are inconsistent with Article 2.1, nor could they be found to support any other finding of inconsistency with the covered agreements.

5. Conclusion on the Certification Requirements

259. As discussed above: (1) the majority of panelists erred in finding that the any detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction due to differences in the education and training of those that make the dolphin safe certification; and, (2) the Panel erred in finding that the determination provisions were a further basis on which to find that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions. For these reasons, the United States respectfully requests the Appellate Body to reverse the Panel's

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how it relates to the objectives pursued by the labelling regime. The Panel is therefore not convinced that this gap stems exclusively from a legitimate regulatory distinction.").

[450] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.196 ("[I]t is our opinion that in examining whether detrimental treatment stems exclusively from a legitimate regulatory distinction, a panel may take into account the extent to which the identified detrimental treatment is explained by, or at least reconcilable with, the objectives pursed by the measure at issue."); *see also id.* para. 7.91 ("[W]e agree with Mexico that, in considering whether detrimental impact caused by a technical regulation reflects 'arbitrary discrimination,' we may consider, among other things, whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue.").

[451] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92 ("This 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 be considered 'legitimate' for the purposes of Article 2.1."); *see also US – Tuna II (Mexico) (AB)*, para. 232 ("Our analysis will scrutinize, in particular, whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the US measure 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."); *US – COOL (AB)*, para. 271 ("[W]here a regulatory distinction is not designed and applied in an even-handed manner . . . the detrimental impact will reflect discrimination prohibited under Article 2.1.").

[452] *US – Tuna II (Mexico) (AB)*, para. 297.

ultimate finding that the certification requirements are inconsistent with Article 2.1 of the TBT Agreement.[453]

H. The Panel Erred in Finding that the Tracking and Verification Requirements Accord Less Favorable Treatment to Mexican Tuna Products than that Accorded to Like Products from the United States and Other Members

1. Introduction

260. The third set of requirements the Panel examined were the tracking and verification requirements. Because the Panel's analysis of this aspect of the amended measure involved not only legal requirements but also the government oversight of those requirements, the United States uses the terms "requirements" and "regimes," as appropriate, to refer to this aspect of the measure.

261. As discussed above in section II.B, the AIDCP mandates certain tracking and verification requirements for tuna that is harvested by large purse seine vessels operating in the ETP. Pursuant to these requirements, Mexico and its industry maintain certain recordkeeping, which can be accessed with the AIDCP TTF number (assigned on a trip-by-trip basis). In recognition of the utility of the AIDCP tracking and verification regime for the purposes of the amended measure, the amended measure requires, for tuna product caught by vessels covered by the AIDCP requirements, that the associated TTF number(s) be included with the Form 370 if that tuna product is certified as "dolphin safe."[454] By having the TTF number, NOAA is able to verify the underlying AIDCP-mandated recordkeeping if concerns are raised for any particular shipment under NOAA's generally applicable tracking and verification regime.[455] NOAA tracking and verification requirements apply generally to all tuna product produced for the U.S. market.[456]

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[453] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[454] *See* 50 C.F.R. §§ 216.92(b)(1), (b)(2)(i) (Exh. US-2); NOAA Form 370, para. 5B(5) (Exh. MEX-22) ("The tuna or tuna products described herein are certified to be dolphin safe: … Tuna harvested in the ETP by a purse seine vessel of more than 400 short tons (362.8 mt) carrying capacity, with valid documentation signed by a representative of the appropriate IDCP-member nation certifying that: (1) there was an IDCP-approved observer on board the vessel during the entire trip; (2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught; and (3) *listing the numbers for the associated Tuna Tracking Forms* which contain the captain's and observer's certifications. IDCP Member Nation Certification attached.") (emphasis added and omitted).

[455] AIDCP Tracking and Verification Resolution § 7 (Exh. MEX-36) ("The Parties, at any time, may request that the Secretariat verify the dolphin safe status of tuna by reference to the *AIDCP Dolphin Safe Certificate* number or TTF number.").

[456] *See, e.g.*, 50 C.F.R. § 216.91(a)(5) (Exh. US-2) (establishing, for tuna caught in "all fisheries," that tuna labeled dolphin safe must be segregated from tuna caught in a set or other gear deployment with a dolphin mortality or serious injury "from the time of capture through unloading"); 50 C.F.R. §§ 216.93(c)(1)(i), (c)(2)(i), (c)(3)(i) (Exh. US-2) (implementing the segregation requirement); 50 C.F.R. § 216.93(f) (Exh. US-2) (requiring that all imported tuna product be accompanied by "a properly certified FCO") (Exh. US-2).

262. As discussed in section III.H.2, the Panel found that differences between the AIDCP and NOAA tracking and verification regimes modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product.[457] The Panel further found that this detrimental impact did not stem exclusively from a legitimate regulatory distinction.[458]

263. As discussed in sections III.H.3, 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. First, the Panel erred in its allocation of the burden of proof. Second, the Panel erred in coming to a finding that is legally unsupportable based on the evidence on the record. Third, the Panel erred by not applying the correct legal analysis in coming to this finding. Fourth, the Panel erred in finding that a "genuine relationship" exists between the tracking and verification requirements and the detrimental impact that the Panel found to exist.

264. As discussed in sections III.H.4, the Panel erred in finding that any detrimental impact that does result from the tracking and verification requirements does not stem exclusively from a legitimate regulatory distinction. Specifically, the Panel erred in by applying the incorrect legal standard. As the United States explains, the tracking and verification requirements are even-handed because: 1) they are "calibrated" to the risks to dolphins from different fishing methods in different fisheries; and 2) they reflect the fact that the parties to the AIDCP have consented to impose a unique observer program on their own tuna industries.

265. In light of these appeals, the United States respectfully requests the Appellate Body to reverse the Panel's ultimate finding that the 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 to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement."[459]

2. The Panel's Analysis

a. The Relevant Regulatory Distinction

266. Unlike its analysis of the certification requirements, the Panel did not separately examine what the relevant regulatory distinction is for this aspect of the analysis. However, it appears that the Panel proceeded on the basis that the relevant regulatory distinction is the difference between the AIDCP-mandated tracking and verification requirements, which only apply to tuna produced in the ETP large purse seine fishery, and the NOAA tracking and verification requirements, which apply to all tuna product produced for the U.S. market, regardless of the fishery in which the tuna was harvested.[460]

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[457] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382.

[458] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.400.

[459] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).

[460] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.284-286.

267. As the Panel did with regard to its analysis of the certification requirements, the Panel concluded that "Mexico has made a distinct [from the eligibility criteria and certification requirements] claim in respect of the different tracking and verification requirements, and that it is appropriate for us to consider that claim."[461]

b. Whether the Tracking and Verification Requirements Modify the Conditions of Competition in the U.S. Market to the Detriment of Mexican Tuna Product

268. The Panel began its analysis by recounting the parties' arguments with regard to the tracking and verification requirements. The Panel observed that Mexico's allegation as to detrimental impact is "essentially the same" as its argument regarding the certification requirements.[462] In the Panel's view, Mexico had not argued that any difference between the AIDCP and NOAA tracking and verification requirements "in themselves block or hinder Mexican access to the dolphin-safe label." Rather, Mexico had argued that "the absence of sufficient requirements" for tuna product produced from fisheries other than the ETP large purse seine fishery allows for the possibility that tuna product may be inaccurately labeled, thus creating the detrimental impact on Mexican tuna product sold in the United States.[463] In other words, for Mexico, the detrimental impact stemmed not from a "denial of a competitive opportunity" to Mexican producers but from the granting of a "competitive advantage" to Mexico's competitors, as they have more latitude than Mexican producers to illegally market non-dolphin safe tuna as dolphin safe.

269. After reviewing the various pieces of evidence put forward by the parties, the Panel provided its legal assessment of the issue, which differed substantially from what Mexico had argued. The Panel concluded that Mexico's evidence suggested that the tracking and verification requirements that apply to tuna product produced from the ETP large purse seine fishery, on the one hand, and from all other fisheries, on the other, differ in three respects: "depth, accuracy, and degree of government oversight."[464]

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[461] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.293.

[462] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288.

[463] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288 ("Mexico's argument is not that the different tracking and verification requirements in themselves block or hinder Mexican access to the dolphin-safe label. Rather, its complaint is that 'the absence of sufficient … record-keeping [and] verification … requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be incorrectly labelled as dolphin-safe. This difference is what is creating the detrimental impact.' According to Mexico, the detrimental impact caused by the different tracking and verification requirements does not stem from the 'denial of a competitive opportunity' – that is, beyond or additional to the denial inherent in the disqualification of tuna caught by setting on dolphins – but rather from the granting of 'a competitive advantage' to tuna and tuna products from the United States and other WTO Members.") (quoting Mexico's Second Written 21.5 Submission, para. 117).

[464] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.354 (emphasis omitted).

270. In terms of "depth," the Panel considered that the two sets of requirements differ in "the point to which tuna can be traced back."[465] Under the AIDCP requirements, the tuna can "be tracked back all the way to the particular set in which the tuna was caught and the particular well in which it was stored."[466] In contrast, under the NOAA regime, the Panel concluded that tuna harvested outside the ETP large purse seine fishery "can be traced back to the vessel and trip on which it was caught."[467]

271. In terms of "accuracy," the Panel considered that the two sets of requirements differ in "the degree of confidence that a particular captain (or, where applicable, observer) statement properly describes the lot of tuna to which it is assigned."[468] Under the AIDCP requirements, the Panel considered that "the tuna tracking forms required for tuna caught by large purse seine vessels in the ETP accompany particular catches of tuna throughout the fishing and production process, from the point of catch right through to the point of retail."[469] In contrast, under the NOAA regime, the Panel considered that it is not clear "how particular certificates are kept with particular lots of tuna up until the tuna reaches the canning plant."[470] In this regard, the Panel questioned whether the evidence put forward by the United States establishes that "[t]he documentation attesting to whether the tuna is dolphin safe or not stays with the tuna," despite the fact that Mexico put forward no evidence at all that such documentation (*i.e.*, the Form 370s) routinely – or even rarely – does not accompany the tuna or tuna product.[471] The Panel further observed that it "does not appear that there is any additional or explicit legal requirement in the amended tuna measure that US canneries ensure or otherwise satisfy themselves, at the time they receive a batch of tuna, of either the validity of a dolphin-safe certificate or whether such certificate in fact describes the batch of tuna with which it is associated."[472]

272. In terms of "government oversight," the Panel considered that the two sets of requirements differ in "the extent to which a national, regional, or international authority is involved in the tracking and verification process."[473] In the AIDCP regime, the Panel considered that "information concerning every stage of the tuna catch and canning process is made available to national and regional authorities, which must be sent copies of tuna tracking forms and are thus able to verify at any stage of the catch and canning process whether a particular batch of tuna is dolphin-safe."[474] In contrast, under the NOAA regime, the Panel considered that, for tuna

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[465] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.355.

[466] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.355.

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

[468] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.360.

[469] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.360.

[470] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.361.

[471] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.361.

[472] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.363 (emphasis omitted).

[473] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.364.

[474] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.364 (further noting that "[v]arious national and regional authorities are also required to be notified whenever ownership of tuna changes").

product produced by U.S. canneries, "the United States must rely on the canneries for information about the movement of the tuna prior to arrival at the cannery, and is not able to go 'behind the documents,' as it were, to verify that a particular dolphin-safe certification describes the batch of tuna with which it is associated."[475] The Panel reached a similar conclusion with respect to tuna product produced by non-U.S. canneries.[476]

273. In the Panel's view, "the issue of government oversight and control" "goes to the very design of the different tracking and verification systems."[477] For the AIDCP, which is an agreement that 14 governments have consented to,[478] the Panel considered that "every step of the catch and canning process … is prescribed and can be monitored by national and regional agencies."[479] In contrast, for the tuna produced outside the jurisdiction of the consensus-based AIDCP, the United States has "delegated responsibility for developing tracking and verification systems to the tuna industry itself, including canneries and importers, and has decided to involve itself only on a supervisory and *ad hoc* basis through the review of monthly reports and the conduct of audits and spot checks."[480]

274. The Panel concluded that "these three differences" "show that the system imposed outside the ETP large purse seine fishery is "significantly less burdensome" than the system imposed inside the ETP large purse seine fishery, modifying the conditions of competition in the U.S. market to the detriment of Mexican tuna product.[481] And while the Panel repeatedly stated that those tracking and verification requirements are either "less burdensome" or "significantly" less so,[482] the Panel never identified what exactly is less (or more) "burdensome" for tuna

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[475] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.365 (further noting that "[t]he US authorities are not, it seems, able to ensure that they receive information that would enable them to track the movement and dolphin-safe status of tuna from the time of catch up to the point of delivery to a US cannery").

[476] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.366 ("Similarly, where tuna products are imported from non-US canneries, it appears that the United States relies on US importers of tuna products for information about the movement of tuna prior to arrival at a US port. As in the case of US canneries, it appears that the United States is not able to directly track the movement and dolphin-safe status of tuna from the time of catch up to the point of delivery to a non-US cannery and subsequent shipment to the United States, but must rely on documentation provided by the importer.").

[477] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.367.

[478] *See supra*, sec. II.B (listing AIDCP parties).

[479] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.367.

[480] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.367.

[481] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.370 ("In the Panel's view, these three differences show that the different tracking and verification requirements modify the conditions of competition. They clearly show that the system imposed outside the ETP large purse seine fishery is significantly less burdensome than the system imposed inside the ETP large purse seine fishery."); *see also id.* para. 7.368.

[482] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.368, 7.369, 7.370, 7.371, and 7.382; *see also id.* para. 7.372 ("The fact that the system in place outside the ETP large purse seine fishery is *less onerous* than that inside is sufficient grounds for finding that this aspect of the amended tuna measure has a detrimental impact.") (emphasis added); *id.* para. 7.370 (noting that the tracking and verification requirements for tuna produced outside

product producers, and why any such difference does, in fact, modify the conditions of competition in the U.S. market to the detriment of Mexican producers' product, as the Panel concluded.[483] For example, the Panel never identified whether any difference in "burden" means that the producers of tuna product produced from fisheries other than the ETP large purse seine fishery incur lower costs or are able to bring their product to market quicker than their Mexican competitors. Moreover, the Panel never identified why any difference in "burden" is of such a nature that the conditions of the competition in the U.S. market have been modified to the detriment of Mexican tuna product.

275. The one thing that is clear from the Panel's analysis, however, is that the Panel did not agree that Mexico proved *its* argument that the tuna product produced from fisheries other than the ETP large purse seine fishery enjoys a "competitive advantage" over Mexican tuna product in the U.S. market because the group of the competitors' tuna products are less accurately labeled than the group of Mexican like tuna products.[484] And while the Panel stated, as it did with regard to the certification requirements, that it saw "some merit in Mexico's argument,"[485] the Panel again concluded that there was not sufficient evidence on the record for the Panel to make such a finding, repeatedly stating that it is not making a "definitive finding" in this regard.[486]

c. Whether a "Genuine Relationship" Exists Between the Amended Measure and the Detrimental Impact

276. The Panel further found that the amended measure has a "genuine relationship" with any detrimental impact caused by the tracking and verification requirements.[487] In coming to this conclusion, the Panel relied heavily on its earlier "genuine relationship" analysis that it did with regard to the certification requirements, stating that its earlier conclusion "applies with equal force in respect of the different tracking and verification requirements."[488] In this regard, while the Panel recognized that the tracking and verification requirements that Mexican producers must adhere to are imposed by the AIDCP, the Panel considered that it is the amended measure itself

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the ETP large purse seine fishery are "less demanding" than the AIDCP-mandated tracking and verification requirements").

[483] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.368, 7.370.

[484] *Compare US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288, *with id.* para. 7.372.

[485] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.372.

[486] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382 ("The system in place outside the ETP large purse seine fishery is less burdensome than that inside the ETP, and may contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery, *although we make no definitive finding on this specific point*, because it would require consideration of other factors that may result in tuna being incorrectly labelled.") (emphasis added); *id.* n.601 ("As we explained above, *we do not here make a definitive finding* that tuna caught outside the ETP large purse seine fishery would in fact be incorrectly labelled.") (emphasis added); *see also id.* para. 7.372.

[487] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294.

[488] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294.

that creates the "regulatory distinction" that is at issue here.[489] Notably, the Panel appeared to recognize that, under the amended measure, an AIDCP TTF number need only accompany tuna product that is to be marketed in the United States as "dolphin safe."[490]

d. Whether the Detrimental Impact Stems Exclusively from a Legitimate Regulatory Distinction

277. The Panel began its analysis of the second step of Article 2.1 with an incorrect characterization of its own finding in the first step of the analysis. As noted above, the Panel did not reach a "definitive finding" as to whether any difference in label accuracy resulting from the different tracking and verification regimes provided a competitive advantage to tuna product produced from tuna harvested outside the ETP large purse seine fishery, thus modifying the conditions of competition to the detriment of Mexican tuna product."[491] Yet, in this part of the analysis, the Panel asserted that:

> We concluded that the different tracking and verification requirements have a detrimental impact on Mexican tuna and tuna products, *including* because they may make it more likely that tuna caught other than by large purse seine vessel will be incorrectly labelled as dolphin-safe. *This incorrect labelling would accord a competitive advantage to non-Mexican tuna products*.[492]

278. Following this incorrect characterization, and without further analysis, the Panel found that:

> Mexico has shown *prima facie* that there is no rational connection between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure. We accept, *prima facie*, Mexico's argument that there is no obvious connection between the imposition of a lighter burden on tuna caught outside the ETP large purse seine fishery and the goals of the amended tuna measure. Accordingly, Mexico has shown, *prima facie*, that the detrimental treatment does not stem exclusively from a legitimate regulatory distinction.[493]

279. The Panel then examined whether the United States had rebutted this *prima facie* case.

280. First, the Panel disagreed with the United States that the fact that the tracking and verification requirements are origin neutral can overcome Mexico's *prima facie* case. In particular, "the fact that the measure is origin neutral on its face does not respond to Mexico's

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[489] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294.

[490] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294.

[491] *See supra*, sec. III.H.1.c (quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.372, n.601).

[492] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.391 (emphasis added).

[493] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.392.

core allegation that … the detrimental impact … is not reconcilable with the objectives of the amended tuna measure."[494]

281. Second, the Panel rejected the approach that "the different tracking and verification requirements simply reflect international commitments undertaken by the United States and Mexico."[495] In this regard, the Panel considered that the question "is not whether the amended tuna measure accurately reflects or implements the United States' international obligations, but rather whether the detrimental impact identified by Mexico stems exclusively from a legitimate regulatory distinction."[496] To answer this question, the Panel considered that "the fact that the United States may or may not have international obligations *vis-à-vis* Mexico or any other Member is … not relevant" because such a fact "is not responsive" to Mexico's allegation that the challenged requirements "are not justifiable on the basis of the amended tuna measure's own objectives."[497]

282. The Panel further rejected the U.S. position that "the tracking and verification requirements embodied in the AIDCP and incorporated into the amended tuna measure are different because of the higher degree of risk to dolphins in the ETP."[498] In the Panel's view, while "[t]he different risk profiles of different fisheries may … explain regulatory differences concerning the eligibility criteria for fishing methods, as well as the need for an independent observer to monitor and certify during and immediately following the fishing activity itself," "tracking and verification is about what happens to tuna after it has already been caught."[499] In the Panel's view, "the special risk profile of the ETP large purse seine fishery simply does not explain or otherwise justify the fact that the post-catch tracking and verification mechanisms applied to tuna caught other than by large purse seine vessels in the ETP are significantly less burdensome."[500]

283. Third, the Panel rejected the U.S. view that Mexico's argument is directly contrary to the fundamental premise underlying the TBT Agreement, namely recognition that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives "at the levels it considers appropriate."[501] In the Panel's view, this fundamental premise of the TBT Agreement "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."[502] As such, the Panel considered that this principle is not "a complete

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[494] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.394-395.

[495] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.396.

[496] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.397.

[497] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.397.

[498] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398.

[499] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398.

[500] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398.

[501] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.399.

[502] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.399.

response to a claim that a particular measure is inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported products than to like domestic products or like products from other Members."[503]

284. Accordingly, the Panel found that the United States had failed to rebut Mexico's *prima facie* case and concluded that the tracking and verification requirements "accord less favourable treatment to Mexican tuna products than to like tuna products from the United States and other WTO Members in contravention of Article 2.1 of the TBT Agreement."[504]

285. As noted above, the United States considers the Panel's findings with regard to the tracking and verification requirements to be in error. In section III.H.3, the United States explains how the Panel erred in finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. In section III.h.4, the United States explains how the Panel erred in finding that this detrimental impact does not stem exclusively from a legitimate regulatory distinction.

3. 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

286. The United States considers that the Panel's finding that the amended measure's tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product is flawed. The United States appeals the Panel's analysis in four respects:

1) The Panel erred in its allocation of the burden of proof.[505]

2) The Panel erred in coming to a finding that is legally unsupportable based on the evidence on the record.[506]

3) The Panel erred by not applying the correct legal analysis in coming to this finding.[507]

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[503] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.399.

[504] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.400.

[505] *See infra*, sec. III.H.3.a.

[506] *See infra*, sec. III.H.3.b.

[507] *See infra*, sec. III.H.3.c. In this regard, the United States further explains why there is no basis to support a finding that the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product under an alternative legal theory from the one that the Panel, in fact, used. *See infra*, sec. III.H.3.d.

4) The Panel erred in finding that a "genuine relationship" exists between the tracking and verification requirements and the detrimental impact that the Panel found to exist.[508]

287. 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 verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Such a reversal would mean, in turn, that the Panel's ultimate finding that the 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 to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement" would need to be reversed.[509] Moreover, and as discussed below, the United States considers that, for identical reasons, the Panel's findings that the certification requirements are inconsistent with Articles I:1 and III:4 of the GATT 1994 are in error and requests reversal of those findings as well.[510]

a. The Panel Erred in Its Allocation of the Burden of Proof

288. As discussed above, it is "well established" that the complainant carries the burden of proving its claim with "evidence and argument."[511] As such, the starting point for examining whether the Panel properly allocated the burden of proof is with the argument that Mexico did, in fact, make before the Panel.

289. In this regard, the Panel accurately described Mexico's argument as being "essentially the same" as its argument regarding the certification requirements.[512] Mexico's argument for this aspect of its claim was that "'the absence of sufficient … record-keeping [and] verification … requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products *that may be incorrectly labelled as dolphin-safe*.'"[513] And it is "*[t]his* difference," in Mexico's view, that is "what is creating the detrimental impact."[514] Thus, Mexico did not argue that its

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[508] *See infra*, sec. III.H.3.e.

[509] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[510] *See infra*, secs. IV.B, V.B.

[511] *See supra*, sec. III.C (quoting, among other cases, *US – Gambling (AB)*, para. 140, as stating "[a] *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency").

[512] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288.

[513] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288 (emphasis added) (quoting Mexico's Second Written 21.5 Submission, para. 117).

[514] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288 (emphasis added) (quoting Mexico's Second Written 21.5 Submission, para. 117).

products suffer from a "denial of a competitive opportunity," but rather from the granting of "a competitive advantage" to tuna product from the United States and other WTO Members.[515]

290. As was the case with the certification requirements, the United States was afforded an opportunity to respond to this argument, and, as recounted by the Panel, did respond.[516]

291. And, again, the Panel made no "definitive finding" with regard to Mexico's argument.[517] While the Panel stated that it saw "some merit in Mexico's argument," it considered that to make such a finding would require a detailed analysis.[518] As explained below, the Panel did not conduct such an analysis, nor did it – in the U.S. view – have sufficient evidence on the record to do so.[519]

292. Instead, the Panel found that a detrimental impact existed based on an entirely different theory from the one that Mexico had argued. In the Panel's view, it is the difference in "burden[]" on the different tuna product industries, resulting from the differences between the AIDCP and NOAA tracking and verification regimes, that has modified the conditions of competition in the U.S. market to the detriment of Mexican tuna product. And it is this difference in "burden" that, in the Panel's view, puts the group of Mexican tuna products at a competitive disadvantage *vis-à-vis* the group of like tuna products produced outside the ETP large purse seine fishery.

293. Yet at no time did Mexico ever argue or present evidence suggesting that any difference between the two regimes imposes a different "burden" on different producers of tuna product for the U.S. market. For example, Mexico never argued or presented evidence showing that its competitors have fewer costs, can get their product to market quicker, or in any other way have a different (lesser) "burden" such that the conditions of competition in the U.S. market have been modified to the detriment of Mexican tuna product. Moreover, Mexico never raised the three-

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[515] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288 (quoting Mexico's Second Written 21.5 Submission, para. 117); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288 ("Mexico's argument is not that the different tracking and verification requirements in themselves block or hinder Mexican access to the dolphin-safe label.").

[516] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.289-292.

[517] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382 ("The system in place outside the ETP large purse seine fishery is less burdensome than that inside the ETP, and may contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery, *although we make no definitive finding on this specific point*, because it would require consideration of other factors that may result in tuna being incorrectly labelled.") (emphasis added); *id.* n.601 ("As we explained above, *we do not here make a definitive finding* that tuna caught outside the ETP large purse seine fishery would in fact be incorrectly labelled.") (emphasis added); *see also id.* para. 7.372.

[518] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.372 ("We also see some merit in Mexico's argument that the different tracking and verification requirements may make it more likely that tuna caught other than by large purse seine vessels in the ETP could be incorrectly labelled. Ultimately, however, in order for the Panel to reach a definite conclusion as to whether the system outside the ETP large purse seine fishery actually allows for incorrect labelling, *the Panel would need to undertake a detailed technical analysis of the system's effective operation*.") (emphasis added); *see also id.* para. 7.382.

[519] *See infra*, sec. III.H.3.c.

part approach of depth, accuracy, and government oversight on which the Panel based its finding, and the United States was never afforded a meaningful opportunity to respond to this approach.[520] The Panel's finding was of its own invention, and, as such, the Panel erred.

294. As discussed above, Mexico had the burden of establishing a *prima facie* case that the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product, a point that the Panel itself recognized.[521] But because Mexico never alleged this difference in burden, Mexico never established a *prima facie* case, and the burden never shifted to the United States to rebut such a *prima facie* case.[522] As such, the matter should have ended there as it is clear that a panel may not take it upon itself "to make the case for a complaining party."[523]

295. In raising *sua sponte* an argument that Mexico never raised, argued, or proved, the Panel acted inconsistently with the burden of proof in this proceeding, and the principles of procedural fairness that are embodied in the DSU. Because the Panel did not allocate the burden of proof properly, instead making the case for Mexico, the United States respectfully requests the Appellate Body to reverse the Panel's finding of detrimental impact and the finding of a breach of Article 2.1 that relates to that erroneous finding of detrimental impact.[524]

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[520] In this regard, the United States observes that the Panel used the term "accuracy" differently than Mexico did. For the Panel, the term "accuracy" refers not to the truthfulness of a captain or observer certification, but to whether the certification was, in fact, attached to the right batch of tuna. *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.360-363 (referring to "the degree of confidence that a particular [captain or observer] statement properly describes the lot of tuna to which it is assigned"). And the Panel was concerned with differences in "burden" in adhering to the two regimes. Mexico, on the other hand, used the term "accurate" to refer to whether "the label [is] made available exclusively to products containing tuna that was not caught in a manner that adversely affected dolphins." *See, e.g.*, Mexico's Second 21.5 Submission, para. 146; *see also id.* paras. 149-150. And Mexico was concerned with the competitive opportunities to be gained by labeling non dolphin safe tuna product as "dolphin safe." *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288.

[521] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.50 ("We understand these passages as indicating that a complainant bears the burden of showing that a challenged measure modifies the conditions of competition in the relevant market (i.e. the relevant market in the responding Member) to the detriment of products from the complaining Member. As noted above, this criterion must always be satisfied before a violation of Article 2.1 can be found, regardless of whether that violation is claimed to be *de facto* or *de jure*.") (quoting *US – Tuna II (Mexico) (AB)*, para. 216; *US – COOL (AB)*, para. 272).

[522] *US – Tuna II (Mexico) (AB)*, para. 216; *US – COOL (AB)*, para. 272.

[523] *Japan – Agricultural Products II (AB)*, para. 129.

[524] *See, e.g., Japan – Agricultural Products II (AB)*, paras. 130-131 ("We, therefore, reverse the Panel's finding that it can be presumed that the 'determination of sorption levels' is an alternative SPS measure which meets the three elements under Article 5.6, because this finding was reached in a manner inconsistent with the rules on burden of proof."); *see also US – COOL (AB)*, para. 469; *US – Gambling (AB)*, paras. 151-154; *US – Certain EC Products (AB)*, paras. 114-115.

b. The Panel Erred in Coming to a Finding that Is Legally Unsupportable Based on the Evidence on the Record

296. The Panel determined that the AIDCP and NOAA tracking and verification regimes differ in three aspects: "depth, accuracy, and degree of government oversight."[525] In the Panel's view, these three differences prove that the different regimes "modify the conditions of competition" as "[t]hey clearly show that the system imposed outside the ETP large purse seine fishery is significantly less burdensome than the system imposed inside the ETP large purse seine fishery."[526]

297. The Panel never identified what exactly it meant by "less burdensome," simply repeating the phrase or using equivalent phrases, such as "less demanding" and "less onerous."[527] Further, the Panel provided no additional analysis of how this difference in "burden" modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product, *equating* any difference in "burden" – however defined – with a finding that the conditions of competition have been amended to the detriment of Mexican tuna product.[528]

298. The Panel erred in coming to this finding as it is legally unsupportable based on the facts on the record. Specifically, the evidence regarding the three differences that the Panel identified – depth, accuracy, and degree of government oversight – do not prove, individually or collectively, that adherence to the NOAA regime is less "burdensome" than adherence to the AIDCP regime such that the conditions of competition have been modified to the detriment of Mexican tuna product.

299. First, the Panel's analysis of "depth" does not provide a basis for a finding that it is more "burdensome" for Mexican tuna product producers to adhere to the AIDCP regime than it is for producers of tuna product from fisheries other than the ETP large purse seine fishery to adhere to the NOAA regime. As discussed above, the Panel considers that the two regimes differ in terms of "depth" with regard to "the point to which tuna can be traced back."[529] Although the Panel spent a fair amount of time discussing internal U.S. cannery procedures,[530] the difference that the Panel identified can be seen as a difference in the forms used under the two different regimes.[531]

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[525] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.354 (emphasis omitted).

[526] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.370.

[527] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.368, 7.369, 7.370, 7.371, 7.372, 7.382, 7.397, and 7.398.

[528] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.370 ("In the Panel's view, these three differences show that the different tracking and verification requirements modify the conditions of competition. They clearly show that the system imposed outside the ETP large purse seine fishery is significantly less burdensome than the system imposed inside the ETP large purse seine fishery.").

[529] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.355.

[530] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.356-358.

[531] Under the AIDCP regime, one or two TTFs (a dolphin-safe and, if applicable, a non-dolphin safe TTF) must be completed for every trip. A TTF must indicate the well(s) in which tuna harvested in a particular set was

300. In this regard, it is fairly clear that the AIDCP regime is *different* from the NOAA regime. However, there is no evidence on the record – and the Panel cites to none – that indicates that this difference in "depth" makes it *more difficult* to adhere to the AIDCP regime than the NOAA one in any measurable way that would suggest the AIDCP regime is "more burdensome" than the NOAA regime. There is no evidence to suggest, for example, that the difference in "depth" between the two regimes requires higher labor costs or affects the marketability of the product in the importing Member, as was the case in *Dominican Republic – Import and Sale of Cigarettes*.[532]

301. And, of course, if there were such a difference in "burden" in adhering to the two regimes, Mexico would be in a position to know what that difference was. As Mexico explained to the Panel, while its tuna fleet consists mainly of ETP large purse seine vessels operating in the ETP, the fleet also includes three ETP small purse seine vessels.[533] Under the AIDCP, these vessels are *prohibited* from setting on dolphins, and the tuna that they produce is *not* subject to

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stored. Under the U.S. regime, imported tuna product (including tuna product produced from the ETP large purse seine fishery) must be accompanied by a Form 370. The Form 370 does not track tuna by well, but tracks tuna by its "dolphin safe" status. That is, all imported tuna product that is intended to be marketed as "dolphin safe" must be accompanied by a Form 370 attesting to the status of the product. A Form 370 can include tuna product produced from tuna caught on multiple trips, although each trip must be listed on the form. NOAA Form 370 (Exh. MEX-22). A Form 370 that certifies that the associated tuna product is "dolphin safe" *may not* cover non-dolphin safe tuna product. For non-dolphin safe tuna product, a separate Form 370 must be used. The requirement that different Form 370s must be used for tuna product that has a different dolphin safe status reflects the segregation requirements of the amended measure, under which tuna, to be contained in tuna product labeled dolphin safe, must be segregated from non-dolphin safe tuna from the time it was caught through unloading to processing.

[532] *See Dominican Republic – Import and Sale of Cigarettes (Panel)*, para. 7.172 (recounting complainant's evidence that the tax stamp measure "may imply additional costs for the importer of almost 10 per cent of the c.i.f. average price of the products, when the equivalent costs for domestic producers would be one hundredth of that amount, i.e. 0.1 per cent of the c.i.f. average price of the products," which included additional labor costs for the "re-opening the boxes and cartons of cigarettes, affixing the stamps to the individual cigarette packets (over the cellophane), and repackaging the cartons and boxes"); *id.* para. 7.186 (referring to those additional steps required to be taken as a "burden"); *id.* paras. 7.193-194 ("The Dominican Republic has not disputed Honduras's argument that placing the stamp on imported cigarettes over the cellophane on each individual packet aesthetically detracts from the overall presentation of the final product. ... The Panel is satisfied with the evidence that from an aesthetic point of view, the tax stamp requirement results in imported cigarette packets having a less smooth presentation than like domestic cigarettes. The Panel is of the view that, other conditions being equal, a consumer may prefer a product that is more attractively packaged over one that is less attractively packaged.").

The rest of the Panel's discussion in paragraphs 7.356-359 likewise does not address the comparative "burden" of adhering to the differing regimes, but rather addresses the "depth" of the internal tracking systems of certain U.S. canneries.

[533] Mexico's Response to Question 57, para. 147 ("[I]n 2013 the Mexican tuna fishing fleet operating in the ETP was comprised of 36 large purse seine vessels that applied for and were assigned vessel-specific Dolphin Mortality Limits (DMLs), and four small purse seine vessels (below 363 MT carrying capacity). The small vessels represent less than five percent of the capacity of the Mexican fleet fishing for tuna in the ETP.") (citing Exhibit MEX-135, and stating that "[o]ne of the four Mexican small vessels, although not identified as such in the table, is actually a larger vessel that has sealed some of its wells and therefore has a smaller capacity; it is nonetheless required to carry an observer because of its potential capabilities")).

the AIDCP tracking and verification requirements.[534] As such, if it were more costly, for example, to comply with the AIDCP regime than the NOAA one, Mexico would know it. Yet Mexico did not put in any evidence that such a difference in "burden" exists, in terms of cost, market access, or anything else.

302. In light of the above, the evidence on the record with regard to the different "depth[s]" of the AIDCP and NOAA regimes – and the Panel's analysis of that evidence – does not support the legal conclusion that the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product.[535]

303. Second, the Panel's analysis of "accuracy" does not provide a basis for a finding that it is more "burdensome" for Mexican tuna product producers to adhere to the AIDCP regime than it is for producers of tuna product from fisheries other than the ETP large purse seine fishery to adhere to the NOAA regime. As noted above, the Panel considered that the two regimes differ in "the degree of confidence that a particular captain (or, where applicable, observer) statement properly describes the lot of tuna to which it is assigned."[536] In making this finding, the Panel questioned the U.S. explanations and evidence regarding whether a certification as to the "dolphin safe" status of a particular batch of tuna will stay with that batch through each production stage (while accepting Mexico's argument on its face).[537]

304. Even accepting that the Panel is correct that "[t]he [TTF] must accompany a particular batch of tuna at each production stage, and accordingly the identity of a particular batch of tuna can, in principle, always be established"[538] – which the United States does not dispute for purposes of this appeal – there is no evidence to suggest that any difference between the AIDCP and NOAA regimes in this regard makes it *more difficult* to adhere to the AIDCP regime than the NOAA one in any way that would suggest the AIDCP regime is "more burdensome" than the NOAA regime. For example, there is no evidence – and the Panel cites to none – that adherence to the AIDCP regime in this regard results in any cost at all for Mexican tuna product producers, much less a higher cost than is incurred by producers of tuna product from fisheries other than the ETP large purse seine fishery. And, as noted above, if there were such a difference in cost Mexico would be in a position to know what that difference is, given that it produces tuna from vessels that are subject to and not subject to the AIDCP tracking and verification regime. Yet Mexico did not submit any evidence that such a difference in "burden" exists, whether in terms of cost, market access, or anything else.

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[534] *See* AIDCP, Annex VIII (Exh. MEX-30) (providing that "no vessel with a carrying capacity of 363 metric tons . . . or less may intentionally set on dolphins"); *id.* Annex II.2 (establishing the On-Board Observer program for "vessels with a carrying capacity greater than 363 metric tons"); *id.* Annex IX (establishing the tracking and verification program, relying on the On-Board Observer Program).

[535] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.370 (relying, in particular, on the differences in "depth," to support the Panel's overall legal conclusion).

[536] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.360.

[537] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.360-363.

[538] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.360.

305. Mexico, of course, did base its allegation of detrimental impact on a difference in "accuracy," but Mexico's complaint did not concern differences in the "burden" of producing accurately versus inaccurately labeled tuna product. Rather, Mexico asserted that a difference in accuracy, in and of itself, placed the group of Mexican tuna product at a competitive disadvantage *vis-à-vis* the group of products produced from tuna harvested outside the ETP large purse seine fishery and marketed in the United States as "dolphin safe."[539] But the Panel did not find that Mexico's argument and evidence in this regard established a *prima facie* case of detrimental impact, suggesting that there was insufficient evidence on the record to conduct such an analysis.[540] Indeed, as discussed below, the United States considers the evidence on the record indicates that Mexico's argument is incorrect.[541]

306. In light of the above, the evidence on the record with regard to the different "accurac[ies]" of the AIDCP and NOAA regimes does not support the legal conclusion that the tracking and verification requirements cause a detrimental impact because the AIDCP regime is more difficult or "burdensome" for tuna producers to adhere to than the NOAA regime.[542]

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[539] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288 ("[Mexico's] complaint is that 'the absence of sufficient … record-keeping [and] verification … requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be incorrectly labelled as dolphin-safe. This difference is what is creating the detrimental impact.'") (quoting Mexico's Second Written 21.5 Submission, para. 117).

[540] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.372 ("Ultimately, however, in order for the Panel to reach a definite conclusion as to whether the system outside the ETP large purse seine fishery actually allows for incorrect labelling, the Panel would need to undertake a detailed technical analysis of the system's effective operation.").

[541] *See infra*, sec. III.H.3.d.

[542] The United States further observes that the Panel's statement that there is no "additional or explicit *legal requirement* that U.S. canneries ensure or otherwise satisfy themselves" of the "validity of a dolphin-safe certificate" or that the certificate "in fact describes the batch of tuna with which it is associated" or "verify the accuracy" of their records wrongly implies that U.S. canneries need not adhere to the requirements of the amended measure and can market non-dolphin safe tuna product as "dolphin safe" in accordance with U.S. law. *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.363 (emphasis in original). As the United States explained to the Panel, it is a violation of Section 5 of the Federal Trade Commission Act "for any producer, importer, exporter, distributor, or seller of any tuna products that are exported from or offered for sale in the United States" to label such products dolphin safe if they do not meet the eligibility and certification requirements of the amended dolphin safe measure. 50 C.F.R. § 216.91(a) (Exh. US-2); U.S. First Written 21.5 Submission, para. 16. Moreover, all successive owners of tuna (including canneries) must endorse as "complete, true, and correct" the Form 370 accompanying the tuna, which, for tuna product labeled dolphin safe, includes the statement: "the tuna or tuna products described herein are certified to be dolphin safe." NOAA Form 370, at (8) (Exh. MEX-22); 50 C.F.R. § 216.24(f)(3)(iii) (Exh. US-2). The United States provided a detailed description to the Panel of the penalties available for persons who make false certifications to the U.S. Government. Such false certifications would include false certifications on an FCO, false labeling, and any false record keeping submitted to NOAA under 50 C.F.R. § 216.93(g)(2). *See* U.S. Response to Panel Question No. 18, paras. 93-98 (describing, *inter alia*, 18 U.S.C. § 1001 (establishing criminal penalties for any person who knowingly and willfully "makes a materially false, fictitious, or fraudulent statement or representation" or "makes or uses any false writing or documents knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" to the U.S. government in any matter within its jurisdiction), 16 U.S.C. § 3372(d) (establishing criminal and administrative penalties for "mak[ing] or submit[ting] any false record, account, or label for, or any false identification of" any fish that has been or is intended to be imported, transported, sold, purchased,

307. Third, the Panel's analysis of "government oversight" does not provide a basis for a finding that it is more "burdensome" for Mexican tuna product producers to adhere to the AIDCP regime than it is for producers of tuna product from fisheries other than the ETP large purse seine fishery to adhere to the NOAA regime. As noted above, the Panel considered that the AIDCP and NOAA regimes differ in "the extent to which a national, regional, or international authority is involved in the tracking and verification process."[543]

308. As an initial matter, the United States observes that what the Panel appears to be comparing is, on the one hand, whether there is *the opportunity* for the Mexican government to verify its producers' adherence to the AIDCP requirements, and, on the other hand, how the U.S. government *actually verifies* adherence to the amended measure's requirements. In this regard, the Panel described the two regimes in different terms. For the AIDCP regime, the Panel assessed whether national and regional authorities "are … able to verify" and whether the tuna produced from the ETP large purse seine fishery "can be monitored by national and regional agencies.[544] With respect to the NOAA regime, however, the Panel assessed the manner in which NOAA "carr[ies] out an audit or spot check" or "carries out inspections on the high seas, at dock-side, and in US canneries."[545]

309. These characterizations conform to the evidence on the record. There is, in fact, no evidence that the Mexican government has ever – *even once* – verified the accuracy of "whether any particular batch of tuna is dolphin-safe [under the AIDCP definition]."[546] The only evidence on the record with regard to actual tracking and verification concerns the efforts of NOAA and the U.S. canneries to ensure that tuna product is accurately marketed in the United States as

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or received from a foreign country or transported in interstate or foreign commerce), and 16 U.S.C. § 1375 (establishing criminal and administrative penalties for "any person who violates any provision of this subchapter or of any permit or regulation issued thereunder," which would cover making a false statement or certification about the dolphin safe status of tuna on an FCO)).

[543] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.364.

[544] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.364 ("Mexico's evidence shows that, in respect of tuna caught by large purse seine vessels in the ETP, information concerning every stage of the tuna catch and canning process is made available to national and regional authorities, which must be sent copies of tuna tracking forms and *are thus able* to verify at any stage of the catch and canning process whether a particular batch of tuna is dolphin-safe.") (emphasis added); *id.* para. 7.367 ("As we understand it, every step of the catch and canning process for tuna caught by large purse seine vessels in the ETP is prescribed *and can be monitored* by national and regional agencies.") (emphasis added).

[545] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.365 ("For tuna caught other than by large purse seine vessels in the ETP, however, US authorities receive information concerning the origin and history of tuna only from US tuna canneries themselves, through the monthly reports that such canneries are required to submit, and when they (the authorities) *carry out an audit or spot check*; and even then it seems that they are only able to verify that proper tracking mechanisms were implemented from the time the cannery received the tuna.") (emphasis added); *id.* para. 7.371 ("In the Panel's view, the fact that the United States *carries out inspections on the high seas, at the dock-side, and in US canneries* is not sufficient to rebut Mexico's showing that the tracking and verification requirements imposed on tuna caught outside the ETP large purse seine fishery are less burdensome than those imposed on tuna caught inside that fishery.") (emphasis added).

[546] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.364.

"dolphin safe" (under the U.S. definition). In this regard, the Panel appears to be making as incorrect comparison, similar to what the original panel did in its Article 2.2 analysis.[547]

310. It is not surprising that Mexico presented no evidence establishing that it is more "burdensome" for Mexican tuna product producers to adhere to the AIDCP regime, in terms of "government oversight," than it is for other tuna product producers to adhere to the NOAA regime in this regard. The United States considers that it would be difficult for Mexico to establish that the AIDCP regime is "burdensome" for its producers based simply on the fact that the Mexican government (or the IATTC) has *the opportunity* to verify the accuracy of the AIDCP dolphin safe label. Of course, as noted above, if the mere opportunity of government authorities to verify adherence to the AIDCP requirements actually is more "burdensome" than adhering to the NOAA regime, Mexico was an ideal position to prove that point. But Mexico put forward no evidence whatsoever suggesting that this is the case.

311. In light of the above, the evidence on the record with regard to the "government oversight" of the AIDCP and NOAA regimes, and the Panel's analysis of that evidence, does not support the legal conclusion that the tracking and verification requirements cause a detrimental impact because the AIDCP regime is more difficult or "burdensome" for tuna producers to adhere to than the NOAA regime.

312. In conclusion, there is no basis in the record for the Panel's legal conclusion even accepting all the Panel's factual findings, which the United States does for purposes of this appeal. In particular, there is no evidence that it is more costly for Mexican tuna product producers to comply with the challenged measure in this regard than it is for tuna product producers harvesting tuna outside the ETP large purse seine fishery, as was the case in *Dominican Republic – Import and Sale of Cigarettes*, *Thailand – Cigarettes (Philippines)*, and any of the other cases where a difference in "burden" meant that the challenged measure accorded less favorable treatment to the complainant's product.[548]

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[547] *See US – Tuna II (Mexico) (AB)*, para. 328 (concluding that the panel's analysis "was based, at least in part, on an improper comparison" in that the panel's comparison "fails to take into account that the alternative measure identified by Mexico is not the AIDCP regime, as such, but rather the coexistence of the AIDCP rules with the US measure").

[548] *See Dominican Republic – Import and Sale of Cigarettes (Panel)*, paras. 7.173, 7.184-185 (summarizing evidence on the record, showing that the "additional costs to importers from affixing the tax stamps in the territory of the Dominican Republic would be US$0.9 per thousand cigarettes, that is, 9.70 per cent of the c.i.f. average price, whereas ... the costs to a domestic producer in the Dominican Republic would be around $0.01 per thousand cigarettes, that is, 0.1 per cent of the c.i.f. average cost," and finding that there is "evidence that there are some steps performed by importers specifically associated with compliance with the tax stamp requirement, which are not necessary for domestic producers" and which cause importers to "assume additional costs in [their] production process"); *Thailand – Cigarettes (Philippines) (AB)*, paras. 137 (affirming the panel's finding that "the additional administrative requirements imposed only on resellers of imported cigarettes may affect business decisions of cigarette suppliers because 'an additional administrative burden can be linked to the operating costs of their business', which would, in turn, modify the conditions of competition to the detriment of imported cigarettes"); *see also China – Auto Parts (Panel)*, paras. 7.267 (summarizing the argument of the complainants that "[the] administrative procedures are *burdensome* and add costs to the assembly operations of automobile manufacturers," including "delay[ing] the launching of a new model in the Chinese market by two to three years" and requiring "an

313. In the end, the only thing that can really be said about the Panel's analysis is that the Panel concluded that the two regimes are "different." Indeed, the Panel may even believe that the AIDCP regime is "better" than the NOAA one. But "different" or "better" does not equate to more "burdensome," and, as discussed in *Korea – Various Measures on Beef*, a finding of "difference" is not a sufficient basis upon which to conclude that the conditions of competition have been modified to the detriment of the complainant's product.[549] The Panel erred in finding otherwise.

c. The Panel Erred by Not Applying the Correct Legal Analysis in Making Its Detrimental Impact Finding

314. As explained above, the Panel erred in finding a detrimental impact/burden without any basis for that conclusion. The Panel made its detrimental impact finding based solely on the Panel's finding that the NOAA regime is "less burdensome" than the AIDCP regime.[550] In the Panel's view, its finding that adherence to one regime is more "burdensome" than the other constitutes "sufficient grounds for finding that this aspect of the amended tuna measure has a detrimental impact," and no further analysis was needed.[551] This legal conclusion is also erroneous and must be reversed.

315. The Panel erred in considering that its finding of a difference in "burden" between the two regimes, *ipso facto*, establishes a *prima facie* case as to the first step of the Article 2.1 analysis, without undertaking an analysis of whether this difference in "burden" modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product.

316. As discussed in section III.G.3.b, a panel must examine whether any difference it has identified modifies the conditions of competition in the respondent's market to the detriment of the group of imported products.[552] Such an "analysis must take into consideration the totality of

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additional six months for a team of 10-15 highly skilled experts" and finding that "by subjecting imported auto parts to the administrative procedures not faced by the like domestic producers, which could cause substantial delay throughout the entire assembly operations from the launching of a new model to the verification by the Verification Centre, the measures modify the conditions of competition in China's market to the detriment of imported auto parts").

[549] *See Korea – Various Measures on Beef (AB)*, para. 135 ("A measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4.").

[550] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.370 ("In the Panel's view, these three differences show that the different tracking and verification requirements modify the conditions of competition. They clearly show that the system imposed outside the ETP large purse seine fishery is significantly less burdensome than the system imposed inside the ETP large purse seine fishery.").

[551] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.372 ("The fact that the system in place outside the ETP large purse seine fishery is less onerous than that inside *is sufficient grounds* for finding that this aspect of the amended tuna measure has a detrimental impact.") (emphasis added).

[552] *See, e.g., US – COOL (AB)*, para. 276 ("Rather, the Panel recognized that different treatment on the face of a measure does not necessarily constitute less favourable treatment, as indicated by the Appellate Body's findings in *Korea – Various Measures on Beef*. The Panel was correct, therefore, in going on to analyze whether, on the

the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market."[553] And while the Appellate Body has said that "'*any* adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure may potentially be relevant' to a panel's assessment of less favourable treatment under Article 2.1,"[554] the Appellate Body has cautioned panels that "Article 2.1 should not be read to mean that any distinction would *per se* accord 'less favourable treatment' within the meaning of that provision."[555] Rather, "where a technical regulation does not discriminate *de jure*, a panel must determine whether the evidence and arguments adduced by the complainant in a specific case nevertheless demonstrate that the operation of that measure, *in the relevant market*, has a *de facto* detrimental impact on the group of like imported products."[556] As discussed above, there are numerous examples where panels have conducted such an analysis, including *Korea – Various Measures on Beef*, *Mexico – Soft Drinks*, *US – COOL*, *Thailand – Cigarettes (Philippines)*, and the original panel's analysis in this very dispute.[557]

317. The Panel's failure to conduct such an analysis thus represented a significant departure from both the clear guidance of the Appellate Body and the actual practice of the original panel and other previous panels. In particular, the Panel provided no explanation of how any extra "burden" – however defined – impacts the conditions of competition for Mexican tuna product *in the U.S. market*. The Panel did not examine, for example, whether the difference in the tracking and verification regimes has negatively affected – or even has the potential to negatively affect – revenue generated from sales *in the U.S. market* of Mexican tuna product because, for example, the differing regimes make it comparatively more costly for Mexican producers to sell their product in the U.S. market, or create a disincentive for consumers or distributors to purchase Mexican products, or for any other reason.[558]

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specific facts of this case, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock.").

[553] *US – Clove Cigarettes (AB)*, para. 206.

[554] *US – Tuna II (Mexico) (AB)*, para. 225.

[555] *US – Tuna II (Mexico) (AB)*, para. 226; *see also Thailand – Cigarettes (Philippines) (AB)*, para. 128 ("Accordingly, the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products.").

[556] *US – COOL (AB)*, para. 286 (emphasis added); *see also US – Tuna II (Mexico) (AB)*, para. 215 ("Instead, in *US – Clove Cigarettes*, the Appellate Body held that a 'panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination *against the group of imported products*.'") (emphasis added).

[557] *See supra*, sec. III.G.3.b (discussing these reports).

[558] *See, e.g.*, *Korea – Various Measures on Beef (AB)*, para. 145 ("The central consequence of the dual retail system can only be reasonably construed, in our view, as the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef. In 1998, when this case began, eight years after the dual retail system was first prescribed, the

318. And the Panel erred in failing to conduct such an analysis. As the Appellate Body has made clear, the mere fact that requirements are different for like products does not "necessarily impl[y] a competitive advantage" for one product over the other.[559] Rather, the panel must "inquire into whether or not [those differences] modif[y] the conditions of competition in the [importing Member's] market to the disadvantage of the imported product."[560]

319. And, of course, surely a key reason the Panel never conducted a proper legal analysis here is that Mexico *never argued* that it was more "burdensome" to adhere to the AIDCP regime than the NOAA one, and, as such, never put forward *any* evidence as to the impact any additional burden has (or potentially has) on Mexican tuna product in the U.S. market. Again, as was the case with the Panel's analysis of the certification requirements, the Panel's flawed detrimental impact analysis and finding was a direct consequence of its decision to improperly make the case for complainant.[561]

d. No Evidence Exists on the Record to Support a Finding that the Tracking and Verification Requirements Modify the

consequent reduction of commercial opportunity was reflected in the much smaller number of specialized imported beef shops (approximately 5,000 shops) as compared with the number of retailers (approximately 45,000 shops) selling domestic beef."); *Mexico – Soft Drinks (Panel)*, para. 8.117 ("The challenged measures create an economic incentive for producers to use cane sugar as a sweetener in the production of soft drinks and syrups, instead of other non-cane sugar sweeteners such as beet sugar or HFCS. … Indeed, there is evidence that the imposition of these measures reverted the trend that was seemingly under way in the Mexican market towards the replacement of cane sugar as an industrial sweetener in the production of soft drinks and syrups, for non-cane sugar sweeteners, such as HFCS.").

[559] *Korea – Various Measures on Beef (AB)*, para. 141 ("[E]ven if we were to accept that the dual retail system 'encourages' the perception of consumers that imported and domestic beef are 'different,' we do not think it has been demonstrated that such encouragement *necessarily* implies a competitive advantage for domestic beef") (emphasis added).

[560] *Korea – Various Measures on Beef (AB)*, para. 144 ("However, that formal separation [of the selling of imported beef and domestic beef], in and of itself, *does not necessarily* compel the conclusion that the treatment thus accorded to imported beef is less favourable than the treatment accorded to domestic beef. To determine whether the treatment given to imported beef is less favourable than that given to domestic beef, *we must*, as earlier indicated, inquire into whether or not the Korean dual retail system for beef *modifies the conditions of competition in the Korean beef market* to the disadvantage of the imported product.") (emphasis added); *see also US – COOL (AB)*, para. 276 ("Rather, the Panel recognized that different treatment on the face of a measure does not necessarily constitute less favourable treatment, as indicated by the Appellate Body's findings in *Korea – Various Measures on Beef*. The Panel was correct, therefore, in going on to analyze whether, on the specific facts of this case, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock."); *Thailand – Cigarettes (Philippines) (AB)*, para. 130 ("Because, however, the examination of whether imported products are treated less favourably cannot rest on simple assertion, close scrutiny of the measure at issue will normally require further identification or elaboration of its implications for the conditions of competition in order properly to support a finding of less favourable treatment under Article III:4 of the GATT 1994.").

[561] *See supra*, secs. III.C, III.H.3.a.

Conditions of Competition in the U.S. Market to the Detriment of Mexican Tuna Product Under Any Other Legal Theory

320. For similar reasons to those discussed above in section III.G.3.c, the United States does not consider that the evidence on the record supports a finding that the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product under any other legal theory. In particular, the Panel was correct not to find in favor of the argument that Mexico did, in fact, make – namely, that the amended measure confers a "competitive advantage" on tuna product containing tuna caught outside the ETP large purse seine fishery over Mexican tuna product because "the absence of sufficient … record-keeping [and] verification … requirements for tuna [caught outside the ETP] … means that Mexican tuna products are losing competitive opportunities to tuna products that may be incorrectly labelled as dolphin-safe."[562]

321. As an initial matter, the United States notes again that Mexico takes the position that *none* of the tuna product that it exports to the United States is eligible for the dolphin safe label because it has been produced by setting on dolphins.[563] In this regard, Mexico did not argue, nor did the Panel ever explain, how any alleged difference in the accuracy of the label regarding *the other* eligibility criterion – *i.e.*, whether a dolphin has been killed or seriously injured – impacts the "group" of Mexican *non-dolphin safe* tuna product at all.[564]

322. In any event, as it did with regard to the certification requirements, the Panel declined to make a finding in favor of Mexico's argument. While the Panel stated that it saw "some merit" in Mexico's argument, it found that, "to reach a definite conclusion as to whether the system outside the ETP large purse seine fishery actually allows for incorrect labelling, the Panel would need to undertake a detailed technical analysis of the system's effective operation."[565]

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[562] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288 (quoting Mexico's Second Written 21.5 Submission, para. 117).

[563] Mexico's Response to Question 57, para. 155 ("Mexico has established that virtually its entire purse seine fleet fishes in the ETP by setting on dolphins"); *id.* para. 146 ("Mexico is not aware that any Mexican tuna products manufacturers have exported any products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure.").

[564] As the United States explained to the Panel, consumer demand for non-dolphin safe tuna product is very low. As such, even if the United States altered the measure in such a way as to reduce the supply of dolphin safe tuna product to the U.S. market, this would not increase demand for non-dolphin safe tuna product. *See* U.S. Second Written 21.5 Submission, para. 77 (citing, among other things, *US – Tuna II (Mexico) (Panel)*, para. 7.288 (finding that it is "undisputed that US consumers are sensitive to the dolphin-safe issue")); *see also* U.S. Second Written 21.5 Submission, para. 168 (citing 1990 Dolphin Safe Articles (Exh. US-98) (quoting the spokesman for Star-Kist tuna explaining that after the film showing setting on dolphins was released, "[Consumers] told us they don't want us to kill dolphins," and reporting how Stark-Kist's officials had changed the company's policy in response to consumer surveys); *US – Tuna II (Mexico) (Panel)*, para. 7.289 (finding that the processors' policy suggests that the producers think they would not be able to sell non-dolphin safe tuna products at a profitable price).

[565] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.372; *see also id.* para. 7.382 ("The system in place outside the ETP large purse seine fishery is less burdensome than that inside the ETP, and may contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery, *although we make no definitive finding*

323. The Panel's decision not to make a finding in Mexico's favor on this point was the correct one. Simply asserting, in the abstract, that a dolphin safe certification for tuna product containing tuna caught by vessels subject to the AIDCP tracking and verification regime "may" be more accurate than tuna product containing tuna caught outside the ETP large purse seine fishery does not establish a *prima facie* case as to the first step of the Article 2.1 analysis. Rather, what Mexico must establish is that the difference in the two regimes modifies the conditions of competition to the detriment of the "group" of Mexican tuna product compared to the "group" of tuna product produced outside the ETP large purse seine fishery.[566] This, Mexico failed to do. In particular, Mexico failed to submit sufficient evidence to establish a *prima facie* case that there is a difference in accuracy between the two groups of products as to whether a dolphin was killed or seriously injured in catching the tuna contained in tuna product labeled dolphin safe, such that the group of tuna product produced from fisheries other than the ETP large purse seine fishery has a "competitive advantage" in the U.S. tuna product market over the group of Mexican tuna product.[567]

324. First, the "accuracy" of a tracking and verification system depends in part on the accuracy of the initial determination of whether a dolphin was killed or seriously injured, and, as the United States explained above, the conditions that impact the accuracy of the certification as to whether a dolphin has been killed or seriously injured are very different for AIDCP-approved observers onboard Mexican large purse seine vessels, which set on dolphins, than for captains of vessels that do not set on dolphins.[568] As such, there is no reason to believe that, as applied, the group of (mythical) Mexican dolphin safe tuna product sold in the United States is being initially certified more accurately as to whether a dolphin was killed or seriously injured than the group

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on this specific point, because it would require consideration of other factors that may result in tuna being incorrectly labelled. We want to be clear that this conclusion does not entail the finding that the tracking and verification system for tuna caught by large purse seine vessels in the ETP is itself *infallible* or that tuna tracked under that system could *never* be incorrectly labelled as dolphin-safe.") (emphasis added and in original).

[566] *See, e.g., US – Tuna II (Mexico) (AB)*, para. 215 ("As the Appellate Body has previously explained, when assessing claims brought under Article 2.1 of the TBT Agreement, a panel should therefore seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of *the group* of imported products *vis-à-vis the group* of like domestic products or like products originating in any other country.") (emphasis added); *US – Clove Cigarettes (AB)*, para. 194 ("In sum, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, *the group* of products imported from the complaining Member and, on the other hand, the treatment accorded to *the group* of like domestic products.") (emphasis added).

[567] The Panel appeared not to have undertaken an analysis of the accuracy of the labels being produced *for either group of products*. *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382 (concluding that the Panel "make[s] no definitive finding on this specific point" because to do so "would require consideration of other factors that may result in tuna being incorrectly labelled," while also noting that that the Panel does not consider the AIDCP regime to be "infallible" or that "tuna tracked under that system could never be incorrectly labelled as dolphin-safe.") (emphasis deleted).

[568] *See supra*, sec. III.G.3.c (noting in particular that the interaction with dolphins is exponentially greater in the ETP large purse seine fishery than any other fishery, *e.g.*, 31.3 million of dolphins chased with 18.5 million captured in 52,130 dolphin sets in the years 2009-2013) (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127)).

of tuna product sold in the United States that is produced from other fisheries. In fact, the evidence suggests that *exactly the opposite* is true.[569]

325. Second, even if the initial designations were equally accurate, the different conditions of the ETP large purse seine fishery compared to other fisheries nevertheless could render the AIDCP tracking and verification regime, overall, less accurate than the NOAA regime. As the United States demonstrated, the rate of dolphin mortality from setting on dolphins in the ETP large purse seine fishery, on a per set basis, is, even under the unique requirements of the AIDCP, far higher than the dolphin mortality rate in any other fishery on the record.[570] Consequently, on a per vessel or per trip basis, there is *much more* tuna in the ETP large purse seine fishery than in other fisheries that was caught in a gear deployment where a dolphin was killed or seriously injured and that, therefore, must be segregated from tuna caught without a dolphin mortality or serious injury. Thus, even if the Panel considered that the AIDCP regime is "better" than the NOAA one because, by design, it will allegedly produce more accurate results, the AIDCP regime, as applied, may, in fact, produce far less accurate results than the NOAA regime, given the unique conditions of the ETP large purse seine fishery.[571]

326. Accordingly, there is no evidence to support a finding that any difference between the two regimes "necessarily implies a competitive advantage" in the U.S. market for tuna product produced outside the ETP large purse seine fishery over Mexican tuna product,[572] and the Panel was correct to decline to make a finding in favor of Mexico in this regard.

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[569] *See supra*, sec. III.G.3.c.

[570] *See* U.S. Response to Panel Question No. 19, paras. 116-119; U.S. Response to Panel Question No. 21, paras.138-142; *see also* Tables Summarizing the Fishery-by-Fishery Evidence on the Record, at 1-2 (Exh. US-127) (showing that: (1) from 2009-2013, the dolphin mortality rate in the ETP large purse seine fishery was 96.96 dolphins per 1,000 dolphin sets and 45.44 dolphins per 1,000 sets overall; (2) from 2007-2010, the dolphin mortality rate in the WCPFC purse seine fishery was 14.35 dolphins per 1,000 sets (27.23 from 2007-2009 and 2.64 in 2010); (3) in the Eastern tropical Atlantic purse seine fishery from 2003-2009, dolphin mortality was zero dolphins per 1,000 sets; (4) in the Indian Ocean tropical purse seine fishery from 2003-2009, dolphin mortality was zero dolphins per 1,000 sets; (5) in the Hawaii deep-set longline fishery from 2009-2013, the dolphin mortality rate was .33 dolphins per 1,000 sets; (6) in the American Samoa longline fishery from 2009-2013, the dolphin mortality rate was .55 dolphins per 1,000 sets; (7) in the Atlantic HMS pelagic longline fishery from 2009-2013, the dolphin mortality rate was 1.28 dolphins per 1,000 sets; and (8) in certain WCPFC longline fisheries from 2004-2012, dolphin mortality was zero or minimal).

[571] *See* Tables Summarizing the Fishery-by-Fishery Evidence on the Record, at 1-2 (Exh. US-127). Indeed, the frequency with which vessels set on dolphins would have to directly correlate with the accuracy of that tuna industry's tracking and verification system in order to produce results as accurate overall as other tuna industries, simply because setting on dolphins causes so many *more* dolphin mortalities and serious injuries than other fishing methods, and, consequently, produces so much more tuna that needs to be segregated.

[572] *Korea – Various Measures on Beef (AB)*, paras. 141, 144 (quoted above).

e. The Panel Erred in Finding that a "Genuine Relationship" Exists Between the Amended Measure and the Detrimental Impact

327. As discussed above, the Panel further found that the amended measure has a "genuine relationship" with the detrimental impact resulting from the differences between the AIDCP and NOAA tracking and verification regimes, noting that its analysis with regard to the certification requirements "applies with equal force in respect of the different tracking and verification requirements."[573] Thus, the Panel found the detrimental impact is attributable to the amended measure because "the regulatory distinction about which Mexico complains[] is the distinction made by the amended tuna measure itself in imposing different tracking and verification requirements on different tuna as a condition of accessing the United States' dolphin-safe label."[574]

328. As was the case with the Panel's analysis of the certification requirements,[575] the Panel's finding here is in error on two different bases.

329. First, the Panel erred by not taking into account the fact that Mexican tuna product *is not eligible for the dolphin safe label* (a distinction that the Panel found to be WTO-consistent). Again, as discussed above, because Mexico's tuna fleet is comprised "virtually" entirely of large purse seine vessels setting on dolphins in the ETP,[576] Mexico does not export "*any* products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure."[577] As such, the Form 370 that accompanies Mexican tuna product for sale in the United States need not include the relevant AIDCP TTF number(s).[578] In other words, the amended measure neither "incorporate[s]" the AIDCP tracking and verification regime, nor "creates a regulatory distinction" with regard to tracking and verification requirements with respect to Mexican tuna product because it is not eligible for the dolphin safe label.[579]

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[573] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294.

[574] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294.

[575] *See supra*, sec. III.G.3.d.

[576] Mexico's Response to Question 57, para. 155 (stating that "Mexico has established that *virtually* its entire purse seine fleet fishes in the ETP by setting on dolphins").

[577] Mexico's Response to Question 57, para. 146.

[578] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.142-143 ("[T]he Panel recalls that the two distinctions at issue in this section of our Report [*i.e.*, certification requirements and tracking and verification requirements] are relevant *only to tuna eligible and intended to receive the dolphin-safe label*. The amended tuna measure does not prohibit non dolphin-safe tuna from being sold in the United States, but only controls access to the US dolphin-safe label. Accordingly, tuna that is either ineligible to access this label (i.e. tuna caught by setting on dolphins) or not intended to be sold under the dolphin-safe label *is not affected by these regulatory distinctions*.") (emphasis added and omitted from original).

[579] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294. The United States considers that the Panel erred as a matter of law with respect to this conclusion. To the extent that this issue could be viewed as a mixed question of fact and law, the United States also considers that the Panel acted inconsistently with Article 11 of the

330. Second, even if one were to assume that Mexican tuna product were potentially eligible for the label, the Panel still erred in finding that a "genuine relationship" exists between the detrimental impact and the amended measure. In particular, the Panel failed to properly take into account that the regulatory distinction contained within 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.

331. As was the case with regard to the certification requirements, the requirement that tuna product produced from the ETP large purse seine fishery that is labeled dolphin safe label be accompanied by the associated TTF number does not add to Mexico's "burden," nor does it increase any disparity in the "burden" of producing tuna product from different fisheries. Again, 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*. This fact is fatal to the Panel's analysis as it means that this aspect of the amended measure does not, in fact, "induce[] or encourage[]" Mexican industry to adhere to the AIDCP tracking and verification requirements.[580] In other words, it simply cannot be said here that *had it not been for the amended measure*, the market participants would act differently than they do, as the Appellate Body found was the case in *US – COOL*.[581]

f. Conclusion

332. Thus, as discussed above, the Panel: 1) erred in its allocation of the burden of proof; 2) erred in coming to a finding that is legally unsupportable based on the evidence on the record; 3) erred by not applying the correct legal analysis in coming to this finding; and 4) erred in finding that a "genuine relationship" exists between the tracking and verification requirements and the detrimental impact that the Panel found to exist. In light of these appeals, the United States respectfully requests the Appellate Body to reverse the Panel's ultimate finding that the amended measure is inconsistent with Article 2.1 of the TBT Agreement because the 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 to like products originating in any other country."[582] As discussed below, the United States considers that, for identical reasons, the

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DSU in concluding that the tracking and verification requirements apply to ***all*** tuna and tuna product. *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.143.

[580] *US – COOL (AB)*, para. 291 ("[W]here private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not 'independent' of that measure."); *see also id.* para. 288 (noting that in *Korea – Various Measures on Beef (AB)*, para. 145, the Appellate Body had held that "the adoption of [the challenged] measure requiring … had the 'direct practical effect,' in that market, of denying competitive opportunities to imports"); *id.* n.530 (citing for the same proposition *China – Auto Parts (AB)*, paras. 195-196 and *US – FSC (Article 21.5 – EC) (AB)*, para. 212).

[581] *US – COOL (AB)*, para. 291 ("In this case, the Panel expressly found that '[i]t is the result of the COOL measure … that in the circumstances of the US market, market participants, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported livestock, opted predominantly for the former.' *Had it not been for the COOL measure*, the Panel reasoned, '*market participants would not have opted this way*.'") (quoting *US – COOL (Panel)*, para. 7.403) (emphasis added).

[582] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).

Panel's findings that the tracking and verification requirements are inconsistent with Articles I:1 and III:4 of the GATT 1994 are in error and requests reversal of those findings as well.[583]

4. The Panel Erred in Finding that the Detrimental Impact Does Not Stem Exclusively from a Legitimate Regulatory Distinction

333. As noted above, the Panel concluded – apparently without analysis – that "Mexico has shown *prima facie* that there is no rational connection between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure," and, as such, that "Mexico has shown, *prima facie*, that the detrimental treatment does not stem exclusively from a legitimate regulatory distinction."[584]

334. The United States considers that the Panel's finding is in error. In particular, the Panel erred by applying the incorrect legal standard. The question for the second step of the Article 2.1 analysis is not whether a "rational connection [exists] between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure," but whether the regulatory distinctions that account for that 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."[585] And while the objectives of the measure may be relevant to that analysis in this dispute, they 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 ocean."[586] As such, the Panel erred in interpreting the second step of the Article 2.1 analysis

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[583] *See infra*, secs. IV, V.

[584] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.392 ("With respect to the second tier of Article 2.1 of the TBT Agreement, the Panel finds that Mexico has shown *prima facie* that there is no rational connection between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure. We accept, *prima facie*, Mexico's argument that there is no obvious connection between the imposition of a lighter burden on tuna caught outside the ETP large purse seine fishery and the goals of the amended tuna measure. Accordingly, Mexico has shown, *prima facie*, that the detrimental treatment does not stem exclusively from a legitimate regulatory distinction."); *see also id.* para. 7.400. Because the Panel's second step analysis is focused on the same "burden" that the Panel identified in the first step, the U.S. objection regarding the allocation of burden of proof applies to this analysis as well. *See supra*, sec. III.H.3.a.

[585] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92 ("Thus, if a panel finds that a technical regulation has a *de facto* detrimental impact on competitive opportunities for like imported products, the focus of the inquiry shifts to whether such detrimental impact stems exclusively from legitimate regulatory distinctions. This 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 be considered 'legitimate' for the purposes of Article 2.1."); *see also US – Tuna II (Mexico) (AB)*, n.461 ("The Appellate Body also stated that a panel must examine, in particular, whether the technical regulation is even-handed."); *US – COOL (AB)*, para. 271 ("[W]here a regulatory distinction is not designed and applied in an even-handed manner . . . the detrimental impact will reflect discrimination prohibited under Article 2.1.").

[586] *US – Tuna II (Mexico) (AB)*, para. 297.

as requiring an assessment of whether the differences between the AIDCP and NOAA regimes are "justifiable on the basis of the amended tuna measure's own objectives."[587]

335. If the Appellate Body were to rule in favor of the United States on this appeal, the Appellate Body 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, in turn, that the Panel's ultimate finding that the 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 to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement" would need to be reversed.[588]

336. There are, in fact, two separate bases for why any detrimental impact caused by the different tracking and verification requirements stems exclusively from a legitimate regulatory distinction:

1) The tracking and verification requirements are even-handed because they are "calibrated" to the risks to dolphins from different fishing methods in different fisheries.

2) The tracking and verification requirements are even-handed in that they can be explained by another legitimate, non-discriminatory reason – they reflect the fact that the parties to the AIDCP have consented to impose a unique observer program on their own tuna industries.

a. The Tracking and Verification Requirements Are Even-Handed Because They Are "Calibrated" to the Risks to Dolphins from Different Fishing Methods in Different Fisheries

337. As was the case with the certification requirements,[589] the tracking and verification requirements are even-handed because they are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean, and the Panel erred in finding otherwise.[590]

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[587] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, 7.397 ("This is because it is not responsive to Mexico's key allegation, namely, that the different tracking and verification requirements are not justifiable on the basis of the amended tuna measure's own objectives."); *see also id.* para 7.559 ("Moreover, the Panel's findings that the different certification and tracking and verification requirements did not stem exclusively from a legitimate regulatory distinction were *all* based on the conclusion that those aspects are arbitrarily discriminatory because they are not reconcilable with the goal of the amended tuna measure.") (emphasis added).

[588] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).

[589] *See supra*, sec. III.G.4.a.i.

[590] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.392, 7.400-401.

338. As discussed above, the Panel did, in fact, conclude that the ETP large purse seine fishery has a different "risk profile" for dolphin harm than other fisheries.[591] In particular, the majority found the ETP large purse seine fishery to be the only fishery where dolphins are "systematically" chased and captured (whereas with other fishing methods in other fisheries, dolphins "are not set on intentionally, and interaction is only accidental").[592]

339. In light of the fact that the risks to dolphins from the "systematic" chasing and encirclement by large purse seine vessels in the ETP are significantly more serious than those posed by other fishing methods in other fisheries,[593] 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. Indeed, this is the very reason that the AIDCP exists *in the first place*. A subset of the IATTC membership consented to impose (and, in part, participate in) a tracking and verification regime that is *different* from any other tracking and verification regime *because* the risk to dolphins in this fishery *is different*.

340. Of course, the fact that these different fisheries present different risk profiles for dolphins was at the very heart of the Appellate Body's analysis in the original proceeding. Indeed, the *central question* in that analysis was whether the relevant regulatory distinction was "even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean."[594]

341. And in this regard, 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 dramatically different. This, of course, is the very point the minority made with regard to the certification requirements. There, the minority

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[591] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. para. 7.398 ("The different risk profiles of different fisheries may, as we found above, explain regulatory differences concerning the eligibility criteria for fishing methods, as well as the need for an independent observer to monitor and certify during and immediately following the fishing activity itself"); *id.* paras. 7.240-242 (maj. op.); *id.* para. 7.278 (min. op.) ("[T]he United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.").

[592] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241-242 (maj. op.) (rejecting Mexico's argument "that the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries," and finding the U.S. rebuttal to be "compelling" on this point).

[593] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (maj. op.) (concluding that the evidence proves that "although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically,' in the words of the original Panel."); *id.* para. 7.278 (min. op.) ("[T]he United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.").

[594] *US – Tuna II (Mexico) (AB)*, para. 232 ("Our analysis will scrutinize, in particular, whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the US measure 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."); *see also id.* paras. 297-298.

correctly reasoned that it is entirely even-handed for a Member to "accept a proportionately larger margin of error" where "the probability of dolphin mortality or serious injury is smaller," but "tolerate only a smaller margin of error" "where the risks are higher," provided, of course, that the tolerated margin of error is "'calibrated' to the risks faced by dolphins in a particular fishery."[595] And, of course, the Panel made no findings that indicated that any (perceived) difference in the "margin of error" being produced by the AIDCP and NOAA regimes is not, in fact, "calibrated" to the differences in risk profiles between the fisheries.

342. The fact is that any difference between the AIDCP and NOAA regimes is "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. Indeed, it is not as if NOAA has no tracking and verification regime at all. NOAA, in fact, has an extensive regime, which includes (1) the requirement that dolphin safe tuna be segregated from non-dolphin safe tuna from catch through unloading; (2) the requirement that all imported products be accompanied by a NOAA Form 370 (including vessel and trip information and the dolphin safe certifications, if appropriate); (3) the requirement that all U.S. processors submit monthly reports containing detailed information about all tuna received; (4) the requirement that all importers, trans-shippers, processors, etc. maintain records going back two years, including NOAA Form 370s and the associated certifications for all tuna received; (5) dockside inspections; (6) audits of U.S. processors; (7) retail spot checks covering U.S. and foreign processors; and (8) inspections on the high seas or in U.S. waters.[596] Moreover, even the Panel recognized that there is no reason to believe that the AIDCP regime, whatever advantages it may have, "is itself *infallible* or that tuna tracked under that system could *never* be incorrectly labelled as dolphin-safe."[597] These points, when viewed in the context that the ETP large purse seine fishery produces substantially more tuna product that is produced where a dolphin has been killed or seriously injured than other fisheries – even with the unique dolphin protection requirements in place – establishes that having different tracking and verification requirements are, in fact, calibrated to the risk.[598]

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[595] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.) ("Put simply, my opinion is that where the probability of dolphin mortality or serious injury is smaller – because, for instance, the degree of tuna-dolphin association is less likely – the United States may accept a proportionately larger margin of error. Conversely, where the risks are higher, it may be appropriate to tolerate only a smaller margin of error. Provided that the tolerated margin of error is, to use a term from the original proceedings, 'calibrated' to the risks faced by dolphins in a particular fishery, the mere fact that the detection mechanisms inside the ETP large purse seine fishery and outside of it are not the same does not deprive the amended tuna measure of even-handedness. Indeed, understood in this sense, 'calibration' of the acceptable margin of error to the degree of risk in a particular fishery seems to me to be at the very heart of the even-handedness analysis in this case.").

[596] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.50-52, 7.303, 7. 304, 7.307, 7.312; *see also* U.S. Response to Panel Question No. 38, paras. 198-204; U.S. Response to Panel Questions 43-44, paras. 229-248.

[597] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382 ("We want to be clear that this conclusion does not entail the finding that the tracking and verification system for tuna caught by large purse seine vessels in the ETP is itself *infallible* or that tuna tracked under that system could *never* be incorrectly labelled as dolphin-safe.") (emphasis in original).

[598] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 2 (Exh. US-127) (noting that the dolphin mortality rate in the ETP large purse seine fishery was 96.96 dolphins per 1,000 dolphin sets in the years 2009-2013 – far more than other fisheries, such as the Hawaii Deep Set Longline (0.33), American Samoa

343. However, the Panel disagreed that the "calibration" analysis is equally relevant to the certification requirements and the tracking and verification requirements. In particular, the Panel considered that *the timing* of when the tracking and verification requirements occurs means that the "calibration" analysis is not legally relevant to whether the regulatory distinction is even-handed.[599] In this, the Panel erred.

344. 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 not dolphin safe or in the subsequent tracking of the tuna). 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.[600] Indeed, this significant difference in dolphin mortality in the ETP large purse seine fishery (compared to other fisheries) provided the parties to the AIDCP the basis for consenting to create (and maintain) the unique requirements that are in place in the ETP large purse seine fishery, as discussed in the subsequent section.

345. And, of course, the *AIDCP* requirements also do not distinguish based on timing, *but on harm*. That is, while the AIDCP *permits* ETP large purse seine vessels to set on dolphins, the AIDCP requires such vessels to carry observers and to adhere to tracking and verification requirements. But the same is not true for ETP *small* purse seine vessels. Because the AIDCP *prohibits* such vessels from setting on dolphins,[601] these vessels do not cause the same level of harm,[602] and the AIDCP does not require these vessels to carry observers *or adhere to the tracking and verification requirements*.[603]

Longline (0.55), or Atlantic HMS Pelagic Longline (1.28) fishery); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) (relying on Exhibit US-127 in concluding that "In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery"). Historically, of course, the number of dolphins estimated to be killed in the ETP large purse seine fishery is the highest known number for any fishery. *See supra*, sec. II.B.

[599] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398.

[600] *See supra*, sec. III.H.3.d.

[601] *See* AIDCP, Annex VIII(6) (Exh. MEX-30).

[602] *See, e.g.*, U.S. Response to Question 19, para. 113. Table 1 (noting that non-dolphin sets account *for less than one percent* of observed dolphin mortalities in ETP large purse seine fishery in any given year despite the fact that such sets constitute *54 percent of all sets* by large purse seine vessels in the ETP).

[603] *See* AIDCP, at Annex II, Annex IX (Exh. MEX-30); AIDCP, Tracking and Verification Resolution, art. 3; *id.* arts. 4-5 (Exh. MEX-36).

Finally, and as explained above in section III.G.4.a.i., the Panel's effort to declare the calibration analysis legally irrelevant to whether the tracking and verification requirements are even-handed is inconsistent with the Panel's *own analysis* of the scope of the proceeding, where the Panel interpreted the Appellate Body's report as applying the calibration analysis to all three of the aspects of the amended measure that Mexico challenges in this proceeding – the eligibility criteria, the certification requirements, and the tracking and verification requirements. *See supra*, sec. III.G.4.a.i (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.36-37). The Panel cannot consider, on the one hand, that these three aspects of the amended measure are inextricably *intertwined* with one

346. Thus, under the correct legal analysis, the tracking and verification requirements of the amended measure are consistent with Article 2.1 of the TBT Agreement because they are calibrated to the different risks to dolphins arising in different fisheries.[604] The Panel erred in finding otherwise, and the United States requests the Appellate Body to reverse that finding.

b. 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

347. Even if the calibration analysis is not the entirety of the even-handed analysis for purposes of this dispute, as discussed above, there exists an additional legitimate, non-discriminatory basis for the difference between the two regimes – *the difference reflects the difference that already exists in the world*.[605] That is to say, because the amended measure merely reflects the fact that the AIDCP parties have consented to tracking and verification requirements that others have not, that does not mean any such differences constitute "arbitrary discrimination."

348. As discussed above, the amended measure "incorporates" – to use the Panel's words – the AIDCP tracking and verification regime by requiring that the AIDCP TTF number be listed with the Form 370 for tuna product that is otherwise eligible for the dolphin safe label.[606] In doing so, the amended measure appropriately recognizes the utility of the AIDCP regime for the purposes of the amended measure.[607] Yet the essence of the Panel's analysis is that by so recognizing the AIDCP regime, the covered agreements *require* the United States to impose the *same* regime on all tuna product, even though no other RFMO has created a parallel regime.

349. In this regard, the United States observes that, while the Panel criticized the NOAA regime for not having the same depth, accuracy, and degree of government oversight as the AIDCP regime, there is, in fact, no reason to believe that requirements unilaterally imposed by a

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another for purposes of determining the *content* of Appellate Body Article 2.1 analysis, but, on the other hand, consider that these same aspects are entirely *isolated* from one another in determining whether the Appellate Body's *analysis applies equally* to them.

[604] *See US – Tuna II (Mexico) (AB)*, para. 297.

[605] *See supra*, sec. III.G.4.a.ii.

[606] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.299 ("The United States concedes that these AIDCP requirements are incorporated, indirectly at least, in the tuna measure. It explains that Form 370 'requires that tuna harvested in the ETP by large purse seine vessels be accompanied by documentation from the appropriate IDCP-member country certifying that there was an IDCP observer on the vessel at all times and listing the numbers for the associated TTF(s).'") (quoting U.S. First Written 21.5 Submission, paras. 44-46); *see also id.* para. 7.355 (noting that "the record-keeping requirements [are] embedded in the AIDCP and incorporated into the amended tuna measure").

[607] As discussed above, this requirement does not apply to Mexico's exports of non-dolphin safe tuna product to the United States. *See supra*, sec. III.H.3.d.

single Member *will ever be precisely the same as* the requirements that many Members have consented to in an international agreement.

350. Thus, for example, while the Panel apparently considered that the differences in oversight by national and regional authorities is a particularly critical issue that goes to the heart of the inconsistency with Article 2.1,[608] it is hardly "arbitrary" that domestic and international instruments may differ in this regard. In the case of an international agreement, the differing national authorities (and participating regional ones) have *consented* to oversee the regulatory program. In the case of the unilateral domestic measure, the importing Member is *requiring* the exporting Member (or the applicable RFMO) to verify that the shipment meets the municipal standards of the importing Member.

351. Of course, there are many municipal measures that require exporting Members to verify to the importing Member's standards, and these measures are either consistent or inconsistent with the covered agreements, depending on the particular facts. But the premise of the Panel's analysis is entirely different than those scenarios. Here, the Panel has concluded that the United States *must* require its trading partners (and applicable RFMOs) to track and verify to U.S. standards the tuna product produced from the fisheries they regulate *in order* for the United States to be in compliance with its WTO obligations. Notably, under the Panel's approach, the United States must require trading partners to track and verify *regardless* of the relative harm to dolphins in any given fishery.[609]

352. In this regard, the United States argued before the Panel that Mexico's argument was fundamentally in error. In essence, Mexico's argument was that, because the United States cannot relieve Mexico of its own international legal commitments, the United States must adjust the requirements of NOAA's tracking and verification regime to meet the requirements of the AIDCP regime in order to assure that its tracking and verification requirements are even-handed. Under Mexico's approach, the AIDCP requirements form the "floor" below which the United States may not go in applying the amended measure to the U.S. industry and the industries of all of its trading partners. But that is certainly not true – the United States sets the level it considers "appropriate," and Mexico's international legal obligations do not set that level.[610]

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[608] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.364, 7.367 ("The issue of government oversight and control is in fact broader than identified in the previous paragraphs, and it goes to the very design of the different tracking and verification systems.").

[609] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.392 (concluding that because "there is no rational connection between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure" "Mexico has shown, *prima facie*, that the detrimental treatment does not stem exclusively from a legitimate regulatory distinction"); *see also id.* para. 7.185 (summarizing Mexico's argument, and stating, "[A]s such, the amended tuna measure should require the same level of accuracy in reporting regardless of *whether one or 1,000 dolphins are killed*") (emphasis added); Mexico's Response to Question 11, para. 50 ("It is not a question of the relative number of dolphins that are killed or seriously injured during fishing sets or gear deployments. It is simply a question of whether or not such adverse effects merely exist.").

[610] TBT Agreement, sixth preambular recital. In this regard, the Panel misunderstood the U.S. objection to Mexico's allegation that the amended measure was not even-handed. The United States did not ground its explanation as to why it imposes different tracking and verification regimes on *U.S.* international obligations. *See*

353. The Panel thus erred by interpreting the U.S. argument as providing "a licence" to discriminate against a particular trading partner that has consented to unique requirements pursuant to an international agreement.[611] Rather, the reference to the sixth recital of the preamble to the TBT Agreement provides context for whether, in fact, there exists an additional legitimate, non-discriminatory basis for the differences between the NOAA and AIDCP tracking and verification regimes such that any detrimental impact stemming from those differences can be said to be even-handed and consistent with Article 2.1. For the reasons explained above, the Panel erred in finding that the tracking and verification requirements are not even-handed, and prove the requirements inconsistent with Article 2.1.

5. Conclusion on the Tracking and Verification Requirements

354. Thus, as discussed above, the Panel erred in applying the incorrect legal analysis in finding that any detrimental impact that does result from the tracking and verification requirements does not stem exclusively from a legitimate regulatory distinction. Indeed, the tracking and verification requirements are even-handed because: 1) they are "calibrated" to the risks to dolphins from different fishing methods in different fisheries; and 2) they reflect the fact that the parties to the AIDCP have consented to impose a unique observer program on their own tuna industries. Accordingly, the United States respectfully requests the Appellate Body to reverse the Panel's ultimate finding that the tracking and verification requirements are inconsistent with Article 2.1 of the TBT Agreement.[612]

I. Conclusion on Article 2.1 of the TBT Agreement

355. For 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.[613]

IV. THE PANEL ERRED IN FINDING THAT THE AMENDED DOLPHIN SAFE LABELING MEASURE IS INCONSISTENT WITH ARTICLE I:1 OF THE GATT 1994

356. Article I:1 of the GATT 1994 provides that any "advantage, favour, privilege, or immunity" accorded to the products of any Member shall be "accorded immediately and unconditionally" to the like products of all Members. The Panel found that the legal standard of Article I:1 was the same as the first element of the standard under Article 2.1 of the TBT

US – Tuna II (Article 21.5 – Mexico) (Panel), para. 7.397 ("[T]he fact that the United States may or may not have international obligations *vis-à-vis* Mexico or any other Member is, in our view, not relevant."). Rather, the reason that Mexico is subject to AIDCP tracking and verification requirements is because of *Mexico's* international obligations, and the United States disputed before the Panel (and, indeed, continues to dispute) that the fact that one trading partner has agreed to a particular set of requirements that may be judged as more stringent does not require the United States to impose such requirements on its tuna product and the tuna product of all other trading partners.

[611] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.399.

[612] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).

[613] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b)-(c).

Agreement.[614] Consequently, the Panel found that it was appropriate to rely on its findings under Article 2.1 in its analysis under Article I:1 of the GATT 1994.[615] Indeed, the Panel relied entirely on its findings under TBT Article 2.1 to find that the eligibility criteria,[616] the certification requirements,[617] and the tracking and verification requirements[618] were inconsistent with Article I:1.

357. Thus, for all the reasons discussed in sections 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 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 Article I:1 of the GATT 1994.[619]

V. THE PANEL ERRED IN FINDING THAT THE AMENDED DOLPHIN SAFE LABELING MEASURE IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

358. Article III:4 of the GATT 1994 provides that the products of any Member "shall be accorded treatment not less favourable than that accorded to like products of national origin" in respect of all laws, regulations, and requirements affecting the products' internal sale. The Panel found that the "less favourable treatment" test of Article III:4 was "very similar" to the first element of the test of Article 2.1 of the TBT Agreement,[620] and relied entirely on its findings

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[614] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.432 ("As the Panel understands it ... the key difference between these two provisions is that, whereas Article I:1 requires *only* an analysis of whether the conditions attached to an advantage detrimentally impact the competitive opportunities of imported products in the relevant market, Article 2.1 of the TBT Agreement requires and *additional* consideration of whether any detrimental impact nevertheless stems exclusively from a legitimate regulatory distinction.").

[615] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.433.

[616] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.443-447 (recalling the Appellate Body's finding under Article 2.1 that "lack of access to the dolphin-safe label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market" and its own finding under Article 2.1 that this detrimental impact persisted).

[617] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.454-456 (recalling its findings under Article 2.1 and stating: "Bearing in mind the significant expenditure associated with observer certification, it seems clear to us that the observer certification requirement represents an additional 'condition' that detrimentally modifies the competitive opportunities of like tuna and tuna products"). The Panel also referred to its finding that the absence of observer certification outside the ETP large purse seine fishery "may also make it easier for tuna caught in those fisheries to be incorrectly labeled" but did not rule "definitively" on that point. *Id.* para. 7.455.

[618] *See US – Tuna II (Article 21.5 – Mexico)*, paras. 7.462-464 (citing to the Panel's findings under Article 2.1 and stating: "In the Panel's view, these factual findings lead to the conclusion that the amended tuna measure is inconsistent with Article I:1 of the GATT 1994."). The Panel also stated that it "saw merit" in Mexico's argument that the system outside the ETP large purse seine fishery "may contribute to inaccurate labeling of tuna," but did not make a "definitive finding" on the point. *Id.*

[619] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.3(b), 8.3(c).

[620] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.481.

under Article 2.1 to find that the eligibility criteria,[621] the certification requirements,[622] and the tracking and verification requirements[623] were inconsistent with Article III:4 of the GATT 1994.

359. Thus, for all the reasons discussed in sections 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 finding that the certification requirements and the tracking and verification requirements are inconsistent with Article III:4 of the GATT 1994.[624]

VI. CONDITIONAL APPEAL: THE PANEL ERRED IN FINDING THAT THE AMENDED DOLPHIN SAFE LABELING MEASURE IS NOT JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

360. Even aside from the fact that the Panel erred in finding a breach of Article I:1 and Article III:4 of the GATT 1994, the Panel erred in its findings with respect to the chapeau of Article XX of the GATT 1994.

361. Assessing whether a measure found to be inconsistent with a provision of the GATT 1994 is nonetheless justified under Article XX requires a two-tiered analysis in which a measure must first be found to be provisionally justified under one of the Article XX subparagraphs and then analyzed under the Article XX chapeau.[625] The Panel correctly found that all three challenged elements of the amended measure were provisionally justified under Article XX(g),[626] and also correctly found that the eligibility criteria met the requirements of the chapeau.[627] The Panel erred, however, in finding that the other two challenged aspects of the measure – the certification requirements and the tracking and verification requirements – did not meet the requirements of the chapeau.

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[621] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.498-499 ("applying [its] finding" under Article 2.1 "that the eligibility criteria modify the conditions of competition in the US tuna market to the detriment of Mexican tuna and tuna products because they deprive certain tuna products of access to the dolphin-safe label" to find that the eligibility criteria inconsistent with Article III:4).

[622] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.500-501 ("applying [its] finding" under Article 2.1 to find that the certification requirements are inconsistent with Article III:4).

[623] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.502-503 ("applying [its] finding" under Article 2.1 to find that the tracking and verification requirements are inconsistent with Article III:4). The Panel noted its previous statement that the different requirements "may also contribute to inaccurate labeling," but stated that it did not need to make a "final determination" on this issue, as the "mere fact that the burden imposed outside the ETP large purse seine fishery is lesser than that imposed inside is sufficient to justify a finding of violation." *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.502, n.711.

[624] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.3(b), 8.3(c).

[625] *See EC – Seal Products (AB)*, para. 5.169; *US – Gasoline (AB)*, p. 22; *US – Shrimp (AB)*, paras. 119-120.

[626] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.541.

[627] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584.

362. As discussed below, the Panel erred in finding that the certification requirements and the tracking and verification requirements do not meet the requirements of the Article XX chapeau. First, in section V1.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. Second, in section V1.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 that this discrimination was "arbitrary or unjustifiable."

363. For the reasons discussed below, the United States respectfully requests the Appellate Body to reverse the Panel's findings that the certification requirements and the 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."[628] The United States further respectfully requests the Appellate Body to complete the analysis and find that these two sets of requirements meet the requirements of the chapeau.

A. The Panel's Analysis

1. Whether the Amended Measure Satisfies the Standard of Article XX(g)

364. The Panel began its analysis by noting that the "parties agree that it is the requirements that are found to cause the inconsistency with a particular GATT provision that need to be justified under the subparagraphs of Article XX."[629] The Panel then explained that, in order to demonstrate that a measure is justified under Article XX(g), the United States, as respondent, must prove that the measure "(i) relates to the conservation of (ii) an exhaustible natural resource, and (iii) is made effective in conjunction with restrictions on domestic production or consumption."[630]

365. Under the first element, the Panel relied on the finding of the original panel, affirmed by the Appellate Body, to conclude that "contribut[ing] to the protection of dolphins" is "one of the goals of the US dolphin-safe labeling regime."[631] In the Panel's view, "the preservation of individual dolphin lives is . . . an act of conservation," and there is an "essential and inextricable

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[628] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).

[629] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 5.510 and n.719 (citing *EC – Seal Products (AB)*, para. 5.185, stating: "In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994").

[630] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.511.

[631] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.524-525 (citing *US – Tuna II (Mexico) (AB)*, para. 242, which stated: "The Panel found that the US measure pursues the following objectives: . . . (ii) 'contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.'").

link between the protection of dolphins on an individual scale and the 'replenishment of [an] endangered species.'"[632]

366. Recognizing that the Appellate Body has previously found that to meet the "relating to" standard, there must be a "substantial relationship," *i.e.*, a "close and genuine relationship of ends and means" between the challenged measure and the conservation objective,[633] the Panel noted that the original panel had found that the U.S. dolphin safe labeling measure was "capable of protecting dolphins by ensuring that the US market is not used to encourage fishing practices that may kill or seriously injure dolphins,"[634] and the Appellate Body had accepted that the measure "related to the conservation of dolphins."[635] With respect to the eligibility criteria, the Panel noted the Appellate Body's finding that the original measure "'fully addresse[d]' the risks caused by the 'particularly' harmful practice of setting on dolphins."[636] With respect to the certification and tracking and verification requirements, the Panel found that, "considered in themselves, systems designed to identify, track, and, indirectly, to reduce dolphin mortality and injury, clearly 'relate' to conservation."[637] Having examined the challenged elements, the Panel concluded: "[I]t is clear that [they] have as their goal the provision of accurate information to consumers concerning the dolphin-safe status of tuna" and "can properly be said to 'relate to' the goal of conserving dolphins."[638]

367. The second element of the Article XX(g) analysis (that dolphins are an exhaustible natural resource) was uncontested.[639]

368. Under the third element of the Article XX(g) analysis, the Panel stated that the amended measure "conditions access to the dolphin-safe label on the same requirements for both US vessels and foreign vessels."[640] In the Panel's view, these requirements apply to "all tuna products . . . regardless of the fishery, nationality of the vessel, or nationality of the

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[632] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527.

[633] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.531 (citing *US – Gasoline (AB)*, p. 19; *China – Raw Materials (AB)*, para. 355; *US – Shrimp (AB)*, para. 136); *see also China – Rare Earths (AB)*, para. 5.90.

[634] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.532.

[635] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.532 (citing *US – Tuna II (Mexico)*, paras. 342-343).

[636] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.532 (citing *US – Tuna II (Mexico) (AB)*, paras. 289, 297).

[637] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.533.

[638] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.535.

[639] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.521.

[640] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.538.

processor."[641] The Panel therefore found that the amended measure "does impose real and effective restrictions on the US tuna industry."[642]

2. Whether the Amended Measure Meets the Requirements of the Article XX Chapeau

369. The Panel began its analysis by describing the relationship between the chapeau of Article XX and Article 2.1 of the TBT Agreement. The Panel found that the second step of the Article 2.1 analysis is "broader" than the chapeau test and, therefore, panels cannot assume that inconsistency with Article 2.1 "necessarily or automatically implies or requires a finding of violation of the chapeau."[643] However, the Panel considered that, where a panel found the measure inconsistent with Article 2.1 "using the analytical framework provided by the phrase 'applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," such panel may "rely on that reasoning" in its chapeau analysis.[644]

370. Based on this reasoning, the Panel concluded that it could rely on its *own* reasoning under Article 2.1 for its chapeau analysis.[645] This was so, in the Panel's view, because its Article 2.1 findings as to the certification and tracking and verification requirements were "all based on the conclusion that those aspects are arbitrarily discriminatory because they are not reconcilable with the goal of the amended measure."[646]

a. The Eligibility Criteria

371. The Panel began its examination of the eligibility criteria by noting that the criteria do not distinguish "between countries," but between fishing methods.[647] Accordingly, the Panel concluded that, for purposes of the chapeau analysis, the most appropriate "condition" to examine was the harms to dolphins caused by different fishing methods.[648]

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[641] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.538.

[642] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.538.

[643] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.555-556.

[644] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.557.

[645] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.560.

[646] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.559. Similarly, the Panel's finding that the eligibility criteria stemmed exclusively from a legitimate regulatory distinction was based on the fact that the distinction drawn was "fully justifiable on the basis of the measure's objectives." *Id.*

[647] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.577. Specifically, the Panel noted that the "no dolphin mortality or serious injury" criterion "applies to all tuna, regardless of where or how it was caught," and the setting-on-dolphins criterion distinguishes between fishing methods. *Id.*

[648] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.577 ("[T]hese eligibility conditions do not distinguish between Members, or even between fisheries, but between fishing methods. In this context, the United States suggests that the most appropriate 'condition' to examine in this analysis is the different harms to

372. In this regard, the Panel considered that, in the original proceeding, the United States had put forward "sufficient evidence . . . to raise a presumption that setting on dolphins not only causes observable harms, but also causes unobservable harms to dolphins beyond mortality and serious injury," and that, based on this evidence, the Appellate Body found that "setting on dolphins is 'particularly harmful' to dolphins.[649] "Applying these factual findings to the present case," the Panel found that it was "not convinced that fishing methods other than setting on dolphins cause the same or similar unobserved harms."[650]

373. Then, without first examining whether "discrimination" exists for purposes of the chapeau, the Panel examined whether any such discrimination is "arbitrary or unjustifiable."[651] For this analysis, the Panel once again examined the objectives of the measure, concluding that "the eligibility criteria are rationally related to the dolphin protection objective of the amended tuna measure."[652] Again, the Panel noted that it had already been decided in the original proceeding that "setting on dolphins is a 'particularly harmful' fishing method, and other fishing methods do not cause the same kinds of unobserved harms to dolphins as are caused by setting on dolphins."[653] In its conclusion, the Panel collapsed the separate analyses of "discrimination" and "arbitrary and unjustifiable" into one:

> [T]he fact that other fishing methods do not cause the kind of unobservable harms as are caused by setting on dolphins means that, at least insofar as the eligibility criteria are concerned, *the conditions* prevailing in fisheries where tuna is caught by setting on dolphins and fisheries where that method is not used *are not the same*. *Accordingly*, in our view, the eligibility criteria *are directly related to the objective of the amended measure*. Any *discrimination* that they (i.e. the eligibility criteria) cause is directly connected to the main goal of the amended tuna measure, and accordingly we conclude that this aspect of the measure is not inconsistent with the requirements of the chapeau.[654]

374. Although the Panel did not state so directly, in light of the above analysis, it would appear that the Panel considered that the causes of the "discrimination" for purposes of the

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dolphins caused by setting on dolphins, on the one hand, and by purse seine (other than setting on dolphins), longline, and pole-and-line fishing, on the other. We agree.").

[649] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.579 (citing *US – Mexico II (AB)*, paras. 246, 289).

[650] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.581. The Panel further referred to the fact that the Appellate Body in the original proceeding had *not* found that disqualifying setting on dolphins gave rise to an inconsistency with Article 2.1 and had "accepted that, in principle, WTO law allows the United States to 'calibrate' the requirements imposed by the amended tuna measure according to 'the likelihood that dolphins would be adversely affected" by tuna fishing in "different fisheries." *Id.* para. 7.582 (citing *US – Tuna II (Mexico) (AB)*, para. 286).

[651] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.583.

[652] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584.

[653] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584 (citing U.S. First Written 21.5 Submission, paras. 89-101, 110-161).

[654] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584 (emphasis added).

chapeau are *the same* as those found to exist under the positive GATT obligations – *i.e.*, denial of access to the label for tuna product produced by setting on dolphins.[655]

b. The Certification Requirements

375. The Panel began its analysis by recalling that it had earlier concluded that "observers are necessary on ETP large purse seiners but may not be necessary on other vessels in other fisheries because of the nature of the fishing technique used by ETP large purse seiners."[656] On this basis, the Panel reasoned that "maintaining different certification requirements does not necessarily amount to imposing unjustifiable or arbitrary discrimination."[657] The Panel then recalled that, with respect to Mexico's claim that the captain's certifications are "inherently unreliable," it had "accepted the evidence submitted by the United States" showing that national and regional regulators routinely rely on captain's statements as establishing a "strong presumption that such certifications are reliable," and Mexico had failed to rebut this evidence.[658]

376. However, the Panel also recalled its finding that certifying dolphin mortality or serious injury is a "highly complex task" and that it had not been shown that captains "are always and necessarily in possession of those skills."[659] Based on this finding, the Panel had concluded that relying on captain certifications "makes it easier for non-dolphin-safe tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin-safe, which . . . would undermine the overall objectives of the amended tuna measure."[660] Applying this analysis to the chapeau, a majority of panelists concluded that the difference in education and training between captains and AIDCP-approved observers renders the certification requirements inconsistent with the requirements of the chapeau.[661] On this point, one panelist dissented. In that panelist's view, the United States had demonstrated that the different certification requirements "are rationally connected to the different risks facing dolphins in different areas and from different fishing

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[655] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.577 ("We note that the amended tuna measure does not impose different regulatory treatment between countries. The main regulatory distinction of the amended tuna measure concerns not countries but different fishing methods: accordingly, it is the fishing method of setting on dolphins – considered to be particularly harmful to dolphins because it necessarily entails the chasing of dolphins to find and catch tuna – that is regulated differently and more tightly than other fishing methods."); *id.* para. 7.447 (stating, for purposes of Article I:1 that "in denying access to the dolphin-safe label to tuna caught by setting on dolphins, the amended tuna measure has the effect of denying to certain tuna and tuna products a valuable market advantage (that is, access to the dolphin-safe label)."); *id.* para. 7.498 (Article III:4); *see also EC – Seal Products (AB)*, para. 5.318 ("We consider that, in the present case, the causes of the 'discrimination' found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau.").

[656] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.592.

[657] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.593; *see also id.* para. 7.597 (finding that relying on captain statements outside the ETP large purse seine fishery "is not necessarily unjustifiable and inconsistent with the chapeau of Article XX").

[658] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.595-596.

[659] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.601.

[660] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.602.

[661] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.603 (maj. op).

methods because those requirements are 'calibrated' or otherwise proportionate to those risks."[662]

377. The Panel also recalled its finding – based on the lack of an "adequate[]" explanation of how the provisions' design was "rationally connected to the objectives pursued by the amended tuna measure" – that the amended measure's determination provisions were inconsistent with Article 2.1.[663]

378. In its final paragraph, the Panel concluded that its Article 2.1 findings "apply with equal force" to the Article XX chapeau.[664] In the Panel's view, whether the different certification requirements are "justified by the objective of conserving dolphins by providing consumers with accurate information about the dolphin-safe status of tuna products" is determinative of both the second step of Article 2.1 and the Article XX chapeau.[665] With regard to whether discrimination under the chapeau was even occurring in the first place, the majority concluded, without analysis, that, unlike its finding concerning the eligibility criteria, the "conditions" prevailing in all countries are the "same."[666] The implication of the majority's analysis is that the only relevant "condition" is whether even one dolphin has been killed or seriously injured in a fishery, although the majority did not say so directly. On this point, the minority appeared to disagree, stating that "the conditions inside the ETP are not the same as those in other fisheries."[667] However, the minority then found that the certification requirements did not meet the requirements of the chapeau, in light of the text of the determination provisions.[668]

379. Although the Panel did not directly say so, the first part of the Panel's analysis would appear to be premised on the assumption that the causes of the "discrimination" for purposes of the chapeau are *the same* as those found to exist under the positive GATT 1994 obligations – *i.e.*, the difference in cost of having an observer (versus not having an observer).[669] However, the second part of the Panel's analysis would appear to suggest that the causes of the "discrimination" are *different* – *i.e.*, a difference in "accuracy" in the labels resulting from the different certification requirements.[670] As noted above, the Panel did not make a "definitive

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[662] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.606 (min. op).

[663] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604.

[664] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605.

[665] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605.

[666] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605 ("We also find that, unlike in the context of the eligibility criteria, for the purposes of this element of the measure, the conditions prevailing among Members are the same, because dolphins may be killed or seriously injured by all fishing methods in all oceans, and accordingly accurate certification is necessary regardless of the particular fishery in which tuna is caught.").

[667] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.606 (min. op.).

[668] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.607 (min. op.).

[669] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.592-593; *id.* para. 7.455 (Article I:1); *id.* paras. 7.500-501 (Article III:4); *id.* para. 7.162 (Article 2.1); *see also EC – Seal Products (AB)*, para. 5.318.

[670] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.593-605, in particular, para. 7.602, stating that "the Panel concluded that the different certification requirements do not stem exclusively from a legitimate

finding" on this point in its detrimental impact analysis for Articles I:1 and III:4 (or, for that matter Article 2.1).[671]

c. The Tracking and Verification Requirements

380. The Panel's analysis of the tracking and verification requirements is extremely brief – accounting for a mere four paragraphs.[672] The Panel began by noting that, "the circumstances that gave rise to the breach of Article 2.1 of the TBT Agreement give rise also to arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994."[673] Thus, the Panel stated that, "[i]n the context of the present analysis," the Panel agreed "with Mexico that the lesser burden placed on tuna caught other than in the ETP large purse seine fishery, is not rationally related to the amended tuna measure's objective of conserving dolphins by providing information to consumers concerning the dolphin-safe status of tuna products."[674] The Panel provided no analysis of whether the "conditions" in the countries are the same, and, as such, never analyzed whether "discrimination" under the chapeau existed with respect to this aspect of the measure.

381. Again, although the Panel did not say so directly, its analysis suggests that the Panel considered that the causes of the "discrimination" for purposes of the chapeau could be *the same* as those found to exist under the positive GATT obligations – *i.e.*, a difference in "burden" in adhering to NOAA regime on the one hand versus the AIDCP regime on the other – and *different* from those found to exist under the positive GATT obligations – *i.e.*, a difference in "accuracy" of the labels affixed to tuna product subject to the AIDCP regime versus the NOAA one.[675] As

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regulatory distinction within the meaning of Article 2.1 of the TBT Agreement, because, to the extent that captains' could not be assumed to have the skills necessary *to make an accurate dolphin-safe certification*, this distinction makes it easier for non dolphin-safe tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin-safe, which inaccurate labelling would undermine the overall objectives of the amended tuna measure." (Emphasis added).

[671] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.455 (Article I:1); *id.* paras. 7.500-502, in particular n.711 (Article III:4); *see also id.* para. 7.169 (noting that the Panel did not "make a definitive finding" as to whether any difference in accuracy resulting from the certification requirements modified the conditions of competition in the U.S. market to the detriment of Mexican tuna product for purposes of Article 2.1).

[672] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.608-611.

[673] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.609.

[674] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.609. The Panel further noted that "to the extent that the different requirements may make it easier for tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled – a point on which we do not make a definitive finding – this would also be inconsistent with the measure's goal of providing accurate information to consumers." *Id.*

[675] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.610 ("In our findings under Article 2.1 of the TBT Agreement, we concluded that the different tracking and verification requirements impose a lighter burden on tuna caught other than in the ETP large purse seine fishery. We also saw merit in Mexico's arguments that the lighter tracking and verification requirements imposed outside of the ETP large purse seine fishery may make it more likely that tuna caught other than by large purse seine vessel will be incorrectly labelled as dolphin-safe, although we did not find it necessary to make a definitive finding on that point. In the context of the present analysis, the Panel agrees with Mexico that the lesser burden placed on tuna caught other than in the ETP large purse seine fishery, is not rationally related to the amended tuna measure's objective of conserving dolphins by providing

previously noted, however, the Panel *never* made a finding – not under either step of the TBT Article 2.1 analysis[676] or under Articles I:1 or III:4 of the GATT 1994[677] – that the different tracking and verification regimes affected the relative "accuracy" of the labels for the group of tuna products produced from outside versus inside the ETP large purse seine fishery.

B. The Panel Erred in Finding that the Amended Measure Does Not Meet the Requirements of the Article XX Chapeau

1. 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

382. Article XX states in relevant part:

> 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; …

383. As the Appellate Body has observed, "the chapeau operates to preserve the balance between a Member's right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994."[678] In this regard, the type of "discrimination" that is at issue under the chapeau "cannot logically refer to the same standard(s)" as those contained in Articles I and III.[679] Indeed, the Appellate Body has considered that "the nature and quality of this discrimination is different from the discrimination

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information to consumers concerning the dolphin-safe status of tuna products. Moreover, to the extent that the different requirements may make it easier for tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled – a point on which we do not make a definitive finding – this would also be inconsistent with the measure's goal of providing accurate information to consumers."); *see also id.* paras. 7.463, n.681 (Article I:1); *id.* n.711 (Article III:4); *see also id.* para. 7.372 (noting that the Panel did not "reach a definitive conclusion" as to whether any difference in accuracy resulting from the tracking and verification requirements modified the conditions of competition in the U.S. market to the detriment of Mexican tuna product for purposes of Article 2.1).

[676] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.372, 7.382, 7.392, 7.400, 7.463.

[677] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.463-465, 7.610.

[678] *EC – Seal Products (AB)*, para. 5.297 (citing *US – Shrimp (AB)*, para. 156).

[679] *EC – Seal Products (AB)*, para. 5.298 (quoting *US – Gasoline (AB)*, p. 23).

in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994."[680]

384. 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.'"[681] "Where this is the case," the panel should then consider "whether the resulting discrimination is 'arbitrary or unjustifiable.'"[682] Thus the chapeau calls for two analyses: whether discrimination exists at all; and, if so, whether that discrimination is "arbitrary or unjustifiable."

385. As to the first element of the analysis, the panel must assess "whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same.'"[683] As to which "conditions" are relevant to this inquiry, the Appellate Body has stated that "the subparagraphs of Article XX, and in particular the subparagraph under which the measure has been provisionally justified, provide pertinent context," and the GATT 1994 provision with which the measure was found inconsistent may also provide guidance.[684]

386. The Appellate Body applied these principles in *EC – Seal Products*. There, to determine whether discrimination existed at all, the Appellate Body first asked "whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same.'"[685] The Appellate Body did not understand the EU to contest that "the same animal welfare conditions prevail in all countries where seals are hunted."[686] And although the EU had argued that "different level[s] of development" may be relevant to this analysis, the Appellate Body did not consider that the EU had "sufficiently explained how these differences would render the conditions prevailing in Canada and Greenland different in a respect that would be relevant under the chapeau."[687] Accordingly, the Appellate Body "proceed[ed] on the basis that the conditions prevailing in these countries are 'the same' for the purposes of the chapeau."[688] The Appellate Body thus concluded that "the causes of the 'discrimination' found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau," and

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[680] *EC – Seal Products (AB)*, para. 5.299 (quoting *US – Shrimp (AB)*, para. 150).

[681] *EC – Seal Products (AB)*, para. 5.303 ("We recall that the Appellate Body has already observed, in *US – Shrimp*, that discrimination within the meaning of the chapeau of Article XX 'results … when countries in which the same conditions prevail are differently treated.' *Where this is the case*, a panel should analyse whether the resulting discrimination is 'arbitrary or unjustifiable.'") (quoting *US – Shrimp (AB)*, para. 165) (emphasis added).

[682] *EC – Seal Products (AB)*, para. 5.303.

[683] *EC – Seal Products (AB)*, para. 5.299.

[684] *EC – Seal Products (AB)*, para. 5.300.

[685] *EC – Seal Products (AB)*, para. 5.317.

[686] *EC – Seal Products (AB)*, para. 5.317. Such animal welfare conditions, of course, formed the basis of the EU argument as to why its measure should qualify under Article XX(a). *See, e.g., id.* paras. 5.179, 5.195.

[687] *EC – Seal Products (AB)*, para. 5.317.

[688] *EC – Seal Products (AB)*, para. 5.317.

proceeded on that basis to examine whether that discrimination was "arbitrary or unjustifiable."[689]

387. By contrast, the Panel's analysis of whether the certification requirements and tracking and verification requirements met the requirements of the chapeau deviated significantly from the above principles and the Appellate Body's application of those principles in *EC – Seal Products* and other disputes.[690] In particular, the Panel conducted little-to-no analysis of whether the conditions prevailing among countries were relevantly the same.

388. Specifically, with regard to eligibility criteria, the Panel conducted only a very brief analysis, apparently concluding that the type of harm caused by different fishing methods was the "condition" and that this condition was not the same across fisheries where different fishing methods were practiced.[691] Nevertheless, the Panel appeared to consider that this finding was not determinative of whether discrimination existed – referring in a subsequent sentence to the "discrimination that [the eligibility criteria] cause …"[692] Moreover, the Panel did not appear to consider that the examination of whether discrimination existed was a separate analysis from whether such discrimination is "arbitrary or unjustifiable," as the Panel treated the two analyses as one – in particular, by using the connector "[a]ccordingly."[693] With respect to the certification requirements, the Panel did far less, simply referring to this analysis in a single sentence.[694] And,

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[689] *EC – Seal Products (AB)*, para. 5.318 ("We consider that, in the present case, the causes of the 'discrimination' found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau. We also note that this is not disputed by the participants. We therefore turn to examine whether such discrimination is 'arbitrary or unjustifiable' within the meaning of the chapeau.").

[690] *See, e.g., Brazil – Retreaded Tyres (AB)*, para. 217 ("Regarding the issue of whether the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that would constitute 'arbitrary or unjustifiable discrimination' between countries where the same conditions prevail, the Panel noted, first, that the health impact of remoulded tyres imported from MERCOSUR countries and their European counterparts can be expected to be comparable."); *US – Gasoline (AB)*, pp. 22-24; *see also US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 150 (finding that, for there to be discrimination under the chapeau, "[the] discrimination must occur between countries where the same conditions prevail").

[691] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584 ("[T]he 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*.") (emphasis added).

[692] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584 ("[T]he fact that other fishing methods do not cause the kind of unobservable harms as are caused by setting on dolphins means that, at least insofar as the eligibility criteria are concerned, the conditions prevailing in fisheries where tuna is caught by setting on dolphins and fisheries where that method is not used are not the same. Accordingly, in our view, the eligibility criteria are directly related to the objective of the amended measure. Any *discrimination* that they (i.e. the eligibility criteria) *cause* is directly connected to the main goal of the amended tuna measure, and accordingly we conclude that this aspect of the measure is not inconsistent with the requirements of the chapeau.") (emphasis added).

[693] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584; *see also id.* paras. 7.606-607 (min. op.) (finding that the certification requirements do not meet the requirements of the chapeau *despite* finding that "the conditions inside the ETP are not the same as those in other fisheries").

[694] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605 (maj. op.) ("We also find that, unlike in the context of the eligibility criteria, for the purposes of this element of the measure, the conditions prevailing among Members *are the same*, because dolphins may be killed or seriously injured by all fishing methods in all oceans, and

of course, with respect to the tracking and verification requirements, the Panel did not even do this – simply ignoring the analysis all together.[695]

389. As discussed above, both the Panel and majority considered that the relevant "conditions" prevailing in the countries are different with respect to different aspects of the amended measure. In this regard, the Panel and majority appeared to consider that the causes of the discrimination for purposes of the chapeau and the positive GATT obligations were either the same or different (or both), depending on the aspect of the challenged measure the Panel was examining.

390. As discussed in sections VI.B.1.a-b, 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.

a. The Panel Erred in Applying the Incorrect Legal Analysis in Examining Whether the Certification Requirements "Discriminate" for Purposes of the Chapeau

391. As discussed above, the Panel did not conduct an independent examination of whether the certification requirements discriminated "between countries where the same conditions prevail." Notwithstanding this failure, the Panel found that the certification requirements did "discriminate" under the chapeau and asserted that the relevant "conditions prevailing among Members are the same."[696] The only "condition" that the Panel cited in support of this statement was the fact that "dolphins may be killed or seriously injured by all fishing methods in all oceans" and the Panel's conclusion that "accurate certification is necessary regardless of the particular fishery" where tuna was caught.[697] Thus the Panel failed to apply the correct legal analysis in examining whether the certification requirements met the requirements of the chapeau.[698]

392. Pursuant to the correct legal analysis, the relevant "conditions" are not "the same" and, therefore, the certification requirements do not "discriminate" for purposes of the chapeau. As noted above, 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."[699]

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accordingly accurate certification is necessary regardless of the particular fishery in which tuna is caught.") (emphasis added); *but see id.* para. 7.606 (min. op.) ("In my view, the conditions inside the ETP *are not the same* as those in other fisheries.") (emphasis added).

[695] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.608-611.

[696] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605 (maj. op.).

[697] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605 (maj. op.).

[698] *See, e.g.*, *EC – Seal Products (AB)*, para. 5.303; *US – Shrimp (AB)*, para. 165.

[699] *EC – Seal Products (AB)*, para. 5.300; *see also id.* para. 5.317.

393. The Panel found that the certification requirements were provisionally justified under Article XX(g) of the GATT 1994.[700] In particular, the Panel considered that the amended measure "remains centrally concerned with the pain caused to dolphins in the context of commercial fishing practices both inside and outside the ETP."[701] In addition, the Panel found that the certification requirements were inconsistent with Articles I:1 and III:4 of the GATT 1994 based on the Panel's conclusion that the added *cost* of having an observer onboard (versus not incurring this cost) modified the conditions of competition to the detriment of Mexican tuna product.[702] And the Panel *agreed* with the United States that *the reason* for this difference in cost relates to *the relative harm* caused by the "systematic" setting on dolphins in the ETP large purse seine fishery and the harm caused by all other fishing methods in other fisheries.[703] Accordingly, the relevant "condition" prevailing in different countries is *the relative harm* (both observed and unobserved) suffered by dolphins from different fishing methods in different fisheries.[704]

394. 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. It is well understood that setting on dolphins is a fishing method that is "particularly harmful to dolphins."[705] And, in this proceeding, the majority explicitly *disagreed* with Mexico's argument that, in this regard, the situation in the ETP is not unique or different enough to justify different observer requirements.[706] "Most important[]," in the view of the

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[700] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.541.

[701] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.533; *see id.* para. 7.535 (finding that it is clear that the certification requirements "have as their goal the provision of accurate information to consumers concerning the dolphin-safe status of tuna" and that they "help to ensure that the US tuna market does not operate in a way that encourages dolphin unsafe fishing techniques").

[702] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.455 (finding that the certification requirements are inconsistent with Article I:1 because of "the significant expenditure associated with observer certification"); *id.* para. 7.500 (finding that the certification requirements are inconsistent with Article III:4 "because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it"); *see also id.* para. 7.162.

[703] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.592; *see also id.* para. 7.242 (maj. op.). In this regard, the United States further observes that there is no basis on which to find that different aspects of the measure, which were *collectively* found to be preliminarily justified under subparagraph (g) should, nevertheless, be analyzed differently under the chapeau. *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.533-535. And since the policy objective of that subparagraph is the most relevant guidepost for determining the relevant condition, there is no basis for concluding that the "conditions" with regard to the analysis of the certification requirements should differ from the "conditions" with regard to the analysis of the eligibility criteria. In this regard, the United States contends that the "condition" for all three challenged aspects of the amended measure *is the same condition – the relative harm* to dolphins caused by different fishing methods in different fisheries.

[704] *See EC – Seal Products (AB)*, para. 5.317; *Brazil – Retreaded Tyres (AB)*, para. 217; *US – Gasoline (AB)*, pp. 22-24.

[705] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120 (citing *US – Tuna II (Mexico) (AB)*, para. 289).

[706] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) ("The Panel notes that Mexico disagrees that the situation in the ETP is unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries. According to Mexico, 'tuna dolphin associations have been sighted and deliberately set on' outside of the ETP, and accordingly the absence of

majority, was the fact that *Mexico's own evidence* suggested that there is very little interaction (and much less actual harm) between tuna vessels and dolphins outside the ETP.[707] Indeed, the majority considered the evidence regarding the differences between the large purse seine fishery in the ETP, on the one hand, and all other fisheries, on the other, to be so strong that the evidence was "sufficient to raise a presumption" that requiring ETP large purse seine vessels to incur the cost of an observer, while other vessels operating in other fisheries are not required to do so, "stem[s] from a legitimate regulatory distinction."[708] Accordingly, the factual findings of the Appellate Body and Panel clearly indicated that the "conditions" prevailing in different countries are *not* relevantly the "same." As such, no "discrimination" – as the term is understood for purposes of the chapeau – exists.

395. But, as noted above, the Panel did not confine its analysis to these factual findings (and the legal conclusions that follow from them). Rather, the Panel went on to examine the issue it addressed in the second step of the Article 2.1 analysis, namely whether differences between the education and training of AIDCP-approved observers and captains results in any difference in the accuracy of the certifications as to whether a dolphin was killed or seriously injured for tuna caught outside and inside the ETP large purse seine fishery.[709] In this regard, the Panel appeared to suggest that the only relevant "condition" for purposes of this analysis is whether *any* harm to dolphins occurs in the applicable fishery.[710] As noted above, this focus on "accuracy" suggests that the Panel considered that the causes of the "discrimination" for purposes of the chapeau are

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independent observers outside the ETP is unjustifiable. In the Panel's view, however, *the evidence submitted by Mexico is not sufficient to rebut the United States' argumentation on this point*.") (emphasis added) (citing Mexico's First Written 21.5 Submission, para. 113).

[707] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) ("Most importantly, the evidence submitted by Mexico suggests that, even though there may be some interaction between tuna and marine mammals, including dolphins, outside of the ETP, 'dolphins in the Atlantic, Indian, and western Pacific Oceans [do not associate with tuna] as systematically as they do in the Eastern Tropical Pacific.'").

[708] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (maj. op.); *see also id.* para. 7.278 (min. op.) ("In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.").

[709] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.602 ("[T]he Panel concluded that the different certification requirements do not stem exclusively from a legitimate regulatory distinction within the meaning of Article 2.1 of the TBT Agreement, because, to the extent that captains' could not be assumed to have the skills necessary to make an accurate dolphin-safe certification, this distinction makes it easier for non dolphin-safe tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin-safe, which inaccurate labelling would undermine the overall objectives of the amended tuna measure.").

[710] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605 ("We also find that, unlike in the context of the eligibility criteria, for the purposes of this element of the measure, the conditions prevailing among Members are the same, because dolphins may be killed or seriously injured by all fishing methods in all oceans, and accordingly accurate certification is necessary regardless of the particular fishery in which tuna is caught.").

different from those found to exist under the positive GATT obligations (*i.e.*, the difference in cost of having an observer versus not having an observer).[711]

396. But there is *no evidence* on the record to support such a legal conclusion, and, as such, the Panel's analysis beginning in paragraph 7.593, and the majority's conclusions in paragraphs 7.603 and 7.605 are in error.

397. As noted above, 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,[712] noting in its Article 2.1 analysis that to make such a "definitive finding" would have required "a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled."[713] 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 that tuna product produced outside the ETP large purse seine fishery without an observer onboard has a "competitive advantage" over Mexican tuna product produced with an observer onboard due to a difference in the accuracy of the two certifications, as Mexico had argued.[714]

398. Indeed, as discussed above in section III.G.3.c, the evidence on the record suggests just the opposite. Specifically, setting on dolphins is unique in the quantity and intensity of dolphin

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[711] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.592-593; *id.* para. 7.455 (Article I:1); *id.* paras. 7.500-501 (Article III:4); *id.* para. 7.162 (Article 2.1); *see also EC – Seal Products (AB)*, para. 5.318.

The United States further observes that the strong implication of the Panel's analysis is that the question of whether discrimination exists at all is subordinate (or irrelevant) to the question of whether any differences in the measure can be reconciled with, or are otherwise "justifiable" by, the objective. *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.603, 7.605. This is not true. If the measure does not discriminate under the chapeau, it cannot be said that it discriminates arbitrarily or unjustifiably. But this is just what the majority indicates in its cursory treatment of what the relevant "conditions" are for purposes of the certification requirements (and its failure to even raise the issue with regard to the tracking and verification requirements). *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.605, 7.610-611; *see also id.* para. 7.584 (using the connector "[a]ccordingly" in its conclusion regarding the eligibility criteria). Indeed, the minority's analysis regarding the certification requirements is *explicit* on this point. Thee minority found that the certification requirements do not meet the requirements of the chapeau *despite* finding that "the conditions inside the ETP are not the same as those in other fisheries." *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.606-607 (min. op.).

[712] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.455 (Article I:1); *id.* paras. 7.500-502, in particular n.711 (Article III:4); *see also id.* para. 7.169.

[713] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169 ("Ultimately, however, a definitive finding on this point would require a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled. Such an analysis is not necessary in the context of the present dispute.").

[714] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.166 ("The core factual assertion underlying Mexico's allegation that the different certification requirements make it easier for tuna caught outside the ETP large purse seine fishery to be incorrectly labelled is that 'captains are neither qualified nor able to make' an accurate designation that no dolphins were killed or seriously injured in a particular gear deployment. … According to Mexico, the incapacity of captains to accurately certify the dolphin safe status of tuna 'create[s] a very real risk that tuna may be improperly certified as dolphin safe,' with the consequence that 'tuna caught in the ETP, which is accurately certified as dolphin safe by independent observers, will lose competitive opportunities to tuna caught outside the ETP, which has received an inherently unreliable dolphin safe certification.'").

interactions that occur.[715] In a single dolphin set, a large purse seine vessel in the ETP may interact with hundreds of dolphins for hours on end, ultimately encircling 300-400 in a purse seine net.[716] Vessels practicing other fishing methods, by contrast, hardly ever interact with dolphins and, on the rare occasions when they do, interact with only a few at a time.[717]

399. Thus, the task of monitoring dolphin mortality and serious injury, and of making the necessary dolphin safe certification, is substantially more difficult in the ETP large purse seine fishery than in other fisheries. It is far more difficult to make an accurate certification in the ETP large purse seine fishery, where there are exponentially more dolphin interactions over a longer period of time (and thus exponentially more opportunities for a dolphin to be killed or seriously injured) 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. Simply put, if a certifier is to miss (or misunderstand) a dolphin mortality or serious injury, it is more likely to be during the thousands of multi-hour chases and captures of hundreds of dolphins that occur each year in the ETP large purse seine fishery[718] than the occasional interactions with a few individual dolphins that occur in other fisheries, and there is no evidence that suggests otherwise.

400. As such, the Panel's analysis is legally unsupported by the evidence on the record. It has simply not been proven that any difference in education and training between AIDCP-approved observers and captains "discriminates" against Mexican tuna product as that term is understood under the GATT positive obligations or under Article XX.

b. The Panel Erred in Applying the Incorrect Legal Analysis in Examining Whether the Tracking and Verification Requirements "Discriminate" for Purposes of the Chapeau

401. As discussed above with respect to the tracking and verification requirements, the Panel did not even mention the analysis of whether they discriminated between countries where "the same conditions prevail" or make a finding in this regard.[719] By failing to even address the issue, the Panel erred.

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[715] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.592 ("Other fishing methods in other oceans may . . . cause dolphin mortality and serious injury, but . . . the nature and degree of the interaction is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental)").

[716] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para.7.240 (maj. op.); U.S. Response to Panel Question No. 30, paras. 166-167.

[717] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras.7.241-242 (maj. op.).

[718] *See* Tables Summarizing the Fishery by Fishery Evidence on the Record, at 2 (Exh. US-127) (showing that, on average, 10,423 dolphins sets a year have occurred in the ETP large purse seine fishery over the past five years); Mexico's Comments on U.S. Response to Panel Question No. 14, para. 64, Table A-7 (showing that between 8,648 and 13,760 dolphin sets by large purse seine vessels have occurred each year since 1998 in the ETP large purse seine fishery).

[719] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.610-611.

402. 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. Accordingly, the tracking and verification requirements do not discriminate for purposes of the chapeau and the Panel erred in finding otherwise.

403. Moreover, the United States considers that the Panel's analysis is in error in that it appears to base its analysis on a view that the different tracking and verification regimes result in a difference in the accuracy of the dolphin safe labels for tuna caught inside and outside the ETP large purse seine fishery, which discriminates against Mexican tuna product. As noted above, the Panel made no finding that this was the case.[720] And, as discussed in the previous section and in section III.H.3.d, there is no evidence to suggest that any difference in accuracy resulting from differences in the AIDCP and NOAA tracking and verifications regimes discriminates against Mexican tuna product by providing tuna product produced from tuna caught outside the ETP large purse seine fishery with a "competitive advantage" over Mexican tuna product.

2. Even if the Certification Requirements and the Tracking and Verification Requirements "Discriminate" for Purposes of the Chapeau, the Panel Erred in Finding that Such "Discrimination" Is "Arbitrary and Unjustifiable"

404. It is well established that an important factor in the assessment of 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."[721] This factor, however, is not "the sole test" for the chapeau, but "one element in a cumulative assessment of unjustifiable discrimination."[722]

405. With regard to the relationship between this analysis and the second step of the TBT Article 2.1 analysis, the Appellate Body has clarified that while there are "important parallels"

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[720] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.463, n.681 (Article I:1); *id.* paras. 7.502, in particular n.711 (Article III:4); *see also id.* para. 7.382 (noting that the Panel made "no definitive finding" as to whether any difference in accuracy resulting from the different tracking and verification systems modified the conditions of competition in the U.S. market to the detriment of Mexican tuna product for purposes of Article 2.1).

[721] *EC – Seal Products (AB)*, 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.").

[722] *EC – Seal Products (AB)*, para. 5.321 ("[T]he relationship of the discrimination to the objective of a measure is one of the most important factors, *but not the sole test*, that is relevant to the assessment of arbitrary or unjustifiable discrimination.") (emphasis added); *id.* para. 5.306 ("In *US – Shrimp*, the Appellate Body considered this factor as *one* element in a cumulative assessment of unjustifiable discrimination.") (internal quotes omitted, emphasis in original).

between the two analyses, there are "significant differences" as well.[723] In particular, the applicable legal standards are different. Under TBT Article 2.1, the question is whether the detrimental impact "stems exclusively from a legitimate regulatory distinction rather than reflecting *discrimination* against the group of imported products," while "[u]nder 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."[724] As such, the Appellate Body has stated that a panel errs "in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement, instead of conducting an independent analysis of the consistency of the [challenged measure] with the specific terms and requirements of the chapeau."[725]

406. Again, the Appellate Body's recent report in *EC – Seal Products* represents a useful guide as to how these principles should be applied. In that dispute, the Appellate Body began by assessing "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."[726] In this regard, the Appellate Body noted that it was uncontested that the challenged measure drew distinctions that "are not related to the welfare of seals."[727] Rather, the EU argued that the measure exempted certain products from the ban to mitigate the harmful economic consequences of the measure for certain communities.[728] In light of these arguments, the Appellate Body found that "the European Union has failed to demonstrate … how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to 'commercial' hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare … given that IC hunts can cause the very pain and suffering for seals that the EU public is concerned about."[729]

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[723] *EC – Seal Products (AB)*, paras. 5.310-311.

[724] *EC – Seal Products (AB)*, para. 5.311 (emphasis in original).

[725] *EC – Seal Products (AB)*, para. 5.313 ("Given these differences between the inquiries under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, we find 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, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.").

[726] *EC – Seal Products (AB)*, para. 5.318.

[727] *EC – Seal Products (AB)*, para. 5.319 ("We recall that the objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare. In pursuit of this objective, the EU Seal Regime bans the importation and placing on the market of seal products derived from 'commercial' hunts, while it allows the importation of seal products derived from hunts that satisfy certain criteria relating to the identity of the hunter, the purpose of the hunt, and the use of by-products from the hunt. *The complainants allege, and the European Union does not dispute, that these criteria are not related to the welfare of seals*.") (emphasis added).

[728] *See EC – Seal Products (AB)*, para. 5.319 ("In response, the European Union submits that it exempts seal products derived from hunts conducted by Inuit and other indigenous peoples from the ban on the importation and placing on the market of seal products in order to mitigate the adverse effects on those communities resulting from the EU Seal Regime to the extent compatible with the main objective of addressing the public moral concerns with regard to the welfare of seals.").

[729] *EC – Seal Products (AB)*, para. 5.320.

But the Appellate Body did not conclude its analysis with this finding. Rather, it went on to consider several more arguments,[730] before ultimately concluding that the challenged measure arbitrarily and unjustifiably discriminated against the complainants' products.[731]

407. The Panel's analysis was fundamentally flawed and deviated significantly from the Appellate Body's analysis in *EC – Seal Products* and other disputes.

408. 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. First, the United States explains that the majority erred by applying the incorrect legal analysis 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. Second, the United States explains that the Panel erred in finding that the determination provisions prove that the certification requirements impose arbitrary or unjustifiable discrimination.

409. 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 by applying the incorrect legal analysis and in its allocation of the burden of proof.

a. The Panel Erred in Finding the Certification Requirements Impose "Arbitrary or Unjustifiable Discrimination" Under the Chapeau

410. As noted above, the Panel began its analysis by recalling that it had concluded earlier that "observers are necessary on ETP large purse seiners but may not be necessary on other vessels in other fisheries because of the nature of the fishing technique used by ETP large purse seiners."[732] On this basis, the Panel reasoned that "maintaining different certification requirements does not necessarily amount to imposing unjustifiable or arbitrary discrimination."[733]

411. However, in light of its earlier finding that captains are not "always and necessarily in possession of those [highly complex] skills" needed to accurately certify whether a dolphin has been killed,[734] the Panel concluded that relying on captain certifications "makes it easier for non-dolphin-safe tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin-safe, which . . . would undermine the overall objectives of the amended tuna

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[730] *See EC – Seal Products (AB)*, paras. 5.321-338.

[731] *EC – Seal Products (AB)*, para. 5.337.

[732] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.592.

[733] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.593; *see also id.* para. 7.597 (finding that relying on captain statements outside the ETP large purse seine fishery "is not necessarily unjustifiable and inconsistent with the chapeau of Article XX").

[734] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.601.

measure."[735] Applying this analysis to the chapeau, a majority of panelists found that the difference in education and training between captains and observers rendered the certification requirements inconsistent with the requirements of the chapeau.[736] As noted above, one panelist dissented, finding that the United States had demonstrated that the different certification requirements "are rationally connected to the different risks facing dolphins in different areas and from different fishing methods because those requirements are 'calibrated' or otherwise proportionate to those risks."[737]

412. The Panel also concluded that its Article 2.1 findings concerning the amended measure's determination provisions apply "with equal force" to the chapeau," as the differences in those provisions are "not justified by the objective of conserving dolphins."[738]

413. The United States appeals both aspects of the Panel's finding with regard to the certification requirements.

i. 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

414. The United States appeals the majority's finding that the certification requirements give rise to arbitrary and unjustifiable discrimination in light of the differences in education and training between captains and AIDCP-approved observers because the majority relied on an incorrect legal analysis. In addition, the United States submits that the certification requirements do not, in fact, impose arbitrary or unjustifiable discrimination because, taking into account differences in education and training, the different requirements: 1) are "calibrated" to the risks to dolphins from different fishing methods in different fisheries; and 2) reflect the consent of the AIDCP Parties to impose on their own tuna industries a unique observer program that no other fisheries management institutions (municipal or international) have adopted.

(A). The Panel Erred In Applying the Incorrect Legal Analysis

415. As noted above, the Panel's analysis of whether the certification requirements giver rise to arbitrary or unjustifiable discrimination relies on an incorrect legal analysis that deviates significantly from the Appellate Body's analysis in *EC – Seal Products* and other cases.

416. First, the Panel misunderstood the analysis of whether the discrimination is "arbitrary or unjustifiable." The Panel erroneously considered it to be a single-factor test – whether the

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[735] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.602.

[736] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.603 (maj. op).

[737] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.606 (min. op).

[738] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604.

different requirements are "justified by the objective of conserving dolphins by providing consumers with accurate information about the dolphin-safe status of tuna products"[739] – rather than a cumulative analysis of all the factors that could be relevant to making such a determination.[740] By applying an overly narrow legal analysis, the Panel improperly disregarded the other relevant factors discussed below. In this regard, at a minimum, the Panel erred in relying *entirely* on its Article 2.1 analysis,[741] rather than making the independent analysis that the Appellate Body has stated is required.[742]

417. Second, the Panel erred in the application of the factor that it did consider – whether the discrimination can be reconciled with, or is rationally related to, the policy objective of subparagraph (g).

418. As discussed above, the Panel erred in not finding that the causes of the "discrimination" for purposes of the chapeau are the same as those found to exist under the positive GATT 1194 obligations – *i.e.*, the difference in cost of having an observer versus not having an observer.[743] Under such a framework, it is clear that the discrimination is reconcilable with, or rationally related to, the policy objective of protecting dolphins (the relevant policy objective for purposes

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[739] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.605 ("In the Panel's view, the findings we made in the context of Article 2.1 apply with equal force in the context of the chapeau of Article XX. Insofar as the different certification requirements are not justified by the objective of conserving dolphins by providing consumers with accurate information about the dolphin-safe status of tuna products, we find that this aspect of the amended tuna measure is unjustifiably and arbitrarily discriminatory."); *id.* para. 7.609 ("The Panel has already reached the conclusion that the different tracking and verification requirements are not even handed within the meaning of Article 2.1 of the TBT Agreement because they cause a detrimental impact that the United States has not justified on the basis of the objectives pursued by the amended tuna measure. In our opinion, the circumstances that gave rise to the breach of Article 2.1 of the TBT Agreement give rise also to arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994."); *id.* para. 7.610 ("In the context of the present analysis, the Panel agrees with Mexico that the lesser burden placed on tuna caught other than in the ETP large purse seine fishery, is not rationally related to the amended tuna measure's objective of conserving dolphins by providing information to consumers concerning the dolphin-safe status of tuna products. … In the Panel's view, the United States has not provided any explanation as to how this differential treatment is related to, let alone justified by, the objectives pursed by the amended tuna measure, which is to provide accurate information to consumers in order to conserve dolphins."); *see also id.* para. 7.559 ("[T]he Panel's findings that the different certification and tracking and verification requirements did not stem exclusively from a legitimate regulatory distinction were *all* based on the conclusion that those aspects are arbitrarily discriminatory because they are not reconcilable with the goal of the amended tuna measure.") (emphasis added).

[740] *EC – Seal Products (AB)*, paras. 5.306, 5.321 (quoted above).

[741] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.560 ("As such, we think it is appropriate for us to rely on the reasoning we developed in the context of Article 2.1 in the course of our analysis under the chapeau of Article XX of the GATT 1994.").

[742] *EC – Seal Products (AB)*, para. 5.313 ("Given these differences between the inquiries under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, we find 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, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.").

[743] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.592-593; *id.* para. 455 (Article I:1); *id.* para. 7.500-501 (Article III:4); *id.* para. 7.162 (Article 2.1); *see also EC – Seal Products (AB)*, para. 5.318.

of Article XX(g)). As the Panel noted, the U.S. explanation of why it requires proof of an observer certificate for some, but not all, tuna product concerns:

> [T]he nature of the fishing technique used by ETP large purse seiners, which essentially involves the chasing and encirclement of many dolphins over an extended period of time. This means that it is necessary to have one single person on board with the responsibility of keeping track of those dolphins caught up in the chase and/or the purse seine net sets. Other fishing methods in other oceans may – and, as the United States recognizes, do – cause dolphin mortality and serious injury, but because the nature and degree of the interaction is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental), there may be no need to have a single person on board whose sole task is to monitor the safety of dolphins during the set or other gear deployment.[744]

419. This rationale is clearly reconcilable with, and rationally related to, the policy of objective of protecting dolphins, and, indeed, the Panel *agreed that this is so*.[745] As such, the certification requirements meet this factor of the chapeau test, and the Panel erred in finding otherwise.

420. However, even under the Panel's framework, where the "discrimination" for purposes of the chapeau appears to be an supposed difference in accuracy resulting from differences in education and training between AIDCP-approved observers and captains, the Panel still erred in finding that the certification requirements impose arbitrary or unjustifiable discrimination because, as explained below, the differences in the certification requirements are "calibrated" to the risks to dolphins arising from different fishing methods in different ocean areas and reflect the fact that the parties to the AIDCP imposed on their own tuna industries a unique observer program.

(B). 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

421. The majority of the panelists erred in finding that the certification requirements impose "arbitrary or unjustifiable discrimination" due to differences in education and training between AIDCP-approved observers and captains outside the ETP large purse seine fishery. As discussed above in the context of Article 2.1,[746] any differences in the accuracy of labels (and here it is

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[744] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.592.

[745] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.593 ("In our view this argument is sufficient to demonstrate that maintaining different certification requirements does not necessarily amount to imposing unjustifiable or arbitrary discrimination.").

[746] *See supra*, sec. III.G.4.a.i.

useful to recall that there was no actual finding of any such differences, only speculation) resulting from such differences in education and training do not reflect "arbitrary or unjustifiable" discrimination because the different requirements are "calibrated" to the risks to dolphins from different fishing methods in different fisheries.

422. The 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.[747] In the context of Article XX, in particular, it is established that a Member can impose different requirements in order to achieve a similar level of protection, based on the different conditions in the areas subject to each type of requirement.[748] Indeed, the Appellate Body had found that *not* taking into account different risk levels or conditions in different countries indicates the measure *does not* meet the requirements of the chapeau.[749]

423. 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.[750] Both the majority and minority agree that dolphins face quantitatively and qualitatively different (and greater) risks in the ETP large purse seine fishery than in other fisheries.[751] In light of this, as the minority panelist explained, "the United States has demonstrated that the different requirements as to *who* must make a dolphin-safe certification are rationally connected to the different risks facing dolphins in different areas and from different fishing methods, because those requirements are 'calibrated' or otherwise proportionate to those risks."[752] The minority's position is undoubtedly correct, and the majority erred in finding that the certification requirements constitute arbitrary or unjustifiable discrimination despite the

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[747] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.582 (quoting *US – Tuna II (Mexico) (AB)*, para. 286); *see also US – Tuna II (Mexico) (AB)*, n.612 (noting that an observer requirement "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury").

[748] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 144 (finding that "condition[ing] market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member . . . allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory."); *id.* para. 149 ("[I]n our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member.").

[749] *See US – Shrimp (AB)*, para. 165; *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 140-143 (describing how the measure in *US – Shrimp* constituted "a single, rigid and unbending requirement" that was found to constitute "unjustifiable discrimination . . . because the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in the exporting countries").

[750] *See also US – Tuna II (Mexico) (AB)*, n.612 ("We note, however, that such [an observer] requirement may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury.").

[751] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-244 (maj. op.); *id.* para. 7.278 (min. op.) ("In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.").

[752] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.606.

requirements being calibrated to the risks to dolphins from different fishing methods in different fisheries.

424. In addition, the United States observes that the changes that the majority's analysis implies would be necessary to correct this alleged "arbitrary or unjustifiable" aspect of the measure highlights the error of the majority's approach. In particular, the majority's analysis indicates that the measure would remain "arbitrary or unjustifiable" unless it required captains certifying as to the "dolphin safe" status of tuna to have the education and training currently required of AIDCP-approved observers.[753] Such an approach disregards the Appellate Body's guidance that the United States could come into compliance with the second step of Article 2.1 without requiring an observer certification for tuna product to have access to the label.[754] This is so because, while the Panel did not formally state that the United States must require an observer on all vessels that produce tuna to be sold as dolphin safe tuna product, the Panel's analysis indicates that the certification requirements would remain arbitrary or unjustifiable unless the measure required a person *of the same background* as an observer to make the certification. In another sense, the Panel's approach *goes well beyond* what was even contemplated in the original proceeding (or argued by Mexico) given that it is *uncontested* that other observers do not have the same education and training as AIDCP-approved observers.[755] Consequently, *even requiring observers* on those vessels would likely not correct the supposedly "arbitrary or unjustifiable" nature of the certification requirements.

425. Moreover, the Panel's approach is hardly limited in scope. Rather, it suggests that the United States must impose, on its own fleet and the fleets of all of its trading partners that produce dolphin safe tuna product from fisheries other than the ETP large purse seine fishery, AIDCP-equivalent education and training standards, *regardless of the relative harm to dolphins*

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[753] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.602-603 (maj. op.).

[754] *US – Tuna II (Mexico) (AB)*, para. 296 ("[N]owhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its 'dolphin-safe' labelling provisions to the risks that the Panel found were posed by fishing techniques other than setting on dolphins. We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.") (emphasis in original).

[755] *See* Mexico's Response to Question 38, para. 111 ("[T]he only reliable method of oversight is to have an independent observer onboard a vessel with the appropriate training and the mandate to monitor for harm to dolphins. The only fisheries where there are such independent observers are the ETP and the U.S. domestic fisheries recently designated by the United States."); Mexico's Response to Question 13, para. 79 ("[N]one of those [RFMOs] has established programs featuring the use of trained independent observers who are marine biologists onboard every large tuna fishing vessel fishing for tuna in their fishery regions."); *id.* ("Observers are not trained to monitor harm to dolphins (they are instead monitoring how much tuna is caught)."); *see also* U.S. Comments on Mexico's Response to Question 13, paras. 54-57; U.S. Comments on Mexico's Response to Question 26, para. 85 ("In fact, Mexico does not identify a *single* observer program in the Atlantic, Indian, or Pacific oceans (or elsewhere) that is suitable for certifying to the dolphin safe status of tuna (other than the seven U.S. fisheries designated as "qualified and authorized" and the AIDCP program). As the Panel will recall, counsel for Mexico continually asserted at the panel meeting that the requirements associated with the AIDCP observer program are the 'minimum' needed to attest to the dolphin safe status of tuna harvested in a particular fishery, and that other observer programs simply did not meet this 'minimum' standard.") (emphasis in original).

in any particular tuna fishery. As discussed above, this is just the type of "rigid and unbending requirement" that the Appellate Body in *US – Shrimp* found to be *inconsistent* with the Article XX chapeau.[756] The United States further observes that thousands, if not tens of thousands, of captains or observers would likely be affected by such an approach.[757]

(C). The Certification Requirements Do Not Impose Arbitrary or Unjustifiable Discrimination Because They Reflect the Fact that the Parties to the AIDCP Consented to Impose a Unique Observer Program on their Tuna Industries

426. In addition to the rationale described above, the different certification requirements do not impose "arbitrary or unjustifiable" discrimination because, as discussed above in the context of Article 2.1, they reflect differences that already exist and neither add to nor diminish these differences.[758] Specifically, the certification requirements reflect the fact that the AIDCP parties chose, in response to the unprecedented level of dolphin mortality in the ETP large purse seine fishery, to impose on themselves a unique observer program with, *inter alia*, unique education and training requirements. No other national or supra-national body in the world has been confronted with a similar problem, and none have adopted an observer program or training and education requirements similar to the AIDCP.

427. Thus the amended measure takes the world as it finds it. The AIDCP imposes an observer requirement on ETP large purse seine vessels and sets certain education and training standards for AIDCP observers and captains of covered vessels.[759] The amended measure imposes no additional observer, training, or education-related costs or requirements on vessels subject to the AIDCP. It merely asks for the AIDCP observer certification where an observer is required by the AIDCP to be onboard the vessel and to collect the necessary information, and it asks for certifications from captains who have, as required by the AIDCP, undergone certain training.[760] Similarly, the amended measure does not impose training or education requirements on captains of vessels outside the ETP or require the placement of observers on such vessels.

428. The fact that the certification requirements simply reflect differences in the world means that the distinctions they draw cannot be deemed "arbitrary or unjustifiable," particularly since

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[756] *See US – Shrimp (AB)*, para. 165; *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 140-143.

[757] As noted above, in the WCPFC convention area alone, there are nearly 5,000 active longline, purse seine, and pole and line vessel. *See* U.S. Second Written 21.5 Submission, para. 177 n.338 (citing WCPFC, *WCPFC Record of Fishing Vessels*, http://www.wcpfc.int/record-fishing-vessel-database (accessed July 21, 2014) (Exh. US-115); WCPFC, *Tuna Fishery Yearbook 2012*, Table 71 (2013) (Exh. US-82)). And, of course, the Panel's analysis would affect not only the vessels in the WCPFC but all vessels operating in all fisheries on the high seas and in waters of national jurisdiction that produce, or potentially could produce, dolphin safe tuna for the U.S. tuna product market.

[758] *See supra*, sec. III.G.4.a.ii.

[759] *See supra*, sec. II.B.

[760] *See supra*, sec. II.B; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.230..

the original adoption of the AIDCP requirements was not arbitrary.[761] To the contrary, the AIDCP parties adopted these unique requirements in response to a special problem of massive dolphin mortality. The majority's analysis, by contrast, would require the United States to, in effect, "globalize" the AIDCP by imposing those same AIDCP education and training standards, regardless of the relative harm to dolphins in the particular fishery and regardless of whether the other Member had agreed to apply these standards.

ii. The Panel Erred in Finding that the Determination Provisions Prove that the Certification Requirements Impose "Arbitrary or Unjustifiable Discrimination"

429. As noted above, the Panel also found that the determination provisions prove that the certification requirements impose "arbitrary or unjustifiable discrimination."[762] In the Panel's view, "[t]his finding was based on the fact that such determinations are only possible in respect of certain fisheries, and the United States had not adequately explained how this limitation is rationally connected to the objectives pursued by the amended tuna measure."[763]

430. The Panel erred in finding that the determination provisions support a finding that the certification requirements give rise to arbitrary and unjustifiable discrimination.

(A). The Panel Erred In Applying the Incorrect Legal Analysis

431. For the same reasons discussed above with regard to the observer certification requirement,[764] the Panel's analysis of whether the determination provisions support a finding that the certification requirements give rise to arbitrary or unjustifiable discrimination relies on an incorrect legal analysis, deviating significantly from the Appellate Body's analysis in *EC – Seal Products* and other disputes.

432. First, the Panel erred in considering the analysis 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.

433. Second, the Panel erred in the application of the factor that it did consider – whether the discrimination can be reconciled with, or is rationally related to, the policy objective of subparagraph (g).

434. In this regard, the United States notes that the Panel's analysis of this issue amounts to barely more than a cross reference to its Article 2.1 analysis, and it is difficult to guess what the

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[761] *See supra*, sec. III.G.4.a.ii.

[762] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604.

[763] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604.

[764] *See supra*, sec. VI.B.3.a.i.A.

Panel considered the causes of the "discrimination" are for purposes of this aspect of its analysis.[765]

435. That said, the Panel recognized 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."[766] The fact that the Panel found fault with the design of the determination provisions does not mean that rationale for requiring proof of an observer certification for dolphin safe tuna product produced in the ETP large purse seine fishery and not in other fisheries is not reconcilable with or rationally related to the objective of dolphin protection. As noted above, the rationale for having observers on ETP large purse seine vessels (which are permitted and capable of setting on dolphins), and not on other vessels (which are not so permitted or capable) is reconcilable with, and rationally related to, the objective of dolphin protection.

436. Thus, even if the design of the determination provisions is relevant to the chapeau analysis in some respect, the Panel erred in considering that the design supports its finding of arbitrary or unjustifiable discrimination because the design is, in fact, reconcilable with, and rationally related to, the objective of dolphin protection.

437. Of course, it is not clear why the determination provisions would be relevant to the chapeau analysis at all. Mexico made no argument that they are relevant, nor did Mexico even allege that a "regular and significant" mortality of dolphins or a "regular and significant" tuna-dolphin association is occurring in any particular fishery in the world (other than the ETP large purse seine fishery).[767] Indeed, the factual findings of the Panel indicate that such a claim would have failed if Mexico had made it.[768]

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[765] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604. The United States further notes that in this brief paragraph the Panel incorrectly characterized the determination provisions as being "inconsistent with Article 2.1 of the TBT Agreement (and Articles I and III of the GATT 1994)." *Id.* As is clear, the Panel made no finding that the determination provisions modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product, either under its TBT Article 2.1 analysis, or under its analysis of GATT Articles I:1 and III:4.

[766] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

[767] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.281 (min. op.) ("Now, if it were shown that some other fishery is, as a matter of fact, causing 'regular and significant mortality or serious injury,' or that another fishery does, as a matter of fact, have 'a regular and significant tuna-dolphin association' akin to that in the ETP, then it might be argued that the failure of the Assistant Administrator to make the relevant determination foreseen in sections 216.91(a)(4)(iii) and/or 216.91(a)(2)(i) itself gives rise to a lack of even-handedness. This would be so because the failure to make a determination would have the result that fisheries in which the same risks exist are being treated differently. However, *Mexico has not asked* the Panel to find that the Assistant Administrator's failure to make a determination is itself a violation of Article 2.1 of the TBT Agreement. *Nor, in my view, has it put forward evidence sufficient to make out such an argument*.") (emphasis added).

[768] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242 (maj. op.) (rejecting Mexico's argument that "the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries"); *id.* para. 7.281 (min. op.) (finding that Mexico has not "put forward evidence sufficient" to prove "that the Assistant Administrator's failure to make a determination is itself a violation of Article 2.1 of the TBT Agreement").

(B). The Panel Erred in Its Allocation of the Burden of Proof

438. The Panel erred in considering this aspect of the amended measure for purposes of its analysis, as Mexico had not argued that the determination provisions rendered the certification requirements inconsistent with the chapeau (or, as discussed above, any other provision of the covered agreements).[769] It is well established that the burden of proof rests with the party asserting an affirmative claim or defense.[770] Once that party has made a *prima facie* case, it is then up to the other party to rebut that case.[771] Thus, under the Article XX chapeau, the United States bore the burden of making a *prima facie* case that the certification requirements did not impose "arbitrary or unjustifiable discrimination."[772]

439. Referring to its finding under Article 2.1 of the TBT Agreement, the Panel found that the United States had met its initial burden of demonstrating that "maintaining different certification requirements does not necessarily amount to imposing unjustifiable or arbitrary discrimination," due to the different "quantitative and qualitative" risks to dolphins inside the ETP large purse seine fishery and outside it.[773] The Panel then referred to the "two reasons" Mexico advanced that the certification requirements nevertheless imposed "arbitrary or unjustifiable discrimination" – that captains "have a financial incentive to certify that their catch is dolphin-safe, even when it is not" and that captains "lack the technical expertise necessary" to make the required certifications.[774] Mexico *did not* assert that the determination provisions rendered the certification requirements "arbitrary or unjustifiable" for purposes of the chapeau. Rather, the Panel raised this issue on its own accord, and erred in doing so.[775]

440. As the Appellate Body has previously stated, a "panel may not take upon itself to rebut the claim (or defense) where the responding party (or complaining party) itself has not done so."[776] The fact that Mexico did not even make such an argument proves the Panel's error in this regard.[777]

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[769] *See supra*, sec. III.G.4.b.i.

[770] *US – Tuna II (Mexico) (AB)*, para. 216.

[771] *See US – Tuna II (Mexico) (AB)*, para. 216; *US – COOL (AB)*, para. 272; *EC – Hormones (AB)*, para. 98 (citing *US – Wool Shirts and Blouses (AB)*, p. 14).

[772] *See, e.g.*, *EC – Seal Products (AB)*, paras. 5.301, 5.336.

[773] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.592-593.

[774] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.594.

[775] *See supra*, secs. III.G.3.a, III.G.3.b.i.

[776] *US – Gambling (AB)*, para. 282.

[777] *See Japan – Agricultural Products II (AB)*, para. 126 ("Since the United States did not even claim before the Panel that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the 'determination of sorption levels' is an alternative measure within the meaning of Article 5.6."). As noted above, a panel may ask questions of the participants to help it understand the evidence they submitted, but "*may not* use its interrogative

441. Thus the Panel misused its authority in making findings on whether the determination provisions rendered the amended measure inconsistent with the Article XX chapeau, and the Panel's finding with respect to the determination provisions should be reversed.[778]

(C). The Panel Erred in Finding that the Design of the Determination Provisions Is Not Rationally Connected to the Objective of Dolphin Protection

442. For the reasons discussed in section III.G.4.b.ii.B, the Panel erred in finding that the alleged limitations of the design of the determination provisions are not rationally connected to the objective of dolphin protection.[779]

443. It would appear undisputed by the Panel that the rationale underlying the determination provisions themselves is rationally connected to the objective of dolphin protection.[780] The Panel, however, appeared to consider that two "gaps" in the design of the provisions undermined that rational connection to the objective. As discussed above in the context of Article 2.1, the Panel's findings as to the two "gaps" are in error[781] and, as such, cannot support the Panel's findings under Article 2.1 or Article XX.

444. With respect to the first so-called "gap,"[782] the evidence on the record establishes that, in purse seine fisheries, a "regular and significant" tuna-dolphin association creates a powerful economic incentive to fish by "setting on dolphins," and that it is this fishing method that leads to unobserved and observed harms to dolphins, including regular and significant dolphin mortality.[783] In purse seine fisheries without such a tuna-dolphin association, by contrast,

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powers to make good the absence of relevant substantiating arguments and evidence." *EC – Steel Fasteners (China) (AB)*, para. 566 (emphasis added).

[778] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604.

[779] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604; *see also id.* paras. 7.258-259.

[780] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 ("These provisions appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter. This would help ensure that similar situations are treated similarly under the amended tuna measure."); *id.* para. 7.280 (min. op.) ("These provisions allow the Assistant Administrator to make a determination that a particular fishery is causing 'regular and significant dolphin mortality' or has a 'regular and significant tuna-dolphin association' akin to that in the ETP. Where such a determination is made, independent observer certification will be required in those fisheries. In other words, the amended tuna measure contains sufficient flexibility to enable the United States to impose the same requirements in fisheries where the same degree of risk prevails.").

[781] *See supra*, sec. III.G.4.b.ii.B.

[782] According to the Panel, the first "gap" occurs in a non-ETP purse seine fishery where "regular and significant mortality" of dolphins was occurring without a "regular and significant" tuna-dolphin association. *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.260-261.

[783] *See supra*, sec. III.G.4.b.ii.B; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122 ("As the Panel reads it, then, the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins. However, as we understand it, what makes setting on dolphins *particularly harmful* is the fact that it

dolphin mortality is extremely low.[784] Thus the evidence on the record contradicts the Panel's finding that any "gap" exists whereby a purse seine fishery would have regular and significant dolphin mortality without a tuna-dolphin association.

445. With respect to the second so-called "gap,"[785] the evidence on the record establishes that fishing techniques other than purse seine fishing are not capable of causing the types of unobservable harms that could result in a fishery in which harm to dolphins was occurring evading a finding of "regular and significant" dolphin mortality.[786] Even under the Panel's own example – that dolphins are "more likely" to be "killed or seriously injured by longlines in areas where there is a 'regular and significant' tuna-dolphin association" – the effects of the harmful association would be covered by the "regular and significant" mortality determination provision.[787] Additionally, of course, there is no evidence on the record that there is, in fact, a correlation between any tuna-dolphin association and harm to dolphins other than in purse seine fisheries.[788] Thus the evidence contradicts the Panel's notion of a "gap" whereby non-purse seine fisheries in which a "regular and significant" tuna-dolphin association existed could evade determination.

446. In light of the evidence on the record, therefore, the determination provisions are related to the measure's policy objective of dolphin protection and nothing in their design undermines that fact.[789]

447. In purse seine fisheries, a tuna-dolphin association similar to that in the ETP is capable of causing unobserved and observed harmful effects on dolphins by creating an incentive to set on dolphins. And there is no evidence that "regular and significant" mortality to dolphins occurs in the absence of such a tuna-dolphin association. In non-purse seine fisheries, there does not seem to be any correlation between any tuna-dolphin association and dolphin harm,[790] and any harm

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causes certain unobserved effects beyond mortality and injury '*as a result of the chase itself*.' These harms would continue to exist 'even if measures are taken in order to avoid the taking and killing of dolphins on the nets.'") (emphasis added) (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.504); Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127) (showing a uniquely high level of dolphin mortality associated with dolphin sets).

[784] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, at Table 1 (Exh. US-127).

[785] According to the Panel, the second "gap" occurs in a non-purse seine fishery where a harmful "regular and significant association" is occurring without "regular and significant mortality" of dolphins. *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

[786] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-131 (finding that neither gillnet fishing nor longline fishing "cause the kinds of unobservable harms that are caused by setting on dolphins" as a result of the chase itself and independently of direct mortalities and serious injuries).

[787] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.261.

[788] *See supra*, sec. III.G.4.b.ii.B.

[789] *See EC – Seal Products (AB)*, para. 5.320; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.541 (finding that the amended measure, and the certification provisions in particular, "relate to the objective of conserving dolphins").

[790] *See supra*, sec. III.G.4.b.ii.B.

that did arise would be direct and observable and, as such, would be captured by the "regular and significant" mortality determination provision.[791] Thus, as the United States explained, the differences in the determination provisions are justified by the goal of dolphin protection.[792]

b. The Panel Erred in Finding that the Tracking and Verification Requirements Impose "Arbitrary or Unjustifiable Discrimination" Under the Chapeau

448. In its brief four paragraph analysis, the Panel found that the tracking and verification requirements impose arbitrary or unjustifiable discrimination based entirely on its earlier finding under the second step of the Article 2.1 analysis.[793] In this regard, the Panel recalled its earlier finding that the NOAA tracking and verification regime "impose[s] a lighter burden on tuna" than does the AIDCP tracking and verification regime.[794] The Panel then stated that it agreed with Mexico that this "lesser burden" "is not rationally related to the amended tuna measure's objective of conserving dolphins."[795] In the Panel's view, this differential treatment is not "related to, let alone justified by, the objectives pursed by the amended tuna measure, which is to provide accurate information to consumers in order to conserve dolphins."[796]

449. 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. Specifically:

1) The Panel erred by applying the incorrect legal analysis.

2) The Panel erred in its application of the burden of proof.

3) 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.

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[791] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-131.

[792] *See* U.S. Response to Panel Question No. 60, paras. 8-11.

[793] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.609 ("The Panel has already reached the conclusion that the different tracking and verification requirements are not even-handed within the meaning of Article 2.1 of the TBT Agreement because they cause a detrimental impact that the United States has not justified on the basis of the objectives pursued by the amended tuna measure. In our opinion, the circumstances that gave rise to the breach of Article 2.1 of the TBT Agreement give rise also to arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994.").

[794] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.610. The Panel also recalled that it "saw merit in Mexico's arguments that the lighter tracking and verification requirements imposed outside of the ETP large purse seine fishery may make it more likely that tuna caught other than by large purse seine vessel will be incorrectly labeled as dolphin-safe," although it had not found it "necessary to make a definitive finding on that point." *Id.*

[795] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.610.

[796] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.610.

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.

i. The Panel Erred In Applying the Incorrect Legal Analysis

450. For similar reasons to those discussed with regard to the certification requirements, the Panel's analysis of whether the tracking and verification requirements impose arbitrary or unjustifiable discrimination relies on the incorrect legal analysis, deviating significantly from the Appellate Body's analysis in *EC – Seal Products* and other similar analyses.

451. First, the Panel erred in considering the analysis to be a single factor test,[797] rather than a cumulative test that analyzed all the factors that could be relevant to making such a determination, including the relationship of the discrimination to the measure's objective.[798] Again, by applying an overly narrow legal analysis, the Panel improperly disregarded these other factors, as discussed below.

452. Second, the Panel erred in the application of the factor that it did consider – whether the discrimination can be reconciled with, or is rationally related to, the policy objective of subparagraph (g). Specifically, the Panel erred in finding that any difference in "burden" in adhering to the NOAA tracking and verification regime, on the one hand, and the AIDCP regime, on the other, supported a finding that the tracking and verification requirements impose arbitrary or unjustifiable discrimination. Indeed, as explained below, the differences between the two regimes that result in this alleged difference in "burden" is both "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean, and reflects the consent of the AIDCP Parties to impose a unique observer program on their own tuna industries.

ii. The Panel Erred in its Application of the Burden of Proof

453. As discussed above in section III.H.3.a, the Panel erred in its allocation of the burden of proof in finding, under Article 2.1, that the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product because adherence to the NOAA regime is "less burdensome" than adherence to the AIDCP regime.[799] Mexico never made such an argument, and the Panel improperly made the case for Mexico, relieving Mexico of its burden of proof. Because the Panel's analysis here relied entirely on

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[797] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.604.

[798] *See EC – Seal Products (AB)*, paras. 5.306, 5.321.

[799] The United States makes this same appeal with regard to the Panel's findings as to GATT Articles I:1 and III:4 by cross reference to the Article 2.1 analysis. *See supra*, secs. IV, V.

these findings of a difference in "burden," the Panel misallocated the burden of proof in this analysis as well.

454. Of course, here the United States, as respondent, had the burden of proving that the tracking and verification requirements met the requirements of the chapeau.[800] And, in fact, the United States put forward an affirmative argument in this regard.[801] Mexico was afforded the opportunity to respond to this argument, and did so.[802] But in doing so, Mexico never argued that it was "less burdensome" to adhere to one regime than the other and that this differences amounted to arbitrary or unjustifiable discrimination. Rather, the Panel made this argument of its own accord, and thus improperly took it upon itself to rebut the U.S. affirmative argument. As the Appellate Body has stated, a "panel may not take upon itself to rebut the claim (or defense) where the responding party (or complaining party) itself has not done so."[803]

iii. The Tracking and Verification Requirements Do Not Impose Arbitrary or Unjustifiable Discrimination Because They Are "Calibrated" to the Risks to Dolphins from Different Fishing Methods in Different Fisheries

455. The Panel erred in finding that the tracking and verification requirements impose "arbitrary or unjustifiable discrimination" due to a "lesser burden" on tuna product produced from fisheries other than the ETP large purse seine fishery.[804] Specifically, any difference in "burden" in adhering to one regime versus the other, and any difference in the "accuracy" of the labels for tuna product subject to the different regimes, does not reflect "arbitrary or unjustifiable" discrimination because the different requirements are "calibrated" to the risks to dolphins from different fishing methods in different fisheries.

456. As discussed above in the context of Article 2.1, the Panel's finding contradicts the principle that a Member, in pursuit of its chosen level of protection, can calibrate its measure to reflect the different levels of risk in different areas.[805] The Appellate Body in the original proceeding affirmed this principle with respect to Article 2.1 of the TBT Agreement, and the Appellate Body in *US – Shrimp* affirmed that it also applies to the Article XX chapeau.[806]

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[800] *See, e.g., EC – Seal Products (AB)*, paras. 5.301, 5.336.

[801] *See* U.S. Second Written 21.5 Submission, paras. 209-217.

[802] *See, e.g.*, Mexico's Second Written 21.5 Submission, paras. 327-336.

[803] *US – Gambling (AB)*, para. 282.

[804] *See US – Tuna II (Article 21.5 – Mexico)*, para. 7.610.

[805] *See supra*, sec. III.H.4.a; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.582 (citing *US – Tuna II (Mexico) (AB)*, para. 286).

[806] *US – Tuna II (Mexico) (AB)*, para. 286 (stating that the Article 2.1 analysis entailed examining "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, are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions"); *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 144 (finding that "condition[ing]

457. And as discussed elsewhere, the evidence on the record demonstrates that the risks to dolphins are different in the ETP large purse seine fishery than in other fisheries. In particular, setting on dolphins is unique in the quantity and intensity of tuna-dolphin interactions that occur in each set.[807] As a result, the initial designation of tuna as dolphin safe or non-dolphin safe, on which tracking and verification systems are based, may be less accurate in fisheries where setting on dolphins is practiced than in other fisheries.[808] Moreover, setting on dolphins is a "particularly harmful" fishing method for dolphins, and other methods do not cause similar observed and unobserved harms.[809] As a result, on a per set basis, there are simply more dolphin mortalities and serious injuries in the ETP large purse seine fisheries than in other fisheries and, consequently, more tuna that needs to be segregated as non-dolphin safe.[810] Thus the different tracking and verification requirements are calibrated to reflect the greater risks to dolphins, and the resulting greater challenges to the dolphin safe tracking and verification system, that arise in the ETP large purse seine fishery due to the prevalence of setting on dolphins.[811]

iv. The Tracking and Verification Requirements Do Not Impose Arbitrary or Unjustifiable Discrimination Because They Reflect the Consent of the AIDCP Parties to Impose a Unique Program on their Tuna Industries

458. The tracking and verification requirements do not impose "arbitrary or unjustifiable" discrimination because they reflect differences that already exist and neither add to nor diminish these differences.[812] Specifically, the differences in these requirements reflect the fact that the AIDCP parties chose, in response to the unprecedented level of dolphin mortality in the ETP large purse seine fishery, to impose on themselves unique tracking and verification requirements and that no other fisheries management institution has adopted a similar regime.

459. The AIDCP imposes certain tracking and verification requirements on large purse seine vessels in the ETP, including the requirement to maintain separate TTFs and segregation

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market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member . . . allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory.").

[807] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.592; Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127) (showing that the interaction with dolphins is exponentially greater in the ETP large purse seine fishery than any other fishery, *e.g.*, 31.3 million of dolphins chased with 18.5 million captured in 52,130 dolphin sets in the years 2009-2013).

[808] *See supra*, sec. III.H.4.

[809] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.125; *id*. paras. 7.130-132.

[810] *See supra*, sec. III.H.4; U.S. Response to Panel Question No. 19, paras. 116-119; U.S. Response to Panel Question No. 21, paras.138-142; *see also* Tables Summarizing the Fishery-by-Fishery Evidence on the Record, at 1-2 (Exh. US-127).

[811] *See* U.S. Second Written 21.5 Submission, paras. 213-217. *See also* Tables Summarizing the Fishery-by-Fishery Evidence on the Record, at 1-2 (Exh. US-127) (showing that, on a per set basis, dolphin mortality in the ETP large purse seine fishery is significantly higher than in any other fishery for which data is available).

[812] *See supra*, sec. III.H.4.

requirements.[813] The amended measure imposes no additional requirements related to tracking and verification but merely asks for the TTF number when, under the AIDCP, a TTF was required to be maintained and the tuna product is certified as "dolphin safe."[814] Conversely, for tuna product not subject to the AIDCP tracking and verification regime, the amended measure does not reduce the burden on tuna product produced in other fisheries.[815]

460. The fact that the tracking and verification requirements simply reflect preexisting differences means that the distinction they draw cannot be deemed "arbitrary or unjustifiable." The establishment of the AIDCP tracking and verification program was not arbitrary. Rather, the AIDCP Parties imposed on themselves unique requirements in response to the unprecedented dolphin mortality that was occurring in their fishery. No other institution in the world has adopted similar requirements, as none has been faced with a similar problem. The amended measure *does* impose tracking and verification requirements on tuna caught outside the ETP large purse seine fishery that ensure the identity of particular tuna and that dolphin safe and non-dolphin safe tuna are not commingled.[816] It does not, however, impose precisely the same tracking and verification requirements on tuna producers everywhere that the AIDCP Parties chose to adopt in response to a unique situation.

461. In other words, under the Panel's analysis the United States would need to impose a certain regime upon all of its trading partners –including requiring their involvement in policing this regime – for the *sole* reason that Mexico has previously consented to these requirements. Given this, the Panel's analysis appears to *call* for an "arbitrary or unjustifiable" measure, not correct one. This is even more the case because the United States would be expected to impose this one regime on all trading partners *regardless* of the relative harm in the particular fishery at issue. But to do so would surely run afoul of the Appellate Body's guidance that measures that

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[813] *See supra*, sec. II.B.

[814] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.47-48.

[815] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.49 (describing the Form 370 requirement, which must accompany all imported tuna product and must be endorsed by each importer or processor that takes custody of the tuna contained in the tuna product with which the form is associated); *see also* NOAA Form 370, at 2 (Exh. MEX-22); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.50-51 (describing the requirement that tuna product labelled dolphin-safe, tuna must be segregated from non-dolphin-safe tuna from the time it was caught through unloading and processing"); *id.* para. 3.52 (describing the reports that U.S. processors are required to submit to NMFS, which include "for all tuna received, whether the tuna is eligible to be labelled dolphin-safe under section 216.91, species, condition of the tuna products, weight, ocean area of capture, catcher vessel, gear type, trip dates, carrier name, unloading dates, location of unloading and, if the tuna products are labelled dolphin-safe, the required certifications for each shipment of tuna").

[816] *See* 50 C.F.R. §§ 216.93(c)(2), 216.93(c)(3) (requiring, for tuna caught in purse seine fisheries outside the ETP and non-purse seine fisheries, that non-dolphin safe tuna be segregated from dolphin-safe tuna from the point of catch through unloading and storage); *id.* 216.93(d) (requiring U.S. canneries to preserve segregation of dolphin safe from non-dolphin safe tuna and to submit reports to NOAA including, *inter alia*, information on the dolphin safe status of all tuna product received); *id.* 216.93(f) (requiring that all imported tuna product be accompanied by "a properly certified FCO" and, as necessary, the "associated certifications"); *id.* 216.93(g) (requiring "any exporter, transshipper, importer, processor, or wholesaler/distributer of any tuna or tuna products" to maintain for at least 2 years records including the required dolphin safe certifications, as applicable and to submit to NMFS all FCOs and certifications associated with any tuna product they receive).

impose "rigid and unbending requirement[s]" are not likely to meet the requirements of the chapeau.[817]

462. For these reasons, the Panel erred in finding that the tracking and verification requirements of the amended measure impose arbitrary and unjustifiable discrimination and, as such, are not consistent with the Article XX chapeau.[818]

3. Conclusion

463. For the above reasons, the United States respectfully requests the Appellate Body to reverse the Panel's findings that the certification requirements and the tracking and verification requirements do not meet the requirements of the chapeau of Article XX of the GATT 1994,[819] and respectfully requests that the Appellate Body complete the analysis consistent with the analysis above.

C. The United States Conditionally Requests that the Appellate Body Complete the Analysis and Find that the Amended Dolphin Safe Labeling Measure Satisfies the Standard of Article XX(b)

464. If the Panel's finding that the any of three challenged elements of the amended measure are provisionally justified under Article XX(g) is reversed, or if the Appellate Body finds that the Panel otherwise erred in failing to complete the analysis under Article XX(b), the United States submits that the Panel's findings and the evidence on the record nevertheless proves that all three elements are provisionally justified under Article XX(b) of the GATT 1994.

465. Article XX(b) states that, subject to the requirements of the Article XX chapeau, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: . . . (b) necessary to protect human, animal or plant life or health." Article XX(b) involves two elements: 1) whether the challenged measure's objective is "to protect human, animal or plant life or health"; and 2) whether the measure is "necessary" to the achievement of its objective.[820] As under Article XX(g), it is the measure(s) found to cause the inconsistency with a particular GATT provision that must be justified under Article XX(b).[821]

466. The Panel's findings under Article XX(g) of the GATT 1994 and the evidence on the record demonstrate that the amended measure satisfies the first element of Article XX(b). Under Article XX(g), the Panel, relying on the finding of the original panel affirmed by the Appellate

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[817] *See US – Shrimp (AB)*, para. 165; *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 140-143.

[818] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.611.

[819] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).

[820] *See Brazil – Retreaded Tyres (AB)*, para. 134.

[821] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 5.510 and n.719 (citing *EC – Seal Products (AB)*, para. 5.185, stating: "In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994").

Body, found that "contribut[ing] to the protection of dolphins" is "one of the goals of the US dolphin-safe labeling regime."[822] The Panel described the measure as being concerned with "the preservation of individual dolphin lives" and "the effects of tuna fishing on the well-being of individual dolphins."[823] The Panel found that all three of the challenged elements were "centrally concerned with the pain caused to dolphins in the context of commercial fishing practices."[824]

467. The Panel's findings under Article XX(g) and the findings of the Appellate Body in the original proceeding, are also sufficient to demonstrate that the amended measure satisfies the second element of Article XX(b). The Appellate Body has found that the "necessary" standard involves "weighing and balancing a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure" and that an analysis of whether a less trade restrictive alternative measure exists should also be undertaken.[825] It is not disputed that protecting dolphins from the harms of commercial tuna fishing is an important objective.[826]

468. With respect to the amended measure's contribution to that objective, the Panel recognized that the Appellate Body in the original proceeding found that the original measure "'fully addresse[d]' the risks caused by the 'particularly' harmful practice of setting on dolphins.[827] The Appellate Body also emphasized that a certification that no dolphin was killed or seriously injured in a set would allow the measure to address "the risks . . . posed by fishing techniques other than setting on dolphins."[828] As noted above, the Panel found that all three challenged elements of the measure are "centrally concerned" with preventing harm to dolphins

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[822] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.524-525 (citing *US – Tuna II (Mexico) (AB)*, para. 242).

[823] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527.

[824] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.532-533 ("[I]n concluding that the tuna measure 'fully addresse[d]' the risks caused by the 'particularly' harmful practice of setting on dolphins, the Appellate Body confirmed that the tuna measure related to the conservation and protection of dolphins. . . . In this context, we note that the amended tuna measure disqualifies from the dolphin safe label all tuna caught in a set or other gear deployment in which dolphins were killed or seriously injured, regardless of the fishing method used or the location in which the tuna was caught. ... [I]t seems to us that the amended measure remains centrally concerned with the pain caused to dolphins in the context of commercial fishing practices both inside and outside the ETP, and caused by both setting on dolphins and other methods of tuna fishing. Whatever may be the shortcomings of one system of certification or tracking and verification *vis-à-vis* another, it seems clear to us that, considered in themselves, systems designed to identify, track, and, indirectly, to reduce dolphin mortality and injury, clearly 'relate' to conservation.").

[825] *EC – Seal Products (AB)*, para. 5.169 (citing *Korea – Various Measures on Beef (AB)*, para. 164, 166; *US – Gambling (AB)*, para. 306-07; and *Brazil – Retreaded Tyres (AB)*, para. 182).

[826] *See* Mexico's Second Written 21.5 Submission, para. 262.

[827] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.532 (citing *US – Tuna II (Mexico) (AB)*, para. 297.

[828] *US – Tuna II (Mexico) (AB)*, para. 296.

due to "commercial fishing practices both inside and outside the ETP."[829] Further, the Panel found that all three elements "help to ensure that the US tuna market does not operate in a way that encourages dolphin unsafe fishing techniques."[830] Thus, the Panel found that the challenged elements make a real and significant contribution to the objective of protecting dolphin life and health.

469. Finally, as the United States showed before the Panel, Mexico did not identify a reasonably available, GATT-consistent alternative measure.[831] Mexico's first proposal, requiring AIDCP-equivalent observer certifications and tracking and verification for all tuna product labeled dolphin safe, is not GATT consistent since there would still be a detrimental impact on Mexican tuna. Mexico's second alternative, allowing use of the AIDCP label in conjunction with the U.S. label, has already been found by the Appellate Body not to fulfill the United States' chosen level of protection.[832] Consequently, it is not a reasonably available alternative measure.[833]

470. Thus the Panel's findings, and those of the Appellate Body in the original proceeding, demonstrate that the challenged elements of the amended measure are provisionally justified under Article XX(b).

VII. CONCLUSION

471. For the foregoing reasons, the United States respectfully requests that the Appellate Body review and modify the Panel's relevant underlying findings and ultimate conclusion consistent with the above analysis.

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[829] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.533.

[830] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.535.

[831] The Appellate Body has defined trade-restrictiveness as meaning "something having a limiting effect on trade" and the term has been understood to refer to market access. *See* Mexico's Second Written 21.5 Submission, paras. 280-281.

[832] *See US – Tuna II (Mexico) (AB)*, paras. 329-331 ("Since under the proposed alternative measure tuna caught in the ETP by setting on dolphins would be eligible for the 'dolphin-safe' label, it would appear, therefore, that the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled 'dolphin-safe.' We disagree therefore with the Panel's findings that the proposed alternative measure would achieve the United States' objectives 'to the same extent' as the existing US 'dolphin-safe' labelling provisions, and that the extent to which consumers would be misled as to the implications of the manner in which tuna was caught 'would not be greater' under the alternative measure proposed by Mexico.").

[833] *See EC – Seal Products (AB)*, para. 5.260 ("[I]n order to qualify as a 'genuine alternative,' the proposed measure must be not only less trade restrictive than the original measure at issue, but should also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.").