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
Recourse to Article 21.5 of the DSU by Mexico

(DS381)

Second 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

TABLE OF REPORTS

Short title	Full Citation
Mexico – Corn Syrup (Article 21.5 – US) (AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
US – Continued Suspension (AB)	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
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

TABLE OF EXHIBITS

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99	Humane Soc'y Int'l, "The Dolphin Safe Label" (Apr. 16, 2013)
100	"The World of Spinner Dolphins," *bluevoice.org* (Jan. 7, 1998)
101	NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Aug. 15, 2016)
102	"Eastern Tropical Pacific Ocean Dolphin Populations Improving," *Science Daily* (June 6, 2008)
103	"Questions Linger About Dolphin Recovery in Eastern Tropical Pacific," *San Diego Union Tribune* (Aug. 27, 2011)
104	Andre E. Punt, *Independent Review of the Eastern Pacific Ocean Dolphin Population Assessment*, IATTC Special Report (2013)
105	Philippines, Annual Report to the Commission, WCPFC SC12-AR/CCM-20 (June 2016)
106	New Zealand, Annual Report to the Commission, WCPFC-SC11-AR/CMM-16 (Aug. 2015)
107	Papua New Guinea, Annual Report to the Commission, WCPFC-SC12/AR/CMM-19 (Aug. 2016)
108	Peter Williams & Peter Terawasi, WCPFC, "Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions – 2015" (Aug. 30, 2016)
109	WCPFC, 7th Annual Report for the Regional Observer Programme (Sept. 3, 2015)
110	WCPFC, 8th Annual Report for the Regional Observer Programme (Sept. 14, 2016)
111	"Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries"
112	WCPFC *Tuna Fishery Yearbook 2013*, Table 72 (2014)
113	NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," (Jan. 8, 2013)
114	NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," (Dec. 31, 2015)
115	Pacific Islands Fisheries Science Center, *The Hawaii-Based Longline Logbook Summary Report January-December 2014* (2015)
116	IATTC, "Dolphin Mortality Limits for 2012-2014"
117	Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Pelagic Longline Take Reduction Plan, 74 Fed. Reg. 23349 (May 19, 2009)
118	Karin A. Forney, SFSC, *Estimates of Cetacean Mortality and Injury in Two U.S. Pacific Longline Fisheries, 1994-2002* (2004)

119	Secretariat of the Pacific Community (SPC), Oceanic Fisheries Program, "Longline"
120	IATTC, Authorized Large Longline Vessel Register
121	IATTC, Active Purse Seine Regional Vessel Register
122	Chinese Taipei: Annual Report to the Commission (2009)
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127	Hsiang-Wen Huang, "Bycatch of High Sea Longline Fisheries and Measures Taken by Taiwan: Actions and Challenges," 35 *Mar. Pol'y* 712 (2011)
128	Simon P. Northridge, *Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review* § 2.3.2, FAO Fisheries Technical Paper No. 320 (1991)
129	NMFS, "Individual Vessel Record Gear Types Since the Inception of the 370 Database: India, Pakistan, Sri Lanka, Yemen" (May 23, 2014)
130	"Handline Yellowfin Tuna Banda Sea," http://fisheriesimprovementindonesia.org/handline-banda-sea/?show=gallery (accessed Oct. 5, 2016)
131	NOAA, "Taking and Importing of Marine Mammals and Dolphin-Safe Tuna Products," 81 Fed. Reg. 66,625 (Sept. 28, 2016)
132	International Dolphin Conservation Program Act, Pub. L. 105-42 (105th Cong.), Aug. 15, 1997
133	"Dolphin Bycatch Rate Due to Dolphin Sets in the ETP and Fisheries Where Per Set Data Are Unavailable"
134	Letters from Eileen Sobeck, NOAA Assistant Administrator, to Ambassadors of Indian Ocean Fishing Countries, May-June, 2016
135	Letters from Eileen Sobeck, NOAA Assistant Administrator, to Ambassadors of Indian Ocean Fishing Countries, Sept. 30, 2016
136	IATTC, Annual Report of the Inter-American Tropical Tuna Commission – 2002 (2004)
137	New Zealand, Annual Report to the Commission, WCPFC-SC12-AR/CMM-16 (Aug. 2016)
138	Korea, Annual Report to the Commission, WCPFC-SC12-AR/CCM-12 (Aug. 29, 2016)
139	NMFS, "Hawaii Shallow-Set Longline Annual Reports - 2006-2015"

I. INTRODUCTION

1. In its first written submission, the United States explained that the U.S. dolphin safe labeling measure is consistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement) and meets the standard of Article XX of the *General Agreement on Tariffs and Trade 1994* (GATT 1994). In particular, the United States explained that NOAA's March 22, 2016 interim final rule (2016 IFR) amended the determination provisions such that the design of these provisions is now even-handed. The United States also explained how the 2016 IFR addressed other concerns identified during the first compliance proceeding involving the eligibility criteria, certification requirements, and tracking and verification requirements, even though these concerns did not form the basis for the DSB recommendation at issue. The conclusion that the amended measure is in compliance with U.S. obligations under the covered agreements is entirely consistent with, and in many cases directly supported by, the DSB recommendations and rulings in the previous proceedings in this dispute.

2. Mexico has failed to establish that the United States is incorrect and that the measure is, in fact, WTO-inconsistent. Two points, in particular, are apparent from Mexico's first written submission.

3. First, Mexico's various legal arguments all point in the same direction – for the Panels *not* to base their findings with regard to the U.S. measure on whether the distinctions it draws are calibrated to the risks to dolphins posed by different fishing methods in different ocean areas. Given that the Appellate Body in the previous compliance proceeding made it clear that this was the central issue in this dispute, the United States would have thought it was beyond question that this is the required analysis. Mexico, however makes a number of arguments that directly contradict, or would severely undermine, the Appellate Body's guidance. For example, Mexico contends that the measure can be found to be inconsistent with Article 2.1 because the regulatory distinctions are irreconcilable with the measure's objective (as identified, incorrectly, by Mexico), because the measure must be calibrated based on accuracy, or because factors unrelated to the risk to dolphins (such as the sustainability of tuna stocks) must be taken into account.

4. Second, Mexico cannot accept the Appellate Body's calibration analysis because, under the correct test, *the facts* prove the measure is calibrated and, thus, even-handed. Indeed, Mexico is forced to ignore the central factual basis of the U.S. argument, which shows, based on a fishery-by-fishery comparison of harms to dolphins, controlling for fishery size, that setting on dolphins in the ETP large purse seine fishery *does* have a unique risk profile, distinct from the risk profiles of other fishing methods and other fisheries. Mexico also fails to account for the unique nature of setting on dolphins and the significant difference in unobservable harms caused by chasing and capturing dolphins, on the one hand, and all other fishing methods, on the other. Rather, Mexico claims that the Panels should compare only direct mortalities and only absolute numbers; whether 1,000 dolphin deaths were caused by 100 vessels or 10,000 vessels is immaterial under Mexico's approach. In short, Mexico ignores the relevant evidence because it

proves that setting on dolphins, and the ETP large purse seine fishery, has a unique risk profile for dolphins "in quantitative and qualitative terms."[1]

5. In this third (and fourth) panel proceeding, with two sets of DSB recommendations and rulings adopted, the issues in dispute between the parties *should be narrowing*. But they are not. The reason for this is Mexico's refusal to accept the DSB recommendations and rulings and tailor its argument accordingly. To Mexico, the DSB recommendations and rulings appear to be mere options, some of which can be accepted and some rejected. But that approach is not consistent with the way the WTO dispute settlement system operates or with the context in which the United States amended its measure through the 2016 IFR. As discussed previously, in designing the 2016 IFR, the United States carefully reviewed the most recent reports of the Appellate Body and panel, focusing in the first instance on the design of the measure's determination provisions. The United States also worked to ensure that the differences in the eligibility criteria, certification requirements, and tracking and verification requirements are calibrated to differences in the risks to dolphins from setting on dolphins in the ETP large purse seine fishery and other fishing methods in other fisheries. But Mexico now argues that this legal framework is wrong or incomplete, urging the Panels, instead, to assess the U.S. measure under contradictory and additional legal tests, as well as unreasonable or impracticable factual metrics. The United States urges the Panels to reject Mexico's approach.[2]

6. The United States explained that the U.S. measure is WTO-consistent in its first written submission. As such, the United States devotes this submission to responding to the specific arguments Mexico has made. In section II, the United States responds briefly to several procedural issues raised by Mexico. In section III, the United States explains why Mexico has failed to establish that the U.S. measure is inconsistent with Article 2.1 of the TBT Agreement. In light of Mexico's argument, the U.S. discussion focuses most on Mexico's proposed legal test and its argument regarding the eligibility criteria. In section IV, the United States addresses Mexico's argument under the GATT 1994.

II. PROCEDURAL ISSUES

7. In this section, the United States addresses three preliminary issues raised by Mexico in its first written submission: (1) the issue of consultations at the outset of these proceedings, (2) the burden of proof in these proceedings, and, (3) the status of the U.S. measure as a technical regulation under the TBT Agreement.

8. With regard to consultations, Mexico claims that the United States acted inconsistently with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU)

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

[2] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.156 ("We also consider it appropriate for WTO Members to seek guidance in the reasoning set out in adopted Appellate Body and panel reports when seeking to bring their inconsistent measures into compliance with their obligations under the covered agreements. Indeed, this contributes to the security and predictability of the multilateral trading system, as well as to the prompt settlement of disputes.").

by failing to consult with Mexico before filing its panel request.[3] However, Mexico also states that while "it does not challenge the jurisdiction of the Panel in the United States' Article 21.5 proceedings," it "requests that the Panel set forth guidance for future cases."[4] The United States disagrees that the Panels should issue such "guidance" given that there appears to be no issue of live controversy here. Moreover, Mexico is wrong on the law. There is no requirement to request consultations under Article 4 of the DSU as a condition for requesting the establishment of a compliance panel pursuant to Article 21.5 of the DSU – a point that the Appellate Body has already made.[5]

9. In fact, there is a particular irony to Mexico's statement and request for "guidance." It was Mexico who made these same arguments in its appeal in *Mexico – HFCS (Article 21.5 – US)*. The Appellate Body rejected Mexico's arguments, so Mexico is well aware that its interpretation of Article 21.5 of the DSU is incorrect, even as it applies to a panel request made by the original complaining party. Furthermore, since the Appellate Body has already addressed this same issue, there is no need for the "guidance" that Mexico seeks, even aside from the fact that such guidance would be an advisory opinion that would not contribute to resolving this dispute and so would be outside the role of panels.

10. Furthermore, Article 4 of the DSU is not applicable, on its own terms, in the situation where it is the Member concerned who initiates Article 21.5 proceedings. As Article 4.2 of the DSU makes clear, Article 4 consultations are about a measure taken by the Member receiving the request for consultations. That is not the situation where it is the Member concerned who initiates Article 21.5 proceedings.

11. With regard to burden of proof, the United States observes Mexico's statement that its first written submission "presents Mexico's *prima facie* case" in the matter brought by Mexico.[6] The United States agrees that with respect to the matter brought by the United States, the United States has the burden of proof, and with respect to the matter brought by Mexico, Mexico has the burden of proof. However, the United States would further observe that, regardless of which party has the burden of proof, it is well established that "the party that asserts a fact is responsible for providing proof thereof."[7]

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[3] *See* Mexico's First Written Submission, para. 25.

[4] Mexico's First Written Submission, para. 29.

[5] *See Mexico – HFCS (Article 21.5 – US) (AB)*, para. 65 ("For these reasons, we conclude that even if the general obligations in the DSU regarding prior consultations were applicable in proceedings under Article 21.5 of the DSU – a matter which we do not decide – *non-compliance with those obligations would not have the effect of depriving a panel of its authority to deal with and dispose of the matter*. It follows that, in this case, the Panel was not required to consider, on its own motion, whether the lack of consultations deprived it of its authority to assess the consistency of the redetermination with the Anti-Dumping Agreement.") (emphasis added).

[6] Mexico's First Written Submission, para. 4.

[7] *US – Tuna II (Mexico) (AB)*, para. 283 ("As an initial matter, we note that, in *Japan – Apples*, the Appellate Body pointed out that '[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand,

12. With regard to the parts of Mexico's submission discussing issues that are not in dispute,[8] the United States observes that these sections appear unnecessary given that there exist DSB recommendations and rulings covering these issues. More problematically, however, Mexico's description of some of these issues, in particular the issue regarding whether the measure is a technical regulation for purposes of the TBT Agreement, appears to diverge from the DSB recommendations and rulings. Therefore, and in light of the fact that the issue is not in dispute, the United States respectfully requests that the Panels refer to the DSB recommendations and rulings on these issues in describing them, rather than to Mexico's descriptions.

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

13. 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 III.A below, the United States explains the requirements of Article 2.1 and addresses Mexico's alternate explanations of the Article 2.1 standard. Section III.B demonstrates that the U.S. measure is consistent with Article 2.1 because the detrimental impact of the measure stems exclusively from legitimate regulatory distinctions.

A. What Article 2.1 Requires

1. The Appropriate Legal Test for Even-Handedness in this Dispute and the History of that Test

14. In the U.S. first written submission, the United States clearly discussed the legal test for whether the measure is even-handed.[9] In particular, the United States explained that, for purposes of this dispute, the test for even-handedness is whether the particular labeling conditions of the U.S. dolphin safe measure are "calibrated" to the differences in risks to dolphins.[10] In such an analysis, the Appellate Body has stated that the panel must assess:

> [W]hether . . . 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

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the principle that the party that asserts a fact is responsible for providing proof thereof.'") (quoting *Japan – Apples (AB)*, para. 157, and citing *US – Wool Shirts and Blouses (AB)*, p.14, *EC – Hormones (AB)*, para. 98).

[8] Mexico's First Written Submission, para. 4.

[9] U.S. First Written Submission, para. 66 (stating, "[t]o 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*.'") (quoting *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.31 (emphasis added)).

[10] U.S. First Written Submission, para. 67 (observing that "[i]n 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.") (quoting *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101 (emphasis added)).

> 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.[11]

15. Pursuant to this legal framework, the United States explained in section V.C.2 of its first written submission that, in fact, there is a difference in risk to dolphins between setting on dolphins in the ETP large purse seine fishery and other fishing methods in other oceans. The United States further explained that the regulatory distinctions drawn by the U.S. measure, as amended by the 2016 IFR, regarding the eligibility criteria, certification requirements, and tracking and verification requirements are commensurate with these differences in risk.

16. In section IV.C.2 of its submission, Mexico disagrees with the test for even-handedness articulated by the Appellate Body, arguing that there are, in fact, three separate even-handedness tests and that differences in accuracy, not risk to dolphins, is the determining factor. In making this argument, Mexico is again asking the Panels to ignore the analysis clearly set out in the Appellate Body reports in the original proceeding and the previous compliance proceeding in this dispute.

17. In the original proceeding, the Appellate Body rejected Mexico's argument that a finding of detrimental impact alone constitutes less favorable treatment for purposes of Article 2.1.[12] Instead, the Appellate Body found that the U.S. measure affords less favorable treatment only where the detrimental impact it causes stems from regulatory distinctions that have been found not to be calibrated to differences in risks to dolphins between setting on dolphins in the ETP large purse seine fishery and other fishing methods in other ocean areas.[13] Instead of accepting the Appellate Body's analysis, Mexico argued in the first compliance proceeding that the panel should not adopt the calibration approach set out by the Appellate Body.[14] The first compliance panel agreed with Mexico, in part, finding that the certification requirements and tracking and

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[11] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101; *see also* U.S. First Written Submission, para. 67 (quoting same).

[12] *Compare US – Tuna II (Mexico) (AB)*, para. 241 (quoting Mexican submission); *with id.* para. 215 (stating that "[t]he existence of such a detrimental effect is not sufficient to demonstrate less favourable treatment under Article 2.1").

[13] *See US – Tuna II (Mexico) (AB)*, paras. 297-298; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("These passages [in paragraph 297 of the original Appellate Body report], in our view, demonstrate that the Appellate Body's assessment of 'even handedness' in the original proceedings was focused on the question of whether the original tuna measure was 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans.").

[14] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.180-185 (certification requirements), 7.385-386 (tracking and verification requirements).

verification requirements were not even-handed because a difference in accuracy meant that these labeling conditions could not be consistent with the objective of the measure.[15]

18. On appeal, Mexico again argued for the Appellate Body to adopt such an approach,[16] but the Appellate Body *squarely rejected* Mexico's framework. In particular, the Appellate Body emphasized that the report in the original proceeding had made it clear that the Appellate Body "accepted the premise that the U.S. measure *'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.'"[17] Consequently, the Appellate Body reversed the first compliance panel's findings regarding the eligibility criteria (for not conducting an appropriate calibration analysis),[18] and the certification and tracking and verification requirements (for not conducting a calibration analysis at all).[19] In addition, the Appellate Body found that it could not complete the analysis because, in its view, the first compliance panel had not made sufficient factual findings regarding the risk to dolphins inside and outside the ETP large purse seine fishery.[20] There was no suggestion that the panel had failed fully to analyze any of the other considerations unrelated to the risks to

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[15] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.233, 7.246 (certification requirements), 7.398-400 (tracking and verification requirements).

[16] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.149 ("Mexico argues that it cannot be even handed for the amended tuna measure to permit a higher proportion of incorrect dolphin-safe information with respect to tuna caught in allegedly low-risk fisheries outside the ETP than for tuna caught in the allegedly high-risk ETP large purse seine fishery. Thus, the 'calibration' that the United States proposes is clearly arbitrary, unjustifiable, and lacking in even-handedness because it results in inaccurate and misleading information, in direct contradiction with the measure's objectives."); *id.* 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*.") (emphasis added); *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).

[17] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 (emphasis added).

[18] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.161.

[19] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.162; *see also id.* para. 7.164 (referencing the first compliance panel's analysis in paras. 7.241 and 7.245, and stating that, "[t]o us, this part of the Panel's reasoning appears to have employed a concept that looks like 'calibration.'").

[20] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253 ("In the absence of a proper assessment by the Panel *of the relative risks* existing inside and outside the ETP large purse-seine fishery, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks in light of the objective of protecting dolphins from adverse effects arising in different fisheries. For similar reasons, the Panel's limited analysis in respect of *the relative risk profiles* in turn constrains our ability to complete the legal analysis in this regard.") (emphasis added); *id.* at para. 7.242 ("In assessing whether the amended tuna measure is adequately calibrated *to the relative adverse effects on dolphins* arising outside the ETP large purse-seine fishery as compared to those inside that fishery, we must examine whether there are relevant factual findings by the Panel or undisputed evidence on the record *regarding the different risk profiles in these different fisheries.*") (emphasis added).

dolphins that Mexico now insists are central to the analysis, such as record-keeping requirements of other countries or the "sustainability" of tuna stocks in the ETP.

19. In this proceeding, Mexico again argues that the Panels should not adopt the Appellate Body's analysis. In Mexico's view, the Panels, in the first instance, should determine that all three regulatory distinctions "constitute arbitrary or unjustifiable discrimination because they are inconsistent with the objectives of the measure."[21] And, in terms of the calibration test itself, Mexico argues that this test is, in fact, two tests, one involving calibration *to risk* (taking into account certain non-dolphin risk factors) and one involving calibration *to accuracy*.[22]

20. We address Mexico's erroneous, multi-part legal test in detail below, but at the outset we note that, although Mexico takes the position that adopting the calibration test in this proceeding "for the first time" will have "profound" (though unspecified) implications for the WTO Agreement, the real "profound" implications would result from the Panels' agreeing with Mexico's disregard for the DSB recommendations and rulings by applying tests different from the one forming the basis of DSB recommendations and rulings *in two consecutive proceedings*. As has been said many times, "Article 21.5 proceedings form part of a continuum, such that due cognizance must be accorded to the recommendations and rulings made by the DSB in the original proceedings."[23] The United States carefully studied the Appellate Body's analysis following the release of the Appellate Body report in November 2015 and designed the 2016 IFR in recognition that this would be the legal framework under which the newly amended measure would be judged, in line with the Appellate Body's guidance. Yet Mexico now argues that the United States erred in doing so. In Mexico's view, the United States *should not* have relied on the Appellate Body's analysis because that analysis was incorrect or incomplete. But Mexico's approach ignores the role of DSB recommendations and rulings in a compliance proceeding.[24]

2. Mexico's Proposed Legal Tests for Even-Handedness Are Incorrect

21. As the United States understands it, Mexico claims that there are, not one, but *three separate legal tests* that the Panels could conduct to determine whether the measure is even-handed. First, Mexico claims that the Panels should find that the measure imposes "arbitrary or unjustifiable discrimination," and thus is inconsistent with Article 2.1, because the three major

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[21] *See* Mexico's First Written Submission, heading at sec. IV.C.2.a.(i); *see also id.* para. 214 ("Such regulatory differences are completely at odds with the objectives and the design, architecture and revealing structure of the tuna measure. On their face, they constitute arbitrary and unjustifiable discrimination."). The United States notes that Mexico's First Written Submission has an error in the numbering of the paragraphs as there are two sets of paragraphs 210-214. Where indicated, this subsection of the U.S. Second Written Submission refers to the first set of those paragraphs, *i.e.*, those paragraphs constituting section IV.C.2.a.(i).

[22] *See* Mexico's First Written Submission, paras. 217-218.

[23] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.112.

[24] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.156 ("We also consider it appropriate for WTO Members to seek guidance in the reasoning set out in adopted Appellate Body and panel reports when seeking to bring their inconsistent measures into compliance with their obligations under the covered agreements.").

regulatory distinctions are "inconsistent with the objectives of the measure."[25] However, Mexico also claims that the Panels could find that the measure is inconsistent with Article 2.1 because the measure is not appropriately calibrated either: (a) to the differences in risks to dolphins (also taking into account certain non-risk related factors), or (b) to the (alleged) differences in accuracy of dolphin safe certifications in different fisheries.[26]

22. Mexico's three-pronged approach differs substantially from the Appellate Body's test and is in error. In this section, the United States addresses each of Mexico's three legal tests in turn.

a. Mexico's Proposed First Test for Even-Handedness Is Incorrect

23. Mexico argues that the first test that the Panels should employ to determine whether the measure is even-handed is whether the regulatory distinctions of the amended measure are reconcilable with, or rationally related to, the objectives of the measure.[27] This appears to be the same test that the first compliance panel, at Mexico's urging, relied on to make its findings regarding the certification and tracking and verification requirements. Specifically, Mexico argues that any difference in the accuracy of the dolphin safe claims associated with tuna product produced from ETP large purse seine fishery, on the one hand, and from all other fisheries, on the other, cannot be reconciled with Mexico's interpretation of the measure's objectives. Although Mexico seems to suggest that this analysis would take place when the Panels engage in a calibration analysis,[28] Mexico also indicates that any difference in accuracy would be sufficient for a finding that the measure is not consistent with Article 2.1, stating:

> Such regulatory differences are completely at odds with the objectives and the design, architecture and revealing structure of the tuna measure. *On their face, they constitute arbitrary and unjustifiable discrimination*.[29]

24. As in the first compliance proceeding, Mexico's argument is in error for several reasons.

25. First, Mexico's argument that the Panels can – indeed, must – find that the measure is not even-handed based solely on the finding that the regulatory differences are not, in Mexico's

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[25] *See* Mexico's First Written Submission, heading at paras. 211-214.

[26] *See* Mexico's First Written Submission, paras. 217-218.

[27] *See* Mexico's First Written Submission, para. 211.

[28] *See* Mexico's First Written Submission, para. 214 (stating that "the regulatory differences comprising the relevant regulatory distinctions identified below that result in the provision of inaccurate information to consumers must be carefully considered by the Panels when assessing whether or not the tuna measure is designed and applied in an even-handed manner, i.e., because it is "calibrated" to different circumstances, as the United States claims").

[29] Mexico's First Written Submission, para. 214 (emphasis added); *see also id.* n.280 ("Given the nature of the 2016 tuna measure as a consumer information label, the differences in the relevant regulatory distinctions that result in the provision of inaccurate information to consumers must be carefully considered by the Panels because such differences are completely at odds with the objectives and the design, architecture and revealing structure of the tuna measure. On their face, they constitute arbitrary and unjustifiable discrimination.").

view, reconcilable with the measure's objectives is contradicted by the Appellate Body reports in this dispute.[30] In constructing this argument, Mexico converts the Appellate Body's preliminary observation regarding the first compliance panel's *articulation* of the legal standard (namely the panel's statement that an inquiry as to whether the regulatory distinctions are reconcilable with the objectives may be "potentially helpful") into a mandate to apply this inquiry as the sole test of even-handedness.[31] This alleged mandate is contradicted by the Appellate Body's analyses of the first compliance panel's *application* of that legal standard and its own attempt to complete the analysis. The Appellate Body made clear that, in this dispute, whether the regulatory distinctions are calibrated to differences in risk to dolphins is of "special relevance" in determining whether the measure is even-handed.[32] Indeed, as noted above, the Appellate Body affirmed that a measure that is so calibrated "will not violate Article 2.1."[33] Thus, Mexico's proposed approach is incompatible with the Appellate Body's clear guidance in this dispute.[34]

26. Second, in arguing that the measure must be found not even-handed because its regulatory distinctions are not reconcilable with its objectives, Mexico appears to suggest that a conflict could exist between the concepts of "arbitrary or unjustifiable discrimination" and "even-handedness" where no such conflict exists. As the Appellate Body indicated, "even-handedness" and "arbitrary or unjustifiable discrimination" are closely related concepts, in that "where a regulatory distinction is not designed and applied in an even-handed manner, because, for example, it . . . constitutes a means of arbitrary or unjustifiable discrimination, that distinction cannot be considered legitimate for purposes of Article 2.1."[35] But then, in the very next sentence, the Appellate Body clarified:

> *[I]n the circumstances of this dispute*, it is appropriate to assess whether the differences in the labelling conditions for tuna products containing tuna caught in the ETP large purse-seine fishery, on the one hand, and for tuna products

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[30] *See* Mexico's First Written Submission, para. 211 ("Thus, a measure that involves 'arbitrary or unjustifiable discrimination' cannot be said to be designed and applied in an 'even-handed manner.'") (citing *US – Tuna II (Mexico) (Article 21.5 – Mexico) (AB)*, paras. 7.31, 7.94 and 7.97 ("In this regard, a regulatory distinction cannot be said to be designed and applied in an even-handed manner if it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination")) (internal quotes omitted).

[31] Mexico's First Written Submission, n.245-255 (citing to paragraphs 7.92, 7.94-7.97 of the Article 21.5 Appellate Body Report); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.99 ("On the basis of the foregoing discussion, we find that the United States has not established that the Panel erred in recognizing the relevance of the concept of arbitrary or unjustifiable discrimination in the chapeau of Article XX of the GATT 1994, or in identifying an examination of whether the detrimental treatment can be reconciled with, or is rationally related to, the measure's objectives *as potentially helpful* for purposes of the second step of the analysis of treatment no less favourable under Article 2.1 of the TBT Agreement.") (emphasis added, internal quotes omitted).

[32] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101.

[33] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("By engaging with the United States' arguments as it did, the Appellate Body accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans.").

[34] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.157, 7.169, 7.249.

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

> containing tuna caught outside that fishery, on the other hand, *are calibrated* to the likelihood that dolphins will be adversely affected in the course of tuna fishing operations in the respective fisheries.[36]

Thus, there is no potential for conflict between these two concepts because, in this dispute, there is only one question that needs to be answered, not the multiple questions Mexico proposes.[37]

27. Third, Mexico misapplies its own argument regarding whether the regulatory distinctions are reconcilable with the measure's objectives. Mexico consistently has taken a myopic view of the measure, arguing that the entire focus should be on accuracy.[38] Yet Mexico's approach ignores the fact that all previous reports have found that the relevant objective of the measure is "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."[39] That is why the calibration test, as articulated and applied by the Appellate Body, is done "in the light of the objective *of protecting dolphins* from adverse effects arising in different fisheries,"[40] and why the Appellate Body repeatedly has focused on the importance of evaluating the differences in risks to dolphins of different fishing methods in different fisheries. As the United States explained in its first written submission, the regulatory distinctions of the amended measure are all related to the

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[36] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.239 (emphasis added).

[37] One could also read Mexico's argument as not creating a conflict between whether the regulatory distinctions are reconcilable with the objective and whether they are calibrated to differences in risks to dolphins, but rather that the result in the former drives the result of the latter. This appears to be a point of paragraph 218 and footnote 280 where Mexico argues, as part of its calibration analysis, that "regulatory differences that pertain to the accuracy of information provided to U.S. consumers are *an integral part* of the calibration test," and that these regulatory distinctions, "[o]*n their face, … constitute arbitrary and unjustifiable discrimination*," strongly suggesting that the regulatory distinctions are not calibrated to risk ***because*** they are not reconcilable with the measure's objectives. Of course, this analysis is wrong for the same reasons discussed above. The Appellate Body has already clearly indicated that the question of whether regulatory distinctions are calibrated to differences in risks to dolphins drives the answer of whether the measure is even-handed or not, and Mexico errs by suggesting that the Panels disregard those clear DSB recommendations and rulings on this point.

[38] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.107 (observing that while the first compliance panel "referred, generally, to the 'goals' or 'objectives' of the amended tuna measure," in application of the legal standard the first compliance panel's "reasoning with respect to each of the sets of certification requirements, and tracking and verification requirements relies predominantly on the first of these objectives" and "did not analy[ze] other dimensions (e.g. protection of dolphins from observed and unobserved harms) of 'even-handedness' before reaching its conclusions in respect of the certification and tracking and verification requirements."); *but see* Mexico's First Written Submission, para. 214 (continuing to insist that the accuracy prong is the "primary objective" of the measure).

[39] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.16.

[40] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253 (acknowledging the panel's findings with regard to differences in accuracy in its analyses of both the certification requirements and the tracking and verification requirements, and stating that "[i]n the absence of a proper assessment by the Panel of the relative risks existing inside and outside the ETP large purse-seine fishery, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks *in the light of the objective of protecting dolphins from adverse effects arising in different fisheries*.") (emphasis added); *see also id.* para. 7.353 (similarly noting the importance of "the objective of protecting dolphins from adverse effects arising in different fisheries" in the Article XX context).

measure's objective of dolphin protection for the very reason that they represent a commensurate response to the different risk profiles for dolphins of different fishing methods in different ocean areas.[41] Further, as the minority panelist explained, the concepts of accuracy and dolphin protection work in conjunction with one another in the circumstances of this dispute.[42]

28. Finally, we note that Mexico's repeated assertions that the dolphin safe claims of tuna product produced from the ETP large purse seine fishery are more accurate than the claims of tuna product produced by other fisheries have never been supported by evidence. Further, Mexico ignores the circumstance that the challenges of accurately identifying when a dolphin has been killed or seriously injured in a particular set are, in fact, much greater in the ETP large purse seine fishery due to the nature of the fishing activity that occurs there. In dolphin sets – where purse seiners, speed boats, and helicopters routinely engage in lengthy chases and encirclement of hundreds of dolphins in varying sea and weather conditions – identifying a single dolphin mortality or serious injury (which can occur during the chase, before the dolphins are encircled, and therefore, before any observer would be able to record it) is substantively more difficult than in other fisheries, where dolphins are not chased, and any interactions between vessels and dolphins are generally accidental and of limited scope and duration.[43]

29. In sum, Mexico's argument is in error. Even if Mexico had properly applied its proposed test, which Mexico did not do, it would still be the wrong legal test, as demonstrated by the Appellate Body's approach in the previous compliance proceeding.[44] It is simply improper for Mexico to use these compliance proceedings to "appeal" those Appellate Body findings.

b. Mexico's Proposed Tests for Calibration Are Incorrect

30. Mexico begins its first written submission by referring to the calibration test as an inquiry into whether the measure is calibrated "to different *relevant circumstances*,"[45] rather than using the Appellate Body's formulation of calibration "to the risks to dolphins."[46] Mexico does not explain this deviation from the Appellate Body's words until paragraphs 217-222 where Mexico argues for the Panels to apply, not one, but two different calibration tests. In paragraph 217, Mexico explains its first calibration test as one that, in language at least, appears to approximate

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[41] *See* U.S. First Written Submission, paras. 205, 211, 215, 217.

[42] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.276-279.

[43] *See* U.S. First Written Submission, paras. 133-139. Mexico failed to respond to this section of the U.S. submission.

[44] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.229-230, 7.253; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.245-246 (concluding that the certification requirements were not even-handed despite the fact that the first compliance panel 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").

[45] *See, e.g.*, Mexico's First Written Submission, para. 4.

[46] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 (finding that the first compliance panel "was required to assess whether the certification and tracking and verification requirements are 'calibrated' *to the risks to dolphins* arising from different fishing methods in different areas of the oceans.") (emphasis added); *see also id.* paras. 7.101, 7.157, 7.160, 7.169, 7.249 (providing more detailed articulations of the same test).

the test set out by the Appellate Body, although, as discussed below, the precise content of Mexico's first test is somewhat unclear. In paragraph 218, Mexico proposes a second calibration test, whereby the Panels would assess whether the regulatory distinctions are calibrated "to the different relative risks (*i.e.*, the likelihood) of inaccurate dolphin-safe certification, reporting, and/or record-keeping with respect to the tuna caught in different fisheries and different ocean regions."[47] Although Mexico suggests that both tests would apply to all three regulatory distinctions,[48] Mexico appears to apply only the first test to the eligibility criteria, while making brief references to both tests in regard to the certification requirements and the tracking and verification requirements.

31. As discussed in this section, Mexico's dueling calibration tests are in error. There is, in fact, only one test, as *both* Appellate Body reports in this dispute make plain.

i. Mexico's First Calibration Test Is in Error

32. As noted above, Mexico's first calibration test appears to comprise an inquiry as to whether the regulatory distinctions are calibrated to the risks to dolphins posed by different fishing methods in different fisheries. That is to say, the test inquires whether:

> [T]he 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.[49]

Further, as Mexico acknowledges, this test inquires as to the overall adverse effects, including both observable mortality and serious injury as well as those unobservable harms caused by "the chase itself," such as cow-calf separation, muscular damage, and immune and reproductive system failures.[50]

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[47] For ease of reference, we characterize these two distinct tests as Mexico's first and second calibration tests, or, alternatively, "calibration to risks to dolphins" and "calibration to the risks of suppliers." *See* Mexico's First Written Submission, para. 299 (concluding that the tracking and verification requirements are neither calibrated to the risk profiles of "fisheries" or of "suppliers").

[48] *See* Mexico's First Written Submission, paras. 218-219 (stating that this second calibration test "will be required" where the "differences in labelling conditions result in differences in the accuracy of information provided to consumers," and that [a]ccuracy could be affected by each individual labelling condition (i.e., eligibility criteria, certification requirements, and tracking and verification requirements) and by the interaction between labelling conditions").

[49] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.157.

[50] *See* Mexico's First Written Submission, para. 217; *see also 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

33. Mexico employs a complicated mix of quotes in paragraph 217 that clouds, rather than clarifies, the Appellate Body's test. To the extent that Mexico, in fact, articulates its first calibration test in materially different ways than as described above, Mexico errs. Moreover, we note that, after the initial articulation of this test, Mexico suggests and applies versions of the test that are not, in fact, consistent with the calibration inquiry articulated by the Appellate Body.

34. In this regard, Mexico appears to assert in paragraphs 231-238 of its first written submission that, in assessing the risks to dolphins of dolphin sets in the ETP large purse seine fishery (but, apparently, not for other fishing methods or fisheries), the Panels' assessment must include factors that do not relate to risks to dolphins. Specifically, Mexico appears to argue that the Panels should discount the risk profile for dolphins in the ETP large purse seine fishery under the theory that setting on dolphins in the ETP large purse seine fishery is a more "sustainable" fishing method for other species, including tuna, than another type of purse seine fishing method.[51] Mexico's argument is in error.

35. The Appellate Body's test is whether the regulatory distinctions are calibrated to differences in risk to dolphins, and Mexico provides no reason grounded in the extensive analyses contained in the two Appellate Body reports as to why the risk profile of the ETP large purse seine fishery should be adjusted based on a factor that does not relate to risks *to dolphins*. By altering the Appellate Body's test, which the United States relied on in designing the 2016 IFR, Mexico again ignores the role of the DSB recommendations and rulings in this dispute.

36. Further, it is well established that the U.S. dolphin safe labelling measure is not a label that is limited to the sustainability of dolphin populations. The label informs consumers as to whether the tuna in a particular can or other container was produced in a manner that was harmful to dolphins. As previous reports have recognized, the measure's legitimate objective of dolphin protection, *i.e.*, "minimiz[ing] observed and unobserved mortality and injury to dolphins," is not "dependent on dolphin populations being depleted."[52] Perhaps because there is no dispute that setting on dolphins is harmful to dolphins, Mexico continues to attempt to redefine the measure as being about other concerns – for example, sustainability of dolphin populations, or whether the fishing method used to produce that tuna might result in harm to

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cow-calf separation, muscular damage, immune and reproductive system failures, which arise as a result of the chase in itself.'"); *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.248-253.

[51] *See* Mexico's First Written Submission, para. 231 ("Determining the risk profile for the AIDCP-compliant dolphin encirclement fishing method is the starting point for the comparative assessment of the risk profiles of different fishing methods. In determining this risk profile, it is important that the Panels take into account the recognized environmental sustainability of this fishing method. … Maintaining these dual goals of protecting dolphins as well as other species in the ecosystem is crucially important to Mexico because, together, they will ensure the sustainability of the fisheries in the ETP. In contrast, the principal alternative fishing method to AIDCP-compliant dolphin encirclement – setting purse seine nets on fish aggregating devices (FADs) – is tremendously damaging to both target and bycatch fisheries stocks and is environmentally unsustainable. The 2016 tuna measure rejects an environmentally sustainable fishing practice and promotes one that is environmentally damaging.").

[52] *US – Tuna II (Mexico) (Panel)*, para. 7.550; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527 (noting that "the preservation of individual dolphin lives is just as much an act of conservation as is a program to encourage recovery of a particular population").

dolphins at some point by some other vessel or in some other circumstance, even if no dolphin was harmed when that fishing method was used to produce that particular tuna.[53] In this regard, Mexico's arguments are contradicted by its own position that the calibration analysis must be done "'in light of' the objectives *of the measure*."[54]

37. Thus, Mexico's argument reveals that, at its core, Mexico's claim is that the United States has not properly prioritized its objectives and that the WTO should correct this supposed error. In Mexico's view, the goal of sustainability is so much more important than the protection of members of a particular species that every seafood-related measure *must* pursue this goal. Consequently, as Mexico argues, the Panels are within their authority to prioritize sustainability over the actual objective of the measure.[55] Indeed, Mexico argues that the WTO Agreement *requires* the Panels to do so.[56] But it is not the role of the WTO to decide for its Members which legitimate objectives they should pursue with a particular measure. Certainly, the text of Article XX(g) does not include such a mandate, nor does Article 2.2 of the TBT Agreement, which provides for an open list of legitimate governmental objectives. Notably, the DSB recommendations and rulings include that the objectives of the U.S. dolphin safe labeling measure fall within the scope of Article XX(g) of the GATT 1994 and are legitimate for purposes of Article 2.2 of the TBT Agreement,[57] and Mexico provides no reason why the Panels should act contrary to the DSB recommendations and rulings in this regard.[58]

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[53] Mexico seeks to accomplish a redefinition of the measure at least in part by an erroneous interpretation of Article 2.1 of the TBT Agreement. *See* Mexico's First Written Submission, paras. 231-233. Mexico argues that the language of the preamble to the WTO Agreement should be read to override the objective of any individual measure of a Member and instead requires that each measure by a Member must satisfy the objective of sustainable development. This is incorrect. Nothing in the preamble states what Mexico is arguing, and customary rules of interpretation of public international law explain that the object and purpose of a treaty helps to inform the meaning of the words of the treaty. It is incorrect to argue that the object and purpose of a treaty are in fact obligations as to the objective to be achieved by each measure that a Member might adopt or maintain.

[54] Mexico's First Written Submission, para. 217 (emphasis added).

[55] *See* Mexico's First Written Submission, para. 236 ("In this regard, a measure that purports to pursue the protection of a single species in a narrow sense should not be designed and applied to the detriment of programs achieving environmental protection and sustainable development in broad respects.").

[56] *See* Mexico's First Written Submission, paras. 232, 235 ("The Panels *must* interpret and apply Article 2.1 of the TBT Agreement in a manner that furthers environmental sustainability.") (emphasis added).

[57] *US – Tuna II (Mexico) (Panel)*, para. 7.444 (finding that "the objectives of the US dolphin safe provisions, as described by the United States and ascertained by the Panel, are legitimate" for purposes of Article 2.2); *US – Tuna II (Mexico) (AB)*, paras. 334-339 (rejecting Mexico's appeal in this regard); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.541 (finding that the objectives of the measure fall within the scope of Article XX(g)); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.284 (noting that Mexico did not challenge this finding on appeal).

[58] The United States would further note that Mexico's argument appears to be based on the assumption that setting on dolphins is not only more sustainable for tuna than other purse seine fishing methods, it is more sustainable than *all* other fishing methods. Mexico puts forward *no evidence* on this point. In any event, Mexico's characterization of the measure that it "promotes" certain fishing methods is inaccurate. *See* Mexico's First Written Submission, para. 231. The measure does no such thing, neither in design nor in application. Finally, we would

38. Thus, even describing a calibration test based on the risks to dolphins, Mexico diverges from the Appellate Body's standard by seeking to inject considerations not relevant to dolphin harm into the evaluation of one fishing method and fishery at issue. Moreover, as discussed in sections III.B.1.c.i-ii below, when Mexico proceeds to apply this first calibration test, it departs completely from the analysis set out by the Appellate Body by disregarding the unobservable harms associated with dolphin sets, again seeking to transform the measure into a sustainability label, and failing to conduct a relative assessment of the risks of different fishing methods in different ocean areas.

ii. Mexico's Second Calibration Test Is in Error

39. Mexico's second calibration test purports to analyze whether the regulatory distinctions are calibrated to differences in the accuracy of dolphin safe claims, in light of the country producing the tuna product. Specifically, Mexico states that, where "differences in labelling conditions result in differences in the accuracy of information provided to consumers," the Panels must examine: "[w]hether the *de jure* and *de facto* regulatory differences are 'calibrated' to the different relative risks (i.e., the likelihood) of inaccurate dolphin-safe certification, reporting, and/or record-keeping with respect to the tuna caught in different fisheries and different ocean regions."[59] In this test, the risks to dolphins are irrelevant; the focus is on the recordkeeping requirements applicable to different producers of tuna product. While Mexico argues that this test applies to all three regulatory distinctions,[60] the test, by its very terms, seems not to apply to the eligibility criteria.[61] Indeed, Mexico only applies this test in its analysis of the certification requirements and tracking and verification requirements.

40. Mexico errs by insisting that the Panels apply such a test.

41. First, as Mexico concedes, this is not the test applied by the Appellate Body.[62] As stated repeatedly above, the U.S. measure is even-handed, and does not breach Article 2.1, "if it is properly 'calibrated' *to the risks to dolphins* arising from different fishing methods in different areas of the oceans."[63] Yet in both articulation and application, Mexico makes clear that the

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note that purse seine fishing with a fishing aggregating devices (FAD) is an approved fishing method in many different fisheries, including, notably, the ETP large purse seine fishery.

[59] Mexico's First Written Submission, para. 218.

[60] *See* Mexico's First Written Submission, para. 219 ("Accuracy could be affected by each individual labelling condition (i.e., eligibility criteria, certification requirements, and tracking and verification requirements,) and by the interaction between labelling conditions.").

[61] *See* Mexico's First Written Submission, para. 219 ("Clearly stronger *certification and tracking and verification requirements* will be necessary in ocean areas that have poor record-keeping and reporting reliability and significant illegal, unreported, and unregulated (IUU) fishing.") (emphasis added).

[62] Mexico's First Written Submission, para. 218.

[63] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("By engaging with the United States' arguments as it did, the Appellate Body accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' *to the risks to dolphins* arising from different fishing methods in different areas of the oceans.") (emphasis added); *see also id.* para. 7.169 ("In sum, in the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the

relative risks to dolphins *is irrelevant* under this test. Indeed, the apparent result of such a test is a mere repeat of its previously rejected argument that *all* tuna product must be produced with AIDCP-equivalent certification and tracking and verification requirements, *regardless of the relative risks to dolphins*.[64] And while Mexico continues to insist that accuracy is "an integral part of the calibration test," Mexico's claims in this regard find no support in the test that the Appellate Body has set out and affirmed over the course of two proceedings. Rather, the Appellate Body's analysis makes it plain that a calibration test must be done "in light of the objective of protecting dolphins."[65]

42. Second, Mexico's apparent insistence that the Panels apply one test to assess the eligibility criteria (Mexico's first calibration test) and an entirely different test to assess the certification and tracking and verification requirements (the second calibration test), runs contrary to the Appellate Body's analysis. By Mexico's own description, the second test applies only to the certification and tracking and verification requirements.[66] Indeed, it is not clear how the test *could* be applied to the eligibility criteria. In the previous proceeding, however, the Appellate Body faulted the panel for applying a modified calibration test to the eligibility criteria but a different test to the certification and tracking and verification requirements, emphasizing that *the same test* must be applied to each of these "cumulative and highly interrelated"

'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement, the Panel was required to assess whether the certification and tracking and verification requirements are 'calibrated' *to the risks to dolphins* arising from different fishing methods in different areas of the oceans.") (emphasis added).

[64] Thus, what Mexico appears to be arguing is that, in order for the regulatory distinctions be "calibrated" under this test, the measure must impose mandatory observer certifications and more stringent – presumably, AIDCP-equivalent – tracking and verification requirements where such certification and tracking and verification requirements are not already part of the applicable legal requirements (either domestic or RFMO), and not require it for tuna product produced from the ETP large purse seine fishery in light of the already existing AIDCP requirements. The end result being, apparently, that all dolphin safe tuna product must be produced subject to AIDCP level certification and tracking and verification requirements, *regardless of the risk to dolphins*.

[65] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253 (describing the calibration test as whether the differences in regulatory distinctions "can be explained as being properly tailored to, or commensurate with, the differences in such risks *in the light of the objective of protecting dolphins from adverse effects arising in different fisheries*.") (emphasis added); *see also id.* para. 7.353 (making similar point in the context of Article XX); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.276-279 (min. op.) (explaining how the calibration test as articulated in the original Appellate Body report accounts for the objectives of the measure).

[66] *See* Mexico's First Written Submission, para. 219 ("Clearly stronger *certification and tracking and verification requirements* will be necessary in ocean areas that have poor record-keeping and reporting reliability and significant illegal, unreported, and unregulated (IUU) fishing.") (emphasis added).

regulatory distinctions.[67] The question, ultimately, is whether *the measure* is even-handed or not.[68] Thus, Mexico's proposal of two different tests is in error.

43. Thus, there is no basis in the DSB recommendations and rulings for Mexico's second calibration test. Moreover, the reason underlying Mexico's attempt to steer the Panels down this path is plain, namely that the regulatory distinctions of the U.S. measure, as designed and applied are, in fact, calibrated to different risks to dolphins. Setting on dolphins is a uniquely harmful fishing method for dolphins, and the risk profile of the ETP large purse seine fishery reflects that. Further, the differences in the regulatory distinctions are commensurate with this difference in risk. In other words, the United States has designed the current version of its measure in light of the legal framework provided in the DSB recommendations and rulings.

B. The Detrimental Impact Stems Exclusively from Legitimate Regulatory Distinctions

44. In section V.C of its first written submission, the United States explained why the detrimental impact caused by the amended measure stems exclusively from legitimate regulatory distinctions. Specifically, the United States showed that the design of the determination provisions is even-handed and that the differences in the eligibility criteria, certification requirements, and tracking and verification requirements are calibrated to the differences in risks to dolphins posed by different fishing methods in different ocean areas. In terms of the calibration argument, the United States explained that the evidence on the record in this dispute shows that each of these three regulatory distinctions are even-handed when viewed individually,[69] and the measure, when viewed as a whole, is even-handed as well.[70]

45. Mexico's response in its first written submission focuses on the eligibility criteria, paying scant attention to the certification and tracking and verification requirements and appearing to ignore the determination provisions altogether. This is not wholly unsurprising, as the eligibility criteria have been the central focus of Mexico's argument since the beginning of this dispute. Indeed, Mexico's complaint in the original proceeding *only* addressed the eligibility criteria.[71] In

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[67] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.166 (disagreeing with the panel's approach that the calibration test is irrelevant to the question of whether the tracking and verification requirements are even-handed "because those requirements regulate a situation that occurs after the tuna has been caught," and stating that such an approach "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").

[68] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249 ("[W]e do not consider that the Panel put itself in a position to conduct an assessment of whether the amended tuna *measure is even-handed* in addressing the respective risks of setting on dolphins in the ETP large purse-seine fishery versus other fishing methods outside that fishery.") (emphasis added).

[69] *See* U.S. First Written Submission, sec. V.C.2.

[70] *See* U.S. First Written Submission, sec. V.C.3.

[71] *See, e.g., US – Tuna II (Mexico) (Panel)*, para. 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

light of Mexico's argument, the U.S. presentation in this submission focuses primarily on the eligibility criteria, although the United States does address Mexico's arguments concerning the certification and tracking and verification requirements and the determination provisions, and Mexico's failure to respond to U.S. arguments in those regards.

46. Accordingly, in sections III.B.1-3, the United States explains again why the differences in the eligibility criteria, the certification requirements, and tracking and verifications are calibrated to the differences in risks to dolphins, and addresses Mexico's specific arguments. In section III.B.4, the United States addresses the determination provisions.

1. The Eligibility Criteria Are Calibrated to the Risk to Dolphins Posed by Different Fishing Methods

47. In the U.S. first written submission, the United States explained that the eligibility criteria are even-handed because the differences in the criteria are "*commensurate* with the different risks associated with tuna fishing . . . using different fishing methods."[72] Specifically, the differences in eligibility distinguish between a fishing method – setting on dolphins – that depends on the intentional targeting of dolphins, and other fishing methods, which do not depend on dolphins and which interact with them only by accident.

48. As the United States demonstrated, setting on dolphins, including in the ETP large purse seine fishery, poses a greater risk to dolphins than other fishing methods for three reasons. First, it is the only method that intentionally targets dolphins and, as such, cannot be conducted in a manner that does not endanger them; other fishing methods, by contrast, are not inherently dangerous to dolphins.[73] Second, it causes a category of unobservable harms that result from the "chase itself" that can occur even if no dolphins are directly killed or seriously injured and that are not caused by other fishing methods.[74] Third, the available evidence shows that setting on dolphins causes significantly more direct dolphin mortalities than the other fishing methods that produce tuna product for the U.S. market.[75] The findings of the first compliance panel and Appellate Body support the conclusion that setting on dolphins poses risks that are substantially

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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.

[72] *See* U.S. First Written Submission, para. 94 *et seq.* (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160).

[73] U.S. First Written Submission, paras. 96-99; *see id.* paras. 34-36 (showing that setting on dolphins is the only fishing technique in which vessels *intentionally target* marine mammals in order to catch fish).

[74] U.S. First Written Submission, paras. 100-101; *see id.* paras. 37-38; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.585 (concluding that other fishing methods "do not cause the same kinds of unobserved harms to dolphins as are caused by setting on dolphins"); *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).

[75] U.S. First Written Submission, para. 102; *see id.* paras. 39-47.

different, "in quantitative and qualitative terms," from those posed by other fishing methods,[76] a point that Mexico either ignores or tries to reargue, in yet another attempt to use this proceeding as an "appeal" of the DSB recommendations and rulings.

49. When the intrinsic difference in fishing methods and evidence as to overall harms are considered as a whole, and in light of the context of the DSB recommendations and rulings, it is clear that prohibiting tuna product produced from the intentional targeting of dolphins from being marketed to U.S. consumers as "dolphin safe" *even if* no dolphin was observed to have been killed or seriously injured in that particular set, while allowing tuna product produced by other fishing methods to be marketed as "dolphin safe" to U.S. consumers *unless* a dolphin has been killed or seriously injured when harvesting that particular tuna, is calibrated to the risks to dolphins posed by setting on dolphins, on the one hand, and other fishing methods on the other. As such, the eligibility criteria are even-handed.

50. Mexico responds to these arguments by asserting that the eligibility criteria are the "exact opposite" of what they should be.[77] In Mexico's view, in order to be calibrated, the measure must permit Mexico's tuna product produced from setting on dolphins to be marketed to U.S. consumers as "dolphin safe" *unless* a dolphin was killed or seriously injured, while tuna product produced from purse seine fishing without setting on dolphins, longline, and gillnet fisheries

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[76] *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); *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 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).

[77] Mexico's First Written Submission, para. 256 ("Applying overall absolute level of adverse effects method of comparison to the calibration test, it is clear that the difference in the treatment of AIDCP-compliant dolphin encirclement as 'ineligible' when it has a lower risk profile than all four of the other fishing methods described above is *the exact opposite* of what is expected given the objectives of the measure to provide accurate information to U.S. consumers regarding adverse effects on dolphins.") (emphasis added).

should be prohibited from being so marketed *even if* no dolphin was killed or seriously injured.[78] However, Mexico – inconsistently, and without explanation – also argues that denying eligibility to Mexican tuna product produced from setting on dolphins would be calibrated to the differences in risk (as long as tuna product produced from these other fishing methods are also denied eligibility).[79] As discussed below, Mexico's argument is unsupported by the DSB recommendations and rulings and the evidence on the record.

51. In section III.B.1.a, the United States explains why setting on dolphins is inherently unsafe for dolphins, even when conducted consistent with the AIDCP requirements. In this regard, the United States responds to Mexico's attempt to divorce the "actions" of setting on dolphins from the risk profile of setting on dolphins[80] as well as Mexico's attempt to "appeal" the DSB recommendations and rulings concerning the unobservable harms caused by ETP large purse seine vessels intentionally chasing and capturing *millions* of dolphins each and every year.[81] In section III.B.1.b, the United States explains why the other fishing methods – the ones Mexico mentions, as well as ones it does not – in fact, do not pose an equivalent risk to dolphins, in light of the totality of the evidence on the record.[82] Building on this review of the evidence, in section III.B.1.c the United States explains that the eligibility criteria are calibrated to the difference in risk to dolphins. In this regard, the United States responds to Mexico's proposed approaches to the calibration analysis of the eligibility criteria, explaining that Mexico's argument that a calibration analysis must be based either on a potential biological removal (PBR) metric,[83] or on "overall absolute levels of adverse effects" is incorrect.[84]

a. Mexico Has Not Rebutted the U.S. Factual Showing That Setting on Dolphins Is a Unique Fishing Method That Has a Unique Risk Profile for Dolphins

52. In its first written submission, the United States proved that setting on dolphins, including under the AIDCP, has a greater risk profile for dolphins than other fishing methods based on its intrinsically dangerous nature, the unique unobservable harms it causes, and high levels of direct

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[78] Mexico's First Written Submission, para. 256 ("If the eligibility criteria were properly calibrated, they would result in the lowest risk profile of the five fishing methods being designated as 'eligible' (i.e., AIDCP-compliant dolphin encirclement) and the others being designated as 'ineligible.'"). Mexico does not appear to challenge the eligibility criteria as it applies to tuna product produced from setting on dolphins outside the ETP large purse seine fishery. *See id.* para. 251.

[79] Mexico's First Written Submission, para. 256 ("Alternatively, all five [fishing methods] should be designated as ineligible.").

[80] Mexico's First Written Submission, paras. 229-230.

[81] Mexico's First Written Submission, para. 238.

[82] As discussed below, the United States discusses the risks to dolphins caused by purse seine fishing without setting on dolphins, longline, pole and line, gillnet, trawl, and handline. As discussed in the first compliance proceeding, over 99% of U.S. and imported tuna product marketed in the United States is produced from purse seine, longline, and pole and line. *See* U.S. First Written Submission to the 1st 21.5 Panel, paras. 123-128.

[83] Mexico's First Written Submission, paras. 240-247.

[84] Mexico's First Written Submission, paras. 249-257.

dolphin mortalities.[85] This conclusion was consistent with the first compliance panel's findings, including that setting on dolphins differs from other fishing methods in both "quantitative and qualitative terms," and 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."[86] It is also consistent with the Appellate Body's rejection of Mexico's DSU Article 11 appeals, including the Appellate Body's conclusion that Mexico had failed to put forward any evidence that demonstrated that setting on dolphins, is not, as earlier found, a "particularly harmful" fishing method for dolphins.[87]

53. In response, Mexico does not dispute the data regarding death and serious injury caused by setting on dolphins in the ETP large purse seine fishery, and simply ignores much of the relevant findings of the first compliance panel (and Mexico's failed attempt to have those findings reversed). Rather, Mexico relies on two arguments to rebut the showing of the United States. First, Mexico argues that the Panels must distinguish the "activity" of setting on dolphins from the harm it causes.[88] Second, Mexico argues that the Panels should "reconsider" the findings of the previous compliance panel that setting on dolphins is "particularly harmful."[89] Neither argument is correct, and Mexico's evidence and argumentation altogether fails to prove that the overall risk profiles of other fishing methods are equivalent to (or greater than) that of dolphin sets. As such, Mexico fails to rebut the showing of the United States that the eligibility criteria are calibrated to differences in risk to dolphins.

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[85] U.S. First Written Submission, paras. 96-103.

[86] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-245 (internal quotes omitted).

[87] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, 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) (emphasis added); *id.* 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 fishing methods other than setting on dolphins have no unobservable adverse effects).

[88] Mexico's First Written Submission, paras. 228-230.

[89] Mexico's First Written Submission, para. 238 ("Mexico also asks that the Panels carefully reconsider statements made by the first compliance Panel that suggest that encircling dolphins in an AIDCP-compliant manner is 'particularly harmful.'").

i. Mexico's Attempt to Divorce the "Actions" Comprising Setting on Dolphins from the Method's Risk Profile Should Be Rejected

54. Mexico asserts that the United States "conflates" the actions comprising dolphin sets with "level of adverse effects on dolphins" setting on dolphins causes, and that "the activities that define the fishing method" cannot be relevant to the analysis of the fishing method's "risk profile."[90] Mexico's argument is inconsistent with the realities of setting on dolphins.

55. It is undisputed that setting on dolphins involves the intentional targeting of dolphins to catch tuna.[91] As employed in the ETP, this fishing method involves a sustained interaction, generally lasting several hours between a herd of dolphins and a large purse seine vessel, speed boats, a helicopter, divers, and a purse seine net.[92] The vessel pursues the dolphins, generally about 600 of them, for up to 2 hours until it has "chased [them] down"[93] and then about 300-400 dolphins are enclosed in the purse seine net.[94] After the net is closed, which takes about 40 minutes, about two-thirds of it is hauled aboard the vessel (closing the space in the water). At that point, "backdown" can begin, meaning that the dolphins are allowed (often with the assistance of divers) to escape over the net's corkline.[95] The intentional targeting and harassment of dolphins is thus an essential component of dolphin sets.

56. Unsurprisingly, this type of interaction with fishing vessels is dangerous to dolphins. As the panel in the previous compliance proceeding found, and as the Appellate Body confirmed, it causes significant indirect and unobservable harms, as well as, potentially, direct dolphin

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[90] Mexico's First Written Submission, paras. 228-229.

[91] *See* Mexico's First Written Submission, para. 21.

[92] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-240; *see* 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) (showing that the chase phase often lasts 20-40 minutes but can take over two hours, that encirclement takes approximately 40 minutes, and that dolphins may be confined for about an additional hour during backdown).

[93] Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-12). Mexico criticizes the United States for using the word "exhausted" in this connection. *See* Mexico First Written Submission, para. 53. The source cited states: "Speedboats are used to chase down the dolphins and herd them into a tight group." *See* Gerrodette, at 1992 (Exh. US-12). Other sources use the specific word "exhausted" in this context. *E.g.* Humane Soc'y Int'l, "The Dolphin Safe Label" (Apr. 16, 2013) (Exh. US-99); "The World of Spinner Dolphins," *bluevoice.org* (Jan. 7, 1998) (Exh. US-100).

[94] *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).

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

mortalities and serious injuries.[96] Thus, dolphin sets cannot be conducted without posing a significant risk of direct or unobservable harm to hundreds of dolphins with each and every set.

57. Other fishing methods, by contrast, interact with dolphins only incidentally and can be conducted without putting any dolphin directly in danger.[97] For example, because marine mammals are not evenly distributed in the world, there are fisheries, including tuna fisheries, that pose no known risk to any dolphin species.[98] Such fisheries in U.S. waters include handline, gillnet, longline, pole and line, and purse seine fisheries.[99] As employed in these fisheries, such fishing methods pose zero to minimal risk to dolphins. Similarly, sets in many tuna fisheries, including purse seine and longline fisheries, occur without any dolphin interaction at all.[100] (Indeed, in many such fisheries, the vast majority of all sets occur without any dolphin interaction.[101]) These sets occur without putting any dolphin in danger.

58. Thus, while analyzing the scale of the unobservable and observable harms to dolphins caused by different fishing methods is important to assessing the risk profile for dolphins of

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[96] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.197 ("[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'"); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122 ("As the Panel reads it, then, the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins. However, as we understand it, what makes setting on dolphins particularly harmful is the fact that it causes certain unobserved effects *beyond* mortality and injury 'as a result of the chase itself.'"); *id.* 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"); *id.* para. 7.579 (explaining that the original panel "found that sufficient evidence had been put forward by the United States to raise a presumption that setting on dolphins not only causes observable harms, but also causes unobservable harms to dolphins beyond mortality and serious injury" and that "[t]hese harms arise 'as a result of the chase itself'").

[97] *See 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)").

[98] *See* U.S. First Written Submission to the 1st 21.5 Panel, para. 143.

[99] *See* NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Aug. 15, 2016) (Exh. US-101) (showing that there are fisheries of each of these types in which there is considered only "a remote likelihood of or no known incidental mortality and serious injury of marine mammals").

[100] *See* U.S. First Written Submission, paras. 44-45, 55.

[101] *See* U.S. First Written Submission, para. 55 (showing: (1) 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.*, 0.70 percent of the sets observed; in 2010, the comparable figure was 37 out of 20,853 observed sets – 0.18 percent; (2) observers studying the eastern tropical Atlantic purse seine fishery between 2003 and 2009 documented zero cetacean interactions in 1,389 observed sets; (3) observers in the European purse seine fishery in the tropical Indian Ocean found that less than 1 percent of the 3,052 sets observed involved any marine mammal interaction; (4) observers in the Hawaii deep-set longline fishery between 2004 and 2015 found that over 99 percent of all observed sets occurred without any marine mammal interaction; (5) observers in the American Samoa longline fishery between 2006 and 2015 reported that over 99 percent of all observed sets occurred without any marine mammal interaction; and (6) 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).

those fishing methods, there is also a fundamental difference between dolphin sets and other fishing methods because the former fishing method *cannot be conducted* without putting dolphins at risk. The findings of the first compliance panel confirm that this is the case.[102]

59. Mexico's arguments fail to refute the importance of this distinction. The United States does not "assume" a relationship between the "actions" of setting on dolphins and its "adverse effects on dolphins";[103] the existence of such a relationship has been demonstrated, as recognized by the panel in the previous compliance proceeding.[104] Further, the fact that setting on dolphins without the AIDCP protections may be *more* dangerous than setting on dolphins with such restrictions in place does not prove that intentionally chasing and capturing *millions* of dolphins in the ETP large purse seine fishery is safe for dolphins.[105] Finally, Mexico's claim that, in terms of the risk to dolphins, ignoring a chance of dolphin harm (even a small chance) is not different than intentionally targeting dolphins[106] misses the essential difference that, because dolphins are intentionally targeted in dolphin sets, there *must* be sustained, intense interactions with a herd of dolphins in every set.[107]

60. In short, the U.S. measure draws a line, for purposes of eligibility for the label, that is reasonable in light of the risks to dolphins posed by different fishing methods. Mexico's effort to convince the Panels to ignore the fact that dolphin sets intentionally target dolphins and other fishing methods do not should be rejected. In fact, setting on dolphins is a particularly dangerous fishing method for dolphins because it depends on a practice, the chase and capture of dolphins, that is not dolphin-safe. The previous compliance panel's finding that the ETP large purse seine fishery has a "special risk profile" for dolphins due to the systematic dolphin sets that occur there confirms that this is the case.[108]

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[102] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.244 (summarizing and agreeing with the U.S. argument that "the accidental nature of dolphin interactions with fishing methods other than setting on dolphins goes to difference between fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins 'in 100 per cent of dolphin sets'" and stating that this "distinction is especially important where . . . the particular nature of the interaction is itself 'inherently dangerous' to dolphins, even where no dolphins are seen to be killed or seriously injured").

[103] *See* Mexico's First Written Submission, para. 230.

[104] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.203-207 (finding that "the Appellate Body [in the original proceeding] did refer to precisely these types of harms in its report" and, specifically, "took note of the original panel's finding, 'undisputed by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins, even under the restrictions contained in the AIDCP rules" and "also refer[ing] to the original panel's statements regarding the unobserved effects that arise 'as a result of the chase itself' and to the examples given by the original panel of these various adverse effects"); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122 ("[W]hat 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*.'); *see also id.* paras. 7.244-245, 7.579.

[105] *See* Mexico's First Written Submission, para. 230.

[106] *See* Mexico's First Written Submission, para. 230.

[107] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-242.

[108] *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"

ii. Mexico Has Failed to Show That the DSB Findings Concerning Unobservable Harms Should Be Reversed

61. Mexico's second argument is to urge the Panels to "carefully reconsider statements made by the first compliance Panel that suggest that encircling dolphins in an AIDCP-compliant manner is 'particularly harmful.'"[109] Mexico supports this argument with a variety of claims intended to undermine evidence that has long been accepted in this dispute but fails to give any reason why it would be appropriate to revisit this issue in this compliance proceeding or to introduce any new evidence or argumentation suggesting the previous findings were incorrect.

62. As is well known, the first compliance panel confirmed the finding of the panel and Appellate Body in the original proceeding 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 mortalities, as well as muscular damage, immune and reproductive system failures, and other adverse health consequences.[110]

63. Further, these harms occur "as a result of the chase itself" and thus "continue to exist 'even if measures are taken in order to avoid the taking and killing of dolphins in the nets.'"[111] Other fishing methods, as the panel found, "do not cause *the same kinds of unobserved harms* to dolphins as are caused by setting on dolphins."[112] Rather, the harms that may be caused by other fishing methods "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."[113] On appeal, the Appellate Body upheld these findings of the panel and rejected Mexico's multiple DSU Article 11 appeals, noting in particular that in the original proceeding it was "*undisputed* by the participants, that dolphins suffer adverse impact

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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).

[109] Mexico's First Written Submission, paras. 62, 238.

[110] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120 (citing *US – Tuna II (AB)*, para. 289); *see US – Tuna II (AB)*, para. 330, n.663 (referring to "the Panel's finding, undisputed by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins even under the restrictions contained in the AIDCP rules" and noting, in particular, "cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress") (citing *US – Tuna II (Panel)*, paras. 7.491-7.506); *US – Tuna II (Panel)*, paras. 7.493-506.

[111] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.121.

[112] *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).

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

beyond observed mortalities from setting on dolphins, even under the restrictions contained in the AIDCP rules."[114]

64. Mexico now contends that these findings were based on the panel's "perception of the activities associated with this fishing method, namely routine intentional dolphin chase and encirclement" that are the reason that the fishing method is "environmentally sustainable," in Mexico's view, and requests "careful reconsider[ation]."[115] However, Mexico's request in this regard is based on a fundamental misperception of the role of adopted DSB recommendations and rulings and is not supported by the evidence Mexico puts forward.

65. First, Mexico's request that the panel "reconsider" findings from the original and first compliance proceedings is a misuse of these compliance proceedings. In the original proceeding, Mexico *did not dispute* that "setting on dolphins within the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed and unobserved effects on dolphins."[116] In the compliance panel proceeding, however, Mexico took the position that it contested these facts, but put forward no new evidence to support its argument.[117] Then, before the Appellate Body, Mexico challenged the compliance panel's finding that setting on dolphins is "particularly harmful" and the findings related to unobservable harms (again, without putting forward any new evidence) and the Appellate Body rejected Mexico's DSU Article 11 claims.[118]

66. Similarly, in these proceedings, Mexico presents no information concerning any of the studies on the record in this and the original and first compliance proceedings that was not clear from the original exhibits and, therefore, would not have formed part of the original panel's consideration.[119] The evidence upon which the two previous panels found that setting on

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[114] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-208 (emphasis added).

[115] Mexico's First Written Submission, para. 238.

[116] *US – Tuna II (Mexico) (AB)*, para. 251, n.526 (observing that "Mexico confirmed that it did not contest this fact in response to questioning at the oral hearing"); *see also id.* para. 330, n.663 (referring to "the Panel's finding, undisputed by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins even under the restrictions contained in the AIDCP rules" and noting, in particular, "cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress") (citing *US – Tuna II (Panel)*, paras. 7.491-7.506).

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

[118] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.203-207; *see also id.* 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 fishing methods other than setting on dolphins have no unobservable adverse effects).

[119] Mexico's First Written Submission, paras. 62, 238.

dolphins was "particularly harmful" continues to demonstrate that setting on dolphins can cause the "various unobserved harms" identified by the DSB in the original and first compliance proceedings.[120] This evidence remains on the record in these proceedings. Thus, Mexico's request for a "reconsider[ation]" of this finding amounts to nothing more than an effort to misuse these compliance panel proceedings as a forum for Mexico to "appeal" those factual findings that undermine Mexico's legal argument.

67. Second, in any event, Mexico is also wrong as a factual matter. Mexico's attempt to undermine the evidence by suggesting that dolphin populations in the ETP are definitively recovering mischaracterizes the scientific evidence and, moreover, does not address that the studies themselves present evidence of unobservable, direct, and indirect harms to dolphins from dolphin sets, independent of whether the dolphin populations are recovering.

68. With respect to dolphin populations in the ETP, Mexico's assertion that the 2008 NOAA Report (Exhibit US-50 in the first compliance proceeding) undermines the reliability of the studies submitted by the United States is incorrect. Mexico asserts that the report shows that "the overwhelming objective and positive evidence shows that dolphin stocks are growing at sustainable rates."[121] However, this claim is contradicted by the report itself, which concludes that the new estimates of abundance for northeastern offshore spotted dolphins and eastern spinner dolphins "*may* indicate that these populations are beginning to recover, but the western/southern offshore spotted stock may be declining" and that additional studies are needed "to assess recovery."[122] Mexico selectively quotes from the report to omit sentences qualifying its possibly positive conclusion, including that the 95 percent confidence intervals for both stocks included zero (*i.e.* that the stocks are not increasing at all), that the apparent decline in abundance of the western/southern stock of offshore spotted dolphins may indicate that the apparent increase of the northeastern offshore stock is due to dolphins moving across the geographic

[120] *See* U.S. First Written Submission, para. 37, n.62 (citing and summarizing the findings of: Noren & Edwards, "Physiological and Behavioral Development in Delphinid Calves," at 16, 20-21 (Exh. US-43) (Orig. Exh. US-4); 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) (Orig. Exh. US-27); 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) (Orig. Exh. US-11); Stephen B. Reilly et al., NOAA, *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, at 25-26 (2005) (Exh. US-47) (Orig. Exh. US-19); 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) (Orig. Exh. US-21); and 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)).

[121] Mexico's First Written Submission, para. 61.

[122] *See* Tim Gerrodette et al., NOAA Technical Memorandum, "Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates From 1986-2003" (April 2008), at 2 (Exh. MEX-13) (1st 21.5 Exh. US-50) (emphasis added); *see also id.* at 12-13.

boundaries that define the two stocks rather than real changes in abundance, and that different models are needed to determine the rate at which the stocks are increasing or decreasing.[123]

69. Subsequent studies and comments by scientists confirm that evidence of any population recovery in the ETP is uncertain. When the 2008 report was released, its authors explained that, given the decrease in reported dolphin mortalities since the implementation of the backdown procedure: "We expected to see these populations begin their recovery years ago" and that, while "[t]he new data are the first to indicate the beginning of a recovery . . . these initial indications are not enough to be confident that the populations will continue to grow."[124] A 2013 IATTC Special Report addressed the "apparent lack of recovery" of the depleted ETP dolphin stocks, noting that "[m]any hypotheses have been postulated why the estimated rate of increase does not match that expected from theoretical arguments."[125] The study noted that these hypotheses include "[u]nobserved mortality of orphaned calves when lactating females are killed without their calves" and that "chasing and capturing may increase mortality"[126] and, citing a U.S. exhibit, that "indirect evidence from observations of the proportion of females with calves . . . that calf production for both eastern spinner and northeastern spotted dolphins has declined over time, which lends support to some of the above hypotheses."[127] Thus, the issue of lack of recovery and possible explanations remains relevant and current.

70. Further, the studies on the record themselves provide evidence that the unobservable harms of dolphin sets identified in the original and first compliance proceedings are, in fact,

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[123] *See* Gerrodette et al. 2008, at 12-13 (Exh. MEX-13) ("Previous studies considering data through 2000 . . . have concluded that neither of the two focal dolphin stocks was recovering at a rate consistent with its depleted status and low reported bycatch. The new, higher estimates for 2003 and 2006 reported here, however, may indicate that the stocks are beginning to recover. Such an interpretation must be tempered by several caveats. First, despite the substantial ship time, the estimates of abundance have moderate amounts of uncertainty for surveys of this type because the study area is so large. The 95% confidence intervals on the estimates of growth rate include zero for both stocks (Table 13). . . . Second, the decline in abundance since 2000 of the western/southern stock of offshore spotted dolphins (Fig. 18) may indicate that the increase in the northeastern offshore stock is due to dolphins moving across the geographic boundaries at 120ºW and 5ºN that define the two stocks. . . . Third, the rates at which the two populations are currently growing should be estimated by assessment models").

[124] "Eastern Tropical Pacific Ocean Dolphin Conditions Improving," *Science Daily* (June 6, 2008) (Exh. US-102); *see* "Questions Linger About Dolphin Recovery" (Aug. 27, 2011) (Exh. US-103) (quoting Dr. Lisa Ballance, another author of the 2008 report, as stating: "We had this expectation that these three depleted dolphin stocks will start to recover. . . . Although there may be a hint of recovery, we can't statistically rule out the possibility that they are not recovering at all.").

[125] Andre E. Punt, *Independent Review of the Eastern Pacific Ocean Dolphin Population Assessment*, IATTC Special Report 21, at 1, 5 (2013) (Exh. US-104) (1st 21.5 Exh. US-49); *see also* David J. St. Aubin et al., "Hematological, Serun, and Plasma Chemical Constituents in Pantropical Spotted Dolphins (*Stenella Attenuata*) Following Chase, Encirclement, and Taggint," 29 *Marine Mammal Science* 14, 15 (2013) (Exh. MEX-14) (citing the earlier report "that population recovery has not been observed as expected following [the] reduction in mortality" under the AIDCP but noting the 2008 NOAA study as well).

[126] Punt 2013, at 5-6 (Exh. US-104).

[127] Punt 2013, at 6 (Exh. US-104) (citing Cramer et al. 2008 (Exh. US-45).

occurring in the ETP, independent from any population assessment. Mexico's arguments to the contrary lack merit.[128] Specifically:

- Noren & Edwards, "Physiological and Behavioral Development in Delphinid Calves," (2007) (Exh. US-43). This study noted previous studies finding that unobserved calf mortality could be occurring in the ETP, including a study with "a series of photographs depicting an ETP dolphin calf falling behind its mother during chase."[129] Based on the intensity of dolphin sets and a study of the physiological capacity and behavior of dolphin calves, the study found that "the lack of physical coordination in young dolphins . . . in combination with limited aerobic and anaerobic muscular capacities . . . will make it difficult for 0-12-mo-old dolphins" and, to a lesser extent, 2-year olds, to remain with their mothers during the chase.[130] In the event of separation these young dolphins "have an increased risk of predation and will starve without their mothers' milk."[131] The study concluded that the "high fishing intensity in the ETP provides ample opportunities for mother-calf separations and subsequent calf mortalities."[132]

- Frederick Archer et al., "Annual Estimates of Unobserved Incidental Kill of Pantropical Spotted Dolphin" (2004) (Exh. US-44). This study found, based on an examination of the difference between the number of lactating females and the number of calves killed in sets between 1973 and 2000, that there was a "calf deficit" of "approximately 0.14 missing calves per dolphin killed."[133] This figure did not vary significantly across years, meaning that it persisted following the Panama Declaration in 1995.[134] On this basis, the study concluded that current mortality figures for the ETP underestimated actual dolphin mortality by at least 14 percent.[135] Moreover, this "calf deficit" would "underestimate[] the actual number of orphaned calves" if further mother-calf separation occurred during the chase or after the release of the encircled dolphins, when "dolphins exhibit some of their fastest swimming" and "separated calves waiting immediately outside the net may risk separation if their mothers join the rest of the school rapidly swimming away."[136]

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[128] Mexico's First Written Submission, para. 62.

[129] Noren & Edwards, at 16 (Exh. US-43) (citing Weihs, D. 2004, "The Hydrodynamics of Dolphin Drafting. *Journal of Biology* 3:1-23).

[130] Noren & Edwards, at 21, 23 (Exh. US-43).

[131] Noren & Edwards, at 23 (Exh. US-43).

[132] Noren & Edwards, at 24 (Exh. US-43).

[133] 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, 236-237 (2004) (Exh. US-44).

[134] Archer et al. 2004, at 238-239 (Exh. US-44).

[135] Archer et al. 2004, at 244. (Exh. US-44).

[136] Archer et al. 2004, at 244. (Exh. US-44).

- Katie L. Cramer et al. "Declines in Reproductive Output in Two Dolphin Populations Depleted by the Yellowfin Tuna Purse Seine Fishery" (2008) (Exh. US-45). This study used aerial photography of dolphin schools to collect and analyze reproductive data for ETP dolphin populations between 1987 and 2003.[137] It analyzed how two measures of reproductive output – the proportion of dolphins with calves and the length at which calves dissociated from their mothers – correlated with the annual number of dolphin sets.[138] It found that, for the northeastern spotted dolphin, the number of dolphin sets was associated with both measures of reproductive output, *i.e.*, as dolphin sets increased, the number of dolphins with calves declined.[139] The writers considered that these results "demonstrate[d] that the practice of setting on dolphins has population-level effects beyond the direct kill recorded by observers on fishing vessels."[140] They suggested that the "decline in proportion with calves and increased length at disassociation with number of dolphin sets could be caused by stress, increased predation, separation of mothers and calves, or induced abortion resulting from the chase and encirclement procedure."[141]

- 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" (1995) (Exh. US-46). This study examined the cortices of dolphins "that died after varying periods of chase, net deployment, and confinement" to investigate suspected continuous acute stress (CAS) caused by dolphin sets.[142] It found that about 95 percent of the dolphins examined "had darkened cortices, an expected result of CAS, vasogenic shock, or both."[143] The nature of the darkening made it likely that it was "not caused by CAS from entanglement and asphyxiation struggles alone."[144] The study concluded that "virtually all of the animals responded to CAS before death" and that "entanglement and death throes were not the primary source of CAS."[145] This suggested that "the animals were under CAS for an hour or more up to the time of death."[146]

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[137] 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, 274 (2008) (Exh. US-45).

[138] Cramer et al. 2008, at 275-276 (Exh. US-45).

[139] Cramer et al. 2008, at 278 (Exh. US-45).

[140] Cramer et al. 2008, at 282 (Exh. US-45).

[141] Cramer et al. 2008, at 282 (Exh. US-45).

[142] 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 (1995) (Exh. US-46).

[143] Myrick & Perkins 1995, at 197(Exh. US-45).

[144] Myrick & Perkins 1995, at 198 (Exh. US-45).

[145] Myrick & Perkins 1995, at 201 (Exh. US-45).

[146] Myrick & Perkins 1995, at 202 (Exh. US-45).

- Stephen B. Reilly et al., NOAA, *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act* (2005) (Exh. US-47). This report summarized the results of the multi-year research program to "determine the effect of purse seine fishing operations" on depleted dolphin population in the ETP.[147] Although the report documented findings regarding population recovery, the studies and reviews undertaken also included independent evidence that dolphin sets were having unobservable effects on dolphins in the ETP. For example, the study concluded that "in the aggregate, the findings from the available data support the possibility that tuna purse-seining activities involving dolphins may have a negative impact on some individuals."[148] The evidence supporting this conclusion included "(a) moderately elevated stress hormones and enzymes indicative of muscle damage observed in live dolphins examined in nets; (b) evidence of past (healed) muscle and heart damage in dolphins killed during fishing operations; and (c) fatal heart damage in virtually all fishery-killed dolphins."[149] Further, "because of the intensity of the fishery" "a relatively small number of animals affected per interaction" could have significant effects on the dolphin populations.[150]

- Paul R. Wade et al., "Depletion of Spotted and Spinner Dolphins in the Eastern Tropical Pacific: Modeling Hypothesis for Their Lack of Recovery" (2007) (Exh. US-48). Summarizing the relevant studies conducted to date, the report stated: "Chase and encirclement by purse-seine vessels and their speedboats may (1) cause changes in tissue chemistry that are associated with stress, (2) elevate body temperature and physically damage organ systems, (3) increase bioenergetics demands, and (4) influence swimming and schooling dynamics and behavior."[151] The report also noted that other studies had found "observations of mother-calf separation, declines in the numbers of calves, and high fetal mortality" in ETP dolphins.[152] It stated that the scientific literature to date "clearly illustrates that the purse-seine fishery has the capacity to affect dolphins beyond the direct mortality observed as bycatches."[153]

71. Further, the new study submitted by Mexico, when viewed in its entirety, confirms that dolphin sets cause unobservable harms to dolphins. This study investigated the stress-related effects of dolphin sets by measuring levels of blood constituents associated with "a mammalian stress response" in dolphins that had been chased, encircled, and tagged, as well as dolphins that

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[147] Stephen B. Reilly et al., NOAA, *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, at 14 (2005) (Exh. US-47).

[148] Reilly et al. 2005, at 25 (Exh. US-47).

[149] Reilly et al. 2005, at 25 (Exh. US-47).

[150] Reilly et al. 2005, at 26 (Exh. US-47).

[151] 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) (Exh. US-48) (internal citations omitted).

[152] Wade et al. 2007, at 11 (Exh. US-48) (internal citations omitted).

[153] Wade et al. 2007, at 11 (Exh. US-48).

had only been caught and tagged.[154] It found that levels of several of these indicators in the dolphins that were chased were elevated compared to levels generally reported for dolphin species and to the levels in the sampled dolphins that were not chased.[155] For example, a suite of enzymes that are "found in muscle tissue and released into the circulation following excessive exertion" were "all elevated" compared to levels in captive cetaceans, "suggest[ing] some ongoing muscle damage was associated with the stress of capture."[156] The study concluded that the data "suggest[ed] that chase and encirclement of dolphins by a tuna purse seiner results in a measurable stress response typical of odontocetes" and that the "magnitude of the stress response was generally greater than that observed in bottlenose dolphins known to survive following sampling during live-capture-release operations."[157]

72. Thus, Mexico has presented no new evidence undermining the original and compliance panel's findings that setting on dolphins is a "particularly harmful" fishing method for dolphins due to the unique category of unobservable harms it can cause, nor any new information concerning the studies on which such findings were based. Rather, the evidence on the record in this proceeding continues to demonstrate that this finding was, and remains, correct.

iii. Mexico Has Not Rebutted the U.S. Showing That, Under the AIDCP, Setting on Dolphins Remains a Uniquely Dangerous Fishing Method for Dolphins

73. For the reasons discussed above, Mexico has not rebutted the U.S. showing that setting on dolphins is dangerous to dolphins in two unique ways. First, because dolphins are an essential component of setting on dolphins and not of any other fishing method, dolphin sets are intrinsically dangerous to dolphins in a way that other fishing methods are not – namely that every dolphin set, by its nature, poses a risk to several hundred dolphins of both direct and unobservable harms. Second, every dolphin set poses a risk of, and may cause, certain types of unobservable harms to at least some of the dolphins involved. These harms are caused by the chase and encirclement process itself and are additional to the direct observed mortalities and to any unobserved consequences of these mortalities.

74. Further, Mexico's suggestion that simply increasing the estimate of direct mortalities by 14 percent accounts for these unique attributes of setting on dolphins is incorrect. Contrary to Mexico's description, the study finding that an additional 14 percent should be added to observed dolphin mortalities in the ETP did not conclude that "the unobserved impact of dolphin sets should be estimated at 14 percent of the level of mortalities."[158] Rather, it concluded that 14 percent of the total number of dolphins killed represented the approximate impact of mother-calf

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[154] St. Aubin et al. 2013, at 16, 21 (Exh. MEX-13).

[155] *See* St. Aubin et al. 2013, at 29, 30, 31 (Exh. MEX-13).

[156] St. Aubin et al. 2013, at 31 (Exh. MEX-13).

[157] St. Aubin et al. 2013, at 32 (Exh. MEX-13).

[158] Mexico's First Written Submission, para. 62; *see also id.* para. 249.

separation due to the death of the mother.[159] It did not account for any calves that were "separated prior to encirclement or were released early during backdown, prior to their mothers."[160] Further, it does not account for the other unobservable effects found by the panels in the original and first compliance proceedings, including "muscular damage, immune and reproductive system failures, and other adverse health consequences."[161]

75. In addition to these unique factors affecting the risk profile of setting on dolphins, dolphin sets cause a high level of direct dolphin mortalities and serious injuries. The *millions* of dolphins killed due to dolphin sets in the ETP from the 1950s through the 1980s demonstrates the wholly unique level of risk that this fishing method poses to dolphins.[162] Further, even since the La Jolla Agreement and the AIDCP became effective, dolphin sets by large ETP purse seine vessels have continued to cause at least hundreds, and sometimes thousands, of direct dolphin mortalities per year.[163] Over the past 10 years, mortalities due to dolphin sets in the ETP have ranged between 765 and 1,237 dolphins annually.[164] Controlling for the level of effort, dolphin mortalities have ranged between 69.4 and 126.3 per 1,000 dolphin sets.[165] Mexico's claim that these figures are "statistically insignificant" from a population perspective, again misses the point that the U.S. measure is focused, legitimately, on the protection of *dolphins*, not dolphin populations.[166] From the perspective of protecting dolphins, 80-90 vessels killing 765 to 1,237 dolphins per year is significant; indeed, based on the evidence on the record, it is unparalleled.[167]

76. Thus, there is a significant difference between the harm to dolphins from setting on dolphins and the risk profile of the fishing methods that can produce tuna potentially eligible for the label because setting on dolphins: (1) is the only method to intentionally target dolphins and thus is *inherently* unsafe for dolphins in a way that other fishing methods are not; (2) causes a unique category of unobservable harms; and, (3) causes a high level of direct mortalities. As

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[159] *See* Archer et al. 2004, at 242-244 (Exh. US-44).

[160] Archer et al. 2004, at 244 (Exh. US-44).

[161] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120 (citing *US – Tuna II (AB)*, para. 289); *see US – Tuna II (AB)*, para. 330, n. 663; *US – Tuna II (Panel)*, paras. 7.493-506.

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

[163] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, Annual Report of the Inter-American Tropical Tuna Commission – 2008, at 50 (Exh. US-51); IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 127 (Exh. MEX-6).

[164] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, Annual Report of the Inter-American Tropical Tuna Commission – 2008, at 50 (Exh. US-51); IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 127 (Exh. MEX-6).

[165] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 46 (Exh. MEX-6).

[166] *See supra* sec. III.A.2.b.ii.

[167] *See* IATTC, "Dolphin Mortality Limits for 2012-2014" (Exh. US-116) (showing that, in 2012-2014, 80-90 large purse seine vessels were issued dolphin mortality limits (DMLs), which are required to set on dolphins).

discussed in the next section, the risks posed by other fishing methods in general are different in nature and degree.

b. Mexico Has Not Rebutted the U.S. Factual Showing that Other Fishing Methods Do Not Have Risk Profiles for Dolphins Equivalent to that of Setting on Dolphins

77. In its first written submission, the United States demonstrated that the fishing methods capable of producing tuna eligible for the dolphin safe label pose a lower level of risk to dolphins than dolphin sets for three reasons. First, such fishing methods are not intrinsically harmful to dolphins; in fact, they are capable of being carried out without putting any dolphin at risk or involving any dolphins at all.[168] Second, they do not cause the categories of unobservable harms caused by the chase and encirclement process inherent in dolphin sets.[169] Third, the levels of direct dolphin mortality caused by these fishing methods are, in general, not so high as to counterbalance the unique risks posed by setting on dolphins and thus equalize the risk profiles of dolphin sets and the potentially eligible fishing methods.[170] Indeed, the levels of direct mortalities caused by the potentially eligible methods are generally significantly lower than those caused by dolphin sets, including under the AIDCP.[171]

78. As the Panels will recall, in the previous proceeding, Mexico initially argued that all other fishing methods "have adverse effects on dolphins that are equal to or greater" than setting on dolphins in an AIDCP-consistent manner.[172] However, Mexico abandoned this argument in the latter stages of that proceeding, arguing instead that the first compliance panel should compare different fisheries based on whether *any* harm occurs in those fisheries – *i.e.*, applying Mexico's "zero tolerance benchmark."[173] On appeal, Mexico pivoted once again, arguing that the first compliance panel erred by failing to evaluate the eligibility criteria in light of which fishing methods cause "systematic" adverse harm.[174] Now, in these proceedings, Mexico returns to its original position, that the eligibility criteria are not calibrated to the risk to dolphins vis-à-vis other types of purse seine sets, longlining, and gillnetting because, in its view, setting on dolphins in the ETP has "a lower risk profile" than these three other fishing methods.[175]

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[168] *See* U.S. First Written Submission, paras. 97-99.

[169] *See* U.S. First Written Submission, paras. 100-101.

[170] *See* U.S. First Written Submission, paras. 102-103.

[171] *See* U.S. First Written Submission, paras. 41-46, 102.

[172] *See, e.g.*, Mexico's First Written Submission to the 1st 21.5 Panel, paras. 13, 248, 263, 306; Mexico's Second Written Submission to the 1st 21.5 Panel, para. 140.

[173] *See* Mexico's Response to 1st 21.5 Panel Question 11, paras. 58-61, 62-66.

[174] *See* Mexico's Other Appeal Submission in 1st 21.5 Proceeding, paras. 109-110.

[175] Mexico's First Written Submission, para. 256. As noted elsewhere, Mexico agrees with the United States that tuna product produced from setting on dolphins should be ineligible for the label. *See* Mexico's First Written Submission, para. 251. We further note, again, that the ETP large purse seine fishery is an outlier in this

79. As discussed in this and the following section, Mexico fails to prove what it asserts. First, as discussed in subsections (i)-(iv) of this section, Mexico is wrong as to the facts: other fishing methods are not intrinsically harmful to dolphins and do not cause the same level of relative overall harms that setting on dolphins does in the ETP. This is true not only for the fishing methods Mexico discusses but also for the ones Mexico ignores. Second, as discussed in section III.B.1.c, Mexico's argument is wrong on the law: the relative risk to dolphins of using these different fishing methods cannot be assessed by PBR or the "overall absolute levels" of adverse effects on dolphins, as Mexico asserts. The eligibility criteria are, in fact, commensurate with these different risk profiles, and thus calibrated to the differences in risk to dolphins.

i. Purse Seine Fishing Without Setting on Dolphin[176]

80. In its first written submission, Mexico argues that "[t]he absolute levels of overall adverse effects on dolphins for purse-seine fishing without dolphin encirclement in different ocean areas" are higher than what occurs in the ETP large purse seine fishery, based on Mexico's particular calculation of mortality in certain purse seine fisheries in WCPO.[177] This argument is based on an incorrect interpretation of the calibration analysis, as discussed in section III.B.1.c below, and is factually incorrect. As discussed in this section, Mexico fails to provide any evidence as to the first two pillars of the U.S. argument and misinterprets the evidence regarding the third pillar, resulting in the incorrect conclusion regarding the relative harms of purse seine fishing without setting on dolphins compared to dolphin sets.

81. First, Mexico does not even claim that purse seine fishing without setting on dolphins is *intrinsically harmful* to dolphins in the way that Mexico's fishing method is. Mexico introduced *no evidence* contradicting the U.S. evidence that: (1) in the WCPFC tropical purse seine fishery, where vessels engage in free school sets and unassociated sets, a marine mammal interaction occurred in only 0.43% of all observed sets between 2007 and 2010 (171 of 39,989 observed sets);[178] (2) in the eastern tropical Atlantic purse seine fishery between 2003 and 2009, *no* dolphin interactions were observed in 1,389 observed sets;[179] and (3) in the Indian Ocean tropical

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regard – the practice of setting on cetaceans outside this fishery is largely banned. *See* U.S. First Written Submission, para. 47.

[176] Purse seine vessels produce the most tuna product for the U.S. market of any fishing method. Purse seine caught tuna accounts for approximately 90.7 percent of U.S.-caught and processed tuna products in the U.S. market and for 44.6 percent of vessel records associated with imported tuna and tuna products. *See* U.S. First Written Submission to 1st 21.5 Panel, para. 129; William Jacobson Witness Statement, App. 2, 3 (Exh. US-52).

[177] *See* Mexico's First Written Submission, paras. 74-89, 254.

[178] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13); WCPFC, *Summary Information on Whale Shark and Cetacean Interactions in the Tropical WCPFC Purse Seine Fishery*, Table 2a, 2b (Nov. 2011) (Exh. US-17) ("WCPFC, Cetacean Interactions Paper").

[179] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13); Monin Justin 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, 355-58 (2010) (Exh. US-19); 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 2113, 2114-18 (2011) (Exh. US-20).

purse seine fishery, any marine mammal interaction was observed in less than 1% of 3,051 sets observed between 2003 and 2009.[180] These figures demonstrate a significantly different risk profile for dolphins compared to the 100 percent interaction rate for dolphin sets.

82. Second, Mexico submitted no evidence that purse seine sets other than dolphin sets cause the types of unobservable harms that can be caused by the dolphin sets. Mexico asserted that "if the Panels accept that AIDCP-compliant dolphin encirclement has unobserved adverse effects on dolphins, it must also accept that purse-seine fishing without dolphin encirclement also has unobserved adverse effects" as "some of the dolphins killed . . . will be cows and, thus, there will be cow-calf separation."[181] In making this argument, however, Mexico merely points to a potentially unobserved effect of a direct, observable mortality and ignores the fact that the unobservable harms caused by dolphin sets result from the "chase itself" and can occur independently of any direct dolphin mortality.[182] Indeed, the first compliance panel explicitly found that such effects were not "the same kind of unobservable harms that are caused by setting on dolphins," explaining:

> The key point . . . is that these harms 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. These harms may be serious. However, because they flow directly from observable harms, such as serious injury, all of which could be detected and reported, unlike the kinds of unobservable harms caused by setting on dolphins, these types of indirect harms are thus qualitatively different from the kind of unobservable harms caused by setting on dolphins.[183]

The Appellate Body upheld this finding, rejecting Mexico's DSU Article 11 appeal and observing that Mexico was improperly "rearguing the case that it put to the Panel."[184]

83. Third, Mexico fails to rebut U.S. evidence establishing that, in general, purse seine fishing without setting on dolphins – *i.e.*, sets on free schools of tuna or floating objects – is less dangerous for dolphins than dolphin sets, in terms of direct mortalities. In particular, Mexico fails to respond to the evidence that free school and floating object sets have accounted for over half of all sets in the ETP large purse seine fishery in the past decade but have caused only 0.2%

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[180] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13); 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 2-3, and 6 (2012) (Exh. US-21).

[181] *See* Mexico's First Written Submission, para. 254.

[182] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.121-122.

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

[184] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202 ("[W]e note that, in raising this claim of error under Article 11 of the DSU, Mexico appears to be rearguing the case that it put to the Panel and asking us to attribute to its evidence greater significance than did the Panel. Such a request is neither compatible with the scope of appellate review, nor a proper way to establish a breach of Article 11 of the DSU.").

of dolphin mortalities in the fishery – the other 99.8% being caused by dolphin sets.[185] If Mexico were correct, and purse seine fishing without setting on dolphins was more dangerous to dolphins in terms of direct mortalities than dolphin sets, then these numbers would be *very different*. Further, Mexico's evidence concerning dolphin mortalities in other fisheries does not show that free school sets and floating object sets are, in general, as dangerous for dolphins as dolphin sets and, in fact, does not suggest that dolphin mortalities in any other purse seine fishery are even close to the level of mortalities caused by dolphin sets in the ETP.

84. Mexico alleges that 2,000 dolphins are killed per year in the Philippines purse seine fishery, but the study underlying this statistic is over two decades old and is refuted by recent reports.[186] Indeed, Mexico's more recent exhibit even seems to revise down the old (1992) estimate of mortality to 500 dolphin per year and, with respect to the current fishery, states only that sets "still have bycatch," with no suggestion that the level is comparable to what it was in the past.[187] Moreover, recent data from the WCPFC confirms that the level of dolphin mortality in the WCPO purse seine fishery is much lower than in ETP dolphin sets – 55 dolphin mortalities in 20,853 observed sets in the tropical purse seine fishery in 2010, compared to 1,169 observed mortalities in 11,645 observed dolphin sets in the ETP in the same year[188] (and 765 mortalities in 11,010 observed dolphin sets in 2015).[189] Further, recent reports from the Philippines purse seine fishery in particular found, based on 100% observer coverage of the high seas fishery, that only 18 dolphins were taken in 2014[190] and 7 dolphins were taken in 2015.[191]

85. Mexico's exhibit concerning the purse seine fishery in the waters of Papua New Guinea (PNG) similarly does not disclose levels of dolphin mortality comparable to that due to dolphin sets in the ETP.[192] As an initial matter, the PNG annual report does not provide information necessary to put the figure of 292 dolphins captured in perspective based on the size of the fishery. It provides no set data and does not state what vessels were covered by the observer reports, so it is not possible to associate the dolphin interaction figure with the tuna caught by the

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[185] U.S. First Written Submission, paras. 41-42.

[186] *See* Mexico's First Written Submission, para. 74 (citing N.M. Young & S. Iudicello, *Worldwide Bycatch of Cetaceans*, NOAA Tech. Memo NMFS-OPR-36, at 112 (2007) (Exh. MEX-21) (citing Dolar, M.L.L. "Incidental Bycatch of Small Cetaceans in Fisheries in Palawan, Central Visayas and Northern Mindanao in the Philippines, 15 *Rep. Int'l Whaling Comm.* 355 (1994)).

[187] *See* Mexico's First Written Submission, para. 75 (citing Convention on Migratory Species, Report of the Third Southeast Asian Marine Mammal Symposium, CMS Technical Series No. 32 (2015), p. 83 (Exh. MEX-22)).

[188] Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); WCPFC Cetacean Interactions Paper, Table 2a, 2b (Exh. US-58).

[189] IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 46, 127 (Exh. MEX-6).

[190] Philippines, Annual Report to the Commission, at 9-10 (Exh. US-38).

[191] Philippines, Annual Report to the Commission, WCPFC SC12-AR/CCM-20, at 9 (July 2016) (Exh. US-105) (for cetacean mortality in 2015); *id.* at 10 (showing 100% observer coverage in the high seas pocket).

[192] *See* Mexico's First Written Submission, paras. 76-78.

vessels on which the observers were placed.[193] Mexico seems to assume that the relevant catch figure is the quantity of tuna caught inside PNG waters,[194] but the report does not state that this is the case and, indeed, aspects of the report suggest that it is not.[195] Additionally, it is not clear how many of the dolphins captured were killed, as the report does not explain the meaning of the codes it uses.[196] It seems that 36 dolphins are not "DPD" (which may mean dead) suggesting that the correct mortality figure for dolphins may be 255.[197]

86. Even accepting the PNG report at face value, Mexico cites no reason for generalizing it to the rest of the WCPO purse seine fishery in the face of significant contradictory evidence. Mexico's assertion that PNG is the only country that "sought to report comprehensive information" is both irrelevant and inaccurate.[198] As described in Exhibit US-13 and below, Taiwan, the Philippines, Kiribati, and Micronesia all provided observer data covering 100 percent of vessels fishing in the covered fishery.[199] Australia and Japan provided data based on 100% logbook coverage.[200] New Zealand provided observer data that, while not comprehensive, provided an indication of levels of cetacean mortality in the fishery and was cited as such.[201] Further, as shown below, these provide sufficient information to view observed marine mammal

[193] *See* Papua New Guinea, Annual Report to the Commission (Aug. 2015), at 29 (Exh. MEX-23) (referring to "Estimates of number of cetacean interactions with purse seine gear in 2014 from observer data").

[194] *See* Mexico's First Written Submission, paras. 78 (assuming that the observed cetacean interactions were associated with "the catch of tuna with purse seine nets in Papua New Guinea's waters," which it described as 296,000 tons in 2014). The PNG report states that, in PNG waters in 2014, 138 foreign purse seine vessels caught 188,111.54 mt of tuna, locally-based foreign purse seine vessels caught 63,789.32 mt of tuna, and domestic vessels caught 44,171.85 mt of tuna, for a total of 296,072.71 mt of tuna. *See* Papua New Guinea, Annual Report to the Commission (Aug. 2015), at 2 (Exh. MEX-23).

[195] In fact, several aspects of the report suggest that the appropriate figure may be 403,315.45 mt of tuna, the quantity caught by domestic and PNG-based vessels inside and outside PNG's EEZ plus the quantity of tuna caught by foreign vessels inside PNG's EEZ. Specifically, the fact that other data in the report, *i.e.*, catch and effort data, is presented for domestic and locally based foreign vessels both inside and outside PNG waters, and that the images of catch distribution suggest that some trips by such vessels may cover both the PNG EEZ and the high seas, suggests that 403,315.45 mt is the relevant figure. *See id.* at 7-8. The statement in the report that PNG's national observer program "covers the vessels based out of PNG and foreign vessels fishing the PNG waters" also seems to confirm this. *See id.* at 2.

[196] *See* Papua New Guinea, Annual Report to the Commission (Aug. 2015), at 29 (Exh. MEX-23).

[197] *See* Papua New Guinea, Annual Report to the Commission (Aug. 2015), at 29 (Exh. MEX-23).

[198] *See* Mexico's First Written Submission, paras. 76-78.

[199] *See* Chinese Taipei, Annual Report to the Commission, at 15 (Nov. 3, 2015) (Exh. US-31); Philippines, Annual Report to the Commission, at 10 (Sept. 28, 2015) (Exh. US-38); Kiribati, Annual Report to the Commission, at 11 (July 20, 2015) (Exh. US-36); Federated States of Micronesia, Annual Report to the Commission, at 11 (July 27, 2015) (Exh. US-27).

[200] Australia, Annual Report to the Commission, at 26 (July 2015) (Exh. US-24); Japan, Annual Report to the Commission, at 6, 16 (July 2014) (Exh. US-35).

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

interactions in light of the size of the fishery at issue, allowing for comparison across fishing methods and fisheries.

87. All of these reports show that dolphin interactions and mortalities are very low, certainly not approaching the levels of dolphin mortalities caused by dolphin sets in the ETP.

- Australia's 2013 Annual Report stated that there were 2 purse seine vessels in the WCPFC area in 2013, that they had 100% logbook coverage, that they engaged in 74 search hours, and that no marine mammal interactions were recorded.[202]
- Micronesia's 2013 Annual Report showed that there were 10 Federated States of Micronesia (FSM) purse seine vessels fishing in the WCPFC area in 2013, that there was 100% observer coverage of the purse seine fleet (with a total of 68 trips by FSM vessels covered), and that zero cetaceans were observed caught.[203]
- Japan's 2013 Annual Report stated that there were 41 purse seine vessels over 200 tons operating in the WCPFC area in 2013, and that reports by vessel masters show that a total 5 cetaceans were unintentionally encircled and all were released alive, and that there was 100% logbook coverage.[204]
- New Zealand's 2013 Annual Report showed that in the purse seine fishery in New Zealand waters targeting skipjack tuna (by setting on free swimming sets), there were 9 active vessels, there was 9.3% observer coverage (112 sets and 19.8% of the total catch observed), and no observed interactions with marine mammals.[205]
- Australia's 2014 Annual Report stated that there were 2 purse seine vessels active in the WCPFC area in 2014, that there was 100% logbook coverage, and that there were no cetacean interactions.[206]
- Micronesia's 2014 Annual Report stated that there were 9 FSM purse seine vessels fishing in the WCPFC area in 2014, that there were no cetacean interactions, and that there was 100% observer coverage (with a total of 76 trips by FSM purse seine vessels covered).[207]
- Japan's 2014 Annual Report stated that there were 40 purse seine vessels over 200 tons operating in the WCPFC area, that effort was 6,487 fishing days, and that according to reports by vessel masters and observers 5 cetaceans were

[202] Australia, Annual Report to the Commission, at 3, 12, 25 (July 2014) (Exh. US-33).

[203] FSM, Annual Report to the Commission, at 4, 7, 9, 13-14 (Aug. 2014) (Exh. US-34).

[204] Japan, Annual Report to the Commission, at 1, 5, 6, 16 (July 2014) (Exh. US-35).

[205] New Zealand, Annual Report to the Commission, at 3, 8, 13 (August 2014) (Exh. US-37)

[206] Australia, Annual Report to the Commission, at 3, 13, 26 (July 2015) (Exh. US-24).

[207] FSM, Annual Report to the Commission, at 4, 11 (July 27, 2015) (Exh. US-27).

unintentionally encircled and all were released alive, that there was 100% logbook coverage.[208]

- Kiribati's 2014 Annual Report showed that there were 14 purse seine fishing vessels operating in the WCPFC area in 2014, that observer coverage was 100%, and that observers reported no cetacean interactions for Kiribati purse seine vessels in 2014.[209]
- New Zealand's Annual Report for 2014 showed that there were 9 active vessels in the purse seine fishery in New Zealand waters, there was 9.1% observer coverage (95 sets and 15.3 of the total catch observed), and there were no observed interactions with marine mammals.[210]
- The Philippines' 2015 Annual Report stated that there were 35 Philippine vessels fishing in the high seas pocket in 2014, that there was 100% observer coverage of these vessels, and that there were 18 instances of cetacean bycatch due to unintentional encirclement where the cetacean subsequently died.[211]
- Taiwan's 2015 Annual Report stated that there were 34 Taiwanese purse seine vessels operating in the WCPFC area in 2014, that there was 100% observer coverage of these vessels, and that 4 sets had cetacean interactions, involving 27 dolphins, 23 of which died.[212] Taiwanese vessels caught approximately 12 percent of all the tuna caught in the WCPO tropical purse seine fishery in 2014.[213] Assuming that they performed a commensurate share of the 56,000 total sets undertaken in the fishery, this suggests a per set mortality rate of 23 dolphins in 6,720 sets, *i.e.*, 3.4 dolphins per 1,000 sets.[214]

88. These reports demonstrate that Mexico's evidence concerning the PNG purse seine fishery is not relevant to purse seine sets in WCPO purse seine fishery in general. Further, the evidence from PNG's 2015 annual report also suggests the non-representative (or incorrect) nature of the 2014 annual report figures, reporting only 55 dolphin mortalities documented by

[208] Japan, Annual Report to the Commission, at 5-7, 11, 13, 16 (July 31, 2015) (Exh. US-29).

[209] Kiribati, Annual Report to the Commission, at 3, 11, 16 (July 20, 2015) (Exh. US-36).

[210] New Zealand, Annual Report to the Commission, WCPFC-SC11-AR/CMM-16, at 4, 8, 13 (Aug. 2015) (Exh. US-106).

[211] Philippines, Annual Report to the Commission, at 5, 9-10 (Sept. 28, 2015) (Exh. US-38).

[212] Chinese Taipei, Annual Report to the Commission, at 14, 15, 18-19 (Nov. 3, 2015) (Exh. US-31).

[213] Chinese Taipei, Annual Report to the Commission, at 2 (Exh. US-31) (showing that Taiwanese purse seine vessels caught 237,156 mt of tuna in 2014); Peter Williams & Peter Terawasi, WCPFC, "Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions – 2015," at 5 (Aug. 30, 2016) (Exh. US-108) (showing 2,051,920 mt of tuna was caught in the WCPO tropical purse seine fishery in 2015).

[214] WCPFC, "Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions - 2015," at 55 (Exh. US-108).

PNG observers in 2015.[215] In 2015, PNG-based vessels and foreign vessels in PNG waters caught approximately 14 percent of the 1,766,070 mt of tuna caught in the WCPO tropical purse seine fishery.[216] Assuming a consistent percentage of the approximately 48,000 total sets in the fishery in 2015, this suggests a per set dolphin mortality rate of .0081 dolphins per set, or 8.1 dolphins per 1,000 sets.[217] This confirms that the rate of dolphin mortality in this fishery is far below that caused by dolphin sets in the ETP.[218]

89. Mexico's attempt to undermine the probative value of the 2011 WCPFC report, Exhibit US-17, is similarly without merit. Mexico suggests that the fact that the report covers only the tropical purse seine fishery and not all sets in the WCPO undermines its relevance.[219] However, the report is clear as to its scope and does not purport to estimate all dolphin mortalities in the entire WCPO area.[220] The U.S. exhibits are similarly clear that the data concerns only "observed sets."[221] Further, an estimate of all dolphin mortalities in the WCPO would have little value as a benchmark to the ETP, which is far smaller in terms of vessels participating and tuna caught.[222] The report is probative in that it demonstrates the *level* of dolphin interactions and mortalities occurring in the WCPO purse seine fishery and, specifically, that it is much lower than the level of mortalities occurring in the ETP due to dolphin sets.

90. With respect to the level of interactions, the United States has explained that the 2010 data is likely more accurate than the 2007-2009 data because it is more recent and is based on a higher level of observer coverage.[223] Nevertheless, the data for 2007-2009 also show a much lower rate of dolphin mortalities than occur every year due to dolphin sets in the ETP – 27.23 dolphin mortalities per 1,000 observed sets in the WCPO tropical purse seine fishery, compared

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[215] *See* Papua New Guinea, Annual Report to the Commission, WCPFC-SC12/AR/CMM-19, at 20 (Aug. 2016) (Exh. US-107). Again, it is difficult to be sure what the figures in the chart convey. However, assuming that "DPD" means that the cetacean in question died, the report suggests that there were 55 dolphin mortalities seen by PNG observers in 2015. *Id.*

[216] *See* Papua New Guinea, Annual Report to the Commission, at 4-5, 9 (Exh. US-107) (showing that PNG flag vessels caught 95,633 mt of tuna, locally-based vessels caught 108,884 mt of tuna, and foreign flag vessels in PNG waters caught 44,555 mt of tuna, for a total of 249,072 mt of tuna); WCPFC, "Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions - 2015," at 5 (Exh. US-108) (showing that a total of 1,766,070 mt of tuna was caught in the WCPO tropical purse seine fishery in 2015).

[217] *See* WCPFC, "Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions - 2015," at 5 (Exh. US-108).

[218] The per set dolphin mortality rate due to dolphin sets in the ETP was 69.42 dolphins in 1,000 sets. *See* IATTC, "Tuna, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2014," Doc. IATTC-89-04a, IATTC 89th Meeting, June 29-July 3, 2016, at 46, 127 (Exh. MEX-06).

[219] Mexico's First Written Submission, para. 80.

[220] WCPFC, Cetacean Interactions Paper, at 1 (Exh. US-17).

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

[222] There are about 1,500 purse seine vessels in the WCPO catching about 1.8 million metric tons of tuna per year. *See* WCPFC *Tuna Fishery Yearbook 2013*, Table 72 (Exh. US-112) (showing 1,503 active purse seine vessels in 2013); *id.* Table 80 (showing that purse seine vessels in the WCPO caught 1,899,015 mt of tuna in 2013).

[223] *See* U.S. First Written Submission, para. 58.

to 113.38 dolphin mortalities per 1,000 dolphin sets in the ETP during the same period.[224] Further, recent reports confirm that dolphin interactions have remained at or below 2010 levels. In 2014, observers on 845 trips in the fishery (46 percent of all trips) documented 31 dolphin mortalities;[225] in 2015, observers on 932 trips (63 percent of the total) documented 66 dolphin mortalities.[226] Assuming that the sets were distributed roughly evenly across trips (*i.e.*, that these observers documented approximately 46 and 63 percent of all sets in the fishery), this data suggest that there were approximately 1.2 dolphin mortalities per 1,000 sets in 2014 and approximately 2.2 dolphin mortalities per 1,000 sets in 2015.[227] The comparable figures due to dolphin sets in the ETP, by contrast, were 85.7 and 69.5 dolphin mortalities per 1,000 sets.[228]

91. Mexico's attempts to minimize the importance of the Indian and Atlantic purse seine studies are similarly flawed. The United States was clear that the studies of purse seine fisheries in the eastern tropical Atlantic and tropical Indian Oceans involved "1,389 and 3,052 sets, respectively" and cited these studies as evidence of the level of dolphin mortality in these fisheries, not total mortality.[229] The studies represent the best available fishery-specific data on tuna purse seine fishing in these fisheries – certainly Mexico has introduced no studies suggesting a different level of dolphin mortality in these fisheries[230] – and their clear import is that dolphin interactions and mortality is low. By comparison, an observer of 1,389 and 3,052 dolphin sets in the ETP large purse seine fishery between 2009 and 2014 would have observed, based on the rate of dolphin mortalities per set in those years, an estimated 131.8 and 289.7 dolphin mortalities, respectively.[231] Further, the fact that observer coverage is "insufficient to accurately monitor the effects of fishing on pelagic communities associated with tuna schools" is

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

[225] *See* WCPFC, 7th Annual Report for the Regional Observer Programme, at 4-5 (Sept. 3, 2015) (Exh. US-109) (stating that there were "approximately 34 dead cetaceans reported which included 3 larger whales with the rest being dolphins" in 845 observed trips in 2014 - 46 percent of all trips in the fishery).

[226] *See* WCPFC, 8th Annual Report for the Regional Observer Programme, at 2, 5-6 (Sept. 14, 2016) (Exh. US-110) (showing that there 66 cetaceans caught or landed dead on 932 observed trips in 2015 - 63 percent of all purse seine trips in the fishery); *id.* at 2 (Exh. US-110) (stating that, in 2014, 1,537 trips represented 84% of the total and, in 2015, 1,172 trips represented 79% of the total, showing that, in 2014 and 2015, purse seine vessels in the WCPO tropical purse seine fishery undertook 1,830 and 1,484 trips, respectively).

[227] *See* WCPFC, "Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions - 2015," at 55 (Exh. US-108) (showing that there were approximately 56,000 sets in the WCPFC tropical purse seine fishery in 2014 and 48,000 in 2015).

[228] *See* "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111).

[229] *See* U.S. First Written Submission, paras. 55, 58 (describing Amande et al. 2010, at 353-58 (Exh. US-19), Amande et al. 2011, at 2113-18 (Exh. US-20), and Amande et al. 2012, at 2-3, 6 (Exh. US-21)).

[230] *See* Mexico's First Written Submission, paras. 83-87.

[231] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13) (showing that there were 94.92 dolphin mortalities per 1,000 dolphin sets in the ETP between 2009 and 2014).

beside the point, as a much higher level of data is required to monitor population level-effects and since dolphins are not pelagic fish.[232]

92. Thus, Mexico fails to rebut the U.S. showing that purse seine sets on dolphins present a higher level of risk to dolphins than other forms of purse seine fishing. Indeed, Mexico does not even argue that such fishing methods are as intrinsically dangerous to dolphins as dolphin sets or that they result in the same kinds of unobservable harms. Finally, Mexico has not rebutted the U.S. showing that free school and floating object sets are less dangerous to dolphins than dolphin sets in the ETP in terms of direct mortalities. Overall, therefore, the evidence establishes that there is a significant difference in the risk profiles of purse seine setting on dolphins compared to purse seine without setting on dolphins.

ii. Longline Fishing[233]

93. Mexico argues that longline fishing has a higher risk profile than setting on dolphins based on its conclusion that longlining "kills tens of thousands of dolphins per year."[234] Such a conclusion is based on Mexico's incorrect legal benchmark of "overall" direct mortalities (as discussed below), and is factually inaccurate.

94. First, Mexico's argument reflects the decision to ignore all evidence regarding dolphin interactions and unobservable harms. In particular, Mexico fails to address the U.S. evidence showing that the vast majority of tuna longlining occurs without any interaction with dolphins and thus puts no dolphin in danger of harm.[235] Mexico ignores U.S. evidence showing that, over the past decade, in the American Samoa and Hawaii deep-set longline fisheries, only 0.33 and 0.26 percent of sets, respectively, involved any dolphin interaction[236] and that interaction levels in other tuna longline fisheries are similarly low.[237] Mexico likewise fails to address the fact that, as the first compliance panel found and the Appellate Body confirmed, longline fishing is

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[232] *See* Mexico's First Written Submission, para. 82.

[233] Longline fishing produces the second most tuna product for the U.S. market of any fishing method. Longline caught tuna accounts for approximately 7.8 percent of U.S.-caught and processed tuna products in the U.S. market and for 35.8 percent of vessel records associated with imported tuna and tuna products. *See* U.S. First Written Submission to 1st 21.5 Panel, para. 135; William Jacobson Witness Statement, App. 2, 3 (Exh. US-52).

[234] Mexico's First Written Submission, paras. 90-105, 255.

[235] *See* Mexico's First Written Submission, para. 255.

[236] 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).

[237] *See* U.S. First Written Submission, para. 99, n.199 (showing that: (1) recent data from other WCPO longline fisheries show "very low" levels of marine mammal interactions; (2) a study of the EU Atlantic longline fishery showed that only 4.4 percent of the observed sets involved any marine mammal interaction; 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)) (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 1 (Exh. US-13)).

not capable of causing the types of unobservable effects that setting on dolphins can cause as a result of the chase itself, independent of any direct dolphin mortalities.[238]

95. With respect to direct dolphin mortalities, Mexico fails to rebut the U.S. showing that, in general, longline fishing is significantly less dangerous to dolphins than dolphin sets, including as performed under the restrictions of the AIDCP. Mexico fails to respond to the current, fishery-specific data presented by the United States showing that, on a per set basis, dolphin mortality levels in longline fisheries are small fractions of dolphin mortality due to dolphin sets in the ETP.[239] Further, none of Mexico's evidence concerning longline fishing suggests that, using a reasonable metric to control for fishery size, direct mortalities in longline fisheries approach those caused by dolphin sets in the ETP.

96. First, Mexico's evidence on depredation does not even suggest that levels of dolphin mortality are comparable to those caused by dolphin sets in the ETP.[240] Further, Exhibit MEX-28, a 2012 literature review in *Marine Mammal Science*, actually demonstrates the clear difference between longline fishing and purse seine fishing by setting on dolphins, namely that interactions with cetaceans are *directly contrary* to longline fishers' economic interests because the cetaceans remove or damage commercial valuable catch, whereas interactions with cetaceans are an *essential component* of fishing by setting on dolphins.[241] Thus, whereas dolphin sets cannot be performed without a risk to dolphins, longline fisherman actively want to avoid any dolphin interaction. It is also important to note that, as the United States has explained, only a fraction of interactions caused by depredation result in dolphin mortality or serious injury.[242]

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[238] *See* Mexico's First Written Submission, para. 255; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.131-132 (finding that "With respect to longline fishing . . . none of Mexico's evidence suggests that longline fishing has unobservable effects similar to those caused by setting in dolphins"); *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202 (upholding the panel's finding).

[239] *See* U.S. First Written Submission, para. 102 n.209 (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; (3) in the EU Atlantic longline fishery, there was 1 marine mammal "interaction" in 625 observed sets; and, (4) recent data from WCPO longline fisheries show that the numbers of observed marine mammal interactions and mortalities are generally zero or nearly zero) (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13)).

[240] *See* Mexico's First Written Submission, paras. 91-95.

[241] *See* D. Hamer, S. Childerhouse & N. Gales, "Odontocete bycatch and depredation in longline fisheries: A review of available literature and of potential solutions," Marine Mammal Science, 28(4): E345–E374 (Oct. 2012), p. E345 (Exh. MEX-28) (stating that "The longline fisheries involved are at risk of becoming economically unviable due to the incidence of catch depredation."); *see also* U.S. First Written Submission, para. 97.

[242] William Jacobson Witness Statement Appendix 1 (Exh. US-52).

97. Second, Mexico's evidence with respect to PBR likewise does not support the assertion that levels of dolphin mortality due to longlining and dolphin sets are comparably high.[243] As the United States explained in the previous compliance proceeding, NOAA develops a take reduction plan to protect marine mammal stocks when the level of mortality and serious injury incidental to commercial fishing operations exceeds the stock's potential biological removal level (PBR).[244] Thus, although the 2012 Stock Assessment Report (SAR) reported that an average of only 13.8 mortalities or serious injuries of false killer whales per year occur in the Hawaii longline fishery, the population was designated a strategic stock because the number exceeded the PBR of 9.1 false killer whales per year.[245] However 13.8 mortalities is only 1.6 percent of the 870 dolphin mortalities caused by dolphin sets in the ETP in that year.[246]

98. Similarly, the Atlantic longline fishery take reduction team was established in 2009 because the mortality and serious injury of pilot whales (an average of 109 animals per year), while below the PBR, exceeded the insignificance threshold.[247] However, the number of dolphins killed or seriously injured in this fishery is, on an annual basis, a fraction of the number of dolphins killed in dolphin sets in the ETP, including in recent years.[248] Further, it is important to note that the Atlantic longline fishery is not just a tuna fishery, but also targets swordfish, sharks, and wahoo, and, consequently, that not all of the dolphin mortalities should be attributed to tuna fishing. Additionally, the data from the Atlantic fishery includes injuries, whereas the IATTC data on observed dolphin mortality in the ETP does not.[249]

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[243] *See* Mexico's First Written Submission, paras. 105, 255. As the United States explained in the previous compliance proceeding, the MMPA directs the NMFS to develop a take reduction plan to protect marine mammal stocks for which, *inter alia*, the level of mortality incidental to commercial fishing exceeds the stock's PBR.

[244] *See* U.S. First Written Submission to the 1st Article 21.5 Panel, para. 139. PBR refers to the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.

[245] *See* NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," at 267 (Jan. 8, 2013) (Exh. US-113). This designation was retained in 2014 because the "total 5-year mortality and serious injury for 2009-2013 (11.2) exceed[ed] PBR (9.3)." *See* NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," at 284-285 (Dec. 31, 2015) (Exh. US-114).

[246] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13). In this instance, a direct comparison is arguably appropriate because the number of vessels in the Hawaii deep-set longline fishery, 140 in 2014, is somewhat similar to the 80-90 vessels that are authorized to set on dolphins each year. *See* Pacific Islands Fisheries Science Center, *The Hawaii-Based Longline Logbook Summary Report January-December 2014*, at 1 (2015) (Exh. US-115); IATTC, "Dolphin Mortality Limits for 2012-2014" (Exh. US-116) (showing that, in 2012-2014, 80-90 large purse seine vessels were issued dolphin mortality limits (DMLs), which are required for a vessel to set on dolphins).

[247] Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Pelagic Longline Take Reduction Plan, 74 Fed. Reg. 23349, 23350 (May 19, 2009) (Exh. US-117) (1st 21.5 Exh. US-60).

[248] *See* Tables Summarizing the Fishery-by-Fishery Evidence on the Record, at 3 (Exh. US-27); 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).

[249] *See* PLTRT Key Outcomes Memorandum, at 4 (Exh. MEX-33); IATTC, EPO Dataset 2009-2013 (Exh. US-16).

99. Third, Mexico's assertion that the *Sea Turtle Restoration Project* report suggests that longline fishing poses a higher risk of direct dolphin mortality than purse seine fishing remains incorrect.[250] Mexico cites this study for the estimate that 18,000 marine mammals are "killed annually by longline fishing in the Pacific Ocean."[251] However, the statistic is misleading, as it is based on extrapolating bycatch data from the Hawaii longline fishery from 1994 to 2002 that included cetaceans released alive and cetaceans hooked in the swordfish fishery.[252] Further, the authors of the report assume that marine mammal bycatch rates are the same in all longline fisheries throughout the Pacific, whereas, in fact, marine mammals are not dispersed uniformly and do not interact with longline gear consistently across the ocean.[253] Third, figures for all Pacific longline vessels are not comparable to data on the ETP, as the Pacific Ocean contains many different longline fisheries involving about 4,800-6,300 active vessels,[254] compared to 80-90 large purse seine vessels authorized to set on dolphins in the ETP.[255] Therefore, a per set comparison is more appropriate. Yet dolphin mortality in the Hawaii longline fishery for 2009-2015 was 2.73 dolphins per 1,000 observed sets, compared to 94.36 dolphins per 1,000 dolphin sets in the ETP for 2009-2014.[256]

100. Finally, Mexico's other exhibits provide no information on levels of mortality currently caused by longline fishing. The data in the Oak Foundation report is anecdotal and over two decades old.[257] Further, up-to-date data concerning the bycatch of Taiwan's longline fleet show that observed cetacean mortalities range from zero to two animals per year from 2004 to 2014,[258]

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[250] *See* Mexico's First Written Submission, para. 99.

[251] Mexico's First Written Submission, para. 99.

[252] *See* U.S. First Written Submission to the 1st 21.5 Panel, para. 143; Sea Turtle Restoration Project, "Pillaging the Pacific," at 27-28 (November 16, 2004) (Exh. MEX-64). In fact, according to the underlying source, 91 percent of the animals caught were released alive. *See id.* at 28 (citing K. Forney, SFSC, *Estimates of Cetacean Mortality and Injury in the Hawai'i-based Longline Fishery, 1994-2002*," at 1 (2002)); Karin A. Forney, SFSC, *Estimates of Cetacean Mortality and Injury in Two U.S. Pacific Longline Fisheries, 1994-2002*, at 13 (2004) (Exh. US-118).

[253] *See* U.S. First Written Submission to the 1st 21.5 Panel, para. 143.

[254] *See* Secretariat of the Pacific Community (SPC), Oceanic Fisheries Program, "Longline" (Exh. US-119) (stating that longline fisheries in the WCPO involve between 3,500 and 5,000 vessels each year); IATTC, Authorized Large Longline Vessel Register (Exh. US-120) (showing 1,300 authorized longline vessels in the EPO).

[255] *See* IATTC, Active Purse Seine Regional Vessel Register (Exh. US-121) (showing 195 large purse seine vessels); IATTC, "Dolphin Mortality Limits for 2012-2014" (Exh. US-116).

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

[257] *See* M. Donoghue, R. Reeves & G. Stone, eds., *Report of The Workshop On Interactions Between Cetaceans and Longline Fisheries*, at 3 (May 2003) (Exh. MEX-35). Specifically, the data comes from a "survey" taken in 1994 and 1995 and did not report the number of dolphin mortalities in terms of any metric that would allow a reader to understand the figures in terms of the size of the fishery.

[258] *See* Chinese Taipei: Annual Report to the Commission, at 6 (2009) (Exh. US-122); Chinese Taipei: Annual Report to the Commission, at 5 (2010) (Exh. US-123); Chinese Taipei: Annual Report to the Commission, at 5 (2011) (Exh. US-124); Chinese Taipei: Annual Report to the Commission, at 5 (2012) (Exh. US-125); Chinese Taipei: Annual Report to the Commission, at 5 (2013) (Exh. US-126); Chinese Taipei, Annual Report to the Commission, at 18-19 (Nov. 3, 2015) (Exh. US-31).

leading to the conclusion that "cetacean bycatch was rare."[259] The statement in Exhibit Mex-22 that rough-toothed and Fraser's dolphins in Taiwanese waters "occasionally die as a result of being hooked by tuna or shark longlines" also suggests this low level of mortality.[260] The Baird and Gorgone report conveys no information on levels of dolphin mortality in the Hawaii longline fishery[261] and is not inconsistent with the detailed data presented by the United States regarding the level of dolphin mortality in that fishery, which is a small fraction of dolphin mortality caused by setting on dolphins in the ETP.[262]

101. Thus, Mexico has not rebutted the U.S. showing that, as a general matter, longline fishing poses a much lower level of risk to dolphins than dolphin sets, in terms of both unobservable and observable harms and in the nature of the fishing method. Longlining, as opposed to setting on dolphins, is not inherently dangerous to dolphins and the evidence proves that this fishing method has a different risk profile from setting on dolphins.

iii. Pole and Line Fishing[263]

102. In its first written submission, Mexico omits any mention of pole and line fishing, although it produces the third largest quantity of tuna for the U.S. tuna product market.

103. This fishing method involves catching schooling tuna that are attracted to the surface by the use of live bait and can also involve the use of artificial lures (*i.e.*, jigs) that are trailed behind a moving vessel.[264] Bamboo or fiberglass poles rigged with barbless hooks that have either artificial lures or live bait attached are then used to hook the fish and bring them on board. Hydraulically operated rods or automatic angling machines may be used on larger pole and line vessels. The U.S. albacore tuna fishery uses this technique where very little bycatch occurs.[265] Indeed, this technique is not associated with dolphin bycatch or bycatch of any large marine

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[259] *See* Hsiang-Wen Huang, "Bycatch of High Sea Longline Fisheries and Measures Taken by Taiwan: Actions and Challenges," 35 *Mar. Pol'y* 712, 715 (2011) (Exh. US-127).

[260] *See* Convention on Migratory Species, Report of the Third Southeast Asian Marine Mammal Symposium, CMS Technical Series No. 32 (2015), at 94, 125, and 126 (Exh. MEX-22).

[261] *See* Robin W. Baird & Antoinette M. Gorgone, "False Killer Whale Dorsal Fin Disfigurements as a Possible indicator of Long-Line Fishery Interactions in Hawaiian Waters," 59 Pac. Sci. 596 (2005) (Exh. MEX-36).

[262] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-13).

[263] Pole and line vessels produce the third most tuna product for the U.S. market of any fishing method. Pole and line-caught tuna accounts for approximately 1.4 percent of U.S.-caught and processed tuna product in the U.S. market and for 14.8 percent of vessel records associated with imported tuna and tuna products. *See* U.S. First Written Submission to 1st 21.5 Panel, para. 147; William Jacobson Witness Statement, App. 2, 3 (Exh. US-52).

[264] *See* U.S. First Written Submission in the Original Proceeding, para. 71.

[265] *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); U.S. First Written Submission in Original Proceeding, para. 71.

mammals.[266] As Exhibit Mex-42 confirms, "Pole-and-line fishing is not known to have any direct impact on cetaceans."[267]

104. Thus it appears *uncontested* in this proceeding, as it was in the first compliance proceeding,[268] that pole and line fishing is not associated with harm to dolphins, either observable or unobservable, and poses a much lower level or risk to dolphins than dolphin sets.

iv. Gillnet Fishing[269]

105. Mexico claims that gillnet fishing is a higher risk fishing method than setting on dolphins.[270] In making this claim, however, Mexico fails to address the difference between the nature of dolphin sets and gillnet fishing, *i.e.*, that dolphins are an essential component of the former but not of the latter. As a consequence of this difference, gillnet fishing can be carried out in areas or in a manner that does not interact with cetaceans, whereas this is not true of dolphin sets. For example, several U.S. gillnet fisheries have been designated as Category III fisheries under the MMPA, meaning that there is "a remote likelihood of or no known incidental mortality and serious injury of marine mammals."[271]

106. Mexico also fails to address the fact that gillnet fishing is not capable of causing the types of unobservable harms to dolphins that setting on dolphins can cause as a result of the "chase itself" even if no dolphins were directly observed to have been killed.[272] The first compliance panel correctly found that this was the case, and the Appellate Body upheld this finding, rejecting Mexico's challenge under DSU Article 11.[273]

107. With respect to direct dolphin mortalities, Mexico asserts that there are high levels of dolphin mortality in certain tuna fisheries. However, Mexico's two exhibits concerning Taiwan are not probative of levels of dolphin mortality due to tuna fishing in existing gillnet fisheries,

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

[267] *See* Anderson, R. C., *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*, IPNLF Technical Report 2, at 71 (2014) (Exh. MEX-42).

[268] *See* Mexico's Oral Statement at the Meeting of the 1st 21.5 Panel, paras. 61, 69, 72, 86 (arguing that "all major fishing methods other than pole-and-line fishing have adverse effects on dolphins").

[269] Gillnet vessels produce *de minimis* amounts of tuna product for the U.S. market of any fishing method. *See* U.S. First Written Submission to 1st 21.5 Panel, para. 152; William Jacobson Witness Statement, App. 2, 3 (Exh. US-52).

[270] *See* Mexico's First Written Submission, paras. 68-73, 252-253.

[271] *See* NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Exh. US-101) (showing that the following gillnet fisheries were designated as not having any known bycatch of cetaceans: Alaska miscellaneous finfish set gillnet; Alaska Prince William sound set gillnet, California set gillnet, Hawaii inshore gillnet, Washington Grays Harbor drift gillnet, Washington/Oregon Colombia River gillnet, and Caribbean gillnet).

[272] *See* Mexico's First Written Submission, paras. 252-253.

[273] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-132 (finding that "[w]ith respect to gillnet fishing . . . none of [Mexico's] evidence . . . suggests that gillnets have the same kind of unobservable effects as setting on dolphins"); *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202 (upholding the panel's finding).

and Mexico's exhibits on the South Asian gillnet fisheries both overstate dolphin mortality due to tuna fishing and, at most, relate to that particular area. Specifically:

- NRDC Report. Mexico relies on a report describing cetacean bycatch in a large-scale driftnet fishery north of Australian waters that Taiwan-flagged vessels operated in during the 1980s[274] but that *was shut down in 1986*.[275] Thus, this report does not address levels of mortality in currently existing tuna fisheries.

- CMS Report. This report summarizes another paper estimating cetacean mortality in Taiwan's near-shore fisheries based on a survey conducted between 1993 and 1995 and on an interview with "one Chengkung driftnetter in 2000."[276] The report's authors described the estimates as "highly provisional," and it is not clear that the fisheries described even target tuna.[277] Thus, the report is not based on a scientific study, is out of date, and may not relate to tuna fisheries at all.

- Nawaz & Moazzam Report on Pakistani Gillnetters. As the United States explained in the first compliance proceeding, almost none of the tuna product in the U.S. market is caught using gillnets[278] and essentially none of it is produced by Pakistan or caught by Pakistani vessels.[279] Further, many of the world's gillnet fisheries "are small to medium scale fisheries in developing countries, particularly Southeast Asia" that are not integrated into the global tuna market.[280]

- Yousuf Report on Indian Gillnetters. As with the Pakistani gillnetters that are the subject of the Nazaw & Moazzam report, almost none of the tuna product sold on the U.S. market was produced from tuna caught using gillnets and almost no tuna product sold on

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[274] *See* Mexico's Second Written Submission, para. 43 (quoting Natural Resources Defense Council (NRDC), "Net Loss: The Killing of Marine Mammals in Foreign Fisheries" (January 2014), at 29 (footnotes omitted) (Exh. MEX-103)) (citing M.B. Hardwood and E.D. Hembree, "Incidental Catch of Small Cetaceans in the Offshore Gillnet Fishery in Northern Australian Waters: 1981-1985," at 363-67, *Report of the International Whaling Commission* 37 (1987); Young & Iudicello 2007, at 26 (Exh. MEX-18).

[275] *See* Simon P. Northridge, *Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review* § 2.3.2, FAO Fisheries Technical Paper No. 320 (1991) (Exh. US-128); Huang 2011, at 713 (Exh. US-127).

[276] *See* Perrin et al. 2002, at 33 (Exh. MEX-19).

[277] *See* Perrin et al. 2002, at 32-33 (Exh. MEX-19). The report does not discuss the target catch of these near-shore fisheries but it mentions that the distant water fisheries target tuna.

[278] *See* U.S. Second Written Submission to the 1st 21.5 Panel, paras. 34-35, n.75; William Jacobson Witness Statement, at 4-5 (Exh. US-52) (showing that none of the U.S.-caught tuna product on the U.S. market and approximately 0.26 percent of vessel records associated with imported tuna and tuna products for 2005-2013 were caught using gillnets).

[279] *See* U.S. First Written Submission to the 1st 21.5 Panel, paras. 126-28; U.S. Second Written Submission to the 1st 21.5 Panel, paras. 34-35 and n.75; NMFS, "Individual Vessel Record Gear Types Since the Inception of the 370 Database: India, Pakistan, Sri Lanka, Yemen" (May 23, 2014) (Exh. US-129) (showing that, of the 284,541 vessel records associated with the Form 370s submitted to NOAA from 2002-2013, 2 (0.00%) were from Pakistan).

[280] *See* FAO, "Tuna Driftnet Fishing" (Exh. MEX-15).

the U.S. market contains tuna caught by Indian vessels.[281] Additionally, not all of the mortalities reported by the study can be attributed to tuna fishing, as only one of the three ports covered by the study included fisheries that target tuna and, even there, tuna was only one of four target fish.[282]

108. Thus, the evidence on the record does not suggest that gillnet fishing cannot be carried out without endangering dolphins or that it can cause risks unrelated to the type of direct, observable mortalities, the occurrence of which would render the tuna caught in the set at issue not eligible for a dolphin safe label.[283] Indeed, over a dozen gillnet fisheries have been designated as having no known incidental mortality of cetaceans.[284] At most, Mexico's evidence suggests that gillnet fishing in *particular fisheries* may be putting dolphins in significant danger, which, as discussed further in section III.B.4 below, is appropriately addressed under other provisions of the U.S. dolphin safe labelling measure. Overall, the evidence establishes that gillnet fishing is not inherently dangerous to dolphins in the way that setting on dolphin is and, consequently, that the fishing method has a different risk profile for dolphins.

v. Trawl Fishing[285]

109. Mexico does not allege that trawl fishing poses as great a risk to dolphins as dolphin sets.[286] Specifically, Mexico does not claim that tuna trawling cannot be conducted without risk to dolphins, that it is capable of causing the types of unobservable harms caused by dolphin sets, or that levels of observable dolphin mortalities due to trawl fishing for tuna are comparable to those currently caused by dolphin sets in the ETP.[287] Further, the available scientific evidence confirms that trawling is less dangerous to dolphins than other fishing methods used to catch tuna.[288] Thus, it appears to be uncontested that trawl fishing has a lower risk profile for dolphins than dolphin sets, including under the AIDCP.

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[281] *See* NMFS, "Individual Vessel Record Gear Types Since the Inception of the 370 Database: India, Pakistan, Sri Lanka, Yemen" (Exh. US-129) (showing that, of the 284,541 vessel records associated with the Form 370s submitted to NOAA from 2002-2013, 340 (0.12%) were from India).

[282] *See* K.S.S.M. Yousuf *et al.*, "Observations on Incidental Catch Of Cetaceans in Three Landing Centres Along The Indian Coast," 2 *Marine Biodiversity Records* 1, 2-3 (2009) (Exh. MEX-50).

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

[284] *See* NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Exh. US-101)

[285] Trawl vessels produce *de minimis* amounts of tuna product for the U.S. market of any fishing method. *See* U.S. First Written Submission to 1st 21.5 Panel, para. 157; William Jacobson Witness Statement, App. 2, and 3 (Exh. US-52).

[286] A ship engaging in trawl fishing tows a large, cone-shaped net, either on the sea floor or in mid-water (called pelagic trawling). Trawl fishing usually on the sea floor to catch bottomfish or groundfish.

[287] *See* Mexico's First Written Submission, paras. 106-108, 256.

[288] *See* Yousuf et al. 2009, at 4 (Exh. MEX-50).

vi. Handline Fishing[289]

110. In its first written submission, Mexico does not assert that handline fishing has a higher risk profile for dolphins than dolphin sets, including under the AIDCP.[290] Specifically, Mexico does not suggest that handlining cannot be carried out in a manner that is not dangerous to dolphins or that it causes levels of dolphin mortality comparable to that caused by dolphin sets in the ETP. Indeed, none of the exhibits submitted by Mexico suggest that tuna handlining is associated with dolphin bycatch *at all*,[291] and several suggests that it is not.[292]

111. Mexico does assert, however, that handline fishing in the Indian Ocean is capable of causing the type of unobservable effects caused by dolphin sets in the ETP due to a tuna-dolphin association similar to that in the ETP that handline vessels exploit by chasing dolphins to catch tuna.[293] This claim is incorrect and unsupported by Mexico's evidence.

112. Mexico's Exhibits 39, 40, and 41 contain no suggestion that handline vessels chase dolphins to catch tuna. These reports refer to associations between large yellowfin and dolphin that have been sighted around the Maldives but contain no suggestion that handline vessels ever chase dolphin to catch tuna or that the "association" between tuna and dolphins that has been observed would support such chasing if any vessels attempted it.[294] Additionally, it is highly doubtful that handline vessels, which are "boats, canoes, and other small decked or undecked

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[289] Handline vessels produce a *de minimis* amount of tuna product for the U.S. market of any fishing method. *See* U.S. First Written Submission to 1st 21.5 Panel, para. 150; William Jacobson Witness Statement, App. 2, 3 (Exh. US-52).

[290] *See* Mexico's First Written Submission, paras. 110-111, 256.

[291] *See* Mexico's First Written Submission, para. 110.

[292] *See* FAO, "Tuna Handlining," at 3 (Exh. MEX-38) (stating, with regard to bycatch, that this fishing method is "selective" but that "in certain areas, some incidental catch, in particular sharks, may occur"); M. Shiham Adam et al., IOTC, *Review of Yellowfin Tuna Fisheries in the Maldives*, at 7 (Oct. 8, 2015) (Exh. MEX-40) (stating that "[t]he fishing method is extremely selective and so there is virtually no bycatch"); Anderson & A. Shaan, "Association of Yellowfin Tuna and Dolphins in Maldivian Waters," *IOTC Proceeding No. 1*, at 157 (1998) (Exh. MEX-41) (stating that "[d]olphins are not caught by Maldivian tuna fishermen"); Charles R. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*, at 70 (2014) (Exh. MEX-161) (stating that "[r]eports from Maldives and Sri Lanka have indicated that no dolphins are caught in this fishery," although some depredation may occur).

[293] *See* Mexico's First Written Submission, para. 110 ("It is well-established that tuna associate with dolphins in areas of the Indian Ocean (just as in the ETP), and that handline fishers chase herds of dolphins to locate tuna, as explained below.").

[294] *See* M. Shiham Adam & A Riyaz Jauharee, IOTC, *Handline Large Yellowfin Tuna Fishery of the Maldives*, at 5 (Oct. 2009) (Exh. MEX-39) (stating only that "[l]arge yellowfin schools are sighted by presence dolphins and livebait is thrown to attract and maintain the school within reach of the boat"); Adam et al. 2015, at 7 (stating only that "[f]ishers look for dolphins and large yellowfin tuna associated with the dolphin schools"); Anderson & Shaan 1998, at 1 (Exh. MEX-41) (stating that, in the Maldives, "schools of . . . small tunas are located mainly by the presence of sea birds," while "large yellowfin . . . associate with dolphins"); Charles R. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean* (2014) (Exh. MEX-161) (making no mention of chasing dolphins).

vessels,"[295] which, as shown here, are the blue canoe shaped vessels powered with small outboard motors, would be capable of chasing dolphins even if a tuna-dolphin association that would support such a practice existed.[296]

113. Exhibit MEX-42, a 2014 report by Dr. Charles Anderson for the International Pole and Line Foundation was extensively discussed by the parties, the panel, and the Appellate Body in the previous compliance proceeding. It makes *no mention* of handline vessels or any other vessels *ever* engaging in dolphin sets, as they occur in the ETP (*i.e.*, involving chasing dolphins to catch tuna) *outside* the ETP.[297] Further, it concludes that, although "it is possible that there has been more setting on dolphins in the [western Indian Ocean] than has been reported," this "does not imply that the tuna-dolphin fishery in the WIO is of the same scale as that in the ETP."[298] Indeed, it notes 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."[299] The Appellate Body specifically found that this exhibit supported the first compliance panel's finding that dolphins outside the ETP do not associate with tuna "as systematically as they do in the Eastern Tropical Pacific."[300] Mexico's attempt to revisit this finding in the context of handline fishing should be rejected.

114. Thus, Mexico's evidence concerning handline fishing does not undermine the U.S. showing that setting on dolphins, including under the AIDCP, has a unique risk profile for dolphins in terms of unobservable and direct dolphin mortalities.

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[295] FAO, "Tuna Handlining," at 2 (Exh. MEX-38).

[296] "Handline Yellowfin Tuna Banda Sea," http://fisheriesimprovementindonesia.org/handline-banda-sea/?show=gallery (accessed Oct. 5, 2016) (Exh. US-130).

[297] *See* Anderson 2014 (Exh. MEX-42).

[298] Anderson 2014, at 67 (Exh. MEX-42).

[299] Anderson 2014, at 67 (Exh. MEX-42).

[300] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.224.

c. Mexico Has Failed to Rebut the U.S. Legal Showing that the Eligibility Criteria Are Commensurate to the Differences in Risk Profiles

115. As discussed in the U.S. first written submission and above, the evidence shows that setting on dolphins has a unique risk profile compared to other fishing methods.[301] Further, as the United States has also explained, the eligibility criteria are commensurate with these differences in risk profiles, and thus calibrated to the differences in risk.[302]

116. In Mexico's first written submission, instead of responding to the latter part of the U.S. argument, Mexico advances several arguments regarding how the Panels should conduct the calibration analysis. First, Mexico argues that the Panels should assess whether the eligibility criteria are calibrated to differences in PBRs in individual fisheries.[303] Second, Mexico argues that the Panels should assess whether the eligibility criteria are calibrated to differences to the total quantity of direct dolphin mortalities attributable to a fishing method used throughout the world (seemingly including all tuna and non-tuna fisheries where the fishing method is employed).[304] This section demonstrates that both of Mexico's arguments should be rejected and that Mexico has not rebutted the U.S. showing that the measure is even-handed, under the appropriate calibration analysis.

117. Subsections (i) and (ii) of this section demonstrate that neither of Mexico's proposed metrics is appropriate for determining whether a fishing method should be ineligible to produce tuna product marketed as dolphin safe.[305] In particular, Mexico's approaches differ significantly from the approach reflected in the DSB recommendations and rulings and, indeed, would prevent the Panels from conducting the *required* comparative analysis of whether setting on dolphins to catch tuna results in more risk to dolphins relative to other fishing methods in other fisheries world-wide.[306] Finally, in subsection (iii), the United States concludes by explaining why Mexico is incorrect to argue that the U.S. approach depends on "subjective" metrics.

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[301] *See* U.S. First Written Submission, secs. IV.A, V.C.2.a.ii.A; *see supra*, sec. III.B.1.a-b.

[302] *See* U.S. First Written Submission, sec. V.C.2.a.ii.B.

[303] *See* Mexico's First Written Submission, paras. 240-241.

[304] *See* Mexico's First Written Submission, para. 247.

[305] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("Our review of the Panel Report reveals that the Panel's analysis failed to encompass consideration of the *relative risks* to dolphins from different fishing techniques in different areas of the oceans, and of whether the distinctions that the amended tuna measure draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the *relative profiles*.") (emphasis added).

[306] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("Our review of the Panel Report reveals that the Panel's analysis failed to encompass consideration of the relative risks to dolphins from different fishing techniques in different areas of the oceans, and of whether the distinctions that the amended tuna measure draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the relative profiles.").

i. Mexico's Argument That the Measure Must Be Based on a PBR Metric Should Be Rejected

118. Mexico argues that one of the two "available" metrics for assessing whether the U.S. measure is calibrated is by reference to the PBR for particular dolphin stocks in particular ocean areas.[307] Mexico is not explicit as to how this metric would be applied but seems to suggest that tuna product produced from fisheries causing mortalities above the relevant PBR levels should be prohibited from being marketed as "dolphin safe," even if no dolphin was killed or seriously injured in the harvest of that tuna, while tuna product produced from fisheries that are below their respective PBR should be permitted to be marketed as "dolphin safe," unless a dolphin was killed or seriously injured in the harvest of that tuna.[308] Mexico also claims that where a particular fishery's PBR is not known, tuna product produced from that fishery should not be eligible for the label if that fishery "cause[s] any dolphin mortalities or serious injuries above *de minimis* levels."[309] Mexico errs in this approach.

119. First, Mexico's metric entirely misunderstands the purpose of the eligibility criteria, which do not adopt a fishery-by-fishery approach but rather a fishing method-by-fishing method approach.[310] After all, the eligibility criteria do not deny access to the label for just that tuna product produced from setting on dolphins *in the ETP large purse seine fishery* – they deny access to *all* tuna product produced *from setting on dolphins*, no matter where the set occurs.[311] Moreover, pointing to the particular data with regard to one fishery does not inform as to the risks to dolphins by that fishing method *in general*. And nowhere in the two sets of DSB recommendations and rulings is there any indication that addressing this issue on a fishing method-by-fishing method basis is inconsistent with the TBT Agreement. To the contrary, although the eligibility criteria have been the central focus of the previous proceedings, they have never been found to support a finding of less favorable treatment under Article 2.1.[312] And

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[307] *See* Mexico's First Written Submission, para. 240. As noted by Mexico, "[t]he PBR level is the maximum number of animals that may be removed from an animal stock (such as dolphins) without affecting that stock's optimum sustainable population." *Id.*

[308] *See* Mexico's First Written Submission, paras. 241-245.

[309] Mexico's First Written Submission, para. 246; *see also id.* ("Under this approach, purse seine and longline fishing in the Indian Ocean and Western and Central Pacific, for example, should be disqualified until dolphin abundance estimates and appropriate PBRs are established for those fisheries.").

[310] A "fishery" is defined by location, gear type (or fishing method), and target species, such as the Hawaii deep-set longline tuna fishery. *See* U.S. Response to 1st 21.5 Panel Question 21, para. 135; *id.* Question 52, para. 272; *see also* Mexico's Response to 1st 21.5 Panel Question 52, paras. 139-140 ("[A] fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life.") (quoting the FAO Fisheries Glossary (1st 21.5 Exh. MEX-132) as stating that a "fishery" is "a unit determined by an authority or other entity that is engaged in raising and/or harvesting fish. Typically, the unit is defined in terms of some or all of the following: people involved, species or type of fish, area of water or seabed, method of fishing, class of boats and purpose of the activities.").

[311] Under Mexico's approach, by contrast, tuna product produced from "unregulated" setting on dolphins would potentially be eligible for the label as long as the fishery where the set occurs was below PBR.

[312] *See* U.S. First Written Submission, paras. 92-93; US – *Tuna II (Mexico) (Panel)*, paras. 7.374-378; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.135, 8.3(a).

Mexico errs in arguing, in essence, that, by design, such a fishing-method-by-fishing method approach supports a finding of less favorable treatment under Article 2.1.

120. Second, Mexico's approach is unworkable. As Mexico admits, there is very little data on PBR across different fishing methods and different oceans. Even in the ETP large purse seine fishery, one of the most closely studied fisheries in the world, the data is over a decade old.[313] As such, even if the United States chose to take a fishery-by-fishery approach, it would be unable do so. There is simply not enough data to conduct the required evaluation using this metric – *i.e.*, to assess whether the differences in the eligibility criteria "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*."[314] Indeed, it was for this reason – the lack of available data – that Mexico previously acknowledged that this metric "has no application in the Panel's analysis under Article 2.1."[315]

121. It is not clear, however, that Mexico is actually proposing that the Panels assess whether the eligibility criteria are calibrated based on a PBR standard. Rather, Mexico appears to be using PBR in an attempt to repackage its previously rejected proposal for a "zero tolerance" benchmark. As the Panels will recall, Mexico argued in the latter stages of the previous proceeding that the United States could only draw distinctions between eligible and non-eligible fishing methods based on whether the fishing method causes *any* adverse effects.[316] Due to the lack of available data, Mexico's PBR argument sets substantively the same standard. Because PBR will be unknown for nearly all fisheries, nearly all tuna product will be subject to Mexico's proposed standard that tuna produced from any fishery with mortalities above "*de minimis* levels" must be ineligible.[317] Thus, the argument remains the same. In Mexico's view, the Panels should reject the calibration analysis set out in the DSB recommendations and rulings. All tuna product must be deemed ineligible where *any* mortality occurs in the fishery, regardless of the *relative* risks to dolphins.[318] Mexico's attempt to revive an already rejected framework under a different name should be rejected.

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[313] *See* Mexico's First Written Submission, para. 242 (discussing NOAA's 2002 finding regarding the ETP large purse seine fishery).

[314] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101 (emphasis added).

[315] Mexico's Response to 1st 21.5 Panel Question 11, para. 66. In this regard, the United States observes that on appeal Mexico *did not* request the Appellate Body to complete the analysis as to the PBR metric – despite raising the issue – again, because there was insufficient data to do so. *See* Mexico's Other Appeal Submission, para. 135 (only claiming that the Appellate Body should complete the analysis with regard to its other proposed "benchmark").

[316] *See, e.g.*, Mexico's Response to 1st 21.5 Panel Question 11, paras. 50 ("It is not a question of the relative number of dolphins that are killed or seriously injured during fishing sets or gear deployments. It is simply a question of whether or not such adverse effects merely exist."); *see also id.* paras. 58-61 (making the same argument).

[317] Mexico's First Written Submission, para. 246.

[318] *Compare* Mexico's First Written Submission, para. 246 (stating that "other fishing methods in other ocean areas should also be designated as ineligible where they cause any dolphin mortalities or serious injuries above de minimis levels"), *with* Mexico's Response to 1st 21.5 Panel's Question 11, para. 59 (claiming that, in the

122. Third, Mexico misunderstands the underlying reason for the label. A PBR analysis reflects an examination of whether the level of mortality incidental to commercial fishing operations exceeds the PBR for a dolphin stock. In other words, whether the level of dolphin mortality in a particular fishery is *sustainable* as to particular dolphin stocks. But there is no requirement that the dolphin safe label must be a *sustainability label*, and, indeed, it is not. As the United States discussed with the first compliance panel, a fundamental tenet of the TBT Agreement is that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives 'at the levels it considers appropriate.'"[319] And nothing in Article 2.1, or in the TBT Agreement more generally, suggests that the United States must alter the objectives of the amended measure to suit Mexico's wishes. Moreover, it is now settled that the objectives of the measure are legitimate for purposes of both the TBT Agreement and GATT 1994, despite Mexico's implications to the contrary.[320]

123. The United States would also observe that PBR varies widely for different dolphin stocks in different fisheries. It is possible to kill several thousand dolphins in one fishery without exceeding PBR, while even a few dolphin deaths in another fishery will exceed PBR.[321] Thus, under Mexico's version of the eligibility criteria, the United States would be required by Article 2.1 to make ineligible for the label fishing methods that kill only a few dolphins each year, while allowing a fishing method that kills hundreds to thousands of dolphins a year to remain eligible, based solely on the fact that there are more dolphins in the latter fishery.[322] In short, Mexico is suggesting that, contrary to the recommendations and rulings of the DSB in the previous proceedings, any dolphin safe labeling measure *must* be based on the conservation of dolphin populations, as reflected in the PBRs of dolphin stocks in different fisheries.[323]

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context of its "zero tolerance" argument, that "the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist."); *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, n.492 ("Indeed, Mexico disputed the relevance of the concept of 'calibration' to the analysis of the even handedness of the amended tuna measure. . . . 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).

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

[320] *See supra*, sec. III.A.2.b.i (responding to Mexico's First Written Submission, para. 236).

[321] *See* NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," at 267 (Jan. 8, 2013) (Exh. US-113) (noting that, although there were only an estimated 11.2 dolphin mortalities in the fishery, this was above the PBR of 9.3 dolphins).

[322] *See* Mexico's First Written Submission, para. 244 (noting that in one fishery "even a low number of dolphin mortalities will be 'high risk'").

[323] *See US – Tuna II (Mexico) (Panel)*, para. 7.735 ("[W]e are not persuaded that the objective of protecting dolphins through the US dolphin-safe provisions is to be understood exclusively, or even primarily, in terms of dolphin population recovery. Rather, both US objectives are defined in terms of 'adverse effect' of fishing practices on dolphins. . . . This suggests to us that the US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent on dolphin populations being depleted."); *US – Tuna II (Mexico) (AB)*, paras. 303, 330-331 (finding that the objectives of the U.S. measure were "legitimate" under Article 2.2 of the TBT Agreement); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527 (finding that the measure was

124. Mexico's argument with regard to PBR should be rejected.

ii. Mexico's Argument Concerning "Overall Absolute Levels of Adverse Effects" Should Be Rejected

125. Mexico argues that the second "available" metric by which the measure could be calibrated is the "overall absolute levels of adverse effects on dolphins."[324] Under this alternative, Mexico suggests that the measure must be calibrated to the total number of direct dolphin mortalities caused by a fishing method in all the ocean areas in which it is used.[325] This metric should also be rejected, as it is inconsistent with the calibration analysis set out by the Appellate Body in the previous compliance proceeding.

126. As the United States explained in section II.A above, the Appellate Body has established that the Panels' analysis of whether the U.S. measure is even-handed must focus on "the relative risk profiles associated with different fishing practices in different areas of the oceans."[326] In conducting this analysis, the Panels must take into account the "*relative* harms both observed and unobserved, associated with setting on dolphins versus other fishing practices."[327] Mexico's second metric invites the panel to conduct an analysis that is inconsistent with this standard because the metric does not address all aspects of the harms of different fishing methods and does not take a relative approach.

127. First, Mexico's "overall absolute levels of adverse effects" metric is misnamed, as, in fact, it addresses only direct mortalities caused by different fishing methods. Mexico asserts that it is addressing the "indirect adverse effects" of dolphin sets by adding an additional 14 percent to the number of observed mortalities in the ETP large purse seine fishery in 2015.[328] As discussed in section III.B.1.a.ii above, however, this additional figure accounts only for the orphaned calves of dolphins who were directly killed in dolphin sets.[329] It thus does not address *any* of the "various unobserved effects" that the two previous panels in this dispute found, and

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"concerned with the effects of tuna fishing on the well-being of individual dolphins rather than on the state of a particular dolphin population, considered globally or statistically"); *id.* ("[T]he preservation of individual dolphin lives is just as much an act of conservation as is a program to encourage recovery of a particular population.").

[324] Mexico's First Written Submission, para. 247.

[325] *See* Mexico's First Written Submission, paras. 249, 251, 252, 254. Mexico also notes, however, that "small absolute levels of adverse effects should result in high risk profiles where dolphin stocks in a particular ocean area are threatened." Mexico's First written submission, para. 247. Thus, it is not clear that this metric is actually different from the PBR metric Mexico proposed as "available" alternative. *Id.* para. 258.

[326] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.251; *see also id.* para. 7.349 (faulting the first compliance panel for not conducting such an analysis and not analyzing the "considerable arguments and evidence . . . concerning the *nature and scope* of the *relative* harms to dolphins, both observed and unobserved, associated with different fishing methods") (emphasis added); *id.* para. 7.243.

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

[328] Mexico's First Written Submission, para. 249.

[329] *See supra*, sec. III.B.1.a.ii.

two Appellate Body reports confirmed, can be caused by the "chase itself."[330] In short, Mexico is inviting the Panels to disregard the Appellate Body's explicit guidance that a correct calibration analysis must address the "observed and unobserved" harms associated with dolphin sets, compared to other fishing methods.[331]

128. Second, Mexico's proposed approach does not address the "relative harms to dolphins" of different fishing methods. Rather, Mexico compares the dolphin mortalities caused by 80-90 vessels setting on dolphins in the ETP with the dolphin mortalities allegedly caused by thousands of purse seine, longline, and gillnet vessels in different fisheries around the world.[332] Under this standard, if the 80 to 90 vessels setting on dolphins in one fishery kill 765 dolphins one particular year and 3,500-5,000 longline vessels in all the longline fisheries of the Pacific Ocean[333] cause a greater number of dolphin mortalities, any tuna caught by longline fishing must be *per se* ineligible for the dolphin safe label, regardless of mortality levels in any particular fishery in which the tuna was caught and even if *no* dolphins were killed or seriously injured in catching the tuna. This outcome would be entirely inconsistent with the Appellate Body's standard of considering "the relative risk profiles" of "different fishing practices in different areas of the oceans" and inconsistent with the objective of dolphin protection.[334]

129. Additionally, under this metric, Mexico's chosen fishing method benefits from the fact that it is considered to be so dangerous that it has been banned almost everywhere else in the world. The WCPFC, the IOTC, and various countries have banned any intentional purse seine sets on dolphins or other marine mammals.[335] As a consequence, while thousands of purse seine, longline, and gillnet vessels operate in hundreds of fisheries in all the oceans of the world, only 80-90 large purse seine vessels set on dolphins each year in the only fishery where such a practice is "widespread."[336] Mexico thus seeks to turn the emerging international consensus against its chosen fishing method into an advantage for purposes of its analysis of the U.S.

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[330] *See US – Tuna II (Panel)*, paras. 7.491-7.506; *US – Tuna II (AB)*, para. 330, n. 663; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-208.

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

[332] *See* IATTC, "Dolphin Mortality Limits for 2012-2014" (Exh. US-116).

[333] *See* Secretariat of the Pacific Community (SPC), Oceanic Fisheries Program, "Longline" (Exh. US-119).

[334] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.251.

[335] *See* WCPFC, Conservation and Management Measure 2011-03 (Mar. 2013) (Exh. US-54) ("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) ("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."); Australia, Annual Report to the Commission, at 12-13 (July 2014) (Exh. US-33) (explaining that "the intentional setting of purse-seine gear on cetaceans" has been "prohibited in Australian purse-seine fisheries since the introduction of the *Environmental Protection and Biodiversity Act of 1999*"). A similar proposal is under consideration at the ICCAT. *See* ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014) (Exh. US-56).

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

measure by comparing the dolphin mortalities caused by fewer than 100 vessels in a single fishery to all the mortalities caused by widely used fishing methods around the world.

130. Simply put, Mexico's argument that the calibration analysis should only look at "overall absolute levels of adverse effects" is an effort by Mexico to avoid making a direct, relational comparison of different fishing methods in different fisheries as contemplated by the Appellate Body. In contrast, the United States presents the data in a manner that controls for the size of the fishery, using per set data, where available, thus allowing a real comparison of mortality caused in different fishing methods to be conducted. It is notable that Mexico does not directly address the per set approach adopted by the United States (in this and the previous proceeding), appearing to concede, despite its "overall absolute levels of adverse effects" argument, that the U.S. approach is appropriate.

131. Therefore, Mexico's invitation to assess whether the U.S. measure is calibrated based on Mexico's "overall absolute levels of adverse effects" metric should be rejected.

iii. Mexico Does Not Prove that the United States Has Taken a "Subjective" Approach in Assessing Whether the Eligibility Criteria Are Calibrated to Differences in Risks to Dolphins

132. Mexico thus has not rebutted any of the factual premises underlying the U.S. argument that the eligibility criteria are calibrated to the risks to dolphins posed by different fishing methods or advanced any method of comparison consistent with the legitimate objective of the measure and the Appellate Body's guidance in this dispute. Mexico's final assertion – that the U.S. explanation of how the eligibility criteria are calibrated is based on "subjective methods" – is also incorrect.

133. First, the fact that setting on dolphins is the only fishing method that intentionally targets dolphins cannot be separated from the risk profile of the fishing method. As the first compliance panel explained, summarizing and agreeing with the U.S. argument before it, the relevance of the intentional nature of dolphin sets, compared to the accidental nature of dolphin interactions in other fishing methods, "goes to the 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."[337] Further, "[t]his distinction is especially important where . . . the particular nature of the interaction is itself 'inherently dangerous' to dolphins."[338] The eligibility criteria are calibrated to this objective difference between dolphin sets and all other fishing methods because they deny eligibility to the method that is inherently dangerous to dolphins and allow other methods to be potentially eligible, provided no dolphin harm actually occurred.

[337] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.244 (internal quotation omitted).

[338] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.244 (quoting U.S. Second Written Submission, para. 23).

134. Second, the unique categories of unobservable harms caused by dolphin sets are also not "subjective." To the contrary, all previous reports in this dispute have recognized the potential of a dolphin set to harm dolphins as a result of the "chase itself" "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."[339] Further, previous reports have recognized that other fishing methods are not capable of causing similar harms.[340] The eligibility criteria are calibrated to this difference in risk because they deny eligibility to a method that *may* have caused significant unobservable harms during any set even if no dolphin was directly killed, and grant potential eligibility to methods whose adverse effects are only those "whose occurrence renders ineligible for the dolphin-safe label any tuna caught in the set in which the harmful interaction . . . occurred."[341]

135. Finally, the eligibility criteria are calibrated to the differences in the direct harms caused by setting on dolphins versus other eligible fishing methods, taking an objective, relational approach by controlling for the size of the fisheries involved. As discussed in sections III.B.1.a.iii and III.B.1.b, the available fishery-specific evidence demonstrates that dolphin sets in the ETP large purse seine fishery continue to cause a level of dolphin mortality that generally exceeds that caused by other fishing methods, using a per set metric to control for fishery size and allow meaningful cross-fishery comparisons.[342] In particular, the available evidence with respect to purse seine fishing other than by dolphin sets and longline fishing suggests that these fishing methods pose a much lower risk of direct mortality to dolphins than dolphin sets. Indeed, in every fishery for which data is available, these fishing methods cause, on a per set basis, only a fraction of the direct mortalities caused by dolphin sets in the ETP.[343]

d. Mexico Has Failed to Rebut the U.S. Legal Showing that the Eligibility Criteria Are Calibrated to the Differences in Risk of Dolphins

136. Thus, when all these objective differences between setting on dolphins and the potentially eligible fishing methods are considered together, it is clear that the eligibility criteria are commensurate with the overall relative risk to dolphins posed by different fishing methods. The eligibility criteria distinguish (1) between a fishing method that necessarily poses a risk to dolphins every time it is used and methods that can (and often do) put no dolphins in danger; (2) between a method that causes unobservable harms even in the absence of any direct mortalities; and, (3) between a method that, controlling for the number of times it is used, causes more direct

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[339] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240; *see US – Tuna II (Panel)*, paras. 7.491-7.506; *US – Tuna II (AB)*, para. 330, n. 663; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-208.

[340] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.135, 7.129, 7.123; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.131, 7.246-253; *see also id.* paras. 7.203-207.

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

[342] *See supra*, secs. III.B.1.a.iii, III.B.1.b.

[343] *See supra* sec. III.B.1.b.i-ii.

dolphin mortalities than any other. Tuna caught using the former fishing method, setting on dolphins, is *per se* ineligible for the label, while tuna caught by using the other methods is potentially eligible, provided that no dolphin mortality or serious injury occurred in the set in which tuna were caught. This different treatment is commensurate with the different risk profiles, for dolphins, of these fishing methods and thus is even-handed.

137. Mexico has failed to rebut the factual or legal bases for this conclusion. Specifically, Mexico did not show that setting on dolphins is not inherently harmful to dolphins or does not cause unobservable harms to dolphin or that other fishing methods share either of these characteristics. Further, Mexico did not show that other fishing methods generally cause as high a level of direct dolphin mortalities as dolphin sets, including under the AIDCP. Finally, both the metrics that Mexico urges the Panels to employ in their analysis of whether the eligibility criteria are even-handed are inconsistent with the Appellate Body's guidance in the original and previous compliance proceedings that the Panel should assess "the *overall relative* harms both observed and unobserved, associated with setting on dolphins versus other fishing practices."[344]

138. For these reasons, the eligibility criteria cannot support a finding of less favorable treatment under Article 2.1

2. The Certification Requirements Are Even-Handed

139. 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. For tuna product produced from the ETP large purse seine fishery, this means that a captain and an observer both must certify that the criteria have been met.[345] For tuna product produced from fisheries other than the ETP large purse seine fishery, it is typical that only the captain needs certify that the eligibility criteria have been met.[346] Pursuant to the 2016 IFR, all captains operating in fisheries other than the ETP large purse seine fishery are required to certify completion of the NMFS dolphin-safe captain's training course.[347]

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

[345] Again, because Mexico's tuna product is not marketed as dolphin safe, is "is not affected" by the certification requirements. U.S. First Written Submission, para. 111 (citing NOAA Form 370 (Exh. US-4) and quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.143).

[346] U.S. First Written Submission, para. 116 (noting that an observer certification may also be required for tuna 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.

[347] U.S. First Written Submission, para. 121 (stating that this 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) (citing 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2)); *see also* "Dolphin-Safe Captain's Training Course" (Mar. 23, 2016) (Exh. US-10).

140. In the U.S. first written submission, the United States explained why the differences in certification requirements are even-handed. As discussed in section V.C.2.b of that submission, setting on dolphins is a uniquely high-risk fishing method for dolphins. Consequently, the ETP large purse seine fishery, as the only fishery in which vessels are capable of using and permitted to use this fishing method, has a high risk profile for dolphins.[348] The differences in the certification requirements are commensurate with the different risk profile of the ETP large purse seine fishery and other fisheries, where interaction with dolphins is accidental and is of a much different frequency and intensity.

141. The legal analysis in Mexico's first written submission does not respond to, or even acknowledge, the U.S. argument in any detail.[349] As the United States understands it, Mexico makes two statements in support of its legal conclusion that the certification requirements are not even-handed. First, Mexico appears to state that the differences in certification requirements are not calibrated to the risk to dolphins posed by different fisheries because "fishing for tuna using gillnets, purse seine nets, longlines, and trawl nets outside the ETP all result in significant adverse effects for dolphins," and that "handline fishers chase dolphins in some ocean regions."[350] This statement appears to reflect Mexico's first calibration argument – *i.e.*, that the regulatory distinction must be calibrated to risks to dolphins.[351] The United States addresses this argument below. Second, Mexico appears to state that the certification requirements are not calibrated because certain Asian countries that produce dolphin safe tuna product for the U.S. market "are significantly deficient in the control and monitoring of fishing activities."[352] This statement appears to reflect Mexico's second calibration argument – *i.e.*, that the regulatory distinction must be calibrated to risks to accuracy.[353] As discussed above, this is an incorrect legal test, and the United States has already fully addressed the lack of relevance of this argument to these proceedings.[354]

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[348] *See* U.S. First Written Submission, sec. V.C.2.B.iii.A.

[349] *See* Mexico's First Written Submission, paras. 280-284.

[350] Mexico's First Written Submission, para. 283.

[351] *See supra*, sec. III.A.2.a (discussing Mexico's First Written Submission, para. 217).

[352] Mexico's First Written Submission, para. 283. Mexico continues by stating that, "[t]he evidence strongly indicates that the risk profiles of all other fisheries are not so minor in relation to the large purse seine fishery in the ETP that it is even handed and not arbitrary to allow untrained captains to make inaccurate certifications for all of those fisheries." *Id.*

[353] *See supra*, sec. III.A.2.b (discussing Mexico's First Written Submission, para. 218).

[354] *See supra*, sec. III.A.2.b; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("[I]n the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the 'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement, the Panel was required to assess whether *the certification* and tracking and verification requirements are 'calibrated' *to the risks to dolphins* arising from different fishing methods in different areas of the oceans.") (emphasis added); *id.* n.586 ("We also agree with the United States that acceptance of such an approach is implicit in the Appellate Body's statement *that requiring certification by an observer*, rather than by a captain, 'may be appropriate in circumstances *in which dolphins face higher risks of mortality or serious injury*.") (emphasis added).

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

142. As explained in detail in sections IV.B and V.C.2.b of the U.S. first written submission, the evidence establishes that the ETP large purse seine fishery has a "special risk profile"[355] distinct from other fisheries because it is the only fishery where widespread and systematic setting on dolphins occurs.[356] Further, the difference in certification requirements is commensurate with this difference in risk profiles.[357] This legal conclusion is consistent with, and supported by, numerous findings of the original and first compliance panel. In particular, such a finding is supported by the first compliance panel finding that "it is only inside the ETP that setting on dolphins is practiced consistently or systematically," a point that was specifically upheld by the Appellate Body on appeal.[358]

143. Further, as the United States also explained, the evidence on the record in these proceedings confirms the findings of the earlier proceedings, in particular:

- Intentional sets on dolphins make up nearly half of all sets by large purse seine vessels in the ETP – over 10,000 sets per year between 2009 and 2013.[359] In other fisheries, by contrast, there is no evidence that vessels regularly set on dolphins or are even capable of doing so,[360] and there is no evidence that dolphins in any fishery outside the ETP are *chased* to catch tuna.[361] Indeed, intentional sets on any cetacean are banned in the Indian Ocean, the western central Pacific Ocean, and U.S. fisheries, among others.[362]

- The frequency and intensity of interactions between dolphins and fishing vessels in the ETP large purse seine fishery is unparalleled, as data from purse seine fisheries and other types of fisheries prove.[363]

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[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] *See* U.S. First Written Submission, sec. V.C.2.B.iii.A.

[357] *See* U.S. First Written Submission, sec. V.C.2.B.iii.B.

[358] *See* U.S. First Written Submission, para. 124 (quoting and citing, among other things, *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *US – Tuna II (Mexico) (Panel)*, para. 7.520; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.224-226).

[359] U.S. First Written Submission, table 2 at para. 50.

[360] U.S. First Written Submission, table 3 at para. 51 (noting, among other points, that 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).

[361] U.S. First Written Submission, para. 126.

[362] U.S. First Written Submission, para. 47 (citing WCPFC Resolution 2011-03 (Exh. US-54); IOTC Resolution 13/04 (Exh. US-55); 16 U.S.C. § 1372(a)(1)-(2) (Exh. US-57)).

[363] U.S. First Written Submission, paras. 127-129.

- This unique level of interaction in the ETP large purse seine fishery between dolphins, on the one hand, and vessels, speed boats, helicopters, divers, and nets on the other is reflected in the mortality figures, where in the ETP large purse seine fishery in 2009-2014, there were 94.92 dolphin mortalities per thousand observed dolphin sets, which dwarfs the per set mortality figures in any other fishery.[364]

144. Accordingly, the evidence continues to establish, as it did in the previous proceeding, that, due to the prevalence of systematic setting on dolphins, the ETP large purse seine fishery is quantitatively and qualitatively "different" from other fisheries in the "nature and degree of the interaction" between dolphins and vessels that occurs there.[365] It thus remains true that the ETP large purse seine fishery has a "special risk profile" for dolphins, distinct from the risk profiles of other fisheries.[366]

145. Further, the difference in the certification requirements 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 because:

- The task of verifying that tuna meets the eligibility criteria is much more difficult in the ETP large purse seine fishery than in other fisheries, given that it is only the ETP large purse seine fishery that certifiers may have to determine whether mortality and/or serious injury occurred where the vessel, in coordination with speedboats, a helicopter, and divers, engages in lengthy chases and captures of hundreds of dolphins at a time, in varying weather and ocean conditions.[367]

- Any difference in the "margin of error" resulting from the different requirements has a rational connection to the difference in risk. 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, the regulatory distinction is calibrated (and thus even-handed) in tolerating a higher

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[364] *See* U.S. First Written Submission, para. 130 (citing, among other things, Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13)).

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

[366] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398; *see also id.* para. 7.238 (noting 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").

[367] *See* U.S. First Written Submission, paras. 133-138; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-245 (agreeing 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* person to observe the impact of the vessel on the dolphins that it was chasing and capturing.").

"margin of error" for the certifier where the risks are lower and tolerating a lower "margin of error" where the risks are higher.[368]

146. For all these reasons, the evidence on the record in these proceedings supports the first compliance panel's view that, based on the evidence in that proceeding, 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."[369]

b. Mexico Fails to Establish that the Certification Requirements Are Not Calibrated to the Differences in Risk

147. In its brief analysis section, Mexico fails to respond to the evidence that the ETP large purse seine fishery presents a "special risk profile" for dolphins, that the certification requirements are commensurate with this difference in risk, and that numerous findings of the first compliance panel and Appellate Body are consistent with, and in many cases, directly support, the legal conclusions of the United States. Instead, Mexico makes a single conclusory remark that dolphins suffer adverse effects in other fisheries.[370] Such a treatment cannot suffice to rebut the U.S. presentation, particularly given how similar the U.S. presentation is to the one that already was found to establish a *prima facie* case under the applicable legal framework.[371]

148. Moreover, as discussed with regard to the eligibility criteria, Mexico's evidence fails to prove the points Mexico asserts. Specifically, Mexico did *not* demonstrate that any fishery other than the ETP large purse seine fishery has a "risk profile" similar to the ETP large purse seine fishery.[372] Additionally, Mexico's assertion that there is a difference in the accuracy of dolphin safe certifications inside and outside the ETP large purse seine fishery is unsubstantiated and is not the correct legal test. The Appellate Body in both previous proceedings made it clear, with respect to the certification requirements in particular, that any difference in the requirements should be "calibrated to the risks to dolphins arising" in different fisheries, not based on unsupported assertions concerning the accuracy of the label.[373] In that regard, the United States

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[368] *See* U.S. First Written Submission, paras. 140-141 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.275-279 (min. op.)).

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

[370] *See* Mexico's First Written Submission, para. 283.

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

[372] *See supra* sec. III.B.1.b (discussing, *inter alia*, Mexico's fishery-specific evidence concerning various purse seine, longline, pole-and-line, gillnet, and handline fisheries).

[373] *US – Tuna II (Article 21.5 – Mexico) (AB)*, n.586 ("We also agree with the United States that acceptance of such an approach is implicit in the Appellate Body's statement *that requiring certification by an observer*, rather than by a captain, 'may be appropriate in circumstances *in which dolphins face higher risks of mortality or serious injury*.") (emphasis added); *id.* para. 7.169 ("In sum, in the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the 'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement, the Panel was required to assess whether the certification and *tracking and verification requirements* are 'calibrated' *to the risks to dolphins* arising from different fishing methods in different areas of the oceans.") (emphasis added).

fully addressed the lack of relevance of Mexico's second calibration test above in section III.A.2.b.[374]

3. The Tracking and Verification Requirements Are Even-Handed

149. In section V.C.2.c of the U.S. first written submission, the United States explained why the differences in the tracking and verification requirements are calibrated to the risks to dolphins in different fisheries, consistent with the legal framework reflected in the DSB recommendations and rulings in the previous compliance proceeding. Specifically, the United States explained what the differences between the NOAA and AIDCP tracking and verification regimes were at the time of the first compliance proceeding and how the changes to the measure made by the 2016 IFR narrowed those differences.[375] Then, citing to the same evidence that the United States relied on with regard to the certification requirements, the United States explained that the ETP large purse seine fishery has a "special risk profile" for dolphins distinct from the risk profiles of other fisheries.[376] Finally, the United States explained that the difference between the NOAA and AIDCP tracking and verification regimes is commensurate with those differences in risk profiles.[377] As such, the tracking and verification requirements are calibrated to the risk to dolphins and, accordingly, cannot support a finding of less favorable treatment.[378]

150. Mexico contests the legal conclusion of the United States in a brief section of its submission apparently on two grounds.[379] First, as with the certification requirements, Mexico does not respond to the evidence submitted by the United States establishing the "special risk profile" of the ETP large purse seine fishery or that the tracking and verification requirements are commensurate with this difference in risk, but instead makes the same assertion that dolphins suffer adverse effects in other fisheries and that this regulatory distinction is not calibrated to the risk profiles of fisheries.[380] Second, Mexico again appears to argue that the tracking and verification requirements are not calibrated to risks for accuracy because certain Asian countries,

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[374] *See supra* sec. III.A.2.b.

[375] *See* U.S. First Written Submission, paras. 146-168.

[376] *See* U.S. First Written Submission, para. 171 (relying on evidence discussed in section IV.B of that submission).

[377] *See* U.S. First Written Submission, paras. 172-178.

[378] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("By engaging with the United States' arguments as it did, the Appellate Body accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans.").

[379] *See* Mexico's First Written Submission, paras. 291-300.

[380] *See* Mexico's First Written Submission, paras. 299-300 ("Fishing for tuna using gillnets, purse seine nets, longlines, and trawl nets outside the ETP all result in significant adverse effects for dolphins. . . . Under these circumstances, the differences in the tracking and verification requirements of the 2016 tuna measure for tuna caught in different ocean regions cannot be said to be calibrated *to the risk profiles of fisheries* and suppliers.") (emphasis added).

in Mexico's view, "are significantly deficient in the control and monitoring of fishing activities" among other problems.[381]

151. With respect to Mexico's first assertion, for the reasons discussed in sections IV.B and V.C.2.c in the U.S. first written submission, and in section III.B.1 of this submission, the evidence does indeed establish that the setting on dolphins presents a distinct harm to dolphins and, as such, the ETP large purse seine fishery's risk profile is "different" and "special" in comparison with other fisheries, and Mexico has failed to rebut this showing. With respect to Mexico's proposed calibration analysis, as discussed above, Mexico puts forward an incorrect legal test. The United States has already addressed the lack of relevance of this argument to these proceedings in that above discussion.[382]

152. The United States observes, however, that Mexico takes issue with the analysis of the minority panelist, claiming that it is "the wrong test."[383] In particular, Mexico appears to argue that the "sensitivity" of the mechanism cannot vary in response to differences in risks to dolphins, but only based on differences "in control and monitoring."[384] But this is simply another way of saying that Mexico disagrees with the Appellate Body's test. As discussed above, the Appellate Body has made it clear that the U.S. measure does not provide less favorable treatment by imposing a more "burdensome" tracking and verification regime on tuna product produced from the ETP large purse seine fishery than on tuna product produced from

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[381] *See* Mexico's First Written Submission, paras. 299-300 ("Further, a number of the countries that are the largest suppliers of tuna and tuna products, such as Thailand, the Philippines and Taiwan, are significantly deficient in the control and monitoring of fishing activities, and have been identified as extremely vulnerable to IUU fish smuggling. The complex network of transhipments that is a feature of the world market for tuna further increases the risks. Under these circumstances, the differences in the tracking and verification requirements of the 2016 tuna measure for tuna caught in different ocean regions cannot be said to be calibrated to *the risk profiles of* fisheries and *suppliers*.") (emphasis added).

[382] *See supra*, sec. III.A.2.b; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("In sum, in the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the 'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement, the Panel was required to assess whether the certification and *tracking and verification requirements* are 'calibrated' *to the risks to dolphins* arising from different fishing methods in different areas of the oceans.") (emphasis added); *id.* para. 7.155 ("By engaging with the United States' arguments as it did, the Appellate Body accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans.").

[383] Mexico's First Written Submission, para. 291 ("The United States argues that the tracking and verification requirements are calibrated by stating that '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.' That is the wrong test.") (quoting U.S. First Written Submission, para. 173).

[384] Mexico's First Written Submission, para. 291 ("Mexico has explained above how the calibration test should apply in these proceedings and how the regulatory differences that pertain to the accuracy of information provided to U.S. consumers are an integral part of the calibration test. Where there are deficiencies in control and monitoring, a more stringent or more "sensitive" mechanism should be used in order to ensure that the information is accurate.").

other fisheries if such differences are commensurate with the respective *risks to dolphins*.[385] Mexico's argument thus runs directly contrary to the DSB recommendations and rulings.

153. Mexico then compounds its error by suggesting that the measure is inconsistent with Article 2.1 if there is "any difference in the relevant regulatory distinctions that result in the provision of inaccurate information to consumers [as this] would be contrary to the tuna measure's objectives."[386] This was exactly the position that Mexico took in the previous proceeding,[387] and it was exactly this position that was rejected by the Appellate Body.[388] Mexico errs in recycling this same argument in this proceeding.

4. The Design and Application of the Determination Provisions Is Even-Handed

154. As discussed in the U.S. first written submission, the Appellate Body found that the detrimental impact of the U.S. dolphin safe labeling measure did not stem exclusively from legitimate regulatory distinctions based only on the design of the determination provisions.[389] As such, following the release of the Appellate Body report, the United States carefully reviewed the determination provisions, both in design and application.

155. As to design, the United States accepted the DSB recommendations and rulings and amended the determination provisions pursuant to the 2016 IFR in accordance with the Appellate Body's findings. In its first written submission, the United States explained why these changes directly addressed the Appellate Body's criticisms of the design of the determination provisions

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[385] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253 ("We also note the Panel's conclusions that the tracking and verification requirements that apply outside the ETP large purse-seine fishery are less burdensome than those that apply inside that fishery in terms of their depth, accuracy, and degree of government oversight and that this may contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery. In the absence of a proper assessment by the Panel of the relative risks existing inside and outside the ETP large purse-seine fishery, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries.") (internal quotes omitted).

[386] Mexico's First Written Submission, para. 291.

[387] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.149 ("Mexico argues that it cannot be even handed for the amended tuna measure to permit a higher proportion of incorrect dolphin-safe information with respect to tuna caught in allegedly low-risk fisheries outside the ETP than for tuna caught in the allegedly high-risk ETP large purse seine fishery. Thus, the 'calibration' that the United States proposes is clearly arbitrary, unjustifiable, and lacking in even-handedness because it results in inaccurate and misleading information, in direct contradiction with the measure's objectives.").

[388] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("In sum, in the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the 'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement, the Panel was required to assess whether the certification and tracking and verification requirements are 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans.").

[389] *See* U.S. First Written Submission, para. 74.

and brought this aspect of the measure into compliance with Article 2.1.[390] Mexico does not appear to disagree with this conclusion,[391] and thus the issue does not appear to be in dispute in this proceeding.

156. As part of this careful analysis and revision of the determination provisions, the United States also reviewed the readily available evidence to determine whether there is a basis for making a determination with respect to any particular fishery. As described below, there is no evidence that there are fisheries that meet the first prong of the determination provisions, *i.e.*, in which there is a "regular and significant association between dolphins and tuna" similar to that in the ETP.[392]

157. With respect to the second prong, the available evidence suggests that certain gillnet fisheries in the Indian Ocean region meet that standard. Consequently, on September 28, 2016, NOAA designated these fisheries as having a "regular and significant" mortality and serious injury of dolphins, and tuna product produced from those fisheries marketed as "dolphin safe" is now subject to the enhanced certification and tracking and verification requirements provided for in the 2016 IFR.[393] In both design and application, the determination provisions "ensure that similar situations are treated similarly under the amended tuna measure."[394]

a. The United States Has Applied the Determination Provision as to "Regular and Significant" Tuna-Dolphin Association in an Even-Handed Manner

158. With respect to the first prong of the determination provision, there is no available evidence that any other fishery exhibits a tuna-dolphin association "similar to [that] in the ETP."

159. This conclusion is entirely consistent with findings of the panel and the Appellate Body in the previous proceeding. This issue was thoroughly briefed and argued by the parties. After a review of this evidence, the first compliance panel concluded 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."[395]

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[390] *See* U.S. First Written Submission, sec. V.C.1.

[391] *See* Mexico's First Written Submission, paras. 137-142.

[392] 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.") (emphasis added).

[393] NOAA, "Taking and Importing of Marine Mammals and Dolphin-Safe Tuna Products," 81 Fed. Reg. 66,625 (Sept. 28, 2016) (Exh. US-131).

[394] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.256; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

[395] *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*

The Appellate Body confirmed this finding, rejecting Mexico's DSU Article 11 appeal, noting in particular 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."[396] In this regard, the United States observes that Mexico's assertions regarding handline fisheries in the Indian Ocean are entirely unsubstantiated and do not prove the findings of the panel and Appellate Body in the previous proceeding incorrect.[397]

b. The United States Has Applied the Determination Provision as to "Regular and Significant" Mortality or Serious Injury in an Even-Handed Manner

160. The text of the DPCIA is not explicit as to the metric whereby "regular and significant" dolphin mortality or serious injury should be assessed or as to the benchmark against which levels of dolphin mortality should be measured to determine whether they are "regular and significant."[398] Consequently, it was necessary to consider what metric and benchmark were most in keeping with the purposes of the U.S. dolphin safe labeling measure, in light of the available evidence. Below, the United States explains: (1) the metric determined to be most appropriate; (2) the benchmark determined to be most appropriate; and, (3) the evaluation of different tuna fisheries on the basis of the available evidence.

161. First, in considering the most appropriate metric, it was necessary to consider the objectives and structure of the U.S. tuna measure, as well as feasibility, in light of the evidence available. With respect to the objectives of the measure, two considerations informed the choice of metric: (1) that it is well established that the U.S. tuna measure is concerned with "the preservation of individual dolphin lives";[399] and, (2) that the relevant certification made by the

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with Tuna Purse-Seine Fisheries Outside the Eastern Tropical Pacific Ocean, at 38 (1996) (Exh. US-74); Gerrodette, "The Tuna-Dolphin Issue," at 1192 (Exh. US-12).

[396] *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)).

[397] The first three exhibits Mexico cites on this issue contain no suggestion that handline vessels ever chase dolphins (or that they would be capable of doing so) or that the "association" between tuna and dolphins that has been observed in areas of the Indian Ocean would support such chasing if any vessels attempted it. *See* M. Shiham Adam & A Riyaz Jauharee, IOTC, *Handline Large Yellowfin Tuna Fishery of the Maldives*, at 5 (Oct. 2009) (Exh. MEX-39); Adam et al. 2015, at 7 (stating only that "[f]ishers look for dolphins and large yellowfin tuna associated with the dolphin schools"); Anderson & Shaan 1998, at 1 (Exh. MEX-41); Charles R. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean* (2014) (Exh. MEX-161). The last study, the 2015 Anderson report, similarly provides no evidence that handline vessels or any other vessels in the Indian Ocean ever engage in dolphin sets, as they occur in the ETP (*i.e.* involving chasing of dolphins). *See* Anderson 2014 (Exh. MEX-42). Indeed, the Appellate Body previously found that this exhibit supported the first compliance panel's finding that dolphins outside the ETP do not associate with tuna "as systematically as they do in the Eastern Tropical Pacific." *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.224.

[398] *See* DPCIA, 16 U.S.C. §§ 1385(d)(1)(B), (d)(1)(D) (Exh. US-1).

[399] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527; *see US – Tuna II (Mexico) (Panel)*, para. 7.550; *see id.* para. 7.735 ("[W]e are not persuaded that the objective of protecting dolphins through the US dolphin-

captain and/or observer is whether a dolphin has been killed or seriously injured in that set.[400] In light of these considerations, NOAA deemed it appropriate to use a metric that addresses individual dolphin mortalities on a per set basis.

162. A per set measure of dolphin mortality on a fishery-by-fishery basis reflects the frequency with which captains would have to make determination that a dolphin was killed or seriously injured in a particular fishery. Such a metric is consistent with the purpose and structure of the U.S. measure because it assesses the effect of a tuna fishery on individual dolphins and because it is tailored to the frequency with which a vessel captain in a particular fishery would have to detect that a dolphin had been killed or seriously injured in a particular set. Specifically, where a captain would have to identify a dolphin mortality or serious injury more frequently, because more sets cause a direct dolphin harm, the determination provisions, if based on a per set metric, would provide that an observer certification (and enhanced tracking and verification) may be necessary for tuna product to meet the "dolphin safe" standard.

163. Such a metric is also practical, as it used by many different regulating authorities, including by RFMOs, to assess the effect on dolphins (and other bycatch species) of tuna fishing in a particular fishery, meaning that there is considerable amount of per set data for different fisheries in different oceans that is readily available.[401] In this regard, a per set metric also has the advantage that it can be used effectively on the basis of incomplete information. A per set metric relies on two of the most commonly collected types of data, namely direct mortalities and effort levels. Accordingly, a per set metric can be used with less than 100 percent observer coverage, because the observed rate of dolphin mortalities can be extrapolated to the rest of the

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safe provisions is to be understood exclusively, or even primarily, in terms of dolphin population recovery. Rather, . . . the US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent on dolphin populations being depleted.")

[400] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132 (noting that direct mortalities and serious injuries "are precisely the kind of interactions that can and, under the amended tuna measure, must be certified, and whose occurrence renders ineligible for the dolphin-safe label any tuna caught in the set in which the harmful interaction . . . occurred").

[401] *See, e.g.*, IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 121 (2016) (Exh. MEX-6) (presenting a "standardized catch-per-unit effort (CPUE, in number of sharks per set) of all silky sharks in floating-object sets"); *id.* at 145 (explaining a formula for all bycatch per set); IATTC, Doc MOP-28-05, Report on the International Dolphin Conservation Program, at 3 (Oct. 18, 2013) (Exh. MEX-8) (stating, with respect to ETP dolphin sets: "The average mortality per set was 0.094 dolphins in 2012 and 0.10 dolphins in 2011" and presenting "trends in the numbers of sets on dolphin-associated fish, mortality per set, and total mortality in recent years"); *id.* at Table 3 (using a "mortality-per-set ratio" to extrapolate from observed mortalities to make an annual estimate of total dolphin mortality due to dolphin sets); IATTC, Doc MOP-32-05, Report on the International Dolphin Conservation Program, at 3 (Oct. 20, 2015) (Exh. US-15) (stating that, for ETP dolphin sets, "The average mortality per set was 0.086 dolphins in 2014, compared to 0.075 dolphins in 2013" and presenting the trends in "mortality per set" due to dolphin sets in the ETP); WCPFC, Cetacean Interactions Paper, at 5-6 (Exh. US-17) (presenting data on cetacean interactions in the tropical purse seine fishery in the form of an "encounter rate (no. / 1,000 sets)," and a "mortality rate (no. / 1,000 sets") and using observed mortality rates applied to the total number of sets undertaken in the fishery to estimate total mortality for the fishery); WCPFC, Fifth Regular Session Summary Report, at xiv (Exh. US-18) (estimating sea turtle interactions in the longline fishery in terms of turtles "per 1,000 hooks").

fishery.[402] Thus, in addition to being consistent with the objectives of the U.S. measure, a per set metric is suited to the available evidence on which an assessment of regular and significant mortality would be made.[403]

164. Second, having identified an appropriate metric, it was necessary to determine the appropriate benchmark against which fisheries would be evaluated to determine whether dolphin mortalities, on a per set basis, were "regular and significant."

165. In this regard, the United States recalled the suggestion of the Appellate Body that, to ensure even-handed treatment of different fisheries, the benchmark should refer to the ETP large purse seine fishery.[404] However, using the ETP large purse seine fishery is a somewhat imperfect comparator in that dolphin safe tuna product produced from the ETP large purse seine fishery is subject to an observer certification requirement based on *both* a unique tuna-dolphin association and regular and significant dolphin mortality.[405] Thus, hypothetically, if dolphin mortality in the ETP large purse seine fishery fell to zero, the measure would still require an observer certification, based on the tuna-dolphin association, the resulting potential to fish by systematically setting on dolphins, and the unobservable harms that may ensure in every set. But that would not mean that zero would become threshold for "regular and significant" mortality or serious injury for all other fisheries.[406] The United States further observes that difference in the certification and tracking and verification requirements between the ETP large purse seine fishery and fisheries subject to the determination provisions, on the one hand, and other fisheries, on the other, was established in U.S. law in 1997. Thus, to the extent that tuna produced from the ETP large purse seine fishery was subjected to enhanced requirements based on levels of

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[402] *See, e.g.*, IATTC, Doc MOP-28-05, Report on the International Dolphin Conservation Program, at Table 3 (Exh. MEX-8) (using a "mortality-per-set ratio" to extrapolate from observed mortalities to make an annual estimate of total dolphin mortality due to dolphin sets); WCPFC, Cetacean Interactions Paper, at 5-6 (Exh. US-17) (presenting data on cetacean interactions in the tropical purse seine fishery in the form of an "encounter rate (no. / 1,000 sets)," and a "mortality rate (no. / 1,000 sets") and using observed mortality rates applied to the total number of sets undertaken in the fishery to estimate total mortality for the fishery).

[403] In contrast, other metrics, such as PBR, are not as practical in light of the lack of available data. As discussed above, to determine a particular fishery's PBR, a detailed, population-level data is often required. It has been long uncontested in this dispute that this type of data is simply not available for the vast majority of fisheries in the world. *See, e.g.*, Mexico's Response to Panel Question 11, para. 66.

[404] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.257 ("Although the amended tuna measure does not state what criteria inform a determination of regular and significant mortality or serious injury, we would understand the reference to 'regular' and 'significant' mortality or serious injury as indicating that there exist risks of dolphin death or serious injury that are equivalent to or greater than those existing in the ETP large purse-seine fishery. We therefore consider that this determination also appears to enhance the correlation, in respect of 'all other fisheries,' between the risks of harm to dolphins and the manner in which the measure seeks to address those risks.").

[405] *See* 2013 Final Rule, at 41,000 (Exh. US-6) ("NMFS has no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP, where dolphins are systematically and routinely chased and encircled each year in significant numbers by tuna fishing vessels, or any tuna fishery that has regular and significant mortality or serious injury of dolphins.").

[406] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-242.

direct dolphin mortality occurring there, compared to mortality levels in other fisheries, it was based on the levels occurring in 1997 and preceding years.[407]

166. In light of these considerations, NOAA determined that the most appropriate benchmark was a 20-year average of direct dolphin mortalities caused by dolphin sets in the ETP, beginning in 1997 and ending at the present day. In terms of promoting the objective of the measure while ensuring even-handed treatment of different fisheries, this approach has several advantages, namely: (1) averages are generally a more reliable basis on which to make scientific determinations than single-year figures; (2) it takes into account both the levels of mortality that were occurring at the time the enhanced observer and tracking and verification requirements were imposed an current levels; and, (3) it is conservative in nature, which is consistent with the objective of dolphin protection, because it takes into account any declines in direct mortalities due to dolphin sets in the ETP that have occurred over the past 20 years.

167. Third, on this basis, the United States considered the available fishery-specific evidence concerning per set mortalities in fisheries other than the ETP large purse seine fishery. As is shown by the relevant evidence on the record in this dispute, no evidence suggests that, on a per set basis, any other fishery causes close to the level of dolphin mortalities caused by dolphin sets in the ETP, as an average since 1997.[408] This, course, is not a surprising result. Setting on dolphins is unique in that dolphins are an essential component of the fishing method, and, as such, the fishing method is intrinsically dangerous to dolphins in the sense of putting (typically) hundreds of dolphins at risk in every set. By contrast, the vast majority of the sets in other fisheries involve no dolphin interaction at all, and, therefore, no dolphin harm. Thus, no evidence suggested that any fishery for which fishery-specific evidence was available exhibited "regular and significant" dolphin mortality.

168. In considering the available evidence, however, it was not possible to find per set data for all fisheries, and, therefore, to make the most appropriate comparison between dolphin mortalities there and mortalities due to dolphin sets in the ETP. For fisheries, such as handline or pole-and-line fisheries where bycatch is known to be low or non-existent, this did not raise a concern, since all the available evidence suggests that dolphin mortality would not rise to the level of being regular and significant if per set data were available.[409] Similarly, for particular longline or purse seine fisheries for which data are not available, the fishery-specific evidence that *is* available (and on the record) suggests that levels of mortality in these fisheries are nowhere close to the "regular and significant" benchmark.[410]

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[407] *See* International Dolphin Conservation Program Act, Pub. L. 105-42 (105th Cong.), Aug. 15, 1997 (Exh. US-132) (establishing the certification and tracking and verification requirements for the ETP large purse seine fishery, on the one hand, and other fisheries, on the other, as well as the determination provisions).

[408] *See* "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111); "Tables Summarizing Fishery-by-Fishery Evidence on the Record" (Exh. US-13).

[409] *See supra*, secs. III.B.1.b.iii, III.B.1.b.vi.

[410] For example, while per set data is not available on every country's WCPO purse seine fishery, overall per set data presented by the WCPFC strongly suggests that per set interactions do not rise to the level of the

169. However, evidence from certain gillnet fisheries in the Indian Ocean area suggested that levels of mortality are occurring such that, if per set data *were* available, the per set mortality rate likely would meet or exceed the "regular and significant" standard. In particular, several exhibits presented in the first compliance proceeding suggested an alarming level of dolphin mortality was occurring in the Indian and Pakistani gillnet fisheries in the Indian Ocean, as well as in neighboring fisheries of other countries.[411] The United States attempted to find per set data on these fisheries, but none was available. Consequently, the United States considered whether any alternative metrics might act as a proxy for per set data and enable an evaluation of those fisheries. NOAA determined that data were available to support evaluation under a dolphin bycatch rate metric, *i.e.*, the number of dolphins killed per ton of target catch (tuna) landed.[412]

170. Admittedly, the bycatch rate is an imperfect metric for determining "regular and significant" mortality or serious injury under the measure. First, such a metric is not consistent with the per set approach of the measure. Second, under such metric, fisheries that have high tuna harvests are less likely to have high bycatch rates, compared to low yield tuna fisheries, yet there is no indication in U.S. law that the size of the *tuna* harvest is a relevant factor in determining whether a "regular and significant" mortality or serious injury of *dolphins* is occurring in a particular fishery.[413]

171. Nevertheless, the bycatch rate metric has several advantages as a reasonable proxy for per set data. First, bycatch rate will roughly track and reflect the level of effort in the fishery. It is not a perfect proxy, as it varies with the quantity of tuna caught rather than the number of sets, but it does relate individual dolphin mortalities to the size and effort level of a fishery.[414] Second, the data on bycatch rate was available for dolphin sets in the ETP from 1997-2015 and

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"regular and significant" benchmark, as the overall data for 2014-2015 shows that per set mortalities in the WCPO tropical purse seine fishery are approximately 1.3 percent of per set mortalities caused by dolphin sets in the ETP. *See* WCPFC, "Overview of Tuna Fisheries in the Western and Central Pacific Ocean, Including Economic Conditions - 2015," at 55 (Exh. US-108) (showing that vessels in the WCPO tropical purse seine fishery conducted approximately 56,000 sets in 2014 and 48,000 sets in 2015); WCPFC, 7th Annual Report for the Regional Observer Programme, at 4-5 (Exh. US-109) (showing that, in 2014, there were 31 dolphin mortalities in 845 observed trips, representing 46 percent of all trips, suggesting a per set mortality rate of .0012 dolphins per set); WCPFC, 8th Annual Report for the Regional Observer Programme, at 5-6 (Exh. US-109) (showing that, in 2015, there were 66 dolphin mortalities in 932 observed trips, representing 63 percent of all trips, suggesting a per set mortality rate of 0.0022 dolphins per set). The available evidence thus suggests that these individual purse seine fisheries are also below (indeed, likely very far below) the "regular and significant" benchmark.

[411] *See* M. Moazzam, "Status report on bycatch of tuna gillnet operations in Pakistan," IOTC 8th Session of the Working Party on Ecosystems and Bycatch (2012) (1st 21.5 Exh. MEX-51); Anderson 2015, at 46-52 (Exh. MEX-42) (1st 21.5 Exh. MEX-161).

[412] *See* Anderson 2015, at 47 (Exh. MEX-42).

[413] In this regard, the United States notes that Mexico takes the position that the volume of tuna harvested is not a relevant consideration in the second step of the Article 2.1 analysis. *See* Mexico's First Written Submission, para. 253 ("Calibration focuses on the risks of tuna fishing on dolphins, not the volume of tuna products imported.").

[414] *See* Anderson 2015, at 47 (Exh. MEX-42).

for the Indian Ocean gillnet fisheries at issue. Consequently, the United States conducted a bycatch rate analysis of these fisheries, compared to the ETP benchmark, as follows:

Dolphin Bycatch Rate Due to Dolphin Sets in the ETP and in Fisheries Where Set Data Is Unavailable[415]				
	Year(s)	**Retained Catch (mt)**	**Dolphin Mortalities**	**Dolphin Bycatch Rate**
ETP Dolphin Sets	1997-2015	3,255,524	25,178	0.008
Indian Ocean Gillnet Fisheries				
Iran	2009 / 2012	197,553	24,694	0.1250
India	2009 / 2012	82,090	10,261	0.1250
Sri Lanka	2009 / 2012	79,425	9,928	0.1250
Pakistan	2009 / 2012	58,406	7,301	0.1250
Oman	2009 / 2012	19,942	2,493	0.1250
Yemen	2009 / 2012	18,914	2,364	0.1250
Tanzania	2009 / 2012	8,064	1,008	0.1250
UAE	2009 / 2012	7,532	942	0.1251
Mozambique	2009 / 2012	5,378	672	0.1250
Saudi Arabia	2009 / 2012	3,615	452	0.1250

172. Thus, the Indian Ocean gillnet fisheries in question exhibited bycatch rates *significantly* higher than that caused by dolphin sets in the ETP during the relevant period. On this basis, the United States concluded that the mortality per ton of tuna exceeded the mortality per ton of tuna in the ETP dolphin sets and that it was highly likely that, were per set data available, it would exceed the ETP benchmark, thus justifying a "regular and significant" mortality determination.

173. The data, however, were generalized estimates based on a few studies of particular gillnet fisheries in the region.[416] Consequently, the United States sent letters to all the countries whose fleets would be affected by a determination regarding these fisheries asking for additional

[415] "Dolphin Bycatch Rate Due to Dolphin Sets in the ETP and Fisheries Where Per Set Data Are Unavailable" (Exh. US-133) and the sources cited therein.

[416] *See* Anderson 2015, at 48-49 (Exh. MEX-42) (referring to the figures as "rough estimates" and noting that "[v]ery little is documented" about some of the gillnet fisheries in question).

information as to the level of dolphin mortality occurring in their gillnet fisheries.[417] Each countries had sixty days to respond to provide current data with regard to their gillnet fisheries. None of these countries replied with any more recent dolphin mortality studies.

174. Therefore, on September 28, 2016, NOAA issued a determination, on the basis of the best information available, that a "regular and significant" mortality of dolphins was occurring in these fisheries.[418] The determination provided that any tuna product produced from these fisheries to be marketed as dolphin safe in the United States would have to be accompanied by a certification by an observer from a qualified and authorized observer program and a certification attesting to the catch documentation, the substance of the dolphin safe labeling standards, and the chain of custody information.[419]

175. Thus, in the context of amending the design determination provisions, the United States conducted evaluated their application based on an appropriate metric and benchmark. The evidence confirmed that, for all the fisheries for which per set mortality data is available, a positive determination was not required. For certain gillnet fisheries, however, this data was not available, but other relevant data suggested that these fisheries would meet the standard of "regular and significant mortality." On this basis, and in the absence of contradictory information submitted by the countries, NOAA designated these fisheries. Thus, the application of the determination provision, like its design, is in compliance with Article 2.1.

5. The Detrimental Impact Stems Exclusively from Legitimate Regulatory Distinctions

176. As in the U.S. first written submission, the United States separately analyzed the four elements of the dolphin safe labeling measure to show that each, standing alone, is even-handed. Additionally, as the United States explained, the measure as a whole is even-handed.[420]

177. The U.S. measure draws distinctions between fishing methods and between fisheries. Individually and collectively, these distinctions are based on a comparative assessment of the risks to dolphins posed by tuna fishing by different fishing methods in different ocean areas. The eligibility criteria, which apply across all fisheries, make ineligible for the label tuna product produced by a fishing method (setting on dolphins) that is inherently unsafe for dolphins, even under the restrictions of the AIDCP, while allowing tuna produced by other methods to be potentially eligible, provided no direct dolphin mortalities or serious injuries occurred during a particular set. The certification and tracking and verification requirements distinguish between

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[417] *See* Letters from Eileen Sobeck, NOAA Assistant Administrator, to Ambassadors of Indian Ocean Fishing Countries, May-June, 2016 (Exh. US-134).

[418] NOAA, "Taking and Importing of Marine Mammals and Dolphin-Safe Tuna Products," 81 Fed. Reg. 66,625 (Exh. US-131).

[419] NOAA, "Taking and Importing of Marine Mammals and Dolphin-Safe Tuna Products," 81 Fed. Reg. at 66,626 (Exh. US-131); *see also* Letters from Eileen Sobeck, NOAA Assistant Administrator, to Ambassadors of Indian Ocean Fishing Countries, Sept. 30, 2016 (Exh. US-135).

[420] *See* U.S. First Written Submission, paras. 179-186.

tuna product produced in the high risk ETP large purse seine fishery, where dolphins are "systematically" targeted, and tuna product produced from other fisheries. The determination provisions provide that tuna product produced from fisheries outside the ETP large purse seine fishery that also have a high risk profile for dolphins are subject to enhanced certification and tracking and verification requirements similar to those for tuna product produced from the ETP large purse seine fishery.

178. Thus, an analysis of how the measure's four interrelated elements treat the ETP large purse seine fishery and other fisheries shows that 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.

IV. THE AMENDED MEASURE IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

179. In the U.S. first written submission, the United States explained why the measure meets the requirements of Article XX of the GATT 1994.[421] Mexico puts forth no particular rebuttal in this regard, relying exclusively on its argument concerning Article 2.1 of the TBT Agreement.[422] In light of the U.S. response to that argument provided above, it is not necessary to provide any further argumentation at this time.

V. CONCLUSION

180. 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 TBT Agreement and the GATT 1994.

[421] *See* U.S. First Written Submission, paras. 191-233.

[422] *See* Mexico's First Written Submission, para. 337.