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

Recourse to Article 21.5 of the DSU by the United States (DS381)

First Written Submission of
the United States of America

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TABLE OF ACRONYMS

Acronym	Full Name
2013 Final Rule	Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997 (July 9, 2013)
2016 IFR	Enhanced Document Requirements and Captain Training Requirements To Support Use of the Dolphin Safe Label on Tuna Products, 81 Fed. Reg. 15,444 (Mar. 23, 2016)
AIDCP	Agreement on the International Dolphin Conservation Program
C.F.R.	Code of Federal Regulations
CITES	Convention on International Trade in Endangered Species
CMM	Conservation and Management Measure
CONAPESCA	National Commission of Agriculture and Fishing (Mexico)
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
FTCA	Federal Trade Commission Act
IATTC	Inter-American Tropical Tuna Commission

ICCAT	International Commission for the Conservation of Atlantic Tunas
IDCP	International Dolphin Conservation Program
IOTC	Indian Ocean Tuna Commission
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
RFMO	Regional Fishery Management Organization
SPC-OFP	Secretariat of the Pacific Community-Oceanic Fisheries Programme
TBT Agreement	Agreement on Technical Barriers to Trade
TTVP	Tuna Tracking and Verification Program
TTF	Tuna Tracking Form
UNGA	United Nations General Assembly
U.S.C.	United States Code
WCPFC	Western and Central Pacific Fisheries Commission
WTO	World Trade Organization

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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 – Tuna II (Article 21.5 – Mexico) (AB)	Appellate Body 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/AB/RW, adopted 3 December 2015
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, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW
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

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I. INTRODUCTION

1. This is the third panel proceeding under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) in the long-standing dispute between Mexico and the United States over whether the U.S. dolphin safe labeling requirements discriminate against Mexican tuna and tuna product.

2. In November 2015, the Appellate Body circulated its second report in this dispute. In that report, the Appellate Body found that:

a) the measure's denial of access to the dolphin safe label for Mexican tuna product, which is produced from vessels setting on dolphins, and conditional access to the dolphin safe label for tuna products produced from other Members, which they produce from other fishing methods, results in a detrimental impact on Mexican tuna products in the U.S. market; and

b) this detrimental impact did not stem from an exclusive legitimate regulatory distinction for the sole reason that the design of the so-called "determination provisions" was not even-handed because those provisions did not take into account certain hypothetical situations (as the Appellate Body was unable to complete the analysis as to the other three elements of the measure in dispute).

3. On these two bases, the Appellate Body found the measure to be inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement). And for very similar reasons the Appellate Body also found the measure inconsistent with Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).

4. The United States responded quickly. On March 22, 2016, the U.S. National Oceanic and Atmospheric Administration (NOAA) issued an interim final rule to bring the U.S. dolphin safe labeling requirements into compliance with the DSB recommendations and rulings. In particular, this new rule directly responds to the concerns of the Appellate Body and the first compliance panel that the design of the determination provisions was not even-handed. But, as discussed in detail below, the United States also made changes to the certification and tracking and verification requirements of the measure because, while the Appellate Body had not found that these aspects of the measure supported a finding of less favorable treatment, the first compliance panel had raised concerns, and the United States sought to address those concerns in light of the Appellate Body's legal framework.

5. But to be clear, the United States has not altered the measure as it applies to the central issue in this dispute. The measure still treats setting on dolphins, and the tuna product it produces, differently from other fishing methods, and the tuna product that they produce. To do otherwise, and choose, as Mexico has suggested, between (1) allowing all fishing methods equal access to the label or (2) eliminating the label entirely,[1] would produce entirely unacceptable

[1] *See* Mexico's First Written 21.5 Submission to the 1st 21.5 Panel, para. 263 (arguing that, for the measure to be consistent with U.S. WTO obligations, "all tuna fishing methods should be either disqualified or qualified").

results. Allowing tuna product produced from vessels engaged in this unique, inherently dangerous fishing method to have access to the dolphin safe label would not protect dolphins, and would be misleading to the U.S. consumer. And denying the label to all tuna product produced from all fishing methods would also not protect dolphins and would wrongly suggest to U.S. consumers that tuna product cannot be produced without harming dolphins.

6. As discussed below, nothing in the covered agreements or the two previous DSB recommendations supports the conclusion that the United States is obligated to change this central aspect of its measure or to overhaul its basic structure. Indeed, the evidence proves that the measure itself is a calibrated, even-handed response to the risks to dolphins posed by tuna fishing by different methods in different ocean areas. Consequently, the United States respectfully requests the Panel to find that the United States has brought the dolphin safe labeling requirements into compliance with the DSB recommendations and rulings, and that the U.S. measure is now consistent with the WTO Agreement.

7. This submission will first discuss the DSB recommendations and rulings in the first compliance proceeding. These recommendations and rulings form the basis for the Panel's terms of reference for this proceeding. The submission will then summarize the measure at issue, explain the context for the measure in terms of the evidence concerning the risk to dolphins, and explain how the 2016 IFR brings the measure into compliance with the DSB recommendation at issue for the Panel, which was based on the determination provisions of the measure. The submission will further then explain how in addition to addressing the DSB recommendation and the determination provisions, the 2016 IFR has also addressed the other concerns identified during the first compliance proceeding, even though these concerns did not form the basis for the DSB recommendation at issue.

II. THE DSB RECOMMENDATIONS AND RULINGS IN THE FIRST COMPLIANCE PROCEEDING

8. In the first compliance proceeding, the Appellate Body found that the U.S. dolphin safe labeling measure, as amended by the 2013 Final Rule, was inconsistent with the nondiscrimination obligations under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.[2] In particular, with respect to Article 2.1, the DSB adopted the Appellate Body's findings that:

> The determination provisions do not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risks, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery. For this reason, it has not been demonstrated that the differences in the dolphin-safe labelling conditions under the amended tuna measure are calibrated to, or commensurate with, the risks to dolphins arising from different fishing methods in different areas of the oceans. Since it therefore follows that the detrimental impact of the amended tuna measure

[2] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 8.1-8.2.

> cannot be said to stem exclusively from a legitimate regulatory distinction, we find that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement.[3]

9. Similarly, with respect to Articles I:1 and III:4 and the exception under Article XX of the GATT 1994, the DSB adopted the Appellate Body's findings that:

> The determination provisions do not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risk, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery. Thus, the United States has not demonstrated that these aspects of the amended tuna measure do not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX. For all of these reasons, it has not been established that the amended tuna measure is justified under Article XX of the GATT 1994.

10. These findings in turn were the basis for the Appellate Body's recommendation, adopted by the DSB, that "the United States to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TBT Agreement and the GATT 1994, into conformity with its obligations under those agreements." These DSB recommendations and rulings form the basis for an examination under Article 21.5 of the DSU of the existence of a measure taken to comply.

11. These are the DSB recommendations and rulings at issue for purposes of the Panel's examination under its terms of reference. As stated in the U.S. panel request, the issue presented is whether:

> The 2016 IFR amends the dolphin-safe labeling regulations and brings the dolphin-safe labeling measure subject to the DSB recommendations into compliance with the TBT Agreement and the GATT 1994 by rectifying the inconsistencies of the amended tuna measure with those agreements as found by the DSB in the proceeding under Article 21.5 of the DSU. The 2016 IFR, among other changes, revises the design of the determination provisions and certification, tracking, and verification requirements such that any detrimental impact stems exclusively from legitimate regulatory distinctions, for purposes of the second step of an analysis under Article 2.1 of the TBT Agreement, and that the measure meets the requirements of the chapeau of Article XX of the GATT 1994.[4]

12. In addition to these DSB recommendations and rulings, the first compliance proceeding examined other issues. Following is a brief summary.

13. Consistent with Mexico's presentation of its affirmative claim under Article 2.1, the first compliance panel separately evaluated three regulatory distinctions of the U.S. measure – the

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[3] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.266.

[4] WT/DS381/32.

eligibility criteria, the certification requirements, and the tracking and verification requirements[5] – finding that each one resulted in a separate detrimental impact and that the latter two were not even-handed.[6] In addition, the panel found the design of the "determination provisions" was not even-handed.[7] The first compliance panel thus found that the measure provided less favorable treatment to Mexican tuna product for purposes of Article 2.1 of the TBT Agreement.[8] Using the same analysis, the first compliance panel also found that the measure was inconsistent with Articles I:1 and III:4 of the GATT 1994 and was not justified under Article XX.[9]

14. On appeal, the Appellate Body found that the panel had erred in its analysis under the first step of Article 2.1 by conducting a "segmented analysis" of the aspects of the measure, when it should have analyzed the manner in which "the different labelling conditions under the measure operate together."[10] The Appellate Body reversed the panel's findings and completed the analysis, finding that that the U.S. measure had a detrimental impact on the competitive opportunities of Mexican tuna product.[11]

15. Under the second step of the Article 2.1 analysis, the Appellate Body found that the panel had erred as follows:

- With respect to the eligibility criteria, by finding that the original proceeding had definitively settled that they were even-handed,[12] and by not conducting an appropriate analysis of the eligibility criterion relating to setting on dolphins that encompassed whether the distinction addressed "the risks associated with this method of fishing" and "the risks associated with other fishing methods" in a way that was "commensurate[] with their respective risk profiles," including both observed and unobserved harms;[13] and

- With respect to the certification and tracking and verification requirements, by failing to include in its analysis an assessment of whether the distinctions were "properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."[14]

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

[6] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2; *id.* paras. 7.233 (concerning the certification requirements), 7.400 (concerning the tracking and verification requirements).

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

[8] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.2, 8.6.

[9] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.3-8.5.

[10] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.61-63.

[11] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.75, 7.238.

[12] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.126; *see also id.* para. 7.129.

[13] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.126, 7.161; *see also id.* para. 7.130.

[14] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 (citing *US – Tuna II (Mexico) (AB)*, n.612, para. 296); *id.* para. 7.157; *id.* para. 7.101 (noting that there is "*a special relevance*" in this dispute of conducting a

Accordingly, the Appellate Body reversed the panel's findings under Article 2.1 concerning these aspects of the amended measure.[15]

16. In completing the analysis under the second step of Article 2.1, the Appellate Body found that the key question for the even-handedness inquiry is whether "the differences in the labelling conditions … are calibrated to the likelihood that dolphins will be adversely affected in the course of tuna fishing operations in the respective fisheries."[16] However, in the Appellate Body's view, the panel had not adequately addressed the evidence as to "the overall relative harms, both observed and unobserved, associated with setting on dolphins versus other fishing practices."[17] Consequently, the Appellate Body found that it did not have sufficient factual findings or uncontested evidence to complete the analysis of whether the eligibility criteria, certification requirements, and tracking and verification requirements were even-handed.[18]

17. With respect to the determination provisions, however, the Appellate Body found that analysis of their design was "not dependent on an assessment of the relative risks associated with different fishing methods in different areas of the oceans."[19] Further, it agreed with the panel that the two "gaps" in the provisions could mean that, hypothetically, situations could exist where fisheries that present the same degree of risk to dolphins as the ETP large purse seine fishery might not be covered by either provision.[20] On this basis alone, the Appellate Body found that the detrimental impact of the amended measure did not stem exclusively from a legitimate regulatory distinction, and, as such, the measure provided less favorable treatment to Mexican tuna product.[21]

18. Like the panel, the Appellate Body's analysis under the GATT 1994 drew on its analysis under Article 2.1 of the TBT Agreement: the measure was found to be inconsistent with Article I:1 and III:4 of the GATT 1994[22] and to be applied inconsistently with the chapeau of Article XX for the sole reason of the "design" of the determination provisions.[23]

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calibration analysis for purposes of the second step of Article 2.1) (emphasis added); *id*., para. 7.165 (concerning the certification requirements); *id.* para. 7.166 (concerning the tracking and verification requirements).

[15] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.131, 7.169, 8.1(a)(vii).

[16] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.239; *see also id.* para. 7.101.

[17] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.246.

[18] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253.

[19] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.254.

[20] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.258.

[21] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.266.

[22] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.340.

[23] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.359.

III. THE MEASURE AT ISSUE

19. The measure at issue in this dispute is the U.S. dolphin safe labeling measure for tuna products.[24] As in the previous two panel proceedings, this measure comprises three legal instruments: (1) the Dolphin Protection Consumer Information Act (DPCIA), (2) the DPCIA implementing regulations issued by NOAA, and (3) the 9th Circuit Court of Appeals decision in *Earth Island Institute v. Hogarth* (*Hogarth*).[25] The measure sets out the minimum conditions under which tuna product may be marketed to U.S. consumers as "dolphin safe."[26]

A. Overview of the U.S. Dolphin Safe Labeling Measure as Reviewed in Previous Proceedings

20. Four different aspects of the U.S. dolphin safe labeling measure have been at issue in this dispute:

- Determination Provisions. This is the mechanism by which NOAA imposes enhanced certification requirements (and now enhanced tracking and verification requirements) on tuna caught in fisheries determined to be high risk.[27] As noted above, this aspect was the sole basis for the DSB recommendation at issue for the Panel.

- Eligibility Criteria. The eligibility criteria establish the standard that tuna product must meet in order to be eligible to carry a dolphin safe label. Under the U.S. measure, both as it existed at the time of the first compliance proceeding and currently, tuna product

[24] Under the U.S. measure, "tuna product" refers to a "food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days." *US – Tuna II (Article 21.5 – Mexico) (AB)*, n.101 (citing 16 U.S.C. § 1385(c)(5)). In other words, "tuna product" is tuna that has undergone some processing and is not sold as "fresh" tuna. This market consists primarily of canned tuna, although products processed in other ways, *e.g.*, freezing, drying, etc., are also sold in the U.S. market to some extent.

[25] *US – Tuna II (Mexico) (Panel)*, para. 2.1; *US – Tuna II (Mexico) (AB)*, para. 172; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.2; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.7.

[26] Specifically, subsection (d) of the DPCIA, as well the NOAA implementing regulations, provides that it is a violation of the Federal Trade Commission Act (FTCA) for "tuna product that is exported from or offered for sale in the United States to include on the label of that product the term 'dolphin safe' or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product" does not meet the conditions established by the DPCIA and the NOAA implementing regulations. DPCIA, 16 U.S.C. §§ 1385(d)(1), (d)(3)(A)(C) (Exh. US-1) (1st 21.5 Exh. MEX-8); *see* 50 C.F.R. § 216.91(a) (Exh. US-2). Thus, the measure sets a minimum standard for tuna product that can bear any label suggesting it is "dolphin safe." And while producers and retailers can make use of the "official" Department of Commerce dolphin safe label, private labels established by non-governmental organizations (NGOs) or particular companies are used much more widely in the U.S. marketplace.

[27] These provisions of the DPCIA implementing regulations, provide a basis to impose an observer certification where the tuna product is produced from a fishery where NOAA has determined that either a "regular and significant mortality or serious injury" of dolphins is occurring or a "regular and significant association between tuna and dolphins" (similar to that in the ETP) is occurring. *See US – Tuna II (Article 21.5 – Mexico) (Panel)* para. 3.45(i), (iv); 50 C.F.R. §§216.91(a)(3)(v), (a)(5)(ii) (Exh. US-2).

caught by two fishing methods – large-scale high seas driftnet fishing and purse seine fishing by "setting on dolphins" – is not eligible for the label.[28] Tuna caught by other fishing methods is potentially eligible but becomes ineligible if it was caught in a set or other gear deployment during which a dolphin was killed or seriously injured.[29]

- Certification Requirements. These requirements provide that, for tuna product to be labeled dolphin safe, it must be accompanied by certifications that the eligibility criteria were met – specifically, under the measure as it existed during the first compliance proceeding, a certification that no dolphins were killed or seriously injured during the gear deployment(s) in which the tuna were caught and additionally, for purse seine vessels, a certification that no purse seine net was intentionally deployed on or used to encircle dolphins during the trip in which the tuna were caught. The captain of the harvesting vessel must make these certifications for all tuna product,[30] and for tuna caught in the ETP large purse seine fishery, a certification is also required from the International Dolphin Conservation Program (IDCP) observer on board the vessel.[31]

- Tracking and Verification Requirements. These requirements, which include documentation and segregation requirements for tuna product sold as dolphin safe, allow NOAA to track and verify that tuna product marketed as dolphin safe does, in fact, meet the label's standards.[32]

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[28] For the ineligibility of tuna caught using large-scale high seas driftnets, see DPCIA, 16 USC § 1385(d)(1)(A) (Exh. US-1), 50 C.F.R. § 216.91(a)(2) (Exh. US-2) and also *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9. For the ineligibility of tuna caught by setting on dolphins, see 50 C.F.R. §§ 216.91(a)(1)(iii), (a)(3)(i), (a)(3)(ii)(A) (Exh. US-2), and also *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9.

[29] *See* 50 C.F.R. §§ 216.91(a)(1)(ii), (a)(3)(ii)(A)-(B), (a)(3)(iii)(A) (Exh. US-2); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9. Following the DSB recommendations and rulings in the original proceeding, the NOAA promulgated a new rule ("the 2013 Final Rule"), which specifically addressed those DSB recommendations and rulings

[30] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.38-41 ("[T]he use of the dolphin-safe label on any tuna product is conditioned on the product being accompanied by certain certifications by the captain of the harvesting vessel"); 50 C.F.R. 216.24(f)(2) (Exh. US-3); NOAA, Form 370: Fisheries Certificate of Origin, at 5.B.1-5 (2016) ("NOAA Form 370") (Exh. US-4); 50 C.F.R. §§ 216.91(a)(3)(ii)(A)-(B), (a)(3)(iii)(A), 216.92(a)(1), (a)(2)(iii), 216.93(a) (Exh. US-2).

[31] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.42-45; 50 C.F.R. 216.24(f)(2) (Exh. US-3); NOAA Form 370, at 5.B.5 (Exh. US-4); 50 C.F.R. §§ 216.91(a)(1), 216.92(a)(1), 216.92(a)(3), 216.92(b)(2) (Exh. US-2); *see also* Agreement on the International Dolphin Conservation Program (AIDCP), Annex II (2009) (Exh. US-5) (1st 21.5 Exh. MEX-30) (requiring that an observer on board during all trips by large purse seine vessels in the ETP).

[32] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.47-52; 50 C.F.R. § 216.93(c)(1)-(3) (Exh. US-2) (requiring that all tuna product labeled dolphin safe must be produced from dolphin safe tuna that has been physically segregated from non-dolphin safe tuna from catch through processing); 50 C.F.R. §§ 216.24(f)(2)(i) and (f)(2)(ii) (Exh. US-3) (requiring that a NOAA Form 370 accompany all imports of tuna and tuna products into the United States); NOAA Form 370, p. 1 (Exh. US-4) (requiring identifying information about the tuna associated with the form, including its dolphin safe status, harvesting vessel, trip dates, and captain certifications, if applicable); 50

21. In the original proceeding, the panel, in light of Mexico's arguments, focused on the eligibility criteria, particularly whether the criterion denying access to the label to tuna product produced by setting on dolphins discriminated against Mexican tuna product.[33] The Appellate Body ultimately found that the other eligibility criterion – whether a dolphin had been killed or seriously injured in the gear deployment in which the tuna was caught – was not even-handed.[34] Following the DSB recommendations and rulings, NOAA promulgated the 2013 Final Rule that directly addressed the DSB recommendations and rulings.[35] In the subsequent compliance proceeding, however, Mexico expanded its argument to encompass the other aspects of the measure described in this section. The DSB recommendations and rulings in the compliance proceeding resulted from this broader scope of argument.

B. The Measure Taken to Comply: The 2016 Interim Final Rule

22. On March 22, 2016, NOAA issued an interim final rule amending the U.S. dolphin safe labeling measure (the "2016 IFR").[36] The rule was published in the U.S. official journal, the *Federal Register*, on March 23, 2016.

23. The 2016 IFR rule made ***five*** substantive changes to the U.S. dolphin safe labeling measure.

24. First, the 2016 IFR revised the determination provisions to eliminate two "gaps" in coverage found in the first compliance proceeding. The two provisions, which had previously been codified at 50 C.F.R. § 216.91(a)(2)(i) and (a)(4)(iii),[37] have been combined into one provision, now codified at 50 C.F.R. § 216.91(a)(3)(v). This revised provision provides that, as a condition for labeling tuna product dolphin-safe, NOAA may require an observer certification (in

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C.F.R. §§ 216.93(d)(i), (d)(ii), (e) (Exh. US-2) (requiring U.S. processors to submit the same information in monthly reports).

[33] *US – Tuna II (Mexico) (Panel)*, para. 4.43 (summarizing Mexico's non-discrimination claims); *id.* para. 7.253-255 (describing Mexico's claim and stating that Mexico had "clarifie[d] that . . . the factual basis of Mexico's discrimination claims is that the *prohibition* against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like product from the United States and other countries'") (emphasis in original).

[34] *US – Tuna II (Mexico) (AB)*, paras. 292-297.

[35] *See Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997 (July 9, 2013) ("2013 Final Rule") (Exh. US-6) (1st 21.5 Exh. MEX-7).

[36] *See Enhanced Document Requirements and Captain Training Requirements To Support Use of the Dolphin Safe Label on Tuna Products*, 81 Fed. Reg. 15,444 (Mar. 23, 2016) ("2016 IFR") (Exh. US-7); "Statement by the United States at the Meeting of the WTO Dispute Settlement Body," at 7-9 (Mar. 23, 2016) (Exh. US-8).

[37] Section 216.91(a)(2)(i) provided authority for NOAA to require proof of an observer certificate where NOAA determines that there exists a purse seine fishery outside the ETP where "a regular and significant association [is] occur[ing] between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)." For all "other fisheries", *i.e.*, fisheries other than the ETP large purse seine fishery, non-ETP purse seine fisheries, and large-scale driftnet fisheries, section 216.91(a)(4)(iii) provided authority for NOAA to require proof of an observer certificate where NOAA determines that the particular fishery is "having a regular and significant mortality or serious injury of dolphins."

addition to the captain certification) where the Assistant Administrator has determined that a fishery has a regular and significant tuna-dolphin association (similar to that in the ETP) or has regular and significant dolphin mortality or serious injury.[38] Thus, this authority *applies equally* to all fisheries – including purse seine fisheries and non-purse seine fisheries such as longline, pole and line, gillnet, and trawl fisheries – that are potentially eligible to produce dolphin safe tuna product for the U.S. market.

25. Second, the 2016 IFR revised the determination provisions such that, if the Assistant Administrator of NOAA's National Marine Fisheries Service (NMFS) makes a determination that a "regular and significant" association exists or a "regular and significant" mortality or serious injury is occurring in a fishery, NMFS will require, as a condition of tuna product being marketed as dolphin safe, a government certificate validating: (1) the catch documentation recorded on the NOAA Form 370 or U.S. cannery report accompanying the tuna or tuna product (*e.g.*, the fishery in which the tuna was caught, the relevant trip dates, the type of gear with which the tuna was caught, and the harvesting vessel); (2) that the tuna or tuna products meet the dolphin-safe labeling standards of 50 C.F.R. § 216.91; and (3) the chain of custody information that must be reported to the U.S. Government or maintained by the importer of record or the U.S. processor, as applicable (a new requirement described below).[39]

26. Third, the 2016 IFR amends the regulations to combine the previously separate categories of ''non-ETP purse seine vessel'' (50 C.F.R. § 216.91(a)(2)) and ''Other fisheries'' (50 C.F.R. § 216.91(a)(4)) into one category under the title ''Other fisheries'' (revised 50 C.F.R. § 216.91(a)(3)). Under the revised 50 C.F.R. § 216.91(a)(3)(iii), captains of all vessels in fisheries not covered by paragraphs (a)(1) (the ETP large purse seine fishery) and (a)(2) (a large-scale driftnet fishery) must certify that:

> no purse seine net or other fishing gear was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that

[38] 50 C.F.R. § 216.91(a)(3)(v) (Exh. US-2) ("For tuna caught in a fishery in which the Assistant Administrator has determined that either a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP) or a regular and significant mortality or serious injury of dolphins is occurring, a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, unless the Assistant Administrator determines an observer statement is unnecessary. . . . The written statement shall certify that: (A) No fishing gear was intentionally deployed on or used to encircle dolphins during the trip on which the tuna were caught; (B) No dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught; and (C) Any relevant requirements of paragraph (a)(4) of this section were complied with during the trip on which the tuna were caught."); 2016 IFR, at 15,446 (Exh. US-7).

[39] 50 C.F.R. § 216.91(a)(5)(ii) (Exh. US-2) ("For tuna designated dolphin-safe that was harvested in a fishery about which the Assistant Administrator made a determination under paragraph (a)(3)(v) of this section, and harvested on a fishing trip that begins on or after 60 days after the date of the Federal Register notice of that determination, the tuna or tuna products are accompanied by valid documentation signed by a representative of the vessel flag nation or the processing nation (if processed in another nation) certifying that: (A) The catch documentation is correct; (B) The tuna or tuna products meet the dolphin-safe labeling standards under this section; and (C) The chain of custody information is correct."); 2016 IFR, at 15,446 (Exh. US-7).

> no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.[40]

This is the same certification that is required for tuna product produced from the ETP large purse seine fishery.[41] Accordingly, the same certification needed for the tuna product to be certified as meeting the dolphin safe standards applies to all fisheries that could produce dolphin safe tuna for the U.S. tuna product market.

27. Fourth, the 2016 IFR requires that, for tuna products to be marketed as dolphin safe, the captain of the harvesting vessel must certify that he or she has completed the NMFS Tuna Tracking and Verification Program (TTVP) dolphin-safe training course (training course).[42] The training course includes information on: (1) identifying dolphins of the taxonomic family *Delphinidae*; (2) identifying intentional gear deployment on or encirclement of dolphins; (3) identifying dolphin mortality and serious injury; and (4) physically separating dolphin-safe tuna from non-dolphin-safe tuna from the time of capture through unloading.[43]

28. Fifth, the 2016 IFR establishes chain of custody recordkeeping requirements for tuna product produced from "other fisheries" that is to be marketed as dolphin safe. Under the amended regulations, U.S. processors and importers of such tuna product must collect and retain for 2 years information on each point in the chain of custody of the tuna or tuna product, including information on all storage facilities, transshippers, processors, and

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[40] 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2) ("For tuna caught by a vessel on a fishing trip that began on or after May 21, 2016, a written statement executed by the Captain of the vessel certifying that: (A) No purse seine net or other fishing gear was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught…"); 2016 IFR, at 15,446 (Exh. US-7).

[41] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.40-41.

[42] 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2) ("For tuna caught by a vessel on a fishing trip that began on or after May 21, 2016, a written statement executed by the Captain of the vessel certifying that: … (B) The Captain of the vessel has completed the NMFS Tuna Tracking and Verification Program dolphin-safe captain's training course. The NMFS Tuna Tracking and Verification Program dolphin-safe captain's training course is available on the Web site of the NMFS Tuna Tracking and Verification Program at http://www.nmfs.noaa.gov/pr/dolphinsafe."); 2016 IFR, at 15,446-47 (Exh. US-7).

[43] *See* 2016 IFR, at 15,446-47 (Exh. US-7); NOAA, "Dolphin-Safe Captain's Training Course" (Mar. 23, 2016), *available at* http://www.nmfs.noaa.gov/pr/dolphinsafe (Exh. US-10). NMFS has endeavored to make the training course as available as reasonably possible. It is available on the Internet in the following languages: English, Mandarin Chinese, Indonesian, Japanese, Korean, Spanish, Tagalog, Thai, and Vietnamese. These languages represent the vast majority of languages spoken by captains producing tuna for the U.S. tuna product market. Specifically, data from the NOAA Form 370 database for 2005-2013 shows that 90% of records associated with the importation of frozen and/or processed tuna came from vessels flying the flags of 15 countries/territories, all of which have as an official language at least one of the nine languages in which the course is available. *See* William Jacobson Second Witness Statement (July 21, 2014) (Exh. US-11) (1st 21.5 Exh. US-86). In addition, the U.S. Government has sent a démarche to embassies of all countries that supply tuna product to the United States notifying these countries of the TTVP training course. 2016 IFR, at 15,447 (Exh. US-7). NOAA has also mailed over 2,100 hard copies of the Training Course to fishermen, importers, and processors.

wholesalers/distributors.[44] The retained information must be provided to NMFS upon request and must be sufficient for NMFS to conduct a trace-back of any tuna product marketed as dolphin safe to verify that the tuna product, in fact, meets the dolphin-safe labeling requirements.[45] The information also must be sufficient for NMFS to trace any non-dolphin safe tuna loaded onto the harvesting vessel back to one or more storage wells or other storage locations for a particular fishing trip to prove that such non-dolphin safe tuna was kept physically separate from dolphin-safe tuna through unloading. This new recordkeeping requirement applies to all tuna product labeled dolphin-safe if the product contains tuna harvested on a fishing trip that begins on or after May 21, 2016.

29. The 2016 IFR did not make changes to other aspects of the measure. For example, it made no changes to the certification requirements or tracking and verification requirements that apply for tuna product produced from the ETP large purse seine fishery. As discussed below, those requirements are set by the Agreement on the International Dolphin Conservation Program (AIDCP) and cross referenced in the U.S. measure. Likewise, the 2016 IFR made no changes to the eligibility criteria, including the criterion regarding setting on dolphins. As discussed below, setting on dolphins is a fishing method that is *inherently* dangerous to dolphins, and nothing in the available data regarding risks to dolphins (or, for that matter, the DSB recommendations and rulings) requires the United States to allow tuna product produced from such a fishing method to be marketed as "dolphin safe."

IV. THE THREAT TO DOLPHINS POSED BY TUNA FISHING

30. It is useful to understand the U.S. measure in the context of its objectives and the evidence relating to the contribution of that measure to its objectives.

31. As the four previous reports in this dispute have recognized, the objectives of the U.S. measure "are, first, 'ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins', and, second, 'contributing to the protection of dolphins, by ensuring that the US market is not used to

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[44] 50 C.F.R. § 216.91(a)(5) (Exh. US-2) ("(5) Other fisheries – chain of custody recordkeeping. By a vessel in a fishery other than one described in paragraph (a)(1) or (2) of this section unless: (i) For tuna designated dolphin-safe that was harvested on a fishing trip that began on or after May 21, 2016, in addition to any other applicable requirements: (A) The importer of record or U.S. processor of tuna or tuna products, as applicable, maintains information on the complete chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors to enable dolphin-safe tuna to be distinguished from non-dolphin-safe tuna from the time it is caught to the time it is ready for retail sale; (B) The importer of record or the U.S. processor, as appropriate, ensures that information is readily available to NMFS upon request to allow it to trace any non-dolphin-safe tuna loaded onto the vessel back to one or more storage wells or other storage locations for a particular fishing trip and to show that such non-dolphin-safe tuna was kept physically separate from dolphin-safe tuna through unloading."); 2016 IFR, at 15,447 (Exh. US-7).

[45] 2016 IFR, at 15,447 (Exh. US-7) ("NMFS expects that typical supply chain records that are kept in the normal course of business, including declarations by harvesting and carrier vessels, bills of lading and forms voluntarily used or required under foreign government or international monitoring programs, which include such information as the identity of the custodian, the type of processing, and the weight of the product, would provide sufficient information for NMFS to conduct a trace back.").

encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.'[46] In the first compliance proceeding, the United States submitted a substantial amount of evidence regarding the risk to dolphins posed by different fishing methods in different parts of the world.[47] Based on this evidence, the first compliance panel found that setting on dolphins is distinct from other fishing methods, in terms of the risk that it poses to dolphins, and that the ETP large purse seine fishery has a "special risk profile" for dolphins because this high risk fishing method is "systematically" used only in that fishery.[48] The evidence on the record during the first compliance proceeding, and the new evidence that has become available since, demonstrates the correctness of both of these findings.

32. In this section, the United States explains the two highly interrelated principles that help confirm that the eligibility criteria, certification requirements, and tracking and verification requirements are "calibrated" to different risks to dolphins in different fisheries around the world. In section IV.A, the United States explains that setting on dolphins is a fishing method that is inherently dangerous to dolphins and, as such, is distinct from other fishing methods that produce tuna product that are potentially eligible for the dolphin safe label. In section IV.B, the United States explains that, because this inherently dangerous fishing method is only practiced "systematically" in the ETP large purse seine fishery, this particular fishery has a distinct risk profile for dolphins compared to other fisheries. In both sections, the United States relies on the evidence that was before the first compliance panel supplemented with additional evidence that has become available since the previous proceeding.

A. Setting on Dolphins Is a Unique Fishing Method That Is Inherently Unsafe for Dolphins

33. In the first compliance proceeding, the United States submitted substantial evidence regarding the unique risks to dolphins resulting from the intentional encirclement and capture of dolphins that is routinely used by purse seine vessels in the ETP large purse seine fishery. After reviewing this evidence, the first compliance panel agreed with the United States that setting on dolphins differs from other fishing methods in both "quantitative and qualitative terms" and specifically disagreed with Mexico 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."[49] As discussed below, that factual conclusion remains valid and continues to be confirmed by the evidence.

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[46] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.16; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.525; *US – Tuna II (Mexico) (AB)*, para. 325; *US – Tuna II (Mexico) (Panel)*, paras.7.401, 7.413, and 7.425.

[47] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.116, 7.240-245; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.244.

[48] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-242, 7.244-245 (agreeing with the United States that setting on dolphins differs from other fishing methods); *id.* para. 7.398 (noting the "special risk profile" of the ETP large purse seine fishery); *see also id.* paras. 7.240, 7.278 (min. op.), 7.282 (min. op.) (making the same point).

[49] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-242 (citing U.S. submissions); *see also id.* paras. 7.244-245 (agreeing with the United States that there is a "difference between fishing methods that cause

34. "Setting on dolphins" is a method of fishing for tuna in which a purse seine vessel locates a herd of dolphins, intentionally chases the dolphins with speedboats, a helicopter, and the vessel itself until they are exhausted, and captures the dolphins in a large purse seine net in order to harvest the tuna swimming underneath.[50] In an average ETP dolphin set, approximately 600 dolphins are chased and approximately 300-400 dolphins are captured.[51] The commercial effectiveness of the fishing method depends on the existence of a strong "association" between tuna and dolphins such that not only will tuna likely be underneath the dolphins when the dolphins are first spotted, but that the tuna will stay with the dolphins during their chase and capture. Such an association exists between dolphins and one species of tuna – yellowfin – in part of the ETP.[52] There is no known fishery other than the ETP large purse seine fishery where the tuna-dolphin association is such that a commercial fishing fleet is able to conduct "widespread" and "systematic" sets upon dolphins in order to harvest tuna.[53]

35. A typical dolphin set involves a sustained interaction between a purse seine vessel, speed boats, a helicopter, divers, and the net, on the one hand, and a large herd of dolphins, on the other.[54] The set begins when the purse seine vessel or scouting helicopter spots the herd of dolphins. The purse seine vessel then moves toward the dolphins, the dolphins flee, and the purse seine vessel, speed boats, and helicopter pursue the dolphins. This chase phase often lasts 20-40 minutes but can take over two hours to complete.[55] During the chase, slower dolphins

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harm to dolphins only incidentally and those, like setting on, that interact with dolphins 'in 100 per cent of dolphin sets,'" and that "[t]his distinction is especially important where, as the United States argues is the case with setting on – the particular nature of the interaction is itself 'inherently dangerous' to dolphins, even where no dolphin is seen to be killed or seriously injured, because it has unobservable deleterious effects on dolphins' physical and emotional well-being") (quoting U.S. submissions).

[50] Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 ("Gerrodette 2009") (Exh. US-12) (1st 21.5 Exh. US-29); *see also* U.S. Response to 1st 21.5 Panel Question 20, para. 122.

[51] *See* "Tables Summarizing Fishery-by-Fishery Evidence on the Record," tables 1-2 (Exh. US-13) (showing that, between 2009 and 2013, a total of 18.6 million dolphins were encircled in a total of 52,115 dolphin sets, for an average of 356.5 dolphins encircled per dolphin set). On average, 6.3 million dolphins are chased and 3.7 million dolphins are captured every year by ETP large purse seine vessels. *See id.*; IATTC, EPO Dataset 2009-2013 (Exh. US-16) (1st 21.5 Exh. US-26).

[52] As evidenced by the location of dolphin sets in the years 2004-2013, the association occurs predominately east of the 130° west longitude, although the association can, on occasion, extend outwards towards the 140° west longitude, depending on environmental factors such as currents and water temperatures. *See* IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-41) (1st 21.5 Exh. US-123). In addition, dolphin sets do not appear to occur north of the 30° north parallel or south of 20° south parallel. *Id.*; *see also* U.S. Response to 1st 21.5 Panel Question 3, para. 9 (stating same).

[53] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242.

[54] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-240.

[55] Barbara E. Curry, *Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean*, NOAA NMFS Technical Memorandum, at 6 (1999) (Exh. US-42) (1st 21.5 Exh. US-36).

(calves, for example) may to fall behind and become lost.[56] The chase ends when the dolphins, now exhausted, slow down, and the speed boats and the helicopter (flying close to the surface of the water) herd the dolphins into a tight group. The purse seine vessel then deploys its net around the dolphins.[57] Speedboats continue to circle the net opening to prevent dolphins from escaping prior to capturing the tuna underneath.[58] About 40 minutes after the net has been completely enclosed, the purse seine vessel can begin a "backdown" procedure to release the captured dolphins at the surface.[59] Divers may be deployed to help the dolphins escape by hoisting them over the net's floating cork line.

36. Setting on dolphins is *the only fishing method in the world* that systematically and intentionally targets a type of marine mammal to capture a commercially valuable fish. The intentional targeting of dolphins is – *by its very nature* – unsafe for dolphins. In a dolphin set, the fishing vessel (and its gear) "interacts with dolphins in a way that is uniquely intense, both in terms of the number of dolphins affected and the frequency of interaction."[60] The *inherent* dangerousness of this intense and sustained interaction between dolphins and fishing vessels means that setting on dolphins is also unique in terms of the level of harm it causes to dolphins.

37. First, scientific evidence supports the conclusion that setting on dolphins causes a unique category of indirect and unobservable harms that occurs as a result of the chase and encirclement process, independent of whether a dolphin is directly killed or injured.[61] These harms include calf-cow separation, muscular damage, immune system failures, reproductive system failures, and other adverse health effects.[62] Because these harms occur "as a result of the chase itself,"

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[56] *US – Tuna II (Mexico) (Panel)*, para. 7.499; 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, 24 (2007) (Exh. US-43) (1st 21.5 Exh. US-45).

[57] A purse seine net is a type of fishing gear consisting of a large wall of netting with floats along the top line and a lead line threaded through the bottom. A purse seine net is deployed as follows: when a school of fish is located, the purse seiner releases a smaller boat that has one end of the net tied to it; the seiner encircles the entire school with the rest of the net; when encirclement is complete, the lead line is pulled in, "pursing" the net closed at the bottom and preventing the fish from escaping. *See* U.S. First Written Submission to 1st 21.5 Panel, para. 82; Curry 1999, at 6 (Exh. US-42); Gerrodette 2009, at 1193 (Exh. US-12).

[58] Curry 1999, at 6 (Exh. US-42).

[59] Curry 1999, at 6 (Exh. US-42).

[60] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.); *see id.* para. 7.240 (stating that, compared to setting on dolphins, with other fishing methods, "the nature and degree of the interaction [between fishing vessels and dolphins] is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental)").

[61] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.197 (stating: "[I]n our view, the Panel reiterated the substance of the Appellate Body's findings when it indicated that 'the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins'").

[62] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120 (affirming that setting on dolphins is "particularly harmful to dolphins" because: "[V]arious adverse impacts can arise from setting on dolphins, beyond observed mortalities, including cow-calf separation during the chasing and encirclement, threatening the subsistence of the calf and adding casualties to the number of observed moralities [sic], as well as muscular damage, immune and reproductive system failures, and other adverse health consequences"); *see also*:

they can occur in every single dolphin set, regardless of whether the individual dolphins survive their interaction with the vessel and its gear.[63] By the very nature of these harms, their magnitude is extremely difficult to quantify, although it is almost certainly significant. From 2009 to 2013, for example, approximately 6.2 million dolphins were chased, and approximately 3.6 million were captured each year in ETP dolphin sets.[64] Each one of these dolphins was at risk of suffering indirect, unobservable harms.

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1. Noren & Edwards, "Physiological and Behavioral Development in Delphinid Calves," at 16, 20-21 (Exh. US-43) (summarizing 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");

2. 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-44) (1st 21.5 Exh. US-46);

3. 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-45) (1st 21.5 Exh. US-47) (concluding that the effect of dolphin sets on two measures of reproduction for Northeastern Spotted Dolphins "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");

4. Albert C. Myrick & Peter C. Perkins, "Adrenocortical Color Darkness and Correlates as Indicators of Continuous Acute Premortem Stress in Chase and Purse-Seine Captured Male Dolphins," 2 *Pathophysiology* 191, at 201-202 (1995) (Exh. US-46) (1st 21.5 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);

5. 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-47) (1st 21.5 Exh. US-28/MEX-119) (concluding 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");

6. 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-48) (1st 21.5 Exh. US-51) (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).

[63] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.121; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.195, 7.206, n.722.

[64] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, tables 1-2 (Exh. US-13); IATTC, EPO Dataset 2009-2013 (Exh. US-16).

38. The potential to cause these types of harms sets this fishing method apart from all others, which do not intentionally target dolphins and which do not depend on interactions with dolphins for their success.[65] As the first compliance panel correctly found, other fishing methods simply "do not cause *the same kinds of unobserved harms* to dolphins as are caused by setting on dolphins."[66] Rather, the indirect harms caused by other fishing methods – including longline, gillnet, and trawl fishing – are those that "flow from mortalities or injuries that are themselves observable, and whose occurrence renders non-dolphin-safe all tuna caught in the set or gear deployment in which the injury or mortality was sustained," as the first compliance panel correctly concluded.[67] Moreover, the unobservable harms caused by dolphin sets are an unavoidable consequence of the nature of the fishing method itself and would not be mitigated by measures to avoid direct mortality or serious injury of dolphins.[68] Thus, as the first compliance panel found, and the Appellate Body affirmed, these harms set apart setting on dolphins from other fishing methods, such as longlining and gillnetting.[69]

39. Second, setting on dolphins causes significant direct, observable mortalities, which, taken together with the unobservable harms, confirm that setting on dolphins is a uniquely high risk fishing method for dolphins. This distinction between setting on dolphins in the ETP and other fishing methods is confirmed not only by the historical and current mortality figures from the ETP, but also by the mortality data from other fisheries (both purse seine and non-purse seine).

40. As to the historical mortality figures in the ETP, the case is clear.[70] In the 1950s, purse seine vessels discovered the unique tuna-dolphin association occurring in part of the ETP and began taking advantage of this association by setting on dolphins to harvest tuna. These vessels did so without taking any measures to avoid the killing of those dolphins captured in their nets. As a result, purse seine vessels killed hundreds of thousands of dolphins each year from the late

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[65] *US – Tuna II (Article 21.5 – Mexico) (AB)*, n.463 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.135 (stating: "The Panel found 'that Mexico ha[d] not provided evidence sufficient to demonstrate that setting on dolphins does not cause observed and unobserved harms to dolphins, or that other tuna fishing methods consistently cause similar harms.'").

[66] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.585 (emphasis added); *see id.* para. 7.135; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202 (rejecting Mexico's DSU Article 11 appeal of the compliance panel's finding).

[67] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.134.

[68] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122 ("[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*.' These harms would continue to exist 'even if measures are taken in order to avoid the taking and killing of dolphins on the nets.' It is precisely because these unobserved harms *cannot be mitigated by measures to avoid killing and injuring dolphins* that the original panel and the Appellate Body found that the United States is entitled to treat setting on dolphins differently from other fishing methods.") (emphasis added) (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.504).

[69] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.122-135; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202, 7.246.

[70] *See, e.g., US – Tuna II (Mexico) (Panel)*, para. 7.493 ("The number of dolphins killed in the ETP before the adoption of the controls established by the AIDCP, and the ensuing degradation of the dolphin stocks in this area, are well-documented.").

1950s through the 1980s, with over 130,000 dolphins being killed annually as recently as 1986.[71] This scale of dolphin death eventually provoked public outrage and spurred governments to act, resulting in the 1990 enactment of the original DPCIA and the 1992 *Agreement for the Conservation of Dolphins* ("La Jolla Agreement"), which required 100 percent observer coverage on ETP large purse seine vessels.[72] In the 1990s, dolphin mortality in the fishery dropped from the hundreds of thousands annually to the tens of thousands.[73] It is estimated that since the beginning of this fishery, ETP purse seine vessels have killed over six million dolphins – *the greatest known mortality figure for any fishery anywhere in the world*.[74]

41. The current mortality figures from the ETP also confirm that setting on dolphins is inherently dangerous, even in light of the unique protections imposed by the AIDCP. As has been previously discussed, following the advent of the AIDCP, mortalities due to dolphin sets have fallen to approximately 1,000 dolphins per year.[75] Yet even this lower level of mortalities starkly illustrates the unique risk level posed by dolphin sets. Over the past decade, dolphin sets accounted for less than half (45.1 percent) of all sets by ETP large purse seine vessels (with the remaining sets being sets on "unassociated" schools and sets on floating objects (such as fish aggregating devices (FADs)).[76] Yet, as depicted in the table below, *dolphin sets accounted for nearly all (99.8 percent) of the dolphin mortalities in the fishery*.

Table 1. Observed Dolphin Mortalities due to ETP Large Purse Seine Vessels, by Set Type[77]

Year	Mortalities Due to Non-Dolphin Sets	Mortalities Due to Dolphin Sets	Total Mortalities	Dolphin Set Mortalities as % of Total
2005	0	1,151	1,151	100%
2006	2	884	886	99.8%

[71] Michael L. Gosliner, "The Tuna Dolphin Controversy," in Twiss & Reeves (eds.) *Conservation and Management of Marine Mammals* 120, 124 (1999) (Exh. US-49) (1st 21.5 Exh. US-34).

[72] *See US – Tuna II (Mexico) (Panel)*, para. 2.35-39 (summarizing the history); Agreement for the Conservation of Dolphins, art. 12 (1992) (Exh. US-50) (1st 21.5 Exh. US-40) ("La Jolla Agreement"). Consistent with the AIDCP, U.S. law, and the previous compliance panel's usage, this submissions uses the term "large purse seine vessel" to refer to purse seine vessels in the ETP with a carrying capacity greater than 363 metric tons and the term "small purse seine vessel" to refer to purse seine vessels in the ETP with a carrying capacity of 363 metric tons or less. *See US – Tuna II (Article 21.5 – Mexico) (AB)*, n.131.

[73] Gosliner, "The Tuna Dolphin Controversy," 120, 124 (1999) (Exh. US-49).

[74] Gerrodette 2009, at 1192 (Exh. US-12).

[75] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13) (showing that, from 2009-2014, 6,027 dolphins were killed due to dolphin sets in the ETP, for an average of 1,004.5 dolphin mortalities per year).

[76] IATTC, "Tuna, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2014," Doc. IATTC-89-04a, at Table A-7, IATTC 89th Meeting, June 29-July 3, 2015 (Exh. US-14) (showing that, from 2005 to 2014, of 227,649 total sets in the ETP large purse seine fishery 102,710, 45.1 percent, were dolphin sets).

[77] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, EPO Dataset 2009-2013 (Exh. US-16); IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2008* (2010) (Exh. US-51) (1st 21.5 Exh. US-43).

2007	1	837	838	99.9%
2008	1	1,168	1,169	99.9%
2009	2	1,237	1,239	99.8%
2010	1	1,169	1,170	99.9%
2011	10	976	986	99.0%
2012	0	870	870	100%
2013	1	800	801	99.9%
2014	0	975	975	100%
Total	**18**	**10,067**	**10,085**	**99.8%**

42. Thus, non-dolphin sets averaged 1.8 observed dolphin mortalities per year between 2005 and 2014, compared to an average of 1,006.7 dolphin mortalities per year during the same period due to sets on dolphins. In short, dolphin mortalities due to dolphin sets were, on average, ***559 times higher*** than dolphin mortalities in other kinds of purse seine sets. On a per set basis, between 2009 and 2014, dolphin mortality per 1,000 dolphin sets ranged from 74.5 to 113.4 dolphins, compared to between 0 and 0.83 dolphin mortalities per 1,000 non-dolphin sets. Overall, for 2009-2014, dolphin mortality per 1,000 dolphin sets was 94.92 dolphins, while dolphin mortality per 1,000 non-dolphin sets was 0.20 dolphins.[78]

43. This stark difference between dolphin sets and other sets is also evident in other data on purse seine, longline, and pole-and-line fishing, which collectively account for over 99 percent of the vessel records associated with U.S.-processed tuna and imported tuna and tuna product.[79]

44. With respect to purse seine fishing, the available evidence shows that setting on dolphins is quantitatively different from, and more dangerous to dolphins than, other types of sets:

- In the Western and Central Pacific Fisheries Commission (WCPFC) purse seine fishery in 2010, 98 percent of observed sets were unassociated or FAD sets, with the remainder being sets on whales or whale sharks.[80] In that year, there were an estimated 110 dolphin mortalities in the fishery – less than 10 percent of the corresponding figure for the ETP large purse seine fishery.[81] Further, because the WCPFC purse seine fishery is much

[78] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[79] *See* U.S. First Written Submission to 1st 21.5 Panel, paras. 125-128; William Jacobson Witness Statement, Appendix 2, 3 (Exh. US-52) (1st 21.5 Exh. US-4).

[80] *Summary Information on Whale Shark and Cetacean Interactions in the Tropical WCPFC Purse Seine Fishery*, at Table 1b, Paper prepared by SPC-OFP, 8th Regular Session, Koror, Palau (Nov. 2012) ("WCPFC Cetacean Interactions Paper") (Exh. US-17) (1st 21.5 Exh. US-58).

[81] WCPFC Cetacean Interactions Paper, Table 2b (Exh. US-17).

larger, in terms of fishing effort, the difference on a per set basis is even starker – an estimated *2.64* dolphin mortalities per 1,000 sets in the WCPFC in 2010 compared to *100 dolphins* per 1,000 dolphin sets in the ETP.[82]

- In the European purse seine tuna fishery in the Indian Ocean, a study of vessels engaging in sets on free-swimming schools and on floating objects during 2003-2009 found that in over 99 percent of sets, no marine mammal interaction occurred *at all*.[83] Further, no instances of dolphin interactions were recorded, and most of the interactions likely involved whales.[84] Thus, zero to one percent of sets interacted with a dolphin in any way, compared to 100 percent of dolphin sets.

- Similarly, in the European purse seine fishery in the Atlantic Ocean, a study of vessels engaging in unassociated and floating object sets between 2003 and 2007 recorded only two "catch events" of marine mammals, both involving baleen whales.[85] An update for 2008-2009 covered 27 trips (791 sets) and recorded no interactions at all with marine mammals, including dolphins, on the covered trips.[86]

45. With respect to longline fishing, observer data from the U.S. Western Pacific longline fisheries targeting tuna indicate that the vast majority of fishing *trips* occur without any dolphin interactions *at all*.[87] Further, dolphin mortalities in U.S. longline fisheries are a small fraction of dolphin mortalities due to setting on dolphins in the ETP.[88] And, as discussed further below, this

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[82] *See* WCPFC Cetacean Interactions Paper, Table 2b (Exh. US-17); IATTC, EPO Dataset 2009-2013 (Exh. US-16) (showing, for 2010, 1,169 dolphin mortalities due to 11,646 dolphin sets, for a total of 100.4 dolphins killed per 1,000 sets).

[83] *See* Monin J. Amande *et al.*, "Precision in Bycatch Estimates: The Case of Tuna Purse Seine Fisheries in the Indian Ocean," *ICES J. Mar. Sci.*, at 6 (2012) (Exh. US-21) (1st 21.5 Exh. US-131).

[84] *See* Amande *et al.* 2012, at 2 (Exh. US-21). An earlier study of tuna seiners in the Western Indian Ocean (WIO) supports the findings of this study, concluding that: "In offshore regions of the WIO tuna-dolphin associations are rare, purse seining for them is not practiced, and there is no dolphin bycatch problem." *See* Evgeny V. Romanov, "Bycatch in the Tuna Purse Seine Fisheries of the Western Indian Ocean," 100 *Fisheries Bulletin* 90, at 91 (2002) (Exh. US-9) (1st 21.5 Exh. US-132).

[85] Monin J. Amande *et al.*, "Bycatch of the European Purse Seine Tuna Fishery in the Atlantic Ocean for the 2003-2007 Period," 23 *Aquat. Living Resour.* 353, 358 (2010) (Exh. US-19) (1st 21.5 Exh. US-133).

[86] Monin J. Amande *et al.*, "Bycatch and Discards of the European Purse Seine Tuna Fishery in the Atlantic Ocean: Estimation and Characteristics for 2008 and 2009," 66 *ICCAT Collect. Vol. Sci. Papers* 2114, 2117-2118 (2011) (Exh. US-20) (1st 21.5 Exh. US-134).

[87] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13); NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2015" (Exh. US-22) (showing that, of the 3,388 fishing trips observed since 2004, only 3.2 percent had any marine mammal interaction *at all*); NMFS, "American Samoa Longline Annual Reports – 2006-2015" (Exh. US-23) (showing that over 92 percent of all observed trips over the past decade have taken place without any marine mammal interaction).

[88] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13); NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2015" (Exh. US-22) (showing that, over the past decade, there were 2.63 marine mammal interactions per 1,000 observed sets, which is 2.8 percent of the 94.92 dolphin mortalities per 1,000 dolphin sets that, on average, have occurred in the ETP over the past 6 years); NMFS, "American Samoa

data is consistent with other studies of longline fisheries, including the Pacific Ocean longline fisheries of Australia, Taiwan, Micronesia, Fiji, Japan, Korea, and Tonga – where only a few, if any, cetacean interactions are observed each year[89] – and the EU Atlantic longline fishery, in which, in a total of 635 observed sets, only one instance of cetacean bycatch occurred.[90]

46. Finally, it is *uncontested* by Mexico that pole and line fishing is not associated with dolphin bycatch.[91]

47. Thus, the evidence on the record demonstrates that setting on dolphins is a unique fishing method that intentionally targets dolphins and that, as such, poses a higher level of risk to dolphins than other fishing methods. This higher level of risk encompasses both indirect, unobservable harms that are the result of "the chase itself," and direct, observable harms that are the result of the chase and capture of the dolphins. The ***final proof*** of the *inherent* danger of setting on dolphins, as compared to other fishing methods, is that the practice of intentionally encircling cetaceans (*i.e.*, dolphins, porpoises, and whales) with purse seine nets is banned in many other parts of the world, including by the Regional Fisheries Management Organizations (RFMOs) for the western central Pacific Ocean and the Indian Ocean[92] and by the United States, which prohibits all U.S. vessels from intentionally targeting any marine mammal (except under limited circumstances)[93] – a step that regulating authorities have *not* taken for other fishing methods, such as other purse seine sets, longlining, and trawling.

Longline Annual Reports – 2006-2015" (Exh. US-23) (showing that, over the same period, there were 3.3 marine mammal interactions per 1,000 sets, *i.e.*, 3.5 percent of dolphin mortalities per 1,000 dolphin sets in the ETP).

[89] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[90] *See* Hernandez-Milian, et al., "Results of a Short Study of Interactions of Cetaceans and Longline Fisheries in Atlantic Waters," 612 *Hydrobiologia* 251, 254 (2008) (Exh. US-40) (1st 21.5 Exh. US-85).

[91] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.366 (citing Mexico's Response to 1st 21.5 Panel Question 11, para. 51, U.S. First Written Submission to 1st 21.5 Panel, para. 236); *see* Eric L. Gilman & Carl Gustaf Lundin, *Minimizing Bycatch of Sensitive Species Groups in Marine Capture Fisheries: Lessons from Tuna Fisheries*, at 3 (2009) (Exh. US-53) (1st 21.5 Exh. US-69) (referring to "extremely low bycatch levels in pole-and-line fisheries," including of marine mammals).

[92] *See* WCPFC, Conservation and Management Measure 2011-03 (Mar. 2013) (Exh. US-54) (1st 21.5 Exh. US-11) ("CMMs shall prohibit their flagged vessels from setting a purse seine net on a school of tuna associated with a cetacean in the high seas and exclusive economic zones of the Convention Area, if the animal is cited prior to commencement of the set."); IOTC, Resolution 13/04 on the Conservation of Cetaceans (2013) (Exh. US-55) (1st 21.5 Exh. US-12) ("Contracting Parties and Cooperating Non-Contracting Parties (collectively CPCs) shall prohibit their flagged vessels from intentionally setting a purse seine net around a cetacean in the IOTC area of competence, if the animal is sighted prior to the commencement of the set."). A similar proposal remains under consideration at the ICCAT. *See* ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014) (Exh. US-56) (1st 21.5 Exh. US-13).

[93] Specifically, it is contrary to U.S. law for any person or vessel "subject to the jurisdiction of the United States to take any marine mammal on the high seas" or in waters under U.S. jurisdiction, except under certain limited circumstances specified in statute (of which purse seine fishing under the auspices of the AIDCP and the conduct of scientific research are examples). 16 U.S.C. § 1372 (Exh. US-57) (1st 21.5 Exh. US-37); 16 U.S.C. § 1362(13) (Exh. US-58) (1st 21.5 Exh. US-38) (defining "take" as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill").

B. The ETP Large Purse Seine Fishery Has a Different Risk Profile for Dolphins than Other Fisheries

48. In the first compliance proceeding, the United States submitted significant evidence regarding the specific risks to dolphins occurring in the ETP large purse seine fishery versus other fisheries. In its report, the first compliance panel concluded, based on the evidence on the record, that the ETP large purse seine fishery does, indeed, reflect a different risk profile from other fisheries because it is only in this particular fishery that dolphins are "systematically" intentionally chased and captured, as opposed to all other fisheries, where fishing vessels and their gear generally interact with dolphins only by accident.[94]

49. This finding was – and continues to be – confirmed by the evidence. Specifically, the evidence establishes that because the ETP large purse seine fishery is the only fishery where setting on dolphins is systematically practiced – *i.e.*, the only fishery where dolphins are routinely intentionally chased and captured by vessels in the pursuit of tuna – there is a unique level of interaction in the fishery between dolphins and fishing vessels (and speed boats, helicopters, divers, and purse seine nets). As a direct consequence of this unique level of interaction, the ETP large purse seine fishery is an exceptionally high-risk fishery for dolphins, as demonstrated by the available fishery-specific data.

50. The tuna-dolphin association that makes setting on dolphins an economically viable fishing method occurs to a unique degree in the ETP.[95] The frequency and intensity of the tuna-dolphin association in the ETP is demonstrated by the data concerning the number of intentional sets by large purse seine vessels on dolphins to catch tuna. As depicted in the table below, there were, on average, 10,423 dolphin sets in the ETP per year from 2009-2013, which amounted to 47.01 percent of all sets in the ETP large purse seine fishery during those years.[96]

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[94] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240 ("Other fishing methods in other oceans may – and, as the United States recognizes, do – cause dolphin mortality and serious injury, but because the nature and degree of the interaction is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental), there is no need to have a single person on board whose sole task is to monitor the safety of dolphins during the set or other gear deployment."); *id.* para. 7.398; *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."); *id.* para. 7.282 (min. op.); *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.220-227 (rejecting Mexico's DSU Article 11 appeal of the compliance panel's finding).

[95] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.220-227; *US – Tuna II (Mexico) (Panel)*, para. 7.520.

[96] *See also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.241 (noting the number of dolphin sets in 2012).

Table 2. Frequency of Dolphin Sets in the ETP[97]

Fishery	Year	Intentional Sets on Dolphins	Dolphins Chased	Dolphins Encircled	Dolphin Sets as % of All Sets
ETP Large Purse Seine	2009	10,910	7,106,662	4,307,169	49.38%
	2010	11,645	6,645,054	3,923,563	53.10%
	2011	9,604	6,095,530	3,428,728	44.24%
	2012	9,220	5,546,533	3,350,085	41.53%
	2013	10,736	5,906,880	3,572,052	46.82%
	Total	52,115	31,300,659	18,581,597	47.01%
	Average	**10,423**	**6,260,132**	**3,716,319**	**47.01%**

In fact, this tuna-dolphin association is so frequent and intense that it has been remarked that, in the ETP, "to catch dolphins is also to catch tuna."[98]

51. By contrast, in purse seine fisheries outside the ETP there is no evidence that vessels routinely intentionally set on dolphins. Rather, the available evidence describes only isolated, accidental or opportunistic incidents of sets on marine mammals (including dolphins) that are in the vicinity of the tuna at the particular time.[99] As set out in Table 3 below, less than one percent of the sets in purse seine fisheries outside the ETP involve any interaction *at all* with a dolphin, much less a mortality or serious injury.[100]

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[97] *See* IATTC, "Tuna, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2014," at Table A-7 (Exh. US-14); IATTC, EPO Dataset 2009-2013 (Exh. US-16).

[98] National Research Council, *Dolphins and the Tuna Industry*, at 45 (1992) (Exh. US-59) (1st 21.5 Exh. US-160).

[99] There is some evidence of opportunistic sets on whale sharks and manta rays, as tuna may congregate near these large fish. *See, e.g.*, Martin Hall & Marlon Roman, *Bycatch and Non-Tuna Catch in the Tropical Tuna Purse Seine Fisheries of the World*, at 64 (2013) (Exh. US-60) (1st 21.5 Exh. US-56) (stating that dolphin sets "are only significant in numbers in the EPO" and that although sets involving dolphins have been "observed in many other locations," it is "not as a frequent and consistent practice, utilized routinely as in the ETP"); *id.* at 19-21 (describing "dolphin sets," as they occur in the EPO as a distinct type of set, and "floating object" sets as another type, which can include "[s]ets on tuna schools associated with live whales" or, "with much lower frequency," "[o]ther cetaceans such as the minke whale . . ., pilot whales . . ., and the rough-toothed dolphin").

[100] It is important to distinguish between observed mortalities and serious injuries and the broader category of "interactions." Observed dolphin mortalities and serious injuries occur when a dolphin is seen to be killed or seriously injured in a fishing set. Dolphin "interactions" include observed mortalities and serious injuries but also include other contacts between dolphins and fishing vessels, such as depredation (in longline fisheries), chasing dolphins, encircling a dolphin in a purse seine net, entanglement in a net of any type, dolphin released alive, etc. *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.224 (stating that setting on dolphins "interact[s] with dolphins 'in 100 per cent of dolphin sets'"); Mexico's First Written Submission to 1st 21.5 Panel, para. 109 (stating

Table 3. Frequency of Sets with Dolphin Interactions in Purse Seine Fisheries Outside the ETP

Fishery	Year	Sets with Dolphin Interactions	Dolphins Chased	Dolphin Interactions	% Sets with Dolphin Interactions
WCPFC Purse Seine[101]	2007-2009	134	no evidence of any	798	0.70%
	2010	37	no evidence of any	397	0.18%
Eastern Tropical Atlantic Purse Seine[102]	2003-2009	0	0	0	0%
Indian Ocean Tropical Purse Seine[103]	2003-2009	fewer than 31	no evidence of any	unknown	less than 1% for all marine mammals

52. Moreover, as the first compliance panel found, most of the interactions that do occur outside the ETP are accidental.[104] As such, there is no evidence that vessels chase dolphins outside the ETP.[105] Further, where an accidental capture of dolphins does occur, only a handful of dolphins will likely be captured, [106] as opposed to the ETP large purse seine fishery, where 300-400 dolphins are captured per dolphin set, on average.[107] Indeed, the *whole point* of setting

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that "nearly all of the RFMOs have reports of interactions with longline fishing" including "depredation events" and "hooking and/or entangling of mammals") (citing Kobe II Bycatch Workshop Background Paper, at 2 (1st 21.5 Exh. MEX-39)); U.S. Response to 1st 21.5 Panel Question 7, para. 55 (describing reports of "interactions," including where marine mammals were caught in purse seine nets and released alive).

[101] *See* WCPFC Cetacean Interactions Paper, Table 2a, 2b (Exh. US-17); WCPFC Scientific Committee, *Fifth Regular Session Summary Report*, at 15 (2009) (Exh. US-18) (1st 21.5 Exh. US-159).

[102] *See* Amande *et al.* 2010, at 355-358 (Exh. US-19); Amande *et al.* 2011, at 2114-2118 (Exh. US-20).

[103] *See* Amande *et al.* 2012, at 2-3, and 6 (Exh. US-21).

[104] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 (affirming that the evidence on the record showed 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'"); *see also* WCPFC Cetacean Interactions Paper, at 3 (Exh. US-17) (stating that interactions with cetaceans "appear to be mainly incidental, rather than the result of sets specifically targeting at these animals").

[105] In neither the original proceeding, nor in the compliance proceeding, has there ever been any evidence on the record that dolphins in any fishery outside the ETP were being chased to catch tuna, as they are in approximately 10,000 dolphins sets per year in the ETP. *See US – Tuna II (Mexico) (AB)*, para. 251; *US – Tuna II (Mexico) (Panel)*, n. 729-731 and the sources cited therein (presenting *no* evidence that any dolphins are chased to catch tuna in any fishery outside the ETP); *see also id.* para. 7.520 (stating that there are "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP"); *US – Tuna II (Mexico – Article 21.5) (AB)*, paras. 7.221-7.226; *see also* Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-13); *US – Tuna II (Mexico – Article 21.5) (AB)*, paras. 7.221-227.

[106] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13) (showing that, between 2007 and 2010 in the WCPFC purse seine fishery, a dolphin interaction occurred in 171 out of 39,989 observed sets, involving a total of 1,195 dolphins, giving an average of 7.0 dolphins involved in each interaction).

[107] Tables Summarizing Fishery-by-Fishery Evidence on the Record, tables 1-2 (Exh. US-13).

on dolphins in the ETP large purse seine fishery is to chase *as many dolphins as possible* because it is likely that there will be more tuna under a bigger herd of dolphins than under a smaller one.[108]

53. Thus, the evidence is clear. In the ETP, there is a frequent, intense bond between tuna and dolphins. Large purse seine vessels are able and permitted to exploit this bond, and they do so, intentionally setting on dolphins about 10,000 times per year. These sets involve chasing approximately 6 million dolphins and capturing 3-4 million dolphins each year. Outside the ETP, tuna may sometimes be found in the vicinity of dolphins – as they may be with other floating objects such as logs, FADs, and, in some cases, other marine mammals or whale sharks. And purse seine vessels will, on occasion, capture dolphins in pursuit of tuna. But this happens infrequently – in less than 1 percent of all observed sets in all of the other purse seine fisheries discussed on the record – and does not involve the level of interaction that comes with intentional dolphin sets, which include a prolonged chase of hundreds of animals.

54. The available fishery-by-fishery evidence confirms this general picture, clearly establishing that the ETP large purse seine fishery has a special risk profile for dolphins compared to the risk profiles of other fisheries. Specifically, the evidence establishes: (1) that the scale on which the fishery interacts with dolphins, and thus the potential for dolphin harm, is of a different magnitude in the ETP large purse seine fishery; and, (2) that the ETP large purse seine fishery has a higher level of observed mortality (and, of course, unobservable harms) than other fisheries do.

55. With respect to dolphin interactions, the available scientific evidence demonstrates that, in tuna fisheries other than the ETP large purse seine fishery, any interaction with dolphins *at all* is extremely rare.

- In the WCPFC purse seine fishery between 2007 and 2009, observers reported that a dolphin interaction occurred in only 134 of nearly 20,000 observed sets – *i.e.*, in only 0.70 percent of the sets observed. In 2010, only 37 of 20,853 observed sets – 0.18 percent – interacted with a dolphin.[109] Similarly, observers on New Zealand purse seine vessels in the WCPFC convention area in 2008 observed 28 percent of all sets and reported no marine mammal interactions.[110]

- In the eastern tropical Atlantic purse seine fishery between 2003 and 2009, observers on European vessels documented zero cetacean interactions in 1,389 observed sets.[111]

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[108] Prior to encirclement, the helicopter will typically guide the speed boats and fishing vessel towards the majority of tuna with the least number of dolphins and have the boars drive away the rest of the herd from the group of dolphins that the vessel intends to capture.

[109] WCPFC Cetacean Interactions Paper, tables 2a, 2b (Exh. US-17).

[110] WCPFC Scientific Committee, *Fifth Regular Session Summary Report*, at 15 (2009) (Exh. US-18).

[111] Amande et al. 2010, at 353, 355-58 (Exh. US-19); Amande et al. 2011, at 2113, 2114-18 (Exh. US-20).

- In the European purse seine fishery in the tropical Indian Ocean, less than 1 percent of the 3,052 sets observed involved any marine mammal interaction, and no marine mammals were encircled or caught.[112]

- In the Hawaii deep-set longline fishery between 2004 and 2015, observers covered 3,388 vessel trips – between 20 and 26 percent of the trips each year – and reported that a marine mammal interaction occurred in only 3.19 percent of trips.[113] Moreover, over 99 percent of sets occurred without any marine mammal interaction,[114] and those interactions that occurred usually involved a single mammal or, at most, two or three.[115]

- Similarly, in the American Samoa longline fishery between 2006 and 2015, over 92 percent of all observed trips and over 99 percent of all observed sets occurred without any marine mammal interaction at all, and the interactions that occurred involved at most 2 or 3 dolphins.[116] In 2014-2015, for example, only 3 of the 1,069 observed sets (0.28 percent) had any marine mammal interaction, and each interaction involved 1 or 2 mammals.[117]

- Studies of the EU and U.S. Atlantic longline fisheries have found that a cetacean interaction occurred in only 4.4 and 2.70 percent, respectively, of all observed sets.[118]

- Finally, annual reports for 2014 from observers in other Pacific Ocean longline and purse seine fisheries confirm the rarity of marine mammal interactions in those fisheries.[119]

56. Thus the available fishery-by-fishery evidence demonstrates that the potential for harm to dolphins is on a completely different scale in the ETP large purse seine fishery than in other fisheries. In the ETP large purse seine fishery, a huge number of sets (nearly half of all sets)

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[112] Amande et al. 2012, at 2-3, and 6 (Exh. US-21).

[113] NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2015" (Exh. US-22); Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13).

[114] NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2015" (Exh. US-22); Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13).

[115] NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2015" (Exh. US-22) (showing that in most years the number of trips with a marine mammal interaction was equal or nearly equal to the number of marine mammal interactions overall, proving that, as a general matter, a trip designated as having a marine mammal interaction involved exactly 1 interaction with 1 dolphin).

[116] NMFS, "American Samoa Longline Annual Reports – 2004-2015" (Exh. US-23); Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13).

[117] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13); NMFS, "American Samoa Longline Annual Reports – 2014-2015" (Exh. US-23).

[118] *See* Hernandez-Milian, et al., "Results of a Short Study of Interactions of Cetaceans and Longline Fisheries in Atlantic Waters," 612 *Hydrobiologia* 251, 254 (2008) (Exh. US-40); NOAA Fisheries, 2015 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species, at 43 (showing number of observed sets), 50-51 (showing observed marine mammal interactions) (2015) (Exh. US-39).

[119] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

interact with, and potentially harm, either directly or indirectly, hundreds to tens of thousands of dolphins annually. In other fisheries, interactions with dolphins rarely occur. Thus, in the vast majority of trips and sets in purse seine and longline fisheries outside the ETP large purse seine fishery, the risk of a dolphin being harmed is orders of magnitude less than in the ETP.

57. With respect to observed dolphin mortalities, the available evidence confirms that the ETP large purse seine fishery, even subject to the unique requirements imposed by the AIDCP, remains a highly dangerous fishery for dolphins. As shown in Table 1 above, over the past decade, large purse seine vessels in the ETP have caused, on average, over 1,000 dolphin mortalities, each year. *Nearly all of these mortalities have been caused by dolphin sets*. On a per set basis (to control for the size of the fishery and make comparisons across fisheries possible), dolphin sets in the ETP large purse seine fishery have caused 94.92 dolphin mortalities for every 1,000 sets between 2009 and 2014.[120] On a per trip basis, ETP large purse seine vessels caused, on average, 1.4 dolphin mortalities for every trip they took from 2009-2013.[121]

58. By contrast, the available fishery-by-fishery scientific evidence demonstrates that the rate of dolphin mortality in other fisheries is a small fraction of this level.

- In the WCPFC purse seine fishery, in 2010 – the first year of expanded observer coverage in the fishery[122] – there were 55 dolphin mortalities in 20,853 observed sets. This is roughly *double* the number of dolphin sets in the ETP that year, which resulted in 1,170 dolphin mortalities.[123] On a per set basis, dolphin mortality in the WCPFC purse seine fishery was 2.64 dolphins per 1,000 sets compared to 100.4 dolphins per 1,000 dolphin sets in the ETP in that same year.[124]

- In the purse seine fisheries in the eastern tropical Atlantic and tropical Indian Oceans, observers on 1,389 and 3,052 sets, respectively, between 2003 and 2009 observed zero marine mammal mortalities.[125]

- In the Hawaii deep-set longline fishery, which is about half as large as the ETP large purse seine fishery in terms of registered vessels, estimated annual mortality and injury of dolphins was 25.23 animals per year for 2002-2006 and 40.4 animals per year for 2006-

[120] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[121] *See* IATTC, "AIDCP Observer Program Info" (data received by Erika Carlsen, NOAA, from Ernesto Altamirano Nieto, IATTC) (July 14, 2014) (Exh. US-64) (1st 21.5 Exh. US-117) (showing that ETP large purse seine fishery have conducted, on average, 728 trips per year from 2009-2013, suggesting that these vessels conduct approximately 31 sets per trip); "Tables Summarizing the Fishery-by-Fishery Evidence on the Record," table 2 (Exh. US-13) (showing that average annual dolphin mortality in the fishery is 1,006.8 dolphins per year).

[122] *See* WCPFC, Conservation and Management Measure 2008-01 for Bigeye and yellowfin Tuna in the Western and Central Pacific Ocean (Dec. 2008), para. 28 (Exh. US-65) (1st 21.5 Exh. US-139).

[123] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13).

[124] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13); WCPFC Cetacean Interactions Paper, at 4-6 (Exh. US-17).

[125] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13).

2010.[126] Those numbers represent mere fractions of the over 1,000 dolphins that are, on average, killed every year in the ETP due to setting on dolphins.[127] Between 2014 and 2015, there were 25 dolphin mortalities and injuries in 7,559 observed sets, for a rate of 3.31 dolphin mortalities *and injuries* per 1,000 sets.[128]

- In the American Samoa longline fishery between 2006 and 2012, there were a total of 16 dolphin mortalities and injuries in 4,684 observed sets, *i.e.*, 3.42 dolphin mortalities *and injuries* per 1,000 sets.[129] From 2014-2015, there were 3 dolphin mortalities and injuries in 1,069 observed sets, or, 2.81 mortalities and injuries per 1,000 sets.[130]

- In the Australian longline fishery in the WCPFC convention area, there have been 8 "captures" of marine mammals (some of which may not have been injured) in the approximately 1,181 observed sets between 2010 and 2014, for a mortality rate of approximately 6.77 dolphins per 1,000 sets.[131]

- Data from other countries' purse seine and longline vessels operating in the WCPFC convention area further demonstrate that dolphin mortality in these fisheries is zero or very low.[132]

- As discussed previously, the only other fishing method that produces a significant portion of tuna for the U.S. tuna product market is pole and line fishing. And it is uncontested that pole and line fishing is not associated with dolphin bycatch.

59. Thus, the available scientific evidence demonstrates that the first compliance panel was indeed correct in finding that the ETP large purse seine fishery has a "special risk profile" for dolphins.[133] No evidence establishes that any other fishery approaches the ETP large purse seine fishery in terms of the level of interaction that occurs between dolphins and fishing vessels. Further, the evidence confirms that this unique level of interaction in the ETP continues to drive

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[126] *See* William A. Karp, Lisa L. Desfosse, & Samantha G. Brooke (eds.), NMFS, *U.S. National Bycatch Report*, at 391, Table 4.6.C.1 and 394, Table 4.6.D.1 (2011) (Exh. US-61) (1st 21.5 Exh. US-66); "U.S. National Bycatch Report First Edition Update," Table 8.3 (Exh. US-62) (1st 21.5 Exh. US-67); "U.S. National Bycatch Report First Edition Update," Table 8.4 (Exh. US-63) (1st 21.5 Exh. US-68).

[127] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13).

[128] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); NMFS, "Hawaii Deep-Set Longline Annual Reports – 2014-2015" (Exh. US-22).

[129] NMFS, "American Samoa Longline Annual Reports – 2004-2013" (Exh. US-23).

[130] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); NMFS, "American Samoa Longline Annual Reports – 2014-2015" (Exh. US-23).

[131] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[132] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[133] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398; *see also id.* para. 7.240; *id.* paras. 7.278, 7.282 (min. op.).

high levels of both unobservable, indirect harms and direct, observed mortalities and serious injuries.

C. Conclusions Regarding the Risks to Dolphins Posed by Tuna Fishing

60. The evidence demonstrates that setting on dolphins is an inherently dangerous fishing method for dolphins and that it is distinct from the fishing methods that can produce dolphin safe tuna product for the U.S. market. The evidence also shows that, because setting on dolphins is routinely employed only in the ETP large purse seine fishery, this fishery has a distinct risk profile compared to other fisheries. Thus, the first compliance panel's factual findings based on the record in that proceeding remain valid and are confirmed by the evidence.

61. This is not to say that the evidence demonstrates that other fishing methods do not cause any harm to dolphins, or that setting on dolphins cannot be conducted in ways that are more or less deadly for dolphins. Certainly, the AIDCP is proof of that – where direct, observed mortalities used to be in the hundreds of thousands every year, they are now about a thousand, which is a considerable achievement for the parties to the AIDCP. The evidence proves, however, that although the AIDCP has been effective in reducing observed mortalities, setting on dolphins cannot ever be a "safe" fishing method for dolphins.

62. In short, a fishing method that relies on the intentional chase and capture of hundreds of dolphins is not "safe" for dolphins, no matter what restrictions are in place. Nor can it ever be said that a fishery that relies on the intentional targeting of dolphins is like a fishery where dolphin interactions are accidental. The two categories of fisheries are simply different for purposes of the dolphin safe label.

V. THE AMENDED MEASURE IS CONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

63. As discussed in this section, the U.S. measure, as amended by the 2016 IFR, is consistent with Article 2.1 of the TBT Agreement because any detrimental impact it causes stems exclusively from legitimate regulatory distinctions and, as such, does not support a finding that the measure accords less favorable treatment to Mexican tuna product. In section V.A below, the United States explains the requirements of Article 2.1. Section V.B summarizes the detrimental impact at issue. Section V.C demonstrates that the U.S. measure is consistent with Article 2.1 because the 2016 IFR directly addressed the DSB recommendations and rulings in the first compliance proceeding, as well as other concerns raised by the first compliance panel.

A. What Article 2.1 Requires

64. Article 2.1 contains both a national treatment obligation and a most favored nation treatment obligation.[134] To establish a breach of Article 2.1, the complainant must prove three elements:

[134] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.25.

> (i) that the measure at issue is a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement; (ii) that the relevant products are 'like products'; and (iii) that the measure at issue accords less favourable treatment to the imported products than to the relevant group of like products.[135]

65. The Appellate Body has interpreted the less favorable treatment element as requiring a two-step analysis. First, the panel must determine that the challenged measure "modifies the conditions of competition to the detriment of such imported products vis-à-vis like products of domestic origin and/or like products originating in any other country."[136] If the panel makes such a finding, it then must determine whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[137]

66. As to the second step of the analysis, the Appellate Body has stated that "Article 2.1 should not be read to mean that any distinctions, in particular ones that are based exclusively on such particular product characteristics, or on particular processes and production methods, would *per se* constitute less favourable treatment within the meaning of Article 2.1."[138] Rather, a measure does not provide less favorable treatment to imported products "where the detrimental impact on imports stems exclusively from a legitimate regulatory distinction."[139] To make such a determination, the panel should analyze whether the measure "is *even handed* in its design, architecture, revealing structure, operation, and application *in the light of the particular circumstances of the case*."[140] Thus, while an assessment of whether a detrimental impact can be reconciled with or is rationally related to the policy pursued by the measure can be "helpful" to this part of the analysis,[141] "'even-handedness' is *the central concept* for determining whether the identified detrimental treatment stems exclusively from a legitimate regulatory distinction."[142]

67. As recounted by the Appellate Body, even-handedness is "a relational concept, and must be tested through a comparative analysis."[143] In the circumstances of this dispute, it is well established that there is "*a special relevance*" of the calibration analysis to the inquiry of whether the measure is even-handed.[144] As such, for this part of the analysis, the panel must assess

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[135] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.25 (citing *US – Tuna II (Mexico) (AB)*, para. 202).

[136] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.26 (citing *US – Tuna II (Mexico) (AB)*, para. 215).

[137] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.26 (citing *US – Tuna II (Mexico) (AB)*, para. 215).

[138] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.30.

[139] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.30.

[140] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.31 (emphasis added).

[141] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.106-107.

[142] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.96 (emphasis added).

[143] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.125.

[144] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101 (emphasis added); *see also id.* para. 7.112 ("We reiterate that these Article 21.5 proceedings form part of a continuum, such that due cognizance must be accorded to

whether "the differences in labelling conditions for tuna products containing tuna caught by large purse-seine vessels in the ETP, on the one hand, and for tuna products containing tuna caught in other fisheries, on the other hand, are 'calibrated' to the differences in the likelihood that dolphins will be adversely affected in the course of tuna fishing operations by different vessels, using different fishing methods, in different areas of the oceans."[145] Failure to conduct such an analysis in evaluating the even-handedness of the eligibility criteria, certification requirements, and tracking and verification requirements constitutes reversible error.[146] In this regard, the Appellate Body *squarely rejected* Mexico's position that whether these elements are calibrated to differences in risk is not relevant (much less determinative) to the question of whether these three regulatory distinctions are even-handed, and that the panel should only look to whether the distinctions can be reconciled with the objectives of the measure.[147]

B. The Detrimental Impact

68. As noted above in section III, the 2016 IFR does not alter the eligibility criterion pertaining to setting on dolphins. As such, under the current version of the measure, as under the previous versions challenged in the two prior proceedings, tuna product produced from setting on dolphins remains ineligible for the dolphin safe label, while tuna product produced from tuna

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the recommendations and rulings made by the DSB in the original proceedings, based on the adopted findings of the Appellate Body and original panel.").

[145] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101; *see also id.* para. 7.160 ("If, for example, the Panel established that the risks posed to dolphins in the different fishing areas and by the different fishing methods are the same, then it may properly have reached the conclusion that treating them differently is not 'even-handed.' If, however, the Panel considered that the risk profiles are different, then further inquiry would have been needed into whether the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could be explained as commensurate with the different risks associated with tuna fishing in different oceans and using different fishing methods.").

[146] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.157 ("These considerations suggest to us that the Panel's inquiry in these Article 21.5 proceedings should have included an assessment of whether, under the amended tuna measure, the differences in labelling conditions for tuna products containing tuna caught in the ETP large purse seine fishery, on the one hand, and for tuna products containing tuna caught in other fisheries, on the other hand, are 'calibrated' to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the different fisheries."); *see also id.* paras. 7.169, 7.249.

[147] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.80 (noting that, "[a]ccording to Mexico, the jurisprudence developed by the Appellate Body in interpreting Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 *does not include a 'calibration' test*. … In response to questioning at the oral hearing, Mexico added that, even if 'calibration' may be one way to assess whether a regulatory distinction involves arbitrary or unjustifiable discrimination, *such an examination is not appropriate in the present dispute*, in particular, given that the amended tuna measure does not incorporate or reflect any concept of 'calibration.'") (emphasis added); *see also id.* n.492 ("Indeed, Mexico *disputed the relevance* of the concept of 'calibration' to the analysis of the even handedness of the amended tuna measure. In Mexico's view, such concept is 'inconsistent with the primary objective of the measure in question, which is concerned with the accuracy of information provided to consumers. . . . For Mexico, '[t]una is either dolphin safe or it is not – *eligibility for the dolphin safe label cannot be viewed as a relative assessment*.'") (quoting Mexico's Second Written Submission to 1st 21.5 Panel, para. 173) (emphasis added).

harvested by other fishing methods, such as purse seine fishing (without setting on dolphins), longline, pole and line, etc. remains potentially eligible.[148]

69. The United States has no reason to believe that the key facts have changed since the prior compliance proceeding, and, therefore, assumes that it remains the case that, due to the eligibility criteria, "most Mexican tuna products are still being excluded from access to the dolphin-safe label, whereas most like products from the United States and other Members are still eligible for such label."[149] In particular, it was uncontested that "because Mexico's tuna fleet is comprised 'virtually' entirely of large purse seine vessels setting on dolphins in the ETP, Mexico does not export 'any products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure.'"[150] As such, the basis for the finding of the original proceeding that the denial of access to the label to Mexican tuna product results in a detrimental impact remains unchanged.[151] Accordingly, the United States does not dispute that the first step of the Article 2.1 analysis is satisfied.

C. The Detrimental Impact Stems Exclusively from Legitimate Regulatory Distinctions

70. The Appellate Body analyzed four aspects of the U.S. measure to determine whether the detrimental impact stems exclusively from a legitimate regulatory distinction: the eligibility criteria, the certification requirements, the tracking and verification requirements, and the determination provisions. As to the regulatory distinctions made in the first three aspects, the Appellate Body determined that it was unable to make a finding because, in the Appellate Body's view, sufficient factual findings and uncontested evidence did not exist for the Appellate Body to determine whether these regulatory distinctions are "calibrated" to the differences in risk

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[148] 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2). As the United States demonstrated to the first compliance panel, tuna caught by purse seine fishing (without setting on dolphins), longline, and pole and line fishing produce approximately 99% of the tuna product in the U.S. market. *See* U.S. First Written to 1st 21.5 Panel, paras. 125-128 (showing that tuna caught by these three fishing methods makes up over 99.9 percent of the tuna caught by U.S. vessels and sold as tuna product in the U.S. market and over 99 percent of the vessel records for imported tuna sold in the U.S. tuna product market); William Jacobson Witness Statement, Appendix 3 (Exh. US-52). Other fishing methods include gillnet (which produces tuna that is potentially eligible for the label) and large-scale driftnets (which produces tuna that is not eligible for the label). 50 C.F.R. § 216.91(a)(2) (Exh. US-2).

[149] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.235 (citing Mexico's First Written Submission to 1st 21.5 Panel, paras. 223-224 and 231-232).

[150] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.235 (quoting U.S. Appellant Submission, para. 329 (referring to and quoting Mexico's Response to 1st 21.5 Panel's Question No. 57, paras. 155 and 146, respectively); *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.235 ("Mexico also submitted that 'virtually all of [its] purse seine tuna fleet continues to fish in the ETP by setting on dolphins.'") (quoting Mexico's First Written Submission to 1st 21.5 Panel, para. 227); *US – Tuna II (Article 21.5 – Mexico) (AB)*, n.783 ("According to Mexico, as of 2012, its tuna fishing fleet operating in the ETP was comprised of '39 large purse-seine vessels' and 'three small vessels.'").

[151] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.236 (recounting the findings of the original proceeding).

to dolphins associated with different fishing methods and different areas of the oceans.[152] However, the Appellate Body considered that the question of whether the design of the determination provisions was even-handed did not depend on the calibration analysis, ultimately upholding the first compliance panel's finding that the design of the determination provisions was not even-handed.[153] This was the sole basis that the Appellate Body found that the detrimental impact did not stem exclusively from legitimate regulatory distinctions.

71. In section V.C.1, the United States explains how the 2016 IFR brings the measure into compliance with the DSB recommendations and rulings. The submission then further explains in section V.C.2 how the 2016 IFR addresses other concerns expressed by the first compliance panel, demonstrating why, looked at independently, the regulatory distinctions made by the eligibility criteria, the certification requirements, and the tracking and verification requirements are even-handed. In section V.C.3, the United States concludes by synthesizing these analyses and conclusions concerning these "highly interconnected" elements of the measure to explain why the detrimental impact stems exclusively from legitimate regulatory distinctions when viewing these four aspects of the measure as a whole.[154]

1. The 2016 IFR Brings the Measure into Compliance

72. As discussed above, the determination provisions authorize NOAA to require that tuna product produced from high risk fisheries be accompanied by an observer certification in order to qualify for the dolphin safe label. The Appellate Body recognized that the determination provisions "help[] to ensure that similar situations are treated similarly under the amended tuna measure."[155]

73. Under the previous version of the regulations, NOAA was authorized to require an observer certification for tuna caught in a non-ETP purse seine fishery where "a regular and significant association" between dolphins and tuna that is "similar to the [ETP] association" was

[152] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253.

[153] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.254.

[154] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.16, 7.19, 7.166; *see also id.* para. 7.305 (making the same point in the GATT Article XX context).

[155] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.256; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263; *id.* 7.280 (min. op.) (observing that the determination provisions are an example of where the amended tuna measure "enable[s] the United States to impose the same requirements in fisheries where the same degree of risk prevails").

occurring,[156] or for tuna caught in a non-purse seine fishery where a "regular and significant mortality or serious injury" was occurring.[157]

74. The Appellate Body criticized the design of the determination provisions in two respects. First, the Appellate Body agreed with the first compliance panel that the design of the determination provisions did not account for two hypothetical scenarios and, consequently, that the measure potentially could treat a high-risk fishery differently from the high-risk ETP large purse seine fishery in terms of an observer requirement.[158] Second, the Appellate Body criticized the measure for not requiring a higher level of tracking and verification requirements for tuna product marketed as dolphin safe that is produced from a fishery that NOAA has determined to be high risk.[159] In light of these two criticisms, the Appellate Body found that the design of the determination provisions was not even-handed.[160] This finding constituted the sole basis for the Appellate Body finding that the detrimental impact did not stem exclusively from legitimate regulatory distinctions and that the measure therefore provided less favorable treatment to Mexican imports for purposes of Article 2.1.[161]

75. The 2016 IFR directly responded to both criticisms, amending the regulations to bring the measure into compliance with the DSB recommendations and rulings by ensuring that the design of the determination provisions is now even-handed. In section V.C.1.a, the United States explains how the 2016 IFR fills the "gaps" in the determination provisions such that they now cover all potential high-risk fisheries. In section V.C.1.b, the United States explains how the

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[156] 50 C.F.R. § 216.91(a)(2)(i) (2015) (Exh. US-2) (stating that tuna product could not be labeled dolphin safe if the tuna contained in such products were harvested: "*Non-ETP purse seine vessel*. Outside the ETP by a vessel using purse seine nets: (i) In a fishery in which the Assistance Administrator has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), unless such products are accompanied as described in § 216.24(f)(3) by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught").

[157] 50 C.F.R. § 216.91(a)(4)(iii) (2009) (Exh. US-2) (stating that tuna product could not be labeled dolphin safe if the tuna contained in such products were harvested: "*Other fisheries*. By a vessel on a vishing trip that began on or after July 13, 2013 in a fishery other than one described in paragraphs (a)(1) through (3) of this section unless such product is accompanied by . . . (iii) In any other fishery that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, a written statement executed by an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Assistant Administrator determines that such an observer statement is necessary."). As discussed with the first compliance panel, fisheries "other than one described in paragraphs (a)(1) through (3)" included all non-purse seine fisheries (except large-scale driftnet fisheries, which cannot produce tuna eligible for the label) and the ETP small purse seine fishery. *See* U.S. Response to 1st 21.5 Panel Question No. 53, paras. 275-276. Tuna produced from large-scale driftnet fisheries was (and remains) ineligible for the label. *See* 50 C.F.R. § 216.91(a)(2) (Exh. US-2).

[158] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.258.

[159] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.265.

[160] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.254-266.

[161] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.266.

tracking and verification requirements now work together with and reinforce the heightened certification requirement that would result from a positive determination.

a. The 2016 IFR Fills the "Gaps" in the Determination Provisions

76. The Appellate Body agreed with the first compliance panel and faulted the design of the determination provisions for not authorizing NOAA to make a finding of either a "regular and significant" tuna-dolphin association or a "regular and significant" dolphin mortality or serious injury in all hypothetical high-risk fisheries. In particular, the Appellate Body criticized the design of the determination provisions for not authorizing NOAA to make a "regular and significant" mortality or serious injury determination for purse seine fisheries outside the ETP or to make a "regular and significant" tuna-dolphin association determination for non-purse seine fisheries. In the view of both the Appellate Body and the first compliance panel, these two "gaps" in the design of the determination provisions rendered the provisions not even-handed because NOAA would not be able to make a determination for all possible fisheries with "comparably high risks."[162]

77. The 2016 IFR ***directly addresses*** this analysis by eliminating these two "gaps" in the design of the determination provisions. Under the amended regulations, NOAA now has explicit authority to impose an observer requirement as a labeling condition for any high risk fishery based on a finding that a "regular and significant" association or a "regular and significant" mortality/serious injury exists for either purse seine or non-purse seine fisheries.

78. As described in section III.B above, under the previous version of the regulations, the two determination provisions were codified separately at 50 C.F.R. § 216.91(a)(2)(i) and (a)(4)(iii).[163] The "regular and significant" association provision was codified as part of section (a)(2), on non-ETP purse seine fisheries, and the "regular and significant" mortality/serious injury was codified as part of section (a)(4), on "other fisheries."

79. The 2016 IFR combines the previously separate categories of non-ETP purse seine fisheries and "other fisheries'' into one category (now codified at section (a)(3)) under the title "other fisheries."[164] Under this revised section (a)(3), the single determination provision (section (a)(3)(v)) has two "regular and significant" prongs – one covering mortality or serious injury and one covering association.[165] Under the revised regulations, NOAA is now explicitly authorized

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[162] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.265 ("Finally, we note that our analysis regarding the determination provisions is premised on the existence of risks outside the ETP large purse-seine fishery *that are comparably high to the risks existing in the ETP large purse-seine fishery*. As the Panel explained, the determination provisions 'appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery *where the conditions in the former approach those of the latter*.'") (quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263) (emphasis added); *see also id.*, para. 7.266.

[163] *See* 50 C.F.R. § 216.91(a)(2)(i); *id.* § 216.91(a)(4)(iii) (2009) (Exh. US-2).

[164] The other two sections in the revised regulations is the ETP large purse seine fishery (which remains codified at section (a)(1)) and large-scale driftnet fisheries (which is now codified at section (a)(2)).

[165] 50 C.F.R. § 216.91(a)(3)(v) (Exh. US-2) ("For tuna caught in a fishery in which the Assistant Administrator has determined that *either a regular and significant association* between dolphins and tuna (similar to

to make a finding of either a "regular and significant" mortality or serious injury or a "regular and significant" association for any fishery, whether purse seine or non-purse seine.[166] Accordingly, the 2016 IFR eliminated both alleged "gaps" in the design of the determination provisions such that NOAA now has explicit authority to impose an observer certificate for all high risk fisheries, and the determination provisions can no longer be considered to lack "even-handedness" for this reason.

80. Nevertheless, the United States would observe that the hypothetical scenarios on which the first compliance panel and the Appellate Body based their findings remain hypotheticals, as there is no evidence of any actual fisheries that would have fallen into one of these two "gaps" in the measure. In particular, there is no evidence that a non-purse seine fishery with a "comparably high risk" to the ETP large purse seine fishery could exist due only to the fact that fishery operates in waters where a tuna-dolphin association exists. The reason for this is that there is no evidence that non-purse seine fisheries are capable of exploiting a tuna-dolphin association in a way that is harmful to dolphins. For example, there is no evidence that fishing with longlines, trawls, etc. in the part of the ETP where the association exists leads to higher level of mortality or serious injury compared to fishing with the same gear type in other areas of the world where the association does not exist. In this regard, there is no evidence to support the first compliance panel's statement that "the risk of mortality or serious injury [from all gear types] is necessarily heightened" in the waters where the ETP tuna-dolphin association exists.[167] Moreover, there is no evidence that non-purse seine vessels are capable of causing any harm to dolphins other than direct mortalities.[168] Thus, even if a tuna-dolphin association *did* cause heightened risk to dolphins in non-purse seine fisheries, this risk could be manifested only in higher mortality, and, therefore, the fishery would be one where a "regular and significant" mortality or serious injury would be evident.

81. There is likewise no evidence that a purse seine fishery has a "comparably high risk" to the ETP large purse seine fishery, manifested in terms of mortality, without a tuna-dolphin association existing that is at least as strong as what occurs in the ETP that would provide a basis for NOAA to impose an observer certification as a labeling condition.[169] Indeed, it is that very

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the association between dolphins and tuna in the ETP) or *a regular and significant mortality or serious injury* of dolphins is occurring, a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, unless the Assistant Administrator determines an observer statement is unnecessary.") (emphasis added).

[166] *See* 50 C.F.R. § 216.91(a)(3) (Exh. US-2).

[167] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.261; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.264 (noting that the U.S. argument has "some merit" and also stating that "[i]t is also not clear to us whether the association of dolphins and tuna necessarily heightens the risk to dolphins from non-purse-seine fishing methods, nor whether any such heightened risk could be adequately addressed by a determination that there is 'regular and significant mortality or serious injury'").

[168] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132; *see also id.* paras. 7.130-131.

[169] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.258.

association, and the continued actions of the large purse seine vessels to take advantage of that association, which drives the mortality figures in the ETP large purse seine fishery.[170]

b. The Tracking and Verification Requirements Now Work Together with and Reinforce the Heightened Certification Requirement Resulting from a Positive Determination

82. The Appellate Body's second criticism of the determination provisions related to the tracking and verification regime. The Appellate Body noted that its analysis was "premised on the existence of risks outside the ETP large purse-seine fishery that are comparably high to the risks existing in the ETP large purse-seine fishery" and that the determination provisions provide a basis for the United States to impose extra labeling conditions on tuna product produced from such other high risk fisheries.[171] After recalling that the tracking and verification requirements differ depending on whether the tuna is subject to the AIDCP, the Appellate Body observed that it "would expect that any determination outside the ETP large purse-seine fishery would entail not only the heightened certification requirements, but also tracking and verification requirements that work together with and reinforce certification in addressing this heightened risk."[172]

83. Again, the United States carefully studied this analysis and the 2016 IFR makes changes to the measure that ***directly respond*** to this analysis.

84. First, and as discussed above,[173] under the revised § 216.91(a)(5), the regulation mandates that, for tuna product sold as dolphin safe, U.S. processors and importers must collect and retain records regarding each custodian of the tuna or tuna product throughout the complete chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors, such that NMFS will be able to conduct a complete trace-back of the tuna product back to the harvesting vessel and trip as well to ensure that any non-dolphin safe tuna was kept physically separate from dolphin safe tuna throughout.[174] This rule applies to tuna

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[170] *See, e.g.*, "Tables Summarizing Fishery-by-Fishery Evidence on the Record," table 2 (Exh. US-13) (showing that, from 2009-2014, non-dolphin sets accounted for over 50 percent of all sets in the ETP large purse seine fishery but accounted for only 14 dolphin mortalities, compared to 6,027 from dolphin sets).

[171] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.265 ("Finally, we note that our analysis regarding the determination provisions is premised on the existence of risks outside the ETP large purse-seine fishery that are comparably high to the risks existing in the ETP large purse-seine fishery. As the Panel explained, the determination provisions 'appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter.'") (quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263).

[172] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.265.

[173] *See supra* sec. III.B.

[174] 50 C.F.R. § 216.91(a)(5) (Exh. US-2) ("(5) Other fisheries—chain of custody recordkeeping. By a vessel in a fishery other than one described in paragraph (a)(1) or (2) of this section unless: (i) For tuna designated dolphin-safe that was harvested on a fishing trip that began on or after May 21, 2016, in addition to any other applicable requirements: (A) The importer of record or U.S. processor of tuna or tuna products, as applicable, maintains information on the complete chain of custody, including storage facilities, transshippers, processors, re-

caught in all "other fisheries" (*i.e.*, all fisheries that can produce dolphin safe tuna product other than the ETP large purse seine fishery, which is already subject to AIDCP requirements).

85. Second, under the revised section (a)(5)(ii), the regulation sets out additional tracking and verification requirements for tuna product produced from a fishery that NOAA has determined has a "regular and significant" tuna-dolphin association or "regular and significant" dolphin mortality/serious injury. Under the revised regulations, where NOAA has made such a determination, NMFS will also require a government certificate validating: (1) the catch documentation; (2) whether the tuna or tuna products meet the dolphin-safe labeling standards under 50 C.F.R. § 216.91; and (3) the chain of custody information reported to the U.S. Government or maintained by the importer of record or the U.S. processor, as applicable.[175]

86. Accordingly, under the revised regulations, where NOAA has determined that a "regular and significant" mortality/serious injury or tuna-dolphin association is occurring in a particular fishery, the tuna product produced from that fishery will be subject to tracking and verification requirements that work together with and reinforce the heightened certification requirements. Specifically, the responsible government will need to validate the catch documentation provided on the Form 370 (or the equivalent documentation provided by U.S. vessels to U.S. canneries).[176] The government also will need to validate that the product meets the dolphin safe standard – in particular by validating the required captain and observer certifications.[177] Finally, the government will need to validate the chain of custody information for the tuna and tuna products to assure that the dolphin safe tuna product was always kept physically separate from non-dolphin safe tuna and tuna product from the vessel through processing.[178]

87. Such active government participation in the tracking and verification of tuna product sold as dolphin safe reflects the heightened risk to dolphins where the tuna product is produced from a fishery where a "regular and significant" mortality/serious injury or tuna-dolphin association is

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processors, and wholesalers/distributors to enable dolphin-safe tuna to be distinguished from non-dolphin-safe tuna from the time it is caught to the time it is ready for retail sale; (B) The importer of record or the U.S. processor, as appropriate, ensures that information is readily available to NMFS upon request to allow it to trace any non-dolphin-safe tuna loaded onto the vessel back to one or more storage wells or other storage locations for a particular fishing trip and to show that such non-dolphin-safe tuna was kept physically separate from dolphin-safe tuna through unloading."); 2016 IFR, at 15,447 (Exh. US-7).

[175] 50 C.F.R. § 216.91(a)(5)(ii) (Exh. US-2) ("For tuna designated dolphin-safe that was harvested in a fishery about which the Assistant Administrator made a determination under paragraph (a)(3)(v) of this section, and harvested on a fishing trip that begins on or after 60 days after the date of the Federal Register notice of that determination, the tuna or tuna products are accompanied by valid documentation signed by a representative of the vessel flag nation or the processing nation (if processed in another nation) certifying that: (A) The catch documentation is correct; (B) The tuna or tuna products meet the dolphin-safe labeling standards under this section; and (C) The chain of custody information is correct."); 2016 IFR, at 15,446 (Exh. US-7).

[176] 50 C.F.R. § 216.91(a)(5)(ii)(A) (Exh. US-2).

[177] 50 C.F.R. § 216.91(a)(5)(i)(B) (Exh. US-2).

[178] 50 C.F.R. § 216.91(a)(5)(ii)(C) (Exh. US-2).

occurring. In this regard, the NOAA tracking and verification for tuna product produced from such fisheries work together with and reinforce the heightened certification requirements.

2. The Measure, as Amended by the 2016 IFR, Addresses Other Concerns

88. In addition to the determination provisions, which were the sole basis for the DSB recommendations and rulings relevant to the Panel's terms of reference, the U.S. measure, as amended by the 2016 IFR, also addressed some additional concerns that had been identified in the first compliance proceedings.

a. The Eligibility Criteria Are Even-Handed

89. As discussed in section III.A, the eligibility criteria are the substantive standards that the tuna product must meet to have access to the dolphin safe label. Tuna product produced from two fishing methods – (1) large-scale high seas driftnet fishing,[179] which is an illegal method condemned by a UN moratorium and prohibited by various RFMOs and numerous countries, including the United States,[180] and (2) setting on (or otherwise intentionally deploying fishing gear on or around) dolphins – is ineligible for the label.[181] Both of these criteria apply to all fisheries, although it is only in the ETP large purse seine fishery that vessels harvest tuna by intentional targeting dolphins on a "widespread" or "systematic" basis.[182] In addition, tuna caught by all other fishing methods – purse seining other than by setting on dolphins and longline, pole and line, gillnet, and trawl fishing, etc. – is ineligible if it was harvested in a set or other gear deployment in which a dolphin was killed or seriously injured.[183] This criteria also applies to all fisheries.

90. As a consequence of the Mexican tuna industry electing not to meet the eligibility criteria – *i.e.*, by producing tuna product by setting on dolphins – Mexican tuna product is generally ineligible for the label. However, the tuna product of many other Members, including the United States (whose large purse seine fleet stopped setting on dolphins in the 1990s) and Ecuador (the vast majority of whose ETP large purse seine vessels do not set on dolphins), meets the

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[179] 50 C.F.R. § 216.91(a)(2) (Exh. US-2); *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9.

[180] *See* United Nations General Assembly Res. 46/215, "Large-Scale Pelagic Drift-net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas" (Dec. 20, 1991) (Exh. US-66) (1st 21.5 Exh. US-6); NMFS, *2012 Report of The Secretary Of Commerce to the Congress of the United States Concerning U.S. Actions Taken On Foreign Large-Scale High Seas Driftnet Fishing*, at 8, 12, 14, 16 (2012) (Exh. US-67) (1st 21.5 Exh. MEX-21) (describing various other instruments implementing the UN moratorium and having the same scope, including an EU regulation and WCPFC and IOTC resolutions).

[181] 50 C.F.R. §§ 216.91(a)(1)(iii), (a)(3)(i), (a)(3)(ii)(A), (a)(3)(iii)(A) (Exh. US-2); *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9.

[182] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *supra* sec. IV.B (citing to numerous pieces of evidence for this point).

[183] *See* 50 C.F.R. §§ 216.91(a)(1)(ii), (a)(3)(ii)(A)-(B), (a)(3)(iii)(A) (Exh. US-2); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9.

eligibility criteria and has access to the label. The United States observes that Mexico did not dispute in the previous compliance proceeding that the eligibility criteria regarding large-scale driftnets or dolphin mortality or serious injury lacked even-handedness, and the DSB made no finding that this was the case.[184]

91. We note, however, the Appellate Body's statement that the even-handedness of the ineligibility for the label of tuna caught by setting on dolphins "depends not only on how the risks associated with this method of fishing are addressed, but also on whether the risks associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles," by the labelling conditions applicable to other tuna product.[185] As such, the United States explains in this section that the eligibility criteria are even-handed because they address the risks of both setting on dolphins and other fishing methods, commensurately with the risks the different methods pose to dolphins.

i. The Eligibility Criterion Regarding Setting on Dolphins Has Never Been Found to Accord (or Otherwise Support) a Finding of Less Favorable Treatment

92. The even-handedness of the eligibility criterion regarding setting on dolphins, which denies access to the label for tuna product produced from vessels that set on dolphins (while potentially allowing access to the label for tuna product produced from vessels that utilize other fishing methods), was the *central issue* in the earlier proceedings in this dispute. Indeed, in the original proceeding, this was Mexico's *only* argument supporting its Article 2.1 claim,[186] while in the first compliance proceeding, it was Mexico's first and most developed argument as to why the amended measure had a detrimental impact on Mexican tuna product and was not even-handed."[187]

93. Accordingly, the question of whether the eligibility criterion regarding setting on dolphins supports a finding of less favorable treatment has been considered in the four DSB reports circulated over the course of the two proceedings.[188] *And in <u>not one</u> of those four reports* has this aspect of the measure been found to accord less favorable treatment to Mexican tuna

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[184] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.98 (listing the regulatory distinctions challenged by Mexico, not including these criteria).

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

[186] *See, e.g., US – Tuna II (Mexico) (Panel)*, paras. 7.255 ("In its rebuttal submission, Mexico also clarifies . . . that the factual basis of Mexico's discrimination claims is that the *prohibition* against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like products from the United States and other countries") (emphasis in original, internal quotes omitted); *see also US – Tuna II (Mexico) (AB)*, paras. 90, 241.

[187] *See US – Tuna II (Mexico) (Panel)*, paras. 7.253-255, 7.260-262 (summarizing Mexico's claim under Article 2.1); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.243 (summarizing Mexico's argument that the U.S. measure discriminates against Mexican tuna products).

[188] *US – Tuna II (Mexico) (Panel)*, paras. 7.546-564; *US – Tuna II (Mexico) (AB)*, paras. 282-297; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.117-135; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.235-253.

product. To the contrary, both previous panels affirmatively found that the eligibility criterion regarding setting on dolphins did not accord less favorable treatment under Article 2.1.[189] And while the Appellate Body faulted the analytical approaches of these two panels, it has never suggested that the panels' ultimate findings that the eligibility criterion regarding setting on dolphins is consistent with Article 2.1 would have been different under the proper legal analysis.[190] As such, nothing in the DSB recommendations and rulings in the first compliance proceeding required the United States to amend the eligibility criterion regarding setting on dolphins, and, consequently, the United States made no change to this aspect of the measure.

ii. The Eligibility Criteria Are Calibrated to the Difference in Risk

94. In explaining the calibration analysis, the Appellate Body stated that where the risks posed to dolphins are the same, different treatment will not be found to be even-handed.[191] However, where the risks are different, a further inquiry needs to be conducted as to whether the regulatory distinction "[can] be explained as commensurate with [those] different risks."[192]

95. The eligibility criteria, specifically, the ineligibility of tuna caught by setting on dolphins and the potential eligibility of tuna caught by other fishing methods meets this test. As discussed in section IV.C.2.a.ii.A, setting on dolphins has a different risk profile for dolphins than other fishing methods because it is the *only* fishing method that *intentionally* targets dolphins to catch tuna and thus is *inherently* unsafe for dolphins. This difference in the intrinsic nature of setting on dolphins versus other fishing methods is confirmed by the available scientific evidence regarding interactions, unobservable harms, and observable mortality and serious injury. Further, as discussed in section IV.C.2.a.ii.B, this regulatory distinction is calibrated to the different risks of different fishing methods. The regulatory distinction is thus even-handed and does not support a finding of less favorable treatment.[193]

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[189] *US – Tuna II (Mexico) (Panel)*, paras. 7.374-378; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.135, 8.3(a).

[190] *See US – Tuna II (Mexico) (AB)*, paras. 285-297; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.243-253.

[191] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160 ("If, for example, the Panel established that the risks posed to dolphins in the different fishing areas and by the different fishing methods are the same, then it may properly have reached the conclusion that treating them differently is not 'even-handed.'").

[192] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160 ("If, however, the Panel considered that the risk profiles are different, then further inquiry would have been needed into whether the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could *be explained as commensurate* with the different risks associated with tuna fishing in different oceans and using different fishing methods.") (emphasis added).

[193] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.96 (noting that "'even-handedness' is *the central concept* for determining whether the identified detrimental treatment stems exclusively from a legitimate regulatory distinction") (emphasis added); *id.* para. 7.101 (noting the "*special relevance*" of the calibration analysis to inquiry of whether the measure is even-handed or not) (emphasis added).

(A). Setting on Dolphins Is a Unique Fishing Method in that It Is Inherently Unsafe for Dolphins

96. As discussed above in section IV.A, setting on dolphins is unique because it is the only fishing technique in which vessels *intentionally target* marine mammals in order to catch commercially valuable fish. By its very nature, every dolphin set *must* involve chasing and herding dolphins and encircling them with a purse seine net. Each and every dolphin set, thus, entails a sustained, intense interaction with numerous dolphins (typically 300-400 individual animals) for up to several hours. And every set *must* pose a risk of harm – both of direct injury or death and of indirect or unobservable harms – to each of the dolphins chased and encircled. Dolphins are a necessary component of the fishing method itself and, therefore, the method cannot be practiced in a way that does not endanger them. It is a fishing method that is *inherently* unsafe for dolphins.

97. This is simply not the case for other fishing methods. As the first compliance panel found, vessels using fishing techniques other than setting on dolphins may occasionally interact with marine mammals, including dolphins, but mammals "are not set on intentionally, and interaction is only accidental."[194] Indeed, interactions with marine mammals are often commercially damaging to the fishing vessels, and vessels actively strive to avoid them, as is the case with depredation in longline fishing.[195] Thus, for fishing methods other than dolphin sets, dolphins are not an essential part of the fishing method.[196] Therefore, fishing operations can be, and generally are, carried out in a way that does not directly endanger any dolphins because there is no interaction between dolphins and the fishing vessels.

98. The available scientific evidence regarding the differences in interactions, unobservable harms, and observable mortality and serious injury all confirm the conclusion that setting on dolphins, is inherently unsafe for dolphins, and, as such, is distinct from other fishing methods for purposes of the dolphin safe label.

99. As discussed in section IV.A, the evidence is clear that interactions between dolphins and fishing vessels occur on a wholly different scale during dolphin sets than when other fishing

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[194] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240. Again, as noted in section IV.A, it is important to distinguish between observed mortalities and serious injuries and the broader category of "interactions," which includes observed mortalities and serious injuries, but also includes other contacts between dolphins and fishing vessels, such as depredation (in longline fisheries), chasing dolphins, encircling a dolphin in a purse seine net, entanglement in a net of any type, etc.

[195] Megan J. Peterson et al., "Killer Whale (*Orcinus orca*) Depredation Effects on Catch Rates of Six Groundfish Species: Implications for Commercial Longline Fisheries in Alaska," 70 *ICES J. of Marine Science* 1220, 1229 (2013) (Exh. US-68) (describing the significant economic impact of killer whale depredation on U.S. longline fisheries and how depredation "has played a major role in changing fishing practices of longline fleets, specifically: gear type, season timing, and proportion of total allowable catch harvested of certain groundfish," as well as some vessels "transitioning to pots as a result of killer whale depredation").

[196] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.244-245 (agreeing with the U.S. argument distinguishing between "fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins 'in 100 per cent of dolphin sets'").

methods are used. While each dolphin set involves a sustained interaction with hundreds of dolphins,[197] in other types of purse seine sets, *i.e.*, sets on free-swimming schools of tuna or floating objects, dolphin interactions hardly ever occur.[198] Any marine mammal interaction is similarly rare in longline fisheries, with only a tiny percentage of sets affecting even one mammal.[199] And pole and line fisheries are not associated with marine mammal interactions. Thus, dolphin interactions are frequent, sustained, and intense during dolphin sets and very rare in fisheries where other methods are used.

100. The evidence is also clear with regard to the unobservable harms caused by setting on dolphins compared to other fishing methods. Setting on dolphins poses the risk of indirect, unobservable harms that are caused by the "chase itself."[200] These harms are inherently difficult to quantify, but they may occur on a massive scale in the ETP, given that, on average, large purse seine vessels *chase over six million dolphins each year*.[201] As noted by the panels in the two previous proceedings, "these harms would continue to exist 'even if measures are taken in order to avoid the taking and killing of dolphins on the nets.'"[202]

101. Other fishing methods, by contrast, do not cause similar harms. They may cause dolphin mortalities and injuries that could possibly have unobserved indirect effects,[203] but such indirect effects of direct harms are not the same as the potentially massive effects of the chase and encirclement process that can occur in every dolphin set, regardless of whether any dolphin is directly injured. As the first compliance panel explained, "these harms flow from mortalities or

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[197] *See supra* sec. IV.A (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (showing that, from 2009-2013, an average of 6,260,131 dolphins were chased and 3,716,319 dolphins were captured *each year* and that, on average, every dolphin set involved chasing 601 dolphins and capturing 357 dolphins in a purse seine net).

[198] *See supra* sec. IV.A (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13) (showing: (1) in the WCPFC purse seine fishery between 2007 and 2010, only 171 of 39,989 observed sets – 0.42 percent of all observed sets – involved any dolphin interaction; (2) studies of the Atlantic purse seine fishery reported *no* dolphin interactions in 1,389 observed sets; and (3) a study of the purse seine fishery in the tropical Indian Ocean showed that any marine mammal interaction in less than 1 percent of 3,052 observed sets).

[199] *See supra*. sec. IV.B (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13) (showing: (1) in the American Samoa longline fishery, a marine mammal interaction occurred in only 0.33 percent of observed sets from 2006-2015 (19 interactions in 5,753 observed sets); (2) in the Hawaii longline fishery, a marine mammal interaction occurred in 0.26 percent of observed sets from 2004-2015 (119 interactions in 45,274 observed sets); and (3) in the Atlantic pelagic longline fishery, a marine mammal interaction occurred in 2.7 percent of observed sets from 2005-2015 (264 interactions in 9,775 observed sets)).

[200] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.206; *US – Tuna II (Article 21.5 – Panel)*, paras. 7.120-122; *US – Tuna II (Mexico) (AB)*, paras. 246, 330; *US – Tuna II (Mexico) (Panel)*, paras. 7.499, 7.504. Such harms potentially include calf-cow separation, muscular damage, immune system failures, reproductive system failures, and other adverse health effects.

[201] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13).

[202] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.504); *US – Tuna II (Mexico) (AB)*, para. 330; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.206; *US – Tuna II (Mexico) (AB)*, para. 330.

[203] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.134.

injuries that are themselves observable, and whose occurrence renders non-dolphin-safe all the tuna caught in the set or gear deployment" in which the direct harm occurred.[204] The Appellate Body found that the panel did not err in its analysis in this regard.[205]

102. Finally, as also discussed in section IV.A, the evidence with regard to observed mortality and serious injury shows clearly that setting on dolphins causes significantly more direct dolphin mortalities than the other fishing methods that produce tuna product for the U.S. market. In addition to the millions of dolphins killed during dolphins sets from the 1950s through the 1980s,[206] recent data from the ETP confirms that, even under the AIDCP, setting on dolphins remains a uniquely dangerous fishing method compared to other types of purse seine sets.[207] Data from other purse seine fisheries confirms that, on a per set basis, dolphin sets cause many times more mortalities than other sets.[208] Current, fishery-specific data from longline fisheries also shows levels of dolphin mortality that, on a per set basis, are small fractions of dolphin mortality due to dolphin sets in the ETP.[209] Finally, pole-and-line fishing is not associated with dolphin bycatch.[210]

103. Thus, there is a substantial difference in risk between setting on dolphins, and those fishing methods that produce tuna that are potentially eligible for the dolphin safe label. Setting on dolphins is the *only* fishing method that intentionally targets dolphins and is, by its very nature, *inherently* unsafe for dolphins in a way that other fishing methods are not. Further, while these other fishing methods do pose risks for dolphins, those risks are substantially different,

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[204] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.134.

[205] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202.

[206] *See* Gosliner 1999, at 124 (Exh. US-49); Gerrodette 2009, at 1192 (Exh. US-12).

[207] *See supra* sec. IV.A at table 1; *See* IATTC, EPO Dataset 2009-2013 (Exh. US-16); IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2008* (2010) (Exh. US-51). From 2009 to 2014, dolphin sets in the ETP caused 94.92 dolphin mortalities for every 1,000 sets, compared to the 0.20 dolphin mortalities per 1,000 sets caused by unassociated and FAD sets by large purse seine vessels. Thus, during that period, on a per set basis, dolphin sets were 474.6 times more deadly to dolphins than other types of sets by large purse seine vessels. Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[208] *See supra* sec. IV.A; Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13) (showing that, from 2009 to 2014, 94.92 dolphins were killed in every 1,000 dolphin sets in the ETP, while: (1) in the WCPFC purse seine fishery, the comparable figures in 2009 and 2010 were 27.12 and 2.64 dolphins per 1,000 observed sets; (2) in the Atlantic and Indian Ocean tropical purse seine fisheries, in studies covering the 2003-2009 period, there were zero dolphin mortalities in 1,389 and 3,052 observed sets, respectively).

[209] *See supra* sec. IV.A; Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13) (showing: (1) from 2009-2015, observers in the two U.S. longline fisheries in the WCPFC area reported a total of 70 and 16 dolphin mortalities *and injuries* in 25,688 and 4,677 observed sets, so that, on a per set basis, there were 2.73 and 3.42 dolphin mortalities and injuries per 1,000 observed sets in these fisheries over the last seven years; (2) in the Australia longline fishery from 2010-2014, there were 8 marine mammal "captures" in over 1.7 million observed hooks, or, approximately 1,181 observed sets, for an estimated mortality rate of 6.77 dolphins per 1,000 sets; and, (3) in the EU Atlantic longline fishery, there was 1 marine mammal "interaction" in 625 observed sets). Effort data is not available for all WCPFC longline fisheries, making cross-fishery comparisons difficult, but the numbers of observed marine mammal interactions and mortalities are generally zero or nearly zero. *Id.*

[210] *See supra* sec. IV.A (citing, among other things, *US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.366).

both in nature and degree, than the risks posed by setting on dolphins, as the evidence on the record confirms. As such, it is legitimate for the United States to treat tuna product produced from dolphin sets differently than tuna product produced from other fishing methods. The first compliance panel's factual findings ***directly support this conclusion***,[211] as does the Appellate Body's ***rejection*** of Mexico's DSU Article 11 appeals.[212]

(B). The Difference in Eligibility Criteria Is Commensurate with the Differences in Risk Profiles of Different Fishing Methods

104. The eligibility criteria are commensurate with the difference in risk to dolphins posed by setting on dolphins, on the one hand, and other fishing methods that product tuna potentially eligible for the label, on the other.

105. First, the eligibility criteria distinguish between the *only* fishing method that intentionally targets dolphins and those that do not. Because it intentionally targets dolphins, setting on dolphins is, by its very nature, *inherently* unsafe to dolphins. Other fishing methods by contrast, are not intrinsically dangerous, in that the intention of the fishing vessels is not to interact with dolphins (and, indeed, most sets occur without putting even one dolphin in danger). It would be inaccurate for tuna caught by setting on dolphins to be labeled "dolphin safe," but this is not the case with other fishing methods. Thus, the eligibility criteria are calibrated to the different risk-

[211] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-242 (agreeing with the United States that setting on dolphins differs from other fishing methods in both "quantitative and qualitative terms" and disagreeing with Mexico that "the situation in the ETP is [not] unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries"); *id.* paras. 7.244-245 (agreeing with the United States that there is a "difference between fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins 'in 100 per cent of dolphin sets,'" and that "[t]his distinction is especially important where, as the United States argues is the case with setting on – the particular nature of the interaction is itself 'inherently dangerous' to dolphins, even where no dolphin is seen to be killed or seriously injured, because it has unobservable deleterious effects on dolphins' physical and emotional well-being") (quoting U.S. submissions).

[212] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.195-197 (concluding that the panel had accurately reflected the previous factual findings, including that such unobservable harms "arise as a result of the 'chase itself,'" and that the Appellate Body had previously "affirmed the original panel's conclusion that 'the US objectives … to minimize unobserved consequences of setting on dolphins' would not be attainable if tuna caught by setting on dolphins were eligible for the dolphin-safe label," ultimately concluding that the compliance panel's "references to the Appellate Body report do not, in our view, mischaracterize the findings made in the original proceedings regarding the existence of unobserved effects on dolphins"); *id.* paras. 7.200-202 (rejecting Mexico's claim that the panel had erred in finding that that fishing methods other than setting on dolphins have no unobservable adverse effects); *id.* paras. 7.203-207 (rejecting Mexico's claim that the panel did not recognize that the Appellate Body – in Mexico's view – had already found that "dolphins face 'equivalent' risks from AIDCP-regulated setting on dolphins and from other fishing methods," noting that it is "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 concluding that, in fact, Mexico had not put forward any evidence that demonstrated that setting on dolphins, is not, as earlier found, a "particularly harmful" fishing method for dolphins).

profiles for dolphins of different fishing methods because they distinguish between a method that is inherently *not* dolphin safe and methods that *may be* dolphin safe (and, indeed, usually are).

106. Second, the eligibility criteria are commensurate with the differences in risk to dolphins of setting on dolphins and other fishing methods, as reflected in the number of dolphins directly endangered when such methods are employed. As described above, setting on dolphins endangers, on average, hundreds of dolphins each and every time the method is employed. Other fishing methods, by contrast, only very rarely endanger a single dolphin, illustrated by the fact that vessels interact with dolphins in less than 1 percent of sets in nearly every fishery for which evidence is available.[213] Thus the eligibility criteria distinguish between a fishing method that endangers hundreds of dolphins 100 percent of the time it is used and methods that, 99 percent of the time, occur without endangering any dolphins at all.

107. Third, the eligibility criteria are commensurate with the differences in risk posed by setting on dolphins and other fishing methods because they deny eligibility to a fishing method that may cause massive unobservable harms every time it is employed, irrespective of whether a dolphin has been killed or injured or whether AIDCP restrictions are applicable, while allowing eligibility for those fishing methods that generally do not cause many of these types of harms at all, and do not cause any of these harms without a dolphin being killed or seriously injured. In this regard, the first compliance panel correctly concluded that the harms caused by other fishing methods "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."[214]

108. Fourth, the eligibility criteria are commensurate with the differences in risk because they deny eligibility to a fishing method that causes a higher rate of observed mortalities and serious injuries while allowing eligibility for those fishing methods that cause a lower rate of observed mortalities and serious injuries.[215]

109. Thus, when the intrinsic difference in fishing methods and the scientific evidence are considered as a whole, it is clear that this regulatory distinction is, in fact, commensurate to the risks to dolphins posed by different methods. As such, the eligibility criteria's different treatment of setting on dolphins and other fishing methods is calibrated to the risk, and is, thus, even-handed. *This conclusion is consistent with, and supported by*, the first compliance panel's legal finding that the eligibility criteria is even-handed based on the differences in unobservable

[213] *See supra* sec. IV.A.

[214] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.195-1967 (concluding that the Appellate Body had previously "affirmed the original panel's conclusion that 'the US objectives … to minimize unobserved consequences of setting on dolphins' would not be attainable if tuna caught by setting on dolphins were eligible for the dolphin-safe label").

[215] *See supra* sec. IV.B.

harms between setting on dolphins and other fishing methods,[216] even when viewed through the lens of the Appellate Body report.[217]

110. For the reasons stated above, the eligibility criteria cannot support a finding of less favorable treatment under Article 2.1.

b. The Certification Requirements Are Even-Handed

111. For tuna product to be marketed in the United States as dolphin safe, it must be certified as meeting the eligibility criteria for the label.[218] As discussed below, the certifications that are required differ depending on whether the tuna product is produced from the ETP large purse seine fishery or from another fishery. However, where tuna product is not imported or sold as dolphin safe, including because it is not eligible for the label, no certifications are required by the U.S. measure.[219] In this regard, the first compliance panel correctly observed that tuna product that is ineligible for the label – such as Mexican tuna product produced from vessels that set on dolphins – "is not affected" by the certification requirements.[220]

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[216] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.135 ("In light of the above, our view is that Mexico has not provided evidence sufficient to demonstrate that setting on dolphins does not cause observed and unobserved harms to dolphins, or that other tuna fishing methods consistently cause similar harms. Rather, the Panel agrees with the United States that '*even if* there are tuna fisheries using … gear types that produce the same number of dolphin mortalities and serious injuries allowed or caused in the ETP … it is simply *not* the case that such fisheries are producing the same level of unobserved harms, such as cow-calf separation, muscular damage, immune and reproductive system failures, which arise as a result of the chase in itself.'"); *see also id.* para. 7.129 ("In our view, the new evidence presented by both parties on this question ultimately supports our decision to reaffirm the conclusions in the original dispute that the United States is entitled to treat setting on dolphins differently from other tuna fishing methods."); *id.* 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.").

[217] As discussed above, while the Appellate Body reversed the panel's finding, noting that the analysis was unduly narrow, the Appellate Body did not disagree with the panel's conclusions regarding unobservable harms, nor did the Appellate Body indicate that the panel's ultimate finding that the eligibility criteria are even-handed would not be correct under the appropriate calibration analysis. *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.131, 7.246-253; *see also id.* paras. 7.203-207 (noting that it is "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, in fact, Mexico had not put forward any evidence that demonstrated that setting on dolphins, is not, as earlier found, a "particularly harmful" fishing method for dolphins).

[218] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 6.9-6.11.

[219] *See* NOAA Form 370 (Exh. US-4) (showing that, if the exporter/importer/signee checks Box 5.A, indicating that "[t]he tuna or tuna products described herein are not certified to be dolphin safe and contain no marks or labels that indicate otherwise," there are no documentation requirements); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.44 ("*For tuna products to be labeled dolphin-safe*, the accompanying Form 370 must be signed by a representative of an IDCP-member nation . . .") (emphasis added); *id.* paras. 7.125, 7.143, 7.177.

[220] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.143 (noting that because the certification requirements (and tracking and verification requirements) are only implicated when the tuna product is intended to be marketed as dolphin safe, such requirements "*are relevant only* to tuna eligible and intended to receive the dolphin safe label," and "tuna that is either ineligible to access this label (i.e. tuna caught by setting on dolphins) or not intended to be sold under the dolphin safe label *is not affected* by these regulatory distinctions") (emphasis

112. As discussed below, the different certification requirements are, in fact, calibrated to the different levels of risk to dolphins in different fisheries. In particular, the changes made by the 2016 IFR have clarified this question by narrowing the differences in the certification requirements for tuna caught in the ETP large purse seine fishery and other fisheries, while the differences in risks between fisheries have remained the same. Accordingly, the certification requirements are even-handed and thus cannot support a finding of less favorable treatment.

113. In section V.C.2.b.i, the United States explains the certification requirements as they existed at the time of the previous proceeding and the relevant analyses and conclusions of the first compliance panel and Appellate Body. In section V.C.2.b.ii, the United States explains the current certification requirements, as altered by the 2016 IFR. In section V.C.2.b.iii, the United States explains that the differences in the certification requirements are calibrated to the differences in risk among different fisheries.

i. The Certification Requirements as Analyzed by the First Compliance Panel

114. At the time of the first compliance proceeding, the certification requirements differed for tuna product produced from the ETP large purse seine fishery, on the one hand, and from other fisheries, on the other.

115. For the ETP large purse seine fishery, both the captain and an AIDCP-approved observer had to certify that the eligibility criteria were met. The measure did not specify any education or training requirements for either certifier. In terms of the captains, the AIDCP/IATTC does not require captains to have a minimum education level. Captains are required to undergo some training, but it does not seem to cover the key aspects of the U.S. dolphin safe labeling measure, namely dolphin mortality and serious injury.[221] For observers, the AIDCP requires applicants to be "university graduates with a degree in biology or a related subject."[222] It also requires observers to undergo training that includes: "identification of certain fish and animals, including tuna and those dolphins associated with tuna fishing; information on how to accurately fill out data forms; and information on identification, dealing with, and documenting 'instances of interference (including bribery attempts), intimidation or obstruction by vessel crew during a

added). *But see id.* paras. 7.147-148 (mischaracterizing the measure as requiring "an observer certification for *all* tuna caught by large purse seine vessels in the ETP") (emphasis added).

[221] *See* IATTC, "Captains' Training" (Exh. US-70) (1st 21.5 Exh. MEX-167) (None of the 160 slides in this presentation concerns identifying dolphin mortality or serious injury); AIDCP, Training Module: Dolphins (Exh. US-71) (1st 21.5 Exh. US-210) (same).

[222] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.214-215 (citing Inter-American Tropical Tuna Commission, Quarterly Report, at 14 (April-June 2013) (1st 21.5 Exh. MEX-29); Agreement on the International Dolphin Conservation Program, "18th Meeting of the Parties: Minutes of the Meeting," at 6 (1st 21.5 Exh. US-243)).

trip.'"[223] We note, however, that the IDCP training course does not appear to address dolphin mortality and serious injury specifically; rather, it focuses on reducing risks in dolphin sets.[224]

116. For the fisheries other than the ETP large purse seine fishery, it is typical that only the captain need certify that the eligibility criteria have been met.[225] At the time, the measure did not specify any education or training requirements for the captain.[226]

117. The first compliance panel addressed the evidence regarding whether the certification requirements were calibrated to differences in risk in paragraphs 7.235 to 7.245, a point the Appellate Body recognized.[227] On the basis of this evidence, the panel concluded that "the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction."[228] In particular, the panel accepted that the United States could come into the DSB recommendations and rulings in the original proceeding without imposing an observer certification requirement on vessels other than large purse seiners in the ETP, and that the observer requirement for the ETP large purse seine fishery was "intricately tied to the special and, in some senses, 'unique' nature of the harms that the ETP large purse seine fishery poses to dolphins."[229]

118. Further, the panel recognized the "different" or "special" risk profile of the ETP large purse seine fishery throughout its report.[230] In this regard, the panel explicitly affirmed that "because the nature and degree of the interaction is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental), there is no need to have a single person on board whose sole task is to monitor the safety of dolphins during the set

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[223] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.215; *see also* IDCP, "Guidelines for Technical Training of Observers," Doc. OBS-2-03b, 2nd Meeting of the IATTC and National Observer Programs (Oct. 27, 2007) (Exh. US-72) (1st 21.5 Exh. US-242); AIDCP, Minutes of 18th Meeting of the Parties, Appendix 2 (Oct. 26, 2007) (Exh. US-73) (1st 21.5 Exh. US-243).

[224] *See* AIDCP, Guidelines for Technical Training of Observers, Doc. OBS-2-03b (Exh. US-72).

[225] An observer certification may also be required where the tuna has been harvested from a fishery that NOAA has designated as having a "regular and significant" mortality/serious injury or tuna-dolphin association or where the tuna has been harvested from one of the seven U.S. fisheries that have an observer program that NOAA has designated as qualified and authorized to certify as to the dolphin safe label. *See* 50 C.F.R. § 216.91(a)(3)(vi) (Exh. US-2); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.45.

[226] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.228-232.

[227] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.164 (observing that "this part of the Panel's reasoning appears to have employed a concept that looks like 'calibration.'").

[228] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.245.

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

[230] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (referring to "the different risk profiles" of the ETP and other fisheries in the context of the eligibility criteria and the "special risk profile of the ETP large purse seine fishery"); *id.* para. 7.282 (min. op.) (concluding that the difference in the certification requirements "represents a fair response to the different risk profiles existing in different fisheries, as established by the evidence"); *see also id.* paras. 7.240-242, 7.244-245, 7.278-282 (min. op.).

or other gear deployment [outside the ETP large purse seine fishery]."[231] Moreover, the panel explicitly disagreed with Mexico 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."[232]

119. However, the panel did not ultimately consider that whether the certification requirements were calibrated to the differences in risk was determinative in finding the certification requirements even-handed, finding that the certification requirements lacked even-handedness based on a separate legal theory.[233] On this point, the minority panelist disagreed with the panel, stating that the calibration analysis is "at the very heart of the even-handedness analysis in this case," and concluding that the certification requirements were even-handed in light of the evidence on the record.[234] The Appellate Body also disagreed with the panel's approach, finding that the panel erred by not making a finding on even-handedness based on a calibration analysis, but concluding that it was not possible to complete the analysis as to whether the certification requirements were, in fact, calibrated to the differences in risks among fisheries.[235]

ii. The Certification Requirements as Amended by the 2016 IFR

120. As described in section III above, the differences in the current certification requirements applied between fisheries, as amended by the 2016 IFR, are unchanged as the observer requirements, but are changed as to the differences in training between captains and AIDCP observers. Under the U.S. measure, as amended, all tuna product sold in the U.S. market as dolphin safe must be accompanied by a captain certification attesting that (1) "no purse seine net

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[231] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240; *see also id.* paras. 7.244-245 (agreeing with the United States that there is a "difference between fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins 'in 100 per cent of dolphin sets,'" and that "[t]his distinction is especially important where, as the United States argues is the case with setting on – the particular nature of the interaction is itself 'inherently dangerous' to dolphins, even where no dolphin is seen to be killed or seriously injured, because it has unobservable deleterious effects on dolphins' physical and emotional well-being") (quoting U.S. submissions).

[232] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242.

[233] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.233 (concluding that the lack of mandated education and training for captains outside the ETP large purse seine fishery "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure," and thus not cannot be said to be even-handed); *see also id.* para. 7.246.

[234] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.276, 7.265 (min. op.); *see also id.* para. 7.278 ("[G]iven the higher degree of risk in the ETP large purse seine fishery, it is in my opinion entirely even-handed for the United States to tolerate a smaller margin of error in that latter fishery, and accordingly to require observers in that fishery but not in others.").

[235] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.153-155 (stating that, in "the particular circumstances" of this dispute, the Appellate Body had already "accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans"); *id.* para. 7.253 (concluding that it could not complete the analysis).

or other fishing gear was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught"; and, (2) no dolphin mortality or serious injury occurred "in the sets or other gear deployments in which the tuna were caught."[236] Additionally, to be eligible for the label, tuna product produced from the ETP large purse seine fishery must be accompanied by certifications from an AIDCP-approved observer, as has been the case since the original measure came into effect.

121. As to the education and training aspect, the 2016 IFR did not alter the situation for the ETP large purse seine fishery, and those AIDCP/IATTC standards remain the same. However, under the 2016 IFR, captains operating outside the ETP large purse seine fishery are now required to certify completion of the NMFS dolphin-safe captain's training course, which includes information on: (1) identifying dolphins of the taxonomic family *Delphinidae*; (2) identifying intentional gear deployment on or encirclement of dolphins; (3) identifying dolphin mortality and serious injury; and (4) physically separating dolphin-safe tuna from non-dolphin-safe tuna from the time of capture through unloading.[237] As such, while differences remain between the certification requirements that apply to "dolphin safe" tuna product produced from the ETP large purse seine fishery, on the one hand, and other fisheries on the other, those differences have narrowed from the time of the first compliance proceeding.

iii. The Certification Requirements Are Calibrated to the Difference in Risk

122. As noted above, the central inquiry as to the even-handedness of the certification requirements is whether they are "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."[238] As also discussed above, in explaining this analysis, the Appellate Body has described a two part inquiry: 1) whether the risks posed to dolphins are, in fact, different; and, if so, 2) whether "the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could *be explained as commensurate* with the different risks associated with tuna fishing in different oceans and using different fishing methods."[239]

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[236] 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2); 2016 IFR, at 15,446 (Exh. US-7).

[237] *See supra* sec. III.B (citing 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2)). Additionally, as described above, an observer certification is required for tuna caught in certain fisheries that have an observer program that NOAA has designated as qualified and authorized to certify as to the dolphin safe label when such observer is on board the harvesting vessel. *See* 50 C.F.R. § 216.91(a)(3)(vi) (Exh. US-2)

[238] *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 (stating that, in "the particular circumstances" of this dispute, the Appellate Body had already "accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans").

[239] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160 ("If, for example, the Panel established that the risks posed to dolphins in the different fishing areas and by the different fishing methods are the same, then it may properly have reached the conclusion that treating them differently is not 'even-handed.' If, however, the Panel considered that the risk profiles are different, then further inquiry would have been needed into whether the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could *be*

123. The certification requirements meet this test. First, as discussed in section V.C.2.b.iii.A, the ETP large purse seine fishery has a special risk profile that is different from the risk profiles of other fisheries. Second, as discussed in section V.C.2.b.iii.B, the differences in the certification requirements are commensurate with these different risk profiles. As such, the certification requirements are calibrated and, as such, even-handed and thus cannot support a finding of less favorable treatment.[240] Such a conclusion is entirely consistent with the DSB recommendations and rulings in both previous proceedings, and is supported by the overwhelming balance of the evidence.

(A). The Special Risk Profile of the ETP Large Purse Seine Fishery

124. The evidence confirms the first compliance panel's finding that the ETP large purse seine fishery has a "special risk profile" distinct from other fisheries.[241] In particular, the ETP is unique among all ocean areas because it is the only area that exhibits an association between tuna and dolphins so frequent and intense that it is exploited systematically by a commercial fishery. In this regard, the original panel found that there were "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP."[242] The first compliance panel confirmed that "even though there may be some interaction between tuna and marine mammals, including dolphins, outside the ETP . . . it is only inside the ETP that setting on dolphins is practiced consistently or systematically."[243] The Appellate Body flatly rejected Mexico's DSU Article 11 appeal on this point, noting that Mexico's own exhibit concluded that "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," and did not "suggest widespread tuna-dolphin association or widespread use of the fishing technique of setting on dolphins outside the ETP."[244]

125. The scientific evidence currently available – which closely tracks the record evidence in the first compliance proceeding – clearly establishes that the type of tuna-dolphin association that makes systematic setting on dolphins possible as a commercial fishing method is unique to the ETP, where the large purse seiners are both capable and permitted to employ this fishing method. As described in section IV.B, intentional sets on dolphins make up nearly half of all

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explained as commensurate with the different risks associated with tuna fishing in different oceans and using different fishing methods.") (emphasis added).

[240] *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.96, 7.101, 7.155.

[241] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (referring to the "special risk profile of the ETP large purse seine fishery"); *see also id.* paras. 7.240-242, 7.244-245, 7.278-283 (min. op.).

[242] *US – Tuna II (Mexico) (Panel)*, para. 7.520.

[243] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *see also* Meghan A. Donahue & Elizabeth F. Edwards, NMFS, *An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside the Eastern Tropical Pacific Ocean*, at 38 (1996) (Exh. US-74) (1st 21.5 Exh. MEX-40); Gerrodette, "The Tuna-Dolphin Issue," at 1192 (Exh. US-12).

[244] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.224-226 (citing Charles R. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*, at 63, 67 (2014) (1st 21.5 Exh. MEX-161)).

sets by large purse seine vessels in the ETP – over 10,000 sets per year between 2009 and 2013.[245] Thus, the tuna-dolphin association in the ETP is so common and intense that it can be exploited on a widespread basis by chasing and capturing hundreds of dolphins thousands of times each year.

126. In other fisheries, by contrast, there is no evidence that vessels regularly set on dolphins or are even capable of doing so. Observer reports from the WCPFC, Eastern Tropical Atlantic, and Indian Ocean Tropical purse seine fisheries suggest that less than 1 percent of sets involve any dolphin interaction at all, even an incidental one.[246] With respect to other fishing methods, such as longline and pole and line fishing, there is no evidence that vessels intentionally deploy fishing gear to target dolphins – let alone on a systematic basis – nor any evidence that it is even possible for such vessels to do so. Further, no evidence suggests that dolphins in any fishery outside the ETP are *chased* to catch tuna.[247] Finally, and as discussed above, any opportunistic setting on even a few dolphins or other marine mammals (much less hundreds) is banned in the Indian Ocean, the western central Pacific Ocean, U.S. fisheries, among others.[248]

127. As a consequence of the unique fishing method practiced there, the frequency and intensity of interactions between dolphins and fishing vessels in the ETP large purse seine fishery is unparalleled. As described above in section IV.A, a single dolphin set involves intense, sustained interaction between a fishing vessel, speedboats, and possibly a helicopter and divers, and hundreds of dolphins, lasting up to several hours. In a single set, approximately 600 dolphins are chased and approximately 350 are then encircled in a purse seine net.[249] In a year, dolphin sets in the ETP involve chasing approximately 6 million dolphins and capturing 3-4 million.[250] All of these dolphins are directly at risk of being killed or seriously injured in the course of the set.

128. In other purse seine fisheries, by contrast, any dolphin interaction at all is rare and those that occur generally involve only a few animals. In the WCPFC purse seine fishery in 2010 and

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[245] *See supra* sec. IV.B, table 2.

[246] *See supra* sec. IV.B, table 3 (showing: (1) in the WCPFC purse seine fishery, any dolphin interaction occurred in only 0.70% and 0.18% of all observed sets from 2007-2009 and in 2010, respectively; (2) in the eastern tropical Atlantic purse seine fishery from 2003-2009, observers documented 0 cetacean interactions in 1,389 observed sets; and (3) observers in the EU purse seine fishery in the tropical Indian Ocean between 2003 and 2009 reported that less than 1% of the 3,052 sets observed involved any marine mammal interaction, and no marine mammals were encircled or caught).

[247] *See supra* sec. IV.B.

[248] *See supra* sec. IV.A (citing WCPFC Resolution 2011-03 (Exh. US-54) (prohibiting setting on cetaceans in the western and central Pacific Ocean); IOTC Resolution 13/04 (Exh. US-55) (prohibiting the setting on cetaceans in the Indian Ocean); 16 U.S.C. § 1372(a)(1)-(2) (Exh. US-57) (prohibiting U.S. vessels from setting on all marine mammals anywhere in the world, subject to limited exceptions)).

[249] Tables Summarizing Fishery-by-Fishery Evidence on the Record, tables 1-2 (Exh. US-13) (showing that, between 2009 and 2013, 31,300,659 dolphins were chased and 18,581,597 dolphins were encircled in a total of 52,115 dolphin sets, for an average of 601 dolphins chased and 357 encircled per set).

[250] Tables Summarizing Fishery-by-Fishery Evidence on the Record, tables 1 (Exh. US-13).

between 2007 and 2009, only 0.18 and 0.70 percent of observed sets involved *any* interaction with a dolphin.[251] Further, each interaction that occurred involved, on average, only seven dolphins.[252] Other recent reports from WCPFC purse seine fisheries confirm that marine mammal interactions occur only rarely and generally involve few animals.[253] Studies of the eastern tropical Atlantic and tropical Indian Ocean purse seine fisheries from 2003-2009 found no marine mammal interactions in 1,389 sets[254] and interactions in less than 1 percent of 3,052 sets.[255] Further, in the rare instances where purse seine vessels outside the ETP intentionally encircle dolphins in their nets, there is no evidence that these vessels *chase* the dolphins.

129. Dolphin interactions in the other types of fisheries are also similarly rare. In the American Samoa and Hawaii deep-set longline fisheries over the past decade, only 0.33 and 0.26 percent of sets, respectively, involved any dolphin interaction.[256] And in the American Samoa and Hawaii deep-set fisheries (the two for which relevant data is available), each interaction involved, on average, only one or two dolphins.[257] Recent data from other longline fisheries in the WCPFC convention area similarly show "very low" levels of marine mammal interactions.[258] A study of the EU Atlantic longline fishery similarly showed that only 4.4 percent of the observed sets involved any marine mammal interaction, and in all but 1 instance the interaction

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[251] Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-13); WCPFC Cetacean Interactions Paper, Table 2a, 2b (Exh. US-17).

[252] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13) (showing that, between 2007 and 2010, a dolphin interaction occurred in 171 out of 39,989 observed sets, and that a total of 1,195 dolphins were involved, giving an average of 7.0 dolphins involved in each interaction).

[253] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13) (showing: (1) in 2013, Australian and Micronesian logbooks and observers reported 1 marine mammal interactions and Japan reported 5, none fatal; and, (2) in 2014, logbooks and observers on Australian, Micronesian, Kirbatian, and New Zealand vessels reported no marine mammal interactions, while Japanese logbooks recorded 5 interactions and observers on Philippines and Taiwanese vessels reported, respectively, 18 marine mammals taken and 4 interactions involving a total of 27 mammals).

[254] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13; Amande et al. 2010, at 355-58 (Exh. US-19); Amande et al. 2011, at 2114-18 (Exh. US-20).

[255] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13); Amande et al. 2012, at 2-3, and 6 (Exh. US-21).

[256] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13); NMFS, "American Samoa Longline Annual Reports – 2004-2015" (Exh. US-23); NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2015" (Exh. US-22); NOAA Fisheries, 2015 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species, at 43, 50-51, Tables 4.3, 4.9 (2015) (Exh. US-39).

[257] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13) (showing: (1) in the American Samoa longline fishery, a marine mammal interaction occurred on 14 different trips and a total of 19 dolphins were involved; and, (2) in the Hawaii deep-set longline fishery, a marine mammal interaction occurred on 108 trips and 119 dolphins were involved).

[258] WCPFC, Scientific Committee, 2010 Overview and Status of Stocks, at 5 (Exh. US-25) (1st 21.5 Exh. US-230); *see* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13) (showing that, in 2014, Micronesian, Fijian, Korean, Taiwanese, and Tongan captains and observers recorded no marine mammals caught and Japanese observers recorded 6 mammals sighted).

involved depredation, not bycatch.[259] Finally, pole and line fisheries are not associated with dolphin bycatch.[260]

130. Unsurprisingly, given the unique level of interaction, the available scientific information on dolphin mortality in particular fisheries confirms that, even under the AIDCP, the ETP large purse seine fishery is uniquely dangerous for dolphins. Specifically, the current evidence establishes that:

- From 2009-2014, large purse seine vessels setting on dolphins in the ETP caused 6,027 dolphin mortalities, for an average of 1,004.5 mortalities each year.[261] On a per set basis (to facilitate comparison across fisheries), there were 94.92 dolphin mortalities per thousand observed sets.[262]

- In the much larger WCPFC purse seine fishery in 2010, there were only 55 dolphin mortalities in over 20,000 observed sets, or 2.64 dolphin mortalities per thousand sets.[263] Observers and logbooks for 2013 and 2014 reported similarly low levels of mortality.[264]

- Studies in Atlantic and Indian Ocean purse seine fisheries reported 0 marine mammal mortalities in 1,389 and 3,052 observed sets, respectively, between 2003 and 2009.[265]

- In the Hawaii deep-set and American Samoa longline fisheries between 2009 and 2015, there were an average of 10 and 2.3 observed dolphin mortalities per year (with observer coverage ranging from 20-25 percent).[266] Controlling for the number of sets, there were 2.73 and 3.42 dolphin mortalities per thousand sets.[267] Reports from

[259] Hernandez-Milian, et al. 2008, at 254 (Exh. US-40).

[260] *See* Gilman & Lundin 2009, at 3 (Exh. US-53).

[261] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, "Report on the International Dolphin Conservation Program," Doc. MOP-32-05, 32nd Meeting of the Parties, at 3 and Table 3 (Exh. US-15).

[262] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, "Tuna, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2014," at Table A-7 (Exh. US-14) (for set numbers); IATTC, "Report on the International Dolphin Conservation Program," Doc. MOP-32-05, 32nd Meeting of the Parties, at 3 and Table 3 (Exh. US-15) (for mortality).

[263] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); WCPFC Cetacean Interactions Paper, Table 2a, 2b (Exh. US-17).

[264] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[265] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[266] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2015" (Exh. US-22); NMFS, "American Samoa Longline Annual Reports – 2004-2015" (Exh. US-23).

[267] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

other WCPFC convention area longline fisheries point to similarly low levels of dolphin mortality.[268]

- Dolphin mortality in the U.S. and EU Atlantic longline fisheries similarly does not approach dolphin mortality in the ETP large purse seine fishery, particularly controlling for the number of sets in the fisheries.[269]

131. Thus, the available scientific evidence demonstrates that the ETP large purse seine fishery is uniquely dangerous for dolphins due to the frequency and intensity of interactions between fishing vessels and dolphins and the resulting high dolphin mortality rate. Accordingly, the first compliance panel's findings in this regard, including that the ETP large purse seine fishery has a "special risk profile," *remains valid*. Setting on dolphins in the ETP is quantitatively and qualitatively "different" in "nature and degree of the interaction" between dolphins and large purse seine vessels than in other fisheries, and sets this particular fishery apart from others.[270] As such, it is completely legitimate for the United States to apply different certification requirements to tuna product produced from the ETP large purse seine fishery than to tuna product produced from other fisheries.

(B). The Difference in the Certification Requirements Is Commensurate with the Differences in Risk Profiles of Different Fisheries

132. The difference in the certification requirements between the ETP large purse seine fishery, on the one hand, and other fisheries, on the other, is commensurate with the different risk profiles of these fisheries, and is thus calibrated to the differences in risk to dolphins posed by tuna fishing in different ocean areas. This is the case for at least two reasons.

133. First, the difference in the certification requirements is commensurate with the differences in risk because the task of verifying that tuna meets the eligibility criteria is so much more difficult in the ETP large purse seine fishery than it is in other fisheries. That is to say, it is appropriate to require two certifiers (one of whom has to meet certain minimum education standards and has undergone some training) where the conditions facing the certifier are very difficult and to require only one certifier (who need not meet minimum education standards but is required to have taken a training course) where the conditions are less difficult.

134. The ETP large purse seine fishery is fundamentally different from other fisheries in terms of *the number* of dolphins put at risk of mortality or serious injury by interacting with the vessel,

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[268] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13) (showing similar levels of dolphin mortality in the Australia western Pacific longline fishery, and the Tongan longline fishery, as well as by Taiwanese, Micronesian, Fijian, Japanese, and Korean longline vessels).

[269] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13) (showing: (1) from 2009 to 2014, there were 17.64 dolphin mortalities *and injuries* per thousand sets in the Atlantic pelagic longline fishery; and (2) from 2006-2007, there was 1 marine mammal mortality in 635 observed sets in the EU Atlantic longline fishery).

[270] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240-241.

fishing gear, etc. and *the frequency* in which that interaction is taking place.[271] Indeed, both the number and frequency of interaction is exponentially greater in the ETP large purse seine fishery than it is for other fisheries.[272] It is, therefore, far more difficult to certify as to mortality and serious injury where the vessel is repeatedly chasing and capturing hundreds of dolphins in 100 percent of dolphin sets in coordination with speedboats, a helicopter, and divers than it is to certify where the vessel has accidentally interacted with a handful of dolphins in that rare set where that occurs in other fisheries.[273]

135. Also, the ETP large purse seine fishery differs substantially from other fisheries in *how* this interaction occurs. ETP large purse seine vessels, in coordination with speedboats and a helicopter, engage in lengthy chases of large dolphin herds, which usually last 20-40 minutes but can take over two hours, with the entire process lasting another one-to-two hours following the end of the chase.[274] Such a complex scene – in varying weather and ocean conditions – can make it very difficult for even the captain and a single observer to see every dolphin interaction throughout the entire process.[275] There is no evidence that this type of interaction is repeated elsewhere in the world.

136. Thus, the certifiers' task is far more difficult inside the ETP large purse seine fishery than outside. Indeed, the first compliance panel appeared to recognize this point when it agreed with the U.S. argument that:

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

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[271] *See supra* secs. IV.B; V.C.2.b.iii.A.

[272] *See generally supra* sec. IV.

[273] *See supra* secs. IV.B, V.C.3.b.iii.A (discussing amount and frequency of dolphin interaction in fisheries other than the ETP large purse seine fishery); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240, 7.244 (finding that "interaction is only accidental" outside the ETP large purse seine fishery).

[274] *See, e.g.*, U.S. Response to 1st 21.5 Panel Question 30, n.282 (noting that, at the end of a chase, speedboats have herded the dolphins into a tight group. The purse seiner then deploys the net around the dolphins, and speedboats circle the net's opening to prevent dolphins from escaping until the net is closed completely. At that point, dolphins cannot escape, other than by jumping over the net's floating corks, until the "backdown" process is initiated. Helicopters are often flown extremely close to the water's surface during the chase and encirclement so that the air turbulence from their rotors creates a windstorm beneath the aircraft which, along with the loud noise from the engines, help deter dolphins from escaping. It takes approximately 40 minutes before the vessel can begin the "backdown" procedure to release the captured dolphins, and thus dolphins could be confined for over an hour and half during a set.) (citing Curry 1999, at 6 (Exh. US-42)).

[275] *See* U.S. Response to Panel Question No. 30, para. 167, n.282.

person to observe the impact of the vessel on the dolphins that it was chasing and capturing.[276]

137. In other fisheries, by contrast, where interactions with dolphins are generally accidental and are of limited scope and duration, captains are capable of determining the fate of the few dolphins he or she may encounter. Indeed, it is not uncommon for captains to be asked to certify as to marine mammal interactions, injuries, and/or mortalities. For example, a number of countries require captains of their flagged vessels to complete logbooks covering marine mammal bycatch and the status of such bycatch. These countries include Australia,[277] Japan,[278] Korea,[279] the Seychelles,[280] Thailand,[281] and the United States,[282] *inter alia*.[283] Also, captains of

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[276] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-245 (citing U.S. Response to 1st 21.5 Panel Question No. 30, para. 168, rejecting Mexico's argument that the ETP is not "unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries," and finding, based on the U.S. argument, that it "would find that the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction") (emphasis added).

[277] *See* Australian Fisheries Management Authority, "Australian Pelagic Longline Daily Fishing Log," at 9 (Exh. US-75) (1st 21.5 Exh. US-177) (requiring captains to list each individual "marine and threatened species" (including dolphins) with which the vessel interacts, including the life status – alive, dead, injured – of the animal); Australian Fisheries Management Authority, "Purse Seine Daily Fishing Log," at 10 (Exh, US-76) (1st 21.5 Exh. US-178) (requiring captains to report each interaction with a "protected species" (including dolphins), including the life status – alive, dead, injured – of the animal).

[278] Japan, "Reporting Form of Incidentally Encircled of Whale Shark (RHN) or Whales" (Exh. US-77) (1st 21.5 Exh. US-180). The form requires that captains report each incidentally encircled whale shark or "whale," as well as the status of the animal after release – survive/swim, dead before release, or other. The Japanese word "鯨類" is translated "whale" in the English text of the form. However, in other contexts, including in the name of the Institute for Cetacean Research, a research organization authorized by the Government of Japan, the word is translated "cetacean" and, therefore, also includes dolphins. *See, e.g.*, Institute of Cetacean Research, *available at* http://www.icrwhale.org/eng-index.html (accessed June 20, 2016) (Exh. US-78).

[279] Korea, "LL, PS / Bycatch Logbook (Ecologically Related Species" (Exh. US-79) (requiring that information on all "other species including seabirds, marine turtles, etc." be recorded, including the number released and the number discarded). In the IOTC, where this logbook is used, the terms "released" vs. "discarded" are generally used to refer to bycatch released alive vs. bycatch discarded dead. *See, e.g.*, IOTC, Resolution 10/12 on the Conservation of Thresher Sharks (Family Alopiidae) Caught in Association with Fisheries in the IOTC Area of Competence" (2012) (Exh. US-80); Romanov et al. IOTC Working Party on Ecosystems and Bycatch, "A Concept Note on an IOTC Shark Tagging Program," at 3 (Sept. 2015) (Exh. US-81) (another IOTC report that distinguishes bycatch that are "discarded dead" from those that are "released alive").

[280] *See* Seychelles, "Weekly Report for Seychelles Flag Vessels" (Exh. US-82) (requiring that logbooks record the number of marine mammals "released alive" and "discarded dead").

[281] Thailand, "Weekly Report for Tuna Longline Fishing Vessels" (Exh. US-83) (requiring that logbooks record the number of marine mammals "released alive" and "discarded dead").

[282] NMFS, "Western Pacific Longline Fishing Log" (Exh. US-84) (1st 21.5 Exh. US-175) (requiring that logbooks record the number of "protected species," including dolphins, released "uninjured, injured, dead"); NMFS, "2014 Atlantic Highly Migratory Species Logbook – Set Form," at 3 (Exh. US-85) (1st 21.5 Exh. US-176) (same).

[283] *See* Sri Lanka, "Longline Finalized Logbook Template" (Exh. US-86) (requiring under "remarks" that "discarded/release – sea turtles, mammals, thresher sharks" be recorded); Mozambique, "Tuna Longliners Fishing Logbook" (Exh. US-87) (stating under "remarks" that "discard/interaction with seabird, turtle, marine mammal, shale shark . . . must be recorded").

large purse seine vessels in the ETP are required to certify their TTFs, including whether any dolphins were killed or seriously injured in each set the vessel undertook, and, although this task can be far more complicated than outside the ETP, no part of the IATTC captain training appears directed at preparing captains to make this certification.[284]

138. In short, the United States is not alone in expecting that men and women who have the experience necessary to become a vessel captain are sufficiently familiar with the species common to the area in which they operate to be able to identify such species and their fate, if necessary. In order to assist these captains in this regard, however, NOAA has developed a training course that covers the key aspects of the eligibility criteria and what is required in terms of the segregation of dolphin safe and non-dolphin safe tuna onboard a vessel. In fact, the training is more specific to the required certifications than the training for AIDCP observers, as the IDCP guidelines do not address dolphin mortality and serious injury specifically, but focus more on techniques to try to reduce the risks to dolphins posed by dolphin sets.[285]

139. Thus, the difference in certification requirements is commensurate with the differences in risk in light of the difficulty of the certifier's task inside and outside the ETP large purse seine fishery, a point that is entirely consistent with the first compliance panel's statement that, in light of this evidence, it would have found "that the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction."[286]

140. Second, the difference in certification requirements is commensurate with the differences in risk among fisheries because any difference in the "margin of error" resulting from the different requirements has a rational connection to the difference in risk, as discussed by the minority panelist in the first compliance panel's report.[287] That is to say, even if the conditions facing the certifiers in the ETP large purse seine fishery and other fisheries were the same (which they are not), and a captain working outside the ETP large purse seine fishery were, therefore, a less "sensitive" mechanism than an AIDCP observer,[288] the regulatory distinction is calibrated

[284] *See* IATTC, "Captains' Training" (Exh. US-70) (None of the 160 slides in this presentation concerns identifying dolphin mortality or serious injury.); AIDCP, Training Module: Dolphins (Exh. US-71) (same).

[285] *See* AIDCP, Guidelines for Technical Training of Observers, Doc. OBS-2-03b (Exh. US-72).

[286] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.245.

[287] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.) ("[W]here the probability of dolphin mortality or serious injury is smaller – because, for instance, the degree of tuna-dolphin association is less likely – the United States may accept a proportionately larger margin of error. Conversely, where the risks are higher, it may be appropriate to tolerate only a smaller margin of error."); *id.* para. 7.277 ("As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection mechanisms in accordance with the historical incidence of and future potential for violations. Provided that there is a rational connection between the variation in intensity and the difference in risk, I would not find that the implementation of different detection mechanisms lacks even-handedness or is otherwise discriminatory.").

[288] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.275, 7.277 (min. op.).

(and thus even-handed) in tolerating a higher "margin of error" for the certifier where the risks are lower and tolerating a lower "margin of error" where the risks are higher.[289]

141. The United States has already demonstrated – indeed, the first compliance panel agreed – that the probability of dolphin mortality or serious injury is greater in the ETP large purse seine fishery than outside it.[290] Thus, it remains the case that, as the minority panelist put it, the different certification requirements "represent[] a fair response to the different risk profiles existing in different fisheries, as established by the evidence,"[291] even without taking into account that the certification requirements have narrowed since the first compliance proceeding. Taking the changes made by the 2016 IFR into consideration, it is even clearer that the certification requirements reflect a "fair response" to different risk profiles among fisheries, as established by the evidence on the record.

142. Thus, the certification requirements are calibrated to the risk profiles of different fisheries and, as such, are even-handed and thus cannot support a finding of less favorable treatment.

c. The Tracking and Verification Requirements Are Even-Handed

143. Because the U.S. measure requires dolphin safe tuna product produced from the ETP large purse seine fishery to be accompanied by the relevant AIDCP TTF number, the first compliance panel considered that the measure imposes two different tracking verification regimes – one that is generally applicable (the "NOAA regime") and one for tuna product produced from the ETP large purse seine fishery (the "AIDCP regime").[292] The panel concluded

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[289] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.) ("[G]iven the higher degree of risk in the ETP large purse seine fishery, it is in my opinion entirely even-handed for the United States to tolerate a smaller margin of error in that latter fishery, and accordingly to require observers in that fishery but not in others."); *id.* para. 7.279 ("As should be clear, my reasoning is based on the proposition that where the degree of risk is different, it is acceptable for the United States to tolerate different margins of error in their detection mechanisms.").

[290] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-244; *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.").

[291] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op.); *see also id.* para. 7.277 ("As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection mechanisms in accordance with the historical incidence of and future potential for violations. *Provided that there is a rational connection between the variation in intensity and the difference in risk*, I would not find that the implementation of different detection mechanisms lacks even-handedness or is otherwise discriminatory.") (emphasis added).

[292] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.294 (describing the regulatory distinction at issue); 50 C.F.R. §§ 216.92(b)(1), (b)(2)(i) (Exh. US-2); NOAA Form 370, para. 5B(5) (Exh. US-4) (requiring, as a condition for being designated dolphin safe, tuna harvested in the ETP by a purse seine vessel of more than 400 short tons carrying capacity to be accompanied by "valid documentation . . . listing the numbers for the associated Tuna Tracking Forms which contain the captain's and observer's certifications"). Again, the measure does not require the AIDCP TTF number to accompany tuna product produced from the ETP large purse seine fishery that is not otherwise eligible for the label – *e.g.*, Mexican tuna product produced from vessels that set on dolphins – as NOAA would only ever need to rely on the AIDCP regime to verify that tuna product certified as *dolphin safe* meets

that the two regimes differed as to "depth," "accuracy," and "degree of government oversight" and that, due to these differences, the AIDCP regime was more "burdensome" than the NOAA regime.[293] On this basis, the first compliance panel found that the measure's tracking and verification requirements were not even-handed.[294]

144. In the first compliance proceeding, the United States argued that any difference between the AIDCP and NOAA regimes was calibrated to the difference in risk between the ETP large purse seine fishery and other fisheries.[295] However, the panel rejected this argument, finding that whether the tracking and verification requirements were calibrated to differences in risk was not relevant to whether the requirements are even-handed.[296] The Appellate Body reversed on this point, but determined that it could not complete the analysis as to whether the differences were, in fact, calibrated to any difference in risk.[297] Although the United States considers that the differences in the tracking and verification requirements, as they existed prior to the 2016 IFR, were calibrated to differences in risk, it nonetheless took the opportunity in the 2016 IFR to narrow the differences between the two regimes, further clarifying that the measure's tracking and verification requirements are calibrated (and thus even-handed).

145. In section V.C.2.c.i, the United States explains the NOAA regime, as modified by the 2016 IFR. In section V.C.2.c.ii, the United States explains the AIDCP regime and discusses how the AIDCP and NOAA regimes currently differ. In section V.C.2.c.iii, the United States concludes by demonstrating how the difference between the two regimes is calibrated to differences in risk between the ETP large purse seine fishery and other fisheries.

i. The NOAA Regime, as Amended by the 2016 IFR

146. The purpose of the tracking and verification requirements of the NOAA regime is to distinguish between tuna product that meets the dolphin safe standard and tuna product that does not.[298] As discussed extensively in the first compliance proceeding, the NOAA tracking and verification regime is composed of several interlocking elements:

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the U.S. standard. *See id.* (noting that if the exporter/importer/signee checks Box 5.A, indicating that "[t]he tuna or tuna products described herein are not certified to be dolphin safe and contain no marks or labels that indicate otherwise," no AIDCP TTF number is required).

[293] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.370.

[294] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.392, 7.400.

[295] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.142 (summarizing U.S. calibration argument); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (summarizing U.S. calibration argument).

[296] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 ("[I]n the Panel's view, the special risk profile of the ETP large purse seine fishery simply does not explain or otherwise justify the fact that the post-catch tracking and verification mechanisms applied to tuna caught other than by large purse seine vessels in the ETP are significantly less burdensome.").

[297] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.166-167.

[298] *See* 2013 Final Rule, at 40,997 (Exh. US-6).

- *Recordkeeping and reporting*: All imported tuna product must be accompanied by a NOAA Form 370, which designates, *inter alia*, whether the product is dolphin-safe.[299] Dolphin safe and non-dolphin safe tuna product must have separate Form 370s.[300] For tuna product designated dolphin safe, the Form 370 contains the necessary certifications, which list the harvesting vessel and the trip on which the tuna was caught.[301] U.S. tuna processors are required to submit monthly reports to the TTVP for all tuna received at their processing facilities that contain the same information contained in the NOAA Form 370, as well as additional information, such as carrier vessel names (if applicable), unloading dates, and the condition of the tuna products.[302]

- *Physical segregation*: The U.S. measure requires that, to be eligible for the dolphin safe label, tuna product must be produced from tuna that has been kept physically separate from non-dolphin safe tuna from the time it was caught through unloading and processing.[303]

- *Verification*: NMFS undertakes verification activities, including dockside inspections of vessels, monitoring of Form 370s, monitoring of cannery reports, audits of U.S. canneries, and retail market spot checks, while other U.S. agencies, including the U.S. Coast Guard, conduct onboard inspections on the high seas and in U.S. waters.[304]

- *Sanctions*: Sanctions for offering for sale or export tuna products falsely labeled dolphin safe may be assessed against any producer, importer, exporter, distributor, or seller who is subject to the jurisdiction of the United States.[305] Violators may be prosecuted under the DPCIA provisions directly, under federal provision establishing false statement or smuggling prohibitions, or under federal labelling standards.[306]

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[299] *See* U.S. First Written Submission to the 1st 21.5 Panel, para. 49; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.49; *see also* NOAA Form 370 (Exh. US-4).

[300] *See* NOAA Form 370 (Exh. US-4).

[301] *See* NOAA Form 370 (Exh. US-4); NMFS, Captain Statement Template (2016) (Exh. US-88); Captain's Statements Received by NMFS, 2012-2014 (Exh. US-89) (1st 21.5 Exh. US-169).

[302] U.S. First Written Submission to 1st 21.5 Panel, para. 52 (citing *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. §§ 216.93(d)(i), (d)(ii), (e) (Exh. US-22); U.S. Response to Original Panel Question No. 4).

[303] *See* U.S. First Written Submission to the 1st 21.5 Panel, para. 50; 50 C.F.R. § 216.93(c)(1)-(3) (Exh. US-2). For example, segregation on board the harvesting vessel will be achieved through the designation of dolphin safe and non-dolphin safe wells where a vessel has multiple wells, but can also be achieved through the use of netting or other materials. 2013 Final Rule, at 40,100 (Exh. US-6).

[304] *See* U.S. First Written Submission to 1st 21.5 Panel, para. 53; U.S. Responses to 1st 21.5 Panel Questions 35, 38, and 44.

[305] *See* U.S. First Written Submission to 1st 21.5 Panel, para. 53; U.S. Response to 1st 21.5 Panel Question No. 18, paras. 92-100; U.S. Response to 1st 21.5 Panel Question No. 38, paras. 197-203; *US – Tuna II (Mexico) (Panel)*, para. 2.33; DPCIA, 16 U.S.C. § 1385(3) (Exh. US-1).

[306] *US – Tuna II (Mexico) (Panel)*, para. 2.33 (citing U.S. Response to Original Panel Question No. 50, para. 120). Sanctions against U.S. individuals and companies are the same regardless of whether the tuna is

147. The changes made to the tracking and verification requirements by the 2016 IFR do not affect the requirements in place prior to that rule taking effect, but rather augment the regime that was already in place.[307] As discussed above, the 2016 IFR established additional chain of custody recordkeeping requirements for U.S. processors or importers, as applicable. Specifically, U.S. processors and importers must collect and retain records regarding each custodian of the tuna or tuna product throughout the complete chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors.[308] These records must be sufficient for NMFS to conduct a trace-back to verify that any tuna product certified to NMFS as dolphin-safe, in fact, meets the dolphin-safe labeling requirements.[309] Moreover, the recordkeeping must be sufficient for NMFS to trace any non-dolphin safe tuna loaded onto the vessel back to one or more storage wells or other storage locations for a particular fishing trip to prove that such non-dolphin safe tuna was kept physically separate from dolphin-safe tuna from catch through unloading.[310]

ii. The AIDCP Regime and How It Compares to the Current NOAA Regime

148. As noted above, the first compliance panel's even-handedness analysis was based on a comparison of the two different sets of legal requirements – those imposed by the AIDCP regime (for tuna product produced from the ETP large purse seine fishery) and those imposed by the NOAA regime (for tuna product produced outside the ETP large purse seine fishery).[311] In

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imported or domestically produced. A product found to have been wrongfully labeled will likely be seized as evidence and, subsequently, re-exported, destroyed, or forfeited, depending on the facts of the case. *See US – Tuna II (Mexico) (Panel)*, para. 2.33; U.S. Response to Original Panel Question No. 4.

[307] As discussed in section III.B, the changes made by the 2016 IFR apply only to tuna product produced from "other fisheries," *i.e.*, all fisheries eligible to product dolphin safe tuna other than the ETP large purse seine fishery (which is subject to the AIDCP regime). *See* 50 C.F.R. § 216.91(a)(5) (Exh. US-2).

[308] 50 C.F.R. § 216.91(a)(5) (Exh. US-2) (stating that tuna caught in "other fisheries" may not be labeled dolphin safe unless "[t]he importer of record or U.S. processor of tuna or tuna products, as applicable, maintains information on the complete chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors to enable dolphin-safe tuna to be distinguished from non-dolphin-safe tuna from the time it is caught to the time it is ready for retail sale …"); 2016 IFR, at 15,447 (Exh. US-7).

[309] *See* 2016 IFR, at 15,447 (Exh. US-7) (stating: "NMFS expects that typical supply chain records that are kept in the normal course of business, including declarations by harvesting and carrier vessels, bills of lading and forms voluntarily used or required under foreign government or international monitoring programs, which include such information as the identity of the custodian, the type of processing, and the weight of the product, would provide sufficient information for NMFS to conduct a trace back.").

[310] 50 C.F.R. § 216.91(a)(5) (Exh. US-2) (stating that tuna caught in "other fisheries" may not be labeled dolphin safe unless "The importer of record or the U.S. processor, as appropriate, ensures that information is readily available to NMFS upon request to allow it to trace any non-dolphin-safe tuna loaded onto the vessel back to one or more storage wells or other storage locations for a particular fishing trip and to show that such non-dolphin-safe tuna was kept physically separate from dolphin-safe tuna through unloading."); 2016 IFR, at 15,447 (Exh. US-7).

[311] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.354; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.358 ("We also recall that the Panel found that the differences in the tracking and verification requirements are such that there are differences in the depth, accuracy, and degree of government oversight that *is legally required* under the amended tuna measure with respect to tuna products derived from tuna caught in the ETP

conducting this comparison, the panel began with the specific legal requirements of the AIDCP regime, *i.e.*, those requirements included in "IDCP System for Tracking and Verifying Tuna," as amended, (hereinafter "AIDCP Tracking and Verification Resolution"), and then compared those requirements with the NOAA regime.[312] As noted, the panel concluded that the two regimes differed as to "depth," "accuracy," and "degree of government oversight."[313]

149. As the panel's benchmarks of depth, accuracy, and degree of government oversight were not briefed by either party in the previous proceeding, the United States here reviews the legal requirements imposed by AIDCP Tracking and Verification Resolution, as well as how they compare to the NOAA regime with respect to the three dimensions identified by the panel.

150. The AIDCP Regime. The objective of the AIDCP regime is to distinguish between tuna where a dolphin was not killed or seriously injured in the harvesting set and tuna where a dolphin was killed or seriously injured (*i.e.*, "dolphin safe" and "non-dolphin safe" tuna as defined by the AIDCP).[314] The AIDCP regime pursues this objective by setting tracking and verification standards designed to ensure that "dolphin safe" and "non-dolphin safe" tuna are kept physically separate from capture through processing and providing for related recordkeeping requirements.[315] AIDCP parties have promulgated regulations implementing the standards set out in the AIDCP Tracking and Verification Resolution,[316] although in doing so, parties may set requirements for their own industries that are more stringent than those required by the AIDCP Tracking and Verification Resolution.

151. The AIDCP recordkeeping system is based on a common form, the TTF.[317] Each TTF has a unique number. On each trip, ETP large purse seine vessels must maintain Form A of the TTF for all "dolphin safe" tuna (as defined by the AIDCP) and a separate Form B of the TTF for all "non-dolphin safe" tuna (as defined by the AIDCP).[318] Under the AIDCP, the determination

large purse-seine fishery, on the one hand, and from tuna caught in all fisheries other than the ETP large purse-seine fishery, on the other hand.") (emphasis added).

[312] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.355, 7.360 (citing AIDCP Tracking and Verification Resolution (1st 21.5 Exh. MEX-36)).

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

[314] International Dolphin Conservation Program, "System for Tracking and Verifying Tuna, as amended," sec. 2 (2015) (Exh. US-90) ("AIDCP Tracking and Verification Resolution") ("The sole purpose of this system is to enable dolphin safe tuna to be distinguished from non-dolphin safe tuna from the time it is caught to the time it is ready for retail sale. This system is based on the premise that dolphin safe tuna shall, from the time of capture, during unloading, storage, transfer, and processing, be kept separate from non-dolphin safe tuna.").

[315] AIDCP Tracking and Verification Resolution, sec. 2 (Exh. US-90). Under the AIDCP, "non-dolphin safe" tuna product is that tuna product produced from tuna harvested in a set where a dolphin was killed or seriously injured. *Id.* at sec. 1.

[316] *See* AIDCP Tracking and Verification Resolution, sec. 2 (Exh. US-90).

[317] *See* AIDCP, Tuna Tracking Form (Exh. US-91) ("AIDCP TTF").

[318] *See* AIDCP Tracking and Verification Resolution, sec. 3(2) (Exh. US-90); AIDCP TTF (Exh. US-91).

of the "dolphin safe" status of tuna is made at the end of each set,[319] and once the tuna harvested in a particular set is onboard, it is loaded into wells of the proper designation and recorded on the trip TTF.[320] Transshipments of tuna (*i.e.*, transfer of tuna at sea before completion of the trip) are permitted and must be documented on the TTFs of the transferring and receiving vessels.[321]

152. During a vessel trip, the only requirement regarding well storage is that "dolphin safe" and "non-dolphin safe" tuna must be loaded into different wells that are correctly designated.[322] Tuna from one set can be loaded into a well containing tuna from another set and tuna from one set can be loaded into multiple wells, provided the designations are correct.[323] Thus, at the end of a trip, the completed "dolphin safe" TTF would indicate how many sets occurred with no dolphin mortality or serious injury and all the wells in which the "dolphin safe" tuna was stored, but tuna from a particular set would not necessarily be identifiable, as it could be stored in the same well with other tuna from another dolphin safe set.[324]

153. When tuna is unloaded at port, "dolphin-safe" tuna and "non-dolphin safe" tuna must be unloaded into separate "bins," and each bin must be identified with the corresponding TTF number.[325] Tuna stored in different wells onboard the vessel may be commingled in individual bins, and tuna stored in the same well may be separated into different bins. The only requirement is that "dolphin safe" tuna and "non-dolphin safe" tuna be kept in separate bins. Thus, from unloading onward, tuna from multiple wells may be co-mingled and is not required to be linked to the particular well in which it was stored.

154. At the time of unloading, the relevant TTF must be transmitted to the competent authority of an AIDCP party.[326] The relevant TTF number then must "accompany" the tuna through sales

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[319] AIDCP Tracking and Verification Resolution, sec. 4(1) (Exh. US-90).

[320] *See* AIDCP Tracking and Verification Resolution, sec. 4(3) (Exh. US-90); AIDCP TTF (Exh. US-91).

[321] AIDCP Tracking and Verification Resolution, sec. 4(5) (Exh. US-90).

[322] AIDCP Tracking and Verification Resolution, sec. 4(2) (Exh. US-90).

[323] AIDCP Tracking and Verification Resolution, sec. 4(2) (Exh. US-90) ("On the basis of the observer's determination, the tuna is designated either dolphin safe or non-dolphin safe. The tuna is brailed and loaded into a prepared *well or wells which already contain either dolphin safe tuna or non-dolphin safe tuna*, as applicable, or into a prepared but empty *well or wells* which shall then be designated dolphin safe or non-dolphin safe, as applicable.") (emphasis added).

[324] *See* AIDCP TTF (Exh. US-91). A "trip" ends when the vessel unloads two-thirds or more of its catch. AIDCP Tracking and Verification Resolution, sec. 1(q) (Exh. US-90).

[325] AIDCP Tracking and Verification Resolution, sec. 5(6) (Exh. US-90) ("Dolphin safe and non-dolphin safe tuna shall be unloaded from fishing or carrier vessels into separate bins. Each bin shall be identified with the corresponding TTF number, the dolphin safe status of the tuna, and confirmed scale weight for the tuna in that bin.").

[326] How this occurs depends on the circumstances of the unloading. *See* AIDCP Tracking and Verification Resolution, sec. 5(2)-(5) (Exh. US-90).

of portions of the catch and processing.[327] During storage and processing, "dolphin safe" and "non-dolphin safe" tuna cannot be processed "on the same lines at the same time," and processors must maintain "records complete enough to allow the lot numbers of processed tuna to be traced back to the corresponding TTF number."[328] Tuna exported as AIDCP "dolphin safe" must be accompanied by a certificate of its dolphin safe status issued by a competent authority, which must include a reference to the relevant TTF number.[329]

155. The AIDCP Tracking and Verification Resolution also provides that the national programs established by the parties to the AIDCP should "include periodic audits and spot checks" for tuna products, as well as mechanisms for cooperation among national authorities, but does not provide specific legal requirements as to audits or cooperation among the parties.[330]

156. Depth. The first compliance panel used the term "depth" to refer to the point to which tuna can be traced back."[331] In that panel's view, the record-keeping requirements imposed by the AIDCP Tracking and Verification Resolution meant that tuna product produced from the ETP large purse seine fishery could "be tracked back all the way to *the particular set* in which the tuna was caught and *the particular well in which it was stored*."[332] However, in order to trace a particular lot of tuna back to a particular set, the tuna would need to be segregated *by set* onboard the vessel and throughout unloading and processing. Similarly, in order to trace back to a particular well, the tuna would need to be segregated *by well* throughout unloading and processing. As discussed above, neither is required by the AIDCP Tracking and Verification Resolution.

157. Rather, the AIDCP regime requires that processed tuna product *be traceable back to the TTF*. And while the relevant TTF lists the sets and wells that covers tuna product will not be traceable back to a particular set or a particular well because the AIDCP regime does not prohibit the co-mingling of tuna harvested in different sets onboard the vessel (as long as "dolphin safe" and "non-dolphin safe" are not co-mingled) or the co-mingling of tuna stored in different wells in the off-loading, storage, and processing of the tuna (provided "dolphin safe" and "non-dolphin safe" are kept separate). Thus, all that is required to be disclosed at the time of an audit is that the tuna in question was harvested on a particular trip covered by the TTF number, that it was

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[327] AIDCP Tracking and Verification Resolution, sec. 5(7) (Exh. US-90) ("Each sale of a portion of the catch shall reference the corresponding TTF number, which will accompany the tuna through every step of processing.").

[328] AIDCP Tracking and Verification Resolution, sec. 6(b)-(c) (Exh. US-90).

[329] AIDCP Tracking and Verification Resolution, sec. 6(d) (Exh. US-90).

[330] AIDCP Tracking and Verification Resolution, sec. 7 (Exh. US-90).

[331] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.355.

[332] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.355 ("Mexico has shown that tuna caught by large purse seine vessels in the ETP can, pursuant to the record-keeping requirements embedded in the AIDCP and incorporated into the amended tuna measure, be tracked back all the way to *the particular set* in which the tuna was caught and *the particular well in which it was stored*.") (emphasis in original) (citing AIDCP Tracking and Verification Resolution).

caught in one of the sets listed on the TTF, and that it was stored in one of the wells listed on the TTF.[333]

158. Further, the level of specificity set by these requirements makes sense given that the objective of the AIDCP regime is to distinguish between "dolphin safe" and "non-dolphin safe" tuna.[334] Being able to trace a lot of tuna back to the particular set or well does not necessarily contribute to the objective, if it is assured the tuna in the relevant group of sets and group of wells is all "dolphin safe" or "non-dolphin safe," which the AIDCP regime does by requiring separate TTF pages (Form A and Form B) for "dolphin safe" and "non-dolphin safe" tuna.

159. Accordingly, ***there is no practical difference*** in the tracking and verification requirements between the AIDCP and NOAA regimes as to "depth." Both regimes have the same objective – to distinguish between dolphin safe and non-dolphin safe tuna, by being able to track and verify that the two types of tuna have been kept physically separate from one another from the vessel through processing.[335] To do so, both regimes require a separate set of information for dolphin safe or non-dolphin safe tuna product (*i.e.*, different TTF pages for the AIDCP regime and different Form 370s (or equivalent) and captain certifications for the NOAA regime), to which NMFS can trace back the tuna. Further, under the NOAA regime, (as amended by the 2016 IFR), U.S. processors and importers are required to maintain records sufficient for NOAA to trace back to *the particular well* (or other storage locations) any non-dolphin safe tuna product caught on a trip.[336]

160. Accuracy. The first compliance panel used the term "accuracy" to refer to "the degree of confidence that a particular captain (or, where applicable, observer) statement properly describes the lot of tuna to which it is assigned."[337] In the panel's view, "[the AIDCP] tuna tracking forms . . . accompany particular catches of tuna throughout the fishing and production process, from the point of catch right through to the point of retail" and, "accordingly the identity of a particular

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[333] *See* AIDCP Tracking and Verification Resolution, sec. 6 (Exh. US-90). In this regard, it is notable that a number of AIDCP Parties also do not require processed tuna product to be tracked back to a *particular set* or a *particular well* in their domestic regulations that implement the AIDCP Tracking and Verification Resolution, confirming that the minimum legal requirements of the AIDCP regime, and thus of the measure (in the previous panel's analysis), do not include such "depth." *See, e.g.*, U.S. Implementing Regulations (50 C.F.R. 216.93) (Exh. US-2); Costa Rica, "Procedure Manual for Traceability Control and Certification of Tuna Designated as 'Dolphin Safe,' art. 3 (2000) (Exh. US-92); Ecuador Office of the Assistant Secretary of Fishing Resources, Official Register No. 22, art. 6(f) (Feb. 22, 2000) (Exh. US-93); European Union, Council Regulation No. 882/2003 Establish a Tuna Tracking and Verification System, art. 4 (May 19, 2003) (Exh. US-94); Peru, Supreme Decree No. 003-2002, Approval of the Tracking and Verification System for Tuna Caught by Tuna Purse Seine Vessels," art. 6.2-6.3 (Mar. 2000) (Exh. US-95); Spain, Royal Decree 942/2001, art. 7 (Aug. 3, 2001) (Exh. US-96).

[334] *See* AIDCP Tracking and Verification Resolution, sec. 2 (Exh. US-90) ("The sole purpose of this system is to enable dolphin safe tuna to be distinguished from non-dolphin safe tuna . . .").

[335] *See* AIDCP Tracking and Verification Resolution, sec. 2 (Exh. US-90); 2016 IFR, at 15,447 (Exh. US-7).

[336] 50 C.F.R. § 216.91(a)(5) (Exh. US-2); 2016 IFR, at 15,447 (Exh. US-7).

[337] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.360.

batch of tuna can, in principle, always be established."[338] In coming to this conclusion, the first compliance panel cited not only the AIDCP Tracking and Verification Resolution but also Mexico's 2013 Implementing Regulations, the statement of CONAPESCA Commissioner Aguilar, and a statement of Mexican Industry Representative(s).[339] In contrast, for the NOAA regime, the first compliance panel questioned whether and how the "particular certificates are kept with particular lots of tuna up until the tuna reaches the canning plant."[340]

161. As to the legal framework, the United States would note the comparison being made in this part of the analysis should be between *the legal requirements* of the NOAA regime and the AIDCP regime, not between the legal requirements of the NOAA regime and the Mexican regime or between the legal requirements of the NOAA regime and the practice of the Mexican industry. The U.S. measure, of course, references the AIDCP regime itself, not how the Mexican Government has implemented that regime through domestic regulations, nor what practices the Mexican industry has instituted. Further, the United States would note that that while the TTF number must accompany the tuna through the unloading and production process, the TTF itself is separated from the tuna at the end of the trip and, further, the AIDCP does not impose any requirements on wholesalers or retailers with respect to the tracking of tuna product.[341]

162. Moreover, the 2016 IFR directly addressed the first compliance panel's concern with regard to "accuracy." U.S. processors and importers now must maintain recordkeeping sufficient to allow NMFS to verify the dolphin safe status of tuna product.[342] Such records must pertain to each custodian of the tuna or tuna product throughout the chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors. In other words, this new recordkeeping requirement establishes a concrete legal obligation that the documentation attesting to whether the tuna is dolphin safe does, in fact, stay with the tuna throughout the supply chain.[343]

163. Accordingly, ***there is no practical difference*** in the tracking and verification requirements between the AIDCP and NOAA regimes as to "accuracy." Given that U.S. processors and U.S. importers must maintain records as to the complete chain of custody sufficient for NMFS to do a complete trace back of the tuna product that is the subject of the verification, the legal requirements in place for both the AIDCP and NOAA regimes mean that "the degree of

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[338] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.360.

[339] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, n.583.

[340] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.361.

[341] *See* AIDCP Tracking and Verification Resolution, sec. 3(7) (Exh. US-90).

[342] 50 C.F.R. § 216.91(a)(5) (Exh. US-2) ("(5) Other fisheries—chain of custody recordkeeping. By a vessel in a fishery other than one described in paragraph (a)(1) or (2) of this section unless: (i) For tuna designated dolphin-safe that was harvested on a fishing trip that began on or after May 21, 2016, in addition to any other applicable requirements: (A) The importer of record or U.S. processor of tuna or tuna products, as applicable, maintains information on the complete chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors to enable dolphin-safe tuna to be distinguished from non-dolphin-safe tuna from the time it is caught to the time it is ready for retail sale …"); 2016 IFR, at 15,447 (Exh. US-7).

[343] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.361.

confidence that a particular captain (or, where applicable, observer) statement properly describes the lot of tuna to which it is assigned" will be the same.

164. Degree of Government Oversight. The first compliance panel used the phrase "degree of government oversight" to refer to "the extent to which a national, regional, or international authority is involved in the tracking and verification process."[344] In the panel's view, in the AIDCP regime, "information concerning every stage of the tuna catch and canning process is made available to national and regional authorities, which must be sent copies of tuna tracking forms and are thus able to verify at any stage of the catch and canning process whether a particular batch of tuna is dolphin-safe."[345] By contrast, in the NOAA regime, "the United States has, as it were, delegated responsibility for developing tracking and verification systems to the tuna industry itself, including canneries and importers, and has decided to involve itself only on a supervisory and ad hoc basis through the review of monthly reports and the conduct of audits and spot checks."[346]

165. As described above and in the panel report, the vehicle for government oversight in the AIDCP regime is the requirement that "national and regional authorities" receive copies of the TTFs associated with tuna caught by vessels subject to their jurisdiction. Using the TTF number, national authorities could monitor the tuna catch and canning process by virtue of the AIDCP requirement that processors "maintain records complete enough to allow the lot numbers of processed tuna to be traced back to the corresponding TTF number."[347] There is, of course, no requirement that authorities will actually engage in such an exercise for each TTF copy they receive. Rather, the AIDCP provides that any party "may request that the Secretariat verify the dolphin safe status of tuna" using a "TTF number," which the Secretariat will do "on the basis of tracking information contained with the data and documentation transmitted to the Secretariat" by the party.[348]

166. In light of these government oversight requirements of the AIDCP, the 2016 IFR responded to the first compliance panel's concern with this aspect of the NOAA regime. Under the current measure, as was the case prior to the 2016 IFR, NMFS receives dolphin safe certifications for all tuna product sold on the U.S. market as dolphin safe.[349] Under the 2016 IFR, however, all U.S. processors and importers marketing dolphin safe tuna product must retain

[344] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.364.

[345] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.364.

[346] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.367.

[347] AIDCP Tracking and Verification Resolution, sec. 6(c) (Exh. US-90).

[348] AIDCP Tracking and Verification Resolution, sec. 7 (Exh. US-90).

[349] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.38-41.

records such that the complete chain of custody for the tuna product, and the tuna contained therein, can be established.[350] These records must be provided to NMFS upon request.

167. Thus, with respect to the ability of the government to access and verify the identity of tuna at every stage of catch and processing, the 2016 IFR narrowed the differences between the NOAA and AIDCP regimes. Of course, there remain differences between the two systems, principally due to inherent differences between international and national systems. Under the AIDCP system, for example, the Secretariat brokers requests for the "data and documentation" that would allow a party to obtain information from processors of another party sufficient to trace back tuna product through its chain of custody to the harvesting vessel and trip. Under the NOAA system, by contrast, NMFS would request this information from U.S. processors or importers directly. Nevertheless, the ability of *a government* (a party under the AIDCP and NMFS under the NOAA system) to obtain chain of custody documentation, and thus to "go behind" the dolphin safe certifications, is not substantively different under the two regimes.

168. One difference that remains between the AIDCP and NOAA systems with respect to government oversight, however, is the requirement in the AIDCP system that tuna "destined for export" and using the AIDCP "dolphin safe" label must be accompanied by a certification of its status "issued by the competent national authority."[351] The NOAA regime does not include such a requirements for typical "other fisheries." It is important to note, however, that there is no nexus between this certificate and the U.S. measure, since the AIDCP dolphin safe label has limited bearing on dolphin safe status in the U.S. market given that tuna product produced from vessels setting on dolphins qualifies for the AIDCP label. That said, as discussed above, the 2016 IFR has established an analogous requirement on tuna caught in fisheries that NOAA has determined to be high risk, *i.e.*, fisheries where a "regular and significant" dolphin mortality/serious injury or tuna-dolphin association is occurring.[352]

iii. The Tracking and Verification Requirements Are Calibrated to the Differences in Risk

169. As noted above, the Appellate Body has described a two-step process for determining whether a regulatory distinction is calibrated to the different risk to dolphins in different fisheries and, as such, is even-handed: 1) whether the risks to dolphins are different among the fisheries in question; and, if so, 2) whether "the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could be explained as commensurate with the different risks associated with tuna fishing in different oceans and using different fishing methods."[353]

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[350] 50 C.F.R. § 216.91(a)(5)(A)-(B) (Exh. US-2). In particular, we note that information from "storage facilities" and "transhippers" must be retained, so that NMFS is able to "go behind the documents" concerning "the movement of tuna prior to arrival at the cannery." *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.365.

[351] AIDCP Tracking and Verification Resolution, sec. 6(d) (Exh. US-90).

[352] *See supra* sec. V.C.1.b.

[353] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160.

170. The tracking and verification requirements meet this test. First, as discussed in section V.C.2.c.iii.A, the ETP large purse seine fishery has a special risk profile that is different from the risk profiles of other fisheries. Second, as discussed in section V.C.2.c.iii.B, the difference in the tracking and verification requirements is commensurate with these different risk profiles. As such, the tracking and verification requirements are calibrated, even-handed, and cannot support a finding of less favorable treatment.[354] Such a conclusion is supported by the overwhelming balance of the evidence.

(A). The Special Risk Profile of the ETP Large Purse Seine Fishery

171. As explained in section V.C.2.b.iii.A with regard to the certification requirements, and as more fully explained in section IV.B, the evidence confirms the first compliance panel's finding that the ETP large purse seine fishery has a "special risk profile" for dolphins distinct from the risk profiles of other fisheries.[355] The United States refers to these above sections for purposes of the tracking and verification requirements. On this basis, it is legitimate for the United States to apply different tracking and verification requirements for tuna product produced from the ETP large purse seine fishery from tuna product produced from other fisheries.

(B). The Difference in the Tracking and Verification Requirements Is Commensurate with the Differences in Risk Profiles of Different Fisheries

172. As with the eligibility criteria and the certification requirements, the difference in the tracking and verification requirements for tuna product produced from the ETP large purse seine fishery and from other fisheries able to produce dolphin safe tuna product is commensurate with the different risk profiles of these fisheries. Indeed, given the fact that the Appellate Body has already observed that the assessment of the even-handedness of the U.S. measure "must take account of the fact" that these three aspects "are cumulative and highly interrelated,"[356] it is entirely consistent with both the law and the evidence that the legal conclusion regarding the tracking and verification requirements is consistent with the legal conclusions of the other two aspects of the measure.

173. Like the certification requirements, the tracking and verification requirements are calibrated, and thus even-handed, because it is appropriate to use a more "sensitive" mechanism where the risks of dolphin mortality and serious injury are high, and a less "sensitive" mechanism where the risks of dolphin mortality and serious injury are low, as discussed by the minority panelist with regard to the certification requirements.[357] The fact that the "mechanism" here occurs subsequent to the catch of the tuna does not mean that the calibration argument is

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[354] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.96, 7.101, 7.155.

[355] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (referring to the "special risk profile of the ETP large purse seine fishery"); *see also id.* paras. 7.240-242, 7.244-245, 7.278-283 (min. op.).

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

[357] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.276-278 (min. op.).

rendered irrelevant to this stage of the analysis, as the Appellate Body has confirmed.[358] Thus, the fact that the two regimes may produce different "margin[s] of error[s]," as the first compliance panel stated, does not mean that the tracking and verification requirements lack even-handedness. To the contrary, the requirements *are* even-handed as long as the difference in the requirements reflects the difference in risk between the "special risk profile" of the ETP large purse seine fishery and other fisheries.

174. And in this instance, any difference in the "margin of error" caused by the different requirements is commensurate to the difference in risk. As demonstrated in section V.C.2.b.iii.B above, there is a significant different in the risk profile for dolphins of the ETP large purse seine fishery compared to other fisheries that can produce dolphin safe tuna, including in terms of direct dolphin mortalities caused in the fisheries. As a consequence, there is a greater likelihood that a vessel in the ETP large purse seine fishery will produce both dolphin safe and non-dolphin safe tuna on any fishing trip and that the two groups of tuna will have to be segregated and tracked.[359] It is appropriate, therefore, to have a more sensitive segregation and tracking mechanism in the fishery where there will be more opportunities for error.

175. Further, as described in the preceding section, any differences between the two "mechanisms," *i.e.*, the tracking and verification systems, are small, particularly in light of the significant difference in risk between the ETP large purse seine fishery and other fisheries. With respect to depth, both the AIDCP and NOAA regimes require that tuna product that is "dolphin

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[358] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.166 ("We read the Panel as having taken the view that the relevant risk profiles would *change* or become *irrelevant* to the analysis of 'even-handedness' merely because those requirements regulate a situation that occurs after the tuna has been caught. In our view, this approach by the Panel does not seem to comport with its own reasoning that the accuracy of the US dolphin-safe label can be compromised at any stage of the tuna production stage, in contradiction with the objectives of the amended tuna measure. Moreover, we consider that the Panel's approach also runs counter to our observations that an assessment of the even-handedness of the amended tuna measure must take account of the fact that its various elements – the eligibility criteria, the certification requirements, and the tracking and verification requirements – establish a series of conditions of access to the dolphin safe label that are cumulative and highly interrelated.") (emphasis in original); *see also id.* para. 7.101 (noting the "special relevance" of the calibration argument to the inquiry of even-handedness).

[359] *See supra* sec. IV.B (showing that *any* dolphin interaction is extremely rare in fisheries other than the ETP large purse seine fishery and that dolphin mortality and serious injury is rarer still). For example, vessels in the ETP large purse seine fishery have conducted, on average, 728 trips per year from 2009-2013, suggesting that these vessels conduct approximately 31 sets per trip. *See* IATTC, "AIDCP Observer Program Info" (data received by Erika Carlsen, NOAA, from Ernesto Altamirano Nieto, IATTC) (Exh. US-64). With the average annual dolphin mortality in the fishery of 1,006.8 dolphins per year, this suggests that an average of approximately 1.38 dolphins are killed per trip in the ETP large purse seine fishery. *See* "Tables Summarizing the Fishery-by-Fishery Evidence on the Record," table 2 (Exh. US-13). In other fisheries capable of producing tuna for the U.S. market, by contrast, the available fishery-specific evidence suggests that the vast majority of vessel trips occur without any dolphin interaction, let alone any dolphin mortality. *See, e.g.*, Tables Summarizing the Fishery-by-Fishery Evidence on the Record," table 2 (Exh. US-13) (showing that, over the past decade or more, the vast majority– well over 90 percent – of trips in the Hawaii and American Samoa longline fisheries occurred without any dolphin interaction at all); *id.* table 1 (showing that, in studies of the Eastern tropical Atlantic and tropical Indian Ocean purse seine fisheries, no dolphin interactions at all were observed in over 3,000 observed sets, respectively); *id.* table 1 (showing that, in the WCPFC purse seine fishery, less than 1 percent of sets in all the years for which evidence is available involved a dolphin mortality or serious injury).

safe" (for purposes of their respective regimes) be traceable back to the harvesting vessel and trip and to the group of wells that held dolphin safe tuna. With respect to accuracy, both regimes require chain of custody recordkeeping sufficient to enable national authorities to trace a particular lot of tuna from harvesting through processing. With respect to government oversight, both regimes enable a government authority to obtain documentation "concerning every stage of the tuna catch and canning process" and thus both can "go behind" the dolphin safe certifications to the same extent.[360]

176. Moreover, it certainly would not be consistent with a calibrated approach rigidly to require the same level of tracking and verification requirements for all fisheries where there is *any* risk of dolphin harm. Such a requirement could require a huge waste of resources for all Members that produce tuna product from fisheries where dolphin mortalities (indeed *any* dolphin interactions) rarely, if ever, occur. This, of course, is not the case in the ETP large purse seine fishery, which the evidence clearly establishes as a high risk fishery because the vessels operating in that fishery are capable and permitted to set on dolphins, and, in fact do set on dolphins in over 10,000 individual sets each year (on average).[361]

177. Further, the U.S. measure is not the outlier in this regard. Indeed, the differences of the measure's tracking and verification requirements conform to the recordkeeping requirements that participants in different fisheries have adopted. Specifically, the IATTC, which manages all the tuna fisheries in the ETP, does not require similar recordkeeping for longline or pole and line vessels. It is only the large purse seiners – which are specifically permitted to engage in this particular risky behavior (that is banned in huge swaths of the world[362]) – that are required to act consistently with the AIDCP tracking and verification regime.

178. Thus, to borrow the minority panelist's terminology with regard to the certification requirements, the difference in the tracking and verification requirements "represents a fair response to the different risk profiles existing in different fisheries, as established by the evidence."[363] Consequently, as was the case with the eligibility criteria and certification requirements, the differences in the tracking and verification requirements are calibrated to the differences in risk, and, as such, are even-handed and thus cannot support a finding of less favorable treatment.

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[360] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.364-365.

[361] *See supra* sec. IV.B at table 2 (stating that large purse vessels set on dolphins in 10,423 individual sets in the ETP, on average, in 2009-2013).

[362] *See supra* sec. IV.A (noting that setting on cetaceans is banned in the Indian Ocean, the western central Pacific Ocean, and all U.S. fisheries, located anywhere in the world (with the exception of the ETP large purse seine fishery)).

[363] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op.); *see also id.* para. 7.277 ("As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection mechanisms in accordance with the historical incidence of and future potential for violations. *Provided that there is a rational connection between the variation in intensity and the difference in risk*, I would not find that the implementation of different detection mechanisms lacks even-handedness or is otherwise discriminatory.") (emphasis added).

3. The Detrimental Impact Stems Exclusively from Legitimate Regulatory Distinctions

179. In order to fully explain each of the four elements of the measure, the United States has analyzed each element independently, as discussed above.[364] Indeed, the United States considers that each of the four elements, standing alone, is even-handed.

180. Even though for purposes of the Panel's terms of reference the only basis for the DSB recommendation was the determination provisions, the United States has also explained how the 2016 IFR addressed other concerns raised during the first compliance proceeding. The United States recalls the Appellate Body's view that the ultimate finding needed in the first compliance proceeding was "whether the amended tuna measure is even-handed in addressing the respective risks of setting on dolphins in the ETP large purse-seine fishery versus other fishing methods outside that fishery."[365] In light of this guidance, the United States provides the following observations concerning the overall even-handedness of the U.S. measure.

181. The U.S. measure draws two types of distinctions – distinctions between fishing methods and distinctions between fisheries – both of which are based on the relative risks to dolphins. Where the measure draws the first type of distinction, it is applied to all fisheries, across the board. Such is the case with the eligibility criteria regarding setting on dolphins, which applies regardless of which fishery the set occurred in, and is the key difference between the measure and the AIDCP that Mexico has relied on in its arguments throughout this dispute. And while the fact that the intentional set on dolphins occurred inside or outside the ETP large purse seine fishery makes a significant difference in terms of the number of dolphins put at risk in the course of that set (hundreds versus a handful), the intentional set itself will be *inherently unsafe for dolphins*, no matter what part of the world it takes place in. Certain restrictions can be, of course, put in place that reduce the overall mortality and serious injury of such sets, but such requirements cannot make an intrinsically unsafe fishing method, safe. Where the measure draws the second type of distinction, it does so taking account of the inherent dangerousness of setting on dolphins, and distinguishes between tuna product produced in the high risk ETP large purse seine fishery, where dolphins are "systematically" targeted, and tuna product produced from other fisheries in the world harvested from other fishing methods.

182. The Appellate Body has advised that, with regard to distinctions between fisheries, the assessment of the even-handedness of the measure "requires looking at both sides of the regulatory distinctions that it draws."[366] And in this regard, the measure's treatment of both sides is calibrated to differences in risk, and thus, even-handed.

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[364] *See also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.14 ("As a general matter, we do not see that it is necessarily inappropriate for a panel, in analysing the conformity of a measure with obligations under the WTO covered agreements, to proceed by assessing different elements of the measure in a sequential manner.").

[365] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249; *see also id.* para. 7.342 (making the same point in the context of the GATT 1994 analysis).

[366] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.168 ("In this dispute, the relevant regulatory distinction drawn by the amended tuna measure consists of the requirements applicable to tuna products derived

183. For the ETP large purse seine fishery, the measure relies on those unique requirements that the AIDCP parties themselves agreed were appropriate in light of the unique risk profile of this particular fishery. The measure does not, for example, require a second observer to be onboard (even though it is exceedingly difficult for that single observer to track whether one dolphin (out of the hundreds being chased and captured) has been killed or seriously injured, as discussed above), nor does it require a parallel recordkeeping requirement to what the AIDCP Tracking and Verification Resolution requires. The only real additional requirement that the measure imposes on tuna product produced from the ETP large purse seine fishery that is not required by the AIDCP is that the measure requires certification that the tuna product was not produced from a trip where dolphins were set upon.[367]

184. For other fisheries, where the risk to dolphins is so much lower, the measure, among other things: imposes the same eligibility criteria as it does in the ETP large purse seine fishery; requires the captain to certify as to that eligibility criteria; and requires extensive recordkeeping to be both submitted to NMFS and be available to NMFS upon request. These requirements are complementary of one another and reflect the level of risk existing from fishing methods used in these other fisheries. What is unusual here is not the requirements that apply outside the ETP large purse seine fishery, but inside, as the AIDCP requirements are, in many ways, *sui generis*, reflecting the unique risk profile of the ETP large purse seine fishery. Indeed, imposing the type of requirements that Mexico has long maintained that the WTO Agreement requires – such as an independent observer must be on 100 percent of all vessels producing dolphin safe tuna product for the U.S. market or that the government must certify as to the validity of each and every shipment – would not be commensurate with the risk that exists in these fisheries.

185. However, where the risk in the other fisheries is as high as it is in the ETP large purse seine fishery, the measure's determination provisions are designed to take account of that risk by authorizing NOAA to impose additional certification and tracking and verification requirements. In this way, the design of the U.S. measure is even-handed in its treatment of tuna produced from potential high-risk fisheries that could develop or come to light as new scientific information becomes available and tuna product produced from the ETP large purse seine fishery.

186. As such, looking at how the measure's four interrelated elements treat both sides – the ETP large purse seine fishery and other fisheries – the measure is even-handed in addressing the respective risks of setting on dolphins in the ETP large purse-seine fishery versus other fishing methods outside that fishery. Accordingly, the detrimental impact does stem exclusively from legitimate regulatory distinctions and the measure does not provide less favorable treatment for purposes of Article 2.1.

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from tuna caught in the ETP large purse-seine fishery vis-à-vis the requirements applicable to tuna products derived from tuna caught in other fisheries. As we have said above, assessing the even-handedness of the amended tuna measure requires looking at both sides of the regulatory distinctions that it draws.").

[367] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-97) (1st 21.5 Exh. US-128).

D. Conclusion on Article 2.1 of the TBT Agreement

187. For the above reasons, the United States respectfully request the Panel to find that the U.S. measure complies with the DSB recommendation to bring the measure into conformity with the U.S. obligations under Article 2.1 of the TBT Agreement.

VI. THE U.S. DOLPHIN SAFE LABELING MEASURE COMPLIES WITH THE DSB RECOMMENDATION REGARDING THE GATT 1994

188. As discussed below, any inconsistency of the measure with Articles I:1 and III:4 of the GATT 1994 is justified under Article XX of the GATT 1994 in that the measure satisfies the standard of Article XX(g) and meets the requirements of the Article XX chapeau. As such, the U.S. measure, as amended by the 2016 IFR, is not inconsistent with U.S. obligations under the GATT 1994.

A. Articles I:1 and III:4 of the GATT 1994

189. In the first compliance proceeding, the Appellate Body observed that, "[n]otwithstanding their textual differences," the analysis under Articles I:1 and III:4 is the same – whether the measure "modifies the conditions of competition in the US market to the detriment of Mexican tuna products vis-à-vis US tuna products or tuna products imported from any other country."[368] The Appellate Body then found that the measure was inconsistent with both Articles I:1 and III:4 on the same basis that it has found that the measure resulted in a detrimental impact under the first step of Article 2.1 of the TBT Agreement.[369]

190. As the United States discussed with regard to the first step of the Article 2.1 analysis in section V.B above, the United States has no reason to believe that the relevant facts have changed since the previous proceeding – most Mexican tuna product remains ineligible for the dolphin safe label, while most like products from other Members and the United States remain potentially eligible.[370] As such, the basis for the DSB's previous finding that the U.S. measure is inconsistent with Articles I:1 and III:4 is unchanged and the United States does not dispute those findings for purposes of this proceeding.

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[368] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.338 ("Notwithstanding their textual differences, Articles I:1 and III:4 are both concerned with protecting expectations of equal competitive opportunities for like imported products, either upon importation or exportation, or within a Member's market. Thus, as the Panel correctly acknowledged, in this dispute the inquiry that must be conducted under both provisions must focus on the question of whether the amended tuna measure modifies the conditions of competition in the US market to the detriment of Mexican tuna products vis-à-vis US tuna products or tuna products imported from any other country.").

[369] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.339-7.340.

[370] *See also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.239.

B. The U.S. Dolphin Safe Labeling Measure is Consistent with Article XX of the GATT 1994

191. Article XX of the GATT 1994 states, in relevant part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any member of measures: . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

192. Assessing whether a measure found inconsistent with a provision of the GATT 1994 is justified under Article XX thus requires a two-tiered analysis: (1) whether the measure is provisionally justified under the relevant Article XX subparagraph; and, if so, (2) whether it is applied consistently with the Article XX chapeau.[371] As discussed in section VI.B.1, the measure satisfies the standard of subparagraph (g).[372] As discussed in section VI.B.2, the measure meets the requirements of the chapeau.

1. The U.S. Dolphin Safe Labeling Measure Satisfies the Standard of Article XX(g)

193. Whether a measure meets the standard of Article XX(g) involves three elements: (1) whether it concerns an "exhaustible natural resource"; (2) whether it is "relating to the conservation" of that resource; and, (3) whether it is made effective "in conjunction with restrictions on domestic production or consumption."[373] The measure satisfies all of these elements.

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[371] *See EC – Seal Products (AB)*, para. 5.169; *US – Gasoline (AB)*, p. 22; *US – Shrimp (AB)*, paras. 119-120.

[372] In the previous proceeding, the United States argued that not only did the measure satisfy the standard of subparagraph was (g), it satisfied the standard of subparagraph (b) as well. *See, e.g.*, U.S. First Written Submission to the 1st 21.5 Panel, paras. 318-324. Having found that the measure satisfied the standard of subparagraph (g), the first compliance panel did not reach the merits of the U.S. argument regarding subparagraph (b). *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.542-545. And because Mexico did not appeal the first compliance panel's finding on subparagraph (g), the first compliance panel's finding with regard to subparagraph (g) were adopted as part of the DSB recommendations and rulings. For purposes of this submission, the United States assumes that Mexico will not challenge that adopted finding of the DSB, and, as such, it is unnecessary for the United States to explain why the measure satisfies the standard of subparagraph (b) as an alternative argument to its subparagraph (g) argument. However, the United States reserves the right to discuss this issue further in future submissions in the event that Mexico does challenge the adopted findings of the DSB regarding subparagraph (g).

[373] *See US – Shrimp (AB)*, paras. 127, 135, 143. The Appellate Body has previously recognized that the "relating to" standard is an easier standard to meet than is the "necessary" one. *US – Gasoline (AB)*, pp. 16-18.

194. As the DSB recommendations and rulings for the first compliance proceeding indicate, the U.S. dolphin safe labeling measure satisfied the elements of Article XX(g) and, consequently, was provisionally justified under that subparagraph.[374] Specifically, the first compliance panel found that dolphins were a natural resource and that the U.S. measure "relate[d] to" the goal of conserving dolphins since it "help[ed] to ensure that the U.S. tuna market does not operate in a way that encourages fishing techniques that are not dolphin safe."[375] With respect to the third element, the panel found that the measure imposed "real and effective restrictions on the US tuna industry" because the conditions apply to "all tuna products," regardless of national origin.[376] Mexico did not appeal the panel's findings and those findings are part of the adopted DSB recommendations and rulings and must be treated as "final resolution" of this issue.[377]

195. Of course, the basic facts remain the same, unaltered by the 2016 IFR. First, as was uncontested in the first compliance proceeding and as recognized by numerous international agreements, dolphins are a living natural resource and, as such, are finite and exhaustible.[378] Second, one of the measure's objectives remains the "protection" of dolphins and the measure's requirements "clearly 'relate' to conservation," in that they are designed to ensure that the U.S. market is not used to encourage dolphin-unsafe fishing practices and "to identify, track, and, indirectly, to reduce dolphin mortality and injury."[379] Third, the measure continues to apply to all tuna, including the U.S. tuna industry as well as the industries of other Members.[380]

196. Therefore, the measure is provisionally justified under Article XX(g).

Further, as was the case in *US – Shrimp*, there is "a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." *US – Shrimp (AB)*, para. 133.

[374] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.4.

[375] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.285 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.535).

[376] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.538.

[377] *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 93 ("[A]n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to the dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of the claim."); *see also US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 96.

[378] *See, e.g.*, AIDCP, preamble (Exh. US-5); Convention on International Trade in Endangered Species (CITES), art. II, Appendix II and III, 27 U.S.T. 1087, TIAS 8249, 993 UNTS 243 (1975) (Exh. US-98) (1st 21.5 Exh. US-81) (listing six species of dolphins. as threatened with extinction and all other species of dolphin are listed as species whose trade must be controlled to avoid utilization incompatible with the species' survival).

[379] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.532 (citing *US – Tuna II (Mexico) (AB)*, paras. 289, 297), 7.533.

[380] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.538.

2. The U.S. Dolphin Safe Labeling Measure Is Consistent with the Article XX Chapeau

197. The measure is applied consistently with the chapeau of Article XX and, as such, is not inconsistent with U.S. obligations under the GATT 1994. In section VI.B.2.a, the United States explains what the chapeau requires. In section VI.B.2.b, the United States explains why the determination provisions meet the requirements of the chapeau. Section VI.B.2.c explains why the three other elements of the measure – the eligibility criteria, certification requirements, and tracking and verification requirements, also address the concerns identified in the first compliance proceeding regarding the requirements of the chapeau. Finally, in section VI.B.2.d, the United States explains why the measure, when seen as a whole, complies with the chapeau.

a. What the Chapeau Requires

198. Whether a measure is applied consistently with the Article XX chapeau involves a two-step analysis: (1) whether the measure's application results in "discrimination" under the chapeau, *i.e.*, "discrimination between countries where the same conditions prevail," and, if so, (2) whether such discrimination is arbitrary or unjustifiable" or constitutes a "disguised restriction on trade.[381]

199. With respect to the first step of the analysis, we recall that, in the first compliance proceeding, the Appellate Body stated that the relevant "conditions" among countries "are the risks of adverse effects on dolphins arising from tuna fishing practices" and that it would "proceed on the basis that the conditions prevailing between countries are the same for purposes of the chapeau."[382] The United States will likewise proceed on that basis and assume that the measure discriminates for purposes of the chapeau.

200. With respect to whether such discrimination is "arbitrary or unjustifiable," the Appellate Body has explained that this analysis should "focus on the cause of the discrimination, or the rationale put forward to explain its existence."[383] One of the "most important factors" in this assessment is "whether this discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified."[384] Depending on the "circumstances of the case at hand," however, "additional factors . . . may also be relevant to the overall assessment."[385] In particular, the Appellate Body determined that, "in the circumstances of this dispute," the chapeau analysis of the eligibility criteria, certification requirements, and tracking and verification requirements, like the parallel analyses for the second

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[381] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.342.

[382] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.308; *see id.*, para. 7.342 ("As we also found above, the same conditions between countries prevail, namely, the risk of adverse effects on dolphins arising from tuna fishing practices.").

[383] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.329, 7.343.

[384] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.329, 7.343.

[385] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.329; *see id.*, para. 7.343.

step of Article 2.1, requires "an assessment of whether the requirements of the amended tuna measure are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions."[386] Indeed, failure to conduct this calibration analysis constitutes reversible error.[387]

201. As discussed below, the 2016 IFR modified the measure to ensure that the design of the determination provisions otherwise meets the requirements of the chapeau. Further, the 2016 IFR also modified the measure and addressed concerns identified regarding whether the eligibility criteria, certification requirements, and tracking and verification requirements are calibrated to the different risk profiles for dolphins of different fishing methods in different ocean areas, and thus meet the requirements of the chapeau.

b. The 2016 IFR Brings the Measure into Compliance with the Chapeau

202. The Appellate Body in the first compliance proceeding found that, unlike the other three distinctions of the measure at issue, the chapeau analysis of the determination provisions was "not dependent on an assessment of the relative risks associated with different fishing methods in different areas of the oceans."[388] Rather, the Appellate Body found that the two "gaps" that the panel had identified in the provisions were "difficult to reconcile with the objective of protecting dolphins" and, as such, the United States had not shown that the provisions did not constitute "arbitrary or unjustifiable discrimination" under the chapeau.[389] For the reasons set out in section V.C.1 above, however, the 2016 IFR brought this aspect of the U.S. measure into compliance not only with Article 2.1 of the TBT Agreement, but with the requirements of the chapeau as well.

203. First, as described in section V.C.1.a, the 2016 IFR directly addressed the findings of the first compliance panel and the Appellate Body by eliminating the two "gaps" in the design of the provisions.[390] As modified, the dolphin safe labeling regulations explicitly authorize NOAA to impose an observer certification requirement on tuna product marketed as dolphin safe that was produced from tuna caught in any fishery in which NOAA has determined *either* a "regular and significant" tuna-dolphin association or a "regular and significant" mortality or serious injury of

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[386] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.330; *see id.*, para. 7.344.

[387] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.334 (finding that the first compliance erred in that it "did not properly identify the relative risk profiles in fisheries that would have permitted the Panel to assess whether the regulatory distinctions in the amended tuna measure are . . . calibrated to the different risk profiles in different fisheries."); *id.* para. 7.332 (finding that the first compliance panel's analysis did not "encompass[] consideration of the relative risks of harm to dolphins from different fishing techniques in different areas of the oceans, or of whether the distinctions that the amended measure draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the relative risk profiles" and reversing the panel on this basis).

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

[389] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.359.

[390] *See supra* sec. V.C.1.a.

dolphins exists.[391] Thus, the determination provisions enable NOAA to impose an observer certification requirement, comparable to that imposed on tuna product produced from the ETP large purse seine fishery, on tuna product produced from any other fishery, regardless of gear type, in which "dolphins face higher risks of mortality or serious injury."[392]

204. Second, as set out in section V.C.1.b, the 2016 IFR addressed the suggestion of the Appellate Body that, for tuna caught in high-risk fisheries, there should be "tracking and verification requirements that work together with and reinforce certification in addressing this heightened risk."[393] Under the U.S. measure, as amended, all tuna or tuna product designated dolphin safe that was produced from fisheries other than the ETP large purse seine fishery is subject to enhanced tracking and verification requirements, namely chain of custody record-keeping requirements under which U.S. processors and importers must retain records sufficient for NMFS to track any tuna product from retail sale back to the point of capture, to ensure that segregation of dolphin safe and non-dolphin safe tuna has been maintained.[394] Additionally, for tuna product produced from fisheries designated under the revised determination provision NOAA will require a government certificate validating the required chain of custody information, as well as the catch documentation for the tuna and its dolphin safe status.[395]

205. Thus, the determination provisions are not applied in a manner that would constitute arbitrary or unjustifiable discrimination under the Article XX chapeau because, following the 2016 IFR, the design of the provisions (now a single provision) "provide[s] for the substantive conditions of access to the dolphin safe label to be reinforced by observer certification in all circumstances of comparably high risk." Further, tuna caught in a fishery identified under the determination provision would also be subject to enhanced tracking and verification requirements. The design of the determination provision is, therefore, now related to the U.S. measure's objective of dolphin protection and, as such, is not "arbitrary or unjustifiable" under the chapeau.

c. The Measure, as Amended by the 2016 IFR, Addresses Other Concerns

206. As explained in this section, the U.S. measure, as amended by the 2016 IFR, also addresses the concerns raised in the first compliance proceeding regarding the eligibility criteria, certification requirements, and tracking and verification requirements, even though these concerns are not part of the DSB recommendation at issue for the Panel.

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[391] *See* 50 C.F.R. § 216.91(a)(3)(v) (Exh. US-2).

[392] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.356.

[393] *See supra* sec. V.C.1.b; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.358.

[394] 50 C.F.R. § 216.91(a)(5)(i) (Exh. US-2).

[395] 50 C.F.R. § 216.91(a)(5)(ii) (Exh. US-2).

i. The Eligibility Criteria Are Calibrated to the Differences in Risk

207. As noted above, the Appellate Body in this dispute has established that, as under the second step of Article 2.1 of the TBT Agreement, an analysis of whether the regulatory distinctions of the U.S. measure impose "arbitrary or unjustifiable discrimination" under the Article XX chapeau must consider whether the measure's different requirements are "calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations."[396]

208. For all of the reasons discussed in section V.C.2.a, the eligibility criteria are calibrated to the risk of setting on dolphins in the ETP large purse seine fishery and other fishing methods in other fisheries, and thus meet the requirements of the chapeau by not reflecting arbitrary or unjustifiable discrimination.

209. As described in section V.C.2.a.ii.A, setting on dolphins is a unique fishing method that is *inherently* unsafe for dolphins. It is the only fishing method that intentionally targets dolphins as an essential component of fishing for tuna; all other fishing methods interact with dolphins only accidentally.[397] Further, and relatedly, each and every dolphin set involves intense, sustained interactions with hundreds of dolphins, putting all of them at risk of harm, whereas other fishing methods very rarely interact with any dolphins – in all of the fisheries for which evidence is available, over 99 percent of sets occur without any dolphin interaction – and interact with only a few at a time.[398] Setting on dolphins also causes potentially massive unobservable harms to dolphins as a result of the chase and encirclement process that may occur regardless of whether any dolphin is directly killed or seriously injured and that are not caused by any other fishing method.[399] Finally, the available evidence shows that setting on dolphins also causes significantly more dolphin mortalities than other fishing methods that produce tuna for the U.S. market.

210. In light of these differences between setting on dolphins and the fishing methods that can produce tuna eligible for the dolphin safe label, the eligibility criterion is calibrated to the likelihood that dolphins will be harmed by different fishing methods. It distinguishes: (1) between a method that always poses a risk to dolphins (because dolphins are a part of the fishing method) and methods that usually pose no risk at all; (2) between a method that directly endangers hundreds of dolphins every time it is used and methods that only rarely endanger even a few; (3) between a method that may cause massive unobservable harms every time it is used

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[396] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.330; *see id.*, para. 7.344.

[397] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-245.

[398] *See supra* sec. IV.B; Tables Summarizing Fishery-by-Fishery Evidence on the Record, tables 1-2 (Exh. US-13).

[399] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.134.

and methods that cannot cause such harms; and, (4) between a method that, controlling for the number of times it is used, causes more direct dolphin mortalities than other fishing methods.[400]

211. Thus, the eligibility criterion distinguishing between setting on dolphins and other fishing methods is calibrated to the different risks of different fishing methods, and as such, is consistent with the measure's objective of protecting dolphins. This conclusion is entirely consistent with – indeed, it is supported by – the first compliance panel's finding that any discrimination caused by the eligibility criteria "is directly connected to the main goal of the amended tuna measure," due to the uniquely harmful nature of dolphin sets, compared to other fishing methods.[401]

ii. The Certification Requirements Are Calibrated to the Differences in Risk

212. For the reasons set out in section V.C.2.b, the certification requirements are calibrated to the risk of setting on dolphins in the ETP large purse seine fishery and other fishing methods in other fisheries, and thus meet the requirements of the chapeau by not reflecting arbitrary or unjustifiable discrimination.

213. As discussed in section V.C.2.b.iii.A, the ETP large purse seine fishery has a "special risk profile" for dolphins distinct from other fisheries.[402] Specifically, it is the only fishery in the world where vessels are able and permitted to fish for tuna by setting on dolphins on a consistent, systematic basis.[403] As a consequence, the frequency and intensity of the interactions between fishing vessels and dolphins in the ETP large purse seine fishery is on a different scale than in the rare and accidental interactions that occur in other fisheries.[404] Further, and unsurprisingly given the high level of interaction, the available scientific evidence shows that, even under the AIDCP, the ETP large purse seine fishery continues to be unusually dangerous for dolphins in terms of the risk of direct mortalities.[405] In short, the available evidence confirms the finding of the first compliance panel that the ETP large purse seine fishery has a "special risk profile" for

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[400] *See supra* sec. V.C.2.a.ii.B.

[401] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.584. In this regard, the United States observes that the Appellate Body did not disagree with the panel's conclusions regarding unobservable harms caused by setting on dolphins and not caused by other fishing methods, nor did the Appellate Body indicate that the panel's ultimate finding that the eligibility criteria are even-handed would not be correct under the appropriate calibration analysis. *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.131, 7.246-253, 7.351.

[402] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398.

[403] *See supra* sec. IV.B; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.224-226.

[404] *See supra* sec. IV (showing, *inter alia*, that, each year, dolphin sets in the ETP involve chasing approximately 6 million dolphins and capturing 3-4 million in purse seine nets, while in every other fishery for which specific evidence is available, dolphin interactions occur less than 1 percent of all observed sets).

[405] *See supra* sec. IV; Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

dolphins due to the quantitatively and qualitatively "different" level of interaction between dolphins and fishing vessels that occur there.[406]

214. As discussed in section V.C.2.b.iii.B, the certification requirements are commensurate to these different risk profiles. First, the additional requirement of an AIDCP observer certification for tuna caught in the ETP large purse seine fishery is commensurate with the greater difficulty of making the dolphin safe certifications in that fishery than in others. Because ETP large purse seine vessels interact with many more dolphins much more frequently than vessels in other fisheries, it is appropriate to require two observer certifiers (one of whom has to meet certain education and training requirements) for tuna caught by such vessels, and to require one certifier (who is required to have taken a training course) where the conditions are less difficult.[407] Second, the certification requirements are commensurate with the risk profiles of different fisheries because they reasonably establish an (arguably) more "sensitive" certification mechanism where the risk to dolphins is higher and an (arguably) less "sensitive" certification mechanism elsewhere.[408]

215. Thus, the certification requirements are calibrated to the risk to dolphins in different fisheries and, as such, are related to the measure's objective of dolphin protection and do not impose "arbitrary or unjustifiable" discrimination. This conclusion is consistent with the first compliance panel's findings that, for purposes of the certification requirements, the ETP large purse seine fishery has a unique risk profile for dolphins due to the "nature and degree of the interaction" between fishing vessels and dolphins that occurs there.[409] It is also consistent with the analytical approach set out by the Appellate Body in the compliance proceeding, namely that the chapeau analysis of the regulatory requirements of the measure must focus on "whether the requirements . . . are calibrated to any differences in risks to dolphins inside and outside the ETP large purse-seine fishery."[410] Finally, it is supported by the Appellate Body's approach in previous disputes, where it found that a Member can, consistently with the Article XX chapeau, impose different requirements in order to achieve a similar level of protection, based on the different conditions in the areas subject to each type of requirement.[411]

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[406] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240-241.

[407] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-245 (rejecting Mexico's argument that 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 finding that "the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction").

[408] *See supra* sec. V.C.2.b.iii.B; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.278-279 (min. op.).

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

[410] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.344, 7.347.

[411] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 144 (finding that "condition[ing] market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member . . . allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions

iii. The Tracking and Verification Requirements Are Calibrated to the Differences in Risk

216. For the reasons set out in section V.C.2.c, the tracking and verification requirements are calibrated to the risk of setting on dolphins in the ETP large purse seine fishery and other fishing methods in other fisheries, and thus meet the requirements of the chapeau by not reflecting arbitrary or unjustifiable discrimination.

217. First, as discussed in sections V.C.2.c.i-ii, there is no or little substantive difference in the tracking and verification requirements of the two regimes, in terms of the depth, accuracy, and degree of government oversight that they entail. Second, as discussed in section V.C..c.iii.A, the ETP large purse seine fishery has a "special risk profile" for dolphins distinct from other fisheries.[412] It is the only fishery in the world where vessels are able and permitted to systematically fish for tuna by setting on dolphins, and, as a result, the frequency and intensity of the interaction between dolphins and fishing vessels is unparalleled.[413] As a further consequence, the available fishery-specific evidence confirms that, controlling for the size of the fishery by using a per set or per trip basis, the ETP large purse seine fishery causes many more dolphin mortalities than other fisheries that produce dolphin safe tuna product for the U.S. market.[414] Third, as discussed in section V.C.2.c.iii.B any difference between the AIDCP and NOAA tracking and verification regimes is commensurate with these differences in risk for the reasons discussed therein. Thus, the tracking and verification requirements do not reflect arbitrary or unjustifiable discrimination and thus meet the requirements of the chapeau.

218. This conclusion is consistent with the DSB recommendations and rulings in the first compliance proceeding and with the Appellate Body's approach in previous disputes. The first compliance panel found that the ETP has a "special risk profile" for dolphins due the fact that the "degree of the interaction" between fishing vessels and dolphins "is different in quantitative and qualitative terms" than in other fisheries.[415] The Appellate Body confirmed that the different risk profiles of different fisheries are relevant to the analysis of the tracking and verification requirements under the Article XX chapeau.[416] Similarly, the Appellate Body in US – Shrimp (Article 21.5 – Malaysia) also found that a measure may impose, consistent with the Article XX chapeau, different requirements based on "the specific conditions prevailing" in different

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prevailing in its territory."); *id.* para. 149 ("[I]n our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member.").

[412] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (referring to the "special risk profile of the ETP large purse seine fishery"); *see also id.* paras. 7.240-242, 7.244-245, 7.278-283 (min. op.).

[413] *See supra* sec. IV.B; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.224-226.

[414] *See supra* sec. IV.B (showing that, on average, large purse seine vessels in the ETP cause approximately 1.35 dolphin mortalities per trip, while over 90 percent of trips in other fisheries for which data is available occur without even a single dolphin *interaction*]; Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[415] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.398, 7.592.

[416] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.332; *see id.*, para. 7.166.

Members to achieve a similar level of protection.[417] Indeed, taking the opposite approach – globalizing the AIDCP system simply because Members in one area have adopted it – would be just the sort of "rigid and unbending" requirement that the Appellate Body in that dispute found to be inconsistent with the Article XX chapeau.[418]

d. The U.S. Measure Meets the Requirements of the Chapeau

219. As discussed in section V.C.3, the measure itself is even-handed when taking account of all four elements of the measure together. And for the same reasons discussed therein, the same is true here – the measure, as a whole, meets the requirements of the chapeau.

220. Again, briefly, the measure draws two types of distinctions – distinctions between fishing methods and distinctions between fisheries – both of which are based on the relative risks to dolphins.

221. With regard to the former, the measure draws distinctions that apply across the board, as is the case with the eligibility criterion regarding setting on dolphins versus other fishing methods. As explained extensively above, this distinction between fishing methods is calibrated to differences in risk because it denies access to the dolphin safe label of a fishing method that is inherently unsafe for dolphins and allows potential access to the label for fishing methods that are not inherently dangerous to dolphins.

222. With regard to the latter, to the extent that there are differences, those differences distinguish between tuna product produced from the high risk ETP large purse seine fishery, where dolphins are "systematically" set upon to harvest tuna, and tuna product produced from lower risk fisheries where other fishing methods are employed. And, as discussed above, the measure treats "both sides" of the equation in an even-handed manner.[419] For tuna product produced from the ETP large purse seine fishery, the measure relies on those unique requirements that the AIDCP parties themselves agreed were appropriate in light of the unique risk profile of this particular fishery. For tuna product produced from other fisheries, the measure imposes different requirements, which are complementary of one another and reflect the level of risk existing from fishing methods used in these other fisheries.

223. As discussed above, the individual four elements of the measure, which judged in isolation, each meet the requirements of the chapeau. But even if one steps back, and sees the whole picture at once, the measure itself meets the requirements of the chapeau in that it draws

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[417] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 144, 149.

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

[419] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.168 ("In this dispute, the relevant regulatory distinction drawn by the amended tuna measure consists of the requirements applicable to tuna products derived from tuna caught in the ETP large purse-seine fishery vis-à-vis the requirements applicable to tuna products derived from tuna caught in other fisheries. As we have said above, assessing the even-handedness of the amended tuna measure requires looking at both sides of the regulatory distinctions that it draws.").

legitimate distinctions based on risk, and does not reflect arbitrary or unjustifiable discrimination. The measure, as a whole, thus, is justified under Article XX.

VII. CONCLUSION

224. For the above reasons, the United States respectfully requests the Panel to find that the United States has brought itself into compliance with the DSB recommendations and rulings and the U.S. dolphin safe labeling measure is now consistent with the WTO Agreement.