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)

Appellee Submission
of the United States of America

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SERVICE LIST

Participant

H.E. Mr. Fernando de Mateo, Permanent Mission of Mexico

Third Parties

H.E. Mr. Hamish McCormick, Permanent Mission of Australia

H.E. Mr. Jonathan Fried, Permanent Mission of Canada

H.E. Mr. Yu Jianhua, Permanent Mission of China

H.E. Mr. Angelos Pangratis, Permanent Mission of the European Union

H.E. Mr. Eduardo Sperisen-Yurt, Permanent Mission of Guatemala

H.E. Mr. Yoichi Otabe, Permanent Mission of Japan

H.E. Mr. Choi Seokyoung, Permanent Mission of the Republic of Korea

H.E. Mr. John Adank, Permanent Mission of New Zealand

Ms. Monica Nagelgaard, Permanent Mission of Norway

H.E. Ms. Wiboonlasana Ruamraksa, Permanent Mission of Thailand

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TABLE OF ACRONYMS

Acronym	Full Name
AIDCP	Agreement on the International Dolphin Conservation Program
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
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
PBR	Potential Biological Removal
NOAA	National Oceanic and Atmospheric Administration

RFMOs	Regional Fishery Management Organizations
TBT Agreement	Agreement on Technical Barriers to Trade
U.S.C.	United States Code
WCPFC	Western and Central Pacific Fisheries Commission
WTO	World Trade Organization

TABLE OF REPORTS

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Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
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Dominican Republic – Import and Sale of Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – 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
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 – Poultry (AB)	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
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
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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
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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 – 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
US – Tuna II (Mexico) (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
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

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. In its Other Appeal Submission, Mexico once again repeats its central argument from the original proceeding that the U.S. dolphin safe labeling requirements are discriminatory because tuna product produced from the fishing method preferred by Mexico is not eligible for the dolphin safe label, while tuna product produced by fishing methods used by the United States and other Members is potentially eligible. Moreover, Mexico argues that the U.S. measure discriminates against Mexican tuna product by not unilaterally requiring the vessels of the United States and other Members to carry observers to certify as to the dolphin safe status of the tuna, while Mexican vessels must carry observers, pursuant to Mexico's international legal commitments. Finally, Mexico makes a series of appeals that seek to overturn various factual findings of the Panel. Mexico's appeals should fail.

2. First, Mexico is wrong to argue that the covered agreements prevent the United States from drawing a distinction between fishing methods with respect to the eligibility for the dolphin safe label where the risk to dolphins differs dramatically between Mexico's preferred fishing method and other fishing methods.

3. Mexico's preferred fishing method – "setting on dolphins" – consists of large purse seine vessels, speed boats, and helicopters taking advantage of the unique tuna-dolphin bond in the eastern tropical Pacific Ocean (ETP) by chasing, herding, and capturing large schools of dolphins in order to catch the tuna swimming below. In this fishing method, vessels intentionally (and intensely) interact with dolphins in 100 percent of sets. Such interactions are *inherently* dangerous to dolphins, posing significant risks of not only direct harms, such as mortalities and serious injuries, but also of those unobservable harms, such as calf-cow separation and diminished reproduction, that dolphins suffer from being the target of multi-hour chases. No other tuna fishery in the world has been shown to cause harm to dolphins that approaches the level of dolphin mortalities, serious injuries, and unobservable harms caused by the ETP large purse seine fishery. This is unsurprising because, with other fishing methods, there is no interaction with dolphins in the vast majority of sets and any interaction that does occur is accidental.

4. Yet Mexico would have the Appellate Body believe that the covered agreements prohibit the United States from denying access to the label for tuna product produced by setting on dolphins while allowing access for tuna product produced by other fishing methods as long as no dolphin is killed or seriously injured. As Mexico has long argued, "all tuna fishing methods should be either disqualified or qualified."[1] In Mexico's view, both Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement) and Article XX of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) prevent the United States from distinguishing between a fishing method that is *inherently* dangerous to dolphins from methods that do not cause harm the vast majority of time, simply because these other fishing methods *can* cause *some* harm. In other words, Mexico argues that the covered agreements prohibit the United States from "calibrating" its measure to different risks from different fishing methods in different parts of the world. Such

[1] Mexico's First Written 21.5 Submission, para. 263.

a position cannot be squared with the text of the WTO Agreement, the Appellate Body's guidance in this very dispute, or good regulatory practices conducted throughout the Membership.

5. Second, Mexico is wrong to argue that captain certifications as to the dolphin safe status of the tuna harvested by their vessels are so unreliable that the United States must require observers on all vessels in the Atlantic, Indian, and Pacific Oceans that seek to produce "dolphin safe" tuna for the U.S. tuna product market simply because Mexico, as a party to the Agreement on the International Dolphin Conservation Program (AIDCP), has agreed to have (educated and trained) observers on all of its large purse seine vessels. As discussed below, the factual premise of Mexico's argument is incorrect. But even more fundamental than that is the fact that Mexico's argument ignores the undeniable fact that the AIDCP sets different requirements with regard to dolphin protection because *the risk* to dolphins in the ETP large purse seine fishery *is different* than in other fisheries. As such, Mexico's argument regarding the certification requirements (and, indeed, many of the Panel's findings with respect to the certification and tracking and verification requirements) disregards the fundamental premise that Members may set different requirements for like goods if those requirements are "calibrated" to different risks.

6. Third, Mexico is wrong to argue that the Panel acted inconsistently with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) in not making an "objective assessment" of certain questions of fact. Specifically, Mexico is wrong to seek to overturn the factual findings of the original proceeding, particularly where Mexico has failed to put forward any new evidence in this compliance proceeding. Mexico is also wrong to seek to overturn the factual findings of the Panel simply on the basis that the Panel did not weigh the evidence in the manner that Mexico would prefer.

7. Ultimately it should be concluded that the challenged measure is not discriminatory. Each of the three specific aspects of the amended measure that Mexico has challenged constitute legitimate, environmental requirements that are appropriately calibrated to the different risks arising due to different fishing methods in different fisheries. Indeed, the very history of the measure supports this conclusion. At the time the United States drew the distinction between setting on dolphins and other fishing methods, the target was U.S. vessels, not Mexican ones.[2] But the mere fact that those U.S. vessels have now decided to fish via other means in different parts of the world does not convert a non-discriminatory measure into a discriminatory one where *the risk* of setting on dolphins in the ETP *remains the same*.

8. The United States thus respectfully requests the Appellate Body to reject Mexico's appeals. The specific legal and factual bases on which Mexico's arguments should be rejected are summarized in the Executive Summary following this section and set out in detail in the remainder of this submission, starting in Section II.

[2] *See US – Tuna II (Mexico) (Panel)*, paras. 7.324, 7.333.

B. Executive Summary

9. As described below, Mexico's legal and factual appeals of the Panel's findings are without merit. Accordingly, the United States respectfully requests the Appellate Body to reject Mexico's appeals in their entirety.

10. Section II of this submission addresses one particular incorrect characterization of fact that Mexico set out in the opening sections of its Other Appeal Submission. Specifically, it demonstrates that, at the time of signing the AIDCP, the parties *knew* that the United States had made any change to the standard dolphin safe label subject to the fulfillment of a particular condition, namely that setting on dolphins in the ETP was not having a significant adverse impact on depleted dolphin populations. As the original panel found, this condition was not fulfilled. Thus, Mexico is wrong to assert that the parties to the AIDCP agreed to impose the unique requirements on their tuna industries in exchange for the United States allowing access to its dolphin safe label for tuna product produced by setting on dolphins.

11. Sections III, IV, and V set out the U.S. response to Mexico's specific appeals.

1. The Three Challenged Aspects of the Amended Measure

12. In Section III of this submission, the United States explains that Mexico's claim that the Panel erred in making separate findings as to the specific aspects of the amended measure challenged by Mexico and should have found the amended measure *as a whole* inconsistent with the covered agreements is in error. Subsections A and B provide an overview of Mexico's appeal and of the Panel's relevant analysis.

13. In Section III.C, the United States explains the several reasons why Mexico's appeal is in error. First, Mexico cites no basis for its assertion that the Panel's findings regarding the detrimental impact caused by the certification and tracking and verification requirements constituted *legal error*, in that Mexico puts forward no reason why it was not reasonable for the Panel to consider Mexico's claims of discrimination by interpreting Mexico's arguments as Mexico did. Second, the factual premise of Mexico's argument – that Mexico did not argue that the certification and tracking and verification requirements cause a "distinct" detrimental impact from the eligibility criteria – is in error. Third, it is unclear why Mexico's appeal, if accepted, would have any substantive effect on this proceeding.

2. Article 2.1 of the TBT Agreement

14. In Section IV of this submission, the United States explains that Mexico's other appeals of the Panel's analysis and findings regarding Article 2.1 of the TBT Agreement should be rejected. In Section IV.A, the United States explains that Mexico's appeals regarding the eligibility criteria should fail. In Section IV.B, the United States explains that Mexico's appeals regarding the certification requirements should also fail.

a. The Eligibility Criteria

15. In Section IV.A, the United States explains that the Panel did not err in finding that the eligibility criteria are consistent with Article 2.1 of the TBT Agreement. Mexico makes several legal and factual appeals regarding the Panel's finding. Each of these appeals is without merit.

16. As explained in Section IV.A.1, Mexico's appeal of the Panel's finding that the Appellate Body had "definitively settled" that the eligibility criteria are even-handed should fail. Mexico is wrong to argue that the Appellate Body's even-handedness analysis was limited to the disqualification of tuna caught by setting on dolphins and did not cover the eligibility of tuna caught by other fishing methods. To the contrary, the issue of whether the United States could deny access to the label for tuna product produced from setting on dolphins while allowing other tuna product to be potentially eligible for the label *was squarely before* the Appellate Body. And the Panel did not err in finding that the Appellate Body "definitively settled" the issue. Mexico is also wrong to minimize the importance of one of the statements of the Appellate Body on which the Panel relied, as that statement was made in response to a U.S. argument and offered guidance on how the United States could come into compliance with the covered agreements.

17. As explained in Section IV.A.2, Mexico's appeal of the Panel's legal analysis of whether the eligibility criteria are even-handed should fail.

18. First, Mexico's appeal is premised on an incorrect legal test. The Appellate Body has explained that, to analyze whether "detrimental impact stems exclusively from legitimate regulatory distinctions" a panel must examine whether the distinctions that account for the detrimental impact "are designed and applied in an even-handed manner such that they may be considered 'legitimate' for the purposes of Article 2.1."[3] For this dispute, the Appellate Body has been clear that this answer will depend on whether the regulatory distinction "is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean."[4] Mexico is wrong to argue that whether the eligibility criteria are calibrated to the different risks in different fisheries is irrelevant.

19. Second, Mexico's proposed "benchmarks" for purposes of an even-handedness analysis are in error. Under Mexico's "zero tolerance" benchmark, Article 2.1 would prohibit the United States from drawing *any* distinctions between fishing methods and Mexico's approach would prohibit the United States from labeling tuna product as dolphin safe even where no dolphin was harmed in producing that tuna. Such a position is *inconsistent* with the Appellate Body's even-handed analysis, and Mexico errs in arguing for such an approach. Mexico's alternate formulation of the "zero tolerance benchmark" (focused on whether a particular fishing method causes "systematic" adverse effects) was never presented to the Panel. As such, the Panel made no assessment of this issue, and the statements that Mexico references cannot be understood in this new context. And Mexico's other proposed benchmark (a comparison of fishery-specific

[3] *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.

[4] *US – Tuna II (Mexico) (AB)*, para. 232.

Potential Biological Removal (PBR) levels) is both impossible to implement and not consistent with the objectives of the amended measure.

20. Third, the eligibility criteria are even-handed under the correct legal test. Setting on dolphins is the *only* fishing method in the world *that intentionally targets dolphins*. As such, it is *inherently* dangerous to dolphins, putting hundreds of dolphins in danger of sustaining both direct and unobservable harms in each and every set. The same cannot be said of other fishing methods, where "the nature and degree of the interaction is different in quantitative and qualitative terms."[5] Numerous factual findings of the Panel, as well as uncontested facts on the record, support the conclusion that the eligibility criteria are even-handed. The factual findings of the Panel establish that the ETP large purse seine fishery has a different, and greater, risk profile for dolphins – in terms of both direct and unobservable harms – than other fisheries. In addition, numerous uncontested facts on the record support this conclusion. Specifically, the United States has submitted fishery-by-fishery data, generated by RFMOs, national governments, and scientists, showing the clear difference between the ETP large purse seine fishery and other fisheries. Mexico has not refuted or challenged the accuracy of this data.

21. As explained in Section IV.A.3, Mexico's Article 11 claims also lack merit.

22. First, the Panel did not improperly change from the original proceeding its finding concerning the unobserved harms of dolphin sets. As an initial matter, Mexico does not explain how the Panel's alleged error in this regard is "so material" that it undermines the objectivity of the Panel's assessment of Mexico's claim, and, on this basis, Mexico's claim does not meet the standard for a proper Article 11 appeal.[6] Additionally, the Panel's characterization of the original panel as having made definitive findings concerning the "various adverse impacts [that] can arise from setting on dolphins, beyond observed mortalities" was accurate, as the Appellate Body's analysis in the original proceeding confirmed. Further, Mexico's suggestion that it introduced new evidence concerning exhibits on which the original panel relied is incorrect.

23. Second, the Panel did not err in finding that other fishing methods do not have unobservable effects similar to those associated with setting on dolphin in the ETP. Contrary to Mexico's assertion that the Panel ignored certain evidence, the Panel conducted a detailed analysis of the evidence on the record, including discussing the paragraphs of Mexico's submissions that Mexico asserts the Panel ignored. Further, the Panel's finding was amply supported by evidence on the record and reflected a weighing and balancing of that evidence of the sort committed to a panel's discretion.[7] In making this appeal, Mexico fails to confront the fact that the Panel was right that Mexico produced no evidence that fishing methods other than

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

[6] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

[7] *See Korea – Dairy (AB)*, para. 137.

setting on dolphins cause unobservable harms that occur independently from direct, observable mortalities and whose existence "cannot be certified because it leaves no observable evidence."[8]

24. Third, the Panel did not err in its characterization of the Appellate Body's finding concerning setting on dolphins. First, the original proceeding clearly resolved that setting on dolphins, including under the AIDCP regime, causes "various adverse impacts . . . beyond observed mortalities," as the Appellate Body incorporated the original panel's finding in this regard.[9] Second, it is clear from the Appellate Body report that the finding that setting on dolphins is "particularly harmful to dolphins" was not limited to setting on dolphins other than under the AIDCP regime. Rather, what makes setting on dolphins "particularly harmful" includes the "various unobserved effects" that occur as a result of the chase itself and thus are not addressed by the AIDCP requirements, as well as the "substantial amount of dolphin mortalities and injuries" that continue to occur under the AIDCP regime.

b. The Certification Requirements

25. In Section IV.B, the United States explains that Mexico's appeals regarding the certification requirements of the amended measure should be rejected.

26. As explained in Section IV.B.1, Mexico's appeal of the Panel's finding regarding the reliability of captain's statements should fail. Mexico's explanation of this appeal is improperly vague in that Mexico does not specify whether it is making a legal or an Article 11 appeal, despite the Appellate Body's guidance that parties must do so.[10] Regardless of how one interprets Mexico's argument, however, the Panel's analysis and finding were not in error.

27. First, the Panel's finding regarding the reliability of captains' certifications was not inconsistent with Article 11. Mexico is wrong in arguing that the Panel failed to understand or address its argument that the "specific circumstances" associated with dolphin safe certifications render captains' certifications inherently unreliable or any evidence related to that argument. To the contrary, the Panel simply did not agree that Mexico had proven its case. Mexico is also wrong to argue that the Panel erred by finding that Mexico had not established that captains' statements were unreliable. In fact, the Panel's finding was supported by a significant amount of evidence on the record, which Mexico fails to confront in making this appeal. Further, Mexico does not even allege that the Panel's treatment of the evidence undermined its objectivity, as is required to meet the standard for a successful Article 11 claim.[11]

28. Second, the Panel did not err as a matter of law in its finding regarding the reliability of captains' certifications. Mexico has not identified a legal finding that it seeks reversal of, nor has it identified a legal error that the Panel has allegedly committed. However, to the extent that Mexico is alleging that the Panel committed a legal error, Mexico's appeal fails. In particular,

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[8] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.132, 7.134.

[9] *See US – Tuna II (Mexico) (AB)*, para. 251; *see also id.* para. 287.

[10] *See China – Rare Earths (AB)*, para. 5.173.

[11] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

any legal finding that Mexico would appeal is amply supported by the evidence on the record, and it cannot be said that the Panel's finding has *no* basis in the record. Mexico's complaint is, rather, that the Panel failed to accord to the evidence the weight that Mexico preferred and to make the factual and legal findings that Mexico sought. However, this does not constitute grounds for a legal appeal any more than it does for an Article 11 appeal.

29. As explained in Section VI.B.2, Mexico's appeal of the Panel's finding concerning the geographic distribution of dolphin sets should be rejected. First, the Panel *did* analyze Mexico's evidence and arguments concerning the existence of dolphin sets outside the ETP. However, the Panel had discretion to choose "which evidence . . . to utilize in making findings" and the fact that it did not rely on one of Mexico's exhibits in a particular place does not establish a failure under Article 11.[12] Second, the Panel's finding certainly had a "proper basis" in the evidence on the record, as the record contained no evidence *at all* that dolphins are *chased* to catch tuna anywhere other than the ETP large purse seine fishery, let alone on a routine basis. Third, the exhibit that Mexico asserts the Panel did not address in no way undermines the Panel's finding.

3. Article XX of the GATT 1994

30. In Section V, the United States explains that Mexico's appeals regarding Article XX of the GATT 1994 should be rejected. Subsections A and B provide an overview of the Panel's relevant analysis and Mexico's appeal. In Subsection V.C, the United States explains that Mexico's appeal is in error.

31. In Section V.C.1, the United States addresses Mexico's argument regarding whether the application of the measure results in discrimination. Mexico does not appear to allege that the Panel erred in this section, and Mexico does not make explicit why this section is relevant to its appeals under the chapeau. It does appear, however, that Mexico is asserting that the "discrimination" found to exist for purposes of positive GATT 1994 obligations must be the same for purposes of the chapeau. But that is not necessarily the case, as the Appellate Body has noted.[13] Rather, whether discrimination exists requires examination of "whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same.'"[14] Mexico also appears to argue that the Panel should have found that the same set of "conditions" are relevant for the analysis of all three aspects of the amended measure challenged by Mexico.

32. In Section V.C.2, the United States explains that Mexico's argument that the Panel erred in finding that the relevant "conditions" are the "same" is in error. As discussed elsewhere, the objectives of the measure – which the Panel found to have a close nexus with the policy objective of subparagraph (g) – relate to all adverse effects on dolphin due to commercial fishing practices inside and outside the ETP. As such, the relevant "conditions" relate to all adverse effects suffered by dolphins, including mortality and serious injuries and those unobservable harms that dolphins incur from being chased. And the *harm* to dolphins in the ETP large purse

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[12] *China – Rare Earths (AB)*, para. 5.178.

[13] *See, e.g.*, *EC – Seal Products (AB)*, para. 5.298.

[14] *EC – Seal Products (AB)*, para. 5.317.

seine fishery and other fisheries *is different*, in terms of dolphin mortalities and serious injuries and unobservable harms. As the relevant "conditions" are not the "same," no discrimination exists for purposes of the chapeau and the eligibility criteria are thus justified under Article XX.

33. In Section V.C.3, the United States explains that Mexico's argument regarding whether the amended measure imposes arbitrary or unjustifiable discrimination is in error. Mexico is wrong to assert that it is arbitrary or unjustifiable to distinguish between setting on dolphins and other methods. This distinction is, in fact, reconcilable with, and rationally related to, the policy objective of protecting dolphins. Setting on dolphins is the *only* fishing method that intentionally targets dolphins. As such, every dolphin set must involve a sustained interaction with a school of dolphins and must pose significant risk of observed and unobserved harm to those animals. This *inherent* danger is simply not present in other fishing methods. This difference is borne out by the factual findings of the Panel, as well as RFMO and national government data and scientific studies. And Mexico is wrong that Article XX(g) *prohibits* Members from applying measures that are "calibrated" to different risks. Indeed, surely *the opposite* is true.[15]

34. For the foregoing reasons, the United States respectfully requests the Appellate Body to reject in their entirety Mexico's appeals of the Panel's report.

II. RESPONSE TO MEXICO'S FACTUAL BACKGROUND

35. Mexico sets out several incorrect characterizations of fact in the opening sections of its Other Appeal Submission. Among them is the assertion, made first in the original proceeding, that the parties to the AIDCP concluded the agreement based on an earlier commitment by the United States to grant tuna caught by setting on dolphins in compliance with the AIDCP access to the dolphin safe label.[16] In this respect, Mexico badly mischaracterizes the history of the amended measure.

36. It is uncontested that dolphin mortality in the ETP purse seine fishery from the 1950s to late 1980s amounted to tens to hundreds of thousands of dolphins every year, with an estimated 6 million dolphins killed since the fishery began.[17] This scale of dolphin death provoked public outrage in the United States and spurred government action, which included the enactment in 1990 of the Dolphin Protection Consumer Information Act (DPCIA). The DPCIA created the official Department of Commerce dolphin safe label and established standards for non-official labels. Tuna products containing tuna caught by setting on dolphins were not eligible to be labeled dolphin safe.

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[15] *See US – Shrimp (AB)*, para. 165; *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 140-143.

[16] *See* Mexico's Other Appeal Submission, paras. 8, 35, 43-44; Mexico's Other Appeal Submission in Original Proceeding, paras. 34, 48.

[17] Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-29); Michael L. Gosliner, "The Tuna Dolphin Controversy," in Twiss & Reeves (eds.) *Conservation and Management of Marine Mammals* 120, 124 (1999) (Exh. US-34).

37. In 1992, the countries participating in the ETP purse seine fishery signed the Agreement for the Conservation of Dolphins (the "La Jolla Agreement"), the intent of which was to reduce dolphin mortality in the fishery.[18] In 1995, the non-binding Panama Declaration reaffirmed the signatories' commitment to the La Jolla Agreement and pledged to conclude a binding international agreement in the future.[19] Additionally, Annex 1 of the Panama Declaration listed "envisioned changes in United States law," and comprised: 1) a reference to lifting the import ban for tuna caught in compliance with the La Jolla Agreement; 2) a reference to opening market access for tuna caught in compliance with the La Jolla Agreement; and 3) with respect to labeling, that "the term 'dolphin safe' may not be used for any dolphin caught in the [eastern Pacific Ocean] by a purse seine vessel in a set in which a dolphin mortality occurred."[20]

38. In 1997, the U.S. Congress amended U.S. law to reflect the changes described in Annex I. Specifically, Congress amended the Marine Mammal Protection Act (MMPA) to permit the importation of tuna caught in compliance with the La Jolla Agreement (and later with the AIDCP) and, through the affirmative finding process set out in the amended MMPA, provided the market access described in Annex I, item 2.[21] Congress also amended the DPCIA to permit tuna product produced from setting on dolphins in compliance with the International Dolphin Conservation Program to be potentially eligible for the dolphin safe label, contingent on a scientific finding by the Secretary of Commerce that setting on dolphins in the ETP was not having a significant adverse impact on depleted dolphin populations.[22]

39. A year *after* Congress changed the law, the parties to the Panama Declaration agreed to sign the AIDCP.[23]

40. Thus, at the time of signing the AIDCP, the parties *knew* that the United States had made any change to the standard dolphin safe label subject to the fulfillment of this particular condition. As the original panel found, however, the "conditions foreseen . . . for this change to occur were ultimately not fulfilled," and the finding that had resulted in the dolphin safe definition being temporarily changed was struck down by the *Earth Island Institute v. Hogarth* court as "contrary to the overwhelming evidence" on the record.[24] Thus, Mexico is wrong to argue that it and the other parties to the AIDCP agreed to impose these unique requirements, including 100 percent observer coverage and a particular tracking and verification regime, in

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

[19] *See US – Tuna II (Mexico) (Panel)*, para. 2.36.

[20] *See US – Tuna II (Mexico) (Panel)*, para. 2.37; U.S. First Written Submission in Original Proceeding, para. 75.

[21] *See* U.S. First Written Submission in Original Proceeding, para. 77 (summarizing the U.S. legislative response to the Panama Declaration).

[22] U.S. First Written Submission, para. 77.

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

[24] *US – Tuna II (Mexico) (Panel)*, para. 7.332; *see Earth Island Inst. v. Hogarth*, 494 F.3d 757, 766, 769 (9th Cir. 2007) (Exh. MEX-16).

exchange for the United States allowing access to its dolphin safe label for tuna product produced by setting on dolphins.

41. Of course, nothing in the text of the AIDCP itself supports Mexico's interpretation of this history. By its terms, the AIDCP has the following objectives: 1) "To progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery" and 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."[25] Indeed, Mexico seems to acknowledge the AIDCP's true objective when it argues that the AIDCP was concluded with the purpose of reducing the "unacceptably and unsustainably high" level of dolphin mortality in the purse seine fishery.[26]

III. MEXICO'S APPEAL CONCERNING THE PANEL'S FINDINGS REGARDING THE THREE CHALLENGED ASPECTS OF THE AMENDED MEASURE SHOULD BE REJECTED

A. Mexico's Appeal

42. Mexico claims that the Panel erred in making separate findings as to the specific aspects of the amended measure challenged by Mexico, and, instead, should have "conclude[d] that the amended measure *as a whole* is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994."[27] While Mexico appears to acknowledge that the Panel's findings reflect Mexico's own arguments, Mexico nevertheless argues that the "narrow manner" of the Panel's findings constitutes legal error.[28] Mexico does not explain what the legal error is, other than to insist that the Panel could have interpreted Mexico's argument differently than it did.[29]

43. The import of Mexico's appeal appears to be its criticism that the Panel analyzed whether each of the challenged aspects of the amended measure, the eligibility criteria, certification requirements, and tracking and verification requirements, *independently* modified the conditions of competition in the U.S. market to the detriment of Mexican tuna product.[30] In this regard,

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[25] *See* AIDCP, art. II (Exh. MEX-30).

[26] *See* Mexico's Other Appeal Submission, para. 6 (noting that, at the time the AIDCP was concluded, "levels of dolphin mortalities occurring in the [ETP] tuna fishery were universally recognized . . . as being *unacceptably and unsustainably high*" and that, "[l]ed by Mexico and the United States, the Parties to the Inter-American Tropical Tuna Commission (IATTC) initiated a cooperative multilateral effort to definitively address *this environmental problem* occurring in an international fishery") (emphasis added).

[27] Mexico's Other Appeal Submission, para. 65 (emphasis added).

[28] Mexico's Other Appeal Submission, para. 66 ("Although these conclusions appear to be a reflection of the approach adopted by the Panel to address the arguments of the parties, the Panel nevertheless erred in stating these conclusions in such a narrow manner rather than concluding that the amended tuna measure, as a whole, is inconsistent with the covered agreements.").

[29] *See* Mexico's Other Appeal Submission, para. 66.

[30] *See* Mexico's Other Appeal Submission, para. 68 ("The Panel's error is reflected, in part, in its finding that the amended tuna measure's modification of the competitive opportunities in the U.S. market to the detriment of Mexican tuna and tuna products comprises two 'distinct type[s] of detrimental impact,' such that 'Mexico's

Mexico appears to argue that the *only* relevant detrimental impact for purposes of Mexico's Article 2.1 claim is the detrimental impact already found to exist by the Appellate Body – *i.e.*, the denial of access to the label for Mexican tuna product because it does not meet the eligibility criteria.[31] In Mexico's view, the certification requirements and tracking and verification requirements are *only* relevant to the second step of the Article 2.1 analysis – whether the detrimental impact stems exclusively from a legitimate regulatory distinction – and not to the first step.[32]

44. Mexico makes an identical argument with regard to its GATT 1994 claims, arguing that the certification requirements and tracking and verification requirements are not relevant to its Article I:1 and III:4 claims, but only to its response to the U.S. Article XX defense.[33]

45. Mexico's appeal is in error and should be rejected.

B. The Panel's Analysis

46. In the Panel's view, Mexico's Article 2.1 argument "developed over the course of its written submissions."[34] As recounted by the Panel, Mexico, in its first written submission, argued the amended measure's denial of the label to Mexican tuna product because it is produced by setting on dolphins (and thus does not meet the eligibility criteria) results in a detrimental impact on Mexican tuna product.[35] However, the Panel considered that Mexico thereafter had argued that the certification and tracking and verification requirements cause "a distinct type of

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arguments on the different certification and tracking and verification requirements constitute a clear and cognizable claim of detrimental impact *separate from* the detrimental impact identified by Mexico as the result of the eligibility criteria.'") (quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.105) (emphasis in original).

[31] Mexico's Other Appeal Submission, para. 69 ("The modification of conditions of competition or 'detrimental impact' caused by the amended tuna measure has not changed from that which was caused by the original tuna measure. With respect to the latter, the Appellate Body agreed with the original Panel's findings that: (i) access to the "dolphin-safe" label constitutes an "advantage" on the U.S. market; and (ii) while most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the U.S. dolphin-safe labelling provisions, most tuna caught by US vessels is potentially eligible for the label. The Appellate Body found that these factual findings clearly established that the lack of access to the 'dolphin-safe' label for tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.").

[32] *See, e.g.*, Mexico's Other Appeal Submission, para. 66.

[33] *See* Mexico's Other Appeal Submission, paras. 75-77; *see also id.* para. 66.

[34] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.102.

[35] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.102 (quoting Mexico as stating, "[w]hile all like US tuna products and most tuna products of other countries have access to the 'dolphin-safe' label, the Amended Tuna Measure denies access to this label for most Mexican tuna products"); *see also id.* para. 7.103 ("It seems to us that this description identifies, at least primarily, the detrimental impact caused by the *eligibility criteria*, because, as the United States argued in its own first written submission, even if the different certification and tracking and verification requirements were eliminated, Mexican tuna product containing tuna caught by setting on dolphins would still be ineligible for the dolphin safe label, and tuna product containing tuna caught using other methods would still be potentially eligible for the label.") (emphasis in original) (internal quotes omitted).

detrimental impact" from the one addressed in the DSB recommendations and rulings.[36] In this revised argument, Mexico contended that, due to the certification and tracking and verification requirements, "Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labelled as dolphin-safe."[37] As the Panel noted, "Mexico articulated its argument in this way throughout the proceedings."[38] And while the Panel recognized that Mexico had, at various times, argued "that it is the differences in these labelling conditions and requirements *together* that account for the detrimental impact on imports," in fact, Mexico "presented its arguments on a distinction-by-distinction basis."[39]

C. Mexico's Appeal Is in Error

47. Mexico's appeal is in error and should be rejected.

48. First, Mexico cites no basis for its assertion that the Panel's findings regarding the detrimental impact caused by the certification and tracking and verification requirements constitute *legal error*. The *only* rationale that Mexico provides is that the Panel erred because it ignored Mexico's argument that it had challenged the consistency of the amended measure "as a whole."[40]

49. As the Appellate Body as long found, panels are under no obligation "to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU."[41] In this regard, as long as the panel "has reasonably considered a claim," the appeal will fail.[42] Yet Mexico puts forward no reason why the Panel did not "reasonably consider[]" Mexico's claims of discrimination by interpreting Mexico's arguments as it did.

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

[37] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.102 (quoting Mexico's Second Written 21.5 Submission, para. 117).

[38] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.233 (citing Mexico's Response to Panel Question 9, para. 36; Mexico's Second Written 21.5 Submission, paras. 147, 163; Mexico's Response to Panel Question 7, paras. 19 and 21).

[39] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.107-108 (quoting Mexico's Response to Panel Question 8, para. 32; Mexico Comments on the U.S. Response to Panel Question 4, para. 20) (emphasis added).

[40] *See* Mexico's Other Appeal Submission, para. 66 ("Although these conclusions appear to be a reflection of the approach adopted by the Panel to address the arguments of the parties, the Panel nevertheless erred in stating these conclusions in such a narrow manner rather than concluding that the amended tuna measure, as a whole, is inconsistent with the covered agreements. As noted above, Mexico challenged the consistency of the amended tuna measure, as a whole, with Article 2.1 of the TBT Agreement and with Articles I:1 and III:4 of the GATT 1994.").

[41] *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 134 (quoting *Dominican Republic – Import and Sale of Cigarettes (AB)*, para. 125).

[42] *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 134 (quoting *EC – Poultry (AB)*, para. 135).

50. Second, the factual premise of Mexico's argument is wrong. In numerous submissions starting with its second written submission, Mexico did, in fact, argue that the certification and tracking and verification requirements cause a "distinct" detrimental impact from the denial of access to the label,[43] and Mexico is wrong to mischaracterize its own argument in this regard.[44] For example, in response to the Panel's Question 7, Mexico argued, under the heading, "'Detrimental Impact' and 'Denial of Competitive Opportunities,'" that its discrimination claim encompassed not only the fact that "Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a dolphin-safe label,"[45] but also that Mexican tuna products suffer additional "discrimination in the form of 'detrimental impact' and the 'denial of competitive opportunities' … because tuna products from the United States and other countries are not subject to [the three labelling conditions and requirements identified by Mexico],"[46] a point that Mexico comes back to repeatedly.[47]

51. Third, it is unclear why Mexico's appeal, if accepted, would have any substantive effect on this proceeding. As the Panel noted, Mexico did, at times, argue "that it is the differences in [the three] labelling conditions and requirements *together* that account for the detrimental impact

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[43] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.97-108.

[44] *See* Mexico's Other Appeal Submission, para. 66.

[45] Mexico's Response to Panel Question 7(a), para. 20 ("With respect to the first context in which Mexico raises discrimination, the discrimination arises because most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and *are therefore not eligible for a dolphin-safe label*, whereas most tuna products from the United States and other countries that are sold in the U.S. market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a dolphin-safe label.") (emphasis added).

[46] Mexico's Response to Panel Question 7(a), para. 21 ("This, in turn, is a consequence of the differences in the three labelling conditions and requirements identified by Mexico. *With respect to the differences in the application of the independent observer requirement, discrimination in the form of 'detrimental impact' and the 'denial of competitive opportunities' arises because tuna products from the United States and other countries are not subject to such requirements*. This contributes to the fact that most tuna products from the United States and other countries are eligible for the dolphin-safe label even if they should not be eligible because, for instance, the tuna was incorrectly classified as dolphin-safe at the time of capture. In this light, there is discrimination in the scenario posed in this question. It should be noted, however, that this is only one factual element of the discrimination identified by Mexico. As explained in Mexico's submissions, the discrimination arises from the combined effect of the qualification/disqualification of fishing methods, the tracking and verification requirements and the independent observer requirement.") (emphasis added).

[47] *See, e.g.*, Mexico's Opening Statement to the Panel, para. 55 ("Mexican tuna products *are being detrimentally impacted* because they are losing competitive opportunities to tuna products that cannot be proven to be dolphin-safe *because of the regulatory differences* in the above-noted labelling conditions and requirements.") (emphasis added); Mexico's Second Written 21.5 Submission, para. 182 ("[T]he captain self-certification regime poses a very real risk 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 from a self-interested captain.") (emphasis added); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.152 ("[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)); *id.* n.233.

on imports."[48] But if that is the case, what Mexico appears to be arguing is that the three sets of requirements all contribute to one undefined detrimental impact in different ways. The eligibility criteria contributes to this "one" detrimental impact by denying Mexican tuna product access to the label while the other two requirements contribute to the "one" detrimental impact by providing tuna product produced outside the ETP large purse seine fishery a "competitive advantage" over Mexican tuna product due to alleged differences in accuracy.[49] In that respect, it would not appear to matter whether there was one or three detrimental impacts – the Panel's analysis, and the U.S. appeals of that analysis, would be the same. In the U.S. view, the Panel would have still erred in its analysis of the certification requirements, for example: 1) in allocating the burden of proof as to whether the certification requirements "contribute" to the "one" detrimental impact in the manner that the Panel found that they did; 2) in determining that the certification requirements contribute to the "one" detrimental impact; and 3) in determining that there was a genuine relationship between any detrimental impact that the Panel did find and the amended measure.[50] The sum result of Mexico's argument would appear to be the same.

52. That said, if what Mexico is now arguing is that it no longer relies on the detrimental impact found to exist by the DSB recommendations and rulings, but relies on an *different* detrimental impact – one grounded in the allegation regarding loss of "competitive opportunities" due to alleged differences in accuracy – then such an approach would change this proceeding greatly. Indeed, Mexico appears to take just this position in paragraph 2 of its Other Appeal Submission.[51] Notably, the Panel did not find that Mexico had established a *prima facie*

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[48] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.107-108 (quoting Mexico's Response to Panel Question 8, para. 32 (emphasis added); and citing Mexico's Comments on the U.S. Response to Panel Question 4, para. 20 ("Mexico [has] highlighted that the three labelling conditions – i.e. (i) the disqualification of setting on dolphins and the qualification of other fishing methods to catch tuna; (ii) the record-keeping, tracking, and verification requirements; and (iii) the mandatory independent observer requirement – *operating together*, account for the detrimental impact on Mexican imports.") (emphasis added)).

[49] *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); *see also id.* para. 7.288 ("The content of Mexico's allegation that the different tracking and verification requirements have a detrimental impact on the competitive opportunities of Mexican tuna and tuna products is essentially the same as that of its claiming concerning the different certification requirements . . . [It] 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).

[50] *See* U.S. Appellant Submission, paras. 136-144, 145-155, 167-184.

[51] *See* Mexico's Other Appeal Submission, para. 2 ("Mexico's challenge in these compliance proceedings focuses on the improper granting of access to the dolphin-safe label to products containing tuna caught by the fleets

case that any difference in the accuracy of the dolphin safe label for tuna product produced from tuna caught inside and outside the ETP large purse seine fishery has resulted in a detrimental impact on Mexican tuna product – 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."[52] *And Mexico does not appeal that finding*. As such, Mexico's appeal regarding the inconsistency of the amended measure "as a whole" has no basis – the Panel did not make the detrimental impact finding that Mexico claims to base its appeal on, nor has Mexico appealed the Panel's failure to make such a finding.

IV. MEXICO'S OTHER APPEALS REGARDING ARTICLE 2.1 OF THE TBT AGREEMENT SHOULD BE REJECTED

53. As discussed below, Mexico makes numerous other appeals that are specific to its Article 2.1 claim. In section IV.A, the United States explains why Mexico's appeals regarding the eligibility criteria should fail. In section IV.B, the United States explains why Mexico's appeals regarding the certification requirements should fail.

A. The Panel Did Not Err in Finding that the Eligibility Criteria Are Consistent with Article 2.1 of the TBT Agreement

54. The Panel found that the eligibility criteria are even-handed and thus the detrimental impact caused by Mexico's lack of access to the label (due to the fact that Mexican tuna product is produced by setting on dolphins) stems exclusively from a legitimate regulatory distinction.[53] 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."[54] 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."[55]

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of other countries using fishing methods other than setting on dolphins in an AIDCP-compliant manner and fishing in oceans other than the ETP. *These proceedings can be distinguished from the original proceedings on this basis*. *The difference* between the two proceedings is highlighted by the fact that, under the amended tuna measure, even if Mexican tuna products were granted the right to use the dolphin-safe label, there would still be a violation of the non-discrimination provisions raised in this dispute. This is because Mexican dolphin-safe tuna products *would be losing competitive opportunities* to like products from the United States and other countries *under circumstances where the dolphin-safe status of those like products cannot be assured*.") (emphasis added).

[52] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169, 7.382; *see also* U.S. Appellant Submission, paras. 102, 137, 158, 275, 277, 290.

[53] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.126, 7.129, 7.135; U.S. Appellant Submission, para. 91.

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

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

55. Mexico disagrees with the Panel's conclusion and makes various appeals of the Panel's analysis and findings. In section IV.A.1, the United States explains why Mexico's appeal regarding whether the Appellate Body had "definitively settled" that the eligibility criteria are even-handed should fail. In section IV.A.2, the United States explains why Mexico's appeal regarding the Panel's legal analysis and findings of whether the eligibility criteria are even-handed should fail. Finally, in section IV.A.3, the United States explains why Mexico's DSU Article 11 appeals lack merit and should fail.

1. Mexico's Appeal Regarding Whether the Appellate Body Had "Definitively Settled" that the Eligibility Criteria Are Even-Handed Should Fail

a. The Panel's Analysis

56. The Panel began its analysis of whether the eligibility criteria are even-handed by addressing the U.S. argument that Mexico should not be allowed to use this compliance proceeding to "appeal" an adverse finding in the DSB recommendations and rulings.[56] In particular, the United States had argued that a compliance panel's analysis does not begin from a "fresh start," but must analyze the complainant's claims "in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the original panel and subsequently by the Appellate Body."[57] If this were not true, the Appellate Body's report could not be considered the "final resolution" of Mexico's Article 2.1 claim.[58]

57. First, the Panel found that the Appellate Body had "settled" the question of whether the United States, consistent with Article 2.1, can deem tuna product produced by setting on dolphins ineligible for the label. The Panel stated that the Appellate Body found that setting on dolphins was "particularly harmful to dolphins,"[59] and, specifically, that setting on dolphins can cause "various adverse impacts . . . beyond observed mortalities" that occur "as a result of the

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[56] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.118.

[57] *US – Shrimp (Article 21.5 – Malaysia) (Panel)*, para. 5.5 ("In other words, although we are entitled to analyse fully the consistency with a covered agreement of measures taken to comply, our examination is not done from a completely fresh start. Rather, it has to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body.") (internal quotes omitted).

[58] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("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.") (internal quotes omitted); *see also US – Tuna II (Mexico) (AB)*, para. 300 ("We have already found that the Panel erred in finding that Mexico failed to establish that the measure at issue is inconsistent with the United States' obligations under Article 2.1 of the TBT Agreement. Therefore, *in order to resolve this dispute*, we need not determine whether, in assessing Mexico's claims under that provision, the Panel also failed to satisfy its obligations under Article 11 of the DSU.") (emphasis added); *see also US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107 ("The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. … The Panel had, *necessarily*, to consider our views on this subject… .") (emphasis added).

[59] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120 (citing *US – Tuna II (Mexico) (AB)*, para. 289).

'chase itself.'"[60] The Panel found that, due to these "unobserved harms that cannot be mitigated by measures to avoid killing and injuring dolphins," the original panel found, and the Appellate Body affirmed, that the United States is "entitled to treat setting on dolphins differently from other fishing methods."[61] The Panel then "reaffirm[ed] the Appellate Body's finding" in this regard."[62]

58. Second, the Panel found that the Appellate Body had resolved the question of whether the United States can, consistent with Article 2.1, disqualify tuna caught by setting on dolphins while *not* disqualifying tuna caught by other fishing methods.[63] The Panel recalled the Appellate Body's finding that imposing an independent observer certification requirement "that no dolphins were killed or seriously injured . . . would [not] be the *only* way" for the United States to calibrate its measure "to the risks that . . . [are] posed by fishing techniques other than setting on dolphins."[64] As the Panel read it, this statement had two implications: 1) it recognized that the United States *may* distinguish between setting on dolphins and other fishing methods for purposes of addressing the risks of methods "other than setting on dolphins";[65] and 2) it indicated that the United States could come into compliance with Article 2.1 without disqualifying other fishing methods, since certifications of no mortality or serious injury are only relevant for methods that are potentially eligible for the label.[66]

59. In light of this analysis, the Panel correctly concluded that the Appellate Body had already "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," finding that it is not.[67]

b. Mexico's Appeal

60. Mexico appeals this finding, contending that the Appellate Body did not conduct an adequate even-handed analysis "in respect of the granting of the eligibility for the 'dolphin-safe'

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[60] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.120-121.

[61] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122.

[62] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.123.

[63] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.124.

[64] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.124 (quoting *US – Tuna II (Mexico) (AB)*, para. 296) (emphasis original).

[65] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.124.

[66] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.125 ("In stating that the United States could 'calibrate' its measure without necessarily requiring observer coverage for tuna caught other than by setting on dolphins, the Appellate Body implicitly recognized that tuna fishing methods other than setting on dolphins *do not need to be disqualified in order for the United States to bring its measure info conformity with the TBT Agreement*. Put simply, we do not believe that the Appellate Body would even have touched upon the issue of certification, which is only relevant to tuna fishing methods that are, at 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.").

[67] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.126.

label to tuna products containing tuna caught by other fishing methods" and thus did not "definitively settle[]" the issue.[68] Mexico also argues that the Panel improperly relied on the Appellate Body's statement that "imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of fishing operations in which the tuna was caught would [not] be the *only* way for the United States to calibrate its 'dolphin-safe' labelling provisions."[69] Mexico complains that the statement was "at most, *obitur dictum*."[70]

c. Mexico's Appeal Is in Error

61. Mexico's appeal should be rejected. Contrary to Mexico's assertions, the Panel correctly concluded that the Appellate Body had already rejected Mexico's argument that the United States could not distinguish, consistently with Article 2.1, between different fishing methods.

62. First, Mexico is wrong to argue that the Appellate Body's even-handedness analysis was limited to the disqualification of tuna caught by setting on dolphins and did not cover the eligibility of tuna caught by other fishing methods.[71] Before the Appellate Body, Mexico had argued:

> The U.S. dolphin-safe labelling provisions are discriminatory. Imports of tuna products produced from tuna harvested outside the ETP – in other words, virtually all of the tuna products currently sold in the U.S. market – can be labelled as dolphin-safe under relaxed compliance standards even though there are no protections for dolphins outside the ETP. Meanwhile, tuna products from Mexican producers – who have taken extensive and demonstratively highly successful measures to protect dolphins – are prohibited from using the label.[72]

63. In other words, this issue of whether the United States could deny access to the label for tuna product produced from setting on dolphins while allowing other tuna product to be potentially eligible for the label *was squarely before* the Appellate Body in the original proceeding. The Appellate Body confirmed that the distinction before it was the "*difference in labeling 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"[73] It was "*this difference*" that the Appellate Body found caused the

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[68] *See* Mexico's Other Appeal Submission, para. 93; *see also id.* para. 132 ("In the original proceedings, the Appellate Body's focus was on the disqualification of tuna products from using the U.S. dolphin-safe label if they contain tuna harvested by setting on dolphins in the ETP in an AIDCP-compliant manner. This focus did not include the granting of eligibility for the dolphin-safe label to other fishing methods and, as a consequence, the necessary even-handedness analysis of the eligibility criteria was not undertaken.").

[69] Mexico's Other Appeal Submission, para. 95, n.137 (quoting *US – Tuna II (Mexico) (AB)*, para. 296).

[70] *See* Mexico's Other Appeal Submission, para. 95.

[71] *See* Mexico's Other Appeal Submission, paras. 93, 95.

[72] *US – Tuna II (Mexico) (AB)*, para. 241 (quoting Mexico's Other Appeal Submission in Original Proceeding, para. 129).

[73] *See US – Tuna II (Mexico) (AB)*, para. 284 (emphasis added).

detrimental impact on Mexican tuna products, and thus it was "*this difference*" that the Appellate Body examined as part of its even-handed analysis.[74]

64. Second, the Panel did not err in finding that the issue was "definitively settled" in the original proceeding. As noted, the *central* question for the Appellate Body was whether the challenged measure was "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean," and the Appellate Body found that *only* the other eligibility criterion – whether a dolphin has been killed or seriously injured – did not meet this test.[75]

65. Moreover, it was correct for the Panel to focus on the Appellate Body's statement that "nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured . . . would be the *only* way for the United States to calibrate its 'dolphin-safe' labeling provisions to the risks that the Panel found were posed by fishing techniques other than setting on dolphins."[76] As the Panel noted, this statement makes sense only if there are fishing methods that are potentially eligible for the label.[77]

66. Further, Mexico is wrong to minimize the importance of this statement by claiming it is mere *dicta*. The statement addressed a key aspect of the Appellate Body's analysis, and was made in response to a U.S. argument.[78] The statement also offered critical guidance that the United States could bring its measure into compliance with Article 2.1 without mandating that observers be placed on its own vessels, and the vessels of all of its trading partners, simply because Mexico has consented to have 100 percent observer coverage on its large purse seine fleet pursuant to its international legal obligation as a party to the AIDCP.

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[74] *US – Tuna II (Mexico) (AB)*, para. 284 ("In the light of the findings of fact made by the Panel, we concluded earlier that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a 'dolphin-safe' label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label. The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand. The question before us is thus whether the United States has demonstrated that *this difference* in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.") (emphasis added).

[75] *US – Tuna II (Mexico) (AB)*, paras. 297-298.

[76] *See US – Tuna II (Mexico) (AB)*, para. 296.

[77] *US – Tuna II (Mexico) (AB)*, para. 296; *id.* n.612 (making the same point when stating that an observer requirement "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury").

[78] *See US – Tuna II (Mexico) (AB)*, paras. 293-296.

2. Mexico's Appeal of the Panel's Legal Analysis of Whether the Eligibility Criteria Are Even-Handed Should Fail

a. The Panel's Analysis

67. After examining whether it had been "definitively settled" in the original proceeding that the eligibility criteria are even-handed, the Panel analyzed the evidence on the record to determine whether the amended measure "sufficiently addresses the risks posed to dolphins from methods of tuna fishing other than setting on dolphins."[79] In this regard, the Panel appeared to focus on whether Mexico's evidence proved that the fishing methods that are potentially eligible for the label cause the same *kind* of unobservable harm that setting on dolphins causes in the ETP as a result of the "chase itself," such as cow-calf separation, muscular damage, immune and reproductive system failures, etc.[80]

68. In the Panel's view, while Mexico had put forward evidence that other fishing methods can cause mortality and serious injury to dolphins, these other fishing methods do not also cause the same *kind* of harms that large purse seine vessels do by intentionally chasing and encircling millions of dolphins every year.[81] From this, the Panel appeared to conclude that the eligibility criteria regarding the disqualification of setting on dolphins and qualification of other fishing methods were "calibrated" to the risks that different fishing methods would cause these unobservable harms, even though the Panel did not put its finding in these terms.[82] However, the United States notes that the Panel also stated its conclusion in broader terms – "[i]n light of the above, our view is that Mexico has not provided evidence sufficient to demonstrate that setting

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[79] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.128-135.

[80] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.120-121. The Panel's focus on these unobservable harms is thus consistent with the Panel's overly narrow interpretation of the Appellate Body's conclusion that the setting on dolphins is a "particularly harmful" fishing method for dolphins, as discussed above, as well as the Panel's GATT Article XX chapeau analysis. *See id.* para. 122 ("[A]s 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.") (emphasis in original internal quotes omitted); *id.* para. 7.584 ("In our view, the fact that other fishing methods do not cause *the kind of unobservable harms* as are caused by setting on dolphins means that, at least insofar as the eligibility criteria are concerned, the conditions prevailing in fisheries where tuna is caught by setting on dolphins and fisheries where that method is not used are not the same.") (emphasis added); *id.* para. 7.585 ("Indeed, setting on dolphins is a 'particularly harmful' fishing method, and other fishing methods do not cause *the same kinds of unobserved harms* to dolphins as are caused by setting on dolphins, although according to the Appellate Body they may, in some circumstances, cause *the same kinds of observed harms*.") (emphasis added).

[81] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132 ("[These harms] are not the kind of unobservable harm that we have found occurs as a result of setting on dolphins, and which cannot be certified because it leaves no observable evidence."); *see also id.* paras. 7.130-131; Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127) (noting that, in the years 2009-2013, ETP large purse seine vessels have chased 31.3 million dolphins, capturing 18.5 of them, and that there is no evidence of chasing dolphins in other fisheries).

[82] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.135 ("As we understand it, this position was also the basis of the original panel and Appellate Body's holding on this issue. Therefore, we find that the new evidence presented in these proceedings merely supports the conclusion reached by the panel and the Appellate Body in the original proceedings.").

on dolphins does not cause *observed and unobserved* harms to dolphins, or that other tuna fishing methods consistently cause similar harms."[83]

b. Mexico's Appeal

69. Mexico appears to argue that the Appellate Body should reverse the Panel's finding as it is based on incorrect legal reasoning.[84] In particular, Mexico cites two alleged errors in the Panel's analysis: 1) the Panel used the incorrect "relevant adverse effects"; and 2) the Panel applied the incorrect "eligibility benchmark to the assessment of those adverse effects."[85]

70. As to the first error, Mexico, after noting that the objectives of the amended measure "broadly refer to 'adverse effects' on dolphins with no limitations,"[86] concludes that the Panel should have, "consistent with the design, revealing structure and architecture of the amended tuna measure," analyzed whether the eligibility criteria are even-handed in light of "*all* observed, unobserved and unobservable adverse effects."[87]

71. As to the second error, Mexico contends that the Panel erred in not selecting either a "zero tolerance" benchmark or what Mexico characterizes as an "objective, scientifically-established" benchmark by which to judge whether the disqualification of setting on dolphins and qualification of other fishing methods is even-handed.[88]

72. As to the "zero tolerance" benchmark, Mexico appears to suggest that it could be applied in one of two ways. In the first version, which Mexico argued before the Panel, the United States could only draw distinctions between qualified and disqualified fishing methods based on whether the fishing method causes "<u>any</u> adverse effects."[89] In the second version, which Mexico

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

[84] *See* Mexico's Other Appeal Submission, para. 98.

[85] Mexico's Other Appeal Submission, para. 99 ("To properly assess the even-handedness of the manner in which the amended tuna measure grant's eligibility to other fishing methods, it is essential to first identify the relevant adverse effects and then apply an appropriate eligibility benchmark to the assessment of those adverse effects.").

[86] Mexico's Other Appeal Submission, para. 101.

[87] Mexico's Other Appeal Submission, para. 106; *see also id.* para. 102 ("The original panel found that 'the adverse effects on dolphins targeted by the US dolphin-safe provisions, as described by the United States, relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations.' Accordingly, in the context of Article 2.1 and the facts of this dispute, the focus of a comparative assessment of the eligibility criteria, as they apply to different fishing methods in different ocean regions, should be on dolphin mortalities or serious injuries resulting from tuna fishing methods. Such adverse effects must include both 'observed' and 'unobserved' mortalities and serious injuries.") (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.486).

[88] *See* Mexico's Other Appeal Submission, paras. 109-110.

[89] Mexico's Other Appeal Submission, para. 109 ("Under this benchmark, if a fishing method causes <u>any</u> adverse effects, none of the tuna caught by that fishing method – by any vessel in any ocean region – can be labelled dolphin-safe. Such a fishing method would have to be designated as "ineligible" in the same manner as setting on

did not argue before the Panel, but now argues for the first time on appeal, the United States could only draw distinctions between qualified and disqualified fishing methods based on whether the fishing method causes "systemic" adverse effects (which Mexico defines as "regular and repeated" adverse effects).[90]

73. As to the "objective, scientifically-established" benchmark, Mexico provides the Potential Biological Removal (PBR) methodology as "an example" of one such benchmark. The PBR methodology attempts to measure the sustainability of the fishing activity on a particular stock (in this case the dolphin population in a particular fishery).[91] Although Mexico is not explicit in this regard, what Mexico is presumably saying is that, under such a benchmark, the United States could not draw distinctions between fishing methods at all, but rather must draw distinctions between *fisheries* based on whether the dolphin bycatch in a particular fishery exceeds the PBR.[92] Mexico describes this as its "prefer[red]" objective, but considers that "the only eligibility benchmark that could reasonably be viewed as incorporated into the amended tuna measure in the circumstances of this dispute is the zero tolerance benchmark."[93] Mexico claims that "[a]ll other eligibility benchmarks would inherently lack even-handedness."[94]

74. In paragraphs 131-136, Mexico analyzes the eligibility criteria using its proposed benchmarks. In Mexico's view, the eligibility criteria are not even-handed under either version of a "zero tolerance" benchmark. Under the first version, the eligibility criteria are not even-handed because other fishing methods can cause at least some harm to dolphins.[95] Under the second version, the eligibility criteria are not even-handed because, in Mexico's view, "fishing methods other than dolphin sets have systemic adverse effects on dolphins."[96] Mexico does not appear to request the Appellate Body to complete the analysis pursuant to a PBR benchmark.[97]

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dolphins in an AIDCP-compliant manner.") (emphasis in original); *see also* Mexico's Response to Panel Question 11, paras. 50-52 (making the same argument).

[90] Mexico's Other Appeal Submission, paras. 105, 109.

[91] As Mexico notes, "[t]he PBR level is the maximum number of animals, not including natural mortalities, that may be removed from an animal stock (such as dolphins) while allowing that stock to reach or maintain its optimum sustainable population." Mexico's Other Appeal Submission, para. 40.

[92] As noted in footnote 41 of the U.S. Appellant Submission, 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 Panel Question 21, para. 135; *id.* Question 52, para. 272; *see also* Mexico's Response to Panel 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.").

[93] Mexico's Other Appeal Submission, para. 112.

[94] Mexico's Other Appeal Submission, para. 112.

[95] Mexico's Other Appeal Submission, para. 135.

[96] Mexico's Other Appeal Submission, para. 135.

[97] Mexico's Other Appeal Submission, para. 135.

75. Mexico concludes by contending that the eligibility criteria are not even-handed because "the differential treatment is not rationally connected to, and is inconsistent with, the two objectives of the amended tuna measure."[98]

c. Mexico's Appeal Is in Error

76. Mexico's appeal is in error, and the Panel's finding that the eligibility criteria are even-handed should not be reversed. In section IV.A.2.c.i, the United States explains that Mexico's appeal is premised on an incorrect legal test for whether the eligibility criteria are even-handed. In section IV.A.2.c.ii, the United States addresses the specific arguments Mexico makes with regard to the various "benchmarks" it proposes. Finally, in section IV.A.2.c.iii, the United States explains that Mexico's argument as to how the Appellate Body should complete the analysis is incorrect and provides the proper framework for the Appellate Body to do so.

i. Mexico's Appeal Is Premised on an Incorrect Legal Test

77. As noted above, the Panel was not explicit as to what legal test it is applying, although its analysis appeared to indicate that it applied the legal test that the Appellate Body applied in the original proceeding – whether the eligibility criteria are "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[99] However, in applying this test, the Panel appeared to focus only on risks of those unobservable harms that result from the "chase itself," rather than on other harms, such as mortality and serious injury, which can result from other types of interactions, such as being captured in a net.[100] For its part, Mexico appears to consider that the appropriate legal test is the same subset of the GATT Article XX chapeau analysis that the Panel (incorrectly) applied in examining whether the certification requirements and the tracking and verification requirements are even-handed or not – *i.e.*, whether the regulatory distinction can be reconciled with, or is rationally related to, the measure's policy objective.[101] In applying this test, Mexico appears to argue at times that whether the eligibility criteria are "calibrated" to the different risks is irrelevant, while at other times appearing to argue the contrary.

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[98] Mexico's Other Appeal Submission, para. 136; *see also id.* para. 134 ("Insofar as the eligibility criteria deny eligibility for the 'dolphin-safe' label to tuna products containing tuna caught by setting on dolphins and grant eligibility for the label to tuna products containing tuna caught by other fishing methods, this differential treatment is not even-handed. The differential treatment does not 'fit' with the legitimate regulatory distinction pursued, it is inconsistent with the objectives of the amended tuna measure, and it is fundamentally unfair.").

[99] *US – Tuna II (Mexico) (AB)*, para. 297; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.125-126; *id*. para. 7.135 ("Therefore, we find that the new evidence presented in these proceedings merely supports the conclusion reached by the panel and the Appellate Body in the original proceedings.").

[100] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-135.

[101] *See* Mexico's Other Appeal Submission, para. 136 ("As a result of these deficiencies in the application of the eligibility criteria, the differential treatment is not rationally connected to, and is inconsistent with, the two objectives of the amended tuna measure …"); *see also id.* para. 134 ("The differential treatment does not 'fit' with the legitimate regulatory distinction pursued, it is inconsistent with the objectives of the amended tuna measure, and it is fundamentally unfair.").

78. As discussed in the U.S. Appellant Submission, Mexico's proposed legal test is incorrect.[102] To answer the question of whether the "detrimental impact stems exclusively from legitimate regulatory distinctions" a panel must examine 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."[103] For purposes of this dispute, the Appellate Body has been clear that this answer will depend on whether the regulatory distinction "is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean."[104] In short, the question is whether the regulatory distinction is "calibrated" to these different risks.[105] As discussed below in section IV.A.2.c.iii, the eligibility criteria are, in fact, so "calibrated."

ii. Mexico's Proposed "Benchmarks" for Purposes of an Even-Handed Analysis Are in Error

79. In its first two submissions before the Panel, Mexico argued that denying access to the label to tuna product produced by setting on dolphins while allowing tuna product produced by other fishing methods to have access is not even-handed because these other fishing methods "have adverse effects on dolphins that are equal to or greater" than setting on dolphins in an AIDCP-consistent manner.[106] To this end, Mexico put forth lengthy fact sections that discussed the harms to dolphins being caused by fishing methods generally other than setting on dolphins in the ETP. The United States responded with specific, fishery-by-fishery data generated by Regional Fisheries Management Organization (RFMO), national governments, and scientific studies that disproved Mexico's factual allegation.[107] Following this evidentiary showing by the United States, Mexico abandoned its argument, and began to argue that the Panel should compare different fisheries based on either a "zero tolerance benchmark" or an "objective

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[102] *See* U.S. Appellant Submission, paras. 73-74, 192-193, 257, 334.

[103] *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.").

[104] *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.").

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

[106] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 13, 248, 263, 306; Mexico's Second Written 21.5 Submission, para. 140.

[107] U.S. First Written 21.5 Submission, sec. II.C; U.S. Second Written 21.5 Submission, sec. II.A-D; *see also* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127) (summarizing the RFMO data on the record).

scientific benchmark."[108] Now, on appeal, while continuing to argue for these two "benchmarks," Mexico pivots once again, arguing, for the first time, that the Panel erred by failing to find that the eligibility criteria are not even-handed because the criteria does not distinguish between fishing methods that cause "systematic" adverse harm and those that do not.[109] Mexico's arguments are in error.

(A). The "Zero Tolerance" Benchmark(s)

80. Mexico describes its "zero tolerance" benchmark in two, inconsistent ways.

81. First, Mexico describes the "zero tolerance" benchmark as an examination of whether a fishing method "causes *any* adverse effects."[110] In this version of its benchmark, where a fishing method has been proven to cause any adverse effect – such as, a single dolphin mortality – tuna product produced from that fishing method must be denied access to the label regardless of whether a dolphin was killed or seriously injured in the harvest of the particular tuna at issue.[111] Mexico defends this approach by reference to the other eligibility criterion.

82. Mexico made this argument before the Panel in its written responses to the Panel's questions.[112] In particular, Mexico took the position that the Panel, in conducting its even-handed analysis, should ignore the "magnitude" of the harm in different fisheries.[113] In Mexico's view, "[t]here is no room for calibration" in analyzing whether the eligibility criteria are even-handed.[114]

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[108] *See* Mexico's Response to Panel Question 11, paras. 58-61, 62-66.

[109] *See* Mexico's Other Appeal Submission, paras. 109-110.

[110] Mexico's Other Appeal Submission, para. 109 (emphasis added).

[111] Mexico's Other Appeal Submission, para. 109 ("Under this benchmark, if a fishing method causes any adverse effects, none of the tuna caught by that fishing method – by any vessel in any ocean region – can be labelled dolphin-safe. Such a fishing method would have to be designated as "ineligible" in the same manner as setting on dolphins in an AIDCP-compliant manner.").

[112] *See, e.g.*, Mexico's Response to Panel Question 11, paras. 58-61.

[113] Mexico's Response to Panel Question 11, para. 59 ("Thus, it appears that the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist."); *see also id.* para. 58 ("[I]t appears that it is not a question of the relative number of dolphins that are killed or seriously injured in a manner that cannot be observed. It is simply a question of whether or not such adverse effects merely exist in relation to these specific fishing methods.").

[114] Mexico's Response to Panel Question 5(b), paras. 10-11 ("*There is no room for calibration* because, in the context of record-keeping, tracking, verification and observer coverage, anything less than full implementation would mean that the provision of inaccurate information to consumers would be deemed acceptable in some circumstances. Such an outcome would not be even-handed. . . . [I]t is Mexico's position that *the same logic applies* to the disqualification of Mexico's fishing method and the qualification of other fishing methods as eligible to catch dolphin-safe tuna.") (emphasis added); *see also id.* para. 9 (arguing that the "the concept of 'calibration' is totally inconsistent" with the objective of the amended measure).

83. Given that it is uncontested that all fishing methods can cause some harm,[115] the result of Mexico's "zero tolerance" benchmark is that Article 2.1 prohibits the United States from drawing *any* distinctions between fishing methods. As Mexico told the Panel, "all tuna fishing methods should be either disqualified or qualified."[116]

84. But such a position is entirely *inconsistent* with the Appellate Body's even-handed analysis, where the Appellate Body had examined whether the eligibility criteria were "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. And Mexico errs in arguing for an approach in a compliance proceeding that is so incompatible with one taken by the Appellate Body in the original proceeding.[117]

85. Second, Mexico describes the "zero tolerance" benchmark as an examination of whether a particular fishing method causes "systematic" adverse effects.[118] In this version of its benchmark, where a fishing method has been proven to cause a "systematic" adverse effect, the tuna product produced from that fishing method must be denied access to the label regardless of whether a dolphin was killed or seriously injured in the harvest of the tuna.[119] Mexico contends that the Panel's statement that the "evidence presents a compelling case that various tuna fishing methods around the world are negatively impacting the health and well-being of dolphin populations" "compels" the conclusion that the eligibility criteria are not even-handed.[120] Mexico does not explain why such an approach, which purports to distinguish between fishing methods based on degree of harm, applies a "zero tolerance" benchmark, and, in fact, Mexico's two versions of "zero tolerance" are in direct conflict with one another.

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[115] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.185 ("Both parties accept that dolphins are at some risk from *all tuna fishing methods* and in *all* fisheries.") (emphasis in original). As the Panel notes, the only possible exception to this is pole and line fishing, which has historically not been associated with dolphin bycatch. *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.366 (citing party submissions).

[116] Mexico's First Written 21.5 Submission, para. 263.

[117] *See, e.g., US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107 ("The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. … The Panel had, *necessarily*, to consider our views on this subject …") (emphasis added).

In this regard, Mexico is wrong to suggest that the Appellate Body did not conduct an even-handed analysis of the eligibility criteria because *US – Clove Cigarettes* was not released until after the briefing had been completed in *US – Tuna II (Mexico)*. *See* Mexico's Other Appeal Submission, para. 132, n.168. Clearly, the Appellate Body conducted such an analysis. *See 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. 286, 297.

[118] Mexico's Other Appeal Submission, para. 109.

[119] Mexico's Other Appeal Submission, para. 109 ("Rather, the eligibility criteria under this benchmark would be applied to systemic adverse effects, including both observed and unobserved effects. If a zero tolerance eligibility benchmark is applied in this manner, then all fishing methods that have systemic adverse effects must be designated as ineligible. If not, then the eligibility requirements are being applied in a manner that is not even-handed.").

[120] Mexico's Other Appeal Submission, paras. 109, 135.

86. As a threshold matter, the United States observes that Mexico *did not* make this argument before the Panel, and appears to have invented it for the sole purpose of this appeal. As such, it is unclear on what basis Mexico considers that the Panel erred in not adopting an approach that Mexico *did not even advocate for*. As discussed in the U.S. Appellant Submission, Mexico clearly has the burden of proving its Article 2.1 claims and to do that must have put forward "evidence and argument" sufficient to establish a *prima facie* case of inconsistency with regard to the eligibility criteria.[121]

87. Moreover, Mexico is wrong to argue that any statements of the Panel regarding gillnets and longlines "compel" the finding Mexico claims they do. Again, Mexico made no argument regarding whether some fishing methods cause "systematic" adverse effects – as Mexico has chosen to define the term[122] – and others do not. As such, the Panel made no assessment of this issue, and the Panel's statements that Mexico references cannot be understood in this new context. Further, while Mexico claims that gillnets and longlines are causing "systematic" adverse effects, Mexico has not alleged that *any* gillnet or longline fishery exists where a "regular and significant" mortality or serious injury is occurring, such that it would be appropriate to require an observer to certify as to the dolphin safe status of the tuna being harvested in that fishery.[123] And, as the minority panelist (correctly) noted, even if Mexico had made such an argument, it would have failed,[124] a conclusion that is consistent with the majority's analysis.[125] And, indeed, the United States put forward sufficient evidence to disprove Mexico's argument that all other fishing methods "have adverse effects on dolphins that are equal to or greater" than setting on dolphins in an AIDCP-consistent manner on a fishery-by-fishery basis, controlling for the different number of vessels in each fishery.[126] Finally, as the

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[121] *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.") (emphasis in original internal quotes omitted).

[122] Mexico apparently uses the term "systematic" to mean "regular and repeated" adverse effects. *See* Mexico's Other Appeal Submission, para. 105.

[123] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.281 (min. op.).

[124] *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).

[125] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 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.").

[126] *See* U.S. First Written 21.5 Submission, paras. 89-101 (discussing the harms due to setting on dolphins in an AIDCP-consistent manner, 129-134 (discussing purse seine fishing other than by setting on dolphins), 135-146

Panel notes, any mortality and serious injury that gillnets, longlines, and any other fishing method are causing would be taken into account by the other eligibility criterion.[127]

(B). The "Objective, Scientifically-Established" Benchmark

88. The other benchmark Mexico discusses in its appeal is an "objective, scientifically-established" benchmark, which Mexico suggests could be based on a comparison of fishery-specific PBR levels.[128] While Mexico is not explicit in this regard, what Mexico appears to be suggesting is that the United States would deny access to the label for tuna product produced from fisheries whose dolphin bycatch is above the PBR while allowing that tuna product produced from fisheries whose dolphin bycatch is below PBR access to the label (assuming no dolphin was killed or seriously injured in that particular set where the tuna was harvested). Again, Mexico's argument fails.

89. First, the United States observes that Mexico conceded to the Panel that sufficient data does not exist to make a PBR comparison across fisheries, and, as such, that this "benchmark has no application in the Panel's analysis under Article 2.1."[129] It is thus unclear why Mexico considers that the Panel erred in not accepting Mexico's framework. Indeed, Mexico does not appear to even request the Appellate Body to complete the analysis as to its PBR benchmark.[130] As such, it is not clear whether Mexico even makes an appeal in this regard, or whether this discussion is more of a general observation as to how Mexico would "prefer" the amended measure to have been designed.[131]

90. Second, Mexico puts forward no reason why the Panel erred in not adopting this approach. A PBR analysis in this context would constitute an examination of whether the level

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(discussing longline fishing), 148-149 (discussing pole-and-line fishing), 154-156 (discussing gillnet fishing); U.S. Second Written 21.5 Submission, para. 23; U.S. Response to Panel Question 19, paras. 111-119; U.S. Response to Panel Question 21, paras. 136-143.

[127] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.243 (maj. op.) ("As we understand it, the United States is not arguing that 'accidental' dolphin mortality or injury is less serious than 'intentional' mortality or injury. Neither is it arguing that tuna can be considered dolphin-safe where it is caught in a gear deployment that accidentally kills or mains dolphins, or that tuna can or should only be considered non-dolphin-safe only when a dolphin is intentionally killed or injured. On the contrary, the amended tuna measure makes clear that tuna cannot be considered dolphin-safe *whenever* a dolphin is killed or seriously injured in the gear deployment in which the tuna was caught, regardless of whether such death or injury was intentional.").

[128] *See* Mexico's Other Appeal Submission, para. 110.

[129] Mexico's Response to Panel Question 11, para. 66 ("However, such a benchmark is not applied under the Amended Tuna Measure. As noted above, the United States has taken the position that the Amended Tuna Measure is not based on dolphin population recovery. Moreover, the United States has not conducted a proper study of the status or the rate of dolphin population recovery in the ETP, and has made no attempt to properly study these characteristics in other tuna fisheries. Accordingly, *this benchmark has no application in the Panel's analysis under Article 2.1*.") (emphasis added).

[130] *See* Mexico's Other Appeal Submission, para. 135 (only mentioning its "zero tolerance" benchmark).

[131] *See* Mexico's Other Appeal Submission, para. 112.

of mortality incidental to commercial fishing operations exceeds the stock's PBR level. In other words, whether the level of dolphin mortality in a particular fishery is *sustainable*. But there is no requirement that the dolphin safe label must be a *sustainability label*, and, indeed, the United States has never claimed that it is. Even if Mexico is making an appeal in this regard – and it appears that it is not – Mexico puts forward no reason why the eligibility criteria are not even-handed because they relate to harm incurred by dolphins, rather than the sustainability of dolphin populations. Indeed, as the United States discussed with the Panel, a fundamental tenant of the TBT Agreement is that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives 'at the levels it considers appropriate.'"[132] And nothing in Article 2.1, or in the TBT Agreement more generally, suggests that the United States must alter the objectives of the amended measure to suit Mexico's wishes. Indeed, Mexico makes no claim in this proceeding that the objectives of the amended measure are not "legitimate" for purposes of Article 2.2.

iii. The Eligibility Criteria Are Even-Handed Under the Correct Legal Test

91. In paragraphs 131-136 of its Other Appeal Submission, Mexico requests the Appellate Body to complete the analysis in light of Mexico's (erroneous) proposed legal standard, and find that the regulatory distinction as to eligibility is not even-handed. Mexico's analysis is in error. Under the correct legal standard described in section IV.2.c.i, the eligibility criteria are, in fact, even-handed, and the detrimental impact found to exist because Mexican tuna product does not have access to the dolphin safe label stems exclusively from a legitimate regulatory distinction.

92. As the United States has explained elsewhere, setting on dolphins is the *only* fishing method in the world *that intentionally targets dolphins*.[133] In the ETP – the only place where the fishing method is practiced "systematically"[134] – large purse seine vessels, speed boats, and helicopters hunt, chase, and capture large schools of dolphins (often numbering in the hundreds of animals) in order to capture the tuna that "associate" with those dolphins. The multi-hour chase and capture of large schools of dolphins is *inherently* dangerous to dolphins, putting hundreds of dolphins in danger of sustaining unobservable and direct harms in each and every set. As such, it cannot be said that setting on dolphins is a "dolphin safe" fishing method.

93. But the same cannot be said of other fishing methods, where the Panel found that "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)."[135] As such, the

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[132] *US – Tuna II (Mexico) (AB)*, para. 316 (quoting the sixth premabular recital) (emphasis added); *US – COOL (AB)*, para. 373 (quoting same).

[133] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241.

[134] *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."); *see also infra*, sec. IV.B.2 (responding to Mexico's related Article 11 claim).

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

eligibility criteria, which draw a distinction between fishing methods that are *inherently* dangerous to dolphins and those that are not, are entirely even-handed, and cannot be said to prove that the detrimental impact incurred by Mexican tuna product "reflects discrimination."[136] Indeed, Mexico's chosen fishing method is considered *so dangerous* (compared to all other fishing methods) that RFMOs have *banned* the practice of setting on cetaceans (*i.e.*, dolphins, porpoises, and whales) in the western central Pacific Ocean and the Indian Ocean (while continuing to allow other fishing methods to be conducted).[137]

94. In terms of completing the analysis, numerous factual findings of the Panel as well as uncontested facts on the record support the conclusion that the eligibility criteria are even-handed.[138]

95. With regard to the Panel's factual findings, the majority concluded 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 such that the large purse seine fishery has a different "risk profile" than other fisheries.[139] The minority, in this regard, agreed with the majority, finding that "the United

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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.") (relying on U.S. Response to Panel Questions 20-22, paras. 120-125, 136-142, 147-149).

[136] In this regard, the United States would note that, as the original panel found, the history of the challenged measure indicates that the eligibility conditions do not directly target Mexican producers to the benefit of U.S. producers. *See US –Tuna II (Mexico) (Panel)*, para. 7.324 (noting that at the time of the enactment of the first version of the DPCIA in 1990, "the United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins").

[137] *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). The United States has long prohibited U.S. flagged vessels from setting on marine mammals anywhere in the world (except as allowed under the AIDCP). U.S. First Written 21.5 Submission, para. 86, n.174 (citing 16 U.S.C. §§ 1372(a)(1)-(2) (Exhs. US-37); 16 U.S.C. § 1362(13) (Exh. US-38). The ICCAT, which is the tuna RFMO for the Atlantic Ocean, is currently considering banning the intentional setting on cetaceans. *See* Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014) (Exh. US-13). While the AIDCP does not, of course, ban the practice of setting on dolphins, this is due to the existence of the unique tuna-dolphin bond in these waters, which makes setting on dolphins a highly economically beneficial method of harvesting tuna in this part of the world. *See* Mexico's Response to Panel Question 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 Panel Question 57, paras. 147-150.

[138] *See US – Hot-Rolled Steel (AB)*, para. 180 ("Out examination of this issue must be based on the factual findings of the Panel or uncontested facts in the Panel record"); *see also US – Tuna II (Mexico) (AB)*, para. 230.

[139] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-243 (maj. op.), in particular *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."); *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

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*."[140] Notably, the Panel squarely disagreed 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."[141]

96. This factual finding, that the ETP large purse seine fishery has a different "risk profile" than other fisheries do, was based on evidence put forward by the United States that covered *all harms* caused by different fishing methods – mortality, serious injury, and those unobservable harms suffered by dolphins from being chased. The citations to the U.S. submissions that the majority relied on focused on the significant difference in *interaction* between fishing vessels and dolphins in the ETP large purse seine fishery and all other fisheries,[142] which covers mortalities, serious injuries, unobservable harms, as well as all other contacts between dolphins and fishing vessels, such as depredation.[143] Of course, the fact that the Panel made these factual findings in the context of whether the certification requirements were even-handed, further confirms that the Panel's analysis covers *all harms* caused by different fishing methods. Indeed, requiring observers on some vessels, but not others, makes no sense if the *sole* concern relates to harms that are truly *unobservable*.[144]

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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)."); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (recalling that "[t]he different risk profiles of different fisheries may, as we found above, explain regulatory differences concerning the eligibility criteria for fishing methods" and referring to "the special risk profile of the ETP large purse seine fishery").

[140] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) (emphasis added); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op) (referring to the different "risk profiles" of the ETP large purse seine fishery and other fisheries, based on the evidence on the record).

[141] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241-242 (maj. op.); *id.* para. 7.278 (min. op.).

[142] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.438, 439 (maj. op.) (relying on U.S. Responses to Panel Questions 20-22, paras. 120-125, 136-142, 147-149); *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.") (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)).

[143] U.S. Appellant Submission, n.74 (citing various sources).

[144] In this regard, the United States did not argue before the Panel, nor does it do so here, that the amended measure draws a distinction between setting on dolphins and other fishing methods based *only* on unobservable harms resulting from the "chase itself." Rather, the United States has always taken the position that the *relative harm* caused by setting on dolphins of mortality, serious injury, *and* unobservable harms – viewed in total – is much greater than other fishing methods, based on a fishery-by-fishery comparison and controlling for the number of vessels. *See, e.g.*, U.S. First Written 21.5 Submission, paras. 131-133, 144-146; U.S. Second Written 21.5 Submission, para. 23; U.S. Response to Panel Question 7, paras. 51-55; U.S. Response to Panel Question 19, paras. 111-119; U.S. Response to Panel Question 21, paras. 136-143. The United States considers its approach is consistent with the Appellate Body's analysis of whether the eligibility criteria are "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean." *US – Tuna II (Mexico) (AB)*, para. 297.

97. In addition to these factual findings by the Panel, there are numerous uncontested facts on the record that support the conclusion that the risk profile of the ETP large purse seine fishery – in terms of mortalities, serious injuries, and and unobservable harms – is different than that of other fisheries. Specifically, the United States has submitted fishery-by-fishery data, generated by RFMOs, national governments, and scientists, depicting the interactions with and harms to dolphins caused by different fishing methods in a number of fisheries around the world. That data, which was submitted individually and summarized in Exhibit US-127, clearly shows the difference in direct harms (*i.e.*, dolphin mortalities and serious injuries) between the ETP large purse seine fishery and other fisheries.[145]

98. Furthermore, this data is uncontested. Mexico has never disputed the accuracy of the data generated by RFMOs, national regulators, and scientists and submitted by the United States.[146] Instead, Mexico relied on a different kind of evidence, namely general summations regarding the state of marine mammal bycatch in the world generally,[147] and highly dated publications that make conclusions based on studies or anecdotes from decades ago.[148] The Panel found that Mexico's evidence was *not* sufficient to rebut the fishery-by-fishery data

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[145] The data submitted by the United States shows, *inter alia*: (1) between 2009 and 2013, observed dolphin mortality due to dolphin sets by large purse seine vessels in the ETP was 96.96 animals per 1,000 sets; (2) between 2009 and 2013, observed dolphin mortality in the Hawaii Deep-Set longline fishery was 0.33 dolphins per 1,000 sets; (3) between 2009 and 2012, observed dolphin mortality in the American Samoa longline fishery was 0.55 dolphins per 1,000 sets; (4) between 2009 and 2012, observed dolphin mortality in the Atlantic longline fishery was 1.28 dolphins per 1,000 sets; (5) between 1995 and 2005, observed dolphin mortality in the WCPFC longline fisheries was 0.58 dolphins per 1,000 sets; (6) between 2007 and 2010, observed dolphin mortality in the WCPFC purse seine fishery 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); (7) between 2003 and 2009, observed dolphin mortality in the EU Indian Ocean tropical purse seine fishery was zero dolphins per 1,000 sets; and (8) between 2007 and 2010, observed dolphin mortality in the Eastern tropical Atlantic purse seine fishery was zero dolphins per 1,000 sets. *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, at Tables 1 and 2 (Exh. US-127) and the sources cited therein.

[146] *See, e.g.*, Mexico's Comments on the U.S. Response to Panel Question 19, at 88; Mexico's Comments on U.S. Response to Panel Question 7, para. 42; Mexico's Comments on U.S. Response to Panel Question 19, para. 89; Mexico's Comments on U.S. Response to Panel Question 7, paras. 43-44 (criticizing the U.S. study concerning the Indian Ocean purse seine fishery as not being comprehensive, in failing to cover the entire Indian Ocean, but not challenging the study's results as to the fishery it purported to cover); Anderson 2014, at 56 (Exh. MEX-161) (summarizing various studies, including the two U.S. exhibits on Indian Ocean purse seine fisheries and confirming their findings by stating that, with respect to dolphin mortality due to FAD fishing in the Indian Ocean, "the scale of this source of mortality appears to be small"). Mexico did not contest the accuracy of the U.S. evidence on the Hawaii longline fishery, and the facts Mexico relied on were not inconsistent with the mortality levels the United States has demonstrated. *See* Mexico's First Written 21.5 Submission, paras. 139-140; Mexico's Second Written 21.5 Submission, para. 32; Mexico's Response to Panel Question 15, para. 90. Mexico never responded at all to the U.S. evidence regarding the American Samoa longline fishery. With respect to the Atlantic longline fishery, Mexico did not contest the level of mortality demonstrated by the U.S. exhibits or the discrepancy between the Atlantic longline fishery and the ETP large purse seine fishery. *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 141-143; Mexico's Second Written 21.5 Submission, para. 32; Mexico's Comments on U.S. Response to Panel Question 21, para. 102.

[147] *See* U.S. Response to Panel Question 21, para. 143, n.246.

[148] *See* U.S. Response to Panel Question 21, para. 143, n.247.

submitted by the United States.[149] Further, even accepting Mexico's evidence at face value, it does not demonstrate that there is any fishery in the world where the risks to dolphins of observed and unobservable harms is as great as in the ETP large purse seine fishery.

99. For the above reasons, the eligibility criteria, which draw a distinction between a fishing method that intentionally targets dolphins – and thus is inherently non-dolphin safe as it inevitably causes unobservable and direct harms – and fishing methods that interact with dolphins *only incidentally* is even-handed, and Mexico is wrong to assert the contrary. In short, the eligibility criteria are "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[150]

3. Mexico's Article 11 Claims Lack Merit

100. Article 11 of the DSU provides that each panel must "make an objective assessment of the matter before it, including an objective assessment of the facts of the case." In examining a panel's obligation under Article 11, the Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation" that "goes to the very core of the integrity of the WTO dispute settlement process."[151] Thus, for an Article 11 claim to succeed, it must be shown that the panel committed "an egregious error that calls into question the good faith of the panel."[152]

101. The Appellate Body has also emphasized that the weighing of the evidence on the record is within panels' discretion,[153] as is "decid[ing] which evidence [a panel] chooses to utilize in making findings."[154] Thus, a panel "is not required to discuss, in its report, each and every piece

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[149] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-242 (finding – based fishery-by-fishery data from the ETP large purse seine fishery and other fisheries – that "the nature and degree of interaction [between dolphins and fishing vessels] is different in quantitative and qualitative terms" in dolphin sets in the ETP than for "[o]ther fishing methods in other oceans" and citing U.S. Response to Panel Question 20, paras. 120-125; U.S. Response to Panel Question 21, paras. 136-142; U.S. Response to Panel Question 22, paras. 147-149). The cited paragraphs of the U.S. responses to the Panel's questions include two tables, reproduced from Exhibit US-127 and presenting, in summary form, the RFMO and academic data submitted by the United States concerning the frequency of sets with dolphin interactions in the ETP large purse seine fishery, on the one hand, and the WCPFC, Eastern tropical Atlantic, and Indian Ocean tropical purse seine fisheries, on the other, *see* U.S. Response to Panel Question 20, para. 121, as well as summaries of the NMFS data from U.S. longline fisheries in the Pacific and Atlantic oceans and academic studies of EU vessels in the Atlantic longline fishery, *see* U.S. Response to Panel Question 21, paras. 136-142. Thus, the Panel clearly relied on the U.S. fishery-by-fishery evidence in making findings concerning the "risk profiles" of different fisheries.

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

[151] *EC – Poultry (AB)*, para. 133.

[152] *EC – Hormones (AB)*, para. 133.

[153] *Korea – Dairy (AB)*, para. 137; *see also China – Rare Earths (AB)*, para. 5.228 (encouraging appellants to "consider carefully when and to what extent to challenge a panel's assessment of a matter pursuant to Article 11, bearing in mind that an allegation of violation of Article 11 is a very serious allegation").

[154] *EC – Hormones (AB)*, para. 135.

of evidence,"[155] and a "panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it."[156] The Appellate Body has further established that "not every error allegedly committed by a panel amounts to a violation of Article 11."[157] Rather, only errors "that are so material that, taken together or singly, they undermine the objectivity of the panel's assessment of the matter before it."[158]

102. Mexico claims that the Panel acted inconsistently with Article 11 in making certain findings concerning the observed and unobserved harms of setting on dolphins and other fishing methods. As the United States demonstrates below, however, with respect to each of its claims, Mexico has failed to meet the high standard of establishing that the Panel acted inconsistently with Article 11.

103. In section IV.A.3.a, the United States explains that the Panel did not improperly change its finding from the original proceeding. In section IV.A.3.b, the United States explains that the Panel did not err in finding that other fishing methods do not have unobservable effects similar to those associated with setting on dolphins in the ETP. In section IV.A.3.c, the United States explains that the Panel did not err in its characterization of the Appellate Body's finding concerning setting on dolphins.

a. The Panel Did Not Improperly Change Its Finding Concerning the Unobserved Harms of Dolphin Sets from the Original Proceeding

104. Mexico argues that the Panel failed to make an objective assessment of the matter with respect to its findings concerning the unobservable harms of dolphin sets. Specifically, Mexico asserts that the Panel "converted its prior finding of 'genuine concerns' into a finding of conclusive evidence of significant unobserved effects," despite "no new evidence on the unobserved effects of dolphin sets" in this proceeding.[159]

105. Mexico does not refer to specific paragraphs of the Panel Report in which the Panel allegedly mischaracterized the original panel's finding regarding the unobserved harms of setting on dolphins. However, the Panel certainly *did find* that the original proceeding established that setting on dolphins is "particularly harmful to dolphins" because, in the words of the original panel, "various adverse impacts can arise from setting on dolphins, beyond observed mortalities,

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[155] *Brazil – Retreaded Tyres (AB)*, para. 202.

[156] *See US – Tuna II (Mexico) (AB)*, para. 272.

[157] *See EC – Fasteners (AB)*, para. 442.

[158] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

[159] *See* Mexico's Other Appeal Submission, para. 117.

including cow-calf separation during chasing and encirclement . . . as well as muscular damage, immune and reproductive system failures, and other adverse health consequences."[160]

106. Mexico does not explain how the Panel's alleged error in this regard is "so material" that it undermines the objectivity of the Panel's assessment of Mexico's claim, and, on this basis alone, Mexico's claim does not appear to meet the standard for a proper Article 11 appeal.[161] Mexico certainly provides no proof that the Panel's analysis "calls into question the good faith of the panel."[162] And, in any event, Mexico is wrong that the Panel's finding mischaracterizes the finding of the original panel in this regard, as is demonstrated by the findings of the original panel and the subsequent findings of the Appellate Body. Additionally, Mexico's suggestion that it introduced new evidence regarding certain exhibits from the original proceeding is incorrect.

107. First, the Panel's characterization of the original panel as having made definitive findings on this issue was accurate. The language that the Panel quotes at paragraph 7.120 in finding that the original proceeding established that setting on dolphins can cause adverse impacts on dolphins apart from observed mortalities comes from paragraph 7.499 of the original panel report, in which the original panel, after summarizing the U.S. evidence concerning the unobserved harms of setting on dolphins,[163] stated:

> These studies therefore suggest that various adverse impacts can arise from setting on dolphins, beyond observed mortalities, including cow-calf separation during the chasing and encirclement, threatening the subsistence of the calf and adding casualties to the number of observed mortalities [citing Exh. US-4, p. 24], as well as muscular damage, immune and reproductive systems failures and other adverse health consequences for dolphins, such as continuous acute stress [citing Exh. US-11, pp. 191, 201; Exh. US-19, p. 5].[164]

108. After making this finding, the original panel noted that some studies "question these conclusions" and cited two studies submitted by Mexico.[165] The original panel then concluded:

> From the above, it appears that there is a degree of uncertainty *in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality*. Nonetheless, we consider that sufficient evidence has

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[160] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120 (citing *US – Tuna II (Mexico) (AB)*, para. 289).

[161] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

[162] *EC – Hormones (AB)*, para. 133.

[163] *See US – Tuna II (Mexico) (Panel)*, paras. 7.495-498.

[164] *US – Tuna II (Mexico) (Panel)*, para. 7.499.

[165] *See US – Tuna II (Mexico) (Panel)*, paras. 7.500-502 (citing Exh. MEX-2, at 114 and Exh. MEX-67).

> been put forward by the United States to raise a presumption that genuine concerns exist in this respect.[166]

109. Thus, the finding of the original panel was that "various adverse impacts can arise from setting on dolphins, beyond observed mortalities." In this regard, the original panel had found that, while there was some uncertainty regarding "the extent" of these impacts, the U.S. evidence had established a presumption that "genuine concerns exist" in that respect.[167] Further, the original panel concluded that the ineligibility of setting on dolphins "enable[s] the US consumer to avoid buying tuna caught in a manner involving the types of observed *and unobserved* adverse impacts on dolphins associated with this method, as described above," a point that Mexico continues to ignore.[168]

110. Second, the Appellate Body's analysis confirmed the Panel's interpretation. The Appellate Body noted "the Panel's finding . . . that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins, even under the restrictions contained in the AIDCP rules."[169] The Appellate Body stated that the original panel had considered, in particular, "cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress."[170] Indeed, the Appellate Body noted that Mexico *had not contested* on appeal that

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[166] *US – Tuna II (Mexico) (Panel)*, para. 7.504 (emphasis added).

[167] *US – Tuna II (Mexico) (Panel)*, para. 7.737 ("[T]he Panel has considered that despite the existence of a degree of uncertainty in relation to the extent to which setting on dolphins may have adverse impact on dolphins beyond observed mortality, sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect and that the method of setting on dolphins 'has the capacity' of resulting in observed and unobserved adverse effects on dolphins.").

[168] *US – Tuna II (Mexico) (Panel)*, para. 7.505 (emphasis added). The original panel's subsequent findings confirmed this. In particular, when comparing the U.S. and AIDCP dolphin safe labels, the panel explained: "[A]s we have accepted earlier, setting on dolphins may result in observed and unobserved harmful effects on dolphins." *US – Tuna II (Mexico) (Panel)*, para. 7.560. The panel then found that the ineligibility of setting on dolphins under the U.S. measure assured that "tuna, when labelled dolphin-safe, did not result in *unobserved* adverse effects on dolphins." *See id.* para. 7.572. Conversely, the AIDCP label would *not* assure consumers that "tuna products using this label do not contain tuna caught by setting on dolphins, or that no *unobserved* negative effects on dolphins arose in the context." *Id.* para. 7.571. Thus the panel found that tuna caught without setting on dolphins was caught without "unobserved adverse effects," while tuna caught using this method, even under the AIDCP regime, was not.

[169] *See US – Tuna II (Mexico) (AB)*, para. 330 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.504); *see also US – Tuna II (Mexico) (AB)*, para. 246 ("The Panel also found that the United States had put forward sufficient evidence to raise a presumption 'that the method of setting on dolphins has the capacity of resulting in observed and unobserved adverse effects on dolphins.'"); *id.* para. 251 (referring to the "finding[] by the Panel" that "setting on dolphins in the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed *and unobserved* effects on dolphins.") (emphasis added); *id.* para. 287 ("The United States has presented extensive evidence and arguments, and the Panel has made uncontested findings, to the effect that the fishing method of setting on dolphins causes observed *and unobserved* adverse effects on dolphins") (emphasis added).

[170] *See US – Tuna II (Mexico) (AB)*, para. 330, n.663 (citing *US – Tuna II (Mexico) (Panel)*, paras.7.491-7.506).

setting on dolphins resulted in such unobserved harms.[171] In light of these findings, the Appellate Body found that the U.S. measure "fully addressed" the "observed *and unobserved* adverse effects on dolphins" of setting on dolphins.[172] Thus the Appellate Body confirmed that the panel had made a finding that setting on dolphins causes unobserved harms beyond direct mortalities and relied on that finding in its own analysis and findings.

111. Third, Mexico's suggestion that it introduced new evidence concerning "the key study on unobserved effects" and a 2002 Department of Commerce study is incorrect.[173] The studies in question (original exhibits US-4 and US-19 and exhibits US-45 and US-28/MEX-119 in this proceeding), were only two of seven studies on which the original panel relied in finding that "various adverse impacts can arise from setting on dolphins, beyond observed mortalities."[174] Mexico did not present any information concerning either study that was not clear from the original U.S. exhibits and, therefore, Mexico did not present any evidence that would undermine the original panel's conclusions based on the studies.[175]

112. Further, Mexico mischaracterizes both exhibits. Mexico's criticism that original exhibit US-4 "did not include any physical examination of dolphins in the ETP"[176] is misplaced, as the exhibit is not a field study *at all* but an academic article presenting and synthesizing the results of several field studies, including some covering the ETP large purse seine fishery and others covering animals that exhibit behavior patterns similar to dolphins from which conclusions may be drawn about dolphin behavior.[177] With respect to Exhibit US-28/MEX-119, Mexico quotes selectively from the study but ignores its conclusions, which include: 1) "the findings from the

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[171] *See US – Tuna II (Mexico) (AB)*, para. 246 and n.513 (referring to the panel's finding that the United States "put forward sufficient evidence to raise a presumption that the method of setting on dolphins has the capacity of resulting in observed and unobserved adverse effects" and noting that "In response to questioning at oral hearing, Mexico indicated that *it did not contest this finding* by the Panel") (emphasis added); *see also id.*, para. 330 and n.663 (stating: "We note, in this regard, the Panel's finding, *undisputed by the participants*, that dolphins suffer adverse impact *beyond observed mortalities* from setting on dolphins, even under the restrictions contained in the AIDCP rules," and that, "In particular, the Panel considered cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress") (citing Panel Report, paras. 7.491-506) (emphasis added).

[172] *See US – Tuna II (Mexico) (AB)*, para. 287 (emphasis added); *see also id.* para. 330 (noting that the AIDCP label 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 labeled 'dolphin safe'").

[173] *See* Mexico's Other Appeal Submission, para. 118.

[174] *See US – Tuna II (Mexico) (Panel)*, para. 7.499 (citing Exh. US-4, p. 24; Exh. US-11, pp. 191, 201; Exh. US-19, p. 5); *see also id.* paras. 7.495-498 (citing Exh. US-4, US-11, US-19, US-21, US-22, US-27, and US-28).

[175] *See* Mexico's Oral Statement, para. 21 (citing Exh. US-45, p. 20 (original exhibit US-4) and Exh. MEX-119, p. 25 (original exhibit US-19)). (Exh. MEX-119 is also the same as Exh. US-28.) As Mexico acknowledges, these exhibits are exactly the same as those in the original proceeding.

[176] *See* Mexico's Other Appeal Submission, para. 118.

[177] *See* Shawn R Noren, & Elizabeth F. Edwards, "Physiological and Behavioral Development in Delphinid Calves: Implications for Calf Separation and Mortality Due to Tuna Purse-Seine Sets," 23 *Marine Mammal Science* 15, 16, 20-21 (2007) (Exh. US-45) (Orig. Exh. US-4).

available data support the possibility that tuna purse-seining activities involving dolphins may have a negative impact on some individuals"; 2) that calf-cow separation causes an underestimate of dolphin mortality by at least "10-15% for spotted dolphins and 6-10% for spinner dolphins" (and likely much more); and 3) that unobserved harms to dolphins could be responsible for the difference in expected and observed growth rates for offshore spotted and eastern spinner dolphins.[178]

b. The Panel Did Not Err in Finding that Other Fishing Methods Do Not Have Unobservable Effects Similar to Those Associated with Setting on Dolphins in the ETP

113. The Panel found that the evidence that Mexico presented in this proceeding did not show that "fishing methods other than setting on dolphins cause the kinds of unobservable harms that are caused by setting on dolphins."[179] The Panel explained, based on a close examination of Mexico's submissions, responses to Panel questions, and exhibits, that the harms that Mexico's evidence showed can occur due to methods other than setting on dolphins are the kind of harms "whose occurrence renders ineligible for the dolphin-safe label any tuna caught in the set in which the harmful interaction … occurred."[180] Thus they are not the types of harm, such as are caused by setting on dolphins, that "cannot be certified because [they] leave[] no observable evidence."[181] The Panel, therefore, concluded that even if a fishery other than the ETP large purse seine fishery were causing "the same number of dolphin mortalities and serious injuries allowed or caused in the ETP . . . it is simply *not* the case that such fisheries are producing the same level of unobserved harms . . . which arise as a result of the chase in itself."[182]

114. Mexico asserts that the Panel "incorrectly rejected Mexico's argument that other fishing methods have unobserved effects on dolphins."[183] First, Mexico argues that the Panel failed to consider certain evidence it submitted concerning the harms of fishing methods other than setting on dolphins.[184] Specifically, Mexico referred to paragraphs 131 and 132-151 of its first written submission and to exhibit MEX-52, which concerned longline and gillnet fishing.[185] Second,

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[178] *See* Stephen B. Reilly et al., NOAA, *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, at 25-26 (2002) (Exh. US-28/MEX-119) (Orig. Exh. US-19).

[179] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132.

[180] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132.

[181] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132.

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

[183] Mexico's Other Appeal Submission, para. 120.

[184] *See* Mexico's Other Appeal Submission, para. 122.

[185] Mexico's Other Appeal Submission, paras. 121-122 (citing M. Gomercic et al. Bottlenose dolphin (Tursiops truncatus) depredation resulting in larynx strangulation with gill-net parts, Marine Mammal Science, Vol. 25, No. 2 (April 2009), pp. 398-99 (Exh. MEX-52)) (arguing that the Panel did not address evidence that dolphins can "die after choking on pieces of broken gillnets, and that the deaths are not instantaneous or contemporaneous with the gear deployment"); *id.* para. 122 (arguing that the Panel did not address evidence that "dolphins are maimed

Mexico asserts that the Panel "claimed that all of the effects on dolphins of other fishing methods would be 'observable' if a trained person were watching for them"[186] and that this finding "is a factual error" because the evidence Mexico presented "clearly demonstrates that other fishing methods have unobserved adverse effects on dolphins."[187]

115. Both of Mexico's arguments are in error and should be rejected. First, the Panel, in fact, undertook an in-depth examination of the evidence on this point that more than satisfies a panel's obligations under Article 11. Second, Mexico's mischaracterizes the Panel's finding concerning this issue and fails to confront the evidence on the record on which that finding was based. In fact, the Panel's findings are amply supported by evidence on the record and the Panel's weighing of that evidence was within its discretion.

i. The Panel Fulfilled Its Obligation to Consider the Evidence Presented to It

116. Contrary to Mexico's argument that the Panel "did not even mention" certain evidence Mexico presented,[188] the Panel conducted a detailed analysis of whether the evidence on the record showed that other fishing methods produced effects "as consistently harmful as those caused by setting on dolphins."[189] In this analysis, the Panel devoted six paragraphs to discussing evidence that Mexico asserted demonstrated that other fishing methods had "the same kind of unobservable effects as setting on dolphins."[190] In these paragraphs, the Panel cited to and discussed numerous paragraphs of Mexico's first and second written submissions, Mexico's response to a relevant Panel question, and individual pages of at least ten of Mexico's exhibits.[191]

117. Indeed, the Panel cited the precise paragraphs of Mexico's submission that Mexico now asserts the Panel ignored. In paragraph 7.130, the Panel cited and discussed paragraph 131 of Mexico's first written submission and exhibit MEX-52.[192] In the next paragraph, 7.131, the Panel cited paragraph 149 of Mexico's first written submission and referred to Mexico's assertions regarding unobserved harms from longline fishing.[193]

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by longlines and still swim away, and that longlines can extend for over 90 miles, so that an observer could not see interactions between the hooks and dolphins.").

[186] *See* Mexico's Other Appeal Submission, para. 121.

[187] *See* Mexico's Other Appeal Submission, paras. 121, 124.

[188] *See* Mexico's Other Appeal Submission, para. 122 (referring, in particular, to paragraphs 131 and 132-151 of its first written submission and to exhibit MEX-52).

[189] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.130.

[190] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 130; *see id.* paras. 7.130-135.

[191] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-135 (citing, *inter alia*, Mexico's First Written 21.5 Submission, paras. 131, 138, and 149, Mexico's Second Written 21.5 Submission, para. 319, Mexico's Response to Panel Question 15, paras. 85-92, and individual pages of ten of Mexico's exhibits).

[192] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.130.

[193] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.131.

118. Thus the Panel directly addressed the evidence that Mexico asserted it improperly overlooked. While Article 11 does not require a Panel to address all the pieces of evidence submitted by the parties,[194] certainly the fact that the Panel did so in this instance demonstrates that it fulfilled its obligations 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 the evidence."[195] The fact that the Panel did not *agree* with Mexico about what Mexico's evidence showed does not render the Panel's analysis inconsistent with Article 11.[196]

ii. The Panel's Weighing of the Evidence on the Record Was Not Inconsistent with Article 11

119. Despite Mexico's assertions to the contrary, the Panel's finding that fishing methods other than setting on dolphins do not cause "the kinds of unobservable harms that are caused by setting on dolphins" was amply supported by evidence on the record and reflects a weighing and balancing of that evidence of the sort that is committed to a panel's discretion.[197]

120. First, Mexico's description of the Panel's finding is incorrect. The Panel did not "claim," as Mexico asserts, that "all of the effects on dolphins of other fishing methods would be 'observable' if a trained person were watching for them."[198] The Panel actually found that Mexico's evidence did not show that fishing methods other than setting on dolphins have "the same kind of unobservable effects as setting on dolphins,"[199] namely harms that occur independently from a direct, observable dolphin mortality and whose existence "cannot be certified because it leaves no observable evidence."[200]

121. Second, Mexico fails to confront the fact that the Panel was correct that Mexico produced no evidence that fishing methods other than setting on dolphins produce this kind of harm. Mexico's evidence, including the evidence summarized in its Other Appeal Submission, concerned direct, observable harms that Mexico argued (but did not prove) may not have been

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[194] *See Brazil – Retreaded Tyres (AB)*, para. 202.

[195] *Brazil – Retreaded Tyres (AB)*, para. 185 (citing *EC – Hormones (AB)*, paras. 132 and 133). *See also, e.g., EC – Seal Products (AB)*, para. 5.150; *Korea – Alcoholic Beverages (AB)*, paras. 161- 162; *Korea – Dairy (AB)*, para. 138.

[196] *See US – Tuna II (Mexico) (AB)*, para. 272.

[197] *See Korea – Dairy (AB)*, para. 137 ("The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.").

[198] *See* Mexico's Other Appeal Submission, para. 121 (emphasis in original). Indeed, Mexico provides no paragraph citation for this supposed finding.

[199] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.130; *see also id.* para. 7.131 (finding that "none of Mexico's evidence suggests that longline fishing has unobservable effects *similar to those caused by setting in dolphins*") (emphasis added); *see id.* para. 7.132 (referring to "the same kinds of unobservable harms that are caused by net sets").

[200] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.132, 7.134.

observed at the time of the set.[201] At most, therefore, Mexico's evidence relates to a different kind of harm, namely an observable harm that, due to oversight or a gear malfunction possibly was not observed.

122. Even if this different kind of "unobserved" harm (*i.e.*, incomplete reporting of an observable harm) may occur (and Mexico has provided no evidence that it has occurred), the evidence on the record concerning the scale and intensity of the dolphin interactions that occur in every ETP dolphin set, compared with the infrequency of any dolphin interaction in other fisheries, suggests that this type of mistake is *more likely* to occur in the ETP large purse seine fishery than outside it. The United States has presented evidence showing that each dolphin set involves intense (*i.e.*, involving multiple vessels and direct contact with fishing gear), prolonged (up to several hours) interactions with hundreds of dolphins.[202] Outside the ETP purse seine fishery, by contrast, an interaction with even one dolphin occurs in a tiny fraction of sets.[203] Thus, it seems that a direct, observable dolphin mortality is much more likely to be missed in the ETP large purse seine fishery than outside it.

123. Moreover, as the Panel correctly found, these types of direct, observable harms are completely different from the types of unobservable harms that can occur in every dolphin set as a result of the chase itself and even if no dolphin was directly killed or seriously injured.[204] The United States presented evidence showing, as the Panel found, that unobservable effects, such as

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[201] *See* Mexico's Other Appeal Submission, paras. 121-122. One proof of this, of course, is that the harm was, ultimately, *observed* and recorded in the exhibits Mexico presented. *See, e.g.*, M. Gomercic et al. "Bottlenose Dolphins (Tursiops Truncatus) Depredation Resulting in Larynx Strangulation with Gill-Net Parts," 25 *Marine Mammal Science* 392, at 396 (2009) (Exh. MEX-52); Mexico's First Written 21.5 Submission, paras. 140, 148 (showing pictures of dolphins entangled with longlines, although the context is not explained and the injury may have been detected during the set in question).

[202] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, tables 1-2 (Exh. US.-127) (showing that, on average, ETP large purse seine vessels chase herds of approximately 600 dolphins in a single dolphin set and capture approximately 300-400 dolphins in a purse seine net); Barbara E. Curry, *Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean*, at 5-6 (1999) (Exh. US-36) (showing: 1) that the chase and encirclement process involves helicopters, 4-6 speedboats, and a large purse seiner; 2) that the chase can last for hours; 3) that the dolphins are ultimately encircled in a net approximately 1.6 kilometers long by 200 meters deep; and 4) that encirclement takes approximately 40 minutes, and dolphins may be confined for an additional hour after encirclement is completed).

[203] *See, e.g.*, U.S. Response to Panel Question 21, para. 138 (showing that in the WCPFC purse seine fishery, the most recent data shows that any cetacean interaction at all occurs in less than 1 percent of observed purse seine sets (0.70% for 2007-2009 and 0.18% for 2010); U.S. Response to Panel Question 7, para. 55 (showing that data from other purse seine fisheries is similar); U.S. Response to Panel Question 21, para. 138 (showing that in the U.S. Pacific longline fisheries over the past decade, a cetacean interaction occurred in less than 1% of observed sets); U.S. Response to Panel Question 21, paras. 140-142 (showing that data from other longline fisheries is similar).

[204] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.134; *see also* Tim Gerrodette, "The Tuna-Dolphin Issue," *in* Perrin, Wursig & Thewissen (eds.), *Encyclopedia of Marine Mammals*, at 1194 (2d. ed. 2009) (Exh. US-29) (distinguishing "underreporting of kill by observers" from "cryptic effects of the fishery not detectable by observers, such as stress, induced abortion, or separation of mothers and calves"); Noren et al. 2006, at 2 (Exh. US-45) (distinguishing between "under reporting of direct fishery-related mortality" and "fishery-related unobserved mortality or suppression of reproduction").

calf-cow separation, muscular damage, and immune and reproductive system failures may result from dolphin sets, even sets without any direct dolphin mortality.[205] This evidence included studies on calf-cow separation,[206] a study on diminished reproduction,[207] a study on continuous acute stress,[208] and studies on diminished ETP dolphin populations concluding that the recovery rates indicate the existence of adverse effects on depleted dolphin populations beyond observed mortalities.[209]

124. Thus the evidence on the record amply supports the Panel's conclusion that other fishing methods are not causing the same kind of unobservable harms as setting on dolphins even if tuna fisheries using techniques other than setting on dolphins produced "the same number of dolphin mortalities and serious injuries allowed or caused in the ETP."[210] The Panel's finding was,

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[205] *See* U.S. First Written 21.5 Submission, paras. 94-95; U.S. Response to Panel Question 15, para. 82.

[206] *See* Shawn R. Noren & Elizabeth F. Edwards, "Physiological and Behavioral Development in Delphinid Calves: Implications for Calf Separation and Mortality Due to Tuna Purse-Seine Sets," 23 *Marine Mammal Science* 15, 16, 21 (20070 (Exh. US-45) (summarizing several studies showing that "examination of the age composition of dolphins killed in the purse seine nets demonstrated that fewer 0-1-yr-old eastern spinner and 0-3-yr-old northeast offshore spotted dolphins were present than expected, as calves did not accompany 75%-95% of the killed lactating females," suggesting mother-calf separation, which was also evidenced in "a series of photographs depicting an ETP dolphin calf falling behind its mother during the chase, and noting that "without their mothers, calves have an increased risk of mortality due to starvation and predation."); Frederick Archer et al., "Annual Estimates of Unobserved Incidental Kill of Pantropical Spotted Dolphin (Stenella Attenuata Attenuata) Calves in the Tuna Purse-Seine Fishery of the Eastern Tropical Pacific," 102 *Fishery Bulletin* 233, 237 (2004) (Exh. US-46).

[207] *See* Katie L. Cramer, Wayne L. Perryman & Tim Gerrodette, "Declines in Reproductive Output in Two Dolphin Populations Depleted by the Yellowfin Tuna Purse Seine Fishery, 369 *Marine Ecology Progress Series* 273, 282 (2008) (Exh. US-47) (concluding that the effect of dolphin sets on two measures of reproduction for Northeastern Spotted Dolphins (the proportion of adults observed with calves and calf length at dissociation from its mother) "demonstrates that the practice of setting on dolphins has population-level effects beyond the direct kill recorded by observers on fishing vessels," which could be caused by "stress, . . . increased predation, . . . separation of mothers and calves, . . . or induced abortion resulting from the chase and encirclement procedure" and concluding, overall, that its results "are consistent with the hypothesis that the tuna purse-seine fishery has a negative effect on dolphin reproduction.").

[208] *See* Albert C. Myrick & Peter C. Perkins, "Adrenocortical Color Darkness and Correlates as Indicators of Continuous Acute Premortem Stress in Chase and Purse-Siene Captured Male Dolphins," 2 *Pathophysiology* 191, at 201-202 (1995) (Exh. US-48) (studying non-entanglement mortalities in the ETP purse seine fishery and finding that virtually all the dead dolphins had been in a state of continuous acute stress (CAS) for an hour or more prior to their time of death, which could have caused or contributed to these mortalities).

[209] *See* Reiley et al. 2005 (Exh. US-28) (concluding, *inter alia*, that neither of the two depleted dolphin stocks, the northeastern offshore spotted dolphin or the eastern spinner dolphin, "is recovering at a rate consistent with [the reported] levels of depletion and the reported kills"); Paul R. Wade et al., "Depletion of Spotted and Spinner Dolphins in the Eastern Tropical Pacific: Modeling Hypothesis for Their Lack of Recovery," 343 *Marine Ecology Progress Series* 1, at 11 (2007) (internal citations omitted) (Exh. US-52) (finding that recent research "clearly illustrates that the purse-seine fishery has the capacity to affect dolphins beyond the direct mortality observed as bycatches" and, specifically, that chase and encirclement by purse-seine vessels may: 1) cause changes in tissue chemistry associated with stress, 2) elevate body temperatures and physically damage organ systems, 3) increase bioenergetics demands, and 4) influence swimming and schooling dynamics and behavior" in dolphins).

[210] The United States notes, however, that the evidence on the record contradicts this hypothetical. *See, e.g.*, U.S. Response to Panel Question 19, paras. 111-119; *see also* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127) (showing that, in the years 2009-2013, dolphin mortality per 1,000

therefore, based on precisely the sort of weighing of the evidence before it that is committed to a panel's discretion.[211] The fact that the Panel did not agree with Mexico's own assessment of the evidence does not result in any inconsistency with Article 11.[212]

c. The Panel Did Not Err in Its Characterization of the Appellate Body's Finding Concerning Setting on Dolphins

125. Mexico asserts that the Panel erred in finding that the Appellate Body found that setting on dolphins is "particularly harmful" to dolphins, compared to other fishing methods.[213] First, Mexico suggests that the Appellate Body did not find that setting on dolphins is "particularly harmful" to dolphins due to "various adverse impacts [that] can arise from setting on dolphins[] beyond observed mortalities."[214] Second (and relatedly), Mexico argues that the Appellate Body's finding that setting on dolphins is "particularly harmful to dolphins" referred only to setting on dolphins not under the AIDCP regime.[215] Mexico's appeal is, again, without merit and should be rejected.

126. First, as discussed above, the original proceeding clearly resolved that setting on dolphins, including under the AIDCP regime, causes "various adverse impacts . . . beyond observed mortalities."[216] Mexico is correct that this finding, as quoted by the Panel at paragraph 7.120, comes from paragraphs 7.499 of the original panel report and is not directly quoted in the Appellate Body report. Mexico does not confront, however, that the Appellate Body report incorporated this finding.

127. The Appellate Body found that the original panel's finding that "setting on dolphins within the ETP . . . has the capacity of resulting in observed and unobserved effects on dolphins"

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dolphin sets ranged from 74.5 to 113.4 dolphins, whereas, 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 id.* Table 2 (showing that, for 2009-2013, dolphin mortality per 1,000 sets in the Hawaii Deep-Set Longline Fishery was 0.33 and in the American Samoa Longline Fishery was 0.55, while 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). Thus the fishery-by-fishery evidence on the record refutes the idea that any fishery other than the ETP large purse seine fishery actually is causing anywhere close to the same rate of dolphin mortalities as occur due to dolphin sets in the ETP.

[211] *See Korea – Dairy (AB)*, para. 137.

[212] *See US – Tuna II (Mexico) (AB)*, para. 272 ("A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.").

[213] *See* Mexico's Other Appeal Submission, para. 129.

[214] *See* Mexico's Other Appeal Submission, para. 125 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120).

[215] *See* Mexico's Other Appeal Submission, para. 129.

[216] *See supra* sec. IV.A.3.a.

was uncontested on appeal.[217] The Appellate Body noted that, as was found by the original panel, the unobserved adverse effects associated with setting on dolphins included "cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress."[218] The Appellate Body also noted the Panel's uncontested finding that dolphins suffer these effects "even under the restrictions contained in the AIDCP rules."[219] Thus the Appellate Body report clearly incorporated the original panel's finding that setting on dolphins, including under the AIDCP regime, has the capacity of resulting in various unobservable adverse effects on dolphins.

128. Second, it is clear from the Appellate Body report that the finding that setting on dolphins is "particularly harmful to dolphins" was not limited to setting on dolphins other than under the AIDCP regime. In paragraph 289 of its report, the Appellate Body found that "the Panel accepted the United States' argument that the fishing technique of setting on dolphins is particularly harmful to dolphins" without any qualification regarding the AIDCP.[220] As discussed above, it was *uncontested* before the Appellate Body that the "unobserved adverse effects" of setting on dolphins occur "under the restrictions contained in the AIDCP rules."[221] With respect to observed harms, the panel report paragraph cited by the Appellate Body stated:

> [C]ertain fishing techniques seem to pose greater risks to dolphins than others. It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries,

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[217] *See US – Tuna II (Mexico) (AB)*, para. 251; *see also id.* para. 287 ("The United States has presented extensive evidence and arguments, and the Panel has made uncontested findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins.").

[218] *See US – Tuna II (Mexico) (AB)*, para. 330 (citing *US – Tuna II (Mexico) (Panel)*, para. 330 and n.663).

[219] *See US – Tuna II (Mexico) (AB)*, para. 330 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.504); *see also id.* para. 246 ("The Panel also found that the United States had put forward sufficient evidence to raise a presumption 'that the method of setting on dolphins has the capacity of resulting in observed and unobserved adverse effects on dolphins.'"); *id.* para. 251 (referring to the "finding[] by the Panel" that "setting on dolphins in the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed *and unobserved* effects on dolphins.") (emphasis added); *id.* para. 287 ("The United States has presented extensive evidence and arguments, and the Panel has made uncontested findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins").

[220] *See US – Tuna II (Mexico) (AB)*, para. 289.

[221] *See US – Tuna II (Mexico) (AB)*, para. 330 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.504); *see also id.* para. 246 ("The Panel also found that the United States had put forward sufficient evidence to raise a presumption 'that the method of setting on dolphins has the capacity of resulting in observed and unobserved adverse effects on dolphins.'"); *US – Tuna II (Mexico) (AB)*, para. 287 ("The United States has presented extensive evidence and arguments, and the Panel has made *uncontested* findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins") (emphasis added); *see also id.* para. 251 (referring to the "finding[] by the Panel" that "setting on dolphins in the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed *and unobserved* effects on dolphins.") (emphasis added).

> *especially* when used without applying certain fishing gear and procedures designed to reduce bycatch.[222]

129. Thus the original panel's finding was that setting on dolphins posed "greater risks" of direct dolphin mortalities, and *especially* when conducted without precautions. It is undisputed that setting on dolphins is more dangerous *without* the AIDCP protections than with them, but it is not accurate that the panel found that *other methods* pose equivalent risks to dolphins. Indeed, the Appellate Body explicitly found that the original panel did *not* make this finding.[223] Thus the Appellate Body's finding that setting on dolphins was "particularly harmful" was based on unobserved effects that occur regardless of the AIDCP regime and on direct mortalities that occur under the AIDCP regime.[224]

130. Indeed, far from attributing to the Appellate Body too broad a finding concerning the harms of setting on dolphins, the Panel actually read the finding *too narrowly* – wrongly interpreting the finding that setting on dolphins is "particularly harmful" as concerning *only* those unobservable harms that result from the "chase itself."[225] In fact, the Appellate Body's statement directly followed its observation that "the United States has presented extensive evidence and arguments, and the Panel has made uncontested findings, to the effect that the fishing method of setting on dolphins causes *observed and unobserved* adverse effects on dolphins."[226] And the Appellate Body's citation, in footnote 593, to paragraph 7.505 of the original panel report further emphasizes that it was discussing observed and unobserved harms, as that paragraph concludes a section that *covers both types of harms*.[227] And, of course, the

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[222] *See US – Tuna II (Mexico) (Panel)*, para. 7.438 (cited by *US – Tuna II (Mexico) (AB)*, para. 288) (emphasis added).

[223] *See US – Tuna II (Mexico) (AB)*, para. 262 ("*[W]e do not see that the Panel found that harm to dolphins resulting from setting on them is equivalent to harm resulting from other fishing methods*. Instead, as noted above, the Panel stated that it was not 'persuaded' that the risks arising from fishing methods other than setting on dolphins to catch tuna outside the ETP are demonstrated to be lower than the *similar* threats faced by dolphins in the ETP,' which *we understood as referring to threats from fishing methods other than setting on dolphins in the ETP*.") (emphasis added).

[224] Further, in paragraph 297, the Appellate Body again referred to setting on dolphins as being "particularly harmful to dolphins" without qualifying this statement by any reference to the AIDCP regime. In this paragraph and the preceding paragraphs on which this finding was based, the Appellate Body distinguished between the "adverse effects on dolphins resulting from setting on dolphins in the ETP," which the Appellate Body affirmed included impacts "beyond observed mortalit[ies]," *see US – Tuna II (Mexico) (AB)*, paras. 246, 297, and the "observed mortality and any resulting adverse effects on dolphin populations" arising from other fishing methods, which could be monitored by a requirement that no dolphin was killed or seriously injured in the sets in which tuna were caught. *See US – Tuna II (Mexico) (AB)*, paras. 291-292.

[225] *See 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 *unobserved* harm to dolphins, and that the United States is therefore entitled, in pursuit of its desired level of protection, to disqualify tuna caught by that method from ever being labelled as dolphin safe.") (emphasis added).

[226] *See US – Tuna II (Mexico) (AB)*, para. 287 (emphasis added).

[227] *See US – Tuna II (Mexico) (Panel)*, para. 7.493 (discussing observed mortalities); paras. 7.494-7.504 (discussing unobserved harms).

evidence on the record concerning the observed rate of dolphin mortalities due to setting on dolphins compared to the observed rate of dolphin mortalities from other fishing methods proves that setting on dolphins is, in fact, a "particularly harmful" fishing method for dolphins.[228]

131. Accordingly, it is clear that the Appellate Body *did* find that setting on dolphins is "particularly harmful to dolphins," including when conducted in accordance with the AIDCP requirements. What makes setting on dolphins "particularly harmful" includes the "various unobserved effects" that occur as a result of the chase itself and thus are not addressed by the AIDCP requirements, as well as the "substantial amount of dolphin mortalities and injuries" that continue to occur under the AIDCP regime. Consequently, the United States respectfully requests the Appellate Body to reject Mexico's appeal in this regard.

B. Mexico's Appeals Regarding the Certification Requirements Should Be Rejected

132. Mexico makes two appeals regarding the Panel's findings with respect to the certification requirements of the amended measure. Mexico claims that: 1) the Panel erred in rejecting Mexico's argument that captain certifications are inherently unreliable due to captains' "economic self-interest"; and 2) the Panel erred in finding that the ETP is unique in terms of the practice of setting on dolphins.[229] For the reasons discussed below, both of Mexico's appeals are without merit and should be rejected.

1. Mexico's Appeal of the Panel's Findings Regarding the Reliability of Captains' Statements Should Fail

a. The Panel's Analysis

133. The Panel began by recalling that Mexico had argued that it is "appropriate and necessary to have an independent observer requirement for tuna fishing *outside* the ETP" and that, without such a universal requirement, the amended tuna measure "cannot be even-handed."[230] In this regard, Mexico had alleged that "captains' statements are unreliable because captains have a financial incentive to certify that tuna is dolphin-safe even when it is not."[231]

134. The Panel rejected Mexico's argument. The Panel explained that it accepted "the evidence submitted by the United States that many regional and international organizations and arrangements rely on captains' certifications and logbooks both to monitor compliance with regulatory requirements and as a means of data collection" as establishing a "strong presumption that, from a systemic perspective, such certifications are reliable."[232] The Panel found that, while

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[228] *See, e.g.*, U.S. Response to Panel Question 19, paras. 111-119; *see also* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127).

[229] *See* Mexico's Other Appeal Submission, sec. VI.

[230] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.197 (emphasis added).

[231] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.199.

[232] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.208.

certain documents submitted by Mexico "suggest that there have been instances in which captains' certifications have been unreliable," the fact that "domestic, regional, and international regimes have continued to rely on captains' certifications and logbooks" showed 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."[233]

135. Further, the Panel was "not convinced" by Mexico's arguments concerning captains' financial incentives.[234] The Panel explained that Mexico "provided no evidence" to support its assertion that even if (as the evidence on the record suggests) captains' remuneration is not tied to the value of the fish caught, captains would be "unlikely to accurately report dolphin mortality and serious injury" because doing so might jeopardize their employment.[235] The Panel also found that the United States' "alternative understanding of the economic incentives facing captains" – namely that they "have economic incentives *not* to lie on their dolphin-safe declarations" because lying could jeopardize their business relationship with canneries and subject them to civil and criminal penalties[236] – "seems just as plausible."[237]

136. Thus, the Panel found that Mexico had not met its burden of making a *prima facie* case that captains' certifications "are unreliable because captains have a financial incentive not to [certify] accurately."[238] Consequently, relying on captain certifications outside the ETP large purse seine fishery did not render the amended measure not even-handed.

b. Mexico's Appeal

137. Mexico argues that the Panel erred in disagreeing with Mexico's arguments concerning the reliability of captains' certifications. First, Mexico contends that the Panel "avoided addressing" Mexico's "specific concerns" regarding the financial incentives of captains in the context of dolphin safe certifications,[239] and that, in "conflat[ing] captains' reliability in general with the reliability, specifically, of captains' self-certifications with respect to the 'dolphin-safe' [label]," the Panel "did not make an objective assessment of the specific matter before it."[240] Further, Mexico asserts that, if there are "gaps" in the accuracy of dolphin safe certifications, they would be "inconsistent with the objectives" of the amended measure, and the Panel erred by "declin[ing] to draw the inevitable conclusion" from its finding that evidence suggested that

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[233] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.209.

[234] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.210.

[235] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.210.

[236] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.202 (citing U.S. Response to Panel Question 36, para. 190; U.S. Response to Panel Question 36, para. 193).

[237] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.210.

[238] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.211.

[239] *See* Mexico's Other Appeal Submission, paras. 139, 140, 142.

[240] *See* Mexico's Other Appeal Submission, para. 142.

"there have been instances in which captains' certifications have been unreliable."[241] Mexico also refers to the Appellate Body report in *EC – Seal Products* which, Mexico asserts, found that "the mere potential that seal products derived from 'commercial hunts' could inaccurately enter the market" was sufficient to establish inconsistency with the chapeau of Article XX of the GATT 1994."[242]

c. Mexico's Appeal Is in Error

138. The Appellate Body has established that "[a]llegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU," whereas "the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision" is a legal question.[243] In this regard, Mexico's explanation of this appeal is unreasonably vague in that Mexico does not specify whether it is making a legal or an Article 11 appeal. However, the United States notes that the title of the appeal refers to the rejection of Mexico's *evidence,* and that Mexico concludes, in paragraph 142, that "the Panel did not make *an objective assessment* of the specific matter before it."[244] Further, the finding that Mexico requests the Appellate Body to reverse is *a factual finding*.[245] As such, the United States understands Mexico to be making an appeal under Article 11. That said, the United States notes that parties must "distinguish[] a claim that the panel erred in applying a legal provision to the facts of the case from a claim that a panel failed to make an objective assessment of the matter as required by Article 11," even if doing so may be difficult.[246] Mexico erred in declining to do so here.

139. In any event, the Panel's analysis and findings on this issue were not in error, regardless of how one interprets Mexico's argument. In section IV.A.1.c.i, the United States explains that the Panel's findings regarding the reliability of captains' certifications were made consistently with Article 11. In section IV.A.1.c.ii, the United States explains that Mexico's appeal would also fail if it is considered to be a legal appeal.

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[241] *See* Mexico's Other Appeal Submission, para. 139.

[242] *See* Mexico's Other Appeal Submission, para. 142.

[243] *See China – Rare Earths (AB)*, para. 7.173; *see also EC – Seal Products (AB)*, para. 5.243 (finding that claims that "relate[] to the Panel's weighing and appreciation of the evidence . . . are more properly addressed under Article 11 of the DSU as challenges to the Panel's objective assessment of the facts").

[244] *See* Mexico's Other Appeal Submission, title for sec. IV.A ("The Panel Erred in Rejecting Mexico's Evidence of Captains' Economic Self-Interest"); *id.* para. 142 ("In Mexico's view, the Panel did not make *an objective assessment* of the specific matter before it because it conflated captains' reliability in general with the reliability, specifically, of captains' self-certifications with respect to the 'dolphin-safe' status of tuna for the purposes of accessing the market advantage of the U.S. label.") (emphasis added).

[245] *See* Mexico's Other Appeal Submission, para. 142 ("Mexico requests that the Appellate Body reverse the Panel's finding that captains' dolphin-safe certifications are always reliable.").

[246] *See China – Rare Earths (AB)*, para. 5.173.

i. The Panel's Findings Regarding the Reliability of Captains' Certifications Were Not Inconsistent with Article 11

140. As described above, the standard is high for a complainant to establish that a panel has acted inconsistently with Article 11 by not making "objective assessment of the matter before it,"[247] and the Appellate Body has stated that it will not "interfere lightly" with a panel's fact-finding authority.[248] In particular, the Appellate Body will not reverse a panel's factual finding "simply because it decline[d] to accord to the evidence the weight that one of the parties believes should be accorded to it."[249]

141. As explained below, Mexico's appeal fails, as it does not meet this high standard.

142. First, Mexico is wrong to argue that the Panel failed to address its argument that the "specific circumstances" associated with dolphin safe certifications render captains' certifications inherently unreliable or any evidence related to that argument.[250] To the contrary, the Panel described Mexico's argument as relating to vessel captains' "financial incentive to certify that their catch is dolphin-safe even when it is not," and responded to it as such.[251]

143. The Panel described Mexico's argument as being that there is "an extremely strong disincentive for a captain to self-report a dolphin-set" because "canneries will not buy" non-dolphin safe tuna, and that this incentive operates even if captains' pay is not based on the value of the tuna caught because their employment would be jeopardized by catching non-dolphin safe tuna.[252] The Panel also recalled that Mexico "acknowledge[d] that 'captain's self-certification might be reliable for certain purposes,'" but denied that they were "reliable for the purpose of certifying the dolphin-safe status of the tuna."[253] Thus the Panel clearly understood Mexico's argument as concerning the specific situation of captains making dolphin safe certifications.

144. The Panel analyzed Mexico's argument in light of this understanding, but, based on this analysis, disagreed that Mexico had proven its case. The Panel found that Mexico "provided no evidence" that financial incentives would affect the accuracy of captains' dolphin safe certifications where the captain's remuneration was not tied to the value of the fish caught.[254]

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[247] *See EC – Poultry (AB)*, para. 133.

[248] *See EC – Sardines (AB)*, para. 299; *US – Carbon Steel (AB)*, para. 142.

[249] *See US – Tuna II (Mexico) (AB)*, para. 272.

[250] *See* Mexico's Other Appeal Submission, paras. 139, 140.

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

[252] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.200 (citing Mexico's Response to Panel Question 36, paras. 107, 110).

[253] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.204.

[254] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.210.

(And no evidence established that captains' pay *was* tied to the value of fish caught.[255]) Moreover, the Panel found that the U.S. understanding of the economic incentives facing captains – that they would be most interested in preserving their credibility with canneries and in avoiding criminal and civil penalties – was "just as plausible" as Mexico's understanding.[256] Additionally, the Panel found that the United States had presented extensive evidence demonstrating that captains' certifications are routinely relied on for a variety of purposes (including monitoring compliance with regulatory requirements) by "RFMOs and other fisheries and environmental organizations [that] are experts in their respective fields," strongly suggesting the reliability of such certifications.[257]

145. Second, Mexico is wrong to argue that the Panel erred by finding that Mexico had not established that captains' statements were unreliable.[258] Rather, the Panel's finding was supported by a significant amount of evidence on the record, which Mexico fails to confront in making this appeal. This evidence includes the following: numerous exhibits submitted by the United States showing that "[c]aptain statements and logbooks are an integral part of [RFMO] regimes and other international regimes and agreements";[259] evidence that domestic regimes rely on captains' self-certifications;[260] and evidence that various international treaties rely for their implementation on captains' self-certifications and logbooks.[261] Also on the record was the U.S. explanation of the economic incentives facing captains, namely that they would be most interested in preserving their credibility with canneries and in avoiding numerous possible criminal and civil penalties, as evinced by U.S. exhibits.[262]

146. Nor do the statements from the Appellate Body report in *EC – Seal Products* provide any basis for finding that the Panel acted inconsistently with Article 11.[263] First, the quoted paragraphs concerned the chapeau of Article XX of the GATT 1994, which, despite Mexico's

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[255] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.202 (citing U.S. Response to Panel Question 36, para. 190).

[256] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.210; *see also id.* para. 7.202.

[257] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.208.

[258] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.211.

[259] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.206 (citing U.S. Response to Panel Question 39, para. 205).

[260] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.207 (citing U.S. Comments on Mexico's Response to Panel Question 39, para. 93).

[261] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.206 (citing U.S. Response to Panel Question 39, para. 214 and giving the example of the Convention for the Conservation of the Antarctic Marine Living Resources, which is dedicated to the protection of Antarctic marine animals, *inter alia*).

[262] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.202 (citing U.S. Response to Panel Question 36, para. 193); *see also* U.S. Response to Panel Question 18, paras. 92-100.

[263] *See* Mexico's Other Appeal Submission, para. 141.

assertion to the contrary,[264] entails a different legal analysis from Article 2.1.[265] Moreover, the quoted paragraphs represent a specific conclusion – based on an in-depth analysis of the particular facts of that dispute – that is not applicable to the very different facts of *this* dispute.[266]

147. Thus Mexico does not articulate any basis for finding that the Panel exceeded its discretion as the trier of fact,[267] or that the Panel's finding was not based on a weighing of the evidence before it.[268] Mexico does not even allege that the Panel's treatment of the evidence undermined its objectivity, as is required to meet the standard for a successful Article 11 claim.[269] Ultimately, Mexico's argument is that the Panel's finding should be reversed because the Panel declined to accord to the evidence the weight that Mexico believed should be accorded to it. As such, Mexico's argument should be rejected.[270]

ii. The Panel Did Not Err as a Matter of Law in Its Findings Regarding the Reliability of Captains' Certifications

148. The Appellate Body has established that "[a]llegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU," whereas "the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision" is a

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[264] *See* Mexico's Other Appeal Submission, para. 141.

[265] *See EC – Seal Products (AB)*, para. 5.311 (emphasis in original).

[266] *See US – Tuna II (Mexico) (AB)*, para. 225 (finding that, in conducting an even-handedness analysis, panels must "carefully scrutinize the particular circumstances of the case," including "the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether the technical regulation is even-handed"). Indeed, the relevant facts concerning the design and application of the measures are very different between *EC – Seal Products* and this dispute. For example, the measure in *EC – Seal Products* consisted of a ban and three exceptions. The paragraphs quoted by Mexico come from the Appellate Body's analysis of whether the application of the one exception resulted in "arbitrary and unjustifiable" discrimination, in which the Appellate Body concluded that, due to ambiguities in the scope of the exception, it could be applied in a manner that treated "countries where the same conditions prevail" differently. *See EC – Seal Products (AB)*, para. 5.328. In this dispute, by contrast, the cause of the discrimination was the different certification requirements for tuna caught inside and outside the ETP large purse seine fishery. *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.170. Thus the Panel's analysis properly focused on whether this difference in the requirements discriminated in a manner that was not explained by a legitimate regulatory distinction. *See id.* paras. 7.195, 7.198. Based on the facts on the record, the Panel found that financial incentives of captains did *not* cause this to be the case, and, therefore, did not cause reliance on captain certifications to render the measure not even-handed. *See id.* para. 7.211. Thus the Appellate Body's analysis in *EC – Seal Products* occurred in a relevantly different factual context and, accordingly, cannot be transposed to apply the measure at issue here.

[267] *See US – Wheat Gluten (AB)*, para. 151.

[268] *See Korea – Dairy (AB)*, para. 137.

[269] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

[270] *See US – Tuna II (Mexico) (AB)*, para. 272.

legal question.[271] In this regard, Mexico has not identified a legal finding that it seeks reversal of, nor has it identified a legal error that the Panel has allegedly committed.[272]

149. However, to the extent that Mexico is alleging that the Panel committed a legal error, Mexico's appeal surely fails. In particular, and as discussed above, any legal finding that Mexico would appeal is amply supported by the evidence on the record, and it cannot be said that the Panel's finding has *no* basis in the record. Mexico's complaint is, rather, that the Panel failed to accord to the evidence the weight that Mexico preferred and to make the factual and legal findings that Mexico sought. However, this does not constitute grounds for a legal appeal any more than it does for an Article 11 appeal.

2. Mexico's Appeal of the Panel's Findings Concerning the Geographic Distribution of Dolphin Sets Should Be Rejected

150. Mexico's assertion that the Panel acted inconsistently with Article 11 in failing to address Mexico's evidence concerning tuna-dolphin associations outside the ETP does not even approach the standard required for a successful Article 11 claim and, as the United States shows in this section, should be rejected.

a. The Panel's Findings

151. In analyzing where setting on dolphins occurs in the world's fisheries, the Panel noted that Mexico disagreed with the assessment that the ETP is "unique or different in any way that would justify" different treatment of the ETP large purse seine fishery.[273] In particular, the Panel noted Mexico's argument that "tuna dolphin associations have been sighted and deliberately set on" outside the ETP.[274] Based on the evidence on the record, however, the Panel disagreed with Mexico's argument in this regard.

152. Specifically, the Panel noted that Mexico's own evidence suggested that "dolphins in the Atlantic, Indian, and western Pacific Oceans [do not associate with tuna] as systematically as they do in the Eastern Tropical Pacific."[275] Another of Mexico's exhibits confirmed that, even according to conservation-minded estimates, "in the WCPFC, only '3.2 per cent of all purse

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[271] *See China – Rare Earths (AB)*, para. 7.173; *see also EC – Seal Products (AB)*, para. 5.243 (finding that claims that "relate[] to the Panel's weighing and appreciation of the evidence . . . are more properly addressed under Article 11 of the DSU as challenges to the Panel's objective assessment of the facts").

[272] *See* Mexico's Other Appeal Submission, paras. 139-142.

[273] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.).

[274] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) (citing Mexico's First Written 21.5 Submission, para. 113).

[275] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) (citing NMFS, *An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of the Eastern Tropical Pacific Oceans*, at 2 (1996) (Exh. MEX-40)).

seine nets are deliberately set on cetaceans.'"[276] Another Mexican exhibit described a study in which only 27 of 494 purse seine sets over a seven year period in the late 1980s were sets on "whale sharks and cetaceans."[277] Juxtaposed against U.S. evidence showing that 9,220 dolphin sets occurred in the ETP large purse seine fishery in 2012, amounting to 40 percent of all sets in that fishery, the Panel found that the evidence on the record confirmed 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.'"[278]

b. Mexico's Appeal

153. Mexico argues that the Panel acted inconsistently with Article 11 of the DSU by failing "to even mention, let alone address" Mexico's evidence that "dolphins associate with tuna and are intentionally set upon in the Indian Ocean."[279] The only exhibit Mexico mentions in this regard was Exhibit MEX-161.[280]

c. Mexico's Appeal Fails

154. Pursuant to Article 11 of the DSU, a panel has an obligation to "consider the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[281] Within these parameters, however, it is "within the discretion of the Panel to decide which evidence it chooses to utilize in making findings"[282] and the "mere fact that a panel did not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11."[283] Further, the Appellate Body will not "interfere lightly" with a panel's fact-finding authority, but must be satisfied that "the panel has exceeded the bounds of its discretion, as the trier of facts," for an Article 11 claim to succeed.[284]

155. Mexico's Article 11 appeal of the Panel's finding regarding the geographic distribution of dolphin sets should fail. In particular: 1) the Panel fulfilled its Article 11 obligation to consider

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[276] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) (citing New York Times, "A Small Victory for Whale Sharks" (Dec. 6, 2012) (Exh. MEX-44)).

[277] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (maj. op.) (citing Australia and Maldives, *On the Conservation of Whale Sharks (Rhincodon Typus)* (2013) (Exh. MEX-45).

[278] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (maj. op.). The Panel also alluded to the finding of the original panel, uncontested on appeal, that there are "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP.'" *See US – Tuna II (Mexico) (AB)*, para. 248 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.520).

[279] *See* Mexico's Other Appeal Submission, para. 143.

[280] *See* Mexico's Other Appeal Submission, para. 144.

[281] *China – Rare Earths (AB)*, para. 5.178.

[282] *China – Rare Earths (AB)*, para. 5.178 (citing *EC – Hormones (AB)*, para. 135).

[283] *EC – Fasteners (AB)*, paras. 441, 442; *Brazil – Retreaded Tyres (AB)*, para. 202.

[284] *See EC – Sardines (AB)*, para. 299; *US – Wheat Gluten (AB)*, para. 151.

the evidence presented to it; 2) the Panel's finding were amply supported by the evidence on the record and were based on a weighing of that evidence; and 3) in any case, the exhibit Mexico raises does not undermine the Panel's finding.

156. First, despite Mexico's assertions to the contrary, the Panel did analyze Mexico's evidence and arguments concerning the existence of dolphin sets outside the ETP. The Panel also acknowledged Exhibit MEX-161, citing it in another part of the Panel's report.[285] However, the Panel had discretion to choose "which evidence . . . to utilize in making findings" and the fact that it did not rely on one on Mexico's exhibits in a particular place is not sufficient to establish an Article 11 violation.[286] Mexico asserts that failing to rely on this exhibit played a crucial role in the Panel's finding that independent observers are unnecessary outside the ETP but does not explain how this can be the case, when, as discussed below, the exhibit does not contradict the Panel's ultimate finding.[287]

157. Second, the Panel's findings certainly had a "proper basis" in the evidence on the record. Specifically, the record contained no evidence *at all* that dolphins are *chased* to catch tuna anywhere other than the ETP large purse seine fishery, let alone on a routine basis.[288] In the ETP, by contrast, the evidence on the record established that large purse seine vessels conduct, on average, over 10,000 dolphin sets each year, resulting in an average of over 6.2 million dolphins chased and 3.7 million dolphins captured *each year*.[289] Further, Mexico's own evidence repeatedly distinguished between the fishing technique practiced in the ETP large purse seine fishery (involving the chase and capture of hundreds of dolphins at a time on a routine basis) and the occasional accidental or opportunistic sets on marine mammals that have been reported to occur in other purse seine fisheries.[290]

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[285] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.46, n.134.

[286] *China – Rare Earths (AB)*, para. 5.178.

[287] *See* Mexico's Other Appeal Submission, para. 146.

[288] *See* U.S. Response to Panel Question 7, para. 50 (citing Exhibit US-127, summarizing the fishery-by-fishery evidence on the record and noting that in the ETP, large purse seine vessels have chased 31,300,659 dolphins (capturing 18,581,597) in the years 2009-2013, while there is *no evidence* of any such chases outside the ETP); U.S. Response to Panel Question 20, paras. 121-124; U.S. Response to Panel Question 22, paras. 147-150; U.S Comments on Mexico's Response to Panel Question 13, para. 56; U.S Comments on Mexico's Response to Panel Question 22, para. 78.

[289] U.S. Response to Panel Question 20, para. 121 (citing Exhibit US-25).

[290] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 285 (third bullet) (quoting a legal counsel to U.S.-flagged purse seiners in the WCPFC area as stating that "schools of dolphins are not chased" in the WCPFC purse seine fishery); Exhibit Mex-40, at 42 (concluding: "There are no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP."); *id.* at 42-43 (stating: "there is no evidence that [the catches of dolphins that do occur] result from directed chase and capture methods such as those used by the large vessels in the ETP").

158. Third, Exhibit MEX-161 in no way undermines the Panel's finding. The exhibit refers to dolphins being spotted in the company of tuna and seabirds (who, in turn, may be in the company of tuna) in several instances.[291] It concludes, however:

> In summary, it is possible that there has been more setting on dolphins in the [western Indian Ocean] than has been reported. This does not imply that the tuna-dolphin fishery in the WIO is of the same scale as that in the ETP. Indeed, the only comparative study of the cetaceans from the western Indian Ocean and the ETP . . . suggested that tuna-dolphin schools were seen less frequently in the WIO than in the ETP.[292]

159. Further, the report makes *no mention at all* of dolphin sets, as they occur in the ETP – involving chasing dolphins to catch tuna – *ever* occurring *outside* the ETP.[293] Thus Exhibit MEX-161 does not suggest the type of "association" that ETP large purse seiners exploit, which enables them to chase, herd, and encircle hundreds of dolphins to catch tuna occurs anywhere outside the ETP. Indeed, it suggests quite the opposite.[294]

160. For the reasons described above, Mexico has failed to meet the high standard required for a successful Article 11 claim, and Mexico's appeal should be rejected.

V. MEXICO'S APPEALS REGARDING ARTICLE XX OF THE GATT 1994 SHOULD BE REJECTED

161. Mexico does not appeal the Panel's finding that the thee challenged aspects of the amended measure fall within the scope of Article XX(g). Rather, Mexico limits its appeal to whether the Panel erred in finding that the eligibility criteria meet the requirements of the Article XX chapeau. Specifically, Mexico argues: 1) that the Panel erred in finding that the "conditions" among countries were not relevantly the "same"; and 2) that the Panel erred in finding that, with respect to the eligibility criteria, the application of the amended measure did not result in "arbitrary or unjustifiable" discrimination. Mexico's appeals are without merit and should be rejected.

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[291] *See* Mexico's Other Appeal Submission, para. 145.

[292] Charles R. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*, at 67 (2014) (Exh. MEX-161).

[293] *See* Anderson 2014 (Exh. MEX-161).

[294] *See* Anderson 2014, at 65 (Exh. MEX-161) ("The fact that dolphins and yellowfin tunas do associate in the WIO, does not necessarily mean that purse seine fishermen set on dolphin schools. Schools of large yellowfin tuna associated with dolphins tend to be fast moving, so setting on them may be difficult and require particular skills."); *id.* at 66 ("Skippers' logbook data show that only 77 sets out of 180,846 (0.04%) were recorded as being associated with 'small toothed whales'"); *id.* at 67 (stating that the possibility that "there has been more setting on dolphins in the WIO than has been reported . . . does not imply that the tuna-dolphin fishery in the WIO is of the same scale as that in the ETP. Indeed, the only comparative study of the cetaceans from the western Indian Ocean and the ETP . . . suggested that tuna-dolphin schools were seen less frequently in the WIO than in the ETP.").

A. The Panel's Analysis

162. The Panel began its analysis of whether the amended measure is consistent with the Article XX chapeau by acknowledging that "discrimination" under the chapeau "exists only where 'countries in which the same conditions prevail are treated differently'" and that, consequently, the Panel had first to examine whether the amended measure "discriminates between countries in which the same conditions exist."[295]

163. With respect to the eligibility criteria, the Panel noted that the criteria distinguished not "between countries," but between fishing methods, and found that the most appropriate "condition" to examine was the harms to dolphins caused by different fishing methods.[296] In this respect, the Panel recalled its finding 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.[297] "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."[298]

164. Despite its earlier correct statement of the applicable analysis, the Panel conflated the two parts of the chapeau analysis, deviating significantly from the Appellate Body's guidance in *EC – Seal Products*.[299] Thus, in paragraph 7.584, despite the Panel concluding that the *kind* of harm caused by different fishing methods was the "condition," and that this condition was not the "same" across fisheries,[300] the Panel still appeared to find that "discrimination" exists, referring

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[295] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.574 (citing *EC – Seal Products (AB)*, para. 5.303).

[296] *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 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."). 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.*

[297] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.579 (citing *US – Mexico II (AB)*, paras. 246, 289).

[298] *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).

[299] *See* U.S. Appellant Submission, paras. 384-388.

[300] *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).

to the "discrimination that [the eligibility criteria] cause" in subsequent sentences.[301] 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."[302] The Panel concluded in this same paragraph that the eligibility criteria do not impose arbitrary and unjustifiable discrimination.

B. Mexico's Appeals

165. Mexico begins its appeal by asserting that it is the "amended tuna measure as a whole" that results in *de facto* discrimination against Mexican tuna products under Article I:1 and III:4 of the GATT 1994.[303] In Mexico's view, the fact that the amended measure "distinguish[es] between fishing methods is at the core of the *de facto* discrimination at issue," and this *de facto* discrimination "is reflected in the amended tuna measure's three elements."[304]

166. In its first appeal, Mexico alleges that the Panel erred in finding that the "conditions" prevailing in fisheries where tuna is caught by setting on dolphins are the "same" as in fisheries where that method is not used.[305] Mexico first reviews the findings of the Panel concerning the relationship of the amended measure to dolphin protection, including that the amended measure is "concerned with the effects of tuna fishing on the well-being of individual dolphins."[306] From this analysis, Mexico alleges that "dolphin-safe means no adverse effects on dolphins, which, in turn, means no dolphin mortalities or serious injuries."[307] Mexico considers that the "conditions" relevant to the chapeau are "dolphin mortalities and serious injuries (both observed and unobserved) caused by commercial tuna fishing operations."[308] Mexico claims that the existence or non-existence of "these adverse effects" is the sole relevant condition, and that "the different

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[301] *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).

[302] *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").

[303] Mexico's Other Appeal Submission, para. 154.

[304] Mexico's Other Appeal Submission, para. 154.

[305] *See* Mexico's Other Appeal Submission, para. 156 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584).

[306] *See* Mexico's Other Appeal Submission, para. 157.

[307] *See* Mexico's Other Appeal Submission, para. 157.

[308] *See* Mexico's Other Appeal Submission, para. 158.

type, nature, quality, magnitude, or regularity of the adverse effects" are irrelevant.[309] Given that all fishing methods can cause some adverse effects, Mexico concludes that the Panel erred in finding that the "relevant conditions" in the different fisheries are the "same."[310]

167. In its second appeal, Mexico contends that the Panel erred in finding that the eligibility criteria do not result in "arbitrary or unjustifiable" discrimination. Mexico first asserts that the Panel erred in focusing on whether the eligibility criteria related to "the objectives of the amended tuna measure" instead of "the policy objective reflected in Article XX(g)."[311] Mexico claims that the Panel found that the relevant policy objective is "to avoid dolphin mortalities and serious injuries," and, as such, the "type, nature, quality, magnitude or regularity of these adverse effects" are irrelevant.[312] In light of the fact that the evidence shows that all "fishing methods cause observed and unobserved dolphin mortalities," any differentiation made in the eligibility criteria between setting on dolphins and other fishing methods must constitute arbitrary and unjustifiable discrimination.[313] Further, Mexico assets that this conclusion would be the same even if analyzed from the perspective of the objectives of the amended measure, and not the objective of subparagraph (g), given that tuna caught by other, eligible fishing methods could cause any unobserved adverse effect on dolphins is inconsistent with the objective of "accurate dolphin-safe labelling."[314] Finally, Mexico makes a new, internally inconsistent argument that the eligibility criteria constitute arbitrary and unjustifiable discrimination because the criteria do not differentiate between those fishing methods that produce "systemic" adverse effects, and those fishing methods that do not produce such "systematic" adverse effects.[315]

168. Mexico concludes that the different treatment of the eligibility criteria "cannot be reconciled with, and is not rationally related to, the policy objective of Article XX(g)," and that the Panel erred in not finding that, due to the eligibility criteria, the amended measure is inconsistent with the chapeau.

C. Mexico's Appeals Are in Error

169. As discussed in the U.S. Appellant Submission, the chapeau calls for two analyses: whether discrimination exists at all; and, if so, whether that discrimination is "arbitrary or unjustifiable."[316]

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[309] *See* Mexico's Other Appeal Submission, para. 158.

[310] *See* Mexico's Other Appeal Submission, para. 158.

[311] *See* Mexico's Other Appeal Submission, para. 160.

[312] *See* Mexico's Other Appeal Submission, para. 161.

[313] *See* Mexico's Other Appeal Submission, para. 162.

[314] *See* Mexico's Other Appeal Submission, para. 164.

[315] *See* Mexico's Other Appeal Submission, para. 164.

[316] *See* U.S. Appellant Submission, paras. 382-386, 404-406.

170. With regard to the first analysis, the question is "whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same.'"[317] 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.[318] This analysis is important as it cannot be presumed that the "discrimination" found to exist for purposes of the positive GATT 1994 obligations will be the same as it is for the chapeau.[319]

171. With regard to the second analysis, the question is whether any discrimination that has been found to exist is arbitrary or unjustifiable. It is well established that an important factor in this assessment 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."[320] This factor, however, is not "the sole test" for the chapeau, but only "one element in a cumulative assessment of unjustifiable discrimination."[321]

172. As discussed above, Mexico divides its argument into three parts. First, Mexico argues that the application of the measure results in discrimination. Second, Mexico argues that the Panel erred in finding that the relevant "conditions" are the "same." Third, Mexico argues that the Panel erred in finding that the application of the amended measure did not result in arbitrary or unjustifiable discrimination. The United States addresses each argument in turn.

1. Mexico's Argument Regarding Whether the Application of the Measure Results in Discrimination Is in Error

173. Mexico begins its analysis by arguing that the "application of the measure results in discrimination."[322] Mexico does not appear to allege that the Panel erred in this section, and Mexico does not make explicit why this section is relevant to its appeals under the chapeau.

174. However, it does appear that Mexico, in discussing the nature of the discrimination found by the Panel to exist for purposes of Articles I:1 and III:4, is arguing that the "discrimination"

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[317] *EC – Seal Products (AB)*, para. 5.299.

[318] *EC – Seal Products (AB)*, para. 5.300.

[319] *See EC – Seal Products (AB)*, para. 5.299.

[320] *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.").

[321] *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).

[322] Mexico's Other Appeal Submission, para. 154.

found to exist for purposes of positive GATT 1994 obligations must be the same for purposes of the chapeau.[323] But that is not necessarily the case, as the Appellate Body has noted.[324] Rather, to determine whether discrimination exists one must first examine "whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same.'"[325] Mexico thus appears to be premising its analysis on a presumption that it will prevail in its first appeal in this section.

175. The United States would further observe that, in emphasizing that the measure must be analyzed "as a whole," and that the *de facto* discrimination that is allegedly occurring is "reflected" in the three challenged aspects of the amended measure, Mexico appears to take the position that the Panel should have found that the same set of "conditions" are relevant for the analysis of all three aspects of the amended measure challenged by Mexico.[326]

2. Mexico's Argument that the Panel Erred in Finding that the Relevant "Conditions" Are the "Same" Is in Error

176. As discussed above, Mexico considers that the Panel erred in finding that the relevant "conditions" do not relate to the different kinds of harms (*i.e.*, those unobservable harms that

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[323] *See* Mexico's Other Appeal Submission, para. 154 ("In this instance, and as per Mexico's above submissions regarding the inconsistency of the amended tuna measure rather than its components, it is the amended tuna measure as a whole (i.e., comprising the DPCIA statute, the regulations and the *Hogarth* court decision) that is inconsistent with Articles I:1 and III:4 of the GATT 1994. It is the amended tuna measure that results in almost all Mexican tuna and tuna products being denied the dolphin-safe label and almost all like products from the United States and other countries being granted the label. The discrimination under the amended tuna measure is *de facto* in nature. Thus, the Panel's above observations, i.e., that the amended tuna measure does not impose different regulatory treatment between countries because it distinguishes between fishing methods, are irrelevant. The fishing method utilized by the Mexican fleet is different from that used by fleets from the United States and other countries.").

[324] *See, e.g.*, *EC – Seal Products (AB)*, para. 5.298 ("With respect to the type of 'discrimination' that is at issue under the chapeau, the Appellate Body noted in *US – Gasoline* that [t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. A finding that a measure is inconsistent with one of the non-discrimination obligations of the GATT 1994, such as those contained in Articles I and III, is thus not dispositive of the question of whether the measure gives rise to 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' under the chapeau of Article XX of the GATT 1994. Moreover, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994. This does not mean, however, that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994.") (internal quotes omitted).

[325] *EC – Seal Products (AB)*, para. 5.317.

[326] *See* Mexico's Other Appeal Submission, para. 154 ("This *de facto* discrimination is reflected in the amended tuna measure's three elements – that is, the three different labelling conditions and requirements for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand – that the Panel examined under the chapeau, including the eligibility criteria.").

dolphins incur from being chased).[327] Mexico takes the position that the relevant "condition[]" for purposes of the chapeau is "whether the adverse effects exist or not."[328] In Mexico's view, "[i]t is not a question of the different type, nature, quality, magnitude or regularity of the adverse effects."[329] Given that different fishing methods cause harm to dolphins, Mexico concludes that the relevant "conditions" must be the "same," and the distinction that the amended measure draws with regard to eligibility between Mexico's preferred fishing method (setting on dolphins) and other fishing methods (purse seining by not setting on dolphins, longlining, gillnetting, trawling, etc.) constitutes "discrimination" for purposes of the chapeau. Mexico's argument is in error.

177. As discussed in the U.S. Appellant Submission, the Panel found that each of the challenged aspects of the measure were provisionally justified under Article XX(g) of the GATT 1994.[330] 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."[331] Moreover, the objectives of the measure – which the Panel found to have a close nexus with the policy objective of subparagraph (g) – relate to adverse effects broadly.[332]

178. As such, the United States considers that the relevant "conditions" relate to *all* adverse effects suffered by dolphins, which, as has been discussed, include not only mortality and serious injuries, but those unobservable harms that dolphins incur from being chased. Thus under the appropriate framework, the conditions are not the "same" between fisheries. As discussed elsewhere, the *harm* to dolphins occurring in the ETP large purse seine fishery and other fisheries *is different*. In particular, the factual findings of the Panel clearly indicate that the ETP large purse seine fishery has a different "risk profile" than other fisheries.[333] As the minority

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[327] Mexico's Other Appeal Submission, para. 156 ("The Panel's finding that the conditions are not the same is erroneous because the 'relevant' conditions are not the differences in unobservable harms.").

[328] Mexico's Other Appeal Submission, para. 158.

[329] Mexico's Other Appeal Submission, para. 158.

[330] *See* U.S. Appellant Submission, paras. 362-368; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.541.

[331] *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").

[332] *See, e.g., US – Tuna II (Mexico) (AB)*, para. 7.525 (confirming that "one of the goals of the US dolphin-safe labeling regime is to contribute to the protection of dolphins"); *id.* para. 7.529 (finding that "to the extent that the goal of the amended tuna measure is to contribute to the protection of dolphins, even on an individual scale, that measure can be said to relate to the conservation of dolphins").

[333] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-243 (maj. op.), in particular *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."); *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

correctly noted, "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*."[334] Notably, the Panel squarely disagreed 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."[335]

179. Of course, the fact that the ETP large purse seine fishery has a different risk profile than other fisheries should come as no surprise, as it is *only* in the ETP that the tuna-dolphin association exists, and, as such, it is *only* in the ETP that fishing vessels are "systematically" setting on dolphins[336] – that is, regularly engaging in multi-hour chases and captures of hundreds of dolphins in order to catch tuna.[337] Setting on dolphins is the *only* fishing method in the world *that intentionally targets dolphins*.[338] As such, it is *inherently* dangerous, causing an unparalleled rate of dolphin mortality and unique unobservable harms. The Appellate Body's finding in the original proceeding that setting on dolphins is a "particularly harmful" fishing method for dolphins further confirms that this is the case.[339] Thus the distinction drawn with respect to the eligibility criteria is "calibrated" to the differing conditions between the ETP large purse seine fishery and other fisheries.[340] Again, it is notable for purposes of this analysis that the memberships of two RFMOs consider the practice of setting on dolphins to be *so dangerous* (compared to other fishing methods) *that they have banned it entirely*.[341]

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not set on intentionally, and interaction is only accidental)."); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (recalling that "[t]he different risk profiles of different fisheries may, as we found above, explain regulatory differences concerning the eligibility criteria for fishing methods" and referring to "the special risk profile of the ETP large purse seine fishery").

[334] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) (emphasis added); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op) (referring to the different "risk profiles" of the ETP large purse seine fishery and other fisheries, based on the evidence on the record).

[335] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242 (maj. op.); *id.* para. 7.278 (min. op.).

[336] *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 the United States' position on this point compelling.").

[337] *See* 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 – an average of 10,246 a year) – where a total of 31.3 million dolphins were chased and 18.6 million dolphins were encircled in purse seine nets).

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

[339] *US – Mexico II (AB)*, paras. 246, 289.

[340] *See* U.S. Appellant Submission, para. 394.

[341] *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)).

180. As the relevant "conditions" are not the "same," no discrimination exists for purposes of the chapeau and the eligibility criteria are thus justified under Article XX and not inconsistent with the GATT 1994.

3. Mexico's Argument Regarding Whether the Amended Measure Imposes Arbitrary or Unjustifiable Discrimination Is in Error

181. Mexico also argues that the Panel erred in finding that the distinction drawn by the eligibility criteria between setting on dolphins and other fishing methods does not impose arbitrary and unjustifiable discrimination. Specifically, Mexico argues that, in light of the policy objective of subparagraph (g), *any* distinction drawn between fishing methods would be arbitrary and unjustifiable. In Mexico's view:

> It is not a question of the different type, nature, quality, magnitude or regularity of these adverse effects. Rather, it is about the reduction of dolphin mortalities and serious injuries in all circumstances. Thus, there is no basis to "calibrate" between different levels of dolphin mortalities or serious injuries in achieving the policy objective in Article XX(g), as interpreted in the circumstances of this dispute.[342]

182. As discussed in the U.S. Appellant Submission, it is well established that an important factor in the examination 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," although this is not "the sole test" for whether a challenged measure meets the requirements of the chapeau.[343]

183. And Mexico is simply wrong to assert that it is arbitrary or unjustifiable to distinguish between setting on dolphins and other methods. This distinction is, in fact, reconcilable with, and rationally related to, the policy objective of protecting dolphins (the relevant policy objective for purposes of Article XX(g)). As discussed above, Mexico's preferred fishing method is the *only* fishing method that intentionally targets dolphins through multi-hour chases captures of large schools of dolphins through the coordinated maneuverers of large purse seine vessels, speed boats, and helicopters. And while the unique AIDCP-mandated requirements – which Mexico considers discriminatory – have *mitigated* the consequences of this fishing method for the targeted dolphins, these requirements cannot transform an *inherently* dangerous fishing method to one that is safe. Every dolphin set must involve a sustained interaction with a school of dolphins and, as such, every set poses a significant risk of mortality, serious injury, and unobservable harm to those animals. This *inherent* danger is simply not present in other fishing methods, despite the fact that they may also kill or seriously injure dolphins.

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[342] Mexico's Other Appeal Submission, para. 161.

[343] *See* U.S. Appellant Submission, paras. 404-407; *EC – Seal Products (AB)*, paras. 5.306, 5.321.

184. Indeed, in the context of the certification requirements, the Panel recognized the legitimacy of drawing a distinction between fishing methods that have different "natures":

> [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.[344]

185. And, as explained previously, this difference between setting on dolphins and other fishing methods is borne out by the factual findings of the Panel, as well as RFMO and national government data and scientific studies on mortality and unobservable harms.[345] The distinction is clearly reconcilable with and rationally related to the policy objective of protecting dolphins.

186. In this regard, Mexico is simply wrong to contend that Article XX(g) *prohibits* Members from applying measures that are "calibrated" to different risks.[346] Indeed, surely *the opposite* is true. As discussed elsewhere, in *US – Shrimp* the Appellate Body found that *not* taking into account different risk levels or conditions in different countries indicated that a measure *does not* meet the requirements of the chapeau.[347]

187. Finally, with regard to Mexico's new argument regarding fishing methods that cause "systematic" adverse effects, the United States would note, again, that Mexico did not raise this argument before the Panel.[348] As such, the Panel made no assessment of this issue, and none of its factual findings can be interpreted as supporting Mexico's assertion that some fishing methods cause "systematic" adverse effects – as Mexico chooses to define this term for purposes of this appeal – and other fishing methods do not cause such "systematic" adverse effects.

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[344] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.592 (emphasis added).

[345] *See infra*, sec. IV.A.2.c.iii; U.S. Appellant Submission, paras. 161-166, 422-423, 457..

[346] Mexico's Other Appeal Submission, para. 161 ("Thus, there is no basis to 'calibrate' between different levels of dolphin mortalities or serious injuries in achieving the policy objective in Article XX(g), as interpreted in the circumstances of this dispute.").

[347] *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").

[348] *See supra*, sec. IV.A.2.c.ii(A).

188. Ultimately, this argument – which is directly inconsistent with Mexico's central argument of a "zero tolerance" benchmark – is yet another mechanism Mexico uses to avoid addressing the conclusion that the facts of this case prove that the amended measure does not discriminate against Mexican tuna product. Mexico's preferred fishing method of setting on dolphins may be an efficient way to catch tuna, but it is not a "dolphin safe" way to catch tuna. The evidence bears this out. And while Mexico is allowed to sell its product in the U.S. market, it simply not accurate to label Mexico's tuna product as "dolphin safe" when, without a doubt, it is not.

VI. CONCLUSION

189. For the foregoing reasons, the United States respectfully requests the Appellate Body to reject Mexico's appeals of the Panel's report.