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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS381/RW.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

Adopted on 19 February 2014

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. 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.

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 an original exhibit is not in the language of the submitting party's written submissions, that party shall also submit a translation in the language of its written submissions. 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. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. 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 compliance proceedings. For example, exhibits submitted by Mexico could be numbered MEX-1, MEX-2, etc. If the last exhibit in connection with the first submission was numbered MEX-5, the first exhibit of the next submission thus would be numbered MEX-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, the party or third party submitting such exhibit shall also identify the number of the original exhibit in the original panel proceedings.

Questions

10. 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

11. 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 6.00 p.m. the previous working day.

12. 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 statement, preferably at the end of the meeting, and in any event no later than 6.00 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

13. 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.

14. 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 6.00 p.m. the previous working day.

15. 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 6.00 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

16. 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.

17. Each party shall submit an executive summary of each of its written submissions and a consolidated executive summary of its opening and closing oral statements, as applicable, at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. A party may include its responses to questions in the executive summary of its statements. In that case, the executive summary, covering the party's statements and responses to questions, shall be submitted at the latest 7 calendar days following the delivery to the Panel of its written responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions. The total length of these summaries shall not exceed 30 pages.

18. The third parties shall submit executive summaries of their written submission and oral statements at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. A third party may include its responses to questions in the executive summary of its statement. In that case, the executive summary, covering the third party's statement and responses to questions, shall be submitted at the latest 7 calendar days following the delivery to the Panel of its written responses to questions. The total length of these summaries shall not exceed 6 pages.

Interim review

19. 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.

20. 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.

21. 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

22. 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 3 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. 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 *****@wto.org, with a copy to *****.*****@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 shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. 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. 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 6.00 p.m. (Geneva time) on the due dates established by the Panel.

f. 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

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

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ANNEX B

ARGUMENTS OF THE PARTIES

MEXICO

UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. This proceeding concerns 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 dispute *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (Tuna dispute).

2. In the original proceedings, Mexico demonstrated that the multilateral Agreement on International Dolphin Conservation Program (AIDCP) has been a tremendous success, reducing dolphin mortality in the Eastern Tropical Pacific (ETP). Mexico also showed that the alternative method of fishing on fish aggregating devices (FADs) promoted by the United States is extremely harmful to tuna stocks because that method captures juvenile tuna. FAD fishing also results in highly destructive bycatch of billfish, turtles, sharks, and other species.

3. On 13 June 2012, the DSB adopted the reports and ruled that the U.S. "dolphin-safe" labelling provisions were inconsistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and recommended that the United States bring its measure into conformity with its obligations under that Agreement.

4. On 9 July 2013, the United States published in its Federal Register a Final Rule entitled "Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products" (2013 Final Rule). The action taken by the United States does not bring its measure into compliance with the WTO Agreements, and also perpetuates a tragic situation for dolphins worldwide and the global marine environment. Although the "effective date" of the Final Rule was stated to be July 13, 2013, the notice accompanying its publication also stated that the United States would not require compliance until 1 January 2014.

5. The "measure taken to comply with the recommendations and rulings" of the DSB (Amended Tuna Measure) comprises: (a) Section 1385 ("Dolphin Protection Consumer Information Act" (DPCIA)), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (b) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 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.

6. The Amended Tuna Measure, like the original Tuna Measure, imposes discriminatory requirements for access to the United States' "dolphin-safe" label in violation of Article 2.1 of the TBT Agreement, and Articles I:1 and III:4 of the GATT 1994.

II. THE AMENDED TUNA MEASURE

7. The Amended Tuna Measure entailed changes only to the implementing regulations, and not to either the DPCIA or the *Hogarth* ruling. Key aspects of the original Tuna Measure were maintained in the Amended Tuna Measure, particularly that tuna caught by setting on dolphins is not eligible for a dolphin-safe label.

A. The Dolphin Protection Consumer Information Act

8. In the original proceeding, the Panel reviewed the most pertinent aspects of the DPCIA. Those provisions remain unchanged. The three major categories of requirements of the DPCIA are (i) the definition/scope of "dolphin-safe," (ii) the obligation to have independent observers ensuring compliance, and (iii) specification of the documentation needed to support the certification.

9. In accordance with subsection (d)(1)(C) of the statute, a tuna product containing tuna caught inside the ETP can be labeled as dolphin-safe only if the product is supported by: (a) a statement by the vessel's captain providing certification under subsection (h), i.e., that no tuna were caught on the trip in which such tuna were harvested using a purse-seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught; (b) a statement by the onboard, independent and AIDCP-approved observer, also providing certification under subsection (h); (c) a statement by the Secretary of Commerce, a Secretary's designee, a representative of the Inter-American Tropical Tuna Commission (IATTC), or a representative of a nation whose national program meets the requirements of the AIDCP, stating that an AIDCP-approved observer was onboard during the entire trip.

10. The statute contemplated the possibility that the U.S. definition of "dolphin-safe tuna" could be made consistent with the definition in the AIDCP. This potential change in the dolphin-safe labelling standard for the ETP was made contingent on the outcome of studies of dolphin populations in the ETP. In 1999, the U.S. Department of Commerce (USDOC) made an Initial Finding that determined that there was insufficient evidence to conclude that intentional encirclement of dolphins with purse-seine nets was having a significant adverse effect on what the United States labeled as "depleted" dolphin stocks in the ETP. The USDOC then did additional studies and, in a Final Finding issued in December 2002, reached the same conclusion that it had previously reached in the Initial Finding. These findings should have allowed the U.S. definition of "dolphin-safe" to be amended to allow tuna caught in compliance with the AIDCP to bear the dolphin-safe label. However, the U.S. courts, in the *Hogarth* case, held that the USDOC's findings were not in accordance with the statute's requirements, and ordered that the definition of "dolphin-safe" continue to ban the use of dolphin sets entirely. The statute does not permit that determination to be re-evaluated at any time in the future.For tuna caught outside the ETP using purse seine nets, the statute only requires a self-certification by the captain of the vessel that a purse seine net was not intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested. For tuna caught without the use of purse seine nets (e.g., longline or trawl), no certification is required at all. For tuna by a vessel less than 400 short tons, no certification is required at all. These requirements have been modified by the 2013 Final Rule.

11. In addition, the DPCIA purports to prohibit the use of the "dolphin-safe" label on tuna caught "on the high seas by a vessel engaged in driftnet fishing." However, in actual operation this restriction has no meaning, because it has never been implemented by the Department of Commerce. Indeed, the United States itself allows fishing with driftnets in its Exclusive Economic Zone.

12. The DPCIA designates when a dolphin-safe certification must be supported by an independent observer. The DPCIA does not require independent observers outside the ETP, except where the USDOC has designated a purse seine fishery as having a regular and significant association between tuna and dolphins or a non-purse seine fishery as having regular and significant dolphin mortality. The USDOC has not designated any fishery under these categories, so observers are not required for any fishery other than the ETP.

13. In the case of a tuna product containing tuna harvested in the ETP by a purse seine vessel, the DPCIA states that the certifications by the captain and observer must "comply with regulations promulgated by the Secretary which provide for the verification of tuna products as dolphin safe." Those regulations incorporate the requirements for tuna tracking to which the members of the AIDCP have agreed. For other tuna products (i.e., non-ETP tuna), the DPCIA contains no requirement to verify the products as dolphin-safe.

14. Under U.S. law, implementing regulations may not change any of the requirements set out in the authorizing statute. Accordingly, all of the DPCIA's requirements that were the subject of review by the Panel and Appellate Body remain in effect today, unchanged. The statute is therefore an integral element of the Amended Tuna Measure.

B. U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H

15. The implementing regulations for the DPCIA address the certifications for "dolphin-safe" and also impose specific requirements, which vary depending on whether the tuna is sourced from the ETP or elsewhere, for: segregating tuna; having independent observers on board vessels; and documenting and verifying compliance.

16. For tuna products made from tuna caught by large purse seine vessels in the ETP, the content of the certification requirement is the same as set forth in the DPCIA. For tuna products containing tuna caught outside the ETP with purse seine nets, the 2013 Final Rule changed the certification to require an additional statement from the captain of the vessel that no dolphins were killed or seriously injured in the sets in which the tuna were caught.

17. For tuna products containing tuna caught (i) not using purse seine nets or (ii) by smaller vessels, that did not require any certification, the 2013 Final Rule requires that all such tuna be supported by a captain's statement that that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. Note that if the dolphin-set fishing method is used even a single time during a voyage, none of the tuna caught during the voyage may be designated as dolphin-safe, including tuna caught without using dolphin sets. The three major tuna products in the U.S. market – Starkist, Chicken of the Sea and Bumble Bee – jointly submitted comments on the new requirement for captains' certifications from vessels not using purse seine nets, saying that such certificates will not be credible.

18. Under the original Tuna Measure, for tuna caught by large purse seine vessels in the ETP only, tuna caught in sets designated as dolphin-safe by the vessel observer must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading at port. For tuna caught outside the ETP, there were no such requirements. Under the Amended Tuna Measure, similar requirements for segregating purportedly now apply to all tuna and tuna products. However, because of the absence of monitoring, verification, and tracking requirements for non-ETP tuna products, the separation-of-tuna obligations for non-ETP tuna are unenforceable and meaningless.

19. For tuna caught by large purse seine vessels in the ETP, including vessels of the Mexican fleet, the original Tuna Measure requires an independent observer on every vessel to monitor compliance with dolphin-safe requirements. The AIDCP requires that every large purse seine vessel carry an independent observer, and Mexico has implemented that requirement in its domestic regulations (NOM-001-SAG/PESC-2013).

20. Under the Tuna Measure, no requirements for independent observers were imposed other than for large purse seine vessels fishing in the ETP. The 2013 Final Rule appears to create the possibility that the USDOC could require independent observer verification of dolphin-safe certifications. However, the USDOC has neither made a determination that observers participating in any non-ETP observer program are so qualified and authorized, nor has it announced plans to even consider doing so.

21. Under the original Tuna Measure, tuna products containing tuna harvested in the ETP have to be supported not only by the required certification, but also by "the documentation requirements for dolphin-safe tuna under § 216.92 and 216.93". These requirements have been maintained under the Amended Tuna Measure. There are no documentation requirements, other than a captain's self-certification, for other tuna products.

22. For U.S. tuna products, section 216.93 establishes a "tracking and verification program" for large U.S. purse seine vessels fishing in the ETP (but not elsewhere) which is designed to be consistent with the AIDCP. U.S. statistics indicate that in 2013 tuna from the ETP constituted about one percent of the tuna used to make tuna products in U.S. canneries. Accordingly, the requirement for ETP tuna tracking forms imposes extremely little, if any, burden on the U.S. processing industry.

23. Compliance with the AIDCP brings with it strict obligations to comply with the tuna tracking system of the AIDCP – the same tracking system that the U.S. regulations implement for U.S. vessels through section 216.93(a). The rules for tracking dolphin-safe tuna are very detailed and comprehensive, and apply from the moment of capture of the tuna all the way through

unloading of the tuna, and then to the processing and marketing of the tuna products containing that tuna. Mexico implemented the AIDCP tuna tracking requirements through the regulation NOM-EM-002-PESC-1999, which was issued in December 1999 and subsequently updated through NOM-001-SAG/PESC-2013. The United States has verified Mexico's compliance with the AIDCP continuously since 2000.

24. For Mexican tuna products to be eligible for the dolphin-safe label under the Amended Tuna Measure: the tuna must be certified as having being been caught without killing or seriously injuring a dolphin in the set in which the tuna was caught and that dolphin sets have not been used during the entire voyage in which the tuna was caught; an independent observer must verify that the certification is accurate; and the certification must be supported by the above-described extensive tracking system, which is audited by the Mexican government.

25. There are no documentation requirements for any type of non-ETP tuna products other than the captain's self-certification.

C. The *Hogarth* Ruling

26. The Ninth Circuit Court of Appeals has the effect of permanently denying Mexican tuna products the benefit of the "dolphin-safe" label in the U.S. marketplace, and this ruling remains an integral element of the Amended Tuna Measure.

D. The 2013 Final Rule

27. The United States did not modify the DPCIA. The revised regulations made only a few changes to the prior regulations. An important feature of the new regulations is that they delayed implementation of the changes. In effect, therefore, the United States unilaterally granted itself a further extension to the RPT by not enforcing the measure that it has introduced for the purpose of bringing itself into compliance. The captains' certifications are not publically available, and there is no transparency regarding how non-ETP vessels and processors verify compliance. A key aspect of the Amended Tuna Measure is that, for tuna caught outside the ETP, the United States still allows the use of the dolphin-safe label when dolphins were killed and seriously injured, and even when nets were set around dolphins.

III. BACKGROUND INFORMATION ON THE GLOBAL TUNA INDUSTRY, ALTERNATIVE FISHING METHODS, AND STATUS OF DOLPHIN POPULATIONS IN THE ETP

28. Dolphin mortalities are a significant problem outside the ETP. Fishers set nets on dolphins outside the ETP, and fishing methods other than the dolphin set method kill and seriously injure dolphins. Moreover, outside the ETP, tuna is frequently brokered through intermediaries and there are no mandatory procedures for tracking the dolphin-safe status of tuna. Meanwhile, the latest evidence indicates that the dolphin stocks in the ETP that the United States designated as "depleted" are actually growing at their maximum expected rates, contrary to what the United States believed in 2002, when the Department of Commerce made its "Final Findings."

A. Fishers Set Nets on Dolphins Outside the ETP, and Other Fishing Methods Kill and Seriously Injure Dolphins

29. During the original proceedings, the Panel found that there were associations between dolphins and tuna outside the ETP, and that methods of fishing other than dolphin sets cause dolphin mortalities. Mexico has collected substantial additional evidence showing that (i) tuna fishers intentionally set nets on marine mammals outside the ETP, and (ii) other methods of fishing for tuna are causing many thousands of dolphin mortalities.

1. Fishers Intentionally Set Purse Seine Nets on Marine Mammals outside the ETP

30. There has been a widely repeated claim that the association between dolphins and tuna in the ETP is "unique", and that dolphin sets rarely occur elsewhere. The evidence demonstrates otherwise.

31. An Administrative Report of the National Oceanic and Atmospheric Administration (NOAA) states that "an obvious problem with concluding … that incidental mortality of dolphins in tuna purse-seines outside the ETP is minimal is that many of the existing reports have been produced by groups with vested interests in one or another viewpoint: groups related to commercial fishing interests will obviously hope to find little evidence of tuna-dolphin problems similar those occurring in the ETP …".

32. More recently, the Secretariat of the Pacific has published an evaluation of the impact of the Western and Central Pacific Ocean (WCPO) fishery on cetaceans. No data have been made publicly available on the overall interaction of this fishery with marine mammals. Nonetheless, the key point is that observers witnessed dolphin and whale sets being made, indicating that there is an association between tuna and marine mammals in the WCPO. Accordingly, there are good reasons to believe that these figures are significantly underestimated.

33. Other sources confirm that nets are intentionally set on marine mammals in the WCPO. In 2012, the WCPFC adopted a measure to protect whale sharks. In April 2013, Australia and the Maldives presented a proposal to the IOTC to adopt a measure to protect whale sharks.

34. The fact that vessels claim to fish only on FADs does not mean that dolphins are not being harmed. For example, a report on bycatch of dolphins sponsored by the USDOC states "[i]n the Philippines, scientists estimated that about 2,000 dolphins—primarily spinner, pan-tropical spotted, and Fraser's—were being killed each year, probably at unsustainable levels, by a fleet of five tuna purse-seiners using fish-aggregating devices".

35. A recent enforcement action taken by the USDOC against U.S. vessels further validates that fishers intentionally set nets on dolphins in the WCPO. The case at issue, entitled *In the Matter of Matthew James Freitas, et al.* ("Freitas case"), involved five U.S.-flagged vessels that fish in the WCPO with FADs, and all of which are managed by the South Pacific Tuna Corporation (SPTC). Two of the vessels were penalized for setting purse seine nets on marine mammals, in violation of the U.S. MMPA. Although the Freitas case refers to the animals as "whales", it also provides details that the animals were pilot whales and false killer whales, which are species of dolphin.

2. Gillnet Fishing Kills and Injures Dolphins

36. As explained by the Fisheries and Aquaculture Department of the United Nations Food and Agriculture Organization (FAO), drifting gillnets are used to catch tuna. In 2004-2005, the Central Marine Fisheries Institute in India conducted a study to quantify the number of cetaceans incidentally caught as by-catch by local fishers. The study concluded that such fishing operations could be killing about 10,000 cetaceans including dolphins every year, which it considered "alarmingly high."

37. A report prepared for the IOTC in 2012 on the gillnet tuna fishery in the coastal waters of Pakistan included the following information "[d]olphins seem to be more frequent in getting entangled in tuna gillnets … According to fishermen, most of dolphins entangled in gillnet die immediately … Although it is not possible to accurately estimate the number of dolphins killed every year in tuna gillnet fisheries of Pakistan but based on limited information collected recently (Moazzam, 2012) it is estimated that 25- 35 dolphins are killed every month."

38. There have also been reports of substantial dolphin bycatch in tuna gillnet fishing operations in Europe.

3. Longline Fishing Kills and Injures Dolphins

39. 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.

40. A recent study summarized that "[o]perational interactions between odontocetes [cetaceans in the suborder Odontoceti or "toothed whales", it includes all species of dolphins and porpoises] and the longline industry is a global problem." Another recent study examined the whale and dolphin species involved in pelagic longline depredation in the tropical and subtropical waters of

the western Indian Ocean. The report draws a connection between where these species are found and where pelagic longline fishing areas exist in the Indian Ocean. Other reports confirm that dolphins are attracted to longline fishing operations.

41. Unfortunately, there are no comprehensive programs to monitor the harm caused to dolphins by longline fishing. 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. There is no doubt, however, that longline fishing operations kill and maim dolphins.

42. The United States itself has designated the longline tuna fishery in the area of the U.S. State of Hawaii as threatening the population of false killer whales (a species of dolphin) in that region, which are classified as "endangered" and "depleted". Yet this tuna is eligible for a dolphin-safe label. The United States has also designated the "Atlantic pelagic longline fishery" as a fishery harmful to marine mammals that requires a "take reduction plan". The United States does not maintain a comprehensive observer program for its longline fleet operating off the U.S. coast in the Atlantic; the coverage is only eight percent.

43. 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 report bases its estimate on an extrapolation of data from the Hawaii longline fishery. The report cautions that the number is likely underestimated.

44. Another report discusses the damage to dolphin's dorsal fins caused by longline fishing. Longlines also get tangled on dolphins' tails. Thus, even when dolphins do not immediately die from an interaction with a longline, they are at risk to suffer from maiming of their mouths, dorsal fins and other body parts, as well as from eventual drowning when they cannot free themselves from the lines.

45. Mexican longline vessels fishing in the Gulf of Mexico for tuna are subject to comprehensive regulations (NOM-023-SAG/PESCA-2014) that require an independent observer on every vessel to monitor fishing practices. To Mexico's knowledge, it is the only country that requires 100 percent observer coverage of its longline vessels; the United States has no such regulation.

4. Trawl Fishing Kills and Injures Dolphins

46. Dolphins are regularly captured in trawl nets. For example, a report included in a 2004 study prepared for the United Kingdom's House of Commons stated "an Irish study of a trial pelagic pair trawl fishery for albacore tuna observed 30 dolphins being caught in a single haul, with 145 cetaceans caught by just four pairs of trawlers in a single season."

47. Clearly dolphins and other marine mammals are at grave risk in tuna fisheries outside the ETP and from fishing methods other than dolphin sets, yet the United States has done nothing to discourage American consumers from purchasing such tuna.

B. Tracking Procedures for Dolphin-Safe Tuna

48. To understand both the complexity and necessity of a tracking system for dolphin-safe tuna, it is crucial to review how tuna is sourced, handled and tracked during the manufacturing process.

49. The major Mexican producers are vertically integrated. Specifically, they have their own fishing fleets, which deliver tuna to their processing facilities within Mexico. Thus, the chain of ownership over the tuna caught by the Mexican fleet is maintained from the time of harvesting through the processing of the tuna into tuna products and the eventual marketing of the tuna products.

50. Outside the ETP, because of the extensive use of intermediaries (brokers), it would be difficult to trace the dolphin-safe status of tuna even if there were enforceable requirements to do so outside the ETP. There are no verifiable procedures or requirements for such tracking for non-ETP vessels and non-ETP tuna processors.

51. Unlike the Mexican 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 has passed through at least two parties before it is processed.

52. For both longline and purse seine fishing, an important role is played by refrigerated fish carriers, who consolidate the catch of multiple fishing vessels. Some of these are believed to be engaged in transshipment at sea. Transshipment at sea can be particularly vulnerable to "tuna laundering," where "black boats" may conduct illegal, unauthorized and unrestricted (IUU) fishing and then transfer their catch to licensed vessels to transship. It has been indicated that observers likely cannot detect IUU fishing and fish laundering.

53. Importantly, the reporting required for transshipments does not address the U.S. dolphin-safe requirements. There are no authorities with responsibility to monitor whether captains' certificates match to a particular lot of tuna, or whether that tuna has been mixed with uncertified tuna in a storage well.

54. Where the vessels have not caught the tuna in the ETP, there is no requirement for dolphin-safe tuna tracking, no TTF forms, and no means to verify the accuracy of the information about how the tuna was caught and whether or not dolphins were killed or seriously injured during the capture of the tuna. Except for tuna caught in the ETP, there is no procedure through which the USDOC can verify – or rely on another country to verify – that a tuna product represented to contain dolphin-safe tuna actually does so. Other than the AIDCP the United States has no international agreements obligating other countries to enforce or verify compliance with dolphin-safe standards. Other than in the ETP, there is no way to determine whether a captain's claim not to have set nets around dolphins during an entire voyage is accurate, whether a claim that no dolphins were killed or seriously injured in a particular set in which the tuna was caught is accurate, whether tuna caught in a dolphin-safe set has been kept segregated from tuna caught in a non-dolphin-safe set, or even whether a certification accompanying imported tuna products matches up correctly to the vessel and voyage that caught the tuna.

55. Because of the absence of controls and tracking mechanisms for non-ETP vessels, tuna processors outside of Mexico in other countries cannot verify (let alone segregate and track) dolphin-safe tuna after they receive it.

56. The U.S. MMPA, independent of the Amended Tuna Measure, requires U.S. vessels to report the "taking" of marine mammals outside the ETP. However, in the absence of independent observers to monitor compliance, the effectiveness of that requirement is questionable.

57. Testimony in the recent enforcement action in the Freitas case, further validates that without independent observers, a captain's certificate is unreliable. Thus, it is impossible for those vessels to comply with the Amended Tuna Measure's requirement that tuna caught in a set that harms dolphins be segregated from tuna caught in dolphin-safe sets. It is *important* to emphasize that the Freitas case involved U.S.-flagged vessels. Foreign-flagged vessels are not subject to U.S. jurisdiction and have even less incentive to comply with the Amended Tuna Measure.

58. The two canneries in American Samoa apparently receive at least some tuna directly offloaded from the vessels that caught the tuna, and in such cases could verify that a captain's statement matched the vessel. However, there is no tuna tracking system for such tuna, so there is no other documentation available to verify that the tuna was caught in dolphin-safe sets, or kept separate from non-dolphin-safe tuna. Other U.S. canneries (in California and in Georgia) import tuna loins from Thailand, not whole fish. Because the tuna from which those loins were made were landed, skinned and boned in another country, it would be even more difficult to track them to a specific vessel, voyage and storage well – if any effort were being made to do so.

59. Virtually no ETP tuna is used by U.S. processors and ETP tuna products have a very small share of the U.S. market. Accordingly, the overwhelming majority of tuna products sold in the U.S. market as "dolphin-safe" lack documentation of compliance from any moment earlier than import into the United States.

C. Status of Dolphin Populations in the ETP

60. The AIDCP regime remains extremely effective. The incidental mortality of dolphins in the ETP tuna fishery in 2012 was only 870 animals, an 11.8 percent decrease from the 986 mortalities recorded in 2011. As was addressed in the original proceedings, the primary excuse of the United States for refusing to change the definition of "dolphin-safe" to conform to the AIDCP was that the populations of the two dolphin stocks it considers to be "depleted" were not recovering at a rate the United States considered acceptable. In 2009, however, the United States agreed with AIDCP to increase the DMLs for these two dolphin stocks, reflecting the more recent evidence that the populations of the stocks are, in fact, growing.

61. Under the Amended Tuna Measure, the USDOC lacks authority to evaluate any evidence regarding dolphin stocks and their recovery, including the evidence referred to above, which has become available since its Final Finding was published in 2002.

IV. LEGAL ARGUMENT

A. The Panel Must Rule on all of Mexico's Violation Claims

62. In order to resolve this dispute, it is necessary for the Panel to rule on all of Mexico's claims under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. The scope and content of the obligations under these provisions are not the same. If the Panel does not make all of the necessary findings under Mexico's three claims, there would only be a partial resolution of the dispute.

B. The Amended Tuna Measure is Inconsistent with Article 2.1 of the TBT Agreement

63. For a violation of Article 2.1 of the TBT Agreement, 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 and to like products originating in other countries.

64. The Amended Tuna Measure fulfills each of the three criteria of the legal test under Annex 1.1 the TBT Agreement, and therefore continues to qualify as a "technical regulation". Also, the relevant imported products at issue – i.e., tuna products from Mexico – continue to be "like" tuna products of U.S. origin and tuna products originating in any other country. The remaining aspect to be considered is whether the Amended Tuna Measure accords to imported products less favourable treatment.

1. Treatment no Less Favourable

65. The key elements of the design and structure of the measure that operated together to deny competitive opportunities were set out in the provisions of the DPCIA that govern dolphin-safe labeling. These elements remain integral components of the Amended Tuna Measure and have not been changed.

66. The features of the relevant market remain unchanged. U.S. retailers and consumers are sensitive to the dolphin-safe issue, and tuna products labeled "dolphin-safe" have an advantage in the marketplace. Major U.S. grocery chains continue to refuse to buy Mexican tuna products because they are unable to sell the brand that does not have the dolphin-safe label.

67. The situation of Mexican tuna producers continues without any material changes from the situation they had during the original proceedings. The U.S. tuna fleet continues not to fish in the ETP. Thus, most tuna caught by Mexican vessels would not be eligible for inclusion in a dolphin-safe product under the U.S. dolphin-safe labelling provisions, while virtually all tuna caught by U.S. vessels is potentially eligible for the label. During 2013, approximately 86 percent of the tuna used by U.S. canners was caught in the Western Pacific. U.S. canners obtained only about one percent of their supply from the ETP. Thus, U.S. canneries used virtually no tuna caught in the ETP.

68. Nothing in the Amended Tuna Measure reduces or minimizes the detrimental impact on imported Mexican tuna products. Accordingly, it is clear that the operation of the Amended Tuna Measure in the relevant market has a *de facto* detrimental impact on the group of like imported products.

69. Based on the two-step approach established by the Appellate Body in *US – Tuna II (Mexico)*, the Panel must analyze whether the above-noted detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.

70. The relevant regulatory distinction (i.e., the difference in labeling conditions and requirements) includes the following conditions and requirements of the Amended Tuna Measure: (i) the disqualification of setting on dolphins in accordance with the AIDCP as a fishing method that can be used to catch tuna in the ETP in a dolphin-safe manner and the qualification of other fishing methods to catch tuna in a dolphin-safe manner; (ii) the record-keeping and verification requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the different requirements for tuna caught outside the ETP using both the same and different fishing methods; and (iii) the mandatory independent observer requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the absence of such requirements for tuna caught outside the ETP using the same and different fishing methods.

71. When the facts and circumstances related to the design and application of these conditions and requirements are examined, it is clear that the detrimental impact on imports of Mexican tuna products does not stem exclusively from a legitimate regulatory distinction. Rather, the detrimental impact reflects discrimination against the group of imported products.

(1) The Differences in Labelling Conditions and Requirements are Not Legitimate

72. In the original dispute, the Appellate Body concluded that the United States had not demonstrated that the difference in labelling conditions was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. It followed from this that the United States had not demonstrated that the detrimental impact of the U.S. measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction. The Appellate Body also observed that the U.S. measure fully addressed the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it did not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP.

(a) Disqualification / Qualification of Fishing Methods

73. Under the Amended Tuna Measure, the labeling conditions and requirements differ depending on the fishing method used to catch tuna. Setting on dolphins is a fishing method that is permanently "disqualified" from being used to catch dolphin-safe tuna, even if the utilization of this method complies with the stringent AIDCP requirements and there are no dolphin mortalities or serious injuries in the set in which the tuna is caught, as confirmed by an independent on-board observer and certified under the comprehensive tracking and verification system established by the AIDCP and Mexican law.

74. The situation is different for the fishing methods used to catch tuna outside the ETP. With the exception of driftnet fishing for tuna on the high seas by the Italian fleet, all of the other tuna fishing methods (including other driftnet fishing) are qualified to be used to catch tuna in a dolphin-safe manner, even though it is well documented that these methods cause substantial dolphin mortalities and serious injuries.

75. The facts and circumstances related to the design and the application of the measure at issue clearly establish that the regulatory distinction, i.e., the difference in these labeling conditions and requirements, is not even-handed. As a consequence, under the approaches of both the Appellate Body and the Panel in *EC – Seal Products*, the detrimental impact on Mexican imports does not stem exclusively from a legitimate regulatory distinction.

76. The regulatory distinction is not legitimate because it is not rationally connected to the objective of the measure. The objectives of the original Tuna Measure were: (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 Amended Tuna Measure maintains the same objectives. The "qualified" tuna fishing methods have substantial adverse effects on dolphins and pose substantial risks for dolphins, therefore, their qualification for use in catching "dolphin-safe" tuna is inconsistent with the objectives of the Amended Tuna Measure. The "disqualification" of Mexico's principal fishing method and the "qualification" of other alternative fishing methods do not bear a rational connection to the objectives of the Amended Tuna Measure. There are no reasons extraneous to the objective of dolphin protection that provide a cause or rationale to justify allowing tuna caught by these fishing methods to be designated as "dolphin-safe". The distinction in labelling conditions and requirements relating to the disqualification/qualification of fishing methods is designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination, such that it lacks even-handedness.

(b) Record-keeping and Verification Requirements

77. The relevant regulatory distinction includes record-keeping and verification requirements. These are important because the fundamental character of the Amended Tuna Measure is the distinction between tuna products that are and are not dolphin-safe under the U.S. definition. Consistent with this fundamental character, and in order to achieve the objectives of the Amended Tuna Measure, accurate information must be provided to consumers on whether the tuna contained in a tuna product is caught in a manner that adversely affects dolphins. It is only through the provision of accurate information that the label can be made available exclusively to products containing tuna that was not caught in a manner that adversely affects dolphins.

78. Under the Amended Tuna Measure, the record-keeping and verification requirements differ depending on the geographic area in which the tuna are caught.

79. Strict record-keeping and verification requirements and procedures are applied to tuna caught in the ETP which provide a meticulous audit trail which ensures that the information provided on the dolphin-safe status of Mexican tuna under the U.S. definition of dolphin-safe is accurate. In stark contrast, similar requirements and procedures are not applied to tuna that is caught in other geographic areas outside the ETP. The route taken by this tuna to U.S consumers is more complex than the route taken by Mexican tuna, and there are many actions that could occur during a fishing voyage and in the downstream processing and distribution chain that could eliminate the dolphin-safe status of such tuna. As a consequence, accurate information is not being provided. The difference in record-keeping and verification requirements for tuna caught inside and outside the ETP does not bear a rational connection to the objectives of the Amended Tuna Measure. Inside the ETP the requirements are comprehensive and the information accurate. Outside the ETP, the requirements are unreliable and do not provide accurate information on the dolphin-safe status of the tuna products comprising this tuna. Thus, U.S. consumers are not receiving accurate information on such tuna products and could be misled or deceived or could encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. . There are no reasons extraneous to the objective of dolphin protection that provide a cause or rationale for providing inaccurate information on the dolphin-safe status of tuna that is caught outside the ETP, while only providing accurate information for tuna that is caught within the ETP. All dolphin-safe tuna should be accurately labeled. Under the Amended Tuna Measure, differences in record-keeping and verification requirements are designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination, such that it lacks even-handedness.

(c) Mandatory Independent Observer Requirements

80. Mexico addresses the mandatory independent observer requirement separately because of its fundamental importance to the designation of tuna as dolphin-safe at the time of capture. Notwithstanding the fact that none of the tuna that is caught using "qualified" fishing methods can be accurately designated as dolphin-safe, it will not matter if a comprehensive and meticulous audit trail is implemented downstream to the U.S. consumer if the initial dolphin-safe designation is inaccurate. The entire audit trail will be tainted.

81. Observers who are independent, specially trained, and approved by the AIDCP are mandated for tuna fishing in the ETP, and they ensure the accuracy of information concerning the

dolphin-safe status of tuna caught in the ETP. Outside of the ETP, there is no requirement for independent observers. Instead, under the Amended Tuna Measure, the dolphin-safe status of tuna is based solely on self-certification by the captain in charge of the fishing vessel. Such self-certification is meaningless. Captains of vessels are not qualified to make dolphin-safe determinations and, even if they were qualified, their certifications are inherently unreliable. While the measure contemplates the possibility of observers being used outside the ETP in certain circumstances, this is meaningless because the USDOC has made no determination that the circumstances are met, i.e., that observers are qualified and authorized in non-ETP fisheries.

82. The difference in the treatment of independent observers inside and outside the ETP is not rationally connected to the objective of the measure. Captain self-certification for tuna caught outside the ETP does not provide reliable or accurate information on the dolphin-safe status of the tuna products comprising this tuna. As a consequence, the initial designation of the dolphin-safe status of tuna caught outside the ETP is unreliable and inaccurate. This taints all subsequent stages in the audit trail up to the U.S. consumer. Thus, U.S. consumers are receiving unreliable and inaccurate information on such tuna products, and they could be misled or deceived, or could unknowingly be supporting or encouraging fishing fleets to catch tuna in a manner that adversely affects dolphins. There are no reasons extraneous to the objective of dolphin protection that provide a cause or rationale that can justify providing U.S. consumers with reliable and accurate information for tuna that is caught within the ETP, while providing them with unreliable and inaccurate information for tuna that is caught outside the ETP. The differences in the treatment of independent observers inside and outside the ETP are designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination, such that it lacks even-handedness.

C. The Amended Tuna Measure is Inconsistent with Article I:1 of the GATT 1994

83. In the circumstances of this dispute, to determine whether there is a violation of Article I:1, three questions must be answered: (i) are the imported products concerned "like" products; (ii) does the measure at issue confer an advantage, favour or privilege on products originating in any other country; and (iii) was the advantage, favour or privilege granted "immediately and unconditionally" to the like product originating in the territories of all other Members?

84. For the same reasons set out above for Mexico's claim under Article 2.1 of the TBT Agreement, the imported products at issue are "like" domestic tuna products within the meaning of Article I:1 of the GATT 1994.

85. The Amended Tuna Measure confers an advantage, within the meaning of Article I:1 of the GATT 1994, to tuna products of U.S. origin and tuna products originating in countries other than Mexico. The advantage granted by the Amended Tuna Measure is the authorization to use "dolphin-safe" labelling in the United States on tuna products. This advantage is granted only to tuna products containing tuna that meets the applicable conditions and requirements set out under the implementing regulations of the Amended Tuna Measure. The Amended Tuna Measure therefore affects "the internal sale, offering for sale, [and] purchase" of tuna products in the United States. This advantage is made available to tuna products originating in other countries, including Thailand and the Philippines, who are the largest sources of imported tuna products into the United States.

86. The "advantage" of access to the dolphin-safe label is not accorded immediately and unconditionally to the like tuna products originating in the territories of all other WTO Members, namely Mexico. The Panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions. This continues to be the case.

D. The Amended Tuna Measure is Inconsistent with Article III:4 of the GATT 1994

87. The Amended Tuna Measure accords Mexican tuna products treatment less favourable than that accorded to U.S. tuna products in a manner that is inconsistent with Article III:4 of the GATT 1994. The Appellate Body has made clear that the scope and content of the provisions of Article III:4 and Article 2.1 of the TBT Agreement are different. Accordingly, the Panel's decision on Mexico's claim under Article 2.1 will not necessarily resolve Mexico's Article III:4 claim, and it is therefore crucial that the Panel make findings on the Article III:4 claim.

88. The Appellate Body explained that a Member's measure is inconsistent with Article III:4 if three elements are met: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

89. For the same reasons set out above for Mexico's claim under Article 2.1 of the TBT Agreement, the imported products at issue are "like" domestic tuna products within the meaning of Article III:4 of the GATT 1994.

90. The Amended Tuna Measure, which comprises a group of laws and regulations that set out the dolphin-safe labeling requirements, pertains to the category of "laws, regulations and requirements".

91. The Amended Tuna Measure clearly "affects" the internal sale, offering for sale, purchase and distribution of tuna products. As found by the Panel and the Appellate Body, access to the "dolphin-safe" label constitutes an "advantage" on the US market; lack of access to the "dolphin-safe" label has a detrimental impact on the competitive opportunities in the U.S. market; and government intervention, in the form of adoption and application of the U.S. "dolphin-safe" labelling provisions, affects the conditions under which like goods, both domestic and imported, compete in the market within a Member's territory.

92. Also, Article III:4 stipulates that WTO Members shall accord imported products "treatment no less favourable" than the treatment accorded to like products of national origin. As explained above, the Appellate Body found that access to the "dolphin-safe" label constitutes an "advantage" on the US market, lack of access to the "dolphin-safe" label has a detrimental impact on the competitive opportunities in the US market, and government intervention, in the form of adoption and application of the US "dolphin-safe" labelling provisions, affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory. Moreover, the Panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label. This continues to be the case.

V. CONCLUSION

93. On the basis of the foregoing, Mexico respectfully requests that the Panel find that the United States has failed to comply with the recommendations and rulings adopted by the DSB on the basis that the Amended Tuna Measure remains inconsistent with Articles 2.1 of the TBT Agreement, Article I:1 and Article III:4 of the GATT 1994.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. In this submission, Mexico responds to the arguments raised by the United States and further supplements the legal and factual basis for its claims that the Amended Tuna Measure is inconsistent with Articles 2.1 of the TBT Agreement, I:1 and III:4 of the GATT 1994 and, in the case of the violations of the GATT 1994, cannot be saved by the general exceptions in Article XX.

2. Mexican tuna products continue to be denied the dolphin-safe label, while tuna products from tuna fisheries other than the ETP can be easily labelled dolphin-safe when supported only by an unverified copy of a simple statement from a ship's captain claiming that the tuna is dolphin-safe, with no comparable tracking requirements to verify the source of the tuna and its dolphin-safe status, and without accounting for the substantial adverse impact that the fishing methods used to catch the tuna have on dolphins in non-ETP fisheries. The balance of competitive opportunities between Mexican tuna products and like products from the United States and other countries is being upset on the premise that these other products are dolphin-safe when, in fact, this status cannot be proven. As a consequence, it is highly likely that tuna products containing tuna caught outside the ETP under circumstances causing adverse effects to dolphins are entering the U.S. market inaccurately labeled as dolphin-safe.

3. The United States has mischaracterized and disregarded Mexico's arguments and evidence. For example, throughout its submission, the United States repeatedly states that "setting on dolphins is *particularly* harmful to dolphins" (italics original), citing paragraph 289 of the Appellate Body Report. This statement mischaracterizes the Appellate Body's statement and quotes it out of context.

II. RESPONSE TO U.S. DESCRIPTION OF THE RELEVANT FACTS

4. The United States argues that tuna imported from non-ETP locations is unlikely to be non-dolphin-safe because some of the examples Mexico provided related to fishing in the waters of countries that export relatively little tuna to the United States, such as India and Sri Lanka. In support of this argument, the United States relies on customs import statistics and a confidential database of data on vessel flags and gear types purportedly derived from Form 370s and information reported by U.S. canneries when receiving tuna from U.S.-flag vessels. The United States also claims that Mexico has not identified any evidence of dolphin mortalities caused by vessels of the nations that are the principal exporters of tuna products to the United States.

5. In particular, the United States asserts that vessels flagged to Thailand, the Philippines, Vietnam, Ecuador, Indonesia and the United States catch the tuna contained in over 96 percent of the U.S. market for canned tuna. In support of this statement, the United States cites statistics on imports of canned and pouched tuna products. But the processing of whole tuna into loins (which are then packed into canned or pouched tuna products) is considered under U.S. law to be a "substantial transformation" that changes the country of origin of the fish to the country where the processing takes place. Accordingly, the country of origin of a tuna product is the country in which the processing took place, not the country of the vessel that caught the tuna. The fact that tuna products have Thai origin, therefore, provides no indication of which nation's vessels caught the tuna. This is verified by the fact that Thailand's tuna fishing fleet is capable of providing only an extremely small portion of the tuna used in Thai-processed tuna products. Thailand imports 800,000 to 900,000 tons of frozen tuna annually to supply its canning industry, and that the leading sources are Taiwan, the United States, South Korea, Vanuatu, Japan, and ASEAN countries. Further, it is undisputed that as Mexico previously demonstrated, tuna processors in Thailand obtain 80 percent of their supply from tuna trading companies, who (i) purchase tuna from third parties and (ii) regularly consolidate catches of tuna from different vessels on carrier ships, making it especially difficult, if not impossible, to trace the original sources of the tuna.

6. The problem of accuracy is not limited to Thailand. IUU fishing is a global phenomenon. For example, the European Union recently issued warnings to a number of countries, including South Korea and Vanuatu (both major suppliers to Thailand) about their failure to keep up with international obligations to fight illegal fishing.

7. Thus, the claim of the United States that all Thai-origin tuna products contain tuna caught by Thai-flagged vessels is self-evidently and blatantly incorrect. The United States lacks information on the sources of the tuna used in Thai tuna products, as well as in tuna products imported from other countries that are not members of the AIDCP, including Vietnam, the Philippines, and Indonesia. The lack of such information extends to tuna loins imported from Thailand for use in the U.S. canneries of Bumblebee and Chicken of the Sea, as the origin of the loins would be reported as Thai even though the tuna was caught, for example, by a Taiwanese- or Sri Lankan-flagged vessel. This blatant inaccuracy in the U.S. information calls into doubt much, if not all, of the U.S. data on the sources of tuna in non-ETP tuna products and the gear types used to capture that tuna.

8. Mexico has previously established that many dolphins have been killed in the WCPO by vessels fishing for tuna with purse seine nets. In addition, Mexico has established that other fishing methods that are used globally, especially longline fishing, gillnet fishing and trawl fishing, are highly destructive to dolphins, with both direct and indirect effects.

9. In particular, Mexico has established that U.S.-flag vessels set purse seine nets on dolphins in the WCPO without self-reporting such events, and that U.S. longline vessels kill and injure dolphins, both in the area of Hawaii and in the Atlantic.

10. According to a report on Vietnam presented to the WCPFC, Vietnam's fleet fishes for tuna using longlines, purse seine nets, gillnets and hand lines; Vietnam lacks a reliable count of its tuna fishing vessels; Vietnam lacks a reliable method to track the quantity of tuna landings; and Vietnam has not established an observer program. In addition, Mexico submitted evidence that Philippine tuna purse seine vessels have killed thousands of dolphins, that Philippine fishers use gillnets to catch dolphins, and that Philippine "group seine operations" are eligible for exemption from the WCPFC's general prohibition on transshipments at sea. Taiwan has by far the largest tuna fishing fleet in the WCPO, and is the largest supplier of tuna to Thailand and other countries. Mexico has established that Taiwanese vessels use gillnets to catch tuna, and that the Taiwanese longline fleet kills dolphins.

11. The evidence clearly demonstrates that there are significant risks to dolphins in tuna fisheries outside the ETP, resulting from the use of a number of different fishing methods. The United States has not explained why these other fishing methods – including the use of purse seine nets outside the ETP, longlines, gillnets, trawls and high seas driftnets – should be considered to be inherently dolphin-safe. As Mexico described in its first written submission, the association of tuna and dolphins has been observed and documented in ocean regions other than the ETP. The fact that thousands of dolphins are being killed in purse seine nets outside the ETP suggests that vessels are regularly intentionally setting on dolphins outside the ETP, even when claiming to be FAD fishing. On the other hand, if the thousands of dolphins are being killed because of "accidents", as the United States alleges, the association between dolphins and purse seine fishing outside the ETP must be especially strong.

12. Longline fishing attracts dolphins – which are drawn to the bait on the hooks – meaning that dolphins "associate" with longline fishing. Mexico also has shown that even when dolphins do not die immediately from an interaction with longlines, they are at risk of serious mutilation and other harm. Mexico also has established that gillnet fishing kills hundreds of thousands of dolphins annually, and that this fishing method is used by some of the nations that are the largest suppliers of the tuna used in the production of tuna products. Mexico also has shown that trawl fishing kills and injures dolphins.

13. The United States claims that a captain's self-certification is sufficient to verify compliance with the requirements for dolphin-safe tuna products. But the record-keeping and inspections at processing facilities – which is only required for processing facilities in the United States and in the ETP, but not elsewhere – cannot improve the accuracy of captains' certificates. Nor can certifications by importers and exporters, who of course are not present on the vessels when the tuna are caught. In fact, the U.S. assertion that captain statements are a "core implementation

tool" to verify compliance with all applicable fishing rules is contradicted by the widespread IUU fishing that certain nations, including the European Union as discussed above, are attempting to combat. Indeed, President Obama recently announced a new initiative to focus the resources of the U.S. government in discouraging IUU fishing.

14. With regard to record-keeping, the United States agrees that detailed record-keeping requirements exist only for the tuna caught by large purse seine vessels operating in the ETP pursuant to the AIDCP. The United States also agrees that those requirements apply to tuna products imported from an AIDCP country. The United States also expressly agrees that the Amended Tuna Measure does not impose any new record-keeping or verification requirements for non-U.S. processors. It is therefore undisputed that with regard to record-keeping, the Amended Tuna Measure imposes different requirements on tuna products from the ETP than it does on tuna products from other regions.

15. Also, importantly, the United States has confirmed that no U.S.-flagged large purse seine vessels currently operate in the ETP. Thus, no tuna products containing U.S.-caught tuna are subject to the extensive tracking and record-keeping requirements for ETP tuna contained in 50 CFR sections 216.92 and 216.93. When the U.S. authorities perform their "verification" of U.S. canneries, they can only check whether a cannery maintains records of the documentation that it receives; there is no way to check the validity of the documentation. The United States does not perform any verification of non-U.S. canneries, and acknowledged during the comment period for its new regulations that the U.S. government lacks the authority or legal capacity to do so outside of U.S. territory.

16. The evidence presented by Mexico of dolphin mortalities and injuries in tuna fisheries outside the ETP, and mortalities and injuries caused by other fishing methods, is both substantial and uncontested. Certainly Mexico's evidence also supports a presumption that there are genuine concerns about harm to dolphins occurring outside the ETP.

17. Currently the value of tuna caught by a purse seine vessel during a typical voyage would range from approximately US$1.4 million to US$2.2 million for skipjack tuna, and US$2.7 million to US$4 million for yellowfin tuna. Because under the U.S. measure the dolphin set method may not be used even one time during a voyage, there is an extremely strong disincentive for a captain to self-report a dolphin set. In the unlikely event that a U.S. vessel is caught in a misrepresentation – such as in the Freitas case – the penalty is only US$11,000 per violation, which is *de minimis* in relation to the value of the catch. Non-U.S. vessels, of course, are not subject to any penalty at all because they are not within U.S. jurisdiction. Accordingly, the U.S. fines for setting on dolphins do not create a deterrent. Yet, tuna products containing tuna caught in that manner, as a practical matter, can be labeled dolphin-safe if harvested outside the ETP, because there are no independent observers to monitor the fishing practices.

III. LEGAL ARGUMENT

A. The Panel has Jurisdiction under Article 21.5 of the DSU to Rule on Mexico's Claim under Article 2.1 of the TBT Agreement

18. The arguments raised by the United States that the Panel does not have jurisdiction to consider Mexico's claim that the Amended Tuna Measure is inconsistent with Article 2.1 of the TBT Agreement unnecessarily complicate a very simple situation. The Panel clearly has jurisdiction to rule on Mexico's Article 2.1 claim. In making its arguments, the United States conflates Mexico's Article 2.1 "claim" with Mexico's "arguments" in support of that claim.

19. Mexico disagrees that the labelling conditions and requirements are "unchanged" from the original Tuna Measure. In addition to the specific changes to the provisions of the measure, Mexico's claim relates to the Amended Tuna Measure in its totality, which, as the measure "taken to comply", is "in principle, a new and different measure". In the alternative, to the extent that the Panel finds that any labelling conditions or requirements are unchanged, the Appellate Body has held that a claim previously raised in the original proceedings may be re-asserted against an unchanged "aspect" of the measure "taken to comply" if the claim was not resolved on the merits in the original proceeding, such that the DSB made no findings in respect of the claim. Further, in *US – Zeroing (Article 21.5 – EC)*, the Appellate Body clarified that "new claims against inseparable aspects of a measure taken to comply, which are unchanged from the original measure" are within

a panel's terms of reference under Article 21.5, even if such claims could have been raised, but were not raised, in the original proceedings. Contrary to the allegations of the United States, Mexico's claim under Article 2.1 of the TBT Agreement in respect of the Amended Tuna Measure in no way "jeopardize[s] the principles of fundamental fairness and due process."

B. The Amended Tuna Measure is Inconsistent with Article 2.1 of the TBT Agreement

20. There is no merit to the United States' argument that the Amended Tuna Measure does not violate Article 2.1 because the detrimental impact on imported Mexican tuna products stems exclusively from a legitimate regulatory distinction. Given the Appellate Body's recent ruling in *EC – Seal Products*, Mexico limits its submission to the approach of the Appellate Body.

21. Contrary to the arguments of the United States, the relevant regulatory distinction encompasses the three labelling conditions and requirements identified by Mexico in the present proceeding. If a regulatory distinction constitutes a means of "arbitrary discrimination" it is not even-handed and therefore not a legitimate distinction. In such circumstances, the detrimental impact cannot be said to stem exclusively from a legitimate regulatory distinction. The meaning of "arbitrary discrimination" in the chapeau of Article XX provides context for the meaning of the term in Article 2.1. In *US – Shrimp*, the Appellate Body found that where the elements of a measure are "contrary to the spirit, if not the letter, of Article X:3", which establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations, the measure is applied in a manner that amounts to arbitrary discrimination within the meaning of the chapeau. The evaluation of impartial administration pursuant to Article X:3(a) of the GATT and the evaluation of even-handedness pursuant to Article 2.1 of the TBT Agreement both depend upon an examination of the manner in which the law or regulation in question is applied. Moreover, as the Appellate Body held in *EC – Seal Products*, one of the most important factors in the assessment of arbitrary or unjustifiable discrimination under the chapeau to Article XX is the question of "whether the discrimination can be reconciled with, or is rationally related to," the relevant policy objective. Accordingly, the analysis of impartial administration under Article X:3(a) and the analysis of a rational connection under the chapeau to Article XX can be used as tools to assess even-handedness within the meaning of Article 2.1.

22. ***Disqualification/Qualification of Fishing Methods***. The United States has not rebutted Mexico's *prima facie* case that the labelling conditions and requirements imposed by the Amended Tuna Measure differed depending on the fishing method used to catch tuna and that this regulatory difference – which effectively disqualifies the fishing method used by the majority of the Mexican tuna fishing fleet from catching tuna eligible for the U.S. dolphin-safe label, while effectively qualifying other fishing methods that are known to cause harm to dolphins – was not even-handed.

23. The United States argues that "Mexico is unable to prove that certain other fishing techniques have adverse effects on dolphins that are equal to or greater than what setting on dolphins has on dolphins," but this merely highlights that the benchmark used by the United States for qualifying or disqualifying a fishing method is entirely unclear. The changing and inconsistent justifications given by the United States provide strong evidence of arbitrariness. Although the United States also argues that there is "significant scientific evidence" underlying the distinction between fishing methods, the United States has not filed any scientific evidence to support the regulatory difference. Moreover, the Amended Tuna Measure does not allow for a further scientific assessment of the adverse impact on dolphin stocks in the ETP, and the National Marine Fisheries Service has never undertaken to evaluate the risks to dolphins in other ocean regions. Finally, the United States attempts to distinguish setting on dolphins from other fishing methods by arguing that "setting on dolphins is the only fishing technique that specifically targets dolphins", "is inherently harmful to dolphins" and "this harm is not replicated in other fishing methods," while the harm caused by gillnets is "merely by accident." This argument emphasizes the absence of a rational connection between the difference in labelling conditions and requirements under the Amended Tuna Measure and the objectives of that measure. Whether or not the operators of the vessel claim mortalities or serious injury were an "accident" is not relevant.

24. ***Record-keeping and Verification Requirements***. The United States has not rebutted Mexico's *prima facie* case that, under the Amended Tuna Measure, the dolphin-safe labelling

conditions and requirements related to record keeping, tracking and verification differ depending on the geographic area in which tuna are caught, and that this difference is not even-handed. While the Amended Tuna Measure requires a comprehensive and independently-verified record-keeping and tracking system for the dolphin-safe status of tuna caught within the ETP, it requires neither an independent verification of the dolphin-safe status of products containing tuna caught outside the ETP nor an effective means of tracking such status while it is stored onboard fishing vessels, consolidated with the tuna caught by other fishing vessels, unloaded at port, brokered through intermediaries, transshipped, partially processed into loins, processed into finished tuna products, and imported into the United States.

25. The accuracy of the dolphin-safe status of tuna products under the Amended Tuna Measure is central to the assessment of whether the measure is "even-handed". As Mexico explained in its first written submission, there are insufficient requirements and procedures under the Amended Tuna Measure to provide the necessary audit trail for tracking the tuna. As a consequence, accurate information is not being provided on the dolphin-safe status of tuna products that contain tuna caught outside the ETP. Considering that U.S. consumers are provided with accurate information regarding the dolphin-safe status of products containing tuna caught within the ETP, but with information that is inherently unverifiable, unreliable, and inaccurate regarding the dolphin-safe status of products containing tuna caught outside the ETP, the labelling conditions and requirements related to record-keeping and verification lack even-handedness and constitute a means of arbitrary or unjustified discrimination. Tuna products derived from tuna caught outside the ETP under non-dolphin-safe circumstances are highly likely if not certain to enter the U.S. market inaccurately labelled as dolphin-safe. Such tuna products are granted an illegitimate competitive advantage over otherwise equivalent products containing non-dolphin-safe tuna caught in the ETP. Consistent with the Appellate Body's analysis in *EC – Seal Products* in the context of the chapeau of Article XX, which found that a *prima facie* case was established on the basis that seal products derived from "commercial" hunts could potentially enter the European market inaccurately classified under the IC Exception, Mexico is only required to demonstrate that, under the circumstances related to the design and application of the Amended 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 Amended Tuna Measure's labelling conditions and requirements. While Mexico has exceeded the standard required to establish a *prima facie* case, the United States has entirely failed to provide any explanation, much less any evidence, and has therefore failed to meet its burden.

26. ***Mandatory Independent Observer Requirements***. The United States has not rebutted Mexico's *prima facie* case that the absence of a mandatory independent observer requirement for tuna fishing outside the ETP meant that the detrimental impact of the Amended Tuna Measure on imports of Mexican tuna products did not stem exclusively from a legitimate regulatory distinction and, instead, reflects discrimination against a group of imported products. If the initial dolphin-safe designation is inaccurate at the point when the tuna is harvested, the entire audit trail for the tuna products will be tainted.

27. The United States argues that it is permitted to make such an arbitrary distinction because it in fact reflects a "calibration" of the relative threats posed to dolphins by different tuna fishing methods. This "calibration" argument, which implies that it is acceptable to provide unreliable information to U.S. consumers in respect of tuna caught outside the ETP, is totally inconsistent with the primary objective of the measure, which is contingent on accurate information, and cannot be reconciled with the relevant policy objective. The United States cannot justify self-certification by reference to other regulatory contexts, because it is impossible to confirm or verify the accuracy of a dolphin-safe certification by way of a post-entry audit. It is a practical reality of tuna fishing activities that, by the time tuna arrives within U.S. territory, authorities have no means of verifying the accuracy of a captain's dolphin-safe certification. The tuna in question is caught and certified by the captain on the high seas, thousands of kilometers from shore, and far from the oversight of objective and independent authorities. As the Appellate Body held in *EC – Seal Products* and *US – Shrimp*, effective verification and auditing mechanisms are centrally important to whether a measure can be applied in a manner that constitutes a means of arbitrary discrimination. Further, the panels in *Argentina – Hides and Leather* and *Thailand – Cigarettes (Philippines)* held, in the context of Article X:3(a) of the GATT 1994, that where a legal instrument provides for a private industry party to participate in the administration of regulations which affect

the party's own commercial interests, this will give rise, in the absence of adequate safeguards, to an "inherent danger" that the party will administer the laws or regulations in a manner that is self-interested, i.e., aligned with its own commercial interests, and therefore lacking impartiality. This is exactly the situation with the Amended Tuna Measure's labelling conditions and requirements related to captains' self-certifications of the "dolphin-safe" status of the tuna caught by their own fishing vessels, and there are no safeguards to address it.

C. The Amended Tuna Measure is Inconsistent with Articles I:1 and III:4 of the GATT 1994

28. The United States has not rebutted Mexico's *prima facie* case that the Amended Tuna Measure is inconsistent with Articles I:1 and III:4. The United States' defence consists of relaying on certain findings of the original Panel under Article 2.1 of the TBT Agreement that were overturned by the Appellate Body and by relying on an interpretation of Articles I:1 and III:4 that was expressly rejected by the Appellate Body in *EC – Seal Products*.

29. In *EC – Seal Products*, the Appellate Body held that Article I:1 prohibits conditions to the granting of an advantage – including regulatory distinctions drawn between like imported products – that "have a detrimental impact on the competitive opportunities for like imported products from *any* Member". The Appellate Body affirmed that a finding of detrimental impact is sufficient on its own to demonstrate a violation of either or both Article I:1, or and Article III:4, and no further analysis of whether the detrimental impact stems exclusively from a legitimate regulatory distinction (i.e., a "discrimination analysis") is required under these provisions. Nothing in the Amended Tuna Measure has reduced or minimized the detrimental impact on imported Mexican tuna products caused by the regulatory distinction imposed in the original Tuna Measure. Rather, the regulatory distinction remains substantially the same, and tuna products of Mexican origin continue to be effectively excluded from the U.S. market.

D. The Inconsistencies with Articles I:1 and III:4 cannot be Saved by Article XX of the GATT 1994

30. The United States has invoked the general exceptions under Articles XX(b) and (g) of the GATT 1994. Neither applies to the measure at issue.

31. The Panel in the original proceedings identified two objectives of the Amended Tuna Measure – the "consumer information objective" (the primary objective) and the "dolphin protection objective" (the secondary objective) – and found a direct correlation between these two objectives. The primary "consumer information objective" bears no relationship with the exceptions set out under subparagraphs (b) and (g) considering that it is unsuccessful in providing accurate information to U.S. consumers about whether tuna products contain tuna that was caught in a manner that adversely affected dolphins. The secondary "dolphin protection objective" is dependent upon the achievement of the primary objective. Since the measure fails to fulfil its primary objective, it cannot fulfil its secondary objective.

32. Article XX(b) requires the measure at issue to be "necessary" to achieve the objective that it pursues. Due to the above-noted inaccuracies, the Amended Tuna Measure fails to address the harm caused to dolphins as a result of tuna fishing methods outside the ETP and, therefore, it does not contribute to the objectives that it pursues and it is not "necessary". Moreover, there are less trade-restrictive alternative measures that are reasonably available to the United States that can achieve the objectives that it pursues. First, establishing independent, qualified observer and tuna tracking systems outside the ETP that are equivalent to those maintained under the AIDCP would balance the Amended Tuna Measure's dolphin-safe conditions and requirements. This would reduce the *de facto* discrimination against Mexican tuna products and would therefore be less trade-restrictive. Second, the measure could be revised to permit the co-existence of labelling schemes that are each required under U.S. law to provide consumers with full and accurate information regarding: the fishing method used to catch the tuna contained in the product; the risks of bycatch related to that fishing method; the sustainability of the fishing method; and the measures taken to protect dolphins and the type of tracking and verification system that backs up the protection scheme. This alternative would provide more reasonable opportunities for Mexican tuna products to access the major commercial distribution channels of the U.S. market and, thus, it would be less trade restrictive. Both alternatives would provide more accurate information to U.S. consumers and would be reasonably available.

33. Article XX(g) does not apply because the Amended Tuna Measure does not relate to the "conservation" of dolphins. It is not intended, designed, or applied as a measure necessary to conserve dolphin stocks in the course of tuna fishing operations in the ETP or to promote recovery of dolphin stocks. The above-noted information inaccuracies further undermine any conservation effect that the measure might have. Thus, the measure does not bear a "substantial relationship" to the goal of conservation, such that it is not "merely incidentally or inadvertently aimed at" conservation, as contemplated by the Appellate Body in *US – Gasoline* and the panel in *China – Rare Earths*. Further, the measure is not "made effective in conjunction with restrictions on domestic production or consumption". The United States has failed to identify any such "restrictions on domestic production or consumption", as none can be said to exist.

34. If the Panel finds that subparagraphs (a) and/or (g) could apply, the Amended Tuna Measure does not meet the requirements of the chapeau to Article XX because the measure is designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Consistent with the analysis established by the Appellate Body in *EC – Seal Products*, the conditions prevailing in the different countries "that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue" are relevantly "the same" within the meaning of the chapeau of Article XX. The adverse effects on dolphins caused by commercial tuna fishing are the same for all countries that are engaged in commercial tuna fishing and, as a consequence, for all countries that use the tuna harvested by such commercial tuna fishing in the production of finished tuna products. Because of these widespread effects, every country producing tuna products produces at least some tuna products which contain tuna that was caught in a manner that caused adverse effects on dolphins.

35. The measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination because the differing labelling conditions and requirements for tuna caught in the ETP and tuna caught outside the ETP are designed and applied in a manner that lacks even-handedness and constitutes a means of arbitrary or unjustifiable discrimination, resulting in regulatory differences that modify the conditions of competition in the U.S. market to the detriment of tuna products from Mexico *vis-à-vis* like products of U.S. origin and like products originating in other countries. While all countries produce tuna products that contain tuna that was caught in a manner that adversely affects dolphins, the Amended Tuna Measure's differing labelling conditions and requirements are designed and applied in a manner that *de facto* precludes only Mexican tuna products from using the dolphin-safe label. This constitutes clearly differential treatment of like products from countries in which the same conditions prevail. This necessarily results in "arbitrary and unjustifiable discrimination" within the meaning of the chapeau to Article XX. Moreover, this discrimination cannot be reconciled with, or rationally related to, the Amended Tuna Measure's objectives. Finally, the unilateral action of the United States in designing and applying the Amended Tuna Measure's labelling conditions and requirements in a manner that contradicts and undermines the dolphin-safe labelling regime under the AIDCP – which was multilaterally negotiated and agreed between the United States, Mexico, and other IATTC member countries specifically for the purpose of establishing a dolphin-safe labeling regime to protect dolphins and other marine species in the ETP from harmful tuna fishing practices – results in arbitrary or unjustifiable discrimination. Had the United States first tried to address its remaining concerns within the AIDCP and been rebuffed, the legal issue in this dispute might be different. But the United States did not even try. It simply acted on its own in applying an extraterritorial measure.

IV. CONCLUSIONS

36. On the basis of the foregoing, Mexico respectfully requests that the Panel find that the U.S. measures are inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Mexico further requests that the Panel find that the general exceptions in Article XX of the GATT 1994 do not apply to the violations of Articles I:1 and III:4.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF MEXICO
AT THE MEETING OF THE PANEL

1. A quarter century ago, levels of dolphin mortalities occurring in the Eastern Tropical Pacific (ETP) tuna fishery were universally recognized by Mexico, the United States and other countries as being unacceptably and unsustainably high. Mexico, the United States, and the Parties to the IATTC embarked upon a cooperative multilateral effort that led to the creation of the International Dolphin Conservation Program (IDCP), in exchange for the United States changing its law and definition of dolphin safe from a method of capture standard to a standard based on whether dolphins were killed or injured. It is indisputable that no other tuna fishery in the world is as highly and successfully regulated for dolphin safety as the ETP. But Mexican tuna products are not allowed to be labelled dolphin-safe, while tuna products from all other fisheries are allowed use of the dolphin-safe label, despite the fact that thousands of dolphins are killed in those other tuna fisheries each year. This is a genuine tragedy for the world's environment and also undermines the consumer information objectives that the United States purports to achieve. Mexico believes that this WTO claim has helped to focus the spotlight on destructive fishing practices and lack of protection for dolphins in all the world's fisheries.

2. At issue before this Panel is whether the Amended Tuna Measure is consistent with the United States' non-discrimination obligations under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 and, in the case of the GATT 1994, whether the Amended Tuna Measure can be saved by Article XX. Mexico's written submissions present a *prima facie* case in respect of all of the elements of its claims.

I. MEXICO HAS PRESENTED *PRIMA FACIE* EVIDENCE THAT THE UNITED STATES HAS NOT REBUTTED

3. The United States has agreed that dolphins are susceptible to being killed in other ocean regions, including by methods other than dolphin sets, and that such harm includes unobserved effects. That is consistent with the Panel's findings in the original proceedings. Moreover, the Amended Tuna Measure purports to assure consumers with absolute certainty that no dolphin was killed or harmed in the harvesting of the tuna. However, the U.S. requirements for non-ETP tuna, and its mechanisms for implementing those requirements, cannot provide that assurance.

4. The United States seeks to make a virtue of the fact that, outside of the ETP, no one is carefully monitoring for harms caused to marine mammals. It argues that without detailed studies, it must be presumed that dolphins are not being harmed outside the ETP. To the contrary, Mexico has presented more than enough evidence to demonstrate that significant numbers of dolphins are regularly being killed in tuna fisheries outside the ETP.

5. The United States asserts that the evidence of unobserved harm to dolphins in the ETP is proven with certitude, when in the original proceedings, the Panel found that "there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality." Meanwhile, the United States complains that Mexico's evidence showing that thousands of dolphins have been killed or maimed outside the ETP, by fishing methods including dolphin sets, longline fishing and FAD fishing, are "ad hoc" or too "old". The key question raised is why the United States applies such widely different presumptions to the evidence, depending on whether the fishing is conducted inside or outside the ETP.

6. In its first written submission, the United States argued that "vessels flagged to Thailand, the Philippines, Vietnam, Ecuador, Indonesia, and the United States produce tuna products accounting for over 96 percent of the U.S. market for canned tuna". In response, Mexico demonstrated that the U.S. assertion was wrong, in particular because Thailand does not have a major tuna fishing fleet. In its second written submission, the United States now claims that its confidential database indicates that Taiwan is the largest supplier of tuna for tuna products exported to the United States, and the top suppliers also include China, Vanuatu, and South Korea, none of which it previously mentioned. For these reasons Mexico re-affirms its position that

the United States has no reliable method for tracking the source of tuna contained in tuna products made with tuna not caught in the ETP.

7. In this regard, Mexico notes that the United States defended its reliance on self-certification by stating that captain's statements, logbooks "and the like" have "always been a core implementation tool for Members to verify compliance with the applicable fishing rules." Mexico submitted evidence that major suppliers of tuna and tuna products to the United States lack logbook programs and cannot track the sources of tuna imported into their countries to be made into tuna products. In its second written submission, the United States now says that it does not care whether foreign governments monitor fishing practices or the sources of imported tuna, because the United States trusts that the fishing vessels and the tuna processors have the necessary information and are accurately reporting it. But the United States also admits that it lacks jurisdiction over foreign vessels and processors.

8. In its Second Written Submission, the United States claims that dolphin mortalities in the Western and Central Pacific are lower than in the ETP. But the report on which the United States relies presents data on only a fraction of the tuna fishing in that ocean region. Moreover, there is a long lag time in the reporting of accurate regional observer program data to the WCPFC. Mexico believes the evidence suggests the mortalities are much higher.

9. Just a few weeks ago, the Commerce Department announced that it would require observers, when they are already onboard U.S. tuna fishing vessels for other reasons, to support the dolphin-safe certification. This requirement only applies to certain tuna fisheries in U.S. domestic waters, and does not increase the level of observer coverage in any of those fisheries. Significantly, the Commerce Department agreed that no foreign observer programs, other than the ones operating under the auspices of the AIDCP, are qualified to make dolphin-safe certifications.

10. To justify not requiring 100 percent observer coverage for non-ETP tuna products, the United States grossly exaggerates the costs of observer programs, and there are several problems with its calculations. The observer costs of the AIDCP program are lower than the United States claims. Other comparative data is provided by the costs of Mexico's observer program for longline vessels operating in the Gulf of Mexico, which is provided in an exhibit. The fact that Mexico can manage to pay to have independent observers shows that an observer program is reasonably available. The U.S. argument that the U.S. government and U.S. industry cannot afford to do so is not credible.

II. THE UNITED STATES HAS NOT REBUTTED MEXICO'S CLAIM UNDER ARTICLE 2.1

11. The United States argues that Mexico's claim falls outside the Panel's terms of reference because it is premised entirely on aspects of the measure that the DSB did not find to be in breach of Article 2.1 in the original proceedings and that are unchanged from the original measure.

12. First, Mexico's Article 2.1 claim challenges the consistency of the Amended Tuna Measure "in its totality." Mexico agrees with the European Union that the various aspects of the Amended Tuna Measure are inseparable from one another, as they "can only meaningfully and reasonably be considered as a whole." Second, the Amended Tuna Measure is, "in principle, a new and different measure" that was not before the Panel and the Appellate Body in the original proceedings. Third, the Appellate Body has established that a Member is not "entitled to assume" in Article 21.5 proceedings that an aspect of the measure that was not decided on the merits in the original proceedings is consistent with the relevant covered agreements.

13. Mexico agrees with the United States that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a dolphin-safe label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a dolphin-safe label.

14. With respect to whether this detrimental impact stems exclusively from a legitimate regulatory distinction within the meaning of Article 2.1, it is necessary to examine the regulatory distinction that accounts for this detrimental impact. This "relevant" regulatory distinction includes

the differences in the three labelling conditions and requirements for tuna products identified by Mexico:

- Mexico's primary fishing method is permanently disqualified from being used to catch dolphin-safe tuna while the fishing methods used by the United States and other countries are qualified to be used to catch dolphin-safe tuna;

- Mexico's tuna and tuna products are subject to strict record-keeping and verification requirements, while tuna and tuna products from the United States and other countries are not subject to such requirements and, therefore, can be mislabeled as dolphin-safe when, in fact, they are not; and

- In the case of Mexican tuna, the initial designation of dolphin-safe status is subject to mandatory independent observer requirements, while, in the case of tuna from other countries, the initial designation of dolphin-safe status is not made by independent observers, thereby allowing the tuna to be mislabeled as dolphin-safe when, in fact, it is not.

15. Mexican tuna products are being detrimentally impacted because of the regulatory differences in the above-noted labelling conditions and requirements. The requirements and conditions that apply to tuna fishing outside of the ETP are deficient. Thus, contrary to the position advanced by the United States, the Amended Tuna Measure is not denying eligibility to tuna products that contain tuna caught outside the ETP in circumstances where a dolphin was killed or seriously injured.

16. The United States criticizes Mexico's interpretation of even-handedness because it draws on the meaning of "arbitrary discrimination" from the chapeau of Article XX. This criticism has no merit. In *EC – Seal Products*, the Appellate Body recognized that "there are important parallels between the analyses under Article 2.1 of the TBT Agreement and the chapeau" and that the concept of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" is found in both. Although the scope and application of the provisions differ, it is clearly appropriate to use the meaning of "arbitrary discrimination" developed under the chapeau of Article XX as context when interpreting the meaning of "even-handedness" in Article 2.1 of the TBT Agreement.

17. The United States argues that the tracking, verification and observer requirements are part of the AIDCP and not the Amended Tuna Measure. But the tracking and verification and observer requirements are included in the Amended Tuna Measure. They apply equally to the Amended Tuna Measure and the AICDP. Mexico is not challenging the application of the tracking, verification and observer requirements to the Mexican fleet. Mexico's position is that the absence of these essential requirements for tuna products from other countries is not even-handed. Major fishing methods other than pole and line fishing have significant adverse effects on dolphins. Given these adverse effects, Mexico has presented a *prima facie* case that there is no basis for the Amended Tuna Measure to qualify all other fishing methods to catch dolphin-safe tuna and, at the same time, disqualify the method of setting on dolphins in an AIDCP-compliant manner. This different treatment is not even-handed.

18. The United States has argued for different approaches to evaluating the even-handedness of the distinction it makes between dolphin sets and other fishing methods. One approach is a zero tolerance benchmark, under which a method should be disqualified if it is believed to cause unobservable effects. Because the United States agrees that other fishing methods cause "unobserved harm" to dolphins, if this benchmark is applied it is not even-handed for the United States not to disqualify those methods as well.

19. The United States has also suggested that rather than zero tolerance, an approach could be applied where the applicable criterion would be whether a fishing method is causing a certain level of observed mortalities comparable to the ETP. With regard to using the actual level of mortalities in the ETP as the benchmark, those mortalities have long been reduced to a statistically insignificant level in relation to the dolphin populations in the ETP. Moreover, it is fundamentally arbitrary to use the dolphin mortalities associated with Mexico's fishing method as the basis for justifying the total disqualification of Mexico's fishing method. Under that test, Mexico's fishing method can never qualify. Meanwhile, there is a reasonable basis to conclude that thousands of

dolphins are being killed in other fisheries, but the fishing methods used in those fisheries have not been disqualified.

20. The United States argues that "setting on dolphin is *inherently* dangerous to dolphins". But virtually all the major fishing methods are dangerous to dolphins. These adverse effects are a reflection of the characteristics of the fishing methods and, therefore, are equally *inherent* to those fishing methods.

21. Finally, the United States argues that "there is only one fishing method that targets dolphins" and that setting on dolphins involves the "intentional harassment of those dolphins". There is no rational connection between this statement and the objective of the Amended Tuna Measure. What matters is whether a fishing method is known to cause adverse effects on dolphins, even if such effects are "incidental". All major fishing methods other than pole-and-line fishing have adverse effects on dolphins. But only in the ETP have positive steps been taken to successfully minimize the risks of dolphins.

22. Under the Amended Tuna Measure, the terms "dolphins … killed or seriously injured" are clearly designed and applied in an absolute way in the context of observed adverse effects. Tuna caught in a fishing set or gear deployment cannot be labelled as dolphin-safe if only a single dolphin mortality or serious injury is observed during the set or deployment. This has important implications for the Panel's analysis of even-handedness in light of the labelling conditions and requirements related to tracking and verification and observers.

23. The guaranteed existence of dolphin-safe and non-dolphin-safe tuna, regardless of the fishery in which the tuna is caught or the fishing method that is used to catch it, makes tracking and verification requirements in all tuna fisheries a necessity; otherwise there is no way to ensure that tuna products are being accurately labelled. Under the Amended Tuna Measure, they are not so applied, and for that reason the relevant regulatory distinction is not even-handed.

24. The guarantee of the label that no dolphins were killed or seriously injured incorporates a "zero tolerance" standard. In order for the dolphin-safe certification to be anything more than an arbitrary designation, the information upon which it is based must be accurate and verifiable. The captain self-certification system provided under the Amended Tuna Measure is inherently flawed, in that it creates a very real risk, if not a certainty, that inaccurate dolphin-safe certifications will be made outside the ETP. To remedy this deficiency in the Amended Tuna Measure, the observer conditions and requirements must be modified so that the accuracy of the dolphin-safe status of the tuna can been guaranteed from the point of initial capture to the retail shelf.

III. THE UNITED STATES HAS NOT REBUTTED MEXICO'S CLAIM UNDER ARTICLES I:1 AND III:4 OF THE GATT 1994

25. Mexico has demonstrated that, for its claims under Articles I:1 and III:4 of the GATT 1994, the conditions and requirements set forth in the Amended Tuna Measure result in a *de facto* detrimental impact on the competitive opportunities for Mexican tuna products in the U.S. market vis-à-vis like tuna products originating in the United States and other countries by effectively denying the advantage of access to the dolphin-safe label to tuna products of Mexican origin. The Amended Tuna Measure, as a whole, is inconsistent with these provisions.

26. The United States argues that "Mexico's approach would doom many legitimate and genuinely non-discriminatory measures." This argument deliberately ignores the context, design and structure of the GATT 1994 by conflating Article III:4 with Article XX. A Member's right to draw legitimate regulatory distinctions is protected by Article XX. There is no justification for imposing a "legitimate regulatory distinction" analysis into the assessment of discrimination under either Article I:1 or III:4.

IV. THE AMENDED TUNA MEASURE'S VIOLATIONS OF ARTICLES I:1 AND III:4 OF THE GATT ARE NOT PROVISIONALLY JUSTIFIED UNDER ARTICLE XX

27. The United States has the burden of proof to demonstrate that the labelling conditions and requirements provided under the Amended Tuna Measure fulfil the requirements of sub-paragraphs b) and g) of Article XX of the GATT 1994. The United States has not done so.

28. If the Panel finds that the measure is provisionally justified under one of these subparagraphs, the chapeau to Article XX prohibits measures that are "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." The Amended Tuna Measure fails to comply with this requirement.

29. The U.S. claims that the relevant "condition" for the purposes of the chapeau to Article XX is the "different harms to dolphins caused by setting on dolphins, on the one hand, and by purse seine (other than setting on dolphins), longline, and pole-and-line fishing, on the other." This argument ignores the fact that the Amended Tuna Measure is concerned with adverse effects on dolphins; it is not concerned with the "relative" or "comparative" adverse effects of different fishing methods. Taking the "pertinent context" of subparagraphs (b) and (g) to Article XX into account, there are in fact two relevant prevailing conditions that the Amended Tuna Measure seeks to address. Mexico has demonstrated that all tuna fishing methods result in harm to dolphins, with the exception of pole-and-line fishing. As such, the first relevant prevailing condition of adverse effects on dolphins caused by commercial tuna fishing is "the same" for all countries that engage in commercial tuna fishing, and by extension, for all countries that use tuna harvested by such commercial tuna fishing in the production of tuna products. Second, and as a corollary, every country producing tuna products produces at least some tuna products that contain tuna that was caught in a manner that caused adverse effects on dolphins.

30. Mexico has demonstrated that it is the three labelling conditions and requirements that apply to Mexico's fishing method, and that differ from the labelling conditions and requirements that apply to other fishing methods, that give rise to the detrimental impact that contravenes Articles I:1 and III:4 of the GATT 1994. Consequently, each of the three labeling conditions and requirements is directly relevant to the analysis under Article XX as a whole, including the chapeau.

31. While Mexico recognizes that a violation of a substantive provision of the GATT may not be relied upon as sufficient to prove a violation of the chapeau to Article XX, the fact remains that the same circumstances giving rise to a violation of a substantive provision of the GATT can also result in arbitrary or unjustifiable discrimination within the meaning of the chapeau.

32. Mexico has also established that the Amended Tuna Measure results in arbitrary and unjustifiable discrimination pursuant to Article 2.1 of the TBT Agreement. In the circumstances of this dispute, "arbitrary and unjustifiable discrimination" within the meaning of Article 2.1 amounts to "arbitrary and unjustifiable discrimination" under the chapeau to Article XX of the GATT 1994.

33. Finally, the United States maintains that "Mexico's position simply ignores the realities of the past and present of the ETP tuna fishery." Ironically, it is the United States that has chosen to ignore the reality that, in all tuna fisheries, commercial tuna fishing activities have adverse effects on dolphins, and that every country producing tuna products produces at least some tuna products that contain tuna that was caught in a manner that caused adverse effects on dolphins. By applying differing labelling conditions and requirements to tuna products from countries in which these same conditions prevail, the Amended Tuna Measure discriminates against Mexican tuna products in an arbitrary and unjustifiable manner. Accordingly, the general exceptions in Article XX do not apply.

V. CONCLUSION

34. It is clear from the facts of this dispute and the evidence provided by Mexico that the United States has not brought itself into compliance with its obligations under the relevant covered agreements through the adoption of the Amended Tuna Measure.

ANNEX B-4

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. ARTICLE 2.1 OF THE TBT AGREEMENT

A. What Article 2.1 Requires

1. The question before the Panel is whether the amended measure accords less favorable treatment to imported products "than that accorded to like domestic products and like products from other countries." To establish this, Mexico must prove that the amended measure: 1) "modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other country"; and 2) that "the detrimental impact on imports [does not] stem[] exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."

2. As to the second element, it is well established that the complainant must prove that the relevant regulatory distinctions are not "even-handed." In this dispute, the Appellate Body determined that the regulatory distinctions of the original measure were not exclusively "even-handed" because tuna products could be labeled dolphin safe where the product contained tuna caught outside the ETP and a dolphin was killed or seriously injured but that same allowance was not provided to tuna products containing tuna caught inside the ETP. This analysis is consistent with the analysis done by the Appellate Body in *US – Clove Cigarettes*, *US – COOL*, as well as in *US – Upland Cotton*. Mexico errs when it urges this Panel to substitute the analysis used by the Appellate Body in this very dispute for the one used by the panel in *EC – Seal Products*.

B. The 2013 Final Rule Directly Addresses the Concerns Identified by the Appellate Body

3. The Appellate Body considered that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the original measure prohibited tuna product from being labeled "dolphin safe" if it contained tuna caught inside the ETP where a dolphin was killed or seriously injured, but allowed tuna product to be so labeled if it contained tuna caught outside the ETP where a dolphin was killed or seriously injured. In this context, the Appellate Body explicitly acknowledged that the United States did not have to require observers for all vessels operating outside the ETP for that tuna to be eligible for the label.

4. The 2013 Final Rule *directly addresses* the Appellate Body's concern. The original rule already required a captain's statement for purse seine vessels operating outside the ETP "to certify that no purse seine was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested." The 2013 Final Rule amends the original regulation to now require "a captain's statement certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught using any fishing gear type in all fishing locations." As to the conditions of eligibility for the dolphin safe label, the relevant substantive requirements of the challenged measure (as amended) currently provide that: *all* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*; and *all* tuna product containing tuna caught where a dolphin was killed or seriously injured is ineligible for the label, *regardless of the fishery, gear type, nationality of the vessel, and nationality of the processor*. The amended measure's substantive requirements are even-handed.

5. Mexico does *not even appear to contest* that the amended measure fully addresses the Appellate Body's analysis with regard to the one regulatory distinction that the Appellate Body considered relevant to its inquiry. Indeed, Mexico does not even appear to consider that whether a dolphin is killed or injured inside or outside the ETP is, in fact, *a regulatory distinction relevant* to this analysis.

6. Article 17.14 of the DSU provides that adopted Appellate Reports are to be "unconditionally accepted by the parties to the dispute, and, therefore, must be treated by the parties to a particular dispute *as a final resolution to that dispute*." And it cannot be questioned that the Appellate Body in this case considered that its own analysis of Article 2.1 *resolved* the dispute as it relates the Article 2.1 claim. The United States accepted the Appellate Body analysis in this dispute, studied it carefully, and designed its measure taken to comply to directly respond to that analysis. Mexico takes a different tack, however. Not only does it not "unconditionally accept[]" the Appellate Body's analysis, it completely *ignores* the analysis. Mexico does not prove its Article 2.1 claim without putting forth a *prima facie* case that the United States has failed to make "even-handed" *the one regulatory distinction* that the Appellate Body considered was not even-handed in the original proceeding. Mexico has not done so – indeed, it *avoids* the issue entirely.

C. Mexico's Attempt to "Appeal" the Appellate Body's Report Must Fail

7. Mexico rejects the relevance of the single regulatory distinction considered by the Appellate Body to be *the* relevant distinction, and argues, in effect, that the Appellate Body erred by not considering three entirely different regulatory distinctions of the original measure, all of which are *unchanged* in the amended measure. Mexico thus seeks to improperly use this compliance proceeding as a vehicle by which to "appeal" the Appellate Body's report. Mexico's misguided attempt to claw back what Mexico failed to achieve in its appeal of the original panel's Article 2.1 analysis should be rejected.

1. Mexico's Claim Falls Outside the Panel's Terms of Reference

8. Mexico's *entire* Article 2.1 claim is premised on the theory that at least one of the following elements is not even-handed: 1) the distinction between the eligibility for the dolphin safe label for tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner and tuna caught by other fishing methods; 2) the distinction between the differing record-keeping and verification requirements required for tuna caught inside and outside the ETP; and 3) the distinction between the differing observer requirements for tuna vessels operating inside and outside the ETP. According to Mexico, if any one of these three elements is not even-handed, the detrimental impact already found to exist in the original proceeding would reflect discrimination, and Mexico's Article 2.1 claim would succeed.

9. Yet these three elements are *unchanged* from the original measure and the Appellate Body *did not consider* that any of them proved the original measure discriminatory. The *only* regulatory distinction the Appellate Body found not to be even-handed was the requirement that tuna product containing tuna caught in the ETP is ineligible for the label where a dolphin had been killed or seriously injured but tuna product containing tuna caught outside the ETP could be so labeled where a dolphin had been killed or seriously injured. And it is *this* distinction that the 2013 Final Rule addresses.

10. By urging the Panel to find the United States in breach of Article 2.1 on entirely different grounds from the Appellate Body, Mexico seeks an unprecedented expansion of the terms of reference of an Article 21.5 panel. The Appellate Body's Article 2.1 analysis surveyed the original panel's findings and uncontested facts on the record and determined that one particular regulatory distinction was not even-handed. The Appellate Body's analysis and findings have resolved this dispute as it pertains to the Article 2.1 claim. By urging the Panel to find the amended measure inconsistent with Article 2.1 on entirely different grounds from the Appellate Body, Mexico "jeopardize[s] the principles of fundamental fairness and due process" given that the United States was "entitled to assume" that these *unchanged* elements are consistent with the covered agreements.

11. Under Mexico's approach, the Appellate Body reports *need not* be "unconditionally accepted" by the parties pursuant to DSU Article 17.14, and the Appellate Body report *cannot* be considered a "final resolution" to the dispute. Rather, a complainant is allowed to raise, and re-raise claims and arguments time and time again – without limit. Such an approach is incompatible with the "prompt settlement of disputes," which is "essential to the effective functioning of the WTO."

2. The Appellate Body Has Already Rejected the Entirety of Mexico's Article 2.1 Claim

12. Even aside from the fact that Mexico's Article 2.1 claim falls outside the Panel's terms of reference, Mexico's claim should be rejected on the basis that the Appellate Body has already considered – and rejected – the entirety of the claim. In this dispute, the Appellate Body found *only one* regulatory distinction to be relevant to the analysis, and has, thus, *rejected* all other alternative legal theories relating to this claim. If this were not true, the Appellate Body's report could not be considered a "final resolution" of Mexico's Article 2.1 claim, which it clearly is.

13. Nowhere is it clearer that the Appellate Body has already rejected Mexico's claim than it is with regard to the first element Mexico raises – the distinction between the eligibility for the dolphin safe label for tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner and by other fishing methods. While the Appellate Body agreed with Mexico that Mexico's theory proved a detrimental impact on Mexican tuna products, it *rejected* Mexico's contention that a detrimental impact alone proves a breach of Article 2.1.

14. It is also clear that the Appellate Body rejected Mexico's claim as it relates to the two other elements: the differing record-keeping and verification requirements required for tuna caught inside and outside the ETP, and the differing observer requirements for tuna vessels operating inside and outside the ETP. The facts that Mexico complains of here were *uncontested* in the original proceeding, and clearly fell within the Appellate Body's review of the record. The Appellate Body did not consider either element as proving the original measure discriminatory. This result is unsurprising, of course, as these two elements are not relevant to the Article 2.1 analysis, and, in any event, are completely even-handed.

3. Mexico Fails To Prove that any of These Three Elements Is Relevant to the Article 2.1 Analysis

15. The Appellate Body has instructed that not every distinction is relevant to an Article 2.1 analysis – "we *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries." Yet *none* of the three elements Mexico raises "accounts" for the detrimental impact. Indeed, Mexico's first element *is* the detrimental impact. Further, the detrimental impact does not stem from either of the other two elements that Mexico raises. That is to say, if the AIDCP parties agreed to eliminate the record-keeping and observer requirements, the detrimental impact would not be affected in the least bit.

4. Mexico Fails To Prove that the Detrimental Impact Does Not Stem Exclusively from Legitimate Regulatory Distinctions

a. Mexico Fails To Prove that the Eligibility Conditions Are Not Even-Handed

16. Mexico's first reason that the amended measure's detrimental impact reflects discrimination is that the eligibility conditions are not even-handed. Mexico fails to prove what it asserts. On the contrary, the relevant eligibility conditions are completely even-handed. The amended measure contains no exceptions or carve outs, as was the case in *EC – Seal Products* and *US – Clove Cigarettes*. The requirements are <u>*equal*</u> for all products and nothing in the design or structure of the amended measure indicates that Mexican producers are disadvantaged in any way vis-à-vis their competitors in the United States, Thailand, the Philippines, or elsewhere.

17. Mexico's argument – that the measure disadvantages Mexican tuna product (and is thus not "even-handed") because tuna product containing tuna caught by setting on dolphins is ineligible for the label while tuna product containing tuna caught by other methods is potentially eligible for the label – is identical in substance to what it argued before the original panel. Yet Mexico ignores that the original panel has already fully addressed Mexico's argument and found it lacking.

18. Those findings are undoubtedly correct. As such, it is difficult to conceive how the amended measure's distinction between setting on dolphins and other fishing methods is anything but "even-handed." Indeed, the Appellate Body appears to analyze whether a regulatory distinction is even-handed in much the same way that the original panel analyzed Mexico's discrimination

argument in the original proceeding. It is thus not surprising that the Appellate Body rejected Mexico's argument that the denial of eligibility of setting on dolphins for the label disadvantages Mexican tuna product producers, as discussed above. In contrast, Mexico constructs its entire argument as if neither the original panel nor the Appellate Body has ever examined these issues. It is simply improper for Mexico to set out its Article 2.1 claim in a vacuum, and urge the Panel to ignore all of the findings and analysis of the original panel and the Appellate Body.

19. Rather than addressing the original panel's analysis, Mexico relies on the assertion that eligible fishing methods "have adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing method of setting on dolphins in an AIDCP-compliant manner." Mexico utterly fails to prove its assertion. Indeed, the science *supports* the distinctions of the amended measure, and *directly contradicts* Mexico's approach. And, of course, it is this science that underlies the Appellate Body's conclusion that "setting on dolphins is *particularly* harmful to dolphins"; a finding, like so many others, that Mexico is forced to ignore. In fact, Mexico ignores the amended measure itself – tuna products containing tuna caught by any method are *ineligible* for the label where a dolphin was killed or seriously injured.

b. Mexico Fails To Prove that the Record-Keeping and Verification Requirements Are Not Even-Handed

20. Mexico's second reason that the amended measure's detrimental impact reflects discrimination is that the AIDCP mandates certain record-keeping and verification requirements for tuna caught by large purse seine vessels inside the ETP and the U.S. measure does not require those same AIDCP-mandated requirements for all other vessels catching tuna contained in tuna products sold labeled as "dolphin safe."

21. The relevant facts indicate that the record-keeping and verification requirements imposed by the challenged measure are entirely even-handed as to Mexican producers vis-à-vis tuna producers from the United States and other Members. These requirements are, in fact, entirely neutral as to the nationality of vessel and origin of the tuna product. Indeed, where the regulations draw distinctions based on nationality, it is the U.S. canneries and other processors that suffer the greater regulatory burden, not their foreign competitors. To the extent that the regulations draw other distinctions, they do so not between Members, or even the fishing methods of Members, but rather between tuna caught by AIDCP-covered large purse seine vessels and tuna caught by all other vessels.

22. And this is where Mexico makes its argument – the AIDCP imposes requirements that are not required of producers operating in (or sourcing) from other fisheries. The problem with this argument is obvious – Mexico complains of a "distinction" created by the AIDCP, not the U.S. measure. Indeed, if the United States eliminated all references to the AIDCP (and its requirements) from the amended measure, the regulatory distinction that Mexico criticizes *would still exist*.

23. But such is the impossibility of Mexico's argument. The mere fact that the U.S. measure acknowledges the AIDCP requirements cannot be considered to be legally problematic. Indeed, it would seem difficult to conceive of Mexico successfully arguing that the binding international legal commitments that *Mexico* has made put its own tuna producers at such a disadvantage vis-à-vis their competitors that *the United States* should be considered to have acted inconsistently with its WTO obligations.

24. Moreover, Mexico puts forward *no* evidence to support the assertion that the U.S. Government and its citizens have been defrauded on an industry-wide scale for over the past two decades. And Mexico's argument fails right here. It simply cannot be the case that a complainant establishes a *prima facie* case on the basis of a bare allegation – without *any* evidence – a point that the Appellate Body has repeatedly found. Of course, the United States is not aware of fraud on the industry-wide scale that Mexico suggests is occurring.

25. The fact that Mexico may consider that the U.S. law imposes "insufficient requirements and procedures" on non-AIDCP-covered large purse seine vessels is entirely beside the point. The Appellate Body's legitimate regulatory distinction analysis is not meant to be a vehicle for any and all criticisms of the challenged measure that the complainant sees fit to make. Indeed, the sixth preambular recital of the TBT Agreement "recognizes that a Member shall not be prevented from

taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*,'" a point that the Appellate Body has repeatedly affirmed.

26. Appearing to acknowledge that the United States cannot relieve Mexico of its own international legal commitments, Mexico argues that the United States can only make this element "even-handed" by increasing the regulatory burden outside the ETP to the level that already exists inside the ETP. Mexico thus appears to argue that the record-keeping and verification requirements that Mexico has agreed to form the "floor" for the requirements that the United States *must* impose on itself and all other trading partners. Mexico cites no legal support for such a proposition, and it is surely incorrect. As noted above, a Member may take measures "at the levels that it considers appropriate," a point that Article 2.4 of the TBT Agreement confirms. However, a Member does not act inconsistently with its WTO obligations by applying domestic measures that reflect the international agreements (or lack thereof) of different Members. *Under no circumstances*, does Mexico set the appropriate level for the United States. The United States sets its own "floor."

c. Mexico Fails To Prove that the Requirement for an Observer Certification Is Not Even-Handed

27. The U.S. measure's treatment of observers is entirely even-handed. The requirement for large purse seine vessels operating in the ETP to carry observers (while other vessels are not similarly required) *stems from the AIDCP*, not U.S. law. Indeed, if the United States eliminated all references to the AIDCP-mandated observer requirement from the amended measure, the "distinction" that Mexico criticizes *would still exist*. Mexico claims that requiring observers for some vessels and not requiring it for others is "arbitrary," but, in fact, it is anything but. The amended measure requires an observer certification where one particular international agreement requires observers, and does not require an observer certification where the relevant authority for the fishery does not require observers to certify as to the tuna's eligibility for a "dolphin safe" label.

28. The Appellate Body was well aware of the uncontested fact that large purse seine vessels operating in the ETP are required to carry observers while other vessels are not, and did not find that difference proved the challenged measure discriminatory. Mexico now wrongly urges the Panel *to ignore* the Appellate Body's conclusion because "neither the Panel nor the Appellate Body had before it the facts regarding adverse effects on dolphins set out in section III of this submission or the facts regarding the unreliability of captain certifications …" But Mexico is not free in an Article 21.5 proceeding to "appeal" the findings of the DSB. Mexico understood the facts on the record, and also understood that any eventual adopted Appellate Body report would constitute a "final resolution" in this dispute. It was Mexico's *own decision* to limit its discrimination claim (and the evidence submitted in support of that claim), and Mexico cannot now complain that it is unsatisfied with the consequences of its own decision. Mexico should not get an unfair "second chance" to re-argue its claim as to *unchanged* elements of the challenged measure.

29. Mexico appears to ground its argument on two assertions: 1) the tuna product containing tuna caught by vessels other than AIDCP-covered large purse seine ones is inaccurately or fraudulently labeled; and 2) the captain statement is "inherently unreliable" and "meaningless." Mexico fails to prove either assertion.

30. First, Mexico puts forward *not a single piece of evidence* that any tuna product has been marketed in the United States as "dolphin safe," when, in fact, it did not meet the conditions of U.S. law. NOAA conducts extensive verification of U.S. canneries, which process both U.S. and foreign tuna, through inspections, audits, and spot checks.

31. Second, Mexico is wrong to argue that a captain's statement is "inherently unreliable" and otherwise "meaningless." As a general matter, the United States relies on "self-certification," as Mexico puts it, in numerous different contexts. Mexico's suggestions – that such an approach is inherently unreliable – would be, if true, *hugely trade disruptive*. Members simply do not have the resources to require the independent verification of all the activities of domestic and foreign producers. This is certainly the case with trade in fish where the vessels operate on the high seas or in the territorial waters of other Members and an importing Member cannot independently verify every action taking place (or not taking place) on every vessel that may produce fish for the domestic market. As such, captain statements, logbooks, and the like have always been a core implementation tool for Members to verify compliance with the applicable fishing rules. The fact is

that a captain's statement is an effective vehicle to determine the eligibility of tuna for the label. The U.S. measure has long relied on a captain statement to certify that the vessel did not set on dolphins, and the original panel found that this certification does, in fact, address the observed and unobserved mortality arising from setting on dolphins. This finding was not only affirmed by the Appellate Body, *it constituted the basis* of the Appellate Body's finding on the Article 2.1 claim.

32. Yet, Mexico disagrees, arguing, in essence, that the original panel and Appellate Body were incorrect, and appealing to the Panel to correct this (alleged) error. But *none* of Mexico's exhibits concludes what Mexico asserts – that the captain's statement is "meaningless" – and much of what is contained in these documents directly contradicts Mexico's own argument.

33. Mexico contends that the *only* way the United States can make this alleged regulatory distinction even-handed is to unilaterally require 100 percent observer coverage throughout the world. Again, Mexico considers that whatever commitment it has made to other AIDCP parties must be the "floor" that all other Members must comply with for continued access to the dolphin safe label. The tuna or tuna product produced by a Member whose producers are not in a position to meet such an expensive requirement (because, for example, there is no international organization that administers an observer program as is the case in the ETP) must be denied access to the label, *even though* the tuna caught by that Member's vessels did not harm dolphins.

34. An importing Member found to have discriminated against an exporting Member's products always has the choice as to how to come into compliance. But here Mexico claims that the United States has no choice – the United States can *only* raise the requirements applied to the like product of the other relevant Members. And the reason that Mexico takes this position is that the difference in requirements *does not flow from the U.S. measure*, but from the differing commitments that Members have taken in different RFMOs for fishing on the high seas and in their own municipal laws for fishing in territorial waters. Mexico's grievance is not with the challenged law, but with the diversity of rules for fishing that exist throughout the world.

II. ARTICLE I:1 OF THE GATT 1994

35. Mexico fails to establish that the U.S. dolphin safe labeling measure is inconsistent with Article I:1 of the GATT 1994. The United States does not contest that the first three elements of Article I:1 are satisfied here. We do, however, disagree with Mexico that the "advantage" has not been "immediately" and "unconditionally" accorded to like products originating in Mexico.

36. The United States considers that the "advantage" for purposes of Article I:1 is the access to the dolphins safe label. No tuna product of a Member has *a right* to the label. Rather, the advantage is subject to eligibility requirements that all tuna products must meet in order to be labeled consistent with U.S. law. Those conditions are: 1) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip; and 2) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.

37. According to the Appellate Body, the "fundamental purpose" of Article I:1 is "to preserve the equality of competitive opportunities for like imported products from all Members." However, the Appellate Body also noted that Article I:1 does not prohibit a Member from attaching any conditions to the granting of an advantage, and "permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member."

38. Mexico must, therefore, prove that the opportunity under U.S. law to label tuna product as "dolphin safe" if certain conditions are met is not immediately and unconditionally accorded to Mexican products. This, Mexico fails to do. In fact, the amended measure provides the *same* opportunity for all tuna products to be labeled "dolphin safe." The fact that some Members elect to take advantage of that opportunity, while others do not, does not amount to discrimination, as the original panel correctly found. Nothing prevents Mexican vessels from fishing in a manner that would yield tuna products eligible for the dolphin safe label, and nothing prevents vessels of other countries from fishing in a manner that would preclude access to the label.

39. Mexico has not provided any reason that the findings of either of the original panel or the GATT 1947 panel do not control the result here. And indeed, Mexico could not do so. The fact is that the original panel was entirely correct when it determined that any discrepancy in access to

the label between Members is due to the different choices Members have made, rather than the requirements of the challenged measure. The eligibility condition regarding setting on dolphins does not "discriminate[] with respect to the origin of the products."

40. The facts here are in contrast to the ones in *EC – Seal Products* where the Appellate Body recently found a breach of Article I:1. There, the market access advantage was subject to eligibility conditions related to immutable characteristics (such as the racial/cultural identity of the seal hunters) such that while virtually all of the products of Greenland were likely to qualify for access under the measure at issue, the vast majority of the products of Canada and Norway were not. But here, fishermen have a choice about how they fish. By no means is setting on dolphins *required* inside (or outside) the ETP to catch tuna. The eligibility conditions – and therefore *the opportunity* for the label – *are the same for everyone*.

III. ARTICLE III:4 OF THE GATT 1994

41. The United States does not contest that the first two elements of Article III:4 are satisfied here. The *only* question for the Panel to determine is whether the eligibility conditions of the amended measure provides less favorable treatment to Mexican tuna products than to like U.S. tuna products.

42. Mexico must prove that the U.S. measure has a "detrimental impact on the conditions of competition" for its products, which requires a "genuine relationship between the measure at issue and the adverse impact on competitive opportunities for imported products." Mexico fails to meet this standard.

43. First, Mexico fails to establish the threshold element that the challenged measure accords different treatment to U.S. and Mexican tuna products. As discussed above, the measure sets the *same* eligibility requirements for all tuna products sold in the United States – no tuna may be caught by setting on dolphins and no tuna may be caught where a dolphin was killed or seriously injured. Second, Mexico completely ignores the original panel's well-reasoned discrimination analysis, which Mexico apparently considers to be entirely irrelevant to the analysis of its Article III:4 claim. Even if Mexico did attempt to prove that the distinction that the U.S. measure draws between setting on dolphins and other fishing methods is unfounded, such an attempt would surely fail. As discussed above, Mexico puts forward no evidence that setting on dolphins could ever be considered "dolphin-safe."

44. Mexico's approach may serve Mexico's offensive interests in this dispute, but, if accepted, would greatly undermine a Member's ability to regulate in the public interest. Under Mexico's approach, the *sole* relevant consideration is the effect of the measure. A responding Member is simply not afforded the opportunity to explain, nor would a panel have the ability to examine, the underlying rationale and operation of the standard in the discrimination analysis. The basis of the requirements – indeed, *the accuracy of the label* – are wholly immaterial to the national treatment analysis. The consequences of such an approach cannot be overstated. Many legitimate measures would be vulnerable to attack where they had not been before.

45. What Mexico's approach suggests, therefore, is that a Member must, prior to applying a measure that sets legitimate standards, survey all current and potential trading partners of products affected by the measure to determine whether the affected products of those countries either meet that standard (or whether its producers are willing to adapt to the new standard). Where a particular country's products do not meet that standard (and that country's producers are not willing to adapt), the Member must *lower* its standards to avoid breaching Article III:4. Such a "least common denominator" approach greatly undermines a Member's ability to regulate in the public interest generally.

46. The Appellate Body's analysis in *EC – Seal Products* does not suggest a different conclusion where there were sufficient facts on the record for the panel and Appellate Body to determine that the challenged measure was *de facto* inconsistent with Article III:4.

IV. ARTICLE XX OF THE GATT 1994

47. Even if the amended dolphin safe labeling measure were found to be inconsistent with Article I:1 or III:4 of the GATT 1994, the amended measure is justified under Article XX(b) and (g).

48. As to the first element of Article XX(b), it has already been determined that one of the two objectives of the original measure was to "contribut[e] 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," and that the original measure "relate[d] to genuine concerns in relation to the protection of the life or health of dolphins," and was "intended to protect animal life or health or the environment."

49. As to the second element of Article XX(b), the amended measure easily satisfies the "necessary" analysis. First, it is hardly debatable that the protection of dolphins is an important objective to the United States. In any event, "the preservation of animal and plant life and health, which constitutes an essential part of the protection of the environment, is an important value, recognized in the WTO Agreement." Second, as both the original panel and Appellate Body have confirmed, the original measure contributed to its objective. Third, the Appellate Body has already found that the alternative measure Mexico identified for purposes of TBT Article 2.2 did not prove the original measure "more trade restrictive than necessary" This is powerful evidence that Mexico will be unable identify a suitable WTO-consistent alternative for purposes of Article XX(b).

50. The amended measure also satisfies the standard of Article XX(g). First, dolphins are a living natural resource and, as such, are finite and exhaustible. Second, the amended measure is clearly "relating to" the conservation of dolphins. The original panel found, and the Appellate Body affirmed, that one of the original measure's objectives is the "protection" of dolphins. Third, the amended measure imposes comparable restrictions on domestic and imported products. In fact, the relevant requirements *are the same*.

51. The amended measure also satisfies the Article XX chapeau. Only where the panel finds such "different regulatory treatment" exists, should the panel analyze "whether the resulting discrimination is 'arbitrary or unjustifiable.'" But here the eligibility conditions are the same for everyone – the amended measure *is neutral* as to nationality. Any tuna product containing tuna caught by setting on dolphins is ineligible for the label – the nationality of the vessel (or processor) *is irrelevant*. Rather, whether tuna product is eligible for the dolphin safe label depends on the choices made by vessel owners, operators, and captains. Moreover, there is no evidence to suggest that this particular eligibility requirement singles out Mexico.

52. In any event, the eligibility conditions regarding setting on dolphins are neither arbitrary nor unjustified. As the Appellate Body has recently emphasized, "[o]ne of the most important factors" in making this assessment is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX." The relevant objective for both subparagraphs (b) and (g) is to "contribut[e] 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."

53. It is without question that the two relevant eligibility conditions are rationally related to this policy objective. First, it could hardly be questioned whether the first eligibility condition is rationally related to the objective, and we do not read Mexico's First Written Submission to the contrary. Second, the United States has already detailed the substantial harms that setting on dolphins causes dolphins with regard to the second eligibility condition. By making tuna product containing tuna caught by setting on dolphins ineligible for the dolphin safe label, the amended measure seeks to "minimize observed and unobserved mortality and injury to dolphins." The other fishing methods that produce tuna for the U.S. tuna product market do not cause the same level of harm to dolphins that setting on dolphins does. Indeed, *all* of the potentially eligible fishing methods capture dolphins only by accident, while *the whole point* of setting on dolphins is to capture them in a purse seine net. Setting on dolphins is the *only* fishing method that *targets* dolphins.

ANNEX B-5

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. MEXICO FAILS TO ESTABLISH THAT THE AMENDED DOLPHIN SAFE LABELING MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

A. Mexico's Claim Falls Outside the Panel's Terms of Reference

1. Mexico's Article 2.1 claim falls outside the Panel's terms of reference.

2. First, Mexico argues that the Panel should focus on the amended measure "as a whole, and not elements comprising that measure." But in determining its own terms of reference, the Panel clearly can look at the specific aspects of the measure. To say that the Panel is prevented from doing so ignores past Appellate Body and panel reports that have consistently found that claims against *unchanged* elements of the original measure fall outside the compliance panel's limited terms of reference.

3. Second, Mexico argues that these three aspects of the measure have changed from the original measure, implying that the line of reports cited by the United States is inapplicable to this dispute. Mexico is mistaken. The 2013 Final Rule does not change any of the requirements *in ways that Mexico alleges prove the amended measure discriminatory*.

4. Third, Mexico argues that, even if the aspects of the amended measure that it now complains of are unchanged from the original measure, the Panel still has jurisdiction to address Mexico's claim because it has not been resolved on the merits. But that is clearly wrong. The original panel and Appellate Body did reach the merits of Mexico's Article 2.1 claim. And, in doing so, the Appellate Body rejected all three elements of Mexico's Article 2.1 claim.

5. Fourth, Mexico states that "'new claims against inseparable aspects of a measure taken to comply, which are unchanged from the original measure' are within a panel's terms of reference under Article 21.5." Mexico makes no actual argument that these aspects are "inseparable" from the measure taken to comply, and all three aspects of the measure clearly fall outside the Panel's terms of reference.

6. Finally, Mexico does not "unconditionally accept" the Appellate Body report. Such an approach deprives the United States of the opportunity to come into compliance with its obligations in accordance with the DSU.

B. The Appellate Body Has Already Rejected the Entirety of Mexico's Article 2.1 Claim

7. Mexico's Article 2.1 claim should be rejected on the basis that the Appellate Body has already considered – and rejected – the entirety of the claim.

8. First, Mexico argues that the "labelling conditions and requirements that relate to the qualification and disqualification of the fishing methods" are "different" in this proceeding than they were in the original proceeding. But of course that is wrong. The eligibility condition Mexico complains about here is the same one it complained of previously.

9. The same point holds true for the other two aspects (record-keeping/verification and observer requirements) that Mexico raises as part of its Article 2.1 claim. The AIDCP mandates certain record-keeping/verification and observer requirements for large purse seine vessels operating inside the ETP that other vessels are not subject to. This "difference" was *uncontested* in the original proceeding and clearly fell within the Appellate Body's review of the record. What Mexico urges the Panel to do is accept its arguments without any regard to the DSB recommendations and rulings in the original proceeding. That is wrong. The Panel's analysis must be "done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the original panel and subsequently by the Appellate Body."

C. Mexico Fails To Prove that Any of the Three Elements Is Relevant to the Article 2.1 Analysis

10. Not every regulatory distinction is relevant to the question of whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction." According to the Appellate Body: "[W]e *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries. While Mexico appears to agree with this principle, it wrongly insists that the requirements regarding record-keeping/verification and observers are relevant to the Article 2.1 analysis. The source of the parties' differing views on this issue is a disagreement over what the detrimental impact is in this dispute.

11. For the first step of its Article 2.1 analysis, Mexico relies on the Appellate Body's Article 2.1 analysis and contends that the detrimental impact is caused by the denial of "access to this label for most Mexican tuna products." However, for the second step of its Article 2.1 analysis, Mexico changes course and, relying heavily on the original panel's Article 2.2 analysis, argues that the "accuracy" of the information is the touchstone of the detrimental impact finding. The United States disagrees that the detrimental impact on the competitive opportunities can ever be different for the two steps of the Article 2.1 analysis. Such an interpretation renders the analysis meaningless. The entire point of the second step of the analysis is to determine whether the detrimental impact *determined to exist in the first step* "reflects discrimination."

12. The Appellate Body's conclusions in paragraphs 233-235 of the report show that *access* not accuracy was the touchstone of its detrimental impact analysis. Thus the record-keeping/verification and observer requirements are not relevant to this analysis, in that neither aspect accounts for the detrimental impact. Not only does Mexico's argument contradict the DSB recommendations and rulings, but Mexico puts forward *zero* evidence to prove such an assertion. Mexico's attempt to "re-imagine" the Appellate Body's detrimental impact analysis is another example of Mexico's attempted "appeal" of the DSB recommendations and rulings.

13. Mexico also errs in arguing that "further support" for the proposition that the detrimental impact exists can be found in the "unilateral application" of the amended measure. First, the DSB recommendations and rulings did not find that the detrimental impact is a factor of so-called "unilateral" application. As such, it is unclear why Mexico considers its argument relevant to the dispute. Second, the Appellate Body has already found that the objective of the original measure is *not* to "coerce" Mexico. Third, Mexico claims that the amended measure "undermines the AIDCP regime" but puts forward no evidence that the functioning of the AIDCP has been harmed. In any event, it simply cannot be the case that the United States has acted contrary to the WTO Agreement by determining for itself what level of protection is appropriate for the United States.

D. Mexico Fails To Prove that the Detrimental Impact Does Not Stem Exclusively from Legitimate Regulatory Distinctions

1. Mexico Fails To Prove that the Eligibility Conditions Are Not Even-Handed

14. In its second submission, Mexico again fails to establish that the eligibility requirements prove the amended measure inconsistent with Article 2.1. As the United States has explained, the eligibility conditions are, in fact, entirely neutral, and thus even-handed. Mexico counters that the Appellate Body determined that the eligibility conditions result in a detrimental impact on Mexican tuna products. That is true, but it does not prove that such eligibility conditions are not even-handed. Further, it is clear from the DSB recommendations and rulings that the Appellate Body did not agree that the eligibility condition regarding setting on dolphins was not even-handed, and the fact that the requirement was neutral across fisheries was key to its finding.

15. Mexico also reasserts its argument that "fishing methods used outside the ETP have adverse effects on dolphins equal to or greater than setting on dolphins in the ETP in an AIDCP-consistent manner." Mexico puts forward no new evidence to support this assertion nor does it respond to the extensive evidence that the United States put forward that proves this assertion to be unfounded.

16. More fundamentally, Mexico is wrong to argue that the United States may not draw distinctions between different fishing methods. Setting on dolphins is the only fishing method that targets dolphins. There is nothing about it that is safe for dolphins, and the measure rightly denies access to the label to tuna products containing tuna caught by this method.

2. Mexico Fails To Prove that the Record-Keeping and Verification Requirements Are Not Even-Handed

17. Mexico argues that, because the AIDCP mandates certain record-keeping and verification requirements for tuna caught by large purse seine vessels operating inside the ETP and the amended measure does not impose those same requirements on other tuna sold in the U.S. tuna product market, the amended measure is not even-handed. However, the "difference" that Mexico complained of does not stem from U.S. law at all, but from the AIDCP. Mexico argues that its "claim is made in respect of the relevant regulatory distinction in the labelling conditions and requirements of the Amended Tuna Measure, and not the AIDCP." But Mexico provides no reason as to why this is so. The actual record-keeping and verification requirements Mexico complains of are contained in the AIDCP. Thus it cannot be the case that *the amended measure* disadvantages Mexican producers in a manner that could be considered not to be even-handed.

18. Mexico has failed to submit any evidence to support its assertion that the U.S. Government and its citizens have been defrauded on an industry-wide scale by inaccurate labeling over the past two decades. Mexico denies that this aspect of its claim fails for lack of evidence based on its theory of its burden of proof. In Mexico's view, a complainant is not required to prove that this element is not even-handed. Rather, all that is required is for Mexico to assert that: "tuna products containing non-dolphin-safe tuna caught outside the ETP *could potentially* enter the U.S. market inaccurately labeled as dolphin-safe." But the Appellate Body made clear that nothing in its Article 2.1 analysis alters the traditional notions of burden of proof.

19. Next, Mexico fails to explain how its approach is not inconsistent with the fundamental principle that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'" By contending that the United States must impose AIDCP-equivalent requirements on all its trading partners, Mexico urges this Panel to adopt an approach whereby whatever Mexico commits to in an international agreement, the United States must require of itself and all its other trading partners, irrespective of the science or any other consideration. Mexico's approach is incompatible with the sixth preambular recital and, as such, cannot establish that the amended measure is inconsistent with Article 2.1.

20. Finally, Mexico ignores the history of the AIDCP. The IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage than other Members have agreed to in other fisheries because the ETP *is different*. Nowhere else has a tuna fishery caused the harm to dolphins that large purse seine vessels have caused in the ETP. Accordingly, it is no surprise that tuna caught by large purse seine vessels in the ETP is now subject to different rules than tuna caught elsewhere. The fact that the amended measure requires the AIDCP reference number to be included on the Form 370 is not illegitimate.

3. Mexico Fails To Prove that the Requirement for an Observer Certification Is Not Even-Handed

21. Mexico again fails to establish a *prima facie* case that not imposing AIDCP-equivalent observer coverage on the rest of the world renders the amended measure discriminatory.

22. First, the specific requirements regarding the AIDCP observer program are contained in the AIDCP and related documents. Such requirements are not repeated in U.S. law.

23. Second, Mexico's approach directly contradicts the Appellate Body's findings. The Appellate Body was aware that large purse seine vessels operating in the ETP carry observers while other vessels do not. Indeed, the Appellate Body noted that the Panel did not state that imposing a general observer certification requirement "would be the *only* way for the United States to calibrate its 'dolphin safe' labeling provisions" and noted "that the measure at issue itself contemplates the possibility" of a captain's certification. Consistently, the Appellate Body did not find the aspect regarding observers and captain statements to be not even-handed. Rather, the Appellate Body recognized that the original measure "*fully* addresses the adverse effects on

dolphins resulting from setting on dolphins" – both inside and *outside the ETP* – even though a captain statement was the certification required for tuna caught outside the ETP. Mexico now seeks to "appeal" this finding.

24. Third, Mexico contends that captain statements are "inherently unreliable" and that the amended measure is "designed and applied in a manner that creates the likelihood, if not the certainty, that non-conforming tuna will be improperly certified as dolphin safe." But Mexico does not establish a *prima facie* case that the amended measure is inconsistent with Article 2.1 based on mere assertions. Mexico puts forward no evidence that any tuna that is ineligible for the label is being illegally labeled as "dolphin safe."

25. Fourth, Mexico argues that this aspect of the measure is not even-handed because it is "entirely inconsistent with the objective" of the measure. The Appellate Body has never mentioned this inquiry as an element of the analysis in either this dispute or the other two TBT disputes. And the Appellate Body has made clear that analyses are different under TBT Article 2.1 and the chapeau of GATT Article XX. Therefore, this issue is not relevant to the analysis.

26. Fifth, Mexico's argument fails because it: 1) ignores why the AIDCP was agreed to in the first place; 2) ignores the level of current harms occurring due to setting on dolphins; 3) ignores the trade consequences of requiring 100 percent observer coverage; 4) ignores the fundamental principle underlying the TBT Agreement that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*'"; and 5) and requires the United States to impose "a rigid and unbending" observer requirement on all of its trading partners, regardless of whether it is needed in light of harm to dolphins in that particular fishery or feasible given the expense of the program.

II. MEXICO FAILS TO ESTABLISH THAT THE AMENDED MEASURE IS INCONSISTENT WITH ARTICLE I:1 OF THE GATT 1994

27. Mexico relies entirely on the Appellate Body's conclusion in paragraphs 233-235 of its report that the amended measure causes a detrimental impact on Mexican tuna product containing tuna caught by setting on dolphins to prove its Article I:1 claim. The Appellate Body's finding of detrimental impact, as well as the original panel's factual findings that underlie the Appellate Body's conclusion, is limited to the ineligibility for the label of tuna product containing tuna caught by setting on dolphins and the potential eligibility of tuna product containing tuna caught by other methods. Mexico *neither claims nor proves* that any other aspect of the amended measure, including the requirements related to record-keeping/verification and observer coverage, are inconsistent with Article I:1.

28. Mexico has failed to meet its burden of demonstrating that the amended measure is inconsistent with Article I:1. The "advantage" accorded by the U.S. measure is access to the dolphin safe label. Nothing prevents Mexican canneries or Mexican vessels from producing tuna product that would be eligible for the dolphin safe label. Mexico asserts that the Appellate Body has "effectively rejected the line of reasoning" on which the U.S. argument relies. We disagree. The Appellate Body did not reject the original panel's characterization of the U.S. measure but, rather, what it perceived as the original panel's assumption that regulatory distinctions not based on "national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the TBT Agreement." The original panel made no findings under Article I:1, and, therefore, the Panel should now undertake an "objective assessment of the matter."

29. Mexico asserts that "the consequences of the United States' unilateral action" in applying the amended measure "provide further support" for the detrimental impact. This argument fails. First, the DSB recommendations and rulings did not find that the "detrimental impact" is a factor of so-called "unilateral" application. Second, Mexico's characterization of the measure as "intentional[ly] exerting pressure on Mexico to change its tuna fishing practices" is incorrect. The original panel concluded that "nothing prevents Members from using the incentives created by consumer preferences to encourage or discourage particular behaviours that may have an impact on the protection of animal life or health." Third, Mexico's reliance on *US – Shrimp* is misplaced. Fourth, the DSB recommendations and rulings state that the AIDCP label does not fulfill the objectives of the U.S. measure at the level the United States considers appropriate.

III. MEXICO FAILS TO ESTABLISH THAT THE AMENDED MEASURE IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

30. Similar to its Article I:1 claim, Mexico relies entirely on paragraphs 233-235 of the Appellate Body report to argue that the amended measure provides less favorable treatment to Mexican tuna product, inconsistently with Article III:4. The Appellate Body's findings concerning detrimental impact are limited to the ineligibility for the label of tuna caught by setting on dolphins and the eligibility of tuna caught by other methods. Mexico *neither claims nor proves* that any other aspect of the amended measure are inconsistent with Article III:4.

31. Further, for the reasons discussed above, Mexico fails to prove that the amended measure accords less favorable treatment to Mexican tuna products. Mexico relies heavily on the Appellate Body's statement in *EC – Seal Products* that, under Article III:4, a panel is not "required to examine whether the detrimental impact of a measure ... stems exclusively from a legitimate regulatory distinction," yet the analogy to this dispute is flawed. Mexico's argument concerning the "unilateral[] design[] and appli[cation]" of the measure is not relevant and fails for reasons discussed above.

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

A. The Scope of the Analysis

32. Mexico urges the Panel to engage in an inquiry that goes well beyond the scope of the subparagraphs (b) and (g) analyses, as set out by the Appellate Body. Mexico relies exclusively on paragraphs 233-235 of the Appellate Body report when it alleges that the amended measure is inconsistent with Article I:1 and Article III:4, under the theory that the amended measure denies "access" to the label to Mexican tuna caught by setting on dolphins while tuna caught by other means continues to have "access" to the label. It *neither claims nor proves* that any other aspect of the amended measure is GATT-inconsistent. However, in its consideration of subparagraphs (b) and (g), Mexico argues that, because "there are no effective record-keeping, tracking and verification requirements or procedures in relation to tuna caught by fishing vessels outside the ETP," the amended measure does not protect animal health and life for purposes of subparagraph (b), nor "relate to" the conservation of dolphins for purposes of subparagraph (g).

33. This is improper. The Appellate Body has made clear that "the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994." The United States need only justify the regulatory distinctions between tuna product containing tuna caught by setting on dolphins and tuna product containing tuna caught by other fishing methods, in light of how Mexico has framed (and attempted to prove) its GATT claims. The portions of Mexico's Article XX response that address the record-keeping/verification and observer requirements are irrelevant to this analysis.

B. The Amended Measure Satisfies the Conditions of Article XX(b)

1. The Amended Dolphin Safe Labelling Measure Has a Sufficient Nexus with an Interest Covered by Article XX(b)

34. The Appellate Body determined that the original measure had two objectives: the "consumer information objective" and the "dolphin protection objective." The amended measure has the same two objectives. The DSB recommendations and rulings demonstrate that there is "a sufficient nexus" between the amended measure's dolphin protection objective and the protection of animal life or health. The original panel found, and the Appellate Body affirmed, that the original measure "relate[d] to genuine concerns in relation to the protection of the life or health of dolphins," and was "intended to protect animal life or health or the environment."

35. Mexico ignores the DSB recommendations and rulings and pursues an unprecedented alternative legal theory, arguing that the amended measure does not pursue an objective that falls within the scope of subparagraph (b) because it *does not contribute* to that objective enough. This theory fails. Mexico's focus on the contribution of the measure improperly collapses the questions of whether the relevant objective falls within the scope of subparagraph (b), and whether the challenged measure is "necessary" to protect animal life and health. The level at which the measure contributes to its objective is not relevant to the former question. Further, Mexico's

argument falls outside the scope of this analysis in that the entire argument is grounded in the aspects of the measure that Mexico neither alleges nor proves are GATT-inconsistent.

2. The Amended Dolphin Safe Labelling Measure Is "Necessary" for the Protection of Dolphin Life or Health

36. A necessity analysis involves "a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure." As to the first element, the United States explained that the protection of dolphins is an important objective. Mexico concedes this point.

37. As to the second element, the DSB recommendations and rulings established that the original measure contributed to the dolphin protection objective to a certain extent. The amended measure contributes to this same objective at an even higher level. Mexico disagrees with the findings of the original panel and Appellate Body. Indeed, Mexico appears to go as far as to contend that neither measure – the original one or the amended one – makes *any* contribution to the dolphin protection objective. In the context of an Article 21.5 proceeding, the underlying DSB recommendations and rulings are taken as a given. The Panel should reject Mexico's unfounded "appeal" of the Appellate Body report.

38. As to the trade restrictiveness of the measure, the Appellate Body in this very dispute stated that "trade-restrictiveness" "means something having a limiting effect on trade." Mexico presents three arguments as to why the U.S. measure is "trade-restrictive." None of these relate to the amended measure's trade-restrictiveness: the amended measure does not bar Mexico from selling tuna product in the United States, and, indeed, Mexican non-dolphin safe tuna product continues to be sold in the United States. The arguments regarding the other two aspects of the measure, record-keeping/verification and observers, fall outside the scope of the inquiry as to whether the amended measure qualifies under subparagraph (b), and it is difficult to understand how either aspect has any impact on exports of Mexican tuna product to the United States.

39. Mexico's first alternative measure is not a "genuine alternative." First, Mexico's description of it is so brief and vague that it deprives the United States of the opportunity to evaluate it. Second, the only difference between the amended measure and Mexico's first alternative is that tuna caught by all vessels other than large purse seine vessels operating in the ETP would be subject to AIDCP-equivalent record-keeping/verification and observer requirements. But only those aspects of the challenged measure "that give rise to the finding of inconsistency under the GATT 1994" need be justified under the subparagraphs of Article XX. Third, Mexico has not shown that its alternative is "less WTO-inconsistent" than the amended measure allegedly is. Fourth, Mexico's alternative is not less trade restrictive than the amended measure. Finally, the proposed alternative is not reasonably available. Leaving aside the start-up costs needed to establish such programs, operating the observer coverage piece of Mexico's alternative on an *annual basis* would cost *at the very least hundreds of millions of U.S. dollars, if not in excess of one billion U.S. dollars*. We would further note that given the size of these costs, it would seem likewise impossible for industry to entirely fund the costs of such programs.

40. Mexico's second proposal is for the United States to "allow alternative labeling schemes," including the AIDCP label, "coupled with a requirement to provide consumers detailed information on what the labels mean." This appears to be the same alternative Mexico put forward in the original proceeding for purposes of TBT Article 2.2. The Appellate Body noted that, under Mexico's alternative, tuna caught by setting on dolphins could be eligible for a dolphin safe label, whereas, under the U.S. measure, such tuna was ineligible. Consequently, Mexico's proposal would contribute to dolphin protection "*to a lesser degree*" than the U.S. measure. The Appellate Body's finding on Mexico's Article 2.2 claim is clearly applicable to this alternative. Mexico provides no explanation of how its second proposed alternative measure is consistent with the Appellate Body report and, in fact, it is not.

C. The Amended Measure Satisfies the Standard of Article XX(g)

41. The amended measure satisfies Article XX(g). First, in its first written submission, the United States explained that dolphins are an exhaustible natural resource. Mexico concedes that this is the case.

42. Second, as discussed above, the original panel found, and the Appellate Body affirmed, that the U.S. measure pursues the above-quoted dolphin protection objective, and, in fact, does contribute to that objective. The original panel found, and the Appellate Body affirmed, that the original measure was capable of achieving its dolphin protection objective completely within the ETP and partially outside the ETP. The amended measure goes farther in protecting dolphins by applying a certification mechanism (captain's statement) that was found "capable of achieving" the U.S. objective in the context of setting on dolphins outside the ETP to the certification that no dolphin was killed or seriously injured in catching the tuna.

43. The amended measure also imposes comparable restrictions on domestic and imported products. The amended measure imposes the *same* eligibility conditions and requirements on U.S. vessels and on foreign vessels. Mexico claims that these requirements fall outside the scope of subparagraph (g) because they do not "distribute the burden of conservation between foreign and domestic consumers in an 'even-handed' or balanced manner." But such an approach is incorrect. Under Mexico's approach and in light of its GATT 1994 Articles I:1 and III:4 claims, subparagraph (g) would be rendered inutile. Mexico also claims that the amended measure "does not impose any real restrictions on the tuna that is harvested by the U.S. fleet outside the ETP." But the Appellate Body has already found that the original measure "fully addresses" the risks caused by the "particularly harmful" practice of setting on dolphins both inside and outside the ETP. The 2013 Final Rule expands the certification system that supported this finding to the risk of death and serious injury outside the ETP.

D. The Amended Measure Is Applied Consistently with the Article XX Chapeau

44. The amended measure is also not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. Under the chapeau, discrimination exists only where "countries in which the same conditions prevail are treated differently." Thus, there are two questions to answer: 1) whether the amended measure provides different regulatory treatment to the products originating from different countries; and 2) whether the "conditions" prevailing in those countries are "the same." Neither is the case here.

45. As the United States has explained, the eligibility condition regarding setting on dolphins is *neutral* as to nationality. This provision has no carve-out whereby the products of certain Members automatically qualify for different regulatory treatment, as was the case in the measures challenged in *Brazil – Retreaded Tyres* and *EC – Seal Products*. Whether tuna product is eligible for the dolphin safe label depends on the choices made by vessel owners, operators, and captains. As the United States noted previously, at the time the DPCIA was originally enacted, U.S.-flagged vessels (as well as many other vessels) operated in the ETP and set on dolphins. The mere fact that, over the past 20 years, vessels flagged to some Members have adopted methods of fishing that are less harmful to dolphins (while others have not) does not mean the U.S. measure provides different regulatory treatment to different countries.

46. Also, the conditions prevailing in the relevant countries are not the same. Because this eligibility condition does not distinguish between Members, or even between fisheries, but between fishing methods, it would appear that the most appropriate "condition" to examine in this analysis is the different harms to dolphins caused by setting on dolphins, on the one hand, and by purse seine (other than setting on dolphins), longline, and pole-and-line fishing, on the other. That comparison is not even close. The science regarding harms to dolphins fully supports the distinction the measure draws between setting on dolphins and other fishing methods. As such, with regard to the protection and conservation of dolphins, the "conditions" prevailing in a Member whose fleet routinely sets on dolphins are *not the same* as those in a Member whose fleet employs the other methods used to produce tuna for the U.S. tuna product market.

47. Mexico also appears to make a separate argument that the alleged difference in the record-keeping/verification and observer requirements also proves that the amended measure discriminates where the conditions are the same. This argument fails. First, Mexico cannot explain why such an argument is relevant to this analysis. Mexico it does not even allege, much less prove, that the record-keeping/verification and observer coverage requirements result in a detrimental impact on Mexican tuna product, which Mexico claims is sufficient to prove the U.S. measure inconsistent with Articles I:1 and III:4. Second, these requirements *stem from the AIDCP*, not U.S. law, and as such, no *genuine relationship* exists between the amended measure and any disadvantage that Mexico perceives its tuna product industry is operating under. Third,

Mexico is wrong that the "conditions," as they relate to these requirements, are the "same." The IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage because the ETP *is different* – nowhere else in the world has tuna fishing caused the harm to dolphins that large purse seine vessels have caused in the ETP.

48. If discrimination is found, one of the "most important factors" in determining whether that discrimination is "arbitrary or unjustifiable" is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX." The denial of eligibility for the label to tuna product containing tuna caught by setting on dolphins is directly related to the dolphin protection objective. As the United States has demonstrated, setting on dolphins is a "particularly harmful" fishing method, and other fishing methods do not cause the same level of harm to dolphins that setting on dolphins does.

49. Indeed, Mexico appears not to focus at all on whether these eligibility conditions are rationally related to the dolphin protection objective. Rather, Mexico's focus appears to be more on the fact that most Mexican-caught tuna, because it is harvested by a large purse seine vessel in the ETP, is subject to AIDCP-mandated record-keeping/verification observer requirements that tuna caught outside the ETP is not subject to. In Mexico's view, this "difference" does not contribute to dolphin protection outside the ETP. First, and as discussed above, Mexico's assertion is contrary to the findings of the DSB that the original measure *did* contribute to dolphin protection outside the ETP, with respect to driftnet fishing and setting on dolphins, and to the Appellate Body's suggestion that captain's statements would provide a suitable certification. Second, to the extent that the record-keeping/verification and observer requirements are relevant to this analysis, which we dispute, we note that the fact that the AIDCP imposes unique requirements that legal regimes covering other fisheries do not replicate is indeed related to the protection and conservation of dolphins.

50. Finally, Mexico asserts that the United States has discriminated arbitrarily and unjustifiably by not working through the AIDCP to "address[] its remaining concerns about dolphins and tuna fishing." Again, Mexico is wrong on the law. As noted previously, a Member may take measures "at the levels that it considers appropriate," and nothing in covered agreements requires a Member to adhere to an international agreement, a point that Article 2.4 of the TBT Agreement confirms.

51. Mexico is also wrong on the facts. The United States *has engaged* in multilateral negotiations with Mexico through the AIDCP process. Further, the United States continued to discuss this issue with Mexico in multiple different fora, including two meetings held in Mexico City in the latter half of 2009. The United States would also note, as mentioned above, that Mexico's reliance on *US – Shrimp* is particularly misplaced. In that dispute, the U.S. measure was initially found not to be justified under Article XX in part because of the "rigid and unbending" nature of the measure. Yet Mexico now claims that the United States must impose "rigid and unbending" record-keeping/verification and observer requirements on all tuna sold as dolphin safe in the U.S. tuna product market, regardless of where or how it was caught, *in order to be justified under Article XX*. Mexico's approach turns *US – Shrimp* upside down.

ANNEX B-6

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE MEETING OF THE PANEL

I. MEXICO'S CLAIM UNDER ARTICLE 2.1 OF THE TBT AGREEMENT FAILS

A. Mexico's Article 2.1 Claim Fails as It Falls Outside the Panel's Terms of Reference

1. Mexico's Article 2.1 claim falls outside the Panel's terms of reference. Relying on *US – Zeroing (Article 21.5 – EC)*, Mexico now argues that its Article 2.1 claim falls within the Panel's terms of reference because the unchanged aspects of the amended measure at issue are "inseparable" from something that clearly falls within the Panel's terms of reference – the U.S. measure taken to comply. Indeed, the 2013 Final Rule amends U.S. law with regard to tuna caught by all vessels *other* than those ETP vessels operating pursuant to the requirements of the AIDCP.

2. It is certainly unfair for a complainant to intentionally stagger its argument in a particular claim over the two proceedings, as Mexico has done here. In short, Mexico urges the Panel to fault the United States for failing to come into compliance with an entirely different set of recommendations and rulings from the one the DSB actually adopted – a proposition that is blatantly unfair, and unnecessarily extends this dispute. Indeed, Mexico's approach presents precisely the unfair "second chance" that the Appellate Body has cautioned against.

B. Mexico's Article 2.1 Claim Fails on the Merits

3. In any event, Mexico's Article 2.1 claim fails on the merits. Mexico has failed to prove that the regulatory distinctions that account for any detrimental impact are not "even-handed." Mexico has thus failed to prove the detrimental impact "reflects discrimination."

4. As to those relevant regulatory distinctions, it is *uncontested* by the parties that the eligibility condition regarding whether a dolphin was killed or seriously injured in the harvesting of the tuna is even-handed. And while Mexico disputes that the eligibility condition regarding setting on dolphins is even-handed, Mexico fails to prove its assertions in this regard.

5. As should be clear, that prohibition applies to all fisheries as well. And the fact that Mexican vessels continue to set on dolphins – and thus produce tuna product ineligible for the label – does not mean that the regulatory distinction is not even-handed. If that was the case, all Mexico would need to prove is that a detrimental impact exists, rendering the second step of the analysis meaningless.

6. The fact is that it is entirely appropriate for the United States to draw a distinction between setting on dolphins, which is *inherently* dangerous to dolphins, and other fishing methods. The science supports the U.S. approach in this regard, and directly contradicts Mexico's approach. Mexico has simply failed to prove what it asserts – that *all* other fishing techniques "have adverse effects on dolphins that are equal to or greater" than setting on dolphins.

7. As such, Mexico is forced to rely heavily on its fall back argument that because the AIDCP requires different requirements for record-keeping, verification, and observer coverage of large purse seine vessels operating in the ETP than the amended measure requires of other vessels, the amended measure is not even-handed. But these "differences" do not cause the detrimental impact the Appellate Body found to exist, and, as such, no analysis of either aspect sheds light on whether *that* detrimental impact "reflects discrimination." Moreover, Mexico fails to allege, much less prove, that these aspects, standing alone, cause a detrimental impact on Mexican tuna product exports to the United States.

8. Mexico argues something different, however. Mexico alleges that the fact that its competitors operating outside the ETP do not have to comply with AIDCP-equivalent requirements

means that these competitors have more opportunity than Mexican producers to illegally market non-dolphin safe tuna product as dolphin safe. In Mexico's view, this greater opportunity to defraud U.S. consumers means that "Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labeled as dolphin-safe." But Mexico puts forth *zero* evidence to support its claim. In particular, there is no evidence that non-dolphin safe tuna product produced outside the ETP is being illegally marketed in the United States as dolphin safe. Nor has Mexico put forward any evidence that even if one could find any illegal marketing, this unfortunate occurrence would be happening at a higher rate than for tuna product containing ETP tuna.

II. MEXICO'S CLAIMS UNDER ARTICLES I:1 AND III:4 OF THE GATT 1994 FAIL

9. Mexico also fails to establish that the amended dolphin safe labeling measure is inconsistent with Article I:1 or Article III:4 of the GATT 1994. Under Mexico's theory, it is simply irrelevant whether the standard is entirely legitimate – or, for that matter, entirely illegitimate – the result is the same. Given the huge diversity of production methods, environmental, health, labor standards, and the like that exist throughout the WTO Membership it seems difficult to believe that *any* technical regulation could survive such a test. Surely there will always be at least one Member whose producers do not meet a foreign standard, such as for lead paint or organic produce. It is undeniable that such a legal theory jeopardizes a wide range of legitimate regulations, and seriously undermines Members' ability to regulate in the public interest.

10. The advantage of access to the "advantage" of the dolphin safe label, subject to origin-neutral requirements, is "immediately and unconditionally" accorded to all Members, including Mexico, as required by Article I:1. And Mexican tuna product is not accorded less favorable treatment than the products of the United States, as required by Article III:4.

11. Mexico is also simply wrong to allege that this "unilateral action" intentionally puts pressure on Mexico to change its practices through the amended measure. Such an allegation is *directly contrary* to the findings of the original panel. Moreover, Mexico's argument assumes that the AIDCP labeling regime is sufficient to fulfill the measure's objective at the U.S. chosen level of protection. But the Appellate Body has already found that the AIDCP label *does not* achieve the U.S. chosen level of protection. Mexico is asserting that the United States *must* accept the AIDCP label as sufficient to protect dolphins, but Mexico gives no reason why this should be the case, and the argument contradicts the principle that Members can choose their own levels of protection.

III. THE AMENDED DOLPHIN SAFE LABELING MEASURE IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

12. In any case, the amended measure is justified under Article XX and therefore is not inconsistent with the GATT 1994. The Appellate Body, in *EC – Seal Products*, *US – Gasoline*, and other disputes, has made it clear that the focus under Article XX will be on the aspects of a measure that give rise to the finding of an inconsistency with the GATT 1994. As already noted, Mexico only challenges one eligibility condition – no setting on dolphins – as being GATT inconsistent. Consequently, this would be the only aspect of the measure that could be relevant to the Panel's analysis under the Article XX subparagraphs.

A. The Amended Dolphin Safe Labeling Measure Satisfies the Conditions of Article XX(b) and XX(g)

13. The amended dolphin safe labeling measure satisfies both prongs of the Article XX(b) standard, namely: its objective falls within the scope of "to protect ... animal life or health," and it is "necessary" to the achievement of that objective. The original panel already found, and the Appellate Body affirmed, that "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" was an objective of the original measure. Mexico's efforts to de-emphasize the "dolphin protection" objective of the amended measure cannot stand. The DSB recommendations and rulings are clear – the measure "relate[s] to genuine concerns in relation to the protection of the life or health of dolphins" and is "intended to protect animal life or health."

14. Likewise, the recommendations and rulings provide a clear pathway for the Panel to conduct its examination of whether the amended measure is "necessary" for the protection of life and

health of dolphins. The Appellate Body, relying on the original panel's findings, found that the measure "fully address[ed] the adverse effects on dolphins resulting from setting on dolphins" both inside and outside the ETP. That eligibility condition remains unchanged – it still relies on captain statements – and still stands. Where the Appellate Body found fault was with the other condition, which, in the Appellate Body's view, did not fully address "mortality ... arising from fishing methods other than setting on dolphins outside the ETP." The 2013 Final Rule corrects this, and, as such, the amended measure makes an even higher contribution to the dolphin protection objective than the original measure did.

15. Finally, the DSB recommendations and rulings clearly establish that neither of Mexico's two alternatives prove the amended measure not to be "necessary." This could not be clearer than with regard to Mexico's second alternative, which is identical to the alternative that the Appellate Body has already rejected for purposes of Article 2.2 as it would allow more tuna "harvested in conditions that adversely affect dolphins," *i.e.*, tuna caught by setting on dolphins, to be labeled dolphin safe. The Panel should follow the DSB recommendations and rulings and reject Mexico's second alternative.

16. Likewise, the Panel should reject Mexico's first alternative, which suffers from any number of defects. Indeed, it is so vague that the United States does not even understand what Mexico is actually proposing as to what the programs would consist of, how expensive it would be to implement such programs, and who would pay for them. Moreover, the proposal is not less WTO-inconsistent (under Mexico's theory), not less trade restrictive, and not reasonably available. Mexico's first proposal wholly fails to accomplish its declared task.

17. The amended measure is also justified under the standard of Article XX(g). As the DSB recommendations and rulings already acknowledge, the original measure pursued the objective of "dolphin protection" and, in fact, contributed to that objective, those recommendations and rulings apply equally in the context of Article XX(g) as to Article XX(b). It is also clear that the original measure contributed to that objective and that the amended measure makes an even greater contribution – one that easily satisfies the "relating to" standard of a "close and genuine relationship of ends and means." Furthermore, these eligibility conditions are not only comparable – they are indeed *identical* – for all domestic and imported products.

B. The Amended Dolphin Safe Labeling Measure Is Applied Consistently with the Article XX Chapeau

18. Finally, the amended measure meets the standard of the Article XX chapeau. First, the amended measure is not applied in a way that gives rise to "discrimination" under the chapeau *at all*, because it draws no distinctions "between countries where the same conditions prevail." The setting-on-dolphins eligibility condition is completely neutral as to nationality: all tuna product containing tuna caught by setting on dolphins is ineligible for the label. There are no carve-outs or exceptions for particular Members' products, and Mexico has presented no evidence that the measure is applied in a discriminatory manner.

19. Even if one were to consider that the relevant "conditions" are the choices made by a country's tuna fishing fleet, there is no arbitrary or unjustifiable discrimination here. The harm to dolphins posed by different fishing methods is central to the objective of the amended measure and thus is clearly "relevant" for purposes of the chapeau. The United States has demonstrated that setting on dolphins is *uniquely* dangerous to dolphins, in terms of observed and unobserved harms. Consequently, the conditions in countries whose vessels routinely set on dolphins are *not the same* for purposes of the chapeau, as the conditions in countries whose vessels employ other methods of fishing for tuna.

20. Mexico also argues that the amended measure draws distinctions with respect to record-keeping and observer certifications that make it inconsistent with the chapeau. This argument also fails. First, it is irrelevant. By Mexico's own admission, the circumstances that supposedly bring about the discrimination under the chapeau are the same as those that brought about the asserted GATT inconsistency, *i.e.*, the setting-on-dolphins eligibility condition. But even if the difference between what the AIDCP parties have agreed to and what other Members have agreed to outside the ETP were relevant, there is no genuine relationship between them and any supposed disadvantage to Mexican tuna product, since the amended measure's additional requirements for the ETP stem entirely from the AIDCP. Of course, these differences are not between countries

where the relevant conditions are "the same." The AIDCP parties have agreed to impose *unique* requirements on themselves because of the catastrophic harm their vessels had done to dolphins in the ETP since the 1950s. It should come as no surprise then that the members of regional fisheries management organizations (RFMOs) for other fisheries have not made that same commitment.

21. Furthermore, even if discrimination under the chapeau were found, any discrimination is not arbitrary or unjustifiable, because the distinctions drawn by the amended measure are "compatible with" and, indeed, "related to" the objective of the measure covered by Article XX, namely dolphin protection.

22. The eligibility criterion relating to setting on dolphins directly relates to dolphin protection. The evidence shows that setting on dolphins is vastly more dangerous to dolphins than other tuna fishing methods. And it is the *only* fishing method that intentionally targets dolphins and, therefore, the *only* fishing method where the risks to dolphins are an *intrinsic* part of fishing operations. Indeed, Mexico does not even appear to contest that prohibiting tuna product containing tuna caught by setting on dolphins from being labeled dolphin safe relates to dolphin protection.

23. To the extent that the record-keeping and observer requirements are relevant to the Article XX analysis (and we do not think they are), the distinctions drawn by the amended measure are not "arbitrary and unjustifiable." As the DSB found in the original proceeding, captain's certifications *do* contribute to dolphin protection. The fact that the AIDCP parties have chosen to impose *additional* record-keeping and observer requirements on themselves, in light of the unique harm to dolphins in the ETP, does not mean that the long-standing reliance on captain statements is illegitimate.

24. The amended dolphin safe labeling measure imposes eligibility conditions that manifestly relate to its objective. One condition relates to dolphin mortality and serious injury, and another relates to fishing methods that, based on all the available scientific evidence, is *not* dolphin safe. All other methods of tuna fishing are potentially eligible for the label (except large-scale high seas driftnet fishing), and, unlike under the original *US – Shrimp* measure, individual canneries and vessel operators can ensure that their product is eligible for the label based on their own purchasing and fishing choices.

25. Mexico's final argument is that the United States discriminated arbitrarily by not working through the AIDCP to "address its remaining concerns" about dolphin protection. This seems to be an attempt to analogize this dispute to the original *US – Shrimp* proceeding, and, as such, it utterly fails. First, nothing in the covered agreements requires Members to adopt whatever level of protection is contained in any relevant international agreement. Second, there is no command in the dolphin safe labeling measure, as there was in the *US – Shrimp* measure, to engage in multilateral negotiations. Third, even if there were, the United States has actually been negotiating this issue with Mexico and the other IATTC members, through the AIDCP process, for decades.

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ANNEX C

ARGUMENTS OF THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE THIRD-PARTY SUBMISSION OF AUSTRALIA

A. THE LEGAL FRAMEWORK FOR PROVISIONAL JUSTIFICATION OF A MEASURE UNDER PARAGRAPH (B) OF ARTICLE XX OF THE GATT 1994

1. Australia recalls the Appellate Body's guidance that a Member wishing to provisionally justify its measure under subparagraph (b) of Article XX must demonstrate that (i) it has adopted or enforced a measure to achieve the objective specified in that subparagraph; and (ii) that the measure is "necessary" to fulfil that objective.[1]

2. To determine whether a challenged measure has been adopted to achieve the relevant objective, a panel should examine whether the challenged measure "address[es] the particular interest specified in that subparagraph" and whether there is "a sufficient nexus between the measure and the interest protected".[2]

3. To determine whether a challenged measure is "necessary" to achieve its objective, a panel should "weigh and balance" a series of factors, "including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure".[3] In addition, the Appellate Body has explained that "in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken".[4]

B. WHETHER THE AMENDED TUNA MEASURE HAS BEEN ADOPTED "TO PROTECT ANIMAL LIFE OR HEALTH"

4. Australia notes that Mexico's statements with respect to the United States' claimed justification for the Amended Tuna Measure under Article XX(b) suggest that it considers an assessment of the *contribution* of the Amended Tuna Measure to its objectives is relevant to whether the Amended Tuna Measure "falls within the range of policies designed to achieve the objective". For example, Mexico states that "[t]he Amended Tuna Measure does not *fulfill the objectives* it claims to address and, therefore, it does not protect animal life or health within the meaning of Article XX(b) of the GATT 1994".[5]

5. Australia agrees with the United States' claim that "Mexico's focus on the contribution of the measure improperly collapses the *distinct* questions of whether the relevant objective falls within the scope of subparagraph (b), and whether the challenged measure is "necessary" to protect animal life and health. While the issue of the level at which the measure contributes to its objective is relevant to the latter, *it is not to the former*, where the question is whether the measure at issue 'address[es] the particular interest specified in [the] paragraph'".[6]

6. Australia considers it would have been open to Mexico, in questioning whether the Amended Tuna Measure falls within the scope of Article XX(b), to challenge whether the "design and structure" of the Amended Tuna Measure indicated the policy objective of the measure was the protection of animal life or health.[7]

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[1] Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Reports *US – Gasoline*, p. 22 DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; and *US – Gambling*, para. 292 (footnotes omitted).

[2] Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Reports *US – Gasoline*, p. 22 DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; and *US – Gambling*, para. 292 (footnotes omitted).

[3] Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182 (footnotes omitted).

[4] Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Report, *US – Gambling*, para. 307.

[5] Mexico's Second Written Submission, para. 252 (emphasis added).

[6] United States' Second Written Submission, para. 157 (emphasis added).

[7] Panel Report, *EC – Tariff Preferences*, paras 7.201-7.202.

7. However, Australia notes that this is a separate and distinct question to the *contribution* made by the measure to its objectives (i.e. whether the measure "fulfils" the objectives it claims to address).

C. WHETHER THE AMENDED TUNA MEASURE IS "NECESSARY" TO FULFIL ITS OBJECTIVE

1. Mexico's arguments with respect to the trade-restrictiveness of the Amended Tuna Measure

8. Australia notes that Mexico appears to argue that the Amended Tuna Measure is trade-restrictive in part because "the Amended Tuna Measure, like the original measure, *does not fulfil the two objectives* that it claims to address, as consumers cannot accurately distinguish between dolphin-safe tuna and non-dolphin safe tuna".[8]

9. In Australia's view, this approach improperly conflates the *contribution* of the Amended Tuna Measure to its objectives with an assessment of the *trade-restrictiveness* of the measure. Australia submits that, consistent with the Appellate Body's guidance, the contribution made by the Amended Tuna Measure and the trade-restrictiveness of the Amended Tuna Measure should be examined by the Panel as two *distinct* factors. The Panel should then examine the interaction of these factors[9], together with the importance of the interests and values at stake, and any other relevant factors, as part of the required "holistic weighing and balancing exercise" to determine whether the Amended Tuna Measure is "necessary" to fulfil its objective under Article XX(b).[10]

2. The parties' differing interpretations of trade-restrictiveness for the purposes of assessing the "necessity" of the Amended Tuna Measure

10. As noted above, trade-restrictiveness is one factor to be examined by a panel in the "weighing and balancing" exercise to determine the "necessity" of a measure under Article XX(b) of the GATT 1994.[11] Australia notes the United States' observation that "the parties differ substantially as to the meaning of the term 'trade-restrictiveness'".[12]

11. Australia recalls that the Appellate Body has described this factor as "the restrictive impact of the measure on international commerce"[13]. Further, in the context of Article XI:2(a) of the GATT 1994, the Appellate Body has noted that the term 'restriction' "is defined as 'a thing which restricts someone or something, a limitation on action, a limiting condition or regulation', and thus refers generally to *something that has a limiting effect*".[14] Finally, in considering the meaning of trade-restrictiveness in the context of Article 2.2 of the Agreement on Technical Barriers to Trade, the Appellate Body found that, used in conjunction with the word 'trade', "the term 'restriction' means 'something having a limiting effect on trade'"[15].

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[8] Mexico's Second Written Submission, para. 272, with respect to trade-restrictiveness.

[9] See Appellate Body Report, *EC – Seal Products*, para. 5.215.

[10] For example, the Appellate Body stated in *Korea – Various Measures on Beef* (para. 163) , that: "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects". The Appellate Body stated in *EC – Seal Products* (para. 5.215) that: "the EU Seal Regime, even if it were highly trade-restrictive in nature, could still be found to be 'necessary' within the meaning of Article XX(a), subject to the result of a weighing and balancing exercise under the specific circumstances of the case and in the light of the particular measure at issue".

[11] Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Reports *US – Gasoline*, p. 22 DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; and *US – Gambling*, para. 292.

[12] United States' Second Written Submission, para. 164.

[13] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 143, citing Appellate Body Report, *US – Gambling*, para. 306 and *Korea – Various Measures on Beef*, para. 163. See also *Korea – Various Measures on Beef,* para. 163 (stating that in respect of a measure inconsistent with Article III:4 of the GATT 1994, it is the extent to which the measure produces "restrictive effects *on imported goods*" that should be examined).

[14] Appellate Body Report, *China – Raw Materials*, para. 319 (emphasis added); cited in Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

[15] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. Australia notes that, while the term "restriction" in Article XI does not appear in Article 2.2, the Appellate Body in *US – Tuna II (Mexico)* relied on the Appellate Body's interpretation of "restriction" in the context of Article XI(2)(a) to define "trade-restrictiveness" under Article 2.2 of the TBT Agreement as "something having a limiting effect on trade".

12. Australia agrees with the United States that, to the extent that Mexico argues that the Amended Tuna Measure is trade-restrictive simply because it is *discriminatory* (i.e. that an alternative measure that reduces "the *de facto* discrimination against Mexican tuna products … would *therefore be less trade restrictive*"),[16] this would introduce an incorrect legal test for assessing the trade-restrictiveness of a measure.

13. Specifically, Australia submits that a finding of *discrimination* (for example, under Article III:4 or Article I:1 of the GATT 1994) is not *per se* determinative of the question of the *trade-restrictiveness* of a measure.[17] Thus, for the purposes of the "necessity" analysis under Article XX(b) of GATT 1994, it is not sufficient to show that the Amended Tuna Measure modifies the conditions of competition to the detriment of imported Mexican tuna products in the US market, rather the measure must also have "a limiting effect on trade".[18]

14. Further, Australia recalls that the interpretation of the legal standards under specific provisions of the GATT 1994 and the covered agreements must be "based on the text of those provisions, as understood in their context, and in the light of the object and purpose of the agreements in which they appear".[19] Accordingly, where a measure is found to be inconsistent with one of the non-discrimination provisions in the GATT 1994 (such as Article III:4 or Article I:1), it would be inappropriate for a panel to simply transpose its finding of inconsistency with these obligations to the consideration of the trade-restrictiveness of a measure under Article XX of the GATT 1994.

15. However, Australia does not suggest that the facts and circumstances that result in a panel's finding of discrimination in a particular case (that is, the basis for a finding that the measure at issue has a detrimental impact on the competitive opportunities for imported products) are *irrelevant* to the analysis of trade-restrictiveness under Article XX.[20]

16. Indeed, Australia notes that panels and the Appellate Body have found a range of factors to be relevant to the assessment of the trade-restrictiveness of a measure, depending on the circumstances of the case, including the nature of the measure at issue and the claimed inconsistency with WTO obligations, the arguments put forward by the parties, and the nature, quality and quantity of the available evidence.[21] That is, the precise contours of trade-restrictiveness may vary in any given case, and will depend largely on the nature of the specific measure at issue and on the specific claims of inconsistency with WTO obligations.

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[16] Mexico's Second Written Submission, para. 281.

[17] Australia considers that the same argument would apply to a finding of discrimination under Article 2.1 of the TBT Agreement and the separate and distinct analytical enquiry of the trade-restrictiveness of a measure under Article 2.2 of the TBT Agreement.

[18] United States' Second Written Submission, para. 165.

[19] Appellate Body Report, *EC – Seal Products*, para. 5.129.

[20] To this end, Australia notes the Appellate Body's comments in *US – COOL* that "[a]lthough the Panel expressed the view that a technical regulation's non-conformity with Article 2.1 is not *per se* an issue for that technical regulation's conformity with Article 2.2 in general or the 'trade-restrictive' element in particular, it nevertheless relied upon findings that it had made in its Article 2.1 analysis to find that the COOL measure is trade-restrictive within the meaning of Article 2.2": Appellate Body Report, *US – COOL,* footnote 756 to para. 381.

[21] See, for example, Panel Report, *India – Autos*, para. 7.270 (noting the phrase "limiting condition" suggests the need to identify "a condition that is limiting, i.e. that has a limiting effect" and "in the context of Article XI, that limiting effect must be *on importation itself*" (emphasis added); Appellate Body Report, *Korea – Various Measures on Beef*, para. 163 (referring to "the extent to which the compliance measure produces *restrictive effects on international commerce*, that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*") (emphasis added); Appellate Body Report, *China – Publications and Audio-Visual Products,* para. 300 (noting the panel, in a finding upheld by the Appellate Body, considered the "restrictive impact the measures at issue have *on imports* of relevant products" and on "*those wishing to engage in importing*, in particular on their right to trade" (emphasis added); Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150 (referring to "restrictive effects on international trade as severe as those resulting from an import ban"); Appellate Body Report, *US – COOL* paras. 477 and 479 (noting that the panel's findings" suggest it considered the measure to have a *considerable degree of trade-restrictiveness* insofar as it has a *limiting effect on the competitive opportunities* for imported livestock as compared to the situation prior to the enactment of the COOL measure" and concluding that "[o]verall, in our view, the Panel's factual findings suggest that the COOL measure…*has a considerable degree of trade-restrictiveness")* (emphasis added)*;* Panel Report, *Colombia – Ports of Entry*, para. 7.236 (noting that "panels have also considered whether a measure makes effective a restriction by evaluating the measure's *impact on competitive opportunities* available to imported products") (emphasis added).

17. Thus, Australia submits that the Panel's analysis of the trade-restrictiveness of the Amended Tuna Measure, in the context of its weighing and balancing exercise under Article XX(b), should focus on whether the Amended Tuna Measure has "a limiting effect on trade" or, in other words, on the "restrictive impact of the measure on international commerce".

18. In the specific circumstances of this case (including the claimed inconsistency of the Amended Tuna Measure with Article III:4 and Article I:1 of the GATT 1994), the effect of the Amended Tuna Measure on the competitive opportunities available to Mexican tuna products in the US market may be relevant to this analysis.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF AUSTRALIA AT THE MEETING OF THE PANEL, AND RESPONSES TO PANEL QUESTIONS

A. WHETHER THE AMENDED TUNA MEASURE HAS BEEN ADOPTED "TO PROTECT ANIMAL LIFE OR HEALTH"

1. Australia recalls the Appellate Body's guidance that a Member seeking to justify its measure under subparagraph (b) of Article XX must demonstrate, first, that it has adopted or enforced a measure to achieve the objective specified in that subparagraph and, second, that the measure is "necessary" to fulfil that objective.[1]

2. Australia notes that the question of whether a challenged measure has been adopted to achieve a relevant objective is a separate and distinct inquiry to whether the measure is "necessary" to fulfil that objective.

3. In determining whether the measure falls within the scope of Article XX(b), Australia submits that, as a first step, the Panel should consider whether the Amended Tuna Measure "addresses the particular interest specified in the paragraph", and whether there is "a sufficient nexus between the measure and the interest protected".[2]

4. Australia considers it would be open to the Panel, in considering whether the Amended Tuna Measure falls within the scope of Article XX(b), to consider whether the "design and structure" of the Amended Tuna Measure indicates the policy objective of the measure was the protection of animal life or health.[3]

5. With respect to the United States' claimed justification for the Amended Tuna Measure under Article XX(b), Mexico suggests in its written submission that it considers an assessment of the contribution of the Amended Tuna Measure to its objective is relevant to whether the Amended Tuna Measure "falls within the range of policies designed to achieve the objective".[4]

6. However, Australia agrees with the United States that an assessment of the contribution of the Amended Tuna Measure to its objective is relevant only to the question of whether the measure is "necessary" to fulfil its objective. It is not relevant to the first question of whether a challenged measure has been adopted to achieve a particular objective.

B. WHETHER THE AMENDED TUNA MEASURE IS "NECESSARY" TO FULFIL ITS OBJECTIVE

7. Australia recalls the Appellate Body's guidance that "… a necessity analysis involves 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to its objective, and the trade-restrictiveness of the measure".[5]

8. Australia submits that, consistent with the Appellate Body's guidance, the contribution made by the Amended Tuna Measure and the trade-restrictiveness of the Amended Tuna Measure should be examined by the Panel as two *distinct* factors. The Panel should then examine the interaction of these factors, together with the importance of the interests and values at stake, and any other relevant factors, as part of the "holistic weighing and balancing exercise", to determine whether

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[1] Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Reports *US – Gasoline*, p. 22 DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; and *US – Gambling*, para. 292 (footnotes omitted).

[2] Appellate Body Report, *EC – Seal Products*, para. 5.169, citing Appellate Body Reports *US – Gasoline*, p. 22 DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; and *US – Gambling*, para. 292 (footnotes omitted).

[3] Panel Report, *EC – Tariff Preferences*, paras. 7.201-7.202.

[4] Mexico's Second Written Submission, para. 252.

[5] Appellate Body Report, *EC – Seal Products*, para. 5.169; see also Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 239-242.

the measure is "necessary" to fulfil its objectives under Article XX(b).[6] Australia further submits that the Panel's analysis of the trade-restrictiveness of the Amended Tuna Measure should focus on whether the Amended Tuna Measure has a "limiting effect on trade". In other words, the Panel's analysis should focus on the "restrictive impact of the measure on international commerce".[7]

9. Australia considers that a finding of discrimination is not *per se* determinative of the question of the trade-restrictiveness of a measure. Moreover, it would not be appropriate to simply transpose a finding of inconsistency with the obligations under another provision of GATT to the consideration of the trade-restrictiveness of a measure under Article XX.

10. However, Australia does not suggest that the facts and circumstances that support a finding of discrimination are irrelevant to the question of trade-restrictiveness. Rather, Australia notes that the precise contours of trade-restrictiveness may vary in any given case, and will largely depend on the nature of the specific measure at issue and the specific claims of inconsistency with WTO obligations.

11. In this instance, the effect of the Amended Tuna Measure on the competitive opportunities available to Mexican tuna products may be relevant to the Panel's analysis of the trade-restrictiveness of the measure.

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

12. In Australia's view, the Appellate Body's statements in paragraph 216 of *US – Tuna* and paragraph 272 of *US – COOL* indicate the complainant must do more than show the technical regulation at issue has a detrimental impact on imports to meet the burden of establishing its prima facie case of less favourable treatment under Article 2.1 of the TBT Agreement. This is consistent with the Appellate Body's prior clarification that not every instance of a detrimental impact on imported products amounts to the less favourable treatment of imports that is prohibited under Article 2.1;[8] and thus the existence of a detrimental impact on imports is not dispositive of less favourable treatment under Article 2.1.[9]

13. Rather, as explained in the Appellate Body's statements, the complainant also bears the burden of adducing evidence and arguments showing that the measure is designed and/or applied in a manner that is not even-handed (for example, in a manner that constitutes a means of arbitrary or unjustifiable discrimination) such that the detrimental impact on imports reflects discrimination prohibited under Article 2.1.[10] While such evidence and arguments could suggest that the detrimental impact on imports does not stem exclusively from a legitimate regulatory distinction, the complainant is not required specifically to prove this negative.

14. In Australia's view, a complainant meets the burden of establishing its prima facie case of less favourable treatment under Article 2.1 once it has adduced evidence and arguments showing that a measure has a detrimental impact on imports and that the measure is designed and/or applied in a manner that is not even-handed. After this, the burden shifts to the respondent to show that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.

[6] Appellate Body Report, *EC – Seal Products*, para. 5.165.

[7] See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 143, citing Appellate Body Report, *US – Gambling*, para. 306 and *Korea – Various Measures on Beef*, para. 163; and Appellate Body Report *China – Raw Materials*, para. 319, cited in Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

[8] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271.

[9] Appellate Body Report, *US – Clove Cigarettes*, paras. 180-182.

[10] Appellate Body Report, *US – COOL*, para. 271.

ANNEX C-3

EXECUTIVE SUMMARY OF THE THIRD-PARTY SUBMISSION OF CANADA

I. INTRODUCTION

1. In its third-party submission, Canada addresses three key systemic legal issues: the scope of analysis under Article 2.1 of the TBT Agreement; the legal standard for determining the legitimacy of the regulatory distinction under Article 2.1; and, the relationship between the legal standards for less favourable treatment in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

II. A PANEL MUST CONSIDER THE OVERALL ARCHITECTURE OF THE MEASURE IN DETERMINING WHETHER THE DETRIMENTAL IMPACT STEMS EXCLUSIVELY FROM A LRD

2. In assessing whether a regulatory distinction is even-handed under Article 2.1, the Appellate Body has been clear that 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."

3. The United States' claim that the LRD analysis must be limited *only* to the distinction that accounts for the detrimental impact limits the scope of the analysis in a manner that is inconsistent with the jurisprudence. Such a narrow approach would undermine a panel's ability to make an objective assessment of the matter before it, contrary to Article 11 of the DSU.

4. The Appellate Body has confirmed that in examining whether a detrimental impact stems exclusively from a LRD, a panel is not limited to considering only the regulatory distinction that accounts for the detrimental impact on imported products. Rather, a panel must consider the overall architecture of the technical regulation, as designed and applied. In addition, the Appellate Body has emphasized that the even-handedness of the challenged technical regulation as a whole is an element of the LRD analysis.

5. There may be other elements of the measure that are relevant to the analysis of whether the regulatory distinction is even-handed. Although these elements may not be directly connected to the regulatory distinction that causes the detrimental impact, they, nevertheless, may help explain whether the detrimental impact reflects discrimination in violation of Article 2.1.

6. Not every element of a technical regulation will be probative of whether a detrimental impact reflects discrimination. A panel's consideration of the relevance of an element of a technical regulation must be done on a case-by-case basis.

III. THE EXAMINATION OF THE RATIONALE FOR THE REGULATORY DISTINCTION IS AN INTEGRAL PART OF THE EVEN-HANDEDNESS ANALYSIS

7. In its first written submission, Mexico applied the three-part test articulated by the panel in *EC – Seal Products*. That test is incorrect because it requires, in its first and second elements, an examination of the explanation or justification for the regulatory distinctions independently of the determination of whether the regulatory distinction is even-handed.

8. In examining the even-handedness of the regulatory distinction, a panel should examine the rationale for the regulatory distinction advanced by the responding Member in light of the identified policy objective, to determine whether there is a rational connection between the regulatory distinction and the identified policy objective. In doing so, a panel must examine whether the regulatory distinction is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination, such that it lacks even-handedness. The jurisprudence supports the view that the extent to which there is a rational connection should not be considered separately from the determination of the even-handedness of the regulatory distinction. The presence or

absence of a rationale that explains or justifies the regulatory distinction in light of the identified policy objective is a critical aspect in determining whether a regulatory distinction is even-handed.

9. The jurisprudence interpreting "arbitrary or unjustifiable discrimination" under the chapeau of Article XX can inform the interpretation of a measure's even-handedness under Article 2.1. This is consistent with the Appellate Body finding that "there are important parallels between the analyses" under Article 2.1 and the chapeau, and that the balance under the TBT Agreement as set out in the preamble is, in principle, not different from the balance set out in the GATT 1994 between the non-discrimination obligations in Articles I:1 and III:4 and the general exceptions in Article XX.

10. Although the Appellate Body recently faulted the panel in *EC – Seal Products* for substituting the Article 2.1 LRD test for the chapeau test under Article XX, this does not undermine the importance of examining, as part of the even-handedness analysis under Article 2.1, whether the regulatory distinction is rationally connected to the objective of the technical regulation.

IV. ALTHOUGH THE LEGAL STANDARDS FOR THE NON-DISCRIMINATION OBLIGATIONS UNDER ARTICLE 2.1 AND ARTICLE III:4 ARE NOT THE SAME, THIS DOES NOT "UNDERMINE A MEMBER'S ABILITY TO REGULATE IN THE PUBLIC INTEREST"

11. In *EC – Seal Products*, the Appellate Body confirmed that the legal standard for the non-discrimination obligation under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT 1994. For the purposes of a "less favourable treatment" analysis under Article III:4, a panel is not required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a LRD.

A. The GATT 1994 Protects a Member's Right to Regulate

12. The Appellate Body has confirmed that under the GATT 1994, a Member's right to regulate is accommodated under Article XX; therefore, in examining detrimental impact under Articles I:1 and III:4, a panel must not conduct an additional inquiry into whether the detrimental impact stems exclusively from a LRD.

13. According to the United States, the legal standard for the obligation under Article III:4 of the GATT 1994 should include an examination of the "underlying rationale and operation of the standard", otherwise a Member would not be able to adopt measures that draw regulatory distinctions in the pursuit of legitimate public policy objectives. This is plainly incorrect. The United States' argument ignores other provisions in the GATT 1994 that enable a Member to "regulate in the public interest", including Article XX, which sets out general exceptions to Members' trade obligations under the Agreement.

B. The GATT 1994 does not preclude a Member from drawing regulatory distinctions

14. The United States' suggestion that Article III:4 should include an examination of "the underlying rationale and operation of the standard" at issue, appears to import into Article III:4 an additional element that considers a measure's policy objectives, such as the LRD test under Article 2.1 of the TBT Agreement. It also denies any legal effect to the provisions in Article XX of the GATT 1994, which protect a WTO Member's right to regulate.

15. The provisions in the GATT 1994 reflect a careful balance between the trade liberalizing objectives reflected in, *inter alia*, its non-discrimination obligations, and the protection of Members' right to regulate in the public interest, as set out in Article XX. Due to the structure of the GATT 1994, the analysis of a challenged measure's policy objectives, which can provide a rationale for the discrimination between like products, is to be conducted under Article XX.

1. The Panel does not have the authority to address any perceived imbalance between a Member's right to regulate under the GATT 1994 and the TBT Agreement

16. The United States asserts that the scope of legitimate objectives that can be invoked under Article XX to justify a violation of the GATT 1994 is narrower than the scope of legitimate objectives that a Member can invoke under Articles 2.1 and 2.2 of the TBT Agreement, and that this would create problems where a Member pursues objectives not listed under Article XX of the GATT 1994.

17. The United States' submissions fail to demonstrate the accuracy of its assertion. However, even if it were the case that the scope of legitimate objectives is narrower under Article XX as compared to Articles 2.1 or 2.2 of the TBT Agreement, as the Appellate Body has pointed out, any perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, is for the WTO Members to address in negotiations.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CANADA
AT THE MEETING OF THE PANEL

I. INTRODUCTION

1. In its third-party oral statement, Canada addressed the correct test to be applied under TBT Article 2.1 with respect to the "less favourable treatment" element, the question of the relationship between that provision and GATT Article III:4, and the sequence of analysis that should be followed under GATT Article XX.

II. TEST FOR "LESS FAVOURABLE TREATMENT" UNDER TBT ARTICLE 2.1

2. The correct test to determine whether a detrimental impact stems exclusively from a legitimate regulatory distinction (LRD) is whether the regulatory distinction is even-handed. There can be a number of factors that can demonstrate even-handedness, or the lack thereof.

3. Canada considers that the European Union mis-states the law when it suggests that all regulatory distinctions are permissible provided that they stem exclusively "from the pursuit of legitimate objectives". It is a necessary but not sufficient condition for the measure as a whole, including the regulatory distinction, to pursue a legitimate objective. It is also necessary for the regulatory distinction itself to be "legitimate". This determination does not rest on whether the objective pursued is legitimate, but on whether the regulatory distinction is "even-handed."

III. ARTICLE III:4 OF THE GATT 1994 DOES NOT INCLUDE A LRD ELEMENT

4. The Appellate Body's findings in *EC – Seal Products* confirms that the legal standard for the non-discrimination obligations under TBT Article 2.1 does not apply equally to claims under GATT Articles I:1 and III:4. Therefore, a panel is not required, under Article III:4, to conduct an additional inquiry into whether the detrimental impact stems exclusively from a LRD or consider any policy rationale that the responding Member puts forth to seek to justify the discriminatory treatment.

5. Canada does not consider that a Member's ability to regulate in the public interest would be undermined if a panel is not required to consider the underlying rationale or policy objective of a measure as part of the analysis under Article III:4. The balance reflected in the TBT Agreement between the desire of WTO Members to avoid unnecessary obstacles to trade and the recognition of Members' right to regulate is given effect, *inter alia*, through the inclusion of the LRD element in TBT Article 2.1. This balance is not, in principle, different from the balance set out between GATT Articles I:1 and III:4, and GATT Article XX. Canada considers that the balance struck in the GATT 1994 does protect a Member's right to regulate. Any attempt to introduce an additional inquiry of a measure's underlying rationale into the Article III:4 analysis would disrupt this careful balance, and the established jurisprudence that has guided the interpretation of the non-discrimination obligations in the light of Article XX.

6. Further, the United States does not offer any concrete example to substantiate its concern that the narrower scope of objectives under Article XX compared to TBT Article 2.1 may undermine a Member's right to regulate.

IV. THE SEQUENCE OF ANALYSIS UNDER GATT ARTICLE XX

7. The Appellate Body has recently affirmed, in *China – Rare Earths*, that an assessment under GATT Article XX involves a two-tiered analysis.

8. The first step, provisional justification, requires that the responding party demonstrate that the impugned measure "address[es] the particular interest specified in that paragraph", and that "there [is] a sufficient nexus between the measure and the interest protected". In the context of Article XX(b), it also requires a responding party to demonstrate that it has adopted or enforced a

measure "necessary to protect human, animal or plant life or health". The necessity analysis involves a process of "weighing and balancing" a series of factors.

9. Although Mexico describes the correct test under Article XX, it fails to apply the correct "sequence of steps" for assessing consistency with Article XX. Canada agrees with the United States that the assessment of whether the measure contributes to the fulfillment of the objective forms part of the necessity test, and should not form part of the analysis of whether the measure falls within the scope of Article XX(b).

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. The European Union has a substantial interest in the matter before the Panel, and we request that our interests as a Third Party be fully taken into account throughout the panel process. Specifically, we request that Third Parties be permitted: to be present throughout the hearing; to comment, at the invitation of the Panel, on matters arising during the hearing; to receive copies of any questions to the Parties, their responses and comments; and to be present at any subsequent meeting of the compliance Panel with the Parties. In order to facilitate the work of the Panel and of the Parties, the European Union proposes that the Third Parties should receive all documents in a single copy in electronic format only. For the same reasons, the European Union also proposes that each Third Party should be permitted to prepare one integrated executive summary of all its submissions, of up to 6 pages (as currently provided), within 7 days (as also currently provided), to be used as the relevant section of the descriptive part of the Panel Report.

2. Although there is no formal system of precedent in WTO law, original proceedings and compliance proceedings are part of a continuous process, and compliance panels are expected to be guided by their own prior findings.

3. If the same matter that was placed before the original panel and decided is again placed before the compliance Panel (that is, the following are unchanged: the law and clarification of the law; the measure; the facts; and the evidence) then the compliance Panel can and should simply refer to its prior finding, and *re-iterate* it. There is no general rule of *res judicata* in WTO law; but compliance panels are expected to follow the results of original proceedings.

4. If one or more of the above elements has changed, then the compliance Panel should take that into account when making its determinations, whilst at the same time being guided by its prior findings.

5. The terminology in the US submissions remains unclear: is it a question of scope, jurisdiction, terms of reference, *res judicata*, *non liquet*, the relationship between different types of DSU proceedings, or the particular language of Article 21.5? Furthermore, the significance of certain statements from past cases remains unclear, particularly when they are taken out of the context of the particular case in which they were made.

6. In the opinion of the European Union, none of the issues raised by the United States touch on the concept of jurisdiction.

7. The concept of *terms of reference* (Article 7 of the DSU) may be thought of as referring to the "jurisdiction" *of a particular panel*, although use of the term "terms of reference" is more precise and preferable, because that is the term used by the treaty, and thus helps to distinguish this concept from the concept of jurisdiction. In this case, Mexico's claim under Article 2.1 of the TBT Agreement is clearly in Mexico's Panel Request and thus within the terms of reference.

8. Nothing in Article 3.7 establishes a condition under which a party would be prevented from initiating proceedings, including compliance proceedings. The only express limitation referred to in Article 3.7 is that a Member shall exercise its judgement as to whether action would be fruitful. A Member is expected to be largely self-regulating in deciding whether any such action would be fruitful. There is no general doctrine of *res judicata* in WTO dispute settlement.

9. Contrary to what the United States appears to believe, *US – Shrimp* does not support its submissions in the present proceedings. On the contrary, it simply confirms that, once particular measures are properly within the scope of compliance proceedings, because they are declared or undeclared measures taken to comply, any claim may be made against them, whether or not made in the original proceedings, *and the compliance panel must assess and rule on such claim*, such ruling being subject to scrutiny on appeal.

10. In *Mexico – Corn Syrup (Article 21.5 – US),* the compliance panel had been correct to examine the consistency of the re-determination. It was this assessment that the Appellate Body reviewed. This case does not support the US submissions in the present proceedings. It simply confirms that, once particular measures are properly within the scope of compliance proceedings, because they are declared or undeclared measures taken to comply, any claim may be made against them, whether or not made in the original proceedings, *and the compliance panel must assess and rule on such claim*, if only to determine that the matter was decided in the original proceedings, such ruling being subject to scrutiny on appeal.

11. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and to make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. This is consistent with Article 23 of the DSU, which requires Members to have recourse to the DSU when they seek redress of a violation of obligations under the covered agreements; Article 3.3 of the DSU, which refers to situations in which *a Member considers* there is a violation; and Articles 3.2 and 19.2 of the DSU, pursuant to which the rights and obligations of Members may not be added to *or diminished* in dispute settlement proceedings. Similarly, Article 17.12 of the DSU requires the Appellate Body to address each of the issues raised in accordance with Article 17.6 during an appellate proceeding. Thus, subject to the proper exercise of judicial economy (which is not at issue in these compliance proceedings), when a matter is properly within the jurisdiction and terms of reference of a WTO adjudicator, that adjudicator is required to assess and rule upon it. There is no general doctrine of *non liquet* in WTO dispute settlement.

12. The concept of the scope of various different proceedings under the DSU *in relation to each other* is different from the concepts of *jurisdiction*, *terms of reference, res judicata* and *non liquet* outlined above. There are certainly some exclusions and overlaps. For example, the same measure and matter can be subject to more than one panel proceeding. A reasonable period of time may be fixed by an arbitrator pursuant to Article 21.3(c) of the DSU; but in some cases the implementation period is fixed by the original panel. And so forth. Thus, just because a particular matter or measure is within the scope of one proceeding or one type of proceeding, that does not necessarily mean that it is not within the scope of another proceeding or type of proceeding.

13. The scope of compliance proceedings is governed by the terms of Article 21.5 of the DSU: it is the "dispute" that consists of the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. Such an examination also includes both *declared* measures taken to comply; as well as any *undeclared* measures taken to comply, including those that satisfy the *close nexus* test. Measures taken to comply, like all measures subject to review in WTO dispute settlement, may be either actions or *omissions* attributable to the responding Member.

14. Once, for whatever reason, measures are within the scope of compliance proceedings, the complaining Member is not restricted to challenging the consistency of those measures with the same provisions of the covered agreements at issue in the original proceedings, and, furthermore, the defending Member is not free to *assume* that such measures are WTO consistent.

15. The scope of compliance proceedings also includes a disagreement "as to the existence" of a measure taken to comply. For example, the complaining Member might assert that no measure taken to comply exists, whilst the defending Member might assert that a measure taken to comply *does exist*. Such disagreement would be within the scope of compliance proceedings, and if found to exist, the measure would necessarily be characterised as a measure taken to comply.

16. Another possibility is that the parties agree that no measure taken to comply exists, but the complaining Member asserts that such a measure was necessary (that is, *should exist*), whilst the defending Member asserts that such a measure was unnecessary (need not exist), because, for example, through events arising during the passage *of* time, the inconsistency has ceased. Another way of expressing this same disagreement is that the complaining Member is complaining about the defending Member's *omission*, that is, its failure to ensure that the measures it adopts *or maintains* are in conformity with the covered agreements. This omission, and by definition the measure to which it refers (that is, the original measure, *as maintained*), are thus also within the scope of the compliance proceedings.

17. The United States bases its submissions on the scope of these compliance proceedings in large measure on the findings in *EC – Bed Linen (Article 21.5 – India).* However, there are in this respect a number of issues that must be taken into consideration.

18. First, if the clarification of WTO law to be applied by a compliance panel will not be the same as the clarification of WTO law that was applied by the original panel (for example, because of clarifications provided in the original proceedings) then the reasoning in *EC – Bed Linen (Article 21.5 – India)* does not apply.

19. Second, if the measures or aspects of the measures that are the subject of the compliance complaint are not the same as the measures or aspects of the measures that were the subject of the original complaint, then the reasoning in *EC – Bed Linen (Article 21.5 – India)* does not apply.

20. Third, given the circumstances of that case, the facts and evidence were *already frozen on the file of the original investigation*. In contrast, if the investigating authority does re-open the record and collect more information and evidence, such that the *facts or evidence have changed* relative to those at issue in the original proceedings, then the reasoning in *EC – Bed Linen (Article 21.5 – India)* does not apply.

21. Fourth, the aspect of the measure in question that was challenged by India was separable from other aspects of the measure. If that is not the case, the reasoning in *EC – Bed Linen (Article 21.5 – India)* does not apply.

22. Furthermore, it is significant that, in each of the subsequent cases that touch on this matter (*US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*; *US – Softwood Lumber VI (Article 21.5 – Canada)*; *US – Cotton (Article 21.5 – Brazil)*; *US – Zeroing (EC) (Article 21.5 – EC))*, the situation arising was distinguished from *EC – Bed Linen (Article 21.5 – India)*. Significantly, in the most recent of these cases, *US – Zeroing (EC) (Article 21.5 – EC)*, in reversing the panel, the Appellate Body referred to a statement by the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* (upon which the United States seeks to rely in these compliance proceedings) to the effect that "a new claim on an aspect of the original measure that was never challenged and remained unchanged" would be precluded in compliance proceedings, and stated expressly that it disagreed with that proposition.

23. The European Union considers that a compliance panel must balance the principles of prompt settlement and due process, and that both principles must take into account not only the interests of the parties in a particular dispute, but also the interests of the system.

24. We are not merely speaking of an additional delay corresponding to an additional reasonable period of time. If the relevant matters would be referred to a new panel it would likely take much longer to return to the current procedural point.

25. In this respect, the European Union refers to the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility" or "ASR"), which have been frequently referred to in WTO litigation. The ASR (and/or the associated Commentaries) confirm three points. First, the legal consequences of an internationally wrongful act (such as the US acts found WTO inconsistent by the original panel) include cessation and non-repetition (and do not affect the continued duty of performance). Second, a concern with non-repetition is particularly justified when the pre-existing situation is not going to be restored. Third, the focus of the WTO dispute settlement mechanism is on cessation rather than reparation.

26. In short, to the extent that WTO rules are understood to focus on cessation rather than reparation, there is already a significant shift in the architecture of WTO dispute settlement away from the principle of prompt settlement, the burden of the passage of time being placed on the complainant rather than the respondent. This being so, it is entirely appropriate, and even essential for the proper functioning of the WTO dispute settlement system, that there is a reasonable re-balancing in the form of an effective apprehension by the system of repetition. The precise moment at which this is achieved is the moment at which the scope of compliance proceedings is under consideration. In the submission of the European Union, this issue should be approached so as to permit a compliance panel to reasonably capture the full extent of what is, in

essence, a continuing situation. The European Union submits that the compliance Panel should bear these factors in mind when considering the various scope arguments advanced by the United States in this particular case.

27. In conclusion: The amended tuna measure is a declared measure taken to comply. Declared measures taken to comply fall within the scope of compliance proceedings. The European Union considers that the various elements of the amended tuna measure can only meaningfully and reasonably be considered as a whole, and are inseparable from each other. Therefore, the entirety of the amended tuna measure falls within the scope of these compliance proceedings. The complaints are within the jurisdiction and terms of reference of the compliance Panel. There is no rule of *res judicata* or *non liquet*. The compliance Panel must make an objective assessment of the matter before it. The situation is not the same as the situation that arose in *EC – Bed Linen (Article 21.5 – India)*, and the reasoning in that case does not therefore apply.

28. As regards the order of analysis: The European Union suggests that the compliance Panel starts with Article 2.1 of the TBT Agreement and then deals with Articles III:4 and XX of the GATT 1994. A good rule of thumb when considering order of analysis is to begin with the more specific provision. This allows the adjudicator to remain as faithful as possible to the intent of the parties to the treaty. Reading the more general rule and the more specific rule together, or one as context for the other, gives a WTO adjudicator the best insight into the drafters' intentions. The recitals of the TBT Agreement confirm that it develops and builds on the GATT 1994.

29. As regards Article 2.1 of the TBT Agreement, and turning to this particular case, first, the European Union considers that, in assessing whether or not there is a detrimental impact on imports, the relevant comparison is between the situation before adoption of the original measure and the present situation.

30. Second, the European Union considers that all regulatory change may involve costs that, in the short term, will inevitably be unequally distributed amongst existing firms and Members as a function of their past investment decisions. This fact alone does not mean that the measure breaches. What is important is that, in the long term, all firms and Members can adjust to the new regulatory regime and enjoy equal competitive opportunities.

31. Third, the European Union considers that the mere fact that unit regulatory compliance costs may be higher for firms or Members with lower production volumes or market share does not, alone, establish breach. Firms and Members make their own choices about economies of scale. Propensity to breach WTO law is not a function of the relative size of Members or their firms or their production volumes or market shares. WTO law treats all WTO Members as equals, taking their relative size as a given fact.

32. Fourth, the European Union considers that the fundamental question is whether or not the legitimate regulatory distinctions are even-handed. No facts are *per se* excluded from that assessment. This is an aspect of the case that will require the compliance Panel to carefully weigh all of the facts and evidence. In essence, the question is whether or not the amended tuna measure involves unjustified discrimination. Existing case law confirms that a mere difference does not necessarily amount to discrimination, let alone unjustified discrimination. The compliance Panel will therefore have to consider whether or not any different treatment within and outside the ETP is even-handed and justified. In particular, the compliance Panel will need to consider whether or not any different treatment is appropriately calibrated to different fishing methods, having regard to the legitimate regulatory objectives pursued by the United States, framed in a manner that actually corresponds to those legitimate objectives. The compliance Panel may also wish to consider whether or not there is an alternative approach, which would consist in significantly narrowing or even eliminating such differences, whilst still making an equivalent contribution to the legitimate objectives, and that is reasonably available taking into account technical and economic feasibility. If this is not the case, the compliance Panel should defer to the legitimate exercise of regulatory autonomy by the United States. If it is the case, the compliance Panel should find that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement.

33. In response to a question from the Panel on the even-handedness requirement the European Union has replied as follows. As explained in our submissions to the original panel and the compliance panel, the Appellate Body has clarified that an assessment of an alleged de facto breach of the national treatment obligation under Article 2.1 of the TBT Agreement, contextually

informed by the recitals of the TBT Agreement and by Article 2.2 of the TBT Agreement, is not in principle different from the analysis that would take place under Articles III:4 and XX of the GATT 1994. This informs what is meant by the term "even-handed". This means that the "rationale" or "objective" or "purpose" or "objective intent" of the regulatory distinction criticised by Mexico is indeed relevant to the assessment, just as it would be relevant in an assessment under Articles III:4 and XX of the GATT 1994.

34. It is possible that the regulatory distinction neither "assists" nor "hinders" the overall objective, but merely reflects a calibration of the different measures to different risks. The mere existence of such differences does not necessarily mean that there is discrimination, or unjustified discrimination. Under the SPS Agreement, for example, measures must be calibrated according to both the origin and the destination of the relevant products. In its consideration of this matter, the Panel may wish to consider whether or not there is an alternative approach, which would consist in significantly narrowing or even eliminating such differences (and any different costs associated with them), whilst still making an equivalent contribution to the legitimate objectives, and which is reasonably available taking into account technical and economic feasibility (that is, cost).

35. In response to an additional question from the Panel on burden of proof, the European Union has replied as follows. The European Union agrees that, in interpreting and applying Article 2.1 of the TBT Agreement in the case of a claim of a *de facto* breach of the national treatment obligation, it should be born in mind that the balance struck in that provision is not different from the balance struck in Articles III:4 and XX of the GATT. It is likely that this will be reflected when it comes to considering the evidence. In particular, it is likely that in some respects the burden of proof will fall on the defending Member, just as it does under the GATT.

36. However, at the same time, the European Union would caution against an excessively mechanistic approach to this question. Whilst it is true that, under the GATT, it will normally be the complainant's burden to demonstrate the breach and the defendant's burden to demonstrate the defence, nevertheless, both of these statements are expressions of the more general principle that it is generally for the party asserting the affirmative of a particular fact to adduce evidence in support of its assertion.

37. Furthermore, we would note that the concept of the burden of proof refers to the proving of a fact through adducing evidence. It is distinct from the burden of persuasion, which rather refers to the making of arguments in order to persuade an adjudicator that a particular fact) should be characterised in a particular manner. When it comes to burden of persuasion, what tends to happen is that, at the end of the exchange of arguments, and having respected due process, the adjudicator will weigh the arguments and make a finding. We would also make the point that future hypotheticals or alternative counterfactuals cannot be proved directly. Finally, we would recall that a panel has the authority to put questions to either party, in search of any information that it deems necessary, and that might reasonably be in that party's possession, without however making the case for either party.

38. In sum, whilst the fact that Article 2.1 (complainant's burden) corresponds in principle to Articles III:4 (complainant's burden) and XX (defendant's burden) of the GATT may seem to pose a burden of proof conundrum, the extent of the difficulties should not be exaggerated. There are in fact many other provisions of the covered agreements that raise similar questions, because it is often not entirely clear when there is a rule-exception relationship, or what the relationships are between different provisions or covered agreements. The way forward in this respect does not lie in an excessively rigid approach to burden of proof issues, but rather in an intelligent use of the panel's authority to question the parties in order to obtain relevant information.

ANNEX C-6

EXECUTIVE SUMMARY OF THE THIRD-PARTY SUBMISSION OF JAPAN

I. Article 2.1 of the TBT Agreement

1. As noted by both parties, the Appellate Body developed a two-step test for panels to follow in assessing claims of *de facto* less favourable treatment under Article 2.1. The first step consists of an examination of whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other country. An affirmative finding that there is such a detrimental effect is not sufficient to demonstrate less favourable treatment under Article 2.1. Instead, there is a second step in which the panel scrutinizes whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[1]

2. The United States argues that the regulatory distinctions examined under the second step of the Article 2.1 analysis are limited to the regulatory distinctions that account for the detrimental impact determined in the first step of the analysis. The United States finds support for this position in a statement made by the Appellate Body in the original proceedings.[2]

3. Japan agrees that the regulatory distinction that accounts for the detrimental impact usually will be the main focus of the assessment under the second step of the analysis. However, the scope of the assessment is not as narrow as the United States suggests. Rather, the Article 21.5 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".[3] In Japan's view, this assessment goes beyond the regulatory distinction that allegedly accounts for the detrimental impact. Thus, Japan does not support an overly rigid definition of the scope of the assessment under the second step.

4. Ultimately, in this case, the parties seem to disagree less about the relationship between steps one and two, and more about the regulatory distinction that was at the heart of the Article 2.1 analysis in the original proceedings. Japan agrees with the United States that the clearest description of what the Appellate Body considered to be the detrimental impact caused by the tuna measure is found in paragraph 284 of the Appellate Body Report, which states:

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

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[1] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* [hereinafter *US – Tuna II (Mexico)*], WT/DS381/AB/R (16 May 2012), para. 215 (referring to Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* [hereinafter *US – Clove Cigarettes*], WT/DS406/AB/R (4 April 2012), paras. 180, 182 and 215).

[2] Second Written Submission of the United States of America (22 July 2014), para. 66 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 286).

[3] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

5. Nonetheless, Japan disagrees with the United States that the recordkeeping/ verification and observer requirements that Mexico has raised in these proceedings are not relevant to the analysis under Article 2.1. In the second step of the Article 2.1 analysis, the Article 21.5 Panel will have to determine whether the detrimental impact stems from a legitimate regulatory distinction. In order to make this determination, the Article 21.5 Panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application" of the amended tuna measure.[4] To the extent that Mexico claims that the recordkeeping/verification and observer requirement aspects of the difference in labelling conditions cause detrimental impact to Mexico tuna products and shows that such labelling conditions are not even-handed, they would be relevant to the Article 21.5 Panel's analysis. Indeed, it would appear that the recordkeeping/verification and observer requirements concern whether tuna products meet the conditions of eligibility of the "dolphin-safe" label. Accordingly, Japan fails to see why such requirements should be excluded *ex ante* from the Article 21.5 Panel's assessment.

II. Article III:4 of the GATT 1994

6. In the recent *EC – Seal Products* dispute, Japan and several other WTO Members expressed the view that the assessment of claims of *de facto* less favourable treatment under Article III:4 of the GATT 1994 may proceed along the lines of the two-step test developed by the Appellate Body in the context of Article 2.1 of the TBT Agreement. Japan, for example, noted that a consistent interpretation of both provisions is supported by the fact that both GATT Article III:4 and TBT Article 2.1 address the same "less favourable treatment" issue. Furthermore, technical regulations are in principle not only regulated under TBT Article 2.1 but also fall among the types of measures regulated by GATT Article III:4. The non-discrimination rule under TBT Article 2.1 only applies with respect to "technical regulations".[5] Thus, TBT Article 2.1 would provide relevant context for the interpretation of Article III:4 when the matter relates to technical regulations. Japan continues to believe that whether the detrimental impact on the competitive opportunities of like imported products stems from legitimate regulatory distinctions is a relevant consideration for purposes of the assessment of a measure under Article III:4 of the GATT 1994.

7. The incongruity of having separate tests under Article III:4 of the GATT 1994 and TBT Article 2.1 is illustrated by the circumstances in this dispute. As noted earlier, the United States' position in this dispute is that the amended tuna measure does not violate TBT Article 2.1 because, in its view, Mexico has failed to show that the detrimental impact on Mexican tuna products does not stem from legitimate regulatory distinctions. Let us assume that the United States were to succeed in its argument. In such circumstances, the amended measure would be found not to provide less favourable treatment and therefore not inconsistent with Article 2.1 of the TBT Agreement. Yet, under an overly narrow interpretation of GATT Article III:4 in which the assessment of less favourable treatment focuses exclusively on the detrimental impact, the same measure could be found to accord less favourable treatment and therefore be inconsistent with GATT Article III:4. The notion that the same technical regulation does not accord less favourable treatment under Article 2.1 of the TBT Agreement, but does accord less favourable treatment for purposes of Article III:4 of the GATT 1994 defies logic.

8. Article 2.1 of the TBT Agreement is the more specific provision in the more specific agreement. TBT Article 2.1 is concerned only with one class of measures: technical regulations. By contrast, GATT Article III:4 addresses a much wider class of measures that can potentially fall under the generic categories of "laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use". That a technical regulation can be found to be consistent with the more specific non-discrimination obligation and yet inconsistent with the more general obligation makes the outcome all the more incongruous.

9. Japan recognizes that a measure found to be inconsistent with GATT Article III:4 could eventually be justified under Article XX of the GATT 1994. However, the availability of Article XX does not provide a neat solution to the problem described above. It is an acknowledged fact that the list of policy reasons that could justify a measure under Article XX is narrower than under Article 2.1 of the TBT Agreement. Moreover, the assessment under Article XX is not necessarily the same as under the second step of Article 2.1. Thus, the risk of conflicting findings is real.

[4] Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[5] Appellate Body Report, *US – Clove Cigarettes*, para. 97.

10. The outcome is less than optimal in other respects. It would appear that a WTO Member facing a technical regulation that it considers to be discriminatory now has an incentive to bring the claim under Article III:4 of the GATT 1994, rather than under Article 2.1 of the TBT Agreement. This is because its burden under Article III:4 is lower than under TBT Article 2.1. Under an overly narrow Article III:4, the complainant only has to demonstrate that the measure has a detrimental impact on the competitive opportunities of the like imported products, at which point the burden shifts to the respondent to show that the technical regulation is justified because any regulatory distinctions are legitimate. It follows from this analysis that TBT Article 2.1 could become redundant and cease to have much meaning. This surely cannot be the outcome intended by WTO Members when they negotiated the TBT Agreement.

11. Like the United States[6], Japan is concerned that excluding any examination of the purpose and nature of the measure at issue from the assessment under GATT Article III:4 could improperly undermine many legitimate and genuinely non-discriminatory measures. Japan therefore urges the Article 21.5 Panel to adopt an interpretation of Article III:4 of the GATT 1994 that is coherent with Article 2.1 of the TBT Agreement and that takes due account of legitimate regulatory distinctions that may underlie a technical regulation.

III. Article 21.5 of the DSU

12. Proceedings under Article 21.5 of the DSU concern disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". The United States recognizes that, in these Article 21.5 proceedings, Mexico would be entitled to:

(a) reassert a claim where the original panel had exercised judicial economy[7];

(b) reassert a claim that alleges that the *new* aspects of the amended measure not only fail to bring the measure into compliance with the provisions that were the subject of the DSB recommendations and rulings, but are inconsistent with the covered agreements[8]; and

(c) make a new claim regarding an unchanged aspect of the measure that it could have brought previously, where that unchanged aspect is an "inseparable" aspect of the measure taken to comply.[9]

Nevertheless, the United States argues that Mexico's claim under Article 2.1 of the TBT Agreement falls outside the Article 21.5 Panel's terms of reference because it is premised on elements of the measure that were not found to be WTO-inconsistent and that are unchanged from the original measure.[10]

13. Japan considers it helpful to begin the analysis of this issue by recalling the relevant DSB recommendation and ruling stemming from the original dispute. These DSB recommendations and rulings derive, of course, from the rulings of the Appellate Body and panel reports in the original proceedings. In the case of Article 2.1 of the TBT Agreement, Japan believes that the relevant ruling is the Appellate Body's finding that "the US 'dolphin-safe' labelling provisions provide 'less favourable treatment' to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and are therefore inconsistent with Article 2.1 of the TBT Agreement".[11] In the light of the DSB's recommendations and rulings, the

[6] Second Written Submission of the United States of America, para. 142.

[7] *See* Appellate Body Report, *United States – Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Article 21.5 – Argentina)* [hereinafter *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*], WT/DS268/AB/RW (12 April 2007), paras. 141, 150-52.

[8] *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (Article 21.5 – India)* [hereinafter *EC – Bed Linen (Article 21.5 – India)*], WT/DS141/AB/RW (8 April 2003), para. 88.

[9] Second Written Submission of the United States of America, para. 48. *See* Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (Article 21.5 – EC)* [hereinafter *US – Zeroing (EC) (Article 21.5 – EC)*], WT/DS294/AB/RW (14 May 2009), para. 433.

[10] First Written Submission of the United States of America (27 May 2014), para. 202(1).

[11] Appellate Body Report, *US – Tuna II (Mexico)*, para. 299.

United States was under an obligation to eliminate the less favourable treatment resulting from the measure. To the extent the amended measure continues to accord less favourable treatment to Mexican tuna products, the United States would have failed to comply fully with the DSB's recommendations and rulings.[12]

14. The United States asserts that the DSB's recommendations and rulings are narrowly limited to the Appellate Body's finding that the original measure prohibited tuna products from being labelled "dolphin safe" if it contained tuna caught in the ETP and a dolphin was killed or seriously injured, but allowed tuna products containing tuna caught outside the ETP to be labelled "dolphin safe" even if dolphins had been killed or seriously injured.[13] Japan notes that, as part of its reasoning, the Appellate Body explained that "the US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does 'not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP'".[14] This is, however, the reason given by the Appellate Body to support its ultimate conclusion that "the US 'dolphin-safe' labelling provisions provide 'less favourable treatment' to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and are therefore inconsistent with Article 2.1 of the TBT Agreement".[15] The United States therefore appears to confuse the Appellate Body's conclusion with the particular reasons that provided the basis for that conclusion.

15. The situation in this case has similarities with the situation before the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. That dispute concerned the likelihood of dumping determination, which was premised on the following two factual bases: (i) a finding of likely past dumping during the period of review; and (ii) a finding that import volumes declined after the imposition of the anti-dumping duty order, which was made in the original sunset determination and was incorporated into the measure challenged in the Article 21.5 proceedings. The original panel only addressed the first factual basis and as a result concluded that the likelihood of dumping determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement. It did not examine the second factual basis. In the compliance proceedings, the United States argued that the second factual basis, i.e. the import volume analysis, which remained unchanged in the U.S. Department of Commerce's ("USDOC") likelihood of dumping redetermination, was not part of the "measure taken to comply" and therefore could not be examined by the Article 21.5 Panel. The Appellate Body disagreed with the United States' argument. The Appellate Body held that the original panel's finding of WTO-inconsistency was addressed to the USDOC's likelihood-of-dumping determination and that USDOC's finding on import volumes is "an integral part of the 'measure taken to comply'"[16]; as a consequence, to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the Anti-Dumping Agreement.[17] The Appellate Body added that the narrow approach advocated by the United States in that case improperly confused the original panel's conclusion concerning the USDOC's likelihood-of-dumping determination with the particular reason that provided the basis for that conclusion.

16. Japan therefore urges the Article 21.5 Panel to find that Mexico's claims are properly within its terms of reference.

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[12] *See* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews (Article 21.5 – Japan)* [hereinafter *US – Zeroing (Japan) (Article 21.5 – Japan)*], WT/DS322/AB/RW (18 August 2009), para. 158.

[13] First Written Submission of the United States of America, para. 192 (referring to Appellate Body Report, *US - Tuna II (Mexico)*, paras. 289-292).

[14] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297 (referring to Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/R (15 September 2011), para. 7.544).

[15] Appellate Body Report, *US – Tuna II (Mexico)*, para. 299.

[16] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 146.

[17] Ibid. para. 143.

ANNEX C-7

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE REPUBLIC OF KOREA AT THE MEETING OF THE PANEL*

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party. While the parties to the dispute and the third parties raise several important issues, Korea would like to briefly focus on the following two systemic issues. First, Korea would like to share its observation on the issue of this compliance Panel's terms of reference. Second, Korea would like to comment on relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT.

A COMPLIANCE PANEL'S TERMS OF REFERENCE

2. As the WTO itself proclaims, the main function of the WTO is to ensure that trade flows as smoothly, predictably, and freely as possible. In order for the WTO agreements to be better enforced, the WTO provides its Members with dispute settlement function. The goal of the WTO dispute settlement is to achieve the prompt settlement of the dispute, while keeping the due process rights of the parties to the dispute.

3. That being said, when a Member's measure is found to be inconsistent with the relevant provisions of the WTO agreements through the dispute settlement procedures, the measure can be said to block the flow of trade. At the DSB meeting, therefore, the WTO requires the Member concerned to bring the measure into the conformity with the relevant provisions of the WTO agreements. At the time when the inconsistent measure has been corrected through the RPT, it can be said that the flow of trade is now recovered.

4. That being so, Korea would like to reiterate its understanding that true finality of a dispute should envisage a situation where the exporters of the aggrieved party restore their competitiveness which they had enjoyed before the WTO inconsistent measure imposed by the Member concerned was adopted.

5. In this regard, a compliance panel's terms of reference is not confined to changed measures; rather it may cover unchanged measures if the compliance panel's review on the unchanged measures is necessary to finalize the dispute. Indeed, the Appellate Body in *United States – Zeroing* (DS294) clarified that claims that had not previously been raised could nevertheless be asserted against an implementing measure in a compliance proceeding "even where such a measure taken to comply incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply."[1]

6. The Appellate Body in several Article 21.5 disputes has already ruled that measures taken to comply are not confined to the declared measures by the implementing Member.[2] The Appellate Body in *Mexico – Corn Syrup (Article 21.5)* has particularly ruled that compliance panels have a duty to examine issues of a "fundamental nature," issues that go to the root of their jurisdiction on their own motion even if the parties to the dispute remain silent on those issues.[3]

7. It should be emphasized, however, that a compliance panel's broad terms of reference must not be interpreted to allow the second chance for the complaining party to re-litigate. Therefore, this compliance Panel must strike a balance between the prompt settlement of the dispute and due process concerns in determining its scope of review.

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* The Republic of Korea requested that its oral statement serve as its executive summary.

[1] *See United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, Appellate Body Report, WT/DS294/AB/RW, 14 May 2009, para. 432.

[2] *E.g.,* Appellate Body Reports, *US-Softwood Lumber IV (Article 21.5 – Canada)*; *US-Zeroing (Article 21.5 – EC)*.

[3] Appellate Body Report, *Mexico-Corn Syrup (Article 21.5)*, para. 36, quoted in *US-Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.35.

RELATIONSHIP BETWEEN ARTICLE 2.1 OF THE TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

8. The WTO does not prohibit a Member from pursuing its legitimate policy goals, *e.g.*, consumers' right to know, safety, and protection of human and animal or plant life or health, etc. Even more, the WTO allows additional policy space to its Members through GATT Article XX exceptions. However, the WTO permits a Member country's policy space only if it meets the rights and obligations under the WTO agreements. Therefore, the WTO carefully strikes the balance between a Member country's policy space and the object and purpose of the WTO agreements.

9. As the current dispute describes, the TBT Agreement allows a Member to pursue its policy goals, through a discriminatory measure, only if the discriminatory measure stems from the legitimate regulatory distinction. However, because the concept, discrimination, lies in both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, the question about the clear relationship between the two provisions in interpreting and applying the concept of discrimination has often been raised.

10. Considering the second recital of the TBT Agreement which states that "[*d*]*esiring* to further the objectives of GATT 1994," the TBT Agreement seems to be more specified instrument dealing with the WTO Members' technical regulations, while the GATT 1994 covers broader measures. In addition, the test for finding a violation of Article 2.1 of the TBT Agreement is different from the test for finding a violation of Article III:4 of the GATT 1994. As a result, there is a possibility that a discriminatory measure under Article III:4 of the GATT 1994 may be justified under Article 2.1 of the TBT Agreement. Although Article XX of the GATT 1994 does provide certain exceptions, it is well discussed so far that the scope may be narrower than that of Article 2.1 of the TBT Agreement, because the two Agreements cover different ambit of trade areas.

11. Considering the rapid technical changes and ensuing increasing non-tariff barriers through the TBT measures, Korea respectfully requests this compliance Panel to provide a guidance on the relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

12. This concludes Korea's oral statement. Thank you.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

I. INTRODUCTION

1. New Zealand's submission comments on what constitutes "compliance" under Article 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the nature of *de facto* discrimination under the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement) and the interpretation of "treatment no less favourable" under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

II. DSU: A MEASURE TAKEN TO COMPLY MUST BE IMPLEMENTED

2. New Zealand notes the claim by Mexico that the United States has in effect "unilaterally granted itself a further extension to the RPT [Reasonable Period of Time for Implementation] by not enforcing the measure it has introduced for the purpose of bringing itself into compliance" during a six month "education and outreach" grace period where the measure is legally in force, but does not appear to be fully enforced.[1] New Zealand has concerns about the significant systemic implications for the dispute settlement process if compliance is found to be achieved when a Member merely announces it will enforce the rules in the future. This should be strongly discouraged. Consistency with WTO obligations must involve compliance both in law and in fact.

3. As stated in Article 21.1 of the DSU, "prompt compliance" with recommendations and rulings of the DSB is essential for the effective resolution of disputes. The DSU recognises that immediate compliance may not be possible in all circumstances, but requires that Members comply within a reasonable period of time as determined under Article 21.3. New Zealand submits that any grace periods should be taken into consideration in the determination of the RPT itself. The Member seeking the grace period could raise this concern in the course of seeking to agree on a RPT with the complaining Member(s) or during Article 21.3(c) arbitration proceedings.[2]

III. THE NATURE OF *DE FACTO* DISCRIMINATION UNDER THE GATT AND THE TBT AGREEMENT

4. At their core, the national treatment and Most Favoured Nation obligations in Articles I:1 and III:4 of the GATT and Article 2.1 of the TBT Agreement are concerned with non-discrimination. The Appellate Body has clarified that discrimination under these articles is not limited to *de jure* discrimination, but extends also to *de facto* discrimination.[3] The Parties appear to disagree about the extent to which a measure that is origin-neutral on its face, such that any Member could choose to meet its conditions, can nevertheless be *de facto* discriminatory.

5. Mexico's First Written Submission alleges that the amended measure accords less favourable treatment to imported products *vis-à-vis* like domestic products inconsistent with the obligation in Article III:4 as:

> … the Panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a

[1] Mexico First Written Submission, 8 April 2014, para. 99.

[2] See Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, p. 937, para. 47 where the arbitrator noted that a thirty day grace period was required for the enforcement of certain measures under Korean law and included this additional period after the promulgation of the amendments to the legislation as part of the RPT.

[3] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985, para. 78; Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012 (*US – Clove Cigarettes*), para. 181; Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014 (*EC – Seal Products*), para. 5.101.

> dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label.[4]

6. By contrast, the United States submit that:

> The amended measure has no exceptions – the eligibility requirements apply to all tuna products. And those eligibility requirements relate to fishing methods, which is not an immutable condition. Any Member may produce non-eligible tuna products one year and eligible products the next year, depending on the different choices that its fleet makes year to year.[5]

7. New Zealand does not comment on whether there is *de facto* discrimination in the instant case but would like to make some general observations. New Zealand notes that the Appellate Body made the following comments on *de facto* discrimination under Article 2.1 of the TBT Agreement in the original proceedings:

> In its analysis, the Panel appears to juxtapose factors that "are related to the nationality of the product" with other factors such as "fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices." In so doing, the Panel seems to have assumed, incorrectly in our view, that regulatory distinctions that are based on different "fishing methods" or "geographical location" rather than national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the *TBT Agreement.* The Panel's approach is difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2.1 even when it is origin-neutral on its face.[6]

8. Like the Appellate Body, New Zealand considers that there can be *de facto* discrimination where a regulatory distinction is based on matters other than national origin, or characteristics with an inherent relationship with origin. New Zealand cautions against any approach that would restrict de facto discrimination to instances where the relevant distinction is inherently related to origin. Narrowing the ambit of de facto discrimination under the GATT and the TBT Agreement in this way would significantly limit the effectiveness of one of the core obligations in the WTO rules. The fact that a Member could theoretically comply with conditions, or could theoretically access an advantage, is not an automatic or complete answer to a discrimination claim. A non-discrimination assessment should continue to focus on whether the impugned measure modifies the competitive conditions of the relevant market under Article III:4 of the GATT and Article 2.1 of the TBT Agreement,[7] and whether an advantage has been accorded immediately and unconditionally to like products originating in or destined for the territory of other Members under Article I:1.[8]

IV. "TREATMENT NO LESS FAVOURABLE"

A. Article 2.1 of the TBT Agreement

9. The Appellate Body has clarified that an assessment of "treatment no less favourable" under Article 2.1 of the TBT Agreement requires panels to assess whether the technical regulation modifies the conditions of competition in the relevant market to the detriment of the imported products *vis-à-vis* like domestic products or like imported products from another country. However, a finding of detrimental impact on competitive opportunities is not dispositive of "less favourable treatment" under Article 2.1.[9] The Appellate Body has clarified that a regulatory

[4] Mexico First Written Submission at para. 329 (footnote omitted).

[5] United States First Written Submission at para. 312.

[6] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012 (*US – Tuna II (Mexico)*), para. 225.

[7] See, for example, Appellate Body Reports, *EC – Seal Products*, para. 5.116 and *US – Tuna II (Mexico)*, para. 237.

[8] Appellate Body Reports, *EC – Seal Products*, para. 5.86.

[9] Appellate Body Report, *US – Clove Cigarettes*, para. 182, as followed in Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215 and Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012 (*US – COOL*), para. 271.

distinction that is not designed in an even-handed manner will not be legitimate.[10] In determining whether a regulatory distinction is even-handed, panels have been directed to consider the "design, architecture, revealing structure, operation, and application of the technical regulation at issue".[11] New Zealand submits that examination of these aspects should focus on the rationale or objective that the regulatory distinction pursues, and assess this against the objective of the measure as a whole.

10. In this dispute, the even-handedness assessment would involve consideration of the United States' rationale for distinguishing between tuna products containing tuna caught by setting on dolphins in the Eastern Tropical Pacific and tuna harvested by other methods in other areas of the ocean. New Zealand submits that the Panel should consider whether this rationale is consistent with the overall objective of the amended dolphin-safety measure. For instance, does the distinction assist or hinder the dolphin-safety objective? Is eligibility for the label tailored to the different levels of dolphin-safety risks arising from the different fishing methods? In other words, is the rationale for the distinction consistent with the measure's overall objective?

B. Article III:4 of the GATT 1994

11. There appears to be some disagreement between the parties about whether the purpose of the measure is relevant to assessing whether it accords "treatment no less favourable" to imported products *vis-à-vis* domestic products. The United States suggests that the purpose and nature of a measure should be assessed as part of the Article III:4 analysis. The United States submits that to do otherwise "would doom many legitimate and genuinely non-discriminatory measures"[12] to inconsistency with Article III:4 of the GATT.

12. The exclusion of the nature and purpose of the measure from an Article III:4 analysis should not be viewed in isolation, but in the context of the requirements of that provision as a whole. The analysis of "treatment no less favourable" contains a number of elements: in order for there to be a breach, the measure at issue must "modify the conditions of competition" to the detriment of imported products;[13] and there must be a "genuine relationship" between any detrimental impact and the measure at issue.[14] Article III:4 does not prevent Members from regulating in the public interest, including by treating imported and domestic products differently. However, it imposes disciplines on *how* Members regulate in order to protect the equality of competitive conditions for like domestic and imported products. Members may regulate to treat domestic and imported products differently, so long as this difference does not detrimentally affect the conditions of competition for imported products. In addition, there will only be a breach of Article III:4 if this detrimental impact is attributable to the measure itself because there is a "genuine relationship" between the measure and the detrimental impact. The exceptions articulated in Article XX of the GATT provide Members with further freedom to regulate for the public policy objectives outlined in the paragraphs set out in that article.

13. New Zealand therefore does not believe that excluding the nature and purpose of the measure from an examination of "treatment no less favourable" under Article III:4 would restrict a Member's right to regulate for legitimate objectives as the United States suggests.

14. New Zealand also notes that a number of third parties have commented on the different tests under Article 2.1 of the TBT Agreement and Article III:4 of the GATT[15] and the risk of conflicting findings under those two articles if the nature and purpose of a measure is excluded

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[10] Appellate Body Report, *US – Clove Cigarettes*, para. 182 as followed in Appellate Body Reports, *US – COOL*, para. 271.

[11] Appellate Body Report, *US – Clove Cigarettes*, para. 182 as followed in Appellate Body Reports, *US – COOL*, para. 271.

[12] United States Second Written Submission, para. 142.

[13] Appellate Body Reports, *EC – Seal Products*, para. 5.101 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 179; Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203 (*Thailand – Cigarettes (Philippines)*), para. 128; and Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5, para. 137).

[14] Appellate Body Reports, *EC – Seal Products*, para. 5.101 (referring to Appellate Body Report, *US – COOL*, para. 270 that in turn quotes Appellate Body Report, *US – Tuna II (Mexico)*, footnote 457 to para. 214, in turn referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134).

[15] Canada third party submission, paras. 43-46, Japan third party submission, paras. 10-15 and Norway third party submission, paras. 9-10.

from the Article III:4 analysis.[16] This could arise because Article XX of the GATT contains a closed list of objectives, while potentially any objective pursued by a regulatory distinction is relevant under Article 2.1 of the TBT Agreement. A regulatory distinction that pursues an objection that is not listed in Article XX could therefore theoretically be consistent with Article 2.1 of the TBT Agreement but inconsistent with Article III:4.

15. The potential for an incoherent result is most likely to arise where the objective of a regulatory distinction does not fall within the exceptions enumerated in Article XX. This is not the situation in the present dispute, where the United States has invoked the exceptions in Article XX(b) and (g). In any event, New Zealand's view is that the potential incoherence between Article 2.1 and Article III:4 is unlikely to be resolved as a matter of strict legal interpretation. We refer to the Appellate Body's statement in *EC – Seal Products* that "if there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance."[17]

[16] Japan third party submission, paras. 11-13.
[17] Appellate Body Reports, *EC – Seal Products*, para. 5.129.

ANNEX C-9

EXECUTIVE SUMMARY OF THE THIRD-PARTY SUBMISSION OF NORWAY[*]

I. INTRODUCTION

1. Norway welcomes the opportunity to be heard and to present its views as a third party in this proceeding under Article 21.5 of the Dispute Settlement Understanding (DSU).

2. Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will in this written submission confine itself to discuss certain aspects of the interpretation of Article III:4 of the GATT 1994.

II. GATT 1994 ARTICLE III:4

A. Introduction

3. GATT 1994 Article III:4 provides in relevant parts that

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

4. Mexico and the United States disagree on whether the Amended Tuna Measure[1] accords Mexican tuna products "treatment no less favourable than that accorded" like tuna products from the United States. With regard to the legal standard, the focus of the disagreement seems to be whether the underlying rationale – the basis – on which the member is regulating, must be part of the examination when assessing "less favourable treatment" under the GATT 1994 Article III:4[2], or if it is sufficient to demonstrate that the measure "has a detrimental impact on the competitive opportunities for imported […] products […] *vis-à-vis* domestic […] products".[3] Accordingly, the Parties seems to disagree on whether or not there is a need to assess if the detrimental impact "reflects discrimination against like imported products, including an "additional inquiry" as to whether the detriment is related to the foreign origin of the product"[4]

5. Norway takes no position on the facts of the dispute, but will in the following submit its views on the legal interpretation of what constitutes "less favourable treatment" under GATT 1994 Article III:4.

B. Less Favourable Treatment

6. There are several prior panel and Appellate Body reports in which the term "treatment no less favourable" in Article III:4 of the GATT 1994 has been interpreted. In *EU – Seals*, the Appellate Body held that "the following propositions are well established" as a result of these prior reports:

> First, the term "treatment no less favourable" requires effective equality of opportunities for imported products to compete with like domestic products. Second, a formal difference in treatment between imported and domestic like products are necessary, nor sufficient, to establish that imported products are accorded less favourable treatment than that accorded to like domestic products. Third, because Article III:4 is concerned with ensuring effective equality of competitive conditions for

[*] Norway requested that its third party submission serve as its executive summary.
[1] The measure is described in the Parties' submissions, see i.a. Mexico's First Written Statement part II and United States' First Written Submission part II.A.
[2] United States' First Written Submission para. 304.
[3] Mexico's Second Written Submission para. 219.
[4] Mexico's Second Written Submission para. 219.

> imported products, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and domestic like products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4. Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on the competitive opportunities for imported products.[5]

7. Article III:4 applies to both *de jure* and *de facto* discrimination.[6] In considering claims of *de facto* discrimination, a panel "must take into consideration 'the totality of facts and circumstances before it', and assess any 'implications' for competitive conditions 'discernible from the design, structure, and expected operation of the measure'".[7] The assessment must be founded on a careful analysis of the contested measure and its implications in the marketplace.[8]

8. The Appellate Body has held that distinctions between imported and like domestic products may be drawn without necessarily according less favourable treatment to the imported products. However, there is a point at which the differential treatment of imported and like domestic products amounts to "treatment no less favourable" within the meaning of Article III:4. [9] According to the Appellate Body, that is when the regulatory differences distort the conditions of competition to the detriment of imported products. If that happens, "then the differential treatment will amount to treatment that is less favourable within the meaning of Article III:4."[10] A further inquiry into the rationale of, or the justification for, the regulatory differences is not required for a finding of a violation under GATT 1994 Article III:4.

9. It is worth noting, that the legal standard for assessing "treatment no less favourable" under Article III:4 of the GATT 1994 differs from the legal interpretation of the identical term in Article 2.1 of the Agreement *on Technical Barriers to Trade* (*TBT Agreement*). Under Article 2.1 of the *TBT Agreement*, there is a second step in the legal analysis, in addition to the examination of whether the contested measure modifies the conditions of competition in the relevant market to the detriment of imported products. The extra step involves an inquiry into whether the detrimental impact (where found) can be explained from stemming exclusively from a legitimate regulatory distinction. As explained above and, and as stated by the Appellate Body in *EU – Seals*, this second step, is not required under Article III:4 of the GATT 1994:

> We do not consider […] that for the purposes of an analysis under Article III:4, a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate distinction.[11]

10. The difference between the legal standards under GATT Article III:4 and Article 2.1 of the *TBT Agreement* is due to the "immediate contextual differences" between the *TBT Agreement* and the GATT 1994.[12] Under GATT 1994 Article III:4, any justifications for the regulatory distinction giving rise to the detrimental impact may be considered pursuant to the exceptions set forth in this Agreement, notably under Article XX. The *TBT Agreement* does not contain a general exceptions clause similar to that of the GATT 1994. Instead, the sixth recital of the preamble of the *TBT Agreement* indicates that a Member has a right to adopt measures necessary to fulfil certain legitimate policy objectives, provided they are not applied in a manner that would constitute a means of arbitrary and unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement.[13] In

[5] Appellate Body Report, *EU – Seals*, para. 5.101 (footnotes omitted).
[6] See, e.g. Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[7] Appellate Body Report, *US – COOL*, para 269 (footnotes omitted).
[8] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[9] Appellate Body Report, *EU – Seals*, para 5.109.
[10] Appellate Body Report, *Thailand – Cigarettes (Phillippines)*, para. 128.
[11] Appellate Body Report, *EU – Seals*, para. 5.117.
[12] Appellate Body Report, *EU – Seals*, para. 5.125.
[13] Appellate Body Report, *US – Clove Cigarettes*, para. 109.

this context, the Appellate Body has set out that, under Article 2.1, if a regulatory distinction has a detrimental impact on imports, a panel may assess its legitimacy under Article 2.1 itself.[14]

III. CONCLUSION

11. Norway respectfully requests the Panel to take account of the considerations set out above.

[14] Appellate Body Report, *US – Clove Cigarettes*, para. 109.

ANNEX C-10

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF NORWAY
AT THE MEETING OF THE PANEL*

I. INTRODUCTION

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings.

2. In its written statement, Norway addressed certain aspects of the interpretation of Article III:4 of the GATT 1994. We will not repeat these arguments here. Rather, we would like to draw the Panel's attention to two issues of relevance to the interpretation of Article 2.1 of the Agreement *on Technical Barriers to Trade* (TBT Agreement).

3. The legal standard for establishing a violation of Article 2.1 of the TBT Agreement involves a finding of less favourable treatment, which again involves a two-step analysis. First, the complainant must establish 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.[1] Second, it must be shown that the detrimental impact on imported products does not stem exclusively from a legitimate regulatory distinction (LRD).[2] Both of the questions that we will comment upon today are related to the second step.

II. THE SCOPE OF THE ANALYSIS

4. The first question that we will address is: what is the scope of the Panel's analysis when determining whether the detrimental impact stems exclusively from a LRD. In the view of the United States, the scope should be confined to those aspects of the measure forming the regulatory distinction.[3] Norway agrees with Canada that the approach proposed by the United States is not in line with the standard articulated in the jurisprudence.[4]

5. In previous TBT cases, the Appellate Body has concluded that "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".[5]

6. In other words, while the regulatory distinction that accounts for the detrimental impact naturally will be in focus of the examination, the panel must look further when undertaking its analysis. Indeed, in accordance with what the Appellate Body has articulated, rather than conducting a limited inquiry only into those parts of the measure constituting the regulatory distinction, the Panel must undertake a thorough assessment on a case-by-case basis of the different elements of the technical regulation. In its determination of whether the detrimental impact reflects discrimination in violation of Article 2.1, the panel must carefully consider the overall architecture of the technical regulation as designed and applied and the even-handedness of the measure as a whole.

III. THE TEST FOR DETERMINING WHETHER OR NOT THE DETRIMENTAL IMPACT STEMS EXCLUSIVELY FROM A LRD

7. The second issue, on which we would like to make a few comments, is related to which *test* should be applied when determining whether the detrimental impact stems exclusively from a LRD. In the so-called TBT Trilogy Cases, the Appellate Body has articulated that the relevant inquiry

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* Norway requested that its oral statement serve as its executive summary.
[1] Appellate Body Report, *US – Clove Cigarettes*, para. 180.
[2] Appellate Body Report, *US – Clove Cigarettes*, paras. 181-182.
[3] United States' First Written Submission, paras. 191 and 222.
[4] Canada's Third Party Submission para. 10.
[5] Appellate Body Report, *US – Clove Cigarettes*, para 182.

when making this determination, 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.[6]

8. In its first written submission, Mexico acknowledges this, but in addition, submits that the panel in *EU – Seals* has set out the most recent elaboration of the test to be applied when analysing the legitimacy of the regulatory distinction. [7] That test included three steps; "step 1" addressing the rational connection between the distinction and the objective of the measure; "step 2" considering whether an otherwise rationally disconnected distinction can be justified by some other "rationale"; and "step 3" addressing whether the distinction is applied in an even-handed manner. [8]

9. In Norway's view, the three steps articulated by the panel in *EU – Seals* does not properly reflect the analytical framework developed in the previous TBT cases. In particular, the test by the panel in *EU – Seals* seems to be at odds with previous jurisprudence when setting up separate inquiries (steps 1 and 2) into the measure's policy objective or other justifications for the regulatory distinction. In the previous cases, the consideration of whether there is a rational connection between the policy objective and the regulatory distinction, or, in the absence of such rational connection, whether there are other cogent reasons explaining the regulatory distinction, has been an integral part of the even-handedness analysis. Indeed, this consideration played an important role in the even-handedness analysis both in *US – Clove Cigarettes* and *US – COOL*.

10. The analytical framework relied on by the Appellate Body in this regard, is not the same as the analysis used in the context of Article XX of the GATT 1994. The need to conduct independent analyses under these two provisions was recently confirmed by the Appellate Body in *EU – Seals*[9]. At the same time, however, the Appellate Body has underscored that there are "important parallels between the analyses" to be applied under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994.[10] In light of this, the even-handedness analysis under Article 2.1 may be informed by the jurisprudence interpreting the term "arbitrary and unjustifiable discrimination" under the chapeau of Article XX. This supports our view that the assessment of the identified policy objectives, or other justifications for the distinction, must take place *as part* of the even-handedness analysis under Article 2.1 of the TBT Agreement.

11. Mr. Chairman, distinguished Members of the Panel, this concludes Norway's statement today.

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[6] Appellate Body Report, *US – Clove Cigarettes*, para. 182 and Appellate Body Report, *US – COOL*, para. 271.

[7] See Mexico's first written submission para. 240. The Appellate Body in *EU – Seals* found that the measure in that case was not a technical regulation and declared "moot and of no legal effect" the findings and conclusions of the Panel with respect to the TBT Agreement, including this particular test.

[8] Panel Reports, *EU – Seals*, paras. 7.259 and 7.328.

[9] Appellate Body Reports, *EU – Seals*, para. 5.313.

[10] Appellate Body Reports, *EU – Seals*, para. 5.310.