WORLD TRADE ORGANIZATION

WT/DS381/RW/USA/Add.1
WT/DS381/RW2/Add.1

26 October 2017

(17-5777)

Page: 1/68

Original: English

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

Addendum

This *addendum* contains Annexes A to C to the Reports of the Panels to be found in document WT/DS381/RW/USA and WT/DS381/RW2.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANELS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANELS

ANNEX A-1

UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS (WT/DS381)

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

WORKING PROCEDURES OF THE PANEL

Adopted on 4 July 2016

Modified on 3 August 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Business Confidential Information (BCI), as defined in the Panel's Additional Procedures Concerning Business Confidential Information, shall be submitted and treated in accordance with those Additional Procedures. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may, upon request by a party or third party, authorize that party, or third party, to lift the confidentiality, by way of delayed viewing, of its own statements made during the Panel's meeting with the parties, or the special session for third parties. Such lifting of confidentiality will be authorized only where it does not impair or otherwise interfere with either the rights of the other party or other third parties or the integrity and promptness of the dispute settlement process. Moreover, such lifting of confidentiality shall be in accordance with additional working procedures, to be adopted by the Panel after consulting with the parties. A request that the Panel adopt additional working procedures to facilitate this lifting of confidentiality shall be made to the Panel no fewer than six weeks before the meeting where the statements in question will be delivered.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States

requests such a ruling, Mexico shall submit its response to the request in its first written submission. If Mexico requests such a ruling, the United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6. The first time a party or third party submits to the Panel an exhibit that corresponds to an exhibit submitted in the original panel proceedings or in the previous compliance proceeding, the party or third party submitting such exhibit shall also identify, within brackets, the number of the original exhibit along with the prior proceeding in which it was submitted.

11. Any exhibit submitted by a party or third party in *US – Tuna II (Article 21.5 – Mexico II)* shall automatically form part of the record of this proceeding. Where a party or third party wishes to refer to an exhibit submitted in *US – Tuna II (Article 21.5 – Mexico II)*, it shall add an appropriate bracket after referring to the exhibit to clarify (e.g. Exhibit US-2 (*US – Tuna II (Article 21.5 – Mexico II)*)).

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

13. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite Mexico to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement and its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file four (4) paper copies of all documents it submits to the Panel. Exhibits may be provided in four (4) copies on CD-ROM or DVD and two (2) paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to ****.****@wto.org@wto.org, ****.****@wto.org, ****.****@wto.org, ****.****@wto.org and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

Modification of working procedures

25. The Panel may modify these working procedures after consulting with the parties.

ANNEX A-2

UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS (WT/DS381)

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

WORKING PROCEDURES OF THE PANEL

Adopted on 3 August 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Business Confidential Information (BCI), as defined in the Panel's Additional Procedures Concerning Business Confidential Information, shall be submitted and treated in accordance with those Additional Procedures. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may, upon request by a party or third party, authorize that party, or third party, to lift the confidentiality, by way of delayed viewing, of its own statements made during the Panel's meeting with the parties, or the special session for third parties. Such lifting of confidentiality will be authorized only where it does not impair or otherwise interfere with either the rights of the other party or other third parties or the integrity and promptness of the dispute settlement process. Moreover, such lifting of confidentiality shall be in accordance with additional working procedures, to be adopted by the Panel after consulting with the parties. A request that the Panel adopt additional working procedures to facilitate this lifting of confidentiality shall be made to the Panel no fewer than six weeks before the meeting where the statements in question will be delivered.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Mexico requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Mexico shall submit its response to the request prior to

the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6. The first time a party or third party submits to the Panel an exhibit that corresponds to an exhibit submitted in the original panel proceedings or in the previous compliance proceeding, the party or third party submitting such exhibit shall also identify, within brackets, the number of the original exhibit along with the prior proceeding in which it was submitted.

11. Any Exhibit submitted by a party or third party (other than India) in *US – Tuna II (Article 21.5 – US)* shall automatically form part of the record of this proceeding. Where a party or third party wishes to refer to an exhibit submitted in *US – Tuna II (Article 21.5 – US)*, it shall add an appropriate bracket after referring to the exhibit to clarify (e.g. Exhibit US-2 (*US – Tuna II (Article 21.5 - US)*)).

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

13. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite Mexico to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement and its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to

which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Mexico presenting its statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This

summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file four (4) paper copies of all documents it submits to the Panel. Exhibits may be provided in four (4) copies on CD-ROM or DVD and two (2) paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to ****.****@wto.org@wto.org, ****.****@wto.org, ****.****@wto.org, ****.****@wto.org and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

Modification of working procedures

25. The Panel may modify these working procedures after consulting with the parties.

ANNEX A-3

PROCEDURES OF THE PANELS CONCERNING BUSINESS CONFIDENTIAL INFORMATION[1]

Adopted on 4 July 2016

1. These procedures apply to any business confidential information (BCI) that a party submits to the Panel.

2. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information and that is not available in the public domain and the release of which could reasonably be considered to cause or threaten to cause harm to an interest of the person or entity that supplied the business information to the party.

3. No person may have access to BCI except a member of the Secretariat or the Panel, a party's or third party's employee participating in the dispute, and a party's or third party's outside advisor for purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of tuna or tuna products. When a party or third party provides BCI to an outside advisor who is an employee or officer of an industry association of such enterprises, that party or third party shall obtain written assurances from such advisor that he or she has read and understands these procedures and will not disclose any BCI in contravention of these procedures.

4. A party obtaining access to BCI as a result of the BCI being submitted in this dispute shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute.

5. A party or third party submitting or referring to BCI in a document shall mark the cover and each page of the document to indicate the presence of BCI in the document as follows: BCI shall be placed between double brackets (for example, [[xx,xxx.xx]]). The cover and the top of each page of the document shall contain the notice "Contains Business Confidential Information". Any BCI that is submitted in electronic form shall be clearly marked with the phrase "Contains BCI" on a label on the storage medium, and clearly marked with the phrase "Contains BCI" in the electronic file name.

6. The parties, third parties, and the Panel shall store all documents containing BCI so as to prevent unauthorized access to such information.

7. The Panel shall not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel makes its report publicly available, the Panel shall give each party an opportunity to ensure that the report does not contain any information that it has designated as BCI.

[1] These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 4 July 2016.

ANNEX A-4

UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS (WT/DS381)

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

ADDITIONAL WORKING PROCEDURES OF THE PANELS ON PARTIALLY OPEN MEETINGS

Adopted on 22 December 2016

Having regard to paragraph 3 of the Panels' Working Procedures, and having received a request from the United States for the adoption of additional working procedures to facilitate the lifting of the confidentiality of its statements at the Panels' meeting with the parties, the Panels have, after consulting with the parties, adopted the following Additional Working Procedures:

1 DEFINITIONS

1.1 For the purposes of these Additional Working Procedures:

a. "Disclosing party" means any party that wishes to lift the confidentiality of its statements at the Panels' meeting with the parties;

b. "Non-disclosing party" means any party that wishes to maintain the confidentiality of its statements at the Panels' meeting with the parties;

c. "Disclosing third party" means any third party that wishes to lift the confidentiality of its statements at the Panels' third party session.

d. "Non-disclosing third party" means any third party that wishes to maintain the confidentiality of its statements at the Panels' third party session.

e. "Statement" means:

i. A party's opening statement;

ii. A party's closing statement;

iii. A party's responses to questions from the Panels concerning (a) issues of law; and (b) the disclosing party's own exhibits, arguments, or positions (referred to in these Working Procedures as a "paragraph 1.1(e)(iii) question");

excluding, however, any part or section of those items that discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. Any part or section of those items that discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party shall, prior to the delayed viewing, be redacted in accordance with the procedures provided for in Section 3.2 of these Additional Working Procedures.

f. "Third party statement" means:

i. A third party's statement at the Panels' third party session;

ii. A third party's responses to a paragraph 1.1(e)(iii) question;

excluding, however, any part or section of those items that discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. Any part or section of the items that discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party shall, prior to the delayed viewing, be redacted in accordance with the procedures provided for in Section 3.2 or 4.3 of these Additional Working Procedures.

g. "Delayed viewing" means the broadcasting by the WTO Secretariat, after the conclusion of the Panels' meeting with the parties and third party session, of the statements of disclosing parties and disclosing third parties that have been recorded and redacted in accordance with Sections 3 and 4 of these Additional Working Procedures.

2 GENERAL

2.1 The delayed viewing shall be held in a room inside the WTO Secretariat building. It will be open to officials of WTO Members and Observers, and, upon registration with the Secretariat, to accredited journalists, accredited representatives of non-governmental organizations, and other interested persons, including members of the public. The names of all persons registered to attend the delayed viewing will be shared with the parties. To this effect, the Secretariat will place a notice on the WTO website, informing the public of the delayed viewing and including a link through which members of the public can register to attend. The notice shall specify: (a) that the names of all persons registered to attend the delayed viewing will be shared with the parties; and (b) that no person attending the delayed viewing is allowed to use electronic devices to record any portion of the broadcast.

2.2 The date of the delayed viewing will be decided by the Panels after consulting with the parties. The redacted recording will be broadcast once, beginning with the floor (i.e. original) language and followed immediately by the translated Spanish or English language version.

3 PANELS' SUBSTANTIVE MEETING WITH THE PARTIES

3.1 Opt-in procedures

3.1 Any party wishing to be a disclosing party shall notify the Panels in writing prior to the Panels' substantive meeting with the parties, by a date to be determined by the Panels. Any party that does not notify the Panels of its intention to be a disclosing party by that deadline will be treated by the Panels as a non-disclosing party.

3.2 Recording of Statements

3.2 In accordance with the usual practice of the WTO, the audio of the entirety of the Panels' meeting with the parties (including the floor recording and interpretation) shall be recorded and entered into the dispute record.

3.3 The entirety of a disclosing party's opening and closing statements shall be video recorded, except as provided for in paragraph 3.9.

3.4 A disclosing party's responses to paragraph 1.1(e)(iii) questions shall also be video recorded, except as provided for in paragraph 3.5 and 3.9. A disclosing party shall advise the Panels, prior to responding to a paragraph 1.1(e)(iii) question, if its response to that question discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

3.5 To facilitate the implementation of paragraph 3.4:

a. The Panels shall, when sending advance questions to the parties, indicate which questions they consider meet the definition in paragraph 1.1(e)(iii) of these Additional Working Procedures.

b. Spontaneous questions asked by the Panels during the course of the meeting shall not be recorded.

3.6 The video recording foreseen under paragraphs 3.3 and 3.4 shall be entered into the dispute record.

3.7 The video recording foreseen under paragraphs 3.3 and 3.4 shall be made from a single camera. The camera shall be set at the same position, zoom, and focus throughout the meeting.

3.8 In addition to the video recording foreseen under paragraphs 3.3 and 3.4, a secondary video recording, using a separate video recording channel but captured from the video camera referenced in paragraph 3.6 will be made of the entirety of the Panels' meeting with the parties for back-up purposes. Except where the primary video recording is technically defective, this secondary video will not be used when the Secretariat compiles the video for the delayed viewing, and will be deleted once the procedures provided for in Section 3.3 of these Additional Working Procedures have been completed.

3.9 A disclosing party shall advise the Panels prior to addressing its own or another party's BCI in its statements. When a disclosing party so advises, both video recordings will be discontinued for the relevant portion of the statement, after which the video recordings will be resumed. In the interests of ensuring an efficient meeting, a disclosing party is invited to structure its statements so as to first deliver a non-BCI portion before delivering a portion that contains BCI. At the conclusion of a disclosing party's statement, the Panels' will ask the non-disclosing party to confirm that none of its own BCI was disclosed during the video recorded portion of the statement.

3.3 Redaction of Recorded Statements

3.10 In order to ensure, pursuant to paragraph 3 of the Panels' Working Procedures, that disclosure by a disclosing party of its statements at the Panels' meeting with the parties does not impair or otherwise interfere with either the rights of a non-disclosing party or non-disclosing third party or the integrity and promptness of the dispute settlement process, statements recorded pursuant to Section 3.2 of these Additional Working Procedures shall be redacted as described in this Section prior to delayed viewing.

3.11 A disclosing party shall indicate, in the final written version of its opening and closing statements, which paragraphs disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. For example, a disclosing party could use the following phrases in the final written version of its opening and closing statements: *Beginning *of discussion of [non-disclosing party]'s submissions** and **End of discussion of [non-disclosing party]'s submissions**. Paragraphs that disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party shall be redacted from the video recording. In order to avoid unnecessary discontinuity in the delayed viewing, a disclosing party is invited to structure its statements in such a way as to separate those statements that disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

3.12 Pursuant to paragraph 3.4 of these Additional Working Procedures, where a response to a paragraph 1.1(e)(iii) question discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party, that response shall be redacted from the video recording.

3.13 Following the conclusion of the Panels' meeting with the parties, the Panels will review the recorded statements and the final written versions of a disclosing party's opening and closing statements. Using the paragraph numbers contained in the final written version of a disclosing party's opening and closing statements, the Panels will identify to the parties any paragraphs additional to those identified by the disclosing party pursuant to paragraph 3.11 that, in the view of the Panels, disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. These paragraphs will be redacted from the video recording, except as provided for in paragraph 3.16.

3.14 Following the conclusion of the Panels' meeting with the parties, the Panels will review the video recording of a disclosing party's responses to paragraph 1.1(e)(iii) questions. The Panels will identify to the parties, by reference to the question number, any responses additional to the responses identified by the disclosing party pursuant to paragraph 3.4 of

these Additional Working Procedures that, in the view of the Panels, disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. These responses will also be redacted from the video recording, except as provided for in paragraph 3.16.

3.15 If a non-disclosing party considers that any part of the video-recorded statements not identified by a disclosing party (pursuant to paragraphs 3.11 and 3.4 of these Additional Working Procedures) or redacted by the Panels (pursuant to paragraph 3.13 or 3.14 of these Additional Working Procedures) discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party, that party may bring such part of the video-recorded statements to the attention of the Panels (through the Secretariat) and the disclosing party. Such notification should be made within a deadline to be specified by the Panels, and should identify the particular paragraph of the relevant opening or closing statement (or, where relevant, third party statement), or the particular response by question number, and indicate how, in the view of the notifying party, it discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. Before the Panels make a decision regarding any identified issue, the disclosing party will be afforded an opportunity to explain where appropriate why, in its view, the identified part of the video-recorded statements does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

3.16 If a disclosing party considers that any part of the video-recorded statements redacted by the Panels (pursuant to paragraph 3.13 or 3.14 of these Additional Working Procedures) does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party, that party may bring such part of the video-recorded statements to the attention of the Panels (through the Secretariat) and the non-disclosing party. Such notification should be made within a deadline to be specified by the Panels, and should identify the particular paragraph of the relevant opening or closing statement (or, where relevant, third party statement), or the particular response by question number, and indicate how, in the view of the notifying party, it does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. Before the Panels make a decision regarding any identified issue, the non-disclosing party will be afforded an opportunity to explain where appropriate why, in its view, the identified part of the video-recorded statements does disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

3.17 The Panels are mindful of the need to ensure the promptness of the dispute settlement process. Therefore, in the interests of ensuring the workability and efficiency of these Additional Working Procedures, where a paragraph of a disclosing party's opening or closing statements, or a disclosing party's response to a paragraph 1.1(e)(iii) question, is found to disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party, the entire paragraph or response will be redacted, even if the paragraph or response also contains content that does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

3.18 If, in order to utilize the procedures provided for in paragraphs 3.15 or 3.16, a party considers it necessary to review a specific part of the un-redacted video-recording (e.g. the video-recording of a particular response to a question from the Panels), that party may request to view that part of the video-recording. Such request must be made in sufficient time to ensure that the party is able to comply with the deadlines determined by the Panels in respect of paragraphs 3.15 and 3.16. Both parties will be invited to any screening of part(s) of the pre-redacted video-recording.

3.19 If either party requests to view the redacted video recording prior to the delayed viewing, the Panels will invite both parties to attend a preview session, accompanied by a representative of the Secretariat, on the premises of the WTO. The purpose of the preview screening is to enable the parties to confirm that the Panels have made the redactions required under this Section. If either party considers that one or more of the redactions required under this Section has not been made, it shall inform the Panels immediately, preferably at the preview screening but in any case no more than 24 hours after the preview

session. After hearing the views of the other party, the Panels will decide whether or not to modify the redacted video-recording. The preview session will be held on a date to be determined by the Panels in consultation with the parties.

3.20 The Panels retain the right to modify these procedures after consulting with the parties.

4 PANELS' SESSION WITH THIRD PARTIES

4.1 Opt-in procedures

4.1 Any third party wishing to be a disclosing third party shall notify the Panels in writing prior to the Panels' session with third parties, by a date to be determined by the Panels. Any third party that does not notify the Panels of its intention to be a disclosing third party by that deadline will be treated by the Panels as a non-disclosing third party.

4.2 Recording of Third Party Statements

4.2 In accordance with the usual practice of the WTO, the audio of the entirety of the Panels' session with third parties (including the floor recording and interpretation) shall be recorded and entered into the dispute record.

4.3 The entirety of a disclosing third party's statement shall be video recorded, except as provided for in paragraph 4.9.

4.4 A disclosing third party's responses to paragraph 1.1(e)(iii) questions shall also be video recorded, except as provided for in paragraph 4.5 and 4.9. A disclosing third party shall advise the Panels, prior to responding to a paragraph 1.1(e)(iii) question, if its response to that question discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

4.5 To facilitate the implementation of paragraph 4.4:

a. The Panels shall, when sending advance questions to the third parties, indicate which questions they consider meet the definition in paragraph 1.1(e)(iii) of these Additional Working Procedures.

b. Spontaneous questions asked by the Panels during the course of the meeting shall not be recorded.

4.6 The video recording foreseen under paragraphs 4.3 and 4.4 shall be entered into the dispute record.

4.7 The video recording foreseen under paragraphs 4.3 and 4.4 shall be made from a single camera. The camera shall be set at the same zoom and focus throughout the meeting.

4.8 In addition to the video recording foreseen under paragraphs 4.3 and 4.4, a secondary video recording, using a separate video recording channel but captured from the video camera referenced in paragraph 4.7 will be made of the entirety of the Panels' session with third parties for back-up purposes. Except where the primary video recording is technically defective, this secondary video will not be used when the Secretariat compiles the video for the delayed viewing, and will be deleted once the procedures provided for in Section 4.3 of these Additional Working Procedures have been completed.

4.9 A disclosing third party shall advise the Panels prior to addressing a party's BCI in its statements. When a disclosing third party so advises, both video recordings will be discontinued for the relevant portion of the statement, after which the video recordings will be resumed. In the interests of ensuring an efficient meeting, a disclosing third party is invited to structure its third party statement so as to first deliver a non-BCI portion before delivering a portion that contains BCI.

4.3 Redaction of Recorded Third Party Statements

4.10 In order to ensure, pursuant to paragraph 3 of the Panels' Working Procedures, that disclosure by a disclosing third party of its statements at the Panels' session with third parties does not impair or otherwise interfere with either the rights of a non-disclosing party or non-disclosing third party or the integrity and promptness of the dispute settlement process, statements recorded pursuant to Section 4.2 of these Additional Working Procedures shall be redacted as described in this Section prior to delayed viewing.

4.11 A disclosing third party shall indicate, in the final written version of its third party statement, which paragraphs disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. For example, a disclosing third party could use the following phrases in the final written version of its third party statement: **Beginning of discussion of [non-disclosing party]'s submissions* and *End of discussion of [non-disclosing party]'s submissions*.* Paragraphs that disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party shall be redacted from the video recording. In order to avoid unnecessary discontinuity in the delayed viewing, a disclosing third party is invited to structure its third party statement in such a way as to separate those statements that disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

4.12 Pursuant to paragraph 4.4 of these Additional Working Procedures, where a third party's response to a paragraph 1.1(e)(iii) question discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party, that response shall be redacted from the video recording.

4.13 Following the conclusion of the Panels' session with third parties, the Panels will review the recorded statements and the final written version of each disclosing third party's third party statement. Using the paragraph numbers contained in the final written version of a disclosing third party's third party statement, the Panels will identify to the relevant disclosing third party, copying the parties and third parties, any paragraphs additional to those identified by the disclosing third party pursuant to paragraph 4.11 that, in the view of the Panels, disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. These paragraphs will be redacted from the video recording, except as provided for in paragraph 4.16.

4.14 Following the conclusion of the Panels' session with third parties, the Panels will review the video recording of a disclosing third party's responses to paragraph 1.1(e)(iii) questions. The Panels will, by reference to the question number, identify to the relevant disclosing third party, copying the parties and third parties, any responses additional to the responses identified by the disclosing third party pursuant to paragraph 4.4 of these Additional Working Procedures that, in the view of the Panels, disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. These responses will also be redacted from the video recording, except as provided for in paragraph 4.16.

4.15 If a non-disclosing party or non-disclosing third party considers that any part of a video-recorded third party statement or third party response to a paragraph 1.1(e)(iii) question not identified by a disclosing third party (pursuant to paragraphs 4.11 and 4.4 of these Additional Working Procedures) or redacted by the Panels (pursuant to paragraph 4.13 or 4.14 of these Additional Working Procedures) discloses, directly or indirectly, its exhibits, arguments, or positions, that party or third party may bring such part of the video-recorded statements to the attention of the Panels (through the Secretariat) and the relevant disclosing third party. Such notification should be made within a deadline to be specified by the Panels, and should identify the particular paragraph of the relevant third party statement, or the particular response by question number, and indicate how, in the view of the notifying party, it discloses, directly or indirectly, its exhibits, arguments, or positions. Before the Panels make a decision regarding any identified issue, the relevant disclosing third party will be afforded an opportunity to explain where appropriate why, in its view, the identified part of the video-recorded statements does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

4.16 If a disclosing third party considers that any part of the video-recorded statements redacted by the Panels (pursuant to paragraph 4.13 or 4.14 of these Additional Working Procedures) does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party, that third party may bring such part of the video-recorded statements to the attention of the Panels (through the Secretariat) and any relevant non-disclosing party or non-disclosing third party. Such notification should be made within a deadline to be specified by the Panels, and should identify the particular paragraph of the relevant third party statement, or the particular response by question number, and indicate how, in the view of the notifying third party, it does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party. Before the Panels make a decision regarding any identified issue, any relevant non-disclosing party or non-disclosing third party will be afforded an opportunity to explain where appropriate why, in its view, the identified part of the video-recorded statements does disclose, directly or indirectly, its exhibits, arguments, or positions.

4.17 The Panels are mindful of the need to ensure the promptness of the dispute settlement process. Therefore, in the interests of ensuring the workability and efficiency of these Additional Working Procedures, where a paragraph of a disclosing third party's third party statement, or a disclosing third party's response to a paragraph 1.1(e)(iii) question, is found to disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party, the entire paragraph or response will be redacted, even if the paragraph or response also contains content that does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party or non-disclosing third party.

4.18 If any party or third party requests to view the redacted video recording of the Panels' session with third parties prior to the delayed viewing, the Panels will invite the parties and the third parties to attend a preview session, accompanied by a representative of the Secretariat, on the premises of the WTO. The purpose of the preview screening is to enable the parties to confirm that the Panels have made the redactions required under this Section.

4.19 The Panels retain the right to modify these procedures after consulting with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

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

A. The Determination Provisions Are Even-Handed in Both Design and Application

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

2. As to design, the United States accepted the DSB recommendations and rulings and amended the determination provisions pursuant to the 2016 IFR in accordance with the Appellate Body's findings. Mexico does not appear to disagree with this conclusion, and thus the issue does not appear to be in dispute in this proceeding.

3. As to application, the United States also reviewed the readily available evidence to determine whether there is a basis for making a determination with respect to any particular fishery. With regard to the first prong of the determination provisions, the result of NOAA's analysis was that there is no evidence that there are fisheries that meet the first prong of the determination provisions, *i.e.*, in which there is a "regular and significant association between dolphins and tuna" similar to that in the ETP. With respect to the second prong, the available evidence suggests that certain gillnet fisheries in the Indian Ocean region meet that standard.

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

5. First, in considering the most appropriate metric, NOAA concluded that a per set measure of dolphin mortality on a fishery-by-fishery basis reflects the frequency with which captains would have to make a determination that a dolphin was killed or seriously injured in a particular fishery. Such a metric is consistent with the purpose and structure of the U.S. measure because it assesses the effect of a tuna fishery on individual dolphins and because it is tailored to the frequency with which a vessel captain in a particular fishery would have to detect that a dolphin had been killed or seriously injured in a particular set. Specifically, where a captain would have to identify a dolphin mortality or serious injury more frequently, because more sets cause a direct dolphin harm, the determination provisions, if based on a per set metric, would provide that an observer certification (and enhanced tracking and verification) may be necessary for tuna product to meet the "dolphin safe" standard. Such a metric is also practical, as it used by many different regulating authorities, including by RFMOs, to assess the effect on dolphins (and other bycatch species) of tuna fishing in a particular fishery, meaning that there is a considerable amount of per set data for different fisheries in different oceans that is readily available.

6. Second, having identified an appropriate metric, it was necessary to determine the appropriate benchmark against which fisheries would be evaluated to determine whether dolphin mortalities, on a per set basis, were "regular and significant." In this regard, the United States recalled the suggestion of the Appellate Body that, to ensure even-handed treatment of different fisheries, the benchmark should refer to the ETP large purse seine fishery. NOAA determined that the most appropriate benchmark was a 20-year average of direct dolphin mortalities caused by

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

7. Third, on this basis, the United States considered the available fishery-specific evidence concerning per set mortalities in fisheries other than the ETP large purse seine fishery. As is shown by the relevant evidence on the record in this dispute, no evidence suggests that, on a per set basis, any other fishery causes close to the level of dolphin mortalities caused by dolphin sets in the ETP, as an average since 1997. Thus, no evidence suggested that any fishery for which fishery-specific evidence was available exhibited "regular and significant" dolphin mortality.

8. However, evidence from certain gillnet fisheries in the Indian Ocean area suggested that levels of mortality are occurring such that, if per set data were available, the per set mortality rate likely would meet or exceed the "regular and significant" standard. In particular, several exhibits presented in the first compliance proceeding suggested an alarming level of dolphin mortality was occurring in the Indian and Pakistani gillnet fisheries in the Indian Ocean, as well as in neighboring fisheries of other countries. The United States attempted to find per set data on these fisheries, but none was available. Consequently, the United States considered whether any alternative metrics might act as a proxy for per set data and enable an evaluation of those fisheries. NOAA determined that data were available to support evaluation under a dolphin bycatch rate metric, *i.e.*, the number of dolphins killed per ton of target catch (tuna) landed. While this is not a perfect metric for this analysis, it served as a reasonable proxy for the per set data. On September 28, 2016, NOAA issued a determination, on the basis of the best information available, that a "regular and significant" mortality of dolphins was occurring in these fisheries. The determination provided that any tuna product produced from these fisheries to be marketed as dolphin safe in the United States would have to be accompanied by a certification by an observer from a qualified and authorized observer program and a certification attesting to the catch documentation, the substance of the dolphin safe labeling standards, and the chain of custody information.

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

10. In the first compliance proceeding, the design of the determination provisions was the sole basis on which the Appellate Body found that the detrimental impact of the measure did not stem exclusively from legitimate regulatory distinctions. In addition to addressing the DSB recommendation and the determination provisions, the 2016 IFR has also addressed the other concerns identified during the first compliance proceeding, even though these concerns did not form the basis for the DSB recommendation at issue. Looked at independently, the regulatory distinctions made by the eligibility criteria, the certification requirements, and the tracking and verification requirements are even-handed.

B. The Appropriate Legal Test for Even-Handedness in This Dispute

11. For purposes of this dispute, as the Appellate Body has explained, the test for even-handedness is whether the regulatory distinctions, when viewed as a whole, are calibrated to the differences in risks to dolphins of overall harms between setting on dolphins in the ETP large purse seine fishery, on the one hand, and other fishing methods in other oceans on the other.

12. Mexico rejects the Appellate Body's analysis. In particular, Mexico rejects the Appellate Body's conclusions that: "there is *a special relevance* in these Article 21.5 proceedings in conducting an assessment" of whether the differences in labelling conditions are calibrated to the risks to dolphins; and a measure "*will not violate Article 2.1* if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."

13. First, Mexico gives no "special relevance" to the Appellate Body's calibration test. Rather, in Mexico's view, whether the differences in labeling conditions are calibrated to differences in overall harm to dolphins is merely "one element" of the legal test for even-handedness that the Panels should apply. Indeed, whether the measure is calibrated to the overall harm is not even the most important test under Mexico's approach, as Mexico suggests that the key inquiry is whether differences in labeling conditions can be reconciled with the objectives of the measure (irrespective of the risk). Moreover, Mexico appears to reject the application of the Appellate Body's calibration test for purposes of examining the certification requirements and tracking and verification requirements.

14. Second, Mexico implicitly – but repeatedly – alleges that the measure *will* violate Article 2.1 *even if* it is calibrated by contending that the measure is inconsistent with Article 2.1 for reasons unrelated to whether it is calibrated to risks of harm to dolphins. Thus, in its first written submission, Mexico argues that all three regulatory distinctions are inconsistent with Article 2.1 because they are "at odds with the objectives and the design, architecture and revealing structure of the tuna measure." While in its second submission Mexico claims that the measure is inconsistent with Article 2.1 because it is "inconsistent with the objectives of sustainable development," as well as the fact that the measure does not apply "strict" certification and tracking and verification requirements to tuna product produced from fishing methods that result in above *de minimis* harms to dolphins or in fisheries subject to (allegedly) substandard municipal regulations.

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

15. First, Mexico conceives of the even-handedness test as a multi-factor analysis where "one of the[] questions" is whether the measure is calibrated, and "[a]nother question is whether the regulatory distinctions are reconciled with the objectives of the measure." In Mexico's view, these two questions "do not create independent or discrete legal tests," but rather are different elements that are weighed and balanced against one another to determine whether the measure is even-handed. Mexico misunderstands the Appellate Body's even-handedness analysis as it applies in this dispute.

16. While the Appellate Body has recognized that there may be different approaches a panel could employ to test whether the challenged measure is even-handed, the facts and circumstances of a particular dispute will dictate the approach that is needed. *In this dispute*, the Appellate Body "considered appropriate an analysis" of whether the measure "is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans." The fact that, in theory, there are different ways to test for even-handedness does not mean, as Mexico suggests, that the Panels must explore all these options in this dispute or that doing so would be appropriate.

17. Indeed, what Mexico seems to be arguing is that the Appellate Body has required the Panels to face the same situation that the first compliance panel did with regard to the certification requirements where that panel balanced the two analyses. The Appellate Body, however, *reversed* this analysis, finding that the majority did not conduct the appropriate analysis to determine the even-handedness of the certification requirements. Further, if Mexico were correct that the Appellate Body has required these Panels to engage in this multifactor balancing test, the Appellate Body's analysis of the eligibility criteria would also have been fundamentally different.

18. In this dispute, the question of whether the detrimental impact stems exclusively from legitimate regulatory distinctions is not answered by conducting an assessment that fails to take into account differences in risks to dolphins. Rather, the question of even-handedness is answered by determining whether those differences in the regulatory distinctions "can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries." In this regard,

it is clear that the calibration analysis, as set out by the Appellate Body, already takes into account the dual objectives of the measure. Specifically, the Appellate Body's test examines whether the measure is calibrated to the risk of harm to dolphins as a way of explaining the differences in regulatory distinctions. Dolphin protection, including through consumer information, is the main substantive objective of the measure, and label accuracy is a means of ensuring that end. Consequently, if the measure is appropriately calibrated to the risks to dolphins in different ocean areas, then the regulatory distinctions of the measure are consistent with the measure's objectives. Additionally, the fact that the Appellate Body analysis requires the same calibration test to determine whether the measure reflects arbitrary or unjustifiable discrimination for purposes of the chapeau of Article XX further confirms that, for purposes of this dispute, the analysis is not what Mexico claims.

19. Second, Mexico argues that the Panels should adopt different tests – not related to risks to dolphins, namely, "the risks of inaccurate information being provided" – to determine the even-handedness of the certification requirements and tracking and verification requirements than it should apply for the eligibility criteria. Mexico's arguments lack merit for several reasons. As explained above, the Appellate Body's calibration analysis already takes into account the objectives of the measure. Further, different tests do not apply to different regulatory distinctions. In the first compliance proceeding, the Appellate Body faulted that panel for applying a modified calibration test to the eligibility criteria and a different test to the certification requirements and tracking and verification requirements, emphasizing that the same test must be applied to each of these "cumulative and highly interrelated" regulatory distinctions. Mexico's approach urges the Panels to conduct an incorrect "segmented analysis" that the Appellate Body has already rejected. Moreover, the tests that Mexico claims must be used to determine whether the certification requirements and tracking and verification requirements are even-handed are incorrect. Specifically, Mexico's argument (that tuna product produced by a fishing method that causes above *de minimis* harm to dolphins must be ineligible for the label) is a rejection of the calibration analysis. Similarly, Mexico's other test, which posits that "strict" certification and tracking and verification requirements need to be applied to tuna caught in all fisheries where the level of applicable municipal fishery regulations falls below some (unspecified) minimum standard, is also a rejection of the calibration argument as it does not depend on an analysis of the differing risks to dolphins.

20. Third, Mexico's argument with regard to "environmental sustainability" is bereft of support, as to both the law and the facts.

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

21. The United States has established that the eligibility criteria are calibrated to the differences in risk to dolphins of overall harm. Specifically, the United States has established that: (1) setting on dolphins is a unique fishing method that is inherently unsafe for dolphins; (2) fishing methods that can produce tuna product eligible for the U.S. dolphin safe label do not pose equivalent risks to dolphins; and (3) the eligibility criteria are commensurate with the differences in risk.

1. Setting on Dolphins Is a Unique Fishing Method that Is Inherently Unsafe for Dolphins

22. The United States has shown that setting on dolphins is a fishing method that is particularly harmful to dolphins for three reasons: (1) it intentionally targets dolphins, such that dolphins must be put at risk of direct and indirect harm in every dolphin set; (2) it causes a unique category of unobservable harms that may occur in every dolphin set, regardless of whether a dolphin is directly killed or injured; and, (3) it continues to cause a high level of direct dolphin mortalities.

23. First, it is well-established that setting on dolphins is the only fishing method that intentionally targets dolphins to catch fish. Thus, every dolphin set involves a sustained interaction between a large purse seine vessel (and its speedboats and often helicopters) and a herd of dolphins whereby the vessel chases about 600 dolphins for up to 2 hours, ultimately capturing about 300-400 of them. Other fishing methods, by contrast, can be used with no effect on dolphins at all. Furthermore, vessels may interact with a small number of dolphins only

incidentally and those other fishing methods can be conducted without putting any dolphin directly in danger.

24. In this regard, Mexico is wrong to argue that the intentional nature of dolphin interactions is not relevant to the risk profile of setting on dolphins. Previous Appellate Body reports confirm that the analysis must be based on an assessment of the "overall levels of risk" caused by different fishing methods in different fisheries. The first compliance panel confirmed the relevance of the intentional nature of the dolphin interactions in dolphin sets, explaining that every set must involve a sustained interaction with hundreds of dolphins for up to several hours and that these interactions are inherently dangerous, as they can cause significant unobservable harms, as well as direct mortalities and serious injuries. There is, thus, no basis for excluding this feature of setting on dolphins from the analysis of the fishing method's risk profile.

25. By contrast, as the first compliance panel recognized, other fishing methods in other fisheries do not intentionally target dolphins. In particular, as the United States has explained, other fishing methods can be used without harm to dolphins. Indeed, some fisheries – including certain handline, gillnet, longline, pole and line, and purse seine fisheries – pose no known, or only a remote, risk to any dolphins, due to the distribution of dolphins and the area where the fishery operates. In many other tuna fisheries, including in particular purse seine and longline fisheries, there is some known risk, but the vast majority of all sets occur without any dolphin interaction and, therefore, without putting any dolphin in danger. Thus, the vast majority of fishing activities in these fisheries involve no dolphins at all and, therefore, pose little or no risk of direct or indirect dolphin harms.

26. Second, setting on dolphins causes a unique category of indirect, unobservable harms due to the chase and encirclement process. Mexico argues that such effects are "speculative and unproven" and claims that, to the extent conclusions are drawn concerning indirect effects caused by dolphin sets, the same conclusions "must be presumed in relation to other fisheries and fishing methods." Further, Mexico claims that the actions that cause the unique unobservable effects of dolphin sets are actually positive because they make the method sustainable. None of Mexico's arguments have merit, and Mexico is wrong to try to "appeal" the DSB recommendations and rulings in these proceedings.

27. In this regard, Mexico is incorrect that if setting on dolphins is found to cause unobservable effects, then there must be a presumption that other fishing methods cause the same effects. As the United States has explained, a significant body of peer-reviewed scientific literature concludes that setting on dolphins causes indirect, unobservable harms to dolphins due to the chase and encirclement process. Such harms include reproductive effects, calf-cow separation, and physical harms induced by stress. A 2007 article on the subject explained that a review of the existing literature showed, *inter alia*, that: (1) dolphin sets "entail well-recognized stressors in other mammals, especially wild animals," and that typical responses "to such disturbances include changes in metabolism, growth, reproduction, and immune status, any of which, alone or in combination, could significantly affect survival and reproduction"; (2) samples from dolphins caught in dolphin sets "showed cell damage similar to that in heart muscle, indicative of a degree of capture myopathy that could lead to unobserved mortality in some cases"; and, (3) "developmental issues indicate that smaller calves (less than 1 year postpartum) may have more difficulty remaining associated with the mother during fishery activities." A 2010 study explained that there is evidence that the ETP large purse seine fishery "has been a significant factor in the lives of dolphins since its inception" and, in particular, "is influencing reproduction in dolphin populations." There are no such studies indicating similar indirect, unobservable mortalities caused by any other fishing method in any other fishery, and Mexico presents none.

28. Mexico has presented no evidence undermining previous findings that setting on dolphins causes a unique category of unobservable harms due to the chase itself that are not caused by other fishing methods. As a consequence, it is simply not possible for dolphin sets to be certified "dolphin safe" in the sense of having caused no harm to dolphins, since unobservable harms may occur in each set, even without any direct dolphin mortality, but cannot be seen by a captain or observer. Mexico's attempts to portray dolphin sets as a sustainable, positively regarded fishing method are misleading and not relevant to whether the method is dolphin safe.

29. Third, setting on dolphins is a uniquely dangerous fishing method in terms of direct dolphin mortalities. Over the past decade, dolphin sets by ETP large purse seine vessels have caused

several hundreds, and sometimes thousands, of direct dolphin mortalities per year. Controlling for the level of effort, in order to facilitate comparison across fisheries, these figures translate to between 69.4 and 126.3 dolphin mortalities per 1,000 dolphin sets. This level of dolphin mortalities, being caused by 80-90 vessels in approximately 10,000 sets per year, is generally unparalleled in other tuna fisheries.

2. Fishing Methods that Can Produce Tuna Product Eligible for the U.S. Dolphin Safe Label Do Not Pose Equivalent Risks to Dolphins

30. Fishing methods that produce tuna product potentially eligible for the dolphin safe label generally pose a lower level of risk to dolphins than setting on dolphins in the ETP because: (1) they are not intrinsically harmful to dolphins and can be carried out without involving any dolphins; (2) they do not cause the types of unobservable harms caused by the chase and encirclement process regardless of whether dolphins are directly killed; and, (3) the levels of any direct dolphin mortality they may cause are generally lower, on a per set basis, than those caused by dolphins sets under the AIDCP and certainly are not high enough to counterbalance the unique risks posed by dolphin sets and thus equalize the risk profiles of dolphin sets and other fishing methods.

31. In this regard, Mexico is wrong to argue that "where there is credible evidence that dolphins have been harmed by a fishing method, it must be assumed that there are widespread direct and indirect harms *unless proven otherwise with absolute certainty*." The Appellate Body found that calibration, not Mexico's "zero tolerance" benchmark, is the applicable test for whether the U.S. measure, including the eligibility criteria, is even-handed. Mexico has put forward no evidence suggesting any other fishing methods are intrinsically dangerous to dolphins or cause such unobservable harms. Further, Mexico's evidence does not show that, as a general matter, other fishing methods cause the level of direct dolphin mortalities caused by dolphin sets under the AIDCP.

32. With respect to purse seine sets other than dolphin sets, all the available set-by-set data confirms that such a fishing method causes a much lower level of direct dolphin mortality than dolphin sets. This is true for the Atlantic, Indian, western and central Pacific, and ETP Ocean purse seine fisheries where all of the evidence shows that levels of direct dolphin mortalities in these fisheries are well below those due to dolphin sets in the ETP. In this regard, the ETP large purse seine fishery itself provides the clearest example of why Mexico's arguments fail. The evidence establishes that free school and floating object sets have accounted for over half of all sets in the ETP large purse seine fishery in the past decade but have caused only 0.2% of dolphin mortalities in the fishery – the other 99.8% being caused by dolphin sets. Mexico's failure to respond to this evidence – or even acknowledge its existence at all – is telling. Purse seine sets other than dolphin sets thus cause significantly lower levels of direct mortality than dolphin sets and also put dolphins at risk less often and do not cause the unobservable harms that are caused by the chase and encirclement process.

33. With respect to longline fishing, the evidence establishes that this fishing method can be used without causing any harms to dolphins, and that the risks to dolphins from longlining in general in different areas of the oceans are significantly lower than the risks to dolphins from setting on dolphins in the ETP large purse seine fishery. While Mexico criticizes the United States for applying a "presumption," Mexico fails to introduce evidence suggesting that the U.S. evidence on the record is not correct and representative. The United States has shown that, for example, in every tuna longline fishery for which data is available, the vast majority of sets (over 95 percent) occur without interacting with any dolphins. Further, the United States has shown that for every tuna longline fishery for which evidence is available, observed direct dolphin mortalities constitute small fractions of those caused by dolphin sets in the ETP on a fishery-by-fishery basis. Mexico has put forward no evidence contradicting the U.S. evidence.

34. With respect to pole and line fishing, Mexico does not even appear to contest that such a fishing method causes less overall harm to dolphins than does setting on dolphins in the ETP large purse seine fishery.

35. With respect to gillnet fishing, such a fishing method can produce tuna product that can be certified dolphin safe in the way that setting on dolphins cannot. Unlike in dolphin sets, dolphins

are not an essential component of gillnet fishing and, therefore, gillnet sets, and even entire gillnet fisheries, can be conducted without interacting with and harming dolphins. Further, as the first compliance panel correctly found and the Appellate Body confirmed, gillnet fishing is not capable of causing the types of unobservable harms to dolphins that setting on dolphins causes as a result of the "chase itself" even if no dolphins were directly observed to have been killed.

36. Mexico is further incorrect to argue that the levels of mortality caused by gillnets in the Indian Ocean gillnet fisheries supports a finding that all tuna product produced from gillnet fishing should be ineligible for the dolphin-safe label. The evidence on the record concerning the Indian Ocean gillnet fisheries is not suggestive of bycatch rates in all gillnet fisheries around the world. Dolphins are not evenly distributed throughout the world's oceans, and different fisheries of the same gear-type can have vastly different bycatch levels depending on their area of operation and spatial overlap with dolphin populations. Some gillnet fisheries, in particular, are carried out in areas such that there is little or no known risk to any dolphin species. Further, there are techniques that can reduce dolphin interactions in gillnet fisheries, and thereby reduce the potential for dolphin harm. Thus, gillnet fishing overall presents a lower risk to dolphins than dolphin sets.

37. With respect to trawl fishing, the evidence establishes that trawl fishing does not cause a higher level of dolphin mortalities than dolphin sets in the ETP. In particular, studies of trawl fisheries indicate that, where they are used to catch tuna, bycatch is generally rare. One study commented that trawlers cause less mortality of marine mammals than other fishing methods, speculating that this might be due to "the disturbance caused by the trawling action at the bottom and at midwater warning cetaceans before they get caught." With respect to tuna pelagic pair trawling in particular, the FAO explained: "In most cases [if it is] a single species fishery, bycatch rates of other species are low. . . . On few fishing ground[s], the incidental catch of dolphins and marine mammals creates some problems."

38. With respect to handline fishing, Mexico has not even argued that such a fishing method causes a higher level of dolphin mortalities than setting on dolphins does in the ETP large purse seine fishery. Indeed, Mexico points to no dolphin mortalities or other harms reportedly caused by handline fishing. Rather, Mexico argues that handline vessels have been known to "chas[e]" dolphins and, therefore, if chasing dolphins is intrinsically harmful, "the tuna measure must disqualify tuna caught by handlines in association with dolphins in order to be even-handed." However, none of Mexico's evidence suggests that handline fishing in general or in the Indian Ocean is harmful to dolphins at all, let alone as harmful as setting on dolphins in the ETP large purse seine fishery.

3. The Eligibility Criteria Are Commensurate with the Differences in Risk

39. The eligibility criteria are commensurate with the differences in risk to dolphins posed by setting on dolphins, on the one hand, and other fishing methods that produce tuna potentially eligible for the label, on the other. First, the eligibility criteria distinguish between the only fishing method that intentionally targets dolphins and those that do not. Because it intentionally targets dolphins, setting on dolphins is, by its very nature, inherently unsafe to dolphins. Other fishing methods by contrast, are not intrinsically dangerous, in that the intention of the fishing vessels is not to interact with dolphins (and, indeed, most sets occur without putting even one dolphin in danger). Second, the eligibility criteria are commensurate with the differences in risk to dolphins of setting on dolphins and other fishing methods, as reflected in the number of dolphins directly endangered when such methods are employed. Setting on dolphins endangers, on average, hundreds of dolphins each and every time the method is employed. Other fishing methods, by contrast, only very rarely endanger a single dolphin, illustrated by the fact that vessels interact with dolphins in less than 1 percent of sets in nearly every fishery for which evidence is available. Third, the eligibility criteria are commensurate with the differences in risk posed by setting on dolphins and other fishing methods because they deny eligibility to a fishing method that may cause massive unobservable harms every time it is employed, irrespective of whether a dolphin has been killed or injured or whether AIDCP restrictions are applicable, while allowing eligibility for those fishing methods that generally do not cause many of these types of harms at all, and do not cause any of these harms without a dolphin being killed or seriously injured. Fourth, the eligibility criteria are commensurate with the differences in risk because they deny eligibility to a fishing method that causes a higher rate of observed mortalities and serious injuries while allowing

eligibility for those fishing methods that cause a lower rate of observed mortalities and serious injuries.

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

E. The Certification Requirements Are Even-Handed

41. Under the U.S. measure, as amended, all tuna product sold in the U.S. market as dolphin safe must be accompanied by a captain certification attesting that (1) "no purse seine net or other fishing gear was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught"; and (2) no dolphin mortality or serious injury occurred "in the sets or other gear deployments in which the tuna were caught." Additionally, to be eligible for the label, tuna product produced from the ETP large purse seine fishery must be accompanied by certifications from an AIDCP-approved observer, as has been the case since the original measure came into effect. Moreover, under the 2016 IFR, captains operating outside the ETP large purse seine fishery are now required to certify completion of the NMFS dolphin-safe captain's training course, regarding issues pertinent to the dolphin safe certification.

42. The certification requirements meet the test of calibration. Specifically, and as discussed above, the ETP large purse seine fishery has a special risk profile that is different from the risk profiles of other fisheries The differences in the certification requirements are commensurate with these different risk profiles. This is the case for at least two reasons.

43. First, the differences in the certification requirements are commensurate with the differences in risk because the task of verifying that tuna meets the eligibility criteria is so much more difficult in the ETP large purse seine fishery than it is in other fisheries. That is to say, it is appropriate to require two certifiers (one of whom has to meet certain minimum education standards and has undergone some training) where the conditions facing the certifier are very difficult and to require only one certifier (who need not meet minimum education standards but is required to have taken a training course) where the conditions are less difficult. The ETP large purse seine fishery is fundamentally different from other fisheries in terms of the number of dolphins put at risk of mortality or serious injury by interacting with the vessel, fishing gear, etc. and the frequency with which that interaction is taking place. Further, the ETP large purse seine fishery differs substantially from other fisheries in how this interaction occurs. ETP large purse seine vessels, in coordination with speedboats and a helicopter, engage in lengthy chases of large dolphin herds, which usually last 20-40 minutes but can take over two hours, with the entire process lasting another one-to-two hours following the end of the chase. Such a complex scene – in varying weather and ocean conditions – can make it very difficult for even the captain and a single observer to see every dolphin interaction throughout the entire process. There is no evidence that this type of interaction is repeated elsewhere in the world. In other fisheries, by contrast, where interactions with dolphins are generally accidental and are of limited scope and duration, captains are capable of determining the fate of the few dolphins they may encounter.

44. Second, the differences in certification requirements are commensurate with the differences in risk among fisheries because any difference in the "margin of error" resulting from the different requirements has a rational connection to the difference in risk, as discussed by the minority panelist in the first compliance panel's report. That is to say, even if the conditions facing the certifiers in the ETP large purse seine fishery and other fisheries were the same (which they are not), and a captain working outside the ETP large purse seine fishery were, therefore, a less "sensitive" mechanism than an AIDCP observer, the regulatory distinction is calibrated (and thus even-handed) in tolerating a higher "margin of error" for the certifier where the risks are lower and tolerating a lower "margin of error" where the risks are higher. The United States has already demonstrated – indeed, the first compliance panel agreed – that the probability of dolphin mortality or serious injury is greater in the ETP large purse seine fishery than outside it. Thus, it remains the case that, as the minority panelist put it, the different certification requirements "represent[] a fair response to the different risk profiles existing in different fisheries, as established by the evidence," even without taking into account that the certification requirements have narrowed since the first compliance proceeding. Taking the changes made by the 2016 IFR into consideration, it is even clearer that the certification requirements reflect a "fair response" to different risk profiles among fisheries, as established by the evidence on the record.

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

F. The Tracking and Verification Requirements Are Even-Handed

46. The purpose of the tracking and verification requirements of the NOAA tracking and verification regime is to distinguish between tuna product that meets the dolphin safe standard and tuna product that does not. The NOAA regime is composed of the interlocking elements of recordkeeping and reporting, physical segregation, verification, and sanctions. The 2016 IFR established additional chain of custody recordkeeping requirements for U.S. processors or importers, as applicable. U.S. processors and importers must collect and retain records regarding each custodian of the tuna or tuna product throughout the complete chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors. These records must be sufficient for NMFS to conduct a trace-back to verify that any tuna product certified to NMFS as dolphin-safe, in fact, meets the dolphin-safe labeling requirements. Moreover, the recordkeeping must be sufficient for NMFS to trace any non-dolphin safe tuna loaded onto the vessel back to one or more storage wells or other storage locations for a particular fishing trip to prove that such non-dolphin safe tuna was kept physically separate from dolphin-safe tuna from catch through unloading.

1. The Regulatory Differences Between the Two Regimes Are Narrow

47. The first compliance panel's even-handedness analysis was based on a comparison of the two different sets of tracking and verification requirements. The first compliance panel concluded that the two regimes differed as to "depth," "accuracy," and "degree of government oversight."

48. Depth. The first compliance panel used the term "depth" to refer to the point to which tuna can be traced back. The AIDCP regime requires that processed tuna product be traceable back to the AIDCP TTF, not the set or the well as the first compliance panel suggested. Thus, all that is required to be disclosed at the time of an audit is that the tuna in question was harvested on a particular trip covered by the TTF number, that it was caught in one of the sets listed on the TTF, and that it was stored in one of the wells listed on the TTF.

49. Accordingly, there is no practical difference in the tracking and verification requirements between the AIDCP and NOAA regimes as to "depth." Both regimes have the same objective – to distinguish between dolphin safe and non-dolphin safe tuna, by being able to track and verify that the two types of tuna have been kept physically separate from one another from the vessel through processing. To do so, both regimes require a separate set of information for dolphin safe or non-dolphin safe tuna product (*i.e.*, different TTF pages for the AIDCP regime and different Form 370s (or equivalent) and captain certifications for the NOAA regime), to which NMFS can trace back the tuna.

50. Accuracy. The first compliance panel used the term "accuracy" to refer to "the degree of confidence that a particular captain (or, where applicable, observer) statement properly describes the lot of tuna to which it is assigned." In the panel's view, "[the AIDCP] tuna tracking forms . . . accompany particular catches of tuna throughout the fishing and production process, from the point of catch right through to the point of retail" and, "accordingly the identity of a particular batch of tuna can, in principle, always be established." In contrast, for the NOAA regime, the first compliance panel questioned whether and how the "particular certificates are kept with particular lots of tuna up until the tuna reaches the canning plant." The 2016 IFR directly addressed the first compliance panel's concern with regard to "accuracy." U.S. processors and importers now must maintain recordkeeping sufficient to allow NMFS to verify the dolphin safe status of tuna product. Such records must pertain to each custodian of the tuna or tuna product throughout the chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors. In other words, this new recordkeeping requirement establishes a concrete legal obligation that the documentation attesting to whether the tuna is dolphin safe does, in fact, stay with the tuna throughout the supply chain.

51. Accordingly, *there is no practical difference* in the tracking and verification requirements between the AIDCP and NOAA regimes as to "accuracy." Given that U.S. processors and U.S. importers must maintain records as to the complete chain of custody sufficient for NMFS to do a

complete trace back of the tuna product that is the subject of the verification, the legal requirements in place for both the AIDCP and NOAA regimes mean that "the degree of confidence that a particular captain (or, where applicable, observer) statement properly describes the lot of tuna to which it is assigned" will be the same.

52. Degree of Government Oversight. The first compliance panel used the phrase "degree of government oversight" to refer to "the extent to which a national, regional, or international authority is involved in the tracking and verification process." In the panel's view, in the AIDCP regime, "information concerning every stage of the tuna catch and canning process is made available to national and regional authorities, which must be sent copies of tuna tracking forms and are thus able to verify at any stage of the catch and canning process whether a particular batch of tuna is dolphin-safe." By contrast, in the NOAA regime, the panel's view was that "the United States has, as it were, delegated responsibility for developing tracking and verification systems to the tuna industry itself, including canneries and importers, and has decided to involve itself only on a supervisory and *ad hoc* basis through the review of monthly reports and the conduct of audits and spot checks." Under the current measure, NMFS receives dolphin safe certifications for all tuna product sold on the U.S. market as dolphin safe. Moreover, all U.S. processors and importers marketing dolphin safe tuna product must now retain records such that the complete chain of custody for the tuna product, and the tuna contained therein, can be established. Thus, with respect to "government oversight," the 2016 IFR narrowed the differences between the NOAA and AIDCP regimes.

2. The Differences in Requirements Are Calibrated to the Differences in Risk

53. Like the certification requirements, the tracking and verification requirements are calibrated, and thus even-handed, because it is appropriate to use a more "sensitive" mechanism where the risks of dolphin mortality and serious injury are high, and a less "sensitive" mechanism where the risks of dolphin mortality and serious injury are low, as discussed by the minority panelist with regard to the certification requirements. The fact that the "mechanism" here occurs subsequent to the catch of the tuna does not mean that the calibration argument is rendered irrelevant to this stage of the analysis, as the Appellate Body has confirmed. Thus, any differences between the two "mechanisms," *i.e.*, the tracking and verification systems, are small, particularly in light of the significant differences in risk between the ETP large purse seine fishery and other fisheries. With respect to depth, both the AIDCP and NOAA regimes require that tuna product that is "dolphin safe" (for purposes of their respective regimes) be traceable back to the harvesting vessel and trip and to the group of wells that held dolphin safe tuna. With respect to accuracy, both regimes require chain of custody recordkeeping sufficient to enable national authorities to trace a particular lot of tuna from harvesting through processing. With respect to government oversight, both regimes enable a government authority to obtain documentation "concerning every stage of the tuna catch and canning process" and thus both can "go behind" the dolphin safe certifications to the same extent.

G. The Measure, as a Whole, Is Even-Handed

54. Although the United States considers it useful to discuss the issues on a distinction-by-distinction basis in order to provide a thorough explanation of how the calibration analysis applies in these proceedings, such a "segmented" approach is not the analysis that the Appellate Body has explained is necessary. Rather, the Appellate Body has stated consistency with the TBT Agreement and GATT 1994 must be determined based on a "comprehensive" analysis that takes into account the "cumulative and highly interrelated" nature of the different distinctions and "reconcil[es]" any different intermediate conclusions that may be drawn as to particular regulatory distinctions. In particular, the Appellate Body has stated that the fact that one regulatory distinction may not be "balanced" in relation to the risk does not mean the measure as a whole should be found inconsistent – it is necessary to look at whether the measure "as a whole" is commensurate with the risk.

55. This type of broad analysis makes sense. It is not the role of a WTO panel to step into the shoes of a regulator and find a measure inconsistent based on a hyper-technical investigation of whether the measure responds to every small detail of different circumstances around the world. The WTO Agreement has never been interpreted as requiring a measure to satisfy such a standard. Rather, the Appellate Body has indicated that the analysis should be the same type of

analysis as other past panels have done, namely whether the measure, as a whole, is justified in light of the evidence available. In this light, the Appellate Body's characterization of the calibration test – in particular, whether the regulatory distinctions are "commensurate" with the risk – is not materially different from how the previous proceeding's minority panelist understood it. The question is simply whether the regulatory distinctions drawn by the measure reflect a "fair response to the different risk profiles existing in different fisheries, as established by the evidence."

56. In fact the measure – when viewed as a whole – reflects such a "fair response" to the evidence. In particular, the evidence establishes that the ETP large purse seine fishery has a higher risk profile than other fisheries because a uniquely dangerous fishing method is widely employed in that fishery that is not employed in other fisheries. The measure recognizes the unique risk to dolphins that the intentional chase and capture of dolphins poses and draws distinctions between fishing methods and fisheries in light of that difference in risk. The difference in risk "explains" the distinctions contained in the measure, and the measure is, in turn, calibrated to the risk. Accordingly, the measure is consistent with Article 2.1.

III. THE MEASURE IS CONSISTENT WITH ARTICLE XX OF THE GATT 1994

57. For purposes of this dispute, the Appellate Body has stated that the question to be answered to determine whether the measure reflects "arbitrary or unjustifiable discrimination," as understood in the chapeau of Article XX, is the same question that needs to be answered to determine whether the measure is even-handed under Article 2.1. Namely, is the measure calibrated to differences in risk of overall harm between setting on dolphins in the ETP large purse seine fishery and other fishing methods employed in other fisheries? As discussed, the measure is, in fact, so calibrated. As such, any inconsistency with GATT 1994 Articles I:1 and III:4 is justified under Article XX.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

I. INTRODUCTION

1. These two proceedings, under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), concern a disagreement as to the consistency with the WTO covered agreements of measures taken to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the first Article 21.5 compliance proceedings in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.

2. The most recently amended tuna measure — that is, the tuna measure as amended by the 2016 Interim Final Rule — continues to be inconsistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Articles I:1 and III:4 of the General Agreement on Tariffs and Trade, 1994 (GATT 1994). Moreover, it does not meet the requirements of the chapeau in Article XX of the GATT 1994 and, therefore, the general exceptions in Article XX do not apply.

3. Mexico has established a *prima facie* case, and both parties agree, that: (i) the tuna measure is a "technical regulation" covered under the TBT Agreement; (ii) the tuna products at issue are "like"; and (iii) the measure has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market, and the first part of the "less favourable treatment" test under Article 2.1 is therefore satisfied. In addition, Mexico has established a *prima facie* case, and both parties agree, that the 2016 tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994. Further, Mexico agrees with the United States that the measure would provisionally fall within subparagraph XX(g) of the GATT 1994.

4. However, Mexico and the United States disagree on whether the detrimental impact stems exclusively from a legitimate regulatory distinction or reflects discrimination against Mexican tuna products under Article 2.1, and also on whether or not the requirements of the chapeau of Article XX are met — specifically, the requirement that the measure must not be applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.

5. The key areas of disagreement relate to whether or not the tuna measure's different regulatory treatment of tuna products containing tuna caught by the Mexican fishing fleet in the Eastern Tropical Pacific Ocean (ETP) large purse seine fishery, on the one hand, and tuna products containing tuna caught by other fishing vessels in other fisheries, on the other hand, is appropriately "calibrated" to the relevant differences in circumstances — i.e., the overall relative risks or levels of harm to dolphins arising from different fishing methods in different areas of the oceans — taking account of the objectives of the measure, such that the detrimental impact caused by the regulatory distinctions can be reconciled with, or rationally related to, the objectives of the measure.

6. The Panels are required to fully interpret and apply the calibration assessment described by the Appellate Body for the purposes of determining: (i) whether, under Article 2.1 of the TBT Agreement, the tuna measure is even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case or lacks even-handedness, such that the detrimental impact cannot be said to stem exclusively from a legitimate regulatory distinction (e.g., because the measure is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination); and (ii) whether the measure satisfies the requirements of the chapeau of Article XX or is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.

7. It is important to note that there will always be differences in factual circumstances where technical regulatory distinctions are applied to like products from different origins with trade-restrictive effects. The mere existence of such factual differences among like products — e.g., different circumstances of production — cannot, on its own, justify differences in regulatory treatment that result in detrimental impact on a group of imported products. Such an interpretation would render Article 2.1 and the chapeau of Article XX inutile.

8. Thus, the Panels must carefully consider under what circumstances regulatory differences amount to "calibration" that justifies them as even-handed, such that they do not constitute a

means of arbitrary or unjustifiable discrimination. Where should the line be drawn between (i) "legitimate" calibration of regulatory distinctions, and (ii) regulatory distinctions that are designed and applied in a manner that lacks even-handedness or otherwise constitutes a means of arbitrary or unjustifiable discrimination? The determination of where this line is drawn must be flexible enough to accommodate the many different facts and circumstances that could arise in respect of a measure in pursuit of legitimate objectives, but not so flexible as to render inutile the obligations in Article 2.1 of the TBT Agreement, the chapeau of Article XX of the GATT 1994, and other similar provisions in the WTO Agreements.

II. THE 2016 TUNA MEASURE

9. The measure taken to comply is the most recently amended tuna measure, which comprises: (a) Section 1385 ("Dolphin Protection Consumer Information Act"), 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; (b) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule and the 2016 Interim Final Rule; (c) the court ruling in Earth Island Institute v. Hogarth, 494 F.3d 757 (9th Cir. 2007); and (d) any implementing guidance, directives, policy announcements or any other document issued in relation to instruments (a) through (c) above, including any modifications or amendments in relation to those instruments.

10. The tuna measure remains inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, and the general exceptions in Article XX of the GATT 1994 do not apply.

III. LEGAL ARGUMENT

11. For a violation of Article 2.1 of the TBT Agreement to be established, the following elements must be satisfied: (i) the measure at issue must be a "technical regulation" within the meaning of Annex 1.1; (ii) the imported products at issue must be like the domestic product and the products of other origins; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products or to like products originating in other country.

12. In these compliance proceedings, it is undisputed that the first two of the above-referenced elements are satisfied.

A. Treatment No Less Favourable

13. The Appellate Body has established a two-step analysis for assessing whether a technical regulation accords "less favourable treatment" under Article 2.1 of the TBT Agreement. The first step focuses on whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products as compared to like domestic products or like products originating in any other Member. The second step determines whether any such detrimental impact stems exclusively from a legitimate regulatory distinction or reflects discrimination against the group of imported products.

14. It is undisputed that the tuna measure continues to modify the conditions of competition in the US market to the detriment of Mexican tuna products, such that the first step of the "treatment no less favourable" test under Article 2.1 is satisfied.

15. In determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinize whether the technical regulation at issue is even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case. The Appellate Body has found that where a regulatory distinction is not designed and applied in an even-handed manner, that distinction cannot be considered "legitimate", and thus the detrimental impact will reflect discrimination prohibited under Article 2.1. The Appellate Body has also confirmed that, in undertaking this assessment of even-handedness, a panel does not err by assessing whether the detrimental impact caused by a regulatory distinction can be reconciled with, or is rationally related to, the policy objectives pursued by the measure at issue, so long as, in doing so, it does not preclude consideration of other factors that may also be relevant to the analysis.

16. In the original proceedings, the Appellate Body concluded that the United States had not demonstrated that the difference in the tuna measure's labelling conditions was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans. In the first compliance proceedings, the Appellate Body found that the compliance panel had erred to the

extent that its analysis had not encompassed, in response to the United States' arguments, an assessment of whether the regulatory distinctions drawn by the amended tuna measure (i.e., with respect to the eligibility criteria, the certification requirements, and the tracking and verification requirements) were "calibrated" to the relative risks of harm to dolphins posed by different fishing techniques in different areas of the oceans. As the United States defended the amended tuna measure's regulatory distinctions on the basis of "calibration", the Appellate Body considered there to be a "special relevance" in conducting a calibration assessment as part of the "treatment no less favourable" test in the second step of the Article 2.1 analysis in this dispute.

17. While the Appellate Body described, in general terms, the methodology of the applicable calibration assessment, it was unable to complete the analysis because there were insufficient factual findings and undisputed facts on the record regarding the overall relative risks or levels of harm to dolphins arising in different fisheries. As a consequence, it was unable to resolve the question of whether or not the different eligibility criteria, the different certification requirements, the different tracking and verification requirements were "calibrated" to such different overall relative risks or levels of harm. Nonetheless, the Appellate Body found that other aspects of the measure's design (i.e., the "determination provisions") reflected a lack of even-handedness, and that, for this reason alone, the United States had not demonstrated that the differences in the amended tuna measure's labelling conditions were calibrated to, or commensurate with, the risks to dolphins arising from different fishing methods in different areas of the oceans.

18. In the current compliance proceedings, the United States attempts to restrict the Panels' assessment of even-handedness in the second step of the "treatment no less favourable" test under Article 2.1 to a narrow interpretation of "calibration". In so doing, the United States seeks to exclude considerations, questions, and factors relevant to both the calibration assessment and the overall analysis described by the Appellate Body in the first compliance proceedings, including whether the tuna measure's regulatory distinctions are designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination because, for example, the detrimental impact they cause cannot be reconciled with, or rationally connected to, the objectives of the measure. In Mexico's view, the assessment of even-handedness is a multi-factor analysis that carefully scrutinizes the design, architecture, revealing structure, operation, and application of the measure in the light of the particular circumstances of the case. This analysis is based on the arguments and evidence adduced by the disputing parties, and therefore includes — but is not restricted to — the question of whether or not the relevant regulatory distinctions are "calibrated" to the relative overall risks of harm to dolphins arising in different fisheries.

19. Thus, the Panels must take into account a number of factors or questions in conducting and resolving the legal test for "even-handedness", including both whether the tuna measure's regulatory distinctions can be justified on the basis that they are "calibrated", and whether, as Mexico argues, the discriminatory effects constitute arbitrary or unjustifiable discrimination on the basis that the regulatory distinctions cannot be reconciled with, or rationally connected to, the legitimate policy objectives of the measure.

20. These questions do not create independent or discrete legal tests; rather, they are elements within the overall analysis of whether or not the tuna measure is "even-handed", and they are assessed cumulatively, in relation to one another, on a common record of facts and circumstances. The careful assessment of a relevant question or factor within the context of the legal test for "even-handedness" should not be viewed as conducting a separate legal test. As the Appellate Body explained, assessing whether a measure involves "arbitrary or unjustifiable discrimination" is "*one* of the ways to determine whether the detrimental impact caused by a technical regulation is even-handed", but "the fact that a measure is designed in a manner that constitutes a means of arbitrary or unjustifiable discrimination is *not* the only way in which a measure may lack even-handedness." A panel should not be precluded from considering "*other factors that may also be relevant to the analysis*". In this regard, the Appellate Body has explicitly confirmed that, in the circumstances of this dispute, a calibration assessment is a necessary part of the legal test for even-handedness, but it is not a separate, independent test in and of itself. The Appellate Body also made it clear that the calibration analysis must be undertaken "taking account of the objectives of the measure".

21. Accordingly, contrary to the arguments of the United States, both the nexus between the regulatory distinctions and the objectives of the measure and the calibration of the measure are relevant to the assessment of whether the tuna measure is even-handed.

1. The Risks to Dolphins can only be Addressed if the Label is Accurate

22. The accuracy of the information provided to consumers on the U.S. dolphin-safe label is a central consideration in determining whether the detrimental impact caused by the tuna measure stems exclusively from a legitimate regulatory distinction. This is because the calibration assessment must be undertaken "taking account of the objectives of the measure", which necessitates an assessment of whether there is a "rational connection" between the regulatory distinctions and the objectives of the measure. This is clearly reflected in the reasoning and findings of the Appellate Body and the Panels in the previous proceedings.

23. The undisputed objectives of the tuna measure are: (i) 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 (ii) 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.

24. Taking these two objectives into account, the calibration assessment requires an assessment of the "accuracy" of the label. This is because an inaccurate label misleads consumers about whether tuna products that they purchase contain tuna caught in a manner that adversely affects dolphins, which in turn allows the U.S. market to be used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. In such circumstances, a high risk of inaccurate labelling equates to a high risk to dolphins, contrary to both of the interrelated objectives of the tuna measure. Thus, the objectives of the measure cannot be fulfilled if the accuracy of the dolphin-safe information on the label is neither (i) required, nor (ii) enforced, i.e., through sufficient certification and tracking and verification conditions.

25. The fundamental linkage between protecting dolphins from mortality and serious injury and providing accurate labelling information was recognized by the original Panel. In the original proceedings, the Panel found that the tuna measure operated on the basis of incentives created by consumer choice, such that achievement of the measure's secondary objective (i.e., to protect 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) was therefore dependent in large part on the achievement of the primary objective (to ensure that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins). In other words, the risks of harm to dolphins are inextricably linked to the accuracy of the dolphin-safe information provided to consumers and, therefore, accuracy is a necessary and central consideration in the calibration analysis

26. The United States' interpretation of calibration as allowing, on the facts of this dispute, for there to be a "margin of error" in the accuracy of the information provided to consumers on the dolphin-safe label is something that cannot be justified for the purposes of the assessment of even-handedness in the second step of the "treatment no less favourable" test under Article 2.1 of the TBT Agreement or for the assessment of arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994.

27. In arguing that the accuracy of the label is not relevant to the calibration test, the United States incorrectly narrows the test to an assessment of the "risks" (i.e., mortality and serious injury to dolphins) in isolation from the mechanism that addresses those risks (i.e., the provision of dolphin-safe information to consumers on the label affixed to tuna products in the U.S. market). The Appellate Body has explained that the focus of the calibration test is on "how the risks … *are addressed*" and not on the risks in isolation. The risks are addressed through the dolphin-safe label which, in turn, is governed by the labelling conditions. The differences in the labelling conditions include differences that relate to the accuracy of the labels.

28. Mexico is not required to adduce evidence that proves actual instances where tuna products containing non-dolphin-safe tuna caught outside the ETP have been inaccurately labelled as dolphin-safe. For the purposes of establishing a lack of even-handedness under the second part of the legal test in Article 2.1 of the TBT Agreement and arbitrary discrimination under the chapeau of Article XX of the GATT 1994, Mexico is only required to establish a *prima facie* case that, under the circumstances related to the design and application of the tuna measure's labelling conditions and requirements, tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe. The burden then shifts to the United States to sufficiently explain how such instances can be prevented in the application of the tuna measure's labelling conditions and requirements.

29. In *EC – Seal Products*, for example, the Appellate Body considered the mere possibility that the measure at issue could be applied in a manner that might inaccurately characterize products with an advantageous market status to be sufficient to establish a *prima facie* case of arbitrary or unjustifiable discrimination, thereby shifting the burden to the responding Member. In this respect, the Appellate Body indicated that it fell to the European Union to sufficiently explain how instances of such inaccurate characterization could be prevented in the application of the measure at issue.

30. In the current proceedings, Mexico has established a *prima facie* case that, due to gaps and deficiencies in the eligibility criteria, the certification requirements and the tracking and verification requirements, tuna products derived from tuna caught outside the ETP under non-dolphin-safe circumstances – which are therefore not properly eligible for the dolphin-safe label – could potentially enter the U.S. market inaccurately labelled as dolphin-safe. Mexico showed not only that there are gaps, but also that major suppliers of tuna for the U.S. market – Thailand, the Philippines and Chinese Taipei – were found by the European Commission to have significantly deficient regulation of their fishing fleets and processing industries, meaning that they could not provide assurances of the sources of their sea food products. That is, in fisheries other than the ETP large purse seine fishery, factors such as deficiencies in record-keeping, transshipments, and illegal, unreported and unregulated (IUU) fishing can lead to dramatic deficiencies in the accuracy of information, including dolphin-safe information. Moreover, the United States lacks jurisdiction to audit foreign fishing vessels, carrier vessels, and foreign processors. The U.S. processors and importers are required to collect the documentation, but not to validate the information contained therein.

2. The Measure is Not Calibrated to the Overall Relative Risks or Levels of Harm to Dolphins arising in Different Fisheries

31. It is important to recall that the concept of "calibration" was first raised in the original proceedings as a defensive argument by the United States, not as an independent analysis developed by the Appellate Body. The concept of "calibration" as a potential justification was further developed by the Appellate Body in the first compliance proceedings, again in relation to the United States' arguments.

32. Further to the Appellate Body's guidance in the first compliance proceedings, the calibration assessment in this dispute must examine whether the *de jure* and *de facto* regulatory differences — i.e., the "relevant regulatory distinctions" under Article 2.1 of the TBT Agreement — are "calibrated" to the different relative risks (i.e., the likelihood) that dolphins will be adversely affected (i.e., dolphin mortalities or serious injuries) in the course of tuna fishing operations by using different fishing methods in different areas of the oceans. The differences are calibrated if they are "not disproportionate with", "are commensurate with", and are "appropriately tailored to" the different "relative overall risks or levels of harm" to dolphins — including both observable and unobservable mortality and serious injury — associated with tuna fishing using different fishing methods in different ocean areas, "taking account of" and "in the light of" the objectives of the measure. The consideration of the objectives of the measure incorporates the requirement that the detrimental impact caused by the regulatory distinctions must be reconciled with, or rationally related to, the objectives of the measure.

33. In order to apply the calibration test, the Panels must first identify the differences in the "risk profiles" of the different "fishing methods" in the different "areas of the oceans". In these proceedings, questions regarding the relative risk profiles are "more acute" and a detailed assessment that reflects a "thorough understanding of the relative risk profiles" is necessary. "Risk" refers to the likelihood of dolphin mortalities or serious injuries. The likelihood of dolphin mortalities or serious injuries (i.e., the risk profile) must be assessed both in relation to fishing methods and in relation to fishing areas of the oceans. In determining the risk profile of a fishery, focusing on both the fishing method and the ocean area is necessary because the risk to dolphins arising from a particular fishing method may change depending on the fishing area. Likewise, the risk to dolphins in a particular fishing area may change depending on the fishing method that is used in that area. The comparative evaluation of the overall relative risks in different areas of the oceans must also take into account the reliability of the record-keeping and reporting — that is, the accuracy of the information provided and the levels of IUU fishing — by the tuna suppliers in those areas, including the level and effectiveness of governmental oversight of the commercial activities of tuna fishing vessels, brokers, trans-shippers and producers of tuna products.

34. Finally, in assessing the various factors that make up the risk profiles of the different fishing methods and the different areas of the oceans, the Panels must take into account the

nature of the evidence relied upon by the United States to establish those factors. Where the United States relies on precautionary presumptions or a low standard of proof for assessing the risk profile of a fishing method and an ocean area, a similar presumption or low standard of proof must be used for assessing the risk profiles of other fishing methods in other ocean areas. To do otherwise would be arbitrary and unjustifiable.

a. Determination of the Risk Profiles of Different Fishing Methods in Different Ocean Areas

35. Pursuant to the Appellate Body's direction, in evaluating whether the measure is calibrated, the Panels must conduct a comparative analysis of the overall relative risks or levels of harm posed to dolphins by different fishing methods in different ocean areas. In the first compliance proceedings, the Panel narrowed its comparison to what it characterized as the "unobservable" adverse effects caused by different fishing methods. The Appellate Body rejected this approach, determining that the comparison must take into account the total adverse effects caused by a fishing method, including the direct, observable mortalities and serious injuries. In this respect, the Appellate Body considered that by focusing solely on its understanding that the unobserved harms differed between setting on dolphins and other fishing methods, the Panel did not consider the relative risks posed by the relevant fishing methods in respect of observable mortality or serious injury, and therefore did not resolve the questions of the overall levels of risk in the different fisheries and how they compare to each other. The Appellate Body specifically and expressly considered that such an examination was needed in order to assess whether the differences in the dolphin-safe labelling conditions under the amended tuna measure are appropriately tailored to, and commensurate with, those respective risks.

36. It is clear from the Appellate Body's reasoning that risk profiles must be objectively determined for the different relevant fishing methods and fishing areas, such that they capture the implications of all factors that affect the likelihood of total or "overall" (i.e., observed and unobserved) dolphin mortality and serious injury caused by each fishing method at issue in each ocean area at issue. Once such risk profiles are determined, they can be compared in order to identify the differences in the overall relative risks or levels of harm. The design and application of the different eligibility criteria, certification requirements, and tracking and verification requirements can then be scrutinized in the light of these differences in order to determine whether or not the regulatory distinctions are commensurate with, or tailored — that is, "calibrated" in an even-handed manner — to the different risk profiles arising in different fisheries.

37. It is not necessary for the Panels to undertake a comprehensive comparison of the risk profiles for all fishing methods in all ocean areas. Rather, the scope of the Panels' analysis is largely dictated in this dispute by the evidence adduced by the Parties. As the Party asserting that the tuna measure is "calibrated", the United States bears the burden of demonstrating that it has properly tailored the different labelling conditions and requirements to the different overall relative risks or levels of harm arising in different fisheries. This burden must be satisfied if the United States is to rebut Mexico's *prima facie* case under Article 2.1 that the measure does not stem exclusively from a legitimate regulatory distinction. In particular, Mexico has shown that the deficiencies and gaps in the design, architecture, revealing structure, operation, and application of the regulatory distinctions result, in the light of the particular circumstances of the case, in the provision of inaccurate dolphin-safe information to consumers in direct contradiction of both of the measure's objectives. Therefore, the measure cannot be said to be designed and applied in an even-handed manner. The Panels need only to find that there is evidence of one example in which the measure is not commensaurate with, or properly tailored to, the overall relative risks or levels of harm for the United States to be found not to have satisfied this burden. While Mexico's evidence demonstrates several examples of fishing methods and fisheries where the overall relative risks to dolphins are equivalent to or greater than the those arising from Agreement on the International Dolphin Conservation Program (AIDCP)-compliant tuna fishing in the ETP, the tuna measure's labelling conditions and requirements are less strict for those fisheries. This outcome is inconsistent with the concept of calibration described by the Appellate Body.

38. In the circumstances of this dispute, the determinative factors in ascertaining the risk profiles for the purposes of the calibration assessment are (i) the existence of observed and unobserved dolphin mortalities and serious injuries, and (ii) the magnitude of those mortalities and serious injuries. These factors reflect the aggregate "results" of all other risk factors that have been discussed in this dispute. While the United States attempts to include as an additonal factor the subjective description of the AIDCP-compliant dolphin encirclement fishing method as "particularly harmful" simply because it involves intentional interactions with dolphins, Mexico

emphasizes that ascribing risk to the features of the fishing activity and, at the same time, to the evidence of both observed and unobserved dolphin mortality and serious injury will double-count the overall relative risks or levels of harm. This is why the Appellate Body did not include a subjective description of fishing techniques in the methodology it described for determining risk profiles. Thus, it is the measurable results or consequences of a fishing method, as evidenced in total aggregate levels of observable and non-observable dolphin mortalities and serious injuries, that must be assessed, rather than presumptions extrapolated from subjective descriptions of the features or characteristics of the fishing methods.

39. The most scientific and objective approach to determining risk profiles would be to use potential biological removal (PBR) rates for the relevant fisheries in order to ascertain whether or to what extent dolphin populations are being adversely affected by the fishing method. Another approach would be to consider the estimated overall, worldwide mortality levels of different fishing methods based on the available evidence on the record. The United States's rejection of the use of PBR levels to evaluate whether different fishing methods and specific fisheries are dolphin-safe is inconsistent with the manner in which the United States regulates its own fisheries, inconsistent with the approach taken in its new Marine Mammal Protection Act regulations, and contrary to scientific methods. If a fishery is small, but the levels of harm caused by the fishing method is depleting the local dolphin stocks, then allowing tuna caught by those methods in those fisheries to be marketed as "dolphin-safe" (i.e., because the absolute number of dolphins killed is lower than in larger fisheries) is inconsistent with dolphin protection and contrary to the objectives of the tuna measure.

40. Alternatively, if the United States disregards scientific measurements and justifies disqualification of Mexico's AIDCP-compliant fishing method on the basis of a specualtive precautionary presumption that it is causing an unknown magnitude of unobservable harms in every fishing set, then *the same type of precautionary presumption and speculation must be applied to other fishing methods and other ocean regions*. In other words, where there is credible evidence that dolphins have been harmed by a fishing method, it must be presumed that there are widespread direct and indirect harms being caused by that fishing method *unless proven otherwise with absolute certainty*. The United States does the opposite, however. For all fishing methods other than dolphin encirclement, the United States applies a presumption that dolphins are not being harmed unless proven otherwise (a presumption that benefits from the general deficit of complete or reliable data on dolphin mortality caused by commercial tuna fishing outside the ETP). If the same presumptive standard is not applied to all fishing methods that cause dolphin mortalities and serious injuries, but rather different presumptive standards are applied arbitrarily, then the tuna measure cannot be said to be applied in an even-handed manner.

41. The favorable presumption that the United States applies to non-ETP fisheries under the tuna measure is inconsistent with regulations that the United States recently issued to implement the Marine Mammal Protection Act, under which the United States, after a five-year grace period, will ban entirely imports of seafood from fisheries for which the exporting nation is unable to demonstrate that the fishery is not having population effects on marine mammals. This inconsistency highlights the arbitrariness of the standard that the United States is applying under the tuna measure, under which it allows products to be labelled and advertised as dolphin-safe without reliable evidence supporting such a claim.

42. It is important to note that, in the original proceedings, the Panel determined that dolphin populations affected by fishing techniques other than setting on dolphins face risks at least equivalent to those currently faced by dolphin populations in the ETP under AIDCP monitoring. The United States has not presented evidence that would justify disregarding that determination.

43. ***Gillnet Fishing.*** The United States has admitted that the tuna gillnet fisheries of Iran, India, Sri Lanka, Pakistan, Oman, Yemen, Tanzania, the United Arab Emirates, Mozambique and Saudi Arabia in the Indian Ocean all have dramatically higher dolphin bycatch rates than dolphin encirclement sets in the ETP large purse siene fishery. Nonetheless, tuna products made with tuna caught using the gillnet fishing method in general — including tuna harvested in these gillnet fisheries in particular — remain eligible for the US dolphin-safe label. Further, this eligibility is conditioned on requirements and conditions that are more liberal than those applicable in the ETP large purse seine fishery.

44. The evidence adduced by Mexico demonstrates that the gillnet fishing method is highly destructive to dolphins. The United States' arbitrary application of the determination provisions to the gillnet fisheries in the Indian Ocean, exclusively on the basis of evidence adduced by Mexico in the first compliance proceeding, raises strong questions about why it has not made tuna products

made with gillnet-caught tuna ineligible for the dolphin-safe label. The United States argues that, in principle, gillnet fishing can be dolphin-safe if it is done in an ocean area where there are no dolphins. In support of this proposition, the United States cites to a report on U.S. fisheries that includes a few that have not been deemed dangerous to marine mammals. However, the fisheries to which the United States refers are not tuna fisheries, and, in any event, the same document identifies a total of twenty-six gillnet fisheries that are designated as posing risks to marine mammals. There is no reasonable explanation why the United States has not made gillnet fishing an ineligible method for harvesting dolphin-safe tuna.

45. ***Longline Fishing.*** There is substantial and uncontradicted evidence on the record that longlines kill and maim dolphins, and that longline fishing is threatening the viability of dolphin stocks in some fisheries.

46. The association between dolphins and longline fishing is well-established. In the past, analyses of this issue tended to focus on negative effects on fishing caused by "depredation" – i.e., the consuming by marine mammals of both bait and target fish on longline hooks – but it is now widely recognized that dolphins are severely harmed by such interactions.

47. Notably, the United States itself has designated the longline tuna fishery in the area of the U.S. State of Hawaii as threatening the regional population of false killer whales (a species of dolphin), which are classified as "endangered" and "depleted". The U.S. Department of Commerce has established a "take reduction plan" to protect those dolphins. Based on the data in this fishery, a report published by the Sea Turtle Restoration Project on longline fishing estimates that over 18,000 dolphins are killed annually by longline fishing in the Pacific Ocean. The United States has also designated the "Atlantic pelagic longline fishery" – in an area off the eastern coast of the United States – as a fishery harmful to marine mammals that requires a "take reduction plan" and formed a Pelagic Longline Take Reduction Team (PLTRT).

48. The United States argues that the total numbers of reported dolphin deaths from longlines are lower than those for dolphin sets in the ETP, and that the number of "interactions" that are reported is low on a per-deployment basis. However, there are no comprehensive programs to monitor the harm caused to dolphins by longline fishing, and the percentage of observed fishing sets is too low to draw scientifically meaningful conclusions. Difficulties also arise from the fact that the lines can be as long as 90 miles in length, which would impair the ability of observers to see the deaths and injuries as they are occurring.

49. The evidence on the record establishes that longline fishing kills tens of thousands of dolphins per year. This level of harm exceeds the adverse effects of AIDCP-compliant dolphin encirclement in the ETP. Notwithstanding these facts, the tuna measure permits tuna caught using longlines to be used to produce tuna products eligible for the US dolphin-safe label, while tuna products produced using tuna harvested in AIDCP-compliant dolphin encirclement sets is never eligible, even if an independent, scientific observer certifies that no dolphins were killed or injured in a fishing set.

50. ***Trawl Fishing.*** The Panel in the first compliance proceeding found that trawl fishing for tuna results in dolphin mortalities. An article published by Greenpeace International reports significant dolphin mortalities caused by the trawl net fishing method, including on example in which 30 dolphins were killed in one single haul of the net. Although it is uncontested that trawl fishing is a highly destructive fishing method that kills dolphins in many fisheries, the United States applies a presumption that this is a safe fishing method for dolphins that should be eligible for the dolphin-safe label. As in the cases of gillnet and longline fishing, it is not even-handed for the tuna measure to unconditionally disqualify the AIDCP dolphin-safe fishing method from producing tuna eligible for dolphin-safe products, but not to disqualify the trawl method.

51. ***Handline Fishing.*** It is well-established that tuna regularly associate with dolphins in the Indian Ocean and other ocean areas, just as they do in the ETP, and that handline fishers chase herds of dolphins specifically to locate the tuna swimming beneath them.

52. Mexico's evidence establishes that (i) the ETP is not the only place in the world in which tuna routinely associate with dolphins, as the United States has argued, and (ii) that other fishing methods intentionally "target" dolphins to find tuna. Moreover, if, as the United States argues, the "chasing" of dolphins to locate tuna is presumed to be "intrinsically" or "particularly" harmful to dolphins, regardless of whether or not any dolphin mortality or serious injury has been caused in the process, then the tuna measure must disqualify tuna caught by handlines in association with dolphins in order to be even-handed.

53. ***Unregulated Purse Seine Fishing.*** The panels in the original and first compliance proceedings found that purse seine fishing in general may result in substantial dolphin bycatch, even when it does not involve the encirclement of dolphins. In the current proceedings, the evidence on the record establishes that purse seine sets on floating objects, such as fish-aggregating devices (FADs), is a highly destructive method, and that FAD fisheries cause thousands of dolphin mortalities. This evidence includes, for example, a report sponsored by the U.S. Department of Commerce in which scientists estimated that about 2,000 dolphins were being killed each year by a fleet of five tuna purse-seiners using fish-aggregating devices in the Philippinnes, and a report in which a single FAD set that killed 180 dolphins was observed, among others. On the basis of this evidence, it is not even-handed for the tuna measure to allow tuna products made with tuna caught in FAD purse seine fishing sets to be eligible for the US dolphin-safe label, while it prohibits tuna products made with tuna harvested using the AIDCP dolphin-safe fishing method from conditional eligibility.

54. ***AIDCP-Compliant Dolphin Encirclement Purse Seine Fishing.*** By virtue of the AIDCP requirement for 100 percent observer coverage (by independent, highly-qualified scientific observers), the ETP large purse seine fishery has the most comprehensive, accurate, and reliable data on dolphin mortality in the world. The evidence regarding the existence and magnitide of direct, observed mortalities caused by the AIDCP-compliant dolphin-encirclement method is not in dispute. This evidence demonstrates that, in 2015, 96.4 percent of dolphin encirclement sets were made without causing any direct dolphin mortality or serious injury.

55. Mexico does not agree that unobserved mortalities and serious injuries from AIDCP-compliant dolphin-safe sets, if they exist at all, always occur in every set or are material. This is a presumption (i.e., the panel in the original proceedings considered there to be "sufficient evidence … to raise a presumption that genuine concerns exist"), and it is based on evidence attempting to explain low population growth estimates that Mexico has vigorously refuted in the current proceedings with more recent evidence.

56. The only objective scientific evidence of the magnitude of any unobservable harms caused by AIDCP-compliant dolphin encirclement is the evidence related to the growth of dolphin stocks in the ETP. The most recent evidence identifies errors in the previous population assessment surveys which indicate that the populations were likely seriously underestimated. One of the Department of Commerce authors who participated in the prior dolphin population assessments has concluded in the more recent evidence that there is a high likelihood that, due to flaws in the design and execution of the population surveys, the northeastern spotted dolphin stock has been underestimated by more than 60 percent, and that the eastern spinner dolphin stock has been underestimated by 73 percent. Moreover, the United States agreed in 2009, based on population estimates, to a decision of the AIDCP Parties, on the advice of the Scientific Advisory Committee, to increase the ETP "stock mortality limits" (SMLs) for the two dolphin stocks that are most involved in the tuna fishery and which the United States has designated as "depleted" – from 648 to 793 for the northeastern spotted dolphin, and from 518 to 655 for the eastern spinner dolphin. The action of the U.S. Department of Commerce in agreeing to increase the SMLs for the two "depleted" stocks contradicts the United States' assertion that there is a reasonable basis to presume that there "could be" thousands of unobserved mortalities.

57. Overall, the evidence on the record shows that direct mortalities in the ETP large purse seine fishery are well within the limits of sustainability, while the suggestions of indirect, unobservable effects are speculative and unproven (generally arising in order to attempt to explain the mistaken premise that dolphin populations are not recovering at the expected rates).

b. Eligibility Criteria

58. The eligibility criteria specify which fishing methods are prohibited from being used to catch tuna that can be designated as dolphin-safe. Only two methods are currently ineligible: dolphin encirclement and high seas large-scale driftnet fishing. All other tuna fishing methods are eligible to catch tuna that could be designated as dolphin-safe provided that the other labelling conditions are met. This difference in treatment between ineligible and eligible fishing methods is not even-handed.

59. The evidence on the record establishes that hundreds of thousands of dolphins and other marine mammals are killed annually in commercial fishing operations. The United States has failed to prove that tuna fishing methods other than the AIDCP-compliant dolphin encirclement method in areas of the oceans outside the ETP do not result in equivalent or greater overall relative risks or levels of harm to dolphins.

60. In particular, the eligibilty criteria permit tuna caught in gillnet fisheries in the Indian Ocean (where the United States estimates there are over 60,000 dolphin mortalities annually) to remain eligible for the US dolphin-safe label, while prohibiting the tuna harvested using AIDCP-compliant dolphin encirclement sets in which no dolphins were killed or injured from ever being eligible. This alone is sufficient to establish that the tuna measure is not commensurate with, or properly tailored to, the relative overall risks or levels of harm to dolphins arising from different fishing methods in different areas of the oceans.

61. Further, under the tuna measure, all tuna caught during a voyage in which a dolphin encirclement set was made even one time is disqualified. In other words, if a fishing vessel, during a two-month voyage, made one dolphin encirclement set while all of its other sets were on FADs or unassociated, and no dolphins were killed or seriously injured during any of the fishing sets, all of the tuna caught by the vessel would be disqualified from the dolphin-safe label. Conversely, in the case identified by Mexico where a vessel fishing in the West Pacific killed 180 dolphins in a single purse seine FAD set, all of the tuna caught by that vessel in other sets during that same voyage was eligible to have the dolphin-safe label.

62. Thus, careful scrutiny of the design and application of the eligibility criteria in the light of the particular circumstances of the case reveals that the tuna measure's regulatory distinctions lack even-handedness, such that the detrimental impact cannot be said to stem exclusively from a legitmate regualtory distinction. Moreover, this shows that the tuna measure's regulatory distinctions between tuna harvested in the ETP using the AIDCP dolphin-safe fishing method and tuna harvested using other fishing methods in other ocean areas is clearly not commensurate with, or properly tailored to, the relative overall risks or levels of harm to dolphins arising from different fishing methods in different areas of the oceans.

c. The Certification Requirements

63. Every Mexican tuna product containing tuna caught by a large purse seine vessel in the ETP must be supported by a signed statement from an independent, highly-trained scientific observer on board the vessel. The sole function of the AIDCP observer is specifically to observe all procedures relating to dolphins during fishing sets, to monitor compliance with all mandatory dolphin-protection procedures, and to provide written reports (which are subsequently reviewed by the AIDCP International Review Panel) on any and all bycatch and interactions with marine mammals, including detecting and reporting on any mortalities or serious injuries caused to dolphins in the course of a fishing set. In contrast, tuna caught outside the ETP large purse seine fishery only needs to be self-certified as dolphin-safe by the captain of the fishing vessel that harvests it. Unlike the independent observer in the ETP, the captain has a number of other important responsibilities that take priority, e.g., the operation of the vessel, conducting fishing manoeuvers, and the safety of the crew, among others. Those other responsibilities require the captain's attention during fishing sets or gear deployments. As a practical matter, a fishing captain outside the ETP large purse seine fishery will either be (i) distracted and unable to give his or her full attention to identifying dolphin mortality or serious injury, or (ii) precluded by his or her other responsibilities from actually observing the fishing set at all.

64. In the first compliance proceedings, the panel determined that the evidence strongly suggested that certifying whether a dolphin has been killed or seriously injured during the course of a fishing set or a gear deployment is a highly complex task. In this regard, the panel found "especially telling" the fact that the tuna measure itself recognized the necessity of training and education in equipping persons with the necessary technical know-how to ensure that they can properly certify the dolphin-safety of a tuna catch. The panel concluded that the United States had failed to rebut Mexico's evidence that captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured, and that this may result in inaccurate information being passed to consumers, in contradiction to the objectives of the measure.

65. In the current proceedings, the online "training" program that the United States purports to provide to fishing vessel captains under the new tuna measure is superficial and filled with ambiguous language. Further, the Department of Commerce has no mechanism to verify that a captain has read the short training document or adequately understands its contents. Moreover, two of the largest tuna product suppliers to the United States have both stated that it will not be possible to implement or enforce these training requirements. Thus, this amendment has not remedied the deficiencies and gaps that led the first compliance panel to determine that captains may not necessarily and always have the required technical skills.

66. As Mexico has previously noted, the accuracy of the dolphin-safe information provided to consumers on the U.S. label is essential to the achievement of the measure's objectives. If the certification is inaccurate, then the error will be replicated throughout the tracking and verification process — to the extent that a functioning tracking and verification process exists — with the consequence that the tuna product produced using that tuna will be erroneously labelled. As explained above, where there is a high risk that inaccurate dolphin-safe information will be provided to consumers, there is a high risk that the U.S. market will be used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. Thus, a higher risk of inaccurate certification in an ocean area results in a higher overall risk of harm to dolphins in that ocean area.

67. As a consequence, a relevant and material factor in both the "rational connection" assessment and the "calibration" assessment is that certain major suppliers of tuna for the U.S. market have been the subject of detailed reports by the European Commission identifying them as non-cooperating countries in fighting IUU fishing and unreliable in terms of accurate or complete reporting and record-keeping. For example, the Philippines was found to have a lack of checks on logbooks. Chinese Taipei vessels were found to have inconsistent information concerning catch, master declarations, logbooks, International Commission for the Conservation of Atlantic Tunas (ICCAT) statistic documents, and *dolphin safety declarations*. The United States has provided no explanation as to how or why the captains' self-certifications from the fleets of these countries should be treated as reliable or accurate.

68. Noting that the Appellate Body's guidance is to assess whether the tuna measure is calibrated to the risks to dolphins arising from different fishing methods *in different areas of the oceans*, it is pertinent and appropriate for the Panels to evaluate the application of the regulatory distinctions not just on the basis of the fishing methods, but also on where they are being used. The reliability (or unreliability) of a fishing fleet or the regulatory authorities that oversee the fleet are relevant factors in the analysis.

d. The Tracking and Verification Requirements

69. Contrary to the United States' assertions, arguments, and purported evidence, there remain dramatic differences between the design and application of the tuna measure's different tracking and verification regimes applicable to the tuna harvested by large purse seine vessels in the ETP, on the one hand, and tuna harvested by other fishing methods in other ocean areas, on the other hand.

70. The tuna measure continues to require tuna products made with tuna harvested in the ETP large purse seine fishery to be supported by the documentation required under the AIDCP regime. The first compliance panel found that the AIDCP's comprehensive regime ensures that the information regarding whether or not a catch of tuna is AIDCP-certified dolphin-safe accompanies the tuna at every stage throughout the fishing and production processes, from the point of catch right through to the point of retail. Specifically, it found that every step of the catch and canning process for tuna caught by large purse seine vessels in the ETP is prescribed, can be monitored by national and regional agencies, and is subject to some sort of governmental (including regional and international) oversight, and the responsible authorities are thus able to verify at any stage of the catch and canning process whether a particular batch of tuna is dolphin-safe. The factual circumstances underpinning these findings have not changed, and the panel's findings continue to apply.

71. In contrast, the most recently amended tuna measure is neither designed nor applied in a manner that can ensure that dolphin-safe certifications made outside the ETP can be connected with the tuna contained in a tuna product produced in the United States or any other country. Unlike the Mexican tuna industry, most major tuna products companies in other countries are not vertically integrated. They purchase tuna from third party companies, and in many cases the tuna passes through several parties before it is processed into a tuna product. The path of tuna from the point where it is harvested from the ocean to the point where it is processed into a tuna product for the U.S. market may involve transhipment at sea, consolidation from multiple fishing vessels into a refrigerated carrier, and IUU fishing activities. Outside the ETP, however, there are no requirements under the tuna measure for, and no actual established practice of, segregating dolphin-safe tuna from non-dolphin-safe tuna in separate storage wells or during transhipment. None of the documents submitted by the United States shows that even U.S. processors require fishing vessels to have separate storage wells for the segregation of dolphin-safe and non-dolphin-safe tuna.

72. The most recent amendments to the tuna measure purport to require U.S. processors and importers to collect and retain for two years "information on each point in the chain of custody regarding the shipment of the tuna or tuna product to the point of entry into U.S. commerce". However, the tuna measure imposes no obligation on U.S. processors or importers to validate or audit the documentation that they receive. Moreover, the Department of Commerce lacks jurisdiction to audit foreign fishing vessels, carrier vessels, and foreign processors on the basis of this documentation. Under other U.S. regulatory compliance programs (unrelated to fishing), a U.S. company would be expected to audit its suppliers or customers, and to have records of such audits available for review by U.S. government authorities, but there are no such obligations under the tuna measure.

73. These gaps and deficiencies are exacerbated in ocean regions where there is unreliable reporting and record-keeping. In this respect, the European Communities' reports on Thailand, the Philippines and Chinese Taipei are especially important. For example, the report on Thailand found that the documentation schemes developed by the authorities for the purpose of traceability are being used incorrectly by operators, allowing them to launder fish by over-declaring the incoming quantities from erroneous catch certificates. Similarly, the report on the Philippines found that there is neither a working traceability system nor any measure to ensure that authorities are controlling the veracity of information and traceability of transactions pertaining to the fishing and transhipment activities of their vessels. The report on Chinese Taipei determined that there is no traceability system able to ensure full transparency in all stages of fishing transactions (i.e. catch, transhipment, landing, transport, factory processing, export and trading), and there is no certainty that what is recorded in the authorities' systems corresponds with what is recorded in the companies' accounting and production systems.

74. The United States argues that the regulatory differences in the tuna measure's tracking and verification requirements are calibrated because "it is appropriate to use a more 'sensitive' mechanism where the risks of dolphin mortality and serious injury are high, and a less 'sensitive' mechanism where the risks of dolphin mortality and serious injury are low. In this regard, the United States relies on the dissenting opinion of the minority panellist in the first compliance proceedings to justify a greater "margin of error" in the application of the measure to other fishing methods in other ocean areas. However, the United States' position that calibration can justify "margins of error" in the accuracy of the dolphin-safe label among different fishing methods and fisheries is legally incorrect. Such an interpretation ignores the large body of jurisprudence on the meaning of arbitrary or unjustifiable discrimination, which involves the question of whether or not a rational connection exists between the detrimental impact caused by the measure and the objectives of the measure. This is a crucial element of the legal analyses for both even-handedness under Article 2.1 of the TBT Agreement and arbitrary or unjustifiable discrimination under the chapeau to Article XX of the GATT 1994 because it ensures symmetry in the calibration tests conducted under each of these provisions.

B. The Tuna Measure is Inconsistent with Articles I:1 and III:4 of the GATT 1994 and Cannot be Justified under Article XX

75. In its submissions, Mexico has established a *prima facie* case that the tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994. The United States does not dispute these inconsistencies. Further, Mexico agrees with the United States that the measure provisionally falls within the general exception in subparagraph XX(g) of the GATT 1994. Mexico and the United States disagree on whether or not the requirements of the chapeau of Article XX are met, namely the requirement that the measure must not be applied in a manner that constitutes a means of arbitrary and unjustifiable discrimination.

76. The burden is on the United States to demonstrate that the requirements of the chapeau of Article XX are met.

77. In the original compliance proceedings, the Appellate Body found that, in the circumstances of this dispute, an assessment of whether the requirements of the tuna measure are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions was relevant for an analysis of arbitrary or unjustifiable discrimination under the chapeau. The Appellate Body further found that, so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for the purposes of conducting an analysis under the other. Thus, given that Mexico's arguments under both Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994 are grounded in the assssment of arbitrary and unjustifiable

discrimination, it is appropriate for Mexico to rely upon its submissions regarding the lack of calibration under Article 2.1 to establish that the 2016 tuna measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, such that the requirements of the chapeau are not met.

78. The Panels need only to find that there is evidence of one example where the tuna measure is not designed or applied in a manner that is commensurate with, or properly tailored to, the overall relative risks or levels of harm to dolphins arising from different fishing methods in different ocean areas in order to conclude that the United States has not satisfied its burden. Mexico has presented considerable evidence and arguments to demonstrate that (i) the tuna measure was never "properly tailored to" and is not otherwise "calibrated" to the risk profiles of the ETP large purse seine fishery and other tuna fisheries, and (ii) the tuna measure is designed and applied in a manner that constitutes a means of arbitrary and unjustifiable discrimination.

79. Consequently, the tuna measure cannot satisfy the requirements of the chapeau of Article XX, and the United States has not met its burden to show otherwise. Therefore, the inconsistencies with Article I:1 and III:4 of the GATT 1994 cannot be justified under Article XX of the GATT 1994.

IV. CONCLUSION

80. For the reasons set out in Mexico's submissions in these two proceedings, Mexico respectfully requests that the Panels reject the United States' claims under Article 21.5 of the DSU in their entirety and find that the tuna measure is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, and cannot be justified under Article XX of the GATT 1994.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia's statements have addressed several issues raised in these proceedings under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

2. This summary sets out Australia's views on the function and scope of Article 21.5 of the DSU proceedings and the core inquiry of an analysis under Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement).

II. FUNCTION AND SCOPE OF PROCEEDINGS UNDER ARTICLE 21.5

3. The Appellate Body has stated that a compliance review should not be confined to an assessment of whether a responding Member has implemented a Dispute Settlement Body (DSB) recommendation. Article 21.5 of the DSU instead requires a panel to examine the consistency of the measures taken to comply with the WTO Agreement.[1]

4. The Appellate Body has also previously noted that these proceedings form part of a continuum – this requires due recognition to be accorded to the recommendations and rulings made by the DSB in the original proceedings, based on the adopted findings of the Appellate Body and original panel.[2]

5. Australia does not consider that it is the purpose of a compliance review to re-open questions which have been substantively answered by the Appellate Body in earlier proceedings and are not required to be re-visited in light of a new and different measure. Australia notes, in this context, that a key objective of the dispute settlement system is to promptly resolve disputes and provide clarity to Members on their WTO obligations. In that regard, Australia considers that the Panel should focus its considerations on whether the 2016 IFR has addressed the issues which the Appellate Body found to cause the inconsistency of the previous measure with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade* (GATT 1994).

III. THE CORE INQUIRY OF A TBT AGREEMENT ARTICLE 2.1 ANALYSIS

6. The Appellate Body has made clear that not every instance of a detrimental impact on imports arising from a technical regulation constitutes a breach of Article 2.1 of the TBT Agreement.[3] Where such detrimental impact stems exclusively from a legitimate regulatory distinction, the technical regulation does not violate Article 2.1.[4]

7. Thus, once a de facto detrimental impact on imports is established, Australia considers the crux of an Article 2.1 analysis is in determining whether the regulatory distinction at issue is designed and applied in a manner that is legitimate (or is instead designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination).

IV. CONSIDERATION OF OBJECTIVES IN AN ARTICLE 2.1 ANALYSIS

8. Australia considers that an assessment of the *legitimacy* of the regulatory distinction at issue must be made in light of the objective of the technical regulation. In Australia's view, determining the legitimacy of the regulatory distinction requires an analysis of whether the regulatory distinction is rationally connected to the objective of the technical regulation. Where the regulatory distinction bears no rational connection to the objective of the technical regulation, Australia

[1] Appellate Body Report, Canada – Aircraft (Article 21.5), paras 40 – 42.
[2] Appellate Body Report, US – Tuna II (Article 21.5 – Mexico), para 7.112.
[3] Appellate Body Reports, *US – COOL*, para. 271.
[4] Appellate Body Reports, *US – COOL*, para. 271.

considers it would constitute arbitrary or unjustifiable discrimination and amount to a breach of Article 2.1.

9. Australia considers that the objectives of the measure at issue in this dispute formed an integral part of the calibration analysis articulated by the Appellate Body in the original proceedings, and that it is unnecessary for the Panel in these proceedings to undertake a revised analysis of the contribution of the policy objectives to the measure. Australia considers that the Panel instead ought to focus on, and make a decision with respect to, the defined issue in these proceedings – whether the 2016 IFR is consistent with the WTO Agreement – in accordance with the calibration analysis test which the Appellate Body has previously and clearly outlined, and which already takes account of the measure's objectives.

V. CALIBRATION ANALYSIS

10. Australia considers that the calibration analysis adopted by the Appellate Body in the original proceedings was used as a means of determining whether the regulatory distinction imposed by the measure at issue was legitimate (or instead constituted a means of arbitrary or unjustifiable discrimination) in the particular circumstances of this dispute. The Appellate Body described calibration as having "special relevance in these proceedings".[5] It also clarified that calibration is "not, in and of itself, a generally applicable test of whether detrimental impact stems exclusively from a legitimate regulatory distinction" but rather terminology that originated in the United States' submissions.[6] The Appellate Body further emphasised that the "use of the terms 'even-handed' and 'calibrated' did not constitute different legal tests."[7]

11. In Australia's view, calibration should be viewed as a useful analytical method when the circumstances of a case warrant its use. However, it should only be used to inform an analysis of the core inquiry – which is whether a regulatory distinction is legitimate, or instead constitutes arbitrary or unjustifiable discrimination. It is not of itself a test of consistency with Article 2.1.

VI. EVEN-HANDEDNESS

12. Similarly, the even-handedness of a measure has been identified by the Appellate Body as one of the considerations that goes to determining whether or not a detrimental impact stems exclusively from a legitimate regulatory distinction as opposed to constituting arbitrary or unjustifiable discrimination.

13. The Appellate Body first used the phrase "even-handed" in connection with Article 2.1 in *US — Clove Cigarettes*, saying that in making an assessment of whether a differentiation stems from a legitimate regulatory distinction:

> …a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.[8]

14. The issue was again examined in *US — COOL*, which cited the *Clove Cigarettes* decision. However, here, the Appellate Body appears to have treated even-handedness as being *the* test for legitimate regulatory distinction rather than merely part of the test, as had been the case in *Clove Cigarettes,* in finding that:

> *In assessing even-handedness*, a panel must "carefully scrutinise the particular circumstances of the case…" (emphasis added)[9]

15. The Appellate Body report in the original proceedings of the current matter cited the *Clove Cigarettes* version of the test,[10] but in the compliance proceedings the Appellate Body used the *US — COOL* formulation (despite citing *US — Clove Cigarettes*).[11]

---

[5] Appellate Body Report *US — Tuna II (21.5 — Mexico)*, para. 7.101.
[6] Appellate Body Report *US — Tuna II (21.5 — Mexico)*, para. 7.154.
[7] Appellate Body Report *US — Tuna II (21.5 — Mexico)*, para. 7.98.
[8] Appellate Body Report *US — Clove Cigarettes*, para. 182.
[9] Appellate Body Reports *US — COOL*, para. 271.

16. In Australia's view, as with the calibration analysis, even-handedness should be viewed as a useful analytical method when the circumstances of a case warrant its use. However, it should only be used to inform an analysis of the core inquiry – which is whether a regulatory distinction is legitimate, or instead constitutes arbitrary or unjustifiable discrimination. It is not of itself a test of consistency with Article 2.1.

VII. OBJECTIVES OF THE 2016 TUNA MEASURE

17. Australia agrees that the objectives set out by the Panel[12] continue to be the objectives of the 2016 Tuna Measure. In Australia's view it is important to see these as inter-linked and mutually supportive objectives.

VII CONCLUSION

18. In its compliance stage report in this matter, the Appellate Body "noted that, in determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, the 'particular circumstances' of the case may inform the appropriate way in which to assess even-handedness in that specific case." This is clearly true. The differentiations made within a measure, the bases on which those differentiations are made, and the way they interact with the measure's objectives will all dictate the analytical process required of a panel in a given case.

19. However, in Australia's view, the core inquiry of any such assessment is determining whether the regulatory distinction at issue is designed and applied in a manner that is *legitimate*, or is instead designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination. The particular analytical process adopted by a panel in the specific circumstances of a given case should give effect to, not replace, this core inquiry.

[10] Appellate Body Report *US — Tuna II (Mexico)*, para. 215 note 461, para 225.
[11] Appellate Body Report *US — Tuna II (21.5 — Mexico)*, para. 7.31, 7.97, 7.239.
[12] As set out in 'Questions in advance of the Panels' Third Party session' circulated 17 January 2017:"first, ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, and, second, contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil's comments focus on the following issues: (i) the scope of the even-handedness test; (ii) the characterization of the Tuna measure; (iii) the relationship between the even-handedness test and the objective of the measure, and (iv) the role of Article 2.2 of the TBT Agreement.

I. The scope of the even-handedness test

2. Brazil understands that the main issue before the Panel is what should be the proper scope for the even-handedness test to establish that Mexican tuna is accorded treatment no less favourable that that accorded to like products of US origin or to like products originating in any other country, as provided for in Article 2.1 of the TBT Agreement. In Brazil's view, the Panel should adopt a holistic approach in determining the elements that compose the even-handedness test, taking into account the objectives of the measure. The Panel should also ensure that the objective of the measure is assessed from a broader standpoint, in light of all the relevant circumstances related to the protection of the legitimate objective, so as to reduce the room for concealing arbitrary and unjustifiable restrictions on international trade

3. For Brazil, in formulating the even-handedness test in the present dispute, the Panel should be guided by the level of adverse effects and not by the fishing methods. It is also important that the Panel do not lose sight of the importance that the even-handedness of the measure be assessed on the basis of performance requirements, and not in relation to a specific technology. In this regard, the Panel should be cautious of statements that 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.

II. The characterization of the Tuna measure

4. Brazil does not dispute that WTO Members have the right to adopt technical regulation to pursue their legitimate objectives and that preventing adverse effects to dolphins is a legitimate objective. Brazil recalls however that, as the Appellate Body has ruled in previous disputes, adjudicators are not bound by a Member's characterization of its measure, making it clear that the formulation of a measure cannot encompass discriminatory exceptions unrelated to its objective.

5. In these proceedings, the United States has identified its objective in relation to fishing methods and their adverse effects to dolphins. The question, thus, is whether, given the particular circumstances of the case, focusing exclusively on the fishing methods as the eligibility criteria for the US "dolphin-safe" could justify a different regulatory treatment for Mexican tuna.

6. In this regard, Brazil agrees with Mexico that "it is essential that the Panel distinguish between the activities that define the fishing method and the level of adverse effects on dolphins caused by those activities". This is a similar consideration as the one made by Professor Mavroidis in discussing the Appellate Body Report in the original proceedings:

> "The question before the Panel should be whether the 'dolphin-safe' label had been accessible to all tuna meeting the regulatory requirements irrespective of the manner in which it had been fished. Performance requirements (e.g., all who use a fishing method for tuna which guarantees that x or less quantity of dolphins will be killed will have access to a 'dolphin-safe' label) are preferable to process requirements (only those who use a particular fishing technique will have access to the 'dolphin-safe' label) for a number of reasons ranging from reaping gains from innovation to reducing the risk for protectionism by promoting a domestic technique, and shifting adjustment costs to foreign imports."

7. In Brazil's view, the level of adverse effects to dolphins would need to be assessed by measurable (quantitative) performance requirements, as for instance, the evidence related to the

growth of dolphin stocks, as suggested by Mexico. Hence, the mere reference to possible unobserved consequences of different fishing methods cannot justify less favourable treatment. Such effects need to be measured, so that it is possible to assess whether the detrimental treatment is calibrated to the risk to dolphins in different fisheries. In this context, Brazil would also like to caution the Panel against widening the margin for the adoption of non-product related PPMs

8. Moreover, it makes little sense that the contribution of a given fishing method to the protection of dolphins should be considered in isolation, while this same method may be harmful to other species or to the marine environment.

III. The relationship between the even-handedness test and the objective of the measure

9. Brazil is of the view that even-handedness needs to be assessed in relation to both objectives of the measure, as initially characterized by the United States in the original proceedings namely: i) "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 ii) "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins". The first relates to consumer protection and the second to the protection of the environment.

10. In what concerns the consumer protection aspect of the measure, Brazil understands that the US's definition of "dolphin safe" is particular sensitive of the way tuna is caught and would not allow consumers to be informed of the reduction in dolphin mortality made possibly by other methods. In Brazil's views nothing on the records of these proceedings seem to support the assertion that consumers are more concerned with the way tuna is caught than with the adverse effects to dolphins.

11. Brazil understands that in these proceedings the United States has tried to present the Tuna Measure as primarily related to the protection of dolphins, adapting the formulation of the objective of the measure to suit its own purposes. Yet if the Tuna Measure is not designed to protect consumers in US territory – but dolphins in all quarters of the world – this would mean that the United States would be acting beyond its jurisdiction.

12. This would be very different from the situation in *US-Shrimp*. In that case, the Appellate Body explained that, since turtles were a migratory species occurring also in US territorial waters, the measure had a sufficient territorial connection to be justified under Article XX of the GATT.[1] In the present dispute, whether there is such a territorial link was never part of the equation, for the measure has always been mainly about consumer protection. However, if we are now to accept the US's argument that the measure main objective is the protection of dolphins all over the world, and that consumer information is only a secondary aspect of the measure, then these considerations become not only relevant, but would need to be clearly established.

13. Brazil considers that, by emphasizing the environmental aspects of the measure to the detriment of its consumer information component, the United States is purposely trying to divert the Panel's attention from the measure's shortcomings concerning accuracy.

14. Brazil is not convinced by the United States' argument that, given that dolphin protection is the main objective of the measure, if the measure is appropriately calibrated to the risks to dolphins in different areas of the ocean, then any regulatory distinctions, including the differences in accuracy of the information contained in the dolphin safe label, are consistent with the measures objectives. For Brazil, it is difficult to see how a measure that, in some cases, can result in granting the US dolphin-safe label to tuna caught in a fishing trip whether dolphins were killed or seriously harmed could be capable of fulfilling its legitimate objectives. It seems only logical that the granting of the dolphin safe label in such situation would not only be misleading to consumers, but it also would not contribute to the objective of dolphin protection.

15. In Brazil's view, the United States is misinterpreting the reasoning of the Appellate Body in paragraphs 7166 to 7169 of its report in the first compliance proceedings. There, the Appellate

[1] Appellate Body Report, *US-Shrimp*, para. 117-119.

Body faulted the Panel for having segmented its analysis, and for not considering that "the accuracy of the US dolphin-safe label can be compromised at any stage of the tuna production stage, in contradiction with the objectives of the amended tuna measure". It is thus clear that accuracy is a fundamental element of the analysis.

16. As Brazil sees it, while the Appellate Body made clear that even-handedness is also relevant when assessing the tracking and verification requirements, it has never suggested that differences in risk profiles in different fisheries would justify diminishing the accuracy of the measure. This is to say that there may be differences in the means the Tuna Measure employs to certify that no dolphins were killed or seriously harmed but under no circumstance should such differences result in mislabelling of the tuna products.

17. Brazil is also not convinced by the US's argument that ensuring that the measure is calibrated to the different risk profiles in different fisheries would automatically entail that the measure is also calibrated to the different certification, tracking and verification requirements. As the Appellate Body has explained, the "assessment of the even-handedness of the amended tuna measure must take account of the fact that its various elements – the eligibility criteria, the certification requirements, and the tracking and verification requirements - establish a series of conditions of access to the dolphin-safe label". This means that both objectives of the measure need to be assessed in relation to all its elements.

IV. Conclusion: The role of Article 2.2 of the TBT Agreement

18. Brazil considers that a large part of the difficulties in crafting a consistent test of even-handedness in this dispute results from the fact that Members are dealing with one single, narrow definition of dolphin-safe designed unilaterally by the United States and to be enforceable worldwide. In Brazil's opinion, there are different ways to protect dolphins. The AIDCP countries made large investments to ensure that dolphin mortalities in the ETP were reduced to levels approaching zero. They adopted stringent certification criteria to make sure that no tuna caught in a manner that adversely affects dolphins would be granted the AIDCP dolphin-safe label. Yet, they can neither use their label in the US market, nor can they inform consumers of how they are ensuring the protection of dolphins. At the same time, the United States is claiming that accuracy is not a relevant consideration of the Tuna Measure, which means that the measure is not capable of fulfilling its consumer information objective.

19. In the original proceedings, the Appellate Body found that the AIDCP dolphin safe label would not be a less trade restrictive alternative to the US dolphin safe-label because it was limited to the ETP and did not address unobserved mortalities. However, given the shortcomings of the Tuna Measure, the Appellate Body could be confronted with a scenario where labels relating to the protection of dolphins in different fisheries coexisted in the US market. These would be less trade restrictive alternatives to the Tuna Measure that would allow consumers to fully exercise their preferences in relation to dolphins protection measures. The Appellate Body's jurisprudence in *US-COOL (21.5)* could be relevant in this regard.

20. Brazil understands that Article 2.2 of the TBT Agreement is not being raised in these compliance proceedings. However, as Canada has argued in its Third Party Submission, the balance of rights and obligations under the TBT is not safeguarded exclusively by Article 2.1. Brazil feels that, in these proceedings, the Appellate Body has fallen short of giving Article 2.2 its full meaning.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. THE LEGITIMATE REGULATORY DISTINCTION TEST UNDER ARTICLE 2.1 OF THE TBT AGREEMENT IS NOT A TEST OF "EVEN-HANDEDNESS"

A. The Legal Standard to be Applied

1. The United States and Mexico disagree on how to apply the legitimate regulatory distinction (LRD) test under Article 2.1 of the TBT Agreement. In particular, the disputing parties advance competing views on the relevance of "calibration" and its role in assessing whether the detrimental impact to competitive opportunities for imported products arising from the amended measure stems exclusively from a legitimate regulatory distinction.

2. The arguments of the disputing parties rely on previous panel and Appellate Body Reports in this dispute, which have found that assessing whether the regulatory distinctions are properly calibrated to the risks to dolphins posed by the various fishing methods used is an appropriate basis upon which to determine whether the measure is "even-handed" and therefore meets the LRD test.

3. Canada agrees that, in the circumstances of this dispute, calibration is a valid conceptual tool to determine whether the detrimental impact on competitive opportunities for imported products arising from the design or application of the measure stems exclusively from a LRD. However, Canada does not agree that even-handedness is the appropriate legal standard to be applied in determining whether the detrimental impact on competitive opportunities for imported products stems exclusively from a LRD.

4. The even-handedness legal standard, as first articulated by the Appellate Body, derives from the sixth recital of the preamble of the TBT Agreement. According to the Appellate Body, the language of the sixth recital suggests that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.

5. In Canada's view, refashioning the explicit language of the sixth recital into the vague and subjective concept of even-handedness is neither necessary nor appropriate as a descriptor for the legal standard to be applied. Specifically, the term even-handedness has no clear relationship with the "arbitrary or unjustifiable discrimination or a disguised restriction on international trade" standard articulated in the sixth recital.

6. There are at least three reasons why the even-handedness legal standard, as articulated by the Appellate Body in *US – COOL*, is not appropriate in the context of the LRD test in TBT Article 2.1.

7. First, in Canada's view, there is no textual support for even-handedness as an independent legal standard. The term does not appear in either the fifth or sixth preambular recital or in Article 2.1 itself. Despite this, starting with *US – COOL*, the Appellate Body appears to have framed even-handedness, not as short-hand for the interpretive guidance found in the sixth recital, but as an independent legal standard that must be met to comply with the non-discrimination obligation in Article 2.1. More specifically, the Appellate Body took the position that arbitrary and unjustifiable treatment is simply an example of the absence of even-handedness.

8. Second, Canada considers that there is no obvious contextual or even conceptual relationship between the language in the fifth and sixth recitals of the TBT Agreement and even-handedness as an independent legal standard.

9. The fifth and sixth recitals contain two central legal concepts. The first concept is necessity. The second concept is the requirement that, even when measures are necessary, they must not be

applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination (AUD), or a disguised restriction on international trade.

10. The necessity concept is explicitly captured by the obligation in Article 2.2. Canada is therefore of the view that the concept has, at most, a very limited role to play in the interpretation of Article 2.1. Otherwise, it could result in the conflation of the disciplines of Articles 2.1 and 2.2.

11. The AUD and disguised restriction language, on the other hand, is clearly relevant to the non-discrimination obligation in Article 2.1, which, by its nature, focuses on regulatory distinctions between products. This link is not, in principle, different from the relationship between the non-discrimination obligations in the GATT, such as Article III:4, and general exceptions in GATT Article XX.

12. The LRD element in TBT Article 2.1 reflects the same balance found in GATT Articles III:4 and XX. This is the balance between the right to regulate and desire to ensure that regulatory measures do not constitute a means of AUD, or a disguised restriction on international trade, as indicated in the sixth recital of the preamble to the TBT Agreement.

13. In both *Brazil – Retreaded Tyres* and *EC – Seal Products*, the Appellate Body identified the AUD phrase as encapsulating the idea of a rational connection between discrimination caused by the measure and its policy objective. Such a rational connection exists where there is a close and genuine relationship of ends and means between the discrimination (or, in the case of TBT Article 2.1, the regulatory distinction) and the policy objective being pursued.

14. Of course, the precise nature of the terminology used would matter less if it was made clear that when we speak of "even-handedness" we are really talking about arbitrary or unjustifiable discrimination. The Appellate Body seemed to suggest as much in *US - Tuna II (Mexico)* when it said that the sixth recital sheds light on the meaning and ambit of the "treatment no less favourable" requirement, by making it clear that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of AUD.

15. However, as Canada explained earlier, the Appellate Body's shifting language indicates that it does not consider even-handedness to be limited in this manner.

16. The third reason that Canada considers the Appellate Body's interpretive reasoning to be problematic has to do with potential for an imbalance to arise between the GATT and the TBT Agreement.

17. This imbalance could arise where a technical regulation is challenged under both the TBT Agreement and the GATT. If that measure were to be challenged under both TBT Article 2.1 and GATT Article III:4, and is found to have resulted in a detrimental impact on the competitive opportunities on imports, it is at least conceivable that it could be found to be justified under GATT Article XX but at the same time be found to have violated Article 2.1.

18. This possibility would exist because the legal standard for satisfying the LRD test is seemingly different from, and more stringent than, the test in the chapeau of Article XX. The Appellate Body has indicated that the absence of AUD is not sufficient to show that the measure is even-handed. Thus a technical regulation that does not give rise to AUD can nevertheless fail the even-handedness standard. As a result, the measure would violate TBT Article 2.1, while at the same time being justifiable under GATT Article XX because it complies with the AUD standard in the chapeau.

19. This is incongruous with the Appellate Body's statement in *US – Clove Cigarettes* that the balance between trade liberalization and the right to regulate reflected in GATT Article III:4 and Article XX is, in principle, not different from the balance reflected in Article 2.1 of the TBT Agreement. Canada considers that it would also be incongruous with the object and purpose of the TBT Agreement.

20. Canada therefore considers that the appropriate standard for whether the detrimental impact on competitive opportunities for imported products stems exclusively from a legitimate regulatory distinction in Article 2.1 should simply be whether that regulatory distinction, whether

in its design or application, gives rise to arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.

B. The relationship between the LRD legal standard and calibration

21. In regard to the case at hand, Canada considers that the question of whether the US measure is calibrated does not need to be answered with reference to whether the measure is "even-handed". Rather, in Canada's view, whether the measure is calibrated fundamentally is a question of whether there is a rational connection between the policy objective being pursued and the regulatory distinctions being drawn.

22. A measure that is not calibrated to the risks to dolphins arising from the various fishing methods used in different parts of the oceans may result in tuna being labelled and sold on the US market as dolphin safe when it is not. This would run contrary to the stated objectives of the measure and would therefore fail the rational connection test under the AUD legal standard. This is consistent with the AUD standard elaborated by the Appellate Body in *Brazil – Retreaded Tyres* and affirmed in *EC – Seal Products*.

23. Therefore, the Panels need not, and should not, resort to the even-handedness legal standard. To determine whether the US measure meets the LRD test, all it needs to do is determine whether there is a rational connection between the US measure and the objectives it pursues; a measure that is properly calibrated to the risks to dolphins arising from the various methods of fishing tuna in different areas of the oceans would reflect such a rational connection.

C. Establishing Whether the Measure Satisfies the LRD Test Requires an Examination of the Relationship Between the Regulatory Distinction and the Objective of the Measure

24. As the Appellate Body indicated in *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, determining whether the measure is even-handed, and therefore that the detrimental impact stems exclusively from a legitimate regulatory distinction, hinges on the relationship between the measure and the policy objective(s) being pursued. If there is no nexus between the regulatory distinctions drawn by the measure and the objective being pursued, or that relationship is weak, this would indicate that the measure is not even-handed. Further, as the Appellate Body indicated in *US – COOL*, such a scenario can arise where the regulatory burden imposed on producers is disproportionate relative to the amount or accuracy of the information provided to the consumer.

25. Similarly, in the case of the US measure at issue in this dispute, the Appellate Body has determined that a key element in determining whether the measure is even-handed is whether the labelling conditions are calibrated to – that is, they accurately reflect – the risks to dolphins arising from the different fishing methods. The relevance of calibration to risks arises from the policy objectives being pursued. Labelling conditions, including tracking and verification requirements, that are properly calibrated as to risks minimizes the likelihood that a tuna product will be improperly labelled as dolphin-safe or improperly prevented from using the label; it therefore strengthens the accuracy of the label, thus contributing to the policy objective of ensuring that consumers are not misled by the presence of a dolphin-safe label on tuna products. By extension, an accurate label allows consumers to exercise their preference for dolphin-safe tuna, thus incentivizing tuna producers to adopt harvesting measures that minimize risks of adverse effects to dolphins.

II. THE ROLE OF THE OBJECTIVE OF SUSTAINABLE DEVELOPMENT IN THE WTO AGREEMENT

26. Mexico claims that the 2016 Tuna Measure is inconsistent with TBT Article 2.1 because "it discriminates against an environmentally sustainable fishing method in favour of one that is unsustainable". Mexico's argument is based on the reference in the first recital in the preamble of the WTO Agreement to "the optimal use of the world's resources in accordance with the objective of sustainable development".

27. Canada considers that Mexico's characterization of the role that the reference to sustainable development in the preamble plays in the interpretation and application of the WTO obligations is

misplaced, and that Mexico's claim that Members' measures that are inconsistent with the objective of sustainable development are *ipso facto* inconsistent with their WTO obligations is incorrect.

28. The preamble to the WTO Agreement makes it clear that optimal use of the world's resources in accordance with the objective of sustainable development is an important principle underlying the WTO Agreement. However, given its preambular status, the role of the reference to sustainable development in respect of the WTO Agreement itself is circumscribed by the customary rules of treaty interpretation, as codified in the Vienna Convention on the Law of Treaties (Vienna Convention).

29. The WTO jurisprudence also confirms the use of the preamble to determine the object and purpose of the treaty, or to inform the meaning of its provisions. The preamble to the TBT Agreement informs the meaning of the term "treatment no less favourable" as used in Article 2.1. However, this does not mean that the reference to sustainable development in the preamble can be used to insert a requirement for consistency with this principle as a precondition for consistency with Article 2.1.

30. Further, the Appellate Body has previously found that the sixth recital of the preamble to the TBT Agreement does not set out a test that is separate and independent from Article 2.1 itself. Canada considers that this is equally true of the reference to sustainable development in the first recital of the WTO Agreement, and consistent with Canada's view that compliance with Article 2.1 does not require a separate examination of whether the measure at issue is consistent with the objective of sustainable development.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR[*]

The purpose of Ecuador's brief intervention as interested third party in this session devoted to "third parties" in the dispute *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, and specifically the recourse by the United States to Article 21.5 of the Dispute Settlement Understanding (DSU) and second recourse by Mexico under the same article, is to highlight the importance of complying with the provisions of the DSU.

For us, the text of Article 21 of the DSU is clear and precise in providing for "prompt implementation", i.e. prompt compliance with the recommendations and rulings of the Dispute Settlement Body (DSB) for the sole purpose of ensuring resolution of a dispute. Clearly, this is only possible if the parties to a dispute have the will to abide by those provisions.

Article 21 also refers to the particular attention that should be paid to matters affecting developing country Members of this Organization with respect to measures that are the subject of the dispute, matters and provisions which, in Mexico's view, the United States has not complied with, since we consider that the "dolphin safe" labelling measure has not been brought into conformity with the DSB's recommendations and rulings.

Ecuador reiterates its position in this respect that it is of the utmost importance for Members to maintain coherence and consistency with their obligations in respect of the covered agreements under the WTO, and hence the need for the DSB to monitor the implementation of its recommendations and determinations. Only then will it be possible to maintain the WTO dispute settlement system as a central element in ensuring the security and predictability of the multilateral trading system which preserves the rights and obligations of Members under the covered agreements.

[*] Ecuador requested that its oral statement at the Panels' joint meetings with the parties be treated as its executive summary. The original statement was delivered in Spanish.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. In the view of the European Union, the Panels should allow themselves to be guided by the Appellate Body clarifications in the previous proceedings. This means, among others, that the test of whether a technical regulation accords less favourable treatment to imported products proceeds in two steps: The first question is whether the technical regulation at issue modifies the conditions of competition to the detriment of such imported products vis-à-vis like products of domestic origin and/or like products originating in another country. If so, then as a second step it is to be assessed whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. Where the detrimental impact caused by a technical regulation stems exclusively from a legitimate regulatory distinction, such technical regulation is not according less favourable treatment to imported products within the meaning of Article 2.1. As regards the test of whether the detrimental impact "stems exclusively from a legitimate regulatory distinction", a panel does not err by assessing whether the detrimental impact can be reconciled with, or is rationally related to, the policy pursued by the measure at issue. However, this must not preclude consideration of other factors that may be relevant to the analysis. The central concept for the analysis is "even-handedness". Even-handedness is a relational concept. It must be tested through a comparative analysis. Regulatory distinctions by definition treat groups or products differently. A proper assessment of even-handedness can only be made through examination of the treatment accorded to all the groups that are being compared. In doing so, the Panels should consider whether the risk profiles of the relevant fisheries giving rise to the different groups of tuna products are the same or different. In assessing whether the amended tuna measure is adequately calibrated to the relative adverse effects on dolphins arising outside the ETP large purse-seine fishery as compared to those inside that fishery, the Panels are asked to make factual findings regarding the different risk profiles in these different fisheries.

2. The Panels asked whether accuracy of the information can be considered merely as the means to achieve the main objective of protecting dolphins. The European Union makes four observations in this respect. First, as a doctrinal matter, the European Union cautions against any tendency to narrow down the analysis to a single, all-encompassing objective and to use such a singular objective as a basis for a roving inquiry into every detail of a particular measure. As we noted previously in the COOL case, the broad assessment under Article 2.1, and in particular the assessment of even-handedness, cannot require regulatory measures to be as pure as the driven snow. In reality, every measure will have a variety of features that cannot be explained by a single overriding objective. A measure might have to mitigate adverse effects on a conflicting objective, or simply on a different objective implicated by the measure. This does not in itself mean that the measure is not even-handed, or that it reflects discrimination. To require that a measure can be entirely explained by a single objective, with other objectives only being means to an end or of an incidental nature, would set the bar prohibitively high for any regulating Member.

3. Second, we will consider the abstract conceptual link between the two objectives at issue in this case. On the one side, "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 on the other side "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins". On an abstract conceptual level the meaning of the objective of "consumer information" is not exhausted by considering it as a mere means to an end. The objective of "ensuring that consumers are not misled or deceived" is legitimate in its own right. In aiming for such an objective, a WTO Member may for example try to give its citizens an informed choice. It may try to make accurate information available and empower its citizens in taking their own decisions, based on their own assessments of the accurate information which they receive. All this may empower an active and responsible citizenry. This shows that the objective of ensuring that consumers are not misled may be an objective in its own right. It can go far beyond the objective of protecting of dolphins.

4. Third, on an abstract level and as regards the order of priority between different objectives: We do not see that on an abstract level, a panel should venture to establish a normative pyramid

of different objectives to which the panel would accord different weight. It would go beyond what could and should reasonably be expected from a Panel or the Appellate Body, and would indeed encroach on the regulatory space of WTO Members, if WTO dispute settlement organs were to try to establish an abstract pyramid of importance for different objectives under Article 2.1.

5. Fourth, the fact that in abstract terms, such objectives (accuracy of information and dolphin protection) may overlap but may remain independent of each other does not necessarily imply that the United States has presented them as fully independent in these proceedings.

6. In addition to the observations set out in our written and oral statements, the European Union would like to respond to the Panels' questions, taken as a whole, with four main points.

7. First, we do not consider that the Panels' task is limited to considering or focussing on only the eligibility criteria. On the contrary, we consider that the Panels must consider the measure as a whole, and this will necessarily include a consideration of the other elements, including the certification requirements, the tracking and verification requirements and the determination provisions. The Panels will have to take a view about the measure as a whole that is balanced and reasonable. In this respect, we also observe that regulatory measures may legitimately pursue more than one objective simultaneously, and indeed this is quite usual. It is also quite possible for there to be multiple objectives that are, in some way, in counterpoint with each other. This may mean that the measure contributes towards achieving one particular objective, but that such contribution is inherently limited by the desire to purse the other objective at the same time. This does not in itself necessarily mean that the measure is internally incoherent or inconsistent, disclosing the existence of *de facto* discrimination.

8. Second, we wish to emphasise again that regulatory space or regulatory autonomy is as much a pillar of the WTO legal system as MFN or national treatment. The WTO does not envisage complete international harmonisation. For similar reasons it does not envisage that successive panels on the same issue will gradually whittle away at the regulatory space of the regulating Member until but one regulatory solution remains. Rather, a given regulatory problem may be susceptible to being dealt with by means of more than one regulatory response. For regulatory space to have any meaning there must be situations in which two or more solutions present themselves, and the regulating Member remains free to choose between them without a panel second guessing that choice.

9. In this respect, as the Appellate Body has explained, Article 2.2 of the TBT Agreement (which sets out a necessity test, not a pure or strong proportionality test) contextually informs an analysis under Article 2.1 of whether or not there is *de facto* discrimination. The concept of *de facto* discrimination is not itself a panacea (and should not be a first port of call), but is rather in the nature of a safety-net to guard against abuse, in the form of facially origin neutral regulations that are in fact disguised restrictions on international trade. This means that, in the context of a *de facto* discrimination analysis, one should not over-extend beyond the normal necessity analysis. It is not the adjudicator's task to opine on what the appropriate trade-off should be between the legitimate objective and the trade restriction. That is a matter for the regulating Member when it fixes its ALOP (which determines what the regulating Member cares about, and how much it cares about it).

10. In this case, what this means is that we should see that the relative risk profiles of the various fisheries on the one hand, and the treatment of those differences in the design and architecture of the measure at issue, especially in terms of the regulatory costs imposed, on the other hand, are broadly comparable. For example, if one sees a difference of, for example, approximately 10:1 in the risk profiles, that is what one would expect to see, approximately, in the measure at issue. A lower ratio (such as, for example, 8:1) should not even be an issue in this case, since that would mean that the measure at issue is *relatively accommodating* to Mexico's trade interest. In the presence of such a mismatch it would be both unnecessary and incorrect to conclude that there is an internal incoherence revealing *de facto* discrimination. On the other hand, a higher ratio (such as, for example, 12:1) should not necessarily lead to a finding of breach. These are approximations only. At the very least, when the Panels find themselves operating within the margin of error of the analytical tools at their disposal they should be extremely cautious about striking at the measure at issue, since there is a severe risk that, in doing so, they would be trespassing in the regulatory space of the regulating Member. Finally, if

the ratio appears to be very different (such as, for example, 20:1), then that may be an indication of breach.

11. Of course, what the margin of error actually is might, in itself, be difficult to quantify and might thus also be in the nature of an approximation or a qualitative assessment. In such circumstances, it would become particularly important to pay close attention to where the burden of proof lies.

12. For these reasons we disagree with Mexico's assertion that the Panels should consider whether or not there is above *de minimis* harm to dolphins elsewhere and if so find in Mexico's favour. To us, that is not the right question. Rather, the question, as set out above, is whether or not the different risk profiles (be they *de minimis* or otherwise) are adequately reflected in the design and architecture of the measure at issue.

13. Third, the burden of proof with respect to the different risk profiles lies with the complainant, Mexico. Mexico complains that the US is demonstrating a sort of reverse "precaution" with respect to other fisheries because it declines to assume harm absent evidence to that effect. In this respect, the EU notes, by way of context, that under Article 5.7 of the SPS Agreement (which is generally taken to embody some concept of "precaution") the obligation on the regulating Member is simply to seek to obtain the information necessary to make a more objective assessment of the risk. That does not mean that the regulating Member is itself required to conduct the necessary research on behalf of the interested party seeking market access. Rather, it can simply ask legitimate questions, and it is then for the interested party to adduce the necessary evidence. Thus, as long as Mexico understands what evidence is required, and as long as the US authorities are open to receiving such evidence, we do not see here any basis on which to support a claim of breach by Mexico. We understand that the relevant matters may be relatively hard for Mexico to prove, and that is something that the Panels can and should take into account – but the burden rests with Mexico.

14. Fourth, we do not think that calibration (which is not treaty language) means precise quantitative analysis – or hyper or ultra-calibration. There is plenty of case law in the field of trade remedies that confirms that Members are not obliged to use quantitative methods. This is all the more true in the area of regulatory law. Furthermore, as explained above, calibration does not mean that a panel can get into the question of whether or not it considers the trade-off between the legitimate objective and the trade restriction is acceptable, the fixing of the ALOP being a matter for the regulating Member.

15. Rather, what calibration requires (and referring to the broadly comparable observation above) is that the Panels are satisfied that the establishment of the facts by the regulating Member was proper, and that the evaluation of those facts by the regulating Member was unbiased and objective. If this is the case, and the differences between the risk profiles and the various elements of the measure are broadly comparable, even though the Panels might themselves have reached a different overall conclusion if they would step into the shoes of the regulator, the regulating Member's evaluation should nevertheless not be overturned. This is the only way in which the concept of regulatory space can be given meaning in practice.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. CALIBRATION OF RISK TO DETERMINE EVEN-HANDEDNESS UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

1. The Appellate Body has explained that an assessment of whether a technical regulation accords "no less favourable" treatment under Article 2.1 of the TBT agreement entails a two-step examination: (1) whether the technical regulation modifies the conditions of competition to the detriment of imported products; and (2) if so, whether the detrimental impact from the measure stems exclusively from a legitimate regulatory distinction. Japan's arguments focus on the second step of the analysis – whether the detrimental impact stems exclusively from a legitimate regulatory distinction.

2. The Appellate Body in the first Article 21.5 proceeding found that, "[i]n determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinize whether the technical regulation at issue is even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case."[1] Then, it examined whether the different conditions for access to a "dolphin-safe" label were "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean.[2] Japan understands that an examination of whether a measure is calibrated to the risk is an appropriate means of assessing whether a measure is even-handed and is therefore in accordance with Article 2.1.

3. In light of the above, when considering whether the U.S. measure complies with Article 2.1, the Panel should examine whether the United States properly conducted a comparative analysis of the overall levels of risk to dolphins in different fisheries and fishing methods, and whether the treatment under the U.S. measure accorded to each of the groups compared is properly calibrated to the levels of identified risk for that group.[3]

A. Comparative Analysis of Different Risks to Dolphins

4. The analysis of whether a measure is properly calibrated to the risks, and therefore even-handed, must begin with an objective identification of the risks posed to dolphins in each fishery and by each fishing method, followed by a comparative analysis of the relevant risk profiles. An examination of whether a measure is properly calibrated also requires a comparison of the different labelling conditions applied to each group vis-à-vis the risks identified in each group.

5. It is important to identify the nature and degree of the relevant risks which the measure at issue addresses in a precise and objective manner. In this respect, Japan notes that the United States draws a distinction between the risk profiles in the ETP large purse seine fishery, on the one hand, and in all other fisheries, on the other. However, the frequencies of dolphin interaction and mortality in the different areas of oceans in the "other fisheries" may not be identical. Moreover, the evidence presented by Mexico challenging the United States' factual examinations appear to warrant further inquiry into the accuracy of the stated differences in the risk profiles among the different fisheries examined by the United States. To the extent that these different fisheries may have different risk profiles, Japan believes that it is necessary to conduct a precise and objective identification of the risks followed by a comparison of the respective risk profiles of the respective fisheries, rather than a comparison only of the risks that exist in the ETP large purse seine fishery with the risks that exist outside of the ETP large purse seine fishery.

---

[1] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.31 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 182).

[2] *See* Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.152 and 7.239.

[3] *See* Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.161.

B. Whether the Treatment Accorded to Each Group is Properly Calibrated to the Relevant Risks Taking Into Account the Objective of the Measure

1. Whether the Different Treatment is Commensurate with the Relevant Risk

6. Once the risks are identified, a Member must determine whether the different treatment accorded to each group is commensurate with the relevant risk, taking into account the objective of the measure as determined by the implementing Member. For such purpose, and thus to determine whether the measure at issue is even-handed, the Panel should examine whether the regulatory distinctions (in the present case, the difference in conditions for tuna products' access to dolphin-safe labels) are tailored to the different risk profiles which exist in the different fisheries and fishing methods. Moreover, although certain discretion is granted to Members when setting labelling conditions calibrated to different risk profiles, such labelling conditions must be designed to ensure that access to the dolphin-safe label is accorded to the tuna and tuna products from the fisheries that are at the same level of safety for dolphins.

7. Japan notes that the risk addressed by the United States through its measure may be mitigated or eliminated through policies implemented by other governments. These mitigation polices are not accounted for in the U.S. measure. For example, as the United States acknowledges, the U.S. measure treats setting on dolphins, and the tuna product it produces, differently from other fishing methods and the tuna product that they produce. Even acknowledging that setting on dolphins is an inherently harmful fishing method, the U.S. measure does not provide for consideration of any other measures or mechanisms that vessels or fisheries may employ to mitigate such harm and achieve the same level of safety as other fishing methods that are eligible for the dolphin-safe label. In Japan's view, a viable measure should focus on the risk and its relationship to the regulatory treatments in question and should leave room for other Members to undertake policies that achieve the goal sought by the measure in question.

2. Whether the Detrimental Treatment is Rationally Related to the Policy Objective of the Measure

8. The question of whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue also provides valid context for whether a measure accords "treatment no less favourable" under Article 2.1, as it constitutes part of the overall analysis of whether the U.S. measure is even-handed.

9. Japan does not contest that the United States has the discretion to implement measures to pursue legitimate objectives. However, such regulatory autonomy is not unlimited and implementation of a measure in a manner that constitutes arbitrary or unjustifiable discrimination between the like products at issue is not permitted. To avoid situations where the grant of regulatory autonomy is boundless, the policy objectives of the measure should be precisely articulated so that the Panel can determine whether the different treatments under different labeling conditions are rationally related to the policy objective. The Panel should also strictly review whether the different treatments under different labeling conditions are appropriately designed to pursue that policy objective.

10. The manner in which the United States defines and articulates its policy objective in implementing a measure will be relevant in determining whether the chosen measure is properly calibrated to meet these objectives in light of the risks. Further, in light of the above, it is the implementing Member that is best positioned to present and explain to the panel that it has clearly articulated the policy objective of a measure. In the case at hand, it is therefore the United States, rather than Mexico, who is best placed to provide a clear articulation of its policy objective to the Panel.

11. The dolphin-safe label only provides information on whether the product satisfies the labeling conditions, which, in turn, reflect the policy objective of the U.S. measure. However, Japan considers that the assessment of the accuracy of the information provided by the label is included in the even-handedness test. The Panel should therefore ensure that a dolphin-safe label on each product represents a uniform level of dolphin safety according to the policy objective, regardless of the risk profile of the fishery and fishing method, or the different labeling conditions.

Different labeling conditions may be applied depending on the risk profiles of the fisheries and fishing methods, but this is so only in such a manner as to ensure that the same threshold is applied to each of the like products for access to the same labeling.

II. INTERPRETATION OF ARTICLES III:4 AND XX OF THE GATT 1994

12. Consistent with its views expressed in previous proceedings before the panels and the Appellate Body in this case, Japan reiterates that an analysis of "no less favourable treatment" under Article III:4 of the GATT 1994 should also involve an assessment of the legitimacy of the measure in light of the policy objectives pursued by the measure. However, Japan will focus on how policy objectives should be considered under Article XX herein.

13. In the present case, in relation to the Article XX chapeau, the Panel must assess whether the U.S. measure constitutes arbitrary and unjustifiable discrimination, focusing on "the rationale put forward to explain [the] existence [of the discrimination]." The United States is in the best position to articulate the policy objective underlying the discriminatory treatment and the rationale for the discrimination. The Panel should then conduct a strict review of whether the United States has explained the rationale behind the discrimination and the relationship between the discrimination and the policy objective, and thus determine whether the discrimination contained in the U.S. measure is aimed at achieving the regulatory objective of dolphin protection in a consistent and even-handed manner for all like products, including both domestic and foreign products.

14. Finally, Japan notes that the "eligibility criteria" exclude tuna caught by large-scale high seas driftnet fishing and purse seine fishing by "setting on dolphins" from being eligible for the dolphin-safe label. The Panel should consider whether such eligibility requirement may constitute arbitrary discrimination, as it constitutes a "single rigid and unbending requirement" that allows "little or no flexibility in how officials made the determination[]."[4] In this connection, Japan notes that the Appellate Body in *US – Shrimp* found that a "discrimination results not only when countries in which same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[5]

15. In this respect, Japan notes the Appellate Body's finding that "[a]uthorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required."[6] Japan's view is that where the regulatory distinctions are not based on the objective characteristics of the products themselves, but rather, on the process or production method of the product – which may vary from country to country, industry to industry, and product to product – an importing country is not necessarily suited to adopt a single process or production method for achieving the level of effectiveness required.

[4] Appellate Body Report, *US – Shrimp*, para. 177.
[5] Appellate Body Report, *US – Shrimp*, para. 144.
[6] Appellate Body Report, *US – Shrimp*, para. 144.

ANNEX C-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

I. INTRODUCTION

1. New Zealand addresses two matters in this second compliance Panel proceeding: first, the role of the calibration assessment in this dispute; and second, the legal status of the Preamble to the WTO Agreement. New Zealand's comments reflects our systemic interest in the proper implementation of the Agreement on Technical Barriers to Trade (TBT Agreement).

II. CALIBRATION ASSESSMENT IN THIS DISPUTE

2. Both complainants in this dispute appear to agree that the legal issue before the Panel is the interpretation and application of the calibration assessment discussed in the Appellate Body report in the original proceedings. While New Zealand does not wish to comment on the facts involved in the calibration assessment itself, New Zealand does wish to comment on the role this assessment played in this dispute and what, if any, role it may play in future disputes under Article 2.1 of the TBT Agreement.

3. The term calibration was first used in this dispute by the United States, who had argued in the original proceedings that the original tuna measure was even-handed, and thus consistent with Article 2.1, because it was calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans.[1] It was then used by the Appellate Body in the original proceedings to assess the United States' argument.

4. The Appellate Body also used this term in the first compliance proceedings, where calibration was relevant to determining whether the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could be explained as commensurate with the different risks associated with tuna fishing in different oceans and using different fishing methods.[2] In other words, it again was part of the assessment of whether the amended tuna measure at issue was applied even-handedly.

5. Therefore, the role of the calibration assessment in this dispute was as part of the test for even-handedness under Article 2.1 of the TBT Agreement. It was not a separate test in and of itself. As such, whether it will be appropriate to apply a calibration assessment in order to determine whether a measure is even-handed in another dispute will depend on the facts of that dispute.

6. New Zealand also wishes to note that the Appellate Body did not appear to rely on the calibration assessment in determining whether the amended tuna measure was even-handed. It relied on other features of the amended tuna measure that were not dependent on an assessment of relative risks associated with different fishing methods in different areas of the oceans.[3] The Appellate Body examined the even-handedness of the labelling conditions applied under the amended tuna measure in certain scenarios that would present comparably high risks to dolphins inside and outside the ETP purse seine fishery.

7. Therefore, the Panel may need to consider factors other than the calibration assessment in order to resolve this dispute.

III. LEGAL STATUS OF THE PREAMBLE TO THE WTO AGREEMENT

8. The second matter on which New Zealand wishes to comment is the legal status of the Preamble to the WTO Agreement.

---

[1] Panel Report, *US - Tuna II (Mexico)*, paras 7.258, 7.574, 7.559, 7.561.
[2] Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras 7.126, 7.155, 7.160.
[3] Ibid., paras. 7.254-7.266.

9. At paragraph 32 of its second written submission, Mexico submits that if the means Members use to achieve its objectives are inconsistent with the objectives of sustainable development, then they are likewise inconsistent with their WTO obligations. New Zealand appreciates the importance of environmentally sustainable fisheries, not only to the Pacific but to all oceans in the world. That is not the issue here. What New Zealand wishes to comment on is whether the Preamble in and of itself creates legally binding obligations under the WTO Agreement and its annexes.

10. In New Zealand's view the Preamble provides the context in which Members have agreed to be bound by the rights and obligations set out in the articles and annexes of the WTO Agreement. As such, the Preamble can be used as an interpretive aid to understanding those rights and obligations. However, it does not impose legally binding rights or obligations on the parties in its own right. Article 31 of the Vienna Convention on the Law of Treaties supports this view. Article 31 identifies the preamble as part of the context for the purpose of the interpretation of a treaty. Similarly, WTO jurisprudence confirms the Preamble to the WTO Agreement as an aid to interpretation. The Appellate Body in *US-Shrimp* considered that the Preamble "adds colour, texture and shading" to the interpretation of the agreements annexed to the WTO Agreement.[4]

11. New Zealand considers there is also support for this view from the structure and language of the WTO Agreement Preamble. First, the term "agree" is only referenced at the end of the Preamble. It introduces what follows in the next part – that is, the articles of the WTO Agreement, which set out the rights and obligations agreed by the parties under the WTO Agreement. Hence, WTO Member's rights and obligations are set out after the Preamble, not as part of it. In other words, the Preamble can be seen as a prelude to the rights and obligations under the Agreement.

12. Second, the language reflects a hortatory approach, rather than binding commitments. The Preamble uses language such as "recognising", "being desirous". As indicated, the term "agree" is only used to introduce the material that follows the Preamble.

13. In New Zealand's view, the Preamble is a valuable aid to interpreting a Member's rights and obligations set out in the provisions of the WTO Agreement and its annexes. However, it does not, in and of itself, create legally binding obligations.

[4] Appellate Body Report, *US - Shrimp*, para. 153.

ANNEX C-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. THE TBT AGREEMENT ARTICLE 2.1 – THE CALIBRATION ANALYSIS

1. The Appellate Body has articulated that the relevant inquiry under Article 2.1 of the TBT Agreement when considering if the detrimental impact stems exclusively from a legitimate regulatory distinction is whether the regulatory distinction is designed and applied in an even-handed manner, or whether it lacks even-handedness, for example because it is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination.[1]

2. In the original proceedings in this dispute, the Appellate Body accepted the notion of "calibration". The Appellate Body has clarified that this is not a separate test, but rather a part of the assessment when considering if a measure is "even-handed".[2] In this particular dispute, a calibration analysis includes an examination of whether different conditions for access to a "dolphin-safe" label are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. Contrary to what Mexico argues in its First Written Submission,[3] Norway agrees with other third parties that the calibration test should not include an assessment of accuracy of certification, reporting and/or record-keeping related to the labelling conditions.[4] We note that this was not a part of the test applied by the Appellate Body in the original proceedings of this dispute.

II. THE BURDEN OF PROOF UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

3. The burden of proof is commented on by both parties in these proceedings in their submissions to the Panels. While Mexico refers to the United States having the burden of proof with regard to Article XX of the GATT 1994, Mexico appears silent on the burden of proof with respect to Article 2.1 of the TBT Agreement. The United States, on the other hand, repeatedly states that the United States has the burden of proof with respect to the matter brought by the United States, and that Mexico has the burden of proof with respect to the matter brought by Mexico. In addition, the United States refers to the Appellate Body's statement that "the party that asserts a fact is responsible for providing proof thereof".[5]

4. Norway chooses to refrain from speculating in what the United States might imply is the consequence of them having initiated Article 21.5 proceedings in a dispute where they were originally the respondent with regard to the burden of proof. However, we would like to point out that, in WTO dispute settlement, the main principle for the allocation of burden of proof is that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[6] Furthermore, "if that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[7] The Appellate Body, in the first Article 21.5 proceedings of this dispute, confirmed its statement in the original proceedings that this principle also applies to Article 2.1 of the TBT Agreement.

5. As explained by the Appellate Body:

> Under Article 2.1, this means that a complainant must show that, under the technical regulation at issue, the treatment accorded to imported products is less favourable than

[1] Appellate Body Report, *US – Clove Cigarettes*, para. 182 and Appellate Body Report, *US – COOL*, para. 271.
[2] Appellate Body Report, *US – Tuna II (Article 21.5 - Mexico)*, para 7.98.
[3] Mexico's First Written Submission, para. 218 ff.
[4] Australia's Third Party Submission, European Union's Third Party Submission.
[5] United States' Second Written Submission, para. 11 and United States' Third Written Submission, both referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 283.
[6] Appellate Body Report, *United States - Wool shirts and Blouses,* p. 14.
[7] Appellate Body Report, *United States - Wool shirts and Blouses,* p. 14.

> that accorded to like domestic products or like products originating in any other country. [...] If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.[8]

6. The Appellate Body's use of the terms «complainant» and «respondent» must be seen in its context. In this regard, we refer to the reiteration by the Appellate Body that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events".[9] The continuum of event means, in Norway's view, that who are considered to be the complainant and the respondent respectively with regard to the burden of proof in relation to Article 2.1 of the TBT Agreement are the same as in the original proceedings. In other words, this does not shift depending on who initiated Article 21.5 proceedings.

7. Hence, it is clear that in this particular dispute, it rests upon Mexico to demonstrate that the first step of the legal standard for establishing a violation of Article 2.1 is fulfilled – i.e. that the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of domestic or other foreign products.[10] If such detrimental impact is demonstrated, it rests upon the United States to show that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.

[8] Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.32.

[9] Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 5.9 and 7.64, referring to previous Appellate Body Reports.

[10] Appellate Body Report, *US – Clove Cigarettes*, para. 180.