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

Recourse to Article 21.5 of the DSU by the United States
Second Recourse to Article 21.5 of the DSU by Mexico

(DS381)

(AB-2017-9)

Executive Summary
of the U.S. Appellee Submission

December 19, 2017

1. This is the third time this long-standing dispute over whether the U.S. dolphin safe labeling requirements discriminate against Mexican tuna and tuna product has come before the Appellate Body. We believe it should be the last.

I. THE PANELS DID NOT ERR IN FINDING THAT THE CHALLENGED MEASURE IS CONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

A. Mexico's Claim that the Panels Erred in Their Interpretation of Article 2.1 Should be Rejected

1. The Panels Correctly Found that the Risk Profiles Must Reflect the Risk of Mortality and Injury to Dolphins

2. Mexico claims that the Panels erred in interpreting the calibration analysis by finding that the risk profiles of the different fishing methods should only reflect harms to dolphins – *i.e.*, mortality and injury (both observed and unobserved) – and not the reliability of different systems for certification and tracking and verification. Mexico's appeal should be rejected.

3. First, Mexico is wrong to claim that the Panels erred in strictly following the Appellate Body's guidance in the previous compliance proceeding. The Appellate Body set out clearly what it considered to be the appropriate calibration analysis. In doing so, the Appellate Body repeatedly referred to the risk profiles of the different fishing methods and that those risk profiles should reflect the relative risks of observed and unobserved mortalities and injury. Second, Mexico's is premised on the insistence that the Panels should have subjected the eligibility criteria to one legal test and the certification and tracking and verification requirements to another. But in the previous proceeding, the Appellate Body faulted the panel for applying different tests to the certification and tracking and verification requirements, on the one hand, and eligibility criteria, on the other, emphasizing that *the same test* must be applied to these "cumulative and highly interrelated" regulatory distinctions. The question, ultimately, is whether *the measure* is even-handed. Finally, Mexico's appeal should be rejected because it has been put forward without any factual basis. Mexico never provided to the Panels any evidence that "the reliability of applicable systems" is "inextricably linked" with actual, physical harm to dolphins, such that "dolphins will be at a greater relative risk of harms" where the "the reliability of applicable systems" is low. Mexico may not make new factual arguments on appeal.

2. The Panels Correctly Assessed the 2016 Measure Based on Whether Its Distinctions Are Calibrated to the Relative Risks to Dolphins

4. Mexico argues that the Panels erred in failing to assess the consistency of the 2016 measure based on the "rational connection test." Mexico seems to raise eight separate arguments in this regard, all addressing the Panels' statement that the Appellate Body's use of the phrase "taking account of the objectives of the measure" means that the Panels were required to take into account that: "(a) the form and content of the calibration test must be appropriately informed by the objectives pursued by the measure, and (b) the calibration test should itself be applied taking account of the measure's objectives." Mexico's appeal should be rejected in its entirety.

5. Mexico's first, third, and fourth arguments are redundant of arguments above and fail for the reasons already explained. Mexico's second argument – that the Panels' analysis tolerates less accurate labels for tuna caught outside the ETP large purse seine fishery than tuna caught inside it – is wrong. The Panels correctly reasoned that: (1) they could not assume that the certifications from any fishery were perfectly correct; (2) the risk of inaccurate labeling is not a

constant "will depend not only on the . . . margin of error [of the certification], but also, and importantly, on the extent of events that require recording whether a dolphin mortality or serious injury was observed in a given fishery"; and (3) in order to determine whether the measure's regulatory differences are consistent with its objectives, they needed to examine those differences "in the light of the relevant risk profiles in different fisheries" and determine whether they are "calibrated to, tailored to, and commensurate with the different risk profiles in different fisheries." Mexico's fifth argument – that the Panels erred in relying on the concept of "margin of error" – fails. The Panels were correct that "it is unlikely that any system could be completely error-proof" and that the measure need not "be completely error-proof in order to be calibrated" (and thus consistent with Article 2.1). The concept of a margin of error is consistent with the Appellate Body's instruction that a compliance analysis must assess all relevant aspects of the measure under the calibration analysis in order to determine whether the measure, as a whole, is calibrated to the risks of harms to dolphins occurring in different fisheries. Mexico's sixth argument – that the Panels "did not account for the variability in the risks to dolphins in particular fisheries outside the ETP" – is addressed below. Mexico's seventh argument – that the Panels misunderstood Mexico's argument regarding the relationship between the measure's two objectives – fails for not identifying a legal error. Mexico's eighth argument – that the Panels erred in not interpreting Article 2.1 to ensure "symmetry" with Article XX of the GATT 1994 – fails; the Panels' approach reflects that consideration, given that it adheres closely to the guidance of the Appellate Body in the previous proceeding.

3. The Panels Correctly Assessed 2016 Measure Without Regard to the Objective of Sustainable Development

6. Mexico's appeal that the Panels erred in finding the 2016 measure consistent with Article 2.1 because the measure "undermines the objective of sustainable development" should be rejected. As the Panels explained, Mexico's argument seeks to transform preambular language regarding sustainable development into a substantive obligation that Members are required to further a sustainability objective pursuant to the TBT Agreement obligation regarding discrimination. There is simply no support for such an argument, and Mexico provides none.

B. Mexico's Claim that the Panels Erred in Their Application of Article 2.1 Should Be Rejected

1. The Panels Correctly Assessed the Different Risk Profiles of Different Fishing Methods in Different Ocean Areas

7. Mexico's claims that the Panels erred by: (a) failing to include assessments of fisheries in their assessment of the risk profiles of different fishing methods; (b) using the harm to dolphins caused by setting on dolphins in the ETP large purse seine fishery as the "single benchmark" for the calibration analysis; and (c) relying on measurements of risk to dolphins that Mexico alleges are deficient while omitting important risk factors should be rejected.

a. Mexico's Claim that the Panels' Analysis of the Risk Profiles of Different Fishing Methods Did Not Encompass Assessments of Relevant Fisheries Should Be Rejected

8. First, Mexico's argument that risk profiles must be assessed exclusively on a "fishery-by-

fishery basis," should be rejected because an exclusively fishery-by-fishery approach conflicts with the design, architecture, and revealing structure of the dolphin safe labeling measure. As is well established, the eligibility criteria draw distinctions on a fishing method-by-fishing method basis, not on a fishery-by-fishery basis. Nowhere in the two sets of DSB recommendations and rulings is there any indication that addressing this issue on a fishing method-by-fishing method basis is inconsistent with Article 2.1. Further, this argument directly conflicts with the design of the determination provisions.

9. Second, Mexico's appeal should be rejected because the approach Mexico insists is required conflicts with the Appellate Body's analysis. There is no support in the Appellate Body's analysis in the previous two proceedings for what Mexico argues. Proof of this can be found in the Appellate Body's analysis of why it could not complete the analysis. In particular, the Appellate Body concluded that it could not complete the analysis not because the first compliance panel had failed to make ultimate findings on a fishery-by-fishery basis, but because the panel had not made an assessment of the *overall risk* of harms to dolphins.

10. Finally, Mexico is incorrect that the Panels' assessment did not reflect the risk profiles of fishing methods "in different areas of the ocean" but, rather reflected an "average" risk profile of the tuna fishing methods other than setting on dolphins in all ocean areas. In fact, the Panels considered and assessed the level of observable and unobservable harms to dolphins in each fishery for which there was probative evidence on the record.

b. Mexico's Claim that the Panels Erred in Using a "Single Benchmark" in the Calibration Analysis Should Be Rejected

11. Mexico's claims that the Panels erred by analyzing whether the regulatory distinctions are calibrated by comparing the risks of harms to dolphins from setting on dolphins inside the ETP large purse seine fishery to the risks of harms to dolphins from other fishing methods used in different areas of the ocean fail.

12. First, Mexico is wrong to argue that the Panels' approach "nullifies the calibration analysis." In fact, the Appellate Body explicitly – and repeatedly – called for the Panels to undertake *this very analysis*. In particular, the Appellate Body stated that the comparison is between the "labelling conditions for tuna products containing tuna caught by large purse-seine vessels in the ETP, on the one hand, and for tuna products containing tuna caught in other fisheries, on the other hand." Further, none of Mexico's explanations of why the Panels' analysis "nullifies the calibration analysis" has any basis. In particular, the question critical is whether the respective regulatory requirements that apply to *all relevant groups* of products – *i.e.*, tuna products produced from setting on dolphins in the ETP large purse seine fishery and tuna products produced from other fishing methods in different parts of the ocean – address the respective risks to dolphins. It is not correct that the analysis the Panels undertook mandates a particular outcome for tuna product produced from setting on dolphins in the ETP.

13. Second, Mexico is wrong to claim that the Panels "erroneously narrowed the risk profile criteria" in their assessment of the risk profile in its discussion of the "kinds of harm" caused by setting on dolphins. Mexico's assertion that the way the Panels grouped types of harm caused by fishing methods caused them to "disregard[]" the alleged effects of "ghost fishing" by gillnets and longline gear is incorrect. In fact, the Panels found that Mexico's evidence on the risks of

"ghost fishing" "[were] relevant to [their] assessment of the risk profile of gillnet fishing" but did not agree with Mexico as to what that evidence showed.

c. Mexico's Claim that the Panels Relied on Deficient or Incomplete Risk Factors Should Be Rejected

14. Mexico appeals the paragraphs where the Panels: (1) accepted that it was appropriate to adopt a per set methodology to compare harms across different fisheries; (2) rejected Mexico's proposed PBR metric; (3) rejected Mexico's proposed "absolute levels of adverse effects" metric; and (4) rejected Mexico's argument that the "reliability" of other applicable certification and tracking systems are elements of the "risk profile of different fisheries."

i. Mexico's Claim on Per Set Methodology Should Be Rejected and Is Not Properly Raised as a Legal Appeal

15. First, Mexico's argument that the Panels erred in "relying on the per set methodology" to evaluate risk profiles while "ignoring the weaknesses" of that approach is wrong. With respect to the Panels' assessment of Exhibit US-179 Rev., Mexico identifies not a single criticism that the Panels "ignored." Indeed, Mexico concedes that "[t]he Panels rejected *all* of Mexico's arguments and found that every aspect of the U.S. chart was reliable." Mexico also fails to show that the Panels "ignored" Mexico's argument on cross-fishery comparison of per set data or that the argument established a "weakness" in the per set approach. As Mexico acknowledges, the Panels fully addressed (and rejected) Mexico's argument. Second, Mexico is incorrect that the Panels "largely disregarded" a per set measurement in assessing the risk profile of gillnet and trawl fishing in different ocean areas. The Panels thoroughly examined trawl and gillnet fishing and relied on the evidence – both per set and general – that they found probative. Third, this challenge pertains to the Panels' appreciation of the facts and Mexico errs in circumventing the standard of DSU Article 11 of the DSU by claiming, without basis, that errors are legal.

ii. The Panels Were Correct Not To Rely on PBR to Evaluate Risk Profiles

16. Mexico appeals paragraph 7.473 of the Reports, arguing that the Panels erred in "rejecting the use of PBR in evaluating risk profiles" of different fishing methods and fisheries.

17. Mexico's first argument – that the Panels' conclusion regarding the applicability of PBR is inconsistent with previous reports – lacks merit. Relying on a PBR metric is not compatible with addressing the "overall levels of relative risks" to *dolphins* in different fisheries because it focuses on the effect that dolphin mortalities have on a dolphin stock, not on the "likelihood that dolphins would be adversely affected in the course of tuna fishing operations." A PBR approach also is not compatible with the objective of the 2016 measure and "sits uncomfortably with [its] design and structure." The Panels' approach is consistent with that of the Appellate Body in the first compliance proceeding, which explained the critical inquiry as whether the distinctions of the measure are "calibrated to the *likelihood* that *dolphins would be adversely affected* in the course of tuna fishing operations." Mexico's claim that the Panels' reasoning is inconsistent with the original panel's analysis is incorrect. None of the paragraphs of the Appellate Body report Mexico cites support this argument, nor do the paragraphs of the original panel report.

18. Mexico's second argument – that not relying on a PBR methodology was "arbitrary" in light of the objectives and structure of the 2016 measure and that the Panels' failed to explain their approach – is also without merit. First, contrary to Mexico's argument, the Panels explained why the effect of mortalities on a dolphin stock is distinct from "adverse effects on dolphins." Second, Mexico is wrong that the Panels failed to explain they decided not to rely on a PBR metric to assess the Hawaii and Atlantic longline fisheries. The Panels' explanation that, where PBR for a particular stock is very low the relationship between observable mortalities and PBR is "not necessarily indicative" of the level of dolphin mortality, related specifically to these fisheries (both of which have very low levels of observable dolphin mortality). Third, Mexico is wrong that the Panels did not explain the relationship between declining to adopt a PBR approach and the objectives and structure of the measure.

19. Mexico's third argument, that the Panels erred in "characterize[ing]" the objectives of the 2016 measure in a manner that is "contradicted" by the measure itself, is wrong. Mexico makes this argument despite not choosing to appeal the substance of the Panels' finding that the measure is concerned with the risks facing dolphins "at an individual level, rather than at a population level." As Mexico has raised no such claim of appeal, there is no basis for the Appellate Body to reconsider this finding by the Panels. Further, the aspect of the measure Mexico raises does not undermine the Panels' finding.

iii. The Panels Were Correct Not To Rely on "Absolute Effects" to Evaluate Risk Profiles

20. In section V.C.1.c(3), Mexico claims that the Panels erred in rejecting the argument that, if the Panels did not rely on a PBR methodology, they should rely on "absolute levels of adverse effects." Mexico's argument should be rejected. The Appellate Body has made it clear that, in this dispute, the assessment under Article 2.1 requires an "evaluation of the *overall levels of relative risks* attributable to different fisheries, including in respect of both observable *and* unobservable harms." Thus, the analysis (1) must assess "observable and unobservable harms" (*i.e.*, "overall" harms), and (2) must be "relative" among the risks of different fisheries. Mexico's proposed absolute effects metric is neither comprehensive nor relative. First, it considers only observable harms and therefore is incompatible with an "overall" assessment of risk. Second, it is incompatible with a "relative" assessment – and an assessment of the "likelihood" of harms in different fisheries – because it does on *not* "contextualize" the adverse effects on dolphins in different fisheries based on the different sizes and effort levels of fisheries.

iv. The Panels Were Correct Not To Rely on Alleged Differences in Accuracy to Evaluate Risk Profiles

21. In section V.C.1.c(4), Mexico claims the Panels erred by "rejecting the risks created in certain ocean areas by insufficient regulatory oversight." Mexico's argument that "insufficient regulatory oversight" itself *causes* greater risk of harm to dolphins and so must be included in the risk profiles of fisheries was addressed above. Mexico's argument that "insufficient regulatory oversight" must be included in the risk profiles of fisheries because it can affect the reliability of reporting of harms to dolphins was fully considered and rejected by the Panels. As they explained, the risk of inaccurate certification or tracking "are not risks that affect dolphins themselves" and thus do not form part of the "risk profile" for dolphins of tuna fishing in different fisheries, as described by the Appellate Body in the first compliance proceeding.

Rather, the risk of inaccurate certification or tracking may be relevant to assessing whether the distinctions of the 2016 measure are calibrated to the risk profiles of different fisheries.

2. The Panels Correctly Found that the Eligibility Criteria, in Context as Part of the Whole Measure, Are Calibrated

22. In section V.C.2.a, Mexico appeals paragraphs 7.538-547, which set out the Panels' legal analysis and finding that the eligibility criteria are calibrated to the risks to dolphins posed by "different fishing methods in different areas of the ocean." All of Mexico's arguments lack merit.

a. Mexico's Argument that the Panels' Assessment Was Incomplete Should Be Rejected

23. Mexico claims that the Panels' assessment of whether the eligibility criteria are calibrated was "incomplete and limited to justifying the ineligibility of the AIDCP-compliant dolphin set method." However, it is clear that the Panels' analysis and conclusion was *not* limited to the ineligibility of setting on dolphins but also encompassed the conditional eligibility of tuna caught by the other fishing methods. First, the Panels' framing of their analysis in Section 7.8.2 shows that they were assessing all components of the eligibility criteria. Second, the body of the Panels' analysis also makes this clear: the Panels continually emphasized that it was *the comparison* between setting on dolphins and other fishing methods that rendered the eligibility criteria calibrated to risk. Third, the Panels' subsequent analysis and descriptions of Section 7.8.2 confirm that their analysis and conclusions in that section covered both the prohibitive and permissive aspects of the eligibility criteria.

b. Mexico's Argument that the Panels Failed to Assess the Risk Profiles of Different Ocean Areas Should Be Rejected

24. Mexico claims that, in their analysis of whether the eligibility criteria are calibrated, the Panels "failed to assess the risk profiles of different ocean areas." Mexico's argument that properly calibrated eligibility criteria *cannot* distinguish based on fishing method simply repeats arguments made earlier in Mexico's submission and addressed above. Mexico's second argument – that the Panels' conclusions on the eligibility criteria did not reflect, and indeed were inconsistent with, their findings on the risk profile of individual fisheries other than the ETP large purse seine fishery – is likewise incorrect.

25. Mexico's argument that the Panels mentioned an "incomplete" selection of fisheries in their analysis of the eligibility criteria is misplaced because the Panels' analysis of risk profiles in Section 7.8.2 was based on their earlier factual findings and conclusions in Section 7.7.2. The Panels said so explicitly at the outset of Section 7.8.2. Moreover, the three previous factual "conclusions" on which the Panels' finding that the eligibility criteria were calibrated is based are conclusions the Panels drew in Section 7.7.2, based on their extensive review of the factual record. Therefore, Mexico's argument that the Panels ignored certain "findings" or "ocean areas" in Section 7.8.2 is wrong. In Section 7.8.2, the Panels summarized the critical findings and conclusions from Section 7.7.2 and gave particular "instance[s]" of relevant facts, but they did not attempt – or need – to reference every exhibit or fishery on the record on which their conclusions indirectly relied. Rather, as they explained, they relied on the "conclusions" from their previous analysis, which *were* based on all the relevant evidence on the record. (Also,

Mexico misstates several of the "findings" and "evidence" it claims the Panels "ignored.")

c. Mexico's Argument that the Panels' Assessment Omitted Relevant Factors Reflects Should Be Rejected

26. Mexico argues that the Panels analysis of whether the eligibility criteria are calibrated is in error because the Panels "failed to include relevant factors in the risk profiles of the fishing methods and ocean areas." The arguments repeat, without addition, arguments Mexico raised in other sections of its appellant submission that are addressed above. Thus, Mexico's argument that the Panels' analysis of the eligibility criteria is incomplete and in error should be rejected.

3. The Panels Correctly Found that the Certification Requirements, in Context as Part of the Whole Measure, Are Calibrated

27. In section V.C.2.b, Mexico appeals paragraphs 7.571, 7.572 and 7.603, 7.607-608, and 7.609 and 7.710 of the Reports. These paragraphs are part of Section 7.8.3, in which the Panels found that the certification requirements of the 2016 measure are "calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean." All of Mexico's arguments should be rejected.

a. Mexico's Argument that the Panels Wrongly Relied on Their Evaluation of Risk Profiles Should Be Rejected

28. Mexico argues the Panels erred in relying in their analysis of the certification requirements on their "erroneous evaluation" of the "comparative risk profiles of the different fishing methods." This argument relies entirely on arguments that were addressed above.

b. Mexico's Argument that the Panels Failed to Conduct an Appropriate Analysis of Ocean Areas Should Be Rejected

29. Mexico argues that the Panels failed to analyze "the risk profiles of ocean areas" and, specifically, "to compare the ETP ocean area to other ocean areas." All of Mexico's arguments should be rejected.

30. Mexico is wrong that the Panels' analysis of the risk profile of the ETP large purse seine fishery and other fisheries was based on global averages concerning different fishing methods and not a review of individual fisheries. In Section 7.7.2, the Panels thoroughly reviewed all the evidence on the record on the seven tuna fishing methods, including all the evidence on particular fisheries and drew conclusions about the risk profile of each of the tuna fishing methods, as used in each and all of the ocean areas for which there was evidence on the record. They concluded that setting on dolphins in the ETP had a much higher risk profile than the other tuna fishing methods used inside and outside the ETP. These factual findings from Section 7.7.2 on the risk profile of different fishing methods in the ocean areas for which evidence was available were the basis for the analysis of the certification requirements in Section 7.8.3.

31. The three specific arguments Mexico advanced are also incorrect. First, Mexico is wrong that the Panels did not correctly analyze the risk profile of the ETP large purse seine fishery because they did not account for vessels that may not set on dolphins. The Panels explicitly addressed this fact and explained that, while not all large purse seine vessels in the ETP "actually

do set on dolphins," what gives the fishery "its special risk profile" is the fact that only in that fishery is there a "technical and legal possibility of setting on dolphins" and only in that fishery does setting on dolphins "occur in a consistent and systematic manner." None of Mexico's assertions undermine this finding. Second, Mexico is wrong that the Panels failed to "consider" whether "particular non-ETP fisheries . . . should be given different risk profiles" and that certain fisheries were classified as "low risk" based evidence on other fisheries using the same gear type. The Panels did analyze whether any "particular" fisheries should not be classified as "low risk" in Section 7.7.2 and in assessing the determination provisions and found that the only high risk fisheries shown by evidence on the record to exist today were gillnet fisheries in the Indian Ocean. Third, Mexico is wrong that the Panels erred in not addressing the observer certification requirements on the seven U.S. domestic fisheries.

c. Mexico's Argument that the Panels' Reasoning Concerning Margins of Error Constituted Legal Error Should Be Rejected

32. Mexico claims that the Panels applied the wrong legal standard in assessing the certification requirements and that this led them to erroneously find that the measure can be calibrated "where it allows higher margins of error for certifications in all ocean areas other than the ETP." This argument is redundant of those advanced in previous sections of Mexico's submission and addressed above.

d. Mexico's Argument on the Panels' Analysis and Conclusions Concerning the Determination Provisions Should be Rejected

33. Mexico claims that the Panels erred in finding that "the determination provisions contribute to the calibration" of the certification requirements. Mexico's argument is in error.

34. First, the Panels did not fail to take into account that the determination provisions are not based any of the three variables that Mexico raises. Rather, the Panels had already found that none of those variables was an appropriate basis to assess whether the measure, including the certification requirements, is calibrated to the risk profile for dolphins of tuna fishing by different fishing methods in different ocean areas. Mexico advances no additional arguments why the determination provisions should be based on any of these variables.

35. Second, there was no "inconsistency" between the Panels' analysis of the determination provisions and their reliance in other parts of their Reports on the level of observed dolphin mortalities for 2009-2015. The Panels relied on the 2009-2015 figure as part of their assessment of the risk profile of setting on dolphins in the ETP. However, as the Panels noted, that level of dolphin mortalities reflects the decreases in observed deaths that have occurred since the La Jolla Agreement and AIDCP requirements incorporated by the U.S. measure went into effect. Therefore, they do not represent the level of "regular and significant" dolphin mortality that would justify additional requirements being imposed in the first place. However, by setting a lower benchmark the measure takes a more dolphin-protective approach to fisheries not currently designated under the determination provisions. And even if the benchmark had been set at the 2009-2015 level, the application of the measure would be unchanged.

36. Finally, Mexico's assertion that, under the Panels' approach, any fishery below the "regular and significant" dolphin mortality or serious injury threshold is "assumed" to pose no or

a *de minimis* risk to dolphins is incorrect. The Panels explicitly recognized that such fisheries may pose some risk of harm to dolphins but found that the certification requirements of the 2016 measure "address" those risks to dolphins "in a way that is calibrated to, tailored to, and commensurate with the risk profiles of those fisheries." That conclusion is correct.

4. The Panels Correctly Found that the Tracking and Verification Requirements, in Context as Part of the Whole Measure, Are Calibrated

37. The United States has addressed above: (1) Mexico's argument that the Panels erred in relying on their previous "erroneous evaluation of risk profiles"; (2) Mexico's argument that the Panels erred in not including in its assessment of the risk profiles of different fisheries criteria "related to the accuracy of the label," including the "sufficien[cy] of regulatory oversight, the reliability of reporting, the existence of IUU fishing and the existence of transshipment"; and (3) Mexico's argument that the Panels "reasoning regarding the determination provisions repeats the same errors discussed above in relation to the Panels' reliance on the determination provisions to support the certification requirements."

a. Mexico's Claim that the Panels' Applied the Wrong Analysis to Conclude that Differences Between the AIDCP and NOAA Regimes Have Been Narrowed Should Be Rejected

38. Mexico's argument that the Panels' analysis of the tracking and verification requirements constitutes legal error because, while the Panels "stated they would apply the same analytical framework as had been applied in the first compliance proceeding," the Panels "failed to consider all the relevant factors" fails.

i. Mexico's Claim Addresses the Panels' Appreciation of the Evidence

39. All of Mexico's arguments in section V.C.2.c(4) appear directed at the Panels' appreciation of the facts and evidence. Mexico's main arguments are that the Panels ignored the alleged "lack of evidence" on certain points, ignored evidence on transshipment, and weighed the evidence concerning certain U.S. laws and regulations differently than the first compliance panel. All these arguments address whether the Panels made an objective assessment of the facts as to the depth, accuracy, and degree of government oversight of the NOAA regime and are aimed at undermining the finding that the "differences between the AIDCP and NOAA regimes 'have been considerably narrowed.'" On this basis, Mexico's argument should be rejected.

ii. Mexico Identifies No Legal Error

40. To the extent that Mexico has raised a legal appeal, the argument seems to be that the "factors" that the first compliance panel considered and the conclusions it drew were legally mandated by Article 2.1, such that there was no other way for the Panels to conduct a correct analysis of whether the tracking and verification requirements are consistent with that provision. This argument is incorrect and should be rejected.

41. The first compliance panel's analysis of the tracking and verification requirements under

Article 2.1 was focused on comparing the difference in relative "burdens" imposed by the NOAA and AIDCP tracking and verification regimes. Thus, any differences between the regimes – regardless of whether they contributed to their ability to segregate and track dolphin safe tuna – were relevant to the panel's analysis if they made one more burdensome than the other. The panel's analysis was reversed by the Appellate Body for that very reason. As the Appellate Body explained, the panel's analysis was incorrect because it focused on identifying and analyzing the difference in "burden" between the AIDCP and NOAA tracking and verification regimes, rather than whether the measure, including the tracking and verification requirements, was "calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans." Of course, once the Panels in this proceeding adopted the correct legal analysis the relevant factors for the analysis did change somewhat, and the Panels did not err by assessing some factors differently, as they were doing so as part of different legal tests.

iii. The Panels Appropriately Assessed the Facts

42. Finally, regardless of how Mexico's claim was raised, none of Mexico's arguments concerning the Panels' appreciation of the facts and evidence on the record have merit.

43. As to the depth of the AIDCP and NOAA regimes, Mexico is wrong to assert that the Panels "did not comment" on the U.S. evidence concerning the "actual practice of processors." In fact, the Panels explicitly addressed the finding from the previous compliance proceeding concerning traceability to the well. In response to "further explanations" by the United States, the Panels clarified the finding of the previous compliance panel regarding traceability to the well under the AIDCP regime. In fact, as the Panels found, under the AIDCP regime, while tuna can "*potentially*" be traced back to the well in which it was stored, the AIDCP requirement is that it be traced back to the group of dolphin-safe wells from that vessel trip (potentially all of the wells on the vessel). Under the NOAA regime, as amended by the 2016 IFR, the requirement is the same: dolphin-safe tuna must be traceable to the "harvesting vessel" and to the group of storage locations in which dolphin-safe tuna was stored (potentially the entire vessel). Thus, there is "no longer any meaningful difference" between the regimes in this regard. Therefore, it is appropriate that the Panels "did not comment" on whether the exhibits submitted by the United States (including Exhibit US-177, which was Exhibit US-192 in the first compliance proceeding) showed that U.S. processors necessarily track tuna to the well in which it was stored.

44. As to the accuracy of the AIDCP and NOAA regimes, Mexico is wrong that the Panels "did not say anything" about the "lack of evidence that processors and importers could actually provide reliable tracking documentation" or about the "problem of multiple intermediaries" before tuna reaches the processor. The Panels in this dispute noted the previous panel's findings and explained that the 2016 IFR imposed a new requirement that all U.S. processors and importers "collect and retain . . . information on each point in the chain of custody" and that this information be "sufficient . . . to conduct a trace-back of any product marketed as dolphin safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements." Thus, the Panels' finding on the additional legal requirement imposed by the 2016 IFR covers both the completeness of the chain of custody documentation and its substantive truth and covers all relevant intermediaries, both prior to the tuna reaching the cannery and afterwards. Consequently, it covers all of the statements of the first compliance panel cited by Mexico.

45. Finally, as to government oversight, Mexico is wrong that the Panels "did not address the

findings of the first compliance Panel regarding the lack of evidence that processors and importers could actually track tuna back to the well in which was stored, or ensure that certificates matched to specific lots of tuna." The Panels found that the situation was different than the previous proceeding because there *is* now a legal requirement that canneries and importers "verify" the completeness and correctness of the chain of custody documentation and captain certification. Consequently, there are no longer any "differences" between the AIDCP and NOAA regimes as to the chain of custody documentation to which the AIDCP "national and regional authorities" and NOAA, respectively, must have access. Given the symmetry of the legal requirements and the Panels' finding that both are meaningful and enforceable, there was no need for the Panels to compare the evidence concerning the implementation of the requirements, as the first compliance panel did after finding that the NOAA regime under the 2013 did not require complete, accurate chain of custody documentation.

46. Finally, Mexico's argument on the Panels' evaluation of the "enforcement penalty statutes" also lacks merit. The first compliance panel had concluded that there was no relevant legal requirement to collect and verify chain of custody documentation. In these proceedings, by contrast, the Panels found that there is such a requirement. Consequently, the existence of civil and criminal penalties for, *inter alia*, breaching the legal requirements of the dolphin safe labeling regulations or submitting false documents to the U.S. government have a completely different relevance in this proceeding.

b. The Panels Acted Consistently with Article 11 in their Treatment of Exhibit MEX-127

47. Mexico's argument that the Panels acted inconsistently with Article 11 of the DSU by failing to cover Exhibit MEX-127 in their analysis of the tracking and verification requirements because this exhibit shows that "the tuna industry . . . is not currently able to provide verification of the catch to the individual vessel and throughout the supply chain" is incorrect.

48. First, properly interpreted, Exhibit MEX-127 does not undermine the findings of the Panels. Mexico assumes that Exhibit MEX-127 refers to the "verification" required under the measure's tracking and verification requirements, but, in fact, the exhibit refers to a different type of "verification" altogether. Thus, the statement that processor systems are not able to provide "verification of the catch to the individual vessel and throughout the supply chain" is not suggestive that processors do not meet the requirements of the AIDCP or NOAA regimes.

49. Second, Mexico's argument is an inappropriate attempt to recast as a DSU Article 11 claim an argument that Mexico made before the Panels and that the Panels rejected. Indeed, the arguments that Mexico puts forward are identical to those it put forward before the Panels in its comments on the U.S. response to question 46. The Panels rejected Mexico's interpretation of Exhibit MEX-127 when they explained that it was "not directly relevant to [their] inquiry."

50. Third, even if Mexico's interpretation of Exhibit MEX-127 were correct, it would not undermine the Panels' finding that the differences between the regimes had been "narrowed" because Mexico would not have identified any errors that undermine the findings that led to that conclusion, let alone that undermine the objectivity of the Panels' assessment of the facts. Mexico's arguments about Exhibit MEX-127 concern an argument Mexico made that the Panels did not accept or use as a basis for their analysis. They do not detract from the factual bases of

the Panels' finding in the evidence on the record or introduce new evidence that "contradict[s]" those bases. Thus, Mexico's arguments concerning Exhibit MEX-127, even if they reflected the correct interpretation of that exhibit, do not undermine the accuracy – let alone the objectivity – of the Panels' assessment that the differences in the tracking and verification requirements for tuna caught outside and inside the ETP large purse seine fishery have been narrowed.

5. The Panels Correctly Found that the Measure Is Calibrated

51. In Section 7.8.6 of the Reports, the Panels analyzed whether the 2016 measure, as a whole, was "calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean" and concluded that it was. Mexico argues that the Panels erred in so finding because their intermediate findings concerning the eligibility criteria, certification requirements, and tracking and verification requirements" "were the exclusive basis for this assessment" and, accordingly, the alleged errors that Mexico identified in those assessments "flowed through" the Panels' assessment of the measure as a whole.

52. As shown in the preceding sections, the Panels' intermediate conclusions concerning the eligibility criteria, certification requirements, and tracking and verification requirements were correct and not in error. In addition, they were not the "exclusive basis" for the Panels' assessment. Contrary to Mexico's suggestion, the Panels did not simply refer to their previous intermediate conclusions. Rather, the Panels explained how the components of the measure "work together" to "achieve the objectives of the 2016 Tuna Measure." In particular, the Panels found that certification requirements (including the determination provisions) effectively "work together with and reinforce the eligibility criteria" and thus enable U.S. consumers "know whether tuna used in producing tuna products was obtained by fishing methods that harmed dolphins," and the tracking and verification requirements "reinforce" the eligibility criteria and certification requirements and "work together" with them by controlling "how the tuna caught by different fishing methods is stored on board the fishing vessels, unloaded and handed over to the canneries." Finally, the determinations provide the "necessary flexibility" that allows the measure to ensure that the same requirements are imposed on situations that are "similar," with respect to the risk to dolphins.

II. MEXICO'S APPEAL REGARDING ARTICLE XX OF THE GATT 1994 SHOULD BE REJECTED

53. Mexico appeals the Panels' finding that the 2016 measure "is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and is therefore justified under Article XX of the GATT 1994. Mexico's arguments should be rejected.

54. First, the Panels did not err in relying on their findings under Article 2.1.

55. The Panels' Article XX analysis is entirely consistent with the Appellate Body's analysis of Article XX in the first compliance proceeding. The Appellate Body confirmed that the analysis of whether the dolphin safe labeling measure is calibrated to the risks to dolphins posed by tuna fishing is as important to the analysis of "arbitrary or unjustifiable discrimination" under the chapeau of Article XX as to the assessment of even-handedness under Article 2.1. It explained: "In the circumstances of this dispute," "an assessment of whether the requirements of the amended tuna measure are calibrated to the likelihood that dolphins would be adversely

affected in the course of tuna fishing operations in the respective conditions" is "relevant for an analysis of arbitrary or unjustifiable discrimination under the chapeau of Article XX."

56. Further, contrary to Mexico's arguments, the Panels' Article 2.1 analysis *did* encompass an assessment of whether the regulatory distinctions of the 2016 measure are rationally related to its objectives. This is because the relevant nexus between the measure's distinctions and its objectives is inherent in the assessment of whether the measure is calibrated to the risks to dolphins of different tuna fishing methods in different ocean areas. As the Panels explained, the objectives of the measure inform both "the form and content of the calibration test" and its application. Thus, the "rational connection test" does not exist as a separate legal step or as a "constraint" on the calibration analysis but is assessed through the calibration analysis itself. The Panels' analysis is supported by the Appellate Body reports in previous proceedings.

57. Second, Mexico's argument concerning *US – Shrimp* lacks merit and should be rejected. The facts and conclusions of *US – Shrimp* are not applicable to this dispute. Unlike the measure in *US – Shrimp*, the 2016 measure does not direct NOAA to engage in negotiations to try to achieve the objectives of the measure by international agreement, and the United States did not engage in negotiations with some Members but not others. Also, Mexico is wrong that the United States has "never raised its concerns" concerning the unobservable harms caused by setting on dolphins in the IATTC fora. In fact, the United States has made the unobservable harms caused by dolphin sets a central theme of its engagement in the AIDCP from the beginning. Indeed, there is an AIDCP/IATTC Scientific Advisory Board that studies and considers the unobservable harms caused by dolphin sets. The United States is instrumental in the group's operations and NMFS studies provide much of the research that the group considers.

III. CONCLUSION

58. The United States respectfully requests the Panels to find that the United States has brought itself into compliance with the DSB recommendations and rulings and the U.S. dolphin safe labeling measure is now consistent with the TBT Agreement and the GATT 1994.