



**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

**UNITED STATES – MEASURES CONCERNING THE IMPORTATION,
MARKETING AND SALE OF TUNA AND TUNA PRODUCTS**

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

AB-2017-9

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to E to the Report of the Appellate Body circulated as document WT/DS381/AB/RW/USA, WT/DS381/AB/RW2.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A-1**MEXICO'S NOTICE OF APPEAL***

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 20(1) of the *Working Procedures for Appellate Review*, the United Mexican States (Mexico) hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panels in *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 – United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second recourse to article 21.5 of the DSU by Mexico* (Reports of the Panels).

2. Mexico is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Where Mexico has not appealed an issue relating to the findings or the reasoning of the Panels, this does not signify agreement therewith or constitute any admission on the part of Mexico.

3. Pursuant to Rule 21(1) and 21(2) of the *Working Procedures*, Mexico is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

4. The measure at issue in this dispute concerns the amended tuna measure, which comprises the following elements (referred to collectively as the "2016 tuna measure"): (i) Section 1385 ("Dolphin Protection Consumer Information Act") (DPCIA), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (ii) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended in March 2016; and (iii) the court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

5. Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Reports containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

I. The Panels Erred in their Interpretation of the Applicable Legal Analysis in the Second Step of the Assessment of "Treatment No Less Favourable" under Article 2.1 of the TBT Agreement

6. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panels with respect to the interpretation and application of the legal analysis in the second step of the assessment of whether the 2016 tuna measure accords "treatment no less favourable" to Mexican tuna products within the meaning of Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).

7. In determining whether the detrimental impact caused by the 2016 tuna measure stems exclusively from a legitimate regulatory distinction, the Panels made errors in interpreting and applying the analytical methodology for assessing whether the regulatory distinctions giving rise to the detrimental impact are designed and applied in an even-handed manner. In particular, the Panels erred in: interpreting how the objectives pursued by the 2016 tuna measure are taken into account in the assessment of whether the relevant regulatory distinctions are "calibrated" to the overall relative risks to dolphins arising from different tuna fishing methods in different areas of the oceans, and failing to include an inquiry into the nexus between the relevant regulatory distinctions and the objectives of the measure, including consideration of whether the differences in regulatory treatment, and the resulting detrimental impact, are disproportionate in the light of the objectives pursued; and in determining and comparatively analyzing the risk profile of the AIDCP-compliant

* This notification, dated 1 December 2017, was circulated to Members as document WT/DS381/45.

dolphin encirclement fishing method in the ETP and risk profiles of the other fishing methods for the purposes of the "calibration" test.

8. The Panels' errors are based on erroneous findings on issues of law and legal interpretation, including the following:

- a. The findings and conclusions of the Panels with respect to the relevance and the consideration of the risks to dolphins associated with inaccurate labelling information, including in relation to the absence of sufficient regulatory oversight, the reliability of reporting, the existence of illegal, unreported and unregulated (IUU) fishing, and the existence of transshipment and catch consolidation at sea in different areas of the oceans. In particular, the Panels erred in finding that the risks to dolphins associated with inaccurate dolphin-safe labelling are not relevant to the determination and comparative analysis of the risk profiles of the different fishing methods in different areas of the oceans.¹
- b. The findings and conclusions of the Panels in determining and comparatively analyzing the respective risk profiles (i.e., the overall relative risks or levels of harm to dolphins) of different fishing methods in different areas of the oceans. In particular, the Panels erred in drawing conclusions on risk profiles relating to different fishing methods rather than risk profiles relating to different fisheries (i.e., different fishing methods in different areas of the oceans).²
- c. The findings and conclusions of the Panels relating to the standards and benchmarks used for determining and comparing the respective risk profiles. In particular, the Panels erred in primarily using a "per 1,000 set" standard to determine and compare risk profiles, rejecting the use of "Potential Biological Removal" (PBR) data or absolute levels of adverse effects to supplement the analysis, using a qualitative description of the characteristics of the AIDCP-compliant dolphin encirclement method for the purposes of determining its risk profile, and using the risk profile of the AIDCP-compliant dolphin encirclement fishing method in the ETP as the benchmark for the comparative analysis of all risk profiles and the assessment of whether the tuna measure is "calibrated" to the different risk profiles.³

II. The Panels Erred in their Findings when Assessing whether the Relevant Regulatory Distinctions in the Labelling Conditions of the 2016 Tuna Measure are Consistent with Article 2.1 of the TBT Agreement on the Basis that they are "Calibrated" to the Different Risk Profiles

9. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panels that the 2016 tuna measure is consistent with Article 2.1 of the TBT Agreement on the basis that the relevant regulatory distinctions in the labelling conditions are "calibrated" to the different risk profiles. The Panels' findings and conclusions are in error and based on incorrect findings of law and legal interpretations, including the following:

- a. The findings and conclusion of the Panels with respect to the eligibility criteria in assessing the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement. In particular, the Panels erred in finding that the eligibility criteria are "calibrated" to the overall relative risks to dolphins arising from different fishing methods in different ocean areas.⁴
- b. The findings and conclusion of the Panels with respect to the certification criteria in assessing the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement. In particular, the Panels erred in finding that the certification criteria are "calibrated" to

¹ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.102, 7.104-7.105, 7.107-7.127.

² The Panels' errors in law are contained, *inter alia*, in paragraphs 7.169-7.170, 7.283-7.285, 7.310, 7.400-7.402, 7.450, 7.457, 7.475, 7.481, 7.494, 7.511, 7.517-7.525, 7.539, 7.541-7.542, 7.571.

³ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.169-7.170, 7.185-7.186, 7.188-7.192, 7.195, 7.204-7.206, 7.211-7.214, 7.279-7.280, 7.281, 7.285, 7.329, 7.339, 7.345, 7.336, 7.373-7.374, 7.384-7.385, 7.89-7.90, 7.397-7.398, 7.419-7.420, 7.469-7.471, 7.473-7.475, 7.518-7.524.

⁴ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.539-7.547.

the overall relative risks to dolphins arising from different fishing methods in different ocean areas.⁵

- c. The findings and conclusion of the Panels with respect to the tracking and verification criteria in assessing the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement. In particular, the Panels erred in finding that the certification criteria are "calibrated" to the overall relative risks to dolphins arising from different fishing methods in different ocean areas.⁶ Mexico also requests the Appellate Body to find that the Panels failed to make an objective assessment of the facts, as required by Article 11 of the DSU, with respect to their findings and conclusion regarding the tracking and verification criteria. In particular, the Panels erred in expressly refusing to give any consideration to evidence adduced by Mexico that was directly relevant and material to the outcome of the legal analysis.⁷
- d. The findings and conclusions of the Panels with respect to the "overall assessment of the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement". In particular, the Panels erred in finding that the 2016 tuna measure, as a whole, is "calibrated" to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁸

III. The Panels Erred in their Findings when Assessing whether the 2016 Tuna Measure is Consistent with the Chapeau of Article XX of the GATT 1994

10. Mexico also seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panels that the 2016 tuna measure, although inconsistent with Articles I:1 and III:4 of the GATT 1994, is exempt from those obligations on the basis that it is justified under Article XX of the GATT 1994. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.⁹ Mexico requests that the Appellate Body modify the reasoning of the Panel and find that the 2016 tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

IV. The Panels Erred in their Finding that they had the Authority to Conduct a Partially Open Meeting

11. Mexico also seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusion of the Panels that they had the authority to conduct a partially open meeting of the parties without the consent of both Parties.

⁵ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.571-7.573, 7.600-7.611.

⁶ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.650, 7.652, 7.671-7.676.

⁷ The Panels' errors in law are contained, *inter alia*, in paragraphs 6.57 and 7.656.

⁸ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.703-7.717, 8.2, 8.6.

⁹ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.739-7.740, 8.3, 8.7.

ANNEX B

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ANNEX B-1**EXECUTIVE SUMMARY OF MEXICO'S APPELLANT'S SUBMISSION****I. INTRODUCTION**

1. This dispute concerns the long-standing consumer labelling regime of the United States that prohibits virtually all Mexican tuna products from being labelled "dolphin-safe", while permitting all tuna and tuna products from the United States and virtually all other countries to be labelled as dolphin-safe without assurances that they are so. In this way, the U.S. measure, including the combined operation of its dolphin-safe labelling conditions and requirements, modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna and tuna products *vis-à-vis* like products from the United States and other countries in a manner that is not consistent with the United States' commitments under the WTO Agreements.

2. Mexican tuna products contain tuna caught by the Mexican fleet in the Eastern Tropical Pacific Ocean (ETP) using a fishing method is certified as "dolphin-safe" under the Agreement on the International Dolphin Conservation Program (AIDCP), a multilateral environmental agreement to which the United States is a party. The AIDCP is an award-winning environmental agreement that is an unqualified success and has enormously reduced dolphin mortality to statistically insignificant levels while promoting sustainable fishing practices. When adopting the AIDCP, the Parties recognized that the scientific evidence demonstrated that such fishing practices are an effective method for the protection of dolphins and rational use of tuna resources in the ETP. The AIDCP's objectives are to minimize to the greatest extent possible dolphin mortality in the ETP while, at the same time, ensuring the sustainability of tuna stocks and associated species in the ETP pelagic ecosystem. Maintaining these dual goals of protecting dolphins as well as other species in the ecosystem is crucially important.

3. Meanwhile, notwithstanding the extensive evidence that there are substantial adverse effects on dolphins in tuna fisheries throughout the world, little, if anything, has been done to protect dolphins in those other fisheries. Yet the U.S. tuna measure allows tuna products from those fisheries to be freely labelled "dolphin-safe", while prohibiting use of the label for Mexican tuna products.

4. It is the combined granting and denial of dolphin-safe label under the measure that upsets the balance of competitive opportunities between Mexican tuna products and tuna products from the United States and other countries. These actions, in particular the large supply of purportedly dolphin-safe products permitted by the measure, have artificially shaped the U.S. market for tuna products into what it is today. This situation would be drastically altered if tuna products from U.S. and other sources were truly dolphin-safe. Dolphins would be better protected, the supply of dolphin-safe tuna products would be reduced to the correct levels, and an incentive would be created for all participants in the U.S. market to reconsider the dolphin-safe issue and the broader issue of fisheries sustainability.

5. Mexico disagrees with the prior findings that tuna caught by AIDCP-compliant setting on dolphins in the ETP can be ineligible for the dolphin-safe label. However, this appeal does not focus on the denial of the label for Mexican tuna products. Rather, this appeal focuses on the granting of access to the label for tuna products containing tuna that is *not* dolphin-safe. The measure does this in a manner that is inconsistent with the objective of protecting dolphins and inconsistent with the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade, 1994 (GATT 1994). The Panels erred in finding that the measure is consistent with these Agreements.

II. GROUNDS FOR APPEAL

6. The focus of this appeal is on the interpretation and application of the legal tests for determining whether the detrimental impact caused by the tuna measure stems exclusively from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement and whether the tuna measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail under the chapeau of Article XX of the

GATT 1994. Specifically, the central issue is whether the differences in the labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP and for tuna products containing tuna caught by other fishing methods in ocean areas outside the ETP are "calibrated" and otherwise designed and applied in an even-handed manner such that the tuna measure is in compliance with the requirements of Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994.

A. The Panels Erred in Finding that the Tuna Measure is Consistent with Article 2.1 of the TBT Agreement

1. Errors in the Panels' Legal Interpretation of the Even-Handedness Test

7. The Panels erred in their legal interpretation of the calibration test and the overall assessment of even-handedness in the second part of the "treatment no less favourable" analysis under Article 2.1 of the TBT Agreement.

8. First, the Panels erred by not reflecting the objectives of the measure in the substantive criteria for assessing whether the measure's regulatory distinctions are designed and applied in an even-handed manner, including on the basis of calibration.

9. Second, in determining the risk profiles for their calibration assessment, the Panels failed to recognize that the risks to dolphins are inextricably linked to the characteristics of ocean areas and fisheries that impact the accuracy of the dolphin-safe label. These characteristics include the absence of sufficient regulatory oversight, the reliability of reporting, the existence of illegal, unreported, and unregulated (IUU) fishing, and the existence of transshipment at sea. The Panels erroneously interpreted the applicable "calibration" assessment to focus solely on the impact of fishing methods in terms of observable and unobservable mortality and serious injury caused to dolphins. This interpretation is too narrow, incomplete, and is legally erroneous. This is particularly so for the certification requirements and the tracking and verification requirements, which are directly aimed at ensuring label accuracy. The very purpose and function of these requirements is to ensure that the information provided to consumers on the dolphin-safe label accurately reflects that the product contains no tuna that was caught in a manner that adversely affects dolphins.

10. Third, the Panels erred by interpreting "risk of inaccuracy" narrowly to relate to the symptom or outcome (i.e., an inaccurate label) rather than the risk factors that cause the symptom or outcome (e.g., the absence of sufficient regulatory oversight, the reliability of reporting, the existence of IUU fishing, and the existence of transshipment at sea). As a result of this error, the Panels concluded that in every fishery outside the ETP, the label could have a "margin of error", without regard to the actual differences among fisheries in the reliability of their certification, tracking and verification systems. By taking this approach, fishing areas that are known to have insufficient regulatory oversight, to have unreliable reporting, significant IUU fishing and transshipment are treated the same as fishing areas that do not have these problems. Consequently, the Panels failed to properly assess the relevant differences between fisheries and therefore did not take into account the risk factors that exist in the different ocean areas.

11. Finally, the Panels erred by not interpreting Article 2.1 in its context, including the sixth recital of the preamble to the TBT Agreement and the chapeau of Article XX of the GATT 1994, so as to ensure symmetry in the interpretation of arbitrary and unjustifiable discrimination in the two provisions and include under both provisions an assessment of the nexus between the regulatory distinctions and the objectives of the measure.

2. Errors in the Application of Calibration to the Facts

12. The Panels' errors in the interpretation of Article 2.1 led the Panels to err in their establishment and assessment of the risk profiles of the different fishing methods and ocean areas. These risk profiles are central to the calibration assessment because they set out the factors that will be used to assess whether the tuna measure's regulatory distinctions are appropriately calibrated to the overall relative risks arising from the use of different fishing methods in different areas of the oceans.

a. The Panels Erred by Failing to Include Calibration Criteria on Ocean Areas

13. Apart from AIDCP-compliant dolphin encirclement in the ETP, the Panels did not draw any conclusions on the risk profiles of fishing methods *in different ocean areas*. The risk profiles of the different fishing methods were assessed on a worldwide basis, without consideration of individual fisheries, particularly those in which a fishing method is causing significant adverse effects on dolphins. The Panels' analysis consisted of a comparative assessment of the risk profiles of the AIDCP-compliant dolphin encirclement fishing method in the ETP to each of the other six fishing methods throughout the world. For each of these other six fishing methods, the Panels effectively averaged or sampled the overall relative risks or levels of harm over all of the fisheries that use the method. As a consequence of the Panels' approach, ocean areas in which the evidence demonstrates that a fishing method is causing significant adverse effects on dolphins are "masked" or "hidden" within the worldwide risk profile for that method. The Panels' conclusions erroneously reflect a comparison of risk profiles of different fishing methods, rather than a comparison of the risk profiles of different fishing methods in different ocean areas (i.e., fisheries). It is clear from the design, architecture, and revealing structure of the measure and from the prior rulings of the Appellate Body that a calibration analysis in this instance requires the comparison of the risk profiles of the different fishing methods in different areas of the oceans. The Panels did not undertake this.

14. Failing to assess both fishing methods and ocean areas contradicts the two objectives of the measure: ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, and, contributing to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. While the Panels stated that they were conducting an "assessment of the overall levels of relative risks posed to dolphins by different fishing methods in different areas of the ocean", they actually undertook only a partial assessment of certain risks averaged across all areas of the oceans.

b. The Panels Erred by Using a Single Benchmark Based on the AIDCP-Compliant Setting on Dolphins

15. The Panels used the risks of harm posed by the AIDCP-compliant dolphin encirclement method in the ETP as the benchmark for the purposes of conducting their risk profile assessment of all tuna fisheries. The use of such a benchmark is erroneous for three reasons.

16. Under the Panels' approach, the benchmark against which the risk profiles of all other fishing methods and ocean areas are compared is the risk profile of the very fishing method and ocean area that is the subject of the discrimination being challenged. Using the dolphin set fishery in the ETP as the benchmark for determining the even-handedness of the regulatory distinctions giving rise to the detrimental impact renders *inutile* the second step of the analysis. This is because, by definition, the risk profile of the fishery targeted by the measure can never better such a benchmark. A benchmark cannot be used to objectively assess the circumstances that constitute the benchmark itself.

17. The benchmark must be an independent and objective standard or point of reference against which the overall relative risks or levels of harm arising from each of the different fishing methods in different areas of the oceans must be assessed, including those that are prohibited and those that are permitted under the tuna measure (i.e., both sides of the relevant regulatory distinctions). The benchmark should correspond to the specific issue or circumstance that the relevant regulatory distinctions are meant to address in the light of the objectives of the measure. In this case, the relevant regulatory distinctions are meant to address the adverse effects — that is, the mortalities and serious injuries — that caused to dolphins by different fishing methods in different areas of the oceans.

18. Due to the differences in adverse effects that a given fishing method can cause in different ocean areas, it is impossible to apply a single benchmark across all fisheries for this calibration assessment. Each fishing method and fishing area must be assessed for its different relative risks that dolphins will be adversely affected in the course of tuna fishing operations.

19. The Panels focused on distinguishing Mexico's fishing method in the ETP from all other fishing methods and, in doing so, the Panels did not assess whether tuna caught by other fishing methods

in other ocean areas should also be excluded from access to the label. The Panels' approach erroneously examined only one side of the relevant regulatory distinction.

20. At most, the Panels' approach encompasses how the relevant regulatory distinctions address the relative risks or levels of harm associated with AIDCP-compliant dolphin sets in the ETP. The Panels erred because their approach did not assess whether the risks or levels of harm associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles, in the labelling conditions that apply in respect of tuna caught in such other fisheries.

21. The risk profile criteria used by the Panels focused on qualitative attributes that are unique to the AIDCP-compliant dolphin encirclement method in the ETP, further ingraining this single benchmark into the Panels' calibration analysis.

22. The Panels' analytical approach caused them to disregard the Appellate Body's direction to take into account the overall effects of each fishing method. Rather than determining the overall relative risks or levels of harm attributable to different fisheries, "including both observed *and* unobserved harms", the Panels analysis created distinctions between (i) different "kinds" of unobservable harms and (ii) the "nature and extent of the interactions with dolphins" of different fishing methods in different areas of the oceans. The practical effect of these distinctions in the Panels' analyses was to exclude certain kinds of harms and certain harmful fishing methods from a direct comparison with the relative overall risks or levels of harm associated with the AIDCP-compliant dolphin encirclement fishing method in the ETP.

23. The Panels' approach means that mortalities and serious injury can be inflicted on dolphins as long as they do not constitute the same "kinds" of harm that have been attributed to the AIDCP-compliant dolphin encirclement method in the ETP.

c. The Panels Erred by Relying on Measurements of Risk to Dolphins that were Incomplete

24. The Panels identified as relevant to the "risk profile": (i) the number of observed mortalities and serious injuries per 1,000 sets; (ii) the existence of unobservable mortalities and serious injuries of the "kinds" it found exist for AIDCP-compliant setting on dolphins in the ETP; (iii) the necessity for a particular method to interact with dolphins; and (iv) the level of interactions with dolphins, although the latter two factors were treated as a proxy for estimating unobservable mortalities and serious injuries, rather than as distinct factors. The Panels rejected to use of other measurement methodologies based on the Potential Biological Removal (PBR) methodology and the absolute levels of dolphin mortalities and serious injuries.

25. The Panels erred in failing to address the deficiencies in their measurement approach, including the improper narrowing of the "risk profiles" of the different fishing methods and fishing areas to be assessed and compared in a manner that omitted important risk factors. The Panels' approach omits from the risk assessment of fishing methods and ocean areas:

- The impact of tuna fishing methods on the sustainability of dolphin stocks, allowing the dolphin-safe label to be used on tuna caught in a manner that jeopardizes the sustainability of dolphin stocks in at least three ocean areas.
- The absolute dolphin mortalities and serious injuries in ocean areas, allowing the dolphin safe label to be used on tuna caught in ocean areas where thousands of dolphins are killed on an annual basis by tuna fishing.
- The risks created in certain ocean areas by insufficient regulatory oversight, unreliable reporting, significant IUU fishing and/or significant transshipment at sea.

26. In reviewing potential alternative methods for evaluating the risk profiles of different fishing methods, the Panels rejected the use of PBR levels. The PBR level is the maximum number of animals, not including natural mortalities, that may be removed from an animal stock (such as dolphins) while allowing that stock to reach or maintain its optimum sustainable population. It provides a measurement of the magnitude of adverse effects on dolphins that is essential for a comparison between ocean areas. A small number of dolphin mortalities will have a much greater

comparative magnitude of adverse effects in ocean areas where dolphin stocks are endangered or low. By rejecting this measurement, the Panels erroneously rejected endangered and low dolphin stocks as a relevant risk factor for eligibility for the label. This contradicts the objective of the tuna measure to discourage fishing practices that are harmful to dolphins. Endangering dolphin stocks in an ocean area is clearly harmful by any measure.

27. The Panels asserted that using the PBR methodology would not be useful, claiming that the tuna measure is concerned with the risks facing dolphins "at an individual level, rather than at a population level". The Panels did not adequately explain, within the context of the design, structure and architecture of the tuna measure, how use of a fishing method in that is causing or threatening dolphin population collapse in a region could be considered not to be adversely affecting dolphins. As Mexico argued, where mortalities could result in the extinction of a dolphin stock, such potential extinctions are encompassed by the concept of "adversely affecting" dolphins. The Panels made no attempt to justify their overlooking of mortalities that endanger the population of dolphins in particular fisheries, such as the following:

- Main Hawaii Island Insular Stock Longline fishery;
- West North Atlantic Longline fishery;
- Pelagic Hawaii Longline fishery.

28. The Panels also rejected Mexico's alternative argument that, if the PBR method was not used, the absolute levels of adverse effects should be used.

29. By dismissing the absolute level approach and adopting a per 1000 set metric (at least for some fisheries), the Panels missed the "big picture" regarding adverse effects on dolphins in a fishery. Where there is a high frequency of sets, the overall adverse effects will be masked. Thus, tuna caught in an ocean area where tuna fishing is causing tens of thousands of deaths per year could be found eligible for the dolphin-safe label. The fact that certain sets do not cause dolphin deaths and serious injuries and the tuna from such sets would be eligible for the label, does not eliminate the fact that tens of thousands of dolphins are being killed in the fishery. These adverse effects are the "overall adverse effects on dolphins" for the fishing method/area. Such fishing practices in such ocean areas should be discouraged.

30. Like the omission of the PBR, the omission of these overall adverse effects contradicts the two objectives of the measure.

31. Calibration involves the assessment of the relative risks of overall harms to dolphins posed by different fishing methods in different ocean regions. For a given fishing method that causes harms to dolphins, dolphins will be at a greater relative risk of harms from that fishing method in ocean areas that have insufficient regulatory oversight including unreliable reporting, significant IUU fishing and/or significant transshipment at sea than in ocean areas that do not. Moreover, these risk factors are directly relevant to the calibration of the certification and tracking and verification labelling conditions. Stricter controls are needed in ocean areas that have these attributes compared to ocean areas that do not.

32. The Panels rejected Mexico's argument that the reliability of the applicable systems in different fisheries for certification, tracking and verification are integral elements of the risk profile of different fisheries that must be assessed and compared.

33. The omission of the reliability of reporting as a criterion in the risk profiles of the fishing areas contradicts the objectives of the measure. There is a greater risk that adverse effects on dolphins will be unreported in unreliable fisheries than in reliable fisheries and, therefore, that actions that adversely affect dolphins in unreliable fisheries will not be discouraged by the measure. Given the importance of certification, tracking and verification to these objectives and to the measure as a whole, the reliability criterion should have been included in the risk profiles.

34. By rejecting these risk factors in their risk assessment, the Panels erred because their risk analysis was incomplete, and the gaps created in the risk profiles contradicted the objectives of the measure.

d. The Panels Incorrectly Assessed the Calibration of each of the Three Labelling Conditions of the Tuna Measure

35. For all three regulatory distinctions, the calibration assessment requires consideration of both fishing methods and ocean areas. The Panels' errors lie principally in their failure to account for differences between ocean areas related to adverse effects on dolphins, regulatory oversight, reliability of reporting, IUU fishing and transshipment. These errors enable the dolphin-safe label to be used on tuna products that are not dolphin-safe, including products containing tuna that was caught using fishing methods in ocean areas where there are systematic and substantial dolphin mortalities and serious injury, in at least three instances where the sustainability of dolphin stocks is jeopardized, and where there is a lack of regulatory oversight, unreliable reporting, IUU fishing and transshipment. These deficiencies in the Panels' assessment enable the label to be used on tuna products when it should not be.

(1) Eligibility Criteria

36. The eligibility criteria determine which fishing methods in certain ocean areas are permitted and which fishing methods in certain ocean areas are prohibited from harvesting tuna to make tuna products that are eligible for the U.S. "dolphin-safe" label. These criteria disqualify tuna harvested using the AIDCP-compliant dolphin-encirclement method in the ETP large purse seine fishery, non-AIDCP-compliant purse seine sets or other gear deployments that intentionally encircle dolphins in all ocean areas, and large-scale driftnet fishing in the high seas ocean areas. All other fishing methods in all other ocean areas (including e.g., driftnet fishing within exclusive economic zones) are permitted to harvest tuna to make products that are eligible for the "dolphin-safe" label in the U.S. market, despite the extensive factual evidence on the record that certain fishing methods in certain ocean areas have substantial adverse effects on dolphins that are equal to or greater than those of the disqualified methods. By permitting, rather than disqualifying, the use of such fishing methods in such ocean areas to make tuna products that are eligible for the "dolphin-safe" label, the regulatory distinction imposed by the eligibility criteria cannot be said to be calibrated – that is, appropriately tailored to, or commensurate with, the relative overall risks to dolphins posed by different fishing methods in different ocean areas.

37. In particular, the Panels completely omitted from their assessment of the eligibility criteria any consideration of the following findings they made and evidence they cited regarding regular and significant mortalities and serious injuries of dolphins from the following fishing methods in the following ocean areas:

- Gillnet fishing in several ocean areas has killed cetaceans arising to the tens of thousands annually, potentially posing a risk to the sustainability of many cetacean stocks;
- Gillnet fishing causes considerable observable harms to dolphins in different areas of the ocean;
- Some tuna gillnet fisheries, particularly driftnets used in coastal areas, are "highly destructive" and represent one of "the greatest threats to populations of small cetaceans in certain areas of the world";
- The significant numbers of dolphin mortalities in the Indian Ocean Mixed-Target Gillnet Fisheries which led NOAA to determine that the mortalities in such fisheries would surpass, many times over, the ETP "regular and significant dolphin mortality or serious injury of dolphins" standard;
- Gillnet fisheries, and driftnet fisheries in particular, have caused, in some circumstances and in certain regions, levels of observable harms greater than those caused by setting on dolphins in the ETP;
- It is estimated that over 18,000 dolphins are killed annually by longline fishing in the Pacific Ocean;

- At least in some fisheries (e.g., Main Hawaii Island Insular Stock Longline fishery, West North Atlantic Longline, Pelagic Hawaii Longline fishery), longlining is having adverse effects on dolphins close to or in excess of the sustainability limits of dolphin populations;
- In relation to trawl fishing, the Panels identified a North Atlantic fishery for which they calculated a per 1,000 set figure of 450 – about five times higher than its figure for the dolphin set fishery in the ETP.
- Gillnet and trawl fishing have caused massive absolute dolphin mortalities in, for example, the Sri Lankan and Indian gillnet fishery, the Chinese Taipei offshore and distant-water gillnet fisheries, and the West African gillnet fishery, as well as the Moroccan driftnet fishery and the Eastern North Atlantic pair trawl fishery.

38. The Panels did not mention these important facts in their assessment of the eligibility criteria. In their discussion of the risk profiles of fishing methods, the Panels disregarded this evidence on the bases, for example, that "while gillnet fishing may be harmful to dolphins, it does not *necessarily* cause such harms in every area of the ocean"; trawl fishing "mortalities are very low in some fisheries and moderate in others"; and population sustainability is not relevant to assessing adverse effects on dolphins.

39. A majority of the Panels' reasoning regarding the eligibility criteria is grounded in the "unobserved" adverse effects caused by setting on dolphins, the finding that this fishing method "routinely and systematically interacts with dolphins" and the finding that other fishing methods "do not cause the same *kinds* of unobservable harms". By limiting their assessment to these distinctions, the Panels excluded adverse effects caused by other fishing methods in other ocean areas, such as such as choking on pieces of gillnets, "ghost fishing" by lost and abandoned gear, and maiming caused by longline hooks. This approach allows for regulatory distinctions that permit mortalities and serious injury of dolphins provided that they do not constitute the same "kinds" of adverse effects that have been attributed to the AIDCP-compliant dolphin encirclement method in the ETP. The Panels' erred by omitting from their calibration assessment other adverse effects caused by other fishing methods in other ocean areas.

40. By any measure, no matter how small on a per set basis, dolphin mortalities and serious injury that threaten dolphin stock sustainability in an ocean area amount to "adverse effects on dolphins" that should be discouraged by the label. The Panels erred by explicitly dismissing these effects as irrelevant, allowing the label to be used for tuna caught in a manner that threatens dolphin stocks, and omitting this important measurement of adverse effects from their calibration assessment of the eligibility criteria.

41. Finally, the Panels erred by omitting from their assessment factors related to the reliability of the ocean area. Dolphins are at a greater overall risk in ocean areas with insufficient regulatory oversight, unreliable reporting, IUU fishing and transshipment at sea than in ocean areas that do not have these attributes. Tuna caught in such ocean areas by any fishing method that causes adverse effects to dolphins should be ineligible for the label and therefore discouraged.

(2) Certification Requirements

42. The "certification requirements" determine who must certify the initial designation of the dolphin-safe status of a catch of tuna at the time of capture. The requirements mandate certification by an independent and qualified observer for tuna caught by large purse seine vessels in the ETP and for all fishing methods in seven U.S. domestic fishery areas for which the Department of Commerce has determined that the U.S. observers are qualified to certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. With respect to these seven fisheries, certification is required by an independent observer only when the observer is on board the vessel for other, unrelated reasons. The United States has also invoked the "determination provisions" in the tuna measure to impose independent observer certification requirements on certain gillnet fisheries in the Indian Ocean on the basis that dolphin mortalities are greater in those fisheries than in the ETP, while simultaneously and contradictorily claiming that purse seine fishing with dolphin sets in the ETP is the only fishing method harmful to dolphins. For all other fishing methods and all other ocean areas captains are allowed to self-certify the dolphin-safe status of tuna at the time of capture, even though the captain might not be qualified to make

the designation, might not be directly involved in the capturing of the tuna, and might be operating in an ocean area that is not subject to sufficient regulatory oversight. By not requiring independent certification in such circumstances, the regulatory distinctions made by the certification requirements are not calibrated. The Panels erred by finding that such distinctions are calibrated and, therefore, erred in finding that the tuna measure is even-handed and consistent with Article 2.1 of the TBT Agreement.

43. The Panels erred by relying on their defective assessment of risk profiles of fishing methods, by relying exclusively on fishing methods while failing to conduct an analysis of ocean areas, and by inappropriately finding that the measure could allow higher margins of error outside the ETP. The Panels also incorrectly found that the "determination provisions" resolved problems with the calibration of the certification requirements, without addressing that, as applied by the United States, a fishery can be designated under the determination provisions only if it has a much higher impact on dolphins than the ETP fishery.

e. Tracking and Verification Requirements

44. The "tracking and verification requirements" ensure that tuna caught by eligible fishing methods in eligible ocean areas that are properly certified as dolphin-safe at the time of capture are accurately tracked from the time of capture to the time of application of the dolphin-safe label on the tuna products that contain the tuna. The tracking and verification requirements for tuna caught by large purse seine vessels inside the ETP are supervised by independent observers and governmental authorities, resulting in comprehensive and reliable documentation. For other fisheries (other than the Indian Ocean gillnet fisheries referenced above), U.S. producers and importers are simply directed to maintain the records they keep in the normal course of business, and the United States submitted no evidence that it had required or obtained fully verifiable tracking and verification documentation from any market participant. By not requiring comprehensive, reliable and accurate tracking and verification requirements for unreliable fisheries – including fisheries that are known to tolerate or are unable to prevent IUU fishing – the regulatory distinctions made by the tracking and verification requirements are not calibrated. The Panels erred by finding that such distinctions are calibrated and, therefore, erred in finding that the tuna measure is even-handed and consistent with Article 2.1 of the TBT Agreement.

45. In evaluating the tracking and verification requirements, the Panels again relied on their defective analysis of risk profiles, including by not taking into account differences among different fisheries outside the ETP, failing to take into account relevant factors such as the reliability of reporting and IUU fishing in particular areas, and applying a faulty analysis to conclude that the differences between the ETP large purse seine fishery and other fisheries have been narrowed. The Panels also acted inconsistently with Article 11 of the DSU by expressly refusing to consider direct evidence that the major tuna products producers are unable to track the sources of their tuna from the Western and Central Pacific and Indian Oceans. As a result of this error, the Panels' findings not only lack a proper basis in the evidence on the record but are contradicted by that evidence.

B. The Panels Erred in Determining that the Tuna Measure Meets the Requirements of the Chapeau of Article XX of the GATT 1994

46. The Panels erred in their reasoning and findings that the tuna measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and is therefore justified under Article XX of the GATT 1994.

47. The Panels erred by declining to conduct, either under Article 2.1 or the chapeau of Article XX, a full assessment of whether the tuna measure is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination by considering, *inter alia*, whether the detrimental impact caused by the tuna measure's regulatory distinctions can be reconciled with, or rationally connected to, the objectives pursued by the measure that were provisionally found to justify the measure under a paragraph (g) of Article XX. Importantly, the Panels made no substantive findings under Article 2.1 with respect to arbitrary or unjustifiable discrimination. Their assessment of the requirements of the chapeau was erroneously incomplete.

C. The Panels Erred in Finding that They Have the Power to Authorize the Conduct of a Partially Open Meeting

48. Based on a unilateral request from the United States that was opposed by Mexico, the Panels partially opened its meeting with the parties to the public, allowing selective video recording and a public showing of the video several weeks after the hearing. This procedure imposed unnecessary burdens on Mexico and interfered with the smooth conduct of the hearing. Mexico seeks a ruling from the Appellate Body, consistent with its prior rulings on this subject, that hearings may be opened only when there is agreement among all the disputing parties.

III. CONCLUSIONS

49. On the basis of the foregoing, Mexico respectfully requests that the Appellate Body find that the Panels erred in their interpretation and application of Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 to the facts at issue, modify the Panels reasoning and reverse the Panels' findings that the 2016 tuna measure is consistent with Article 2.1 and meets the requirements of the chapeau to Article XX.

ANNEX B-2**EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION**

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

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

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

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

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

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

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

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

5. Mexico's first, third, and fourth arguments are redundant of arguments above and fail for the reasons already explained. Mexico's second argument – that the Panels' analysis tolerates less accurate labels for tuna caught outside the ETP large purse seine fishery than tuna caught inside it – is wrong. The Panels correctly reasoned that: (1) they could not assume that the certifications from any fishery were perfectly correct; (2) the risk of inaccurate labeling is not a constant "will depend not only on the ... margin of error [of the certification], but also, and importantly, on the extent of events that require recording whether a dolphin mortality or serious injury was observed in a given fishery"; and (3) in order to determine whether the measure's

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

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

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

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

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

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

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

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

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

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

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

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

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

13. Second, Mexico is wrong to claim that the Panels "erroneously narrowed the risk profile criteria" in their assessment of the risk profile in its discussion of the "kinds of harm" caused by setting on dolphins. Mexico's assertion that the way the Panels grouped types of harm caused by fishing methods caused them to "disregard[]" the alleged effects of "ghost fishing" by gillnets and longline gear is incorrect. In fact, the Panels found that Mexico's evidence on the risks of "ghost fishing" "[were] relevant to [their] assessment of the risk profile of gillnet fishing" but did not agree with Mexico as to what that evidence showed.

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

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

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

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

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

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

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

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

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

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

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

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

21. In section V.C.1.c(4), Mexico claims the Panels erred by "rejecting the risks created in certain ocean areas by insufficient regulatory oversight." Mexico's argument that "insufficient regulatory oversight" itself *causes* greater risk of harm to dolphins and so must be included in the risk profiles of fisheries was addressed above. Mexico's argument that "insufficient regulatory oversight" must

be included in the risk profiles of fisheries because it can affect the reliability of reporting of harms to dolphins was fully considered and rejected by the Panels. As they explained, the risk of inaccurate certification or tracking "are not risks that affect dolphins themselves" and thus do not form part of the "risk profile" for dolphins of tuna fishing in different fisheries, as described by the Appellate Body in the first compliance proceeding. Rather, the risk of inaccurate certification or tracking may be relevant to assessing whether the distinctions of the 2016 measure are calibrated to the risk profiles of different fisheries.

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

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

a. Mexico's Argument that the Panels' Assessment was Incomplete Should be Rejected

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

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

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

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

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

26. Mexico argues that the Panels analysis of whether the eligibility criteria are calibrated is in error because the Panels "failed to include relevant factors in the risk profiles of the fishing methods and ocean areas." The arguments repeat, without addition, arguments Mexico raised in other

sections of its appellant submission that are addressed above. Thus, Mexico's argument that the Panels' analysis of the eligibility criteria is incomplete and in error should be rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36. Finally, Mexico's assertion that, under the Panels' approach, any fishery below the "regular and significant" dolphin mortality or serious injury threshold is "assumed" to pose no or a *de minimis* risk to dolphins is incorrect. The Panels explicitly recognized that such fisheries may pose some risk of harm to dolphins but found that the certification requirements of the 2016 measure "address" those risks to dolphins "in a way that is calibrated to, tailored to, and commensurate with the risk profiles of those fisheries." That conclusion is correct.

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

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

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

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

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

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

the finding that the "differences between the AIDCP and NOAA regimes 'have been considerably narrowed.'" On this basis, Mexico's argument should be rejected.

ii. Mexico Identifies No Legal Error

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

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

iii. The Panels Appropriately Assessed the Facts

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

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

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

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

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

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

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

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

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

50. Third, even if Mexico's interpretation of Exhibit MEX-127 were correct, it would not undermine the Panels' finding that the differences between the regimes had been "narrowed" because Mexico would not have identified any errors that undermine the findings that led to that conclusion, let alone that undermine the objectivity of the Panels' assessment of the facts. Mexico's arguments about Exhibit MEX-127 concern an argument Mexico made that the Panels did not accept or use as a basis for their analysis. They do not detract from the factual bases of the Panels' finding in the evidence on the record or introduce new evidence that "contradict[s]" those bases. Thus, Mexico's arguments concerning Exhibit MEX-127, even if they reflected the correct interpretation of that exhibit, do not undermine the accuracy – let alone the objectivity – of the Panels' assessment that the differences in the tracking and verification requirements for tuna caught outside and inside the ETP large purse seine fishery have been narrowed.

5. The Panels Correctly Found that the Measure is Calibrated

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

accordingly, the alleged errors that Mexico identified in those assessments "flowed through" the Panels' assessment of the measure as a whole.

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

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

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

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

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

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

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

III. CONCLUSION

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

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION¹

1. "Even-handedness" is a concept used to determine whether a measure's detrimental impact on imports stems exclusively from a legitimate regulatory distinction to assess a measure's consistency with Article 2.1 of the TBT Agreement.
2. Australia considers that an assessment of the *legitimacy* of the regulatory distinctions imposed by a measure must be made in light of that measure's *objectives*.
3. "Calibration" is a means of testing, in this particular dispute, the even-handedness of the 2016 Tuna Measure to determine whether its impact on Mexican imports stems exclusively from a legitimate regulatory distinction.
4. In Australia's view, the calibration analysis adopted by the Panel – which assessed whether the measure is calibrated to the risks to dolphins arising from different fishing methods in different areas of the ocean – takes account of the measure's objectives. Mexico's contention that the Panel's analysis did not consider the objective of ensuring accurate consumer information fails to recognise that this objective formed *part of* the objective of *protecting dolphins*.
5. Since the Panel's calibration analysis was based on the objectives of the measure, Australia considers the Panel did not err in its interpretation of the analysis required to determine the legitimacy of the regulatory distinctions imposed by the measure.

¹ Total number of words: 272.

ANNEX C-2**EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION¹**

1. Brazil deals with two main issues in its submission: (i) the scope of the even-handedness test under Article 2.1 of the TBT Agreement and the objectives of the Measure; and (ii) the reasoning behind the Panels' findings regarding the risks to dolphins.

2. First, when reviewing the even-handedness test in the present dispute, the Appellate Body should be guided by the level of adverse effects of the measure and not only by fishing methods, contrary to what was done by the Panels. The even-handedness of the measure should be assessed on the basis of performance requirements, not in relation to a specific technology. This is particularly important for developing members. In this regard, the adjudicating WTO bodies should be cautious concerning statements that could suggest that the only fishing methods that do not pose any harm to dolphins are those adopted by developed countries with ample means to purchase the most novel (and expensive) technologies. The mere reference to possible unobserved consequences of different fishing methods cannot justify less favourable treatment.

3. Second, due to the technical expertise demanded to perform a substantiated assessment of the risks to the dolphins associated with distinct fishing methods in different areas of the ocean, the Panels could have requested the assistance of independent experts in accordance with Article 13.2 of the DSU. In choosing not to do so, the Panels resorted to the evidence produced by the parties and to their own limited understanding of the subject in order to make their findings.

¹ Word count: 251.

ANNEX C-3**EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION¹**

1. Mexico's interpretation appeal concerns the proper role of the regulatory objective in the analysis under Article 2.1, and in particular the "rational connection" between the regulatory objective and the detrimental impact, which should be taken into account in addition to the "calibration" test.
2. The European Union considers that panels should not use a given regulatory objective as a benchmark for second-guessing every single detail of a regulatory measure. Two objectives could be seen as complementary, without imposing on the regulating Member the burden of showing that the measure is perfectly coherent with two distinct objectives.
3. "Calibration" is not a treaty term, but merely a helpful concept developed in jurisprudence. Calibration is not a precise quantitative analysis, and panels should allow for a margin of error when conducting the assessment of even-handedness.
4. Whether a rational relationship between the detrimental impact caused by the measure and its policy objective exists is a question that may be asked when applying Article 2.1. This is not an additional or distinct step to be applied in the Article 2.1 analysis.
5. Whether the Panels actually properly took the regulatory objectives of the measure into account when applying their interpretation of Article 2.1 to the facts seems to be an issue of the application, as opposed to interpretation, of Article 2.1.
6. Mexico considers that the Panels made no substantive findings under Article 2.1 with respect to arbitrary or unjustifiable discrimination and that their assessment of the requirements of the *chapeau* was erroneously incomplete.
7. The European Union notes that there are several differences between the analyses required under Article 2.1 and under the *chapeau* of Article XX, including the fact that the legal standards applicable under the two provisions differ. However, the two analyses are not disconnected and benefit from each other.
8. Article 2.1 of TBT Agreement, the *chapeau* of Article XX of GATT 1994 and Article 2.3 of SPS Agreement perform similar functions. The *chapeau* of Article XX is ultimately an expression of the principle of good faith, which also applies in respect of Article 2.1.
9. The Panels did not err in the analysis of the concepts of "arbitrary and unjustifiable discrimination" under the *chapeau* of Article XX by relying on their conclusions reached under Article 2.1.

¹ Total length of the submission, excluding executive summary: 3935. Length of the executive summary: 381.

ANNEX C-4**EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION¹**

1. The Appellate Body has applied an "even-handedness" test to determine whether a detrimental impact of a technical regulation on imports stems from a legitimate regulatory distinction, as a means of determining whether the measure accords non-discriminatory treatment to imports as required under Article 2.1 of the TBT Agreement. In applying the "even-handedness" test, the Appellate Body has used a "calibration test" as an analytical tool. It is Japan's view that the identification and assessment of the policy objective of the measure is a prerequisite to a proper calibration test. Clearly, it is the implementing Member that is in the best position to articulate and explain the policy objective, and how the regulatory distinctions in a measure achieve this policy objective.

2. The "calibration test" must assess whether the regulatory distinctions are tailored to the specific level and nature of risk that exist under each scenario for which a regulatory distinction exists. Thus, the different regulatory burdens that are imposed as a result of the regulatory distinctions in the 2016 Tuna Measure must be proportionate to the requirements necessary to achieve the level of dolphin safety that the United States seeks to achieve through the "dolphin-safe" label.

3. Japan views the consideration made under Article 2.1 of the TBT Agreement as informative in determining whether the 2016 Tuna Measure is consistent with the chapeau of Article XX of the GATT 1994. As such, the assessment of whether certain regulatory distinctions are rationally related to a policy objective under the "calibration test" is relevant to the assessment of whether a discriminatory measure constitutes "arbitrary or unjustifiable discrimination" under the Article XX chapeau. As the 2016 Tuna Measure restricts fishing not only in its domestic territories but also in foreign territories, the analysis should be undertaken stringently.

¹ 295 words.

ANNEX D

PROCEDURAL RULING

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ANNEX D-1**PROCEDURAL RULING OF 20 DECEMBER 2017**

1. On 5 December 2017, the Appellate Body Division hearing this appeal informed the participants and third participants of the Working Schedule for Appeal. According to the Working Schedule, the third participants' submissions and executive summaries were due on Wednesday, 3 January 2018.
 2. On 19 December 2017, the Appellate Body received a communication from Japan requesting an extension to the deadline for filing the third participants' submissions and executive summaries due to the year-end closure of both the WTO Secretariat and Japanese governmental offices. In its letter, Japan requested that the Division allow Japan to file the third participant submission and executive summary via electronic mail on Thursday, 28 December 2017, and to submit these documents in paper form on Thursday, 4 January 2018. Japan indicated, in its letter, that it did not consider that its request would unduly delay these appellate proceedings or would result in manifest unfairness.
 3. That same day, on behalf of the Division hearing this appeal, I invited Mexico, the United States, and the other third participants to comment, should they so wish, on Japan's request by 12 noon on 20 December 2017. Comments were received from Mexico on 20 December 2017. Mexico had no objection to Japan's request, provided that it did not result in an undue delay to the proceedings. Neither the United States nor other third participants commented on Japan's request.
 4. The Division considers the reasons identified by Japan, and Mexico's comments, to be pertinent to its assessment of Japan's request. The Division also takes into account the fact that none of the participants or other third participants has objected to the request for changing the deadline for filing the third participants' submissions and executive summaries. The Division is cognisant of the logistical and administrative implications of having to make filings immediately after the WTO Secretariat and certain government offices reopen following the year-end closure, and is keen to minimize any inconveniences resulting therefrom.
 5. Taking into account all of the foregoing, and in accordance with Rule 16 of the Working Procedures for Appellate Review, on behalf of the Division hearing this appeal, I inform the third participants that the deadline for the third participants' submissions and executive summaries has been changed, for both submission in paper form and filing an electronic copy, to Thursday, 4 January 2018, by 5 p.m. Geneva time.
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ANNEX E

COMMUNICATION FROM THE APPELLATE BODY

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ANNEX E-1**COMMUNICATION FROM THE APPELLATE BODY***

I am writing to you pursuant to Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which stipulates that, as a general rule, the Appellate Body will circulate its Report no later than 60 days after the appellant has formally notified the Dispute Settlement Body (DSB) of its decision to appeal. Article 17.5 states, furthermore, that when the Appellate Body considers that it cannot provide its Report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its Report.

Mexico notified the DSB on 1 December 2017 of its decision to appeal certain issues of law covered in the Panel Reports and legal interpretations developed by the Panels in these cases, with the result that the 60-day period expires on Tuesday, 30 January 2018. Due to the time required to hear and decide this appeal, the Appellate Body is not able to circulate its Report by this date.

The Appellate Body faces a substantially enhanced workload in 2018, with several appeals proceeding in parallel, and there is increasing overlap in the composition of the Divisions hearing the different appeals owing to the current vacancies on the Appellate Body. Due to the scheduling issues arising from these circumstances, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat, the Appellate Body will not be able to circulate its Report in this dispute within the 90-day timeframe provided for in Article 17.5 of the DSU.

The circulation date of the Appellate Body Report in this appeal will be communicated to the participants and third participants after the oral hearing.

* This notification, dated 29 January 2018, was circulated to Members as document WT/DS381/46.