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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

AB-2015-6

Report of the Appellate Body

Addendum

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

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

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ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

1. Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and to Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by Mexico* (WT/DS381/RW) ("Panel Report") and certain legal interpretations developed by the Panel.

2. The United States seeks review by the Appellate Body of the Panel's findings and conclusion that the amended U.S. dolphin safe labeling measure is inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") because it accords less favorable treatment to Mexico's tuna and tuna product exports.[1] This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including:

(a) the Panel's finding that the certification requirements of the amended measure modify the conditions of competition in the U.S. market to the detriment of like Mexican tuna and tuna products because they impose a lighter burden on tuna and tuna product caught outside the Eastern Tropical Pacific (ETP) large purse seine fishery than on tuna and tuna product caught within it.[2]

(b) the Panel's finding that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions because the requirements for tuna caught outside the ETP large purse seine fishery may result in inaccurate information being passed to consumers.[3]

(c) the Panel's finding that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions due to the design of the determination provisions.[4]

(d) the Panel's finding that the tracking and verification requirements of the amended measure modify the conditions of competition in the U.S. market to the detriment of like Mexican tuna and tuna products because they impose a lesser burden on tuna and tuna product caught outside the ETP large purse seine fishery than on tuna and tuna product caught within it.[5]

(e) the Panel's finding that the detrimental impact caused by the tracking and verification requirements does not stem exclusively from legitimate regulatory distinctions.[6]

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* This Notice, dated 5 June 2015, was circulated to Members as document WT/DS381/24.

[1] *See, e.g.*, Panel Report, paras. 7.233, 7.263, 8.2(b) (with respect to the certification requirements); *id.* paras. 7.400, 8.2(c) (with respect to the tracking and verification requirements).

[2] *See, e.g.,* Panel Report, paras. 7.162, 7.170, 7.178-179, 7.454, 7.500, 8.2(b). The United States considers that the Panel erred as a matter of law with respect to this finding. However, to the extent that the Appellate Body considers the question of the meaning of municipal law in this instance to be a question of fact, the Panel acted inconsistently with Article 11 of the DSU in concluding that the certification requirements apply to ***all*** tuna and tuna product.

[3] *See e.g.*, Panel Report, paras. 7.233-7.234, 7.246, 7.598-7.602, 8.2(b).

[4] *See e.g.*, Panel Report, paras. 7.258-263, 7.283, 8.2(b).

[5] *See, e.g.*, Panel Report, paras. 7.369-7.372, 7.382, 7.462-7.463, 7.502, 8.2(c). The United States considers that the Panel erred as a matter of law with respect to this finding. However, to the extent that the Appellate Body considers the question of the meaning of municipal law in this instance to be a question of fact, the Panel acted inconsistently with Article 11 of the DSU in concluding that the tracking and verification requirements apply to ***all*** tuna and tuna product.

[6] *See, e.g.*, Panel Report, paras. 7.392, 7.395, 7.397-7.402, 8.2(c).

3. The United States also seeks review by the Appellate Body of the Panel's findings and conclusions that the amended U.S. dolphin safe labeling measure is inconsistent with Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")[7] and, if the Appellate Body should not reverse the Panel's finding with respect to either Article I:1 or Article III:4, then the United States seeks review of the Panel's findings that the amended measure is not applied consistently with the Article XX chapeau.[8] These conclusions are in error and are based on erroneous findings on issues of law and legal interpretations, including:

(a) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they require observer coverage for purse seine vessels in the ETP but not for vessels in other fisheries.[9]

(b) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they impose a lesser burden on vessels outside the ETP large purse seine fishery than on vessels within it.[10]

(c) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.[11]

(d) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.[12]

(e) the Panel's finding that the certification requirements of the amended measure impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail," contrary to the chapeau of Article XX of the GATT 1994, because the requirements for tuna and tuna product caught outside the ETP large purse seine fishery make it easier for non-dolphin-safe tuna to be incorrectly labeled as dolphin safe.[13]

(f) the Panel's finding that the certification requirements of the amended measure impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail," contrary to the chapeau of Article XX of the GATT 1994, due to the design of the determination provisions.[14]

(g) the Panel's finding that the tracking and verification requirements impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail" contrary to the chapeau of Article XX of the GATT 1994 because they impose a lesser burden on tuna caught other than in the ETP large purse seine fishery.[15]

4. The United States also requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter before it, as called for by Article 11 of the DSU, with regard to the so-called "determination provisions."[16] The Panel drew its conclusions with regard to these

[7] *See, e.g.*, Panel Report paras. 7.455-456, 7.500-7.501, 7.504, 8.3(b) (with respect to the certification requirements); *id.* paras. 7.464-465, 7.502-7.504, 8.3(c) (with respect to the tracking and verification requirements).

[8] *See, e.g.*, Panel Report, paras. 7.603-7.605, 8.5(b) (with respect to the certification requirements); *id.* paras. 7.611, 8.5(c) (with respect to the tracking and verification requirements).

[9] *See, e.g.*, Panel Report, paras. 7.455-7.456, 8.3(b).

[10] *See, e.g.*, Panel Report, paras. 7.463-7.465, 8.3(c).

[11] *See, e.g.*, Panel Report, paras. 7.500-7.501, 8.3(b).

[12] *See, e.g.*, Panel Report, paras. 7.502-7.503, 8.3(c).

[13] *See, e.g.*, Panel Report, paras. 7.598-7.603, 7.605, 8.5(b).

[14] *See, e.g.*, Panel Report, paras. 7.604-7.605, 7.607, 8.5(b).

[15] *See, e.g.*, Panel Report, paras. 7.610-7.611, 8.5(c).

[16] *See* Panel Report, paras. 7.258-7.263, 7.604.

provisions based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.[17]

5. In the event that Mexico appeals the finding by the Panel that the amended measure, including the three challenged elements, is provisionally justified under subparagraph (g) of Article XX of the GATT 1994 and the Appellate Body reverses the finding with respect to any of the three challenged elements, the United States seeks review of the Panel's exercise of judicial economy with respect to the U.S. defense under Article XX(b) of the GATT 1994.[18] The United States submits that there are sufficient facts on the record for the Appellate Body to complete the analysis of the amended measure, including the three challenged elements, and find that the measure is provisionally justified under Article XX(b).

[17] *See, e.g.*, Panel Report, paras. 7.258-7.263, 7.604.
[18] *See* Panel Report, paras. 7.543-7.545.

ANNEX A-2

MEXICO'S NOTICE OF OTHER APPEAL*

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23(1) of the *Working Procedures for Appellate Review*, the United Mexican States (Mexico) hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by Mexico)* (WT/DS386/RW) (Panel Report).

2. Pursuant to Rules 23(1) and 23(3) of the *Working Procedures for Appellate Review*, Mexico is simultaneously filing this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat.

3. The measure at issue in this dispute concerns the amended tuna measure which comprises: (i) Section 1385 ("Dolphin Protection Consumer Information Act") (DPCIA), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (ii) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule; and (iii) the court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

4. Pursuant to Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

I. The Panel Erred in Finding and Concluding that Specific Requirements under the Amended Tuna Measure were Inconsistent with WTO Provisions Rather than the Measure as a Whole

5. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to modify, the findings and conclusions of the Panel that only two of the three elements of the amended tuna measure are inconsistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Articles I:1 and III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

6. While Mexico agrees with some of the reasoning and findings in the Panel's Report, the Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with those provisions rather than limiting its ruling to specific elements.

7. The Panel should have concluded that the amended tuna measure as a whole 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 GATT 1994, the inconsistencies were not justifiable under Article XX. The Panel's failure to do so is a legal error.[1]

II. The Panel Erred in its Findings Regarding the Fishing Method Eligibility Criteria when Assessing the Consistency of the Amended Tuna Measure with Article 2.1 of the TBT Agreement

8. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusion of the Panel, with respect to the fishing method eligibility criteria when assessing the consistency of the amended tuna measure with Article 2.1 of the TBT Agreement.

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* This document, dated 10 June 2015, was circulated to Members as document WT/DS381/25.

[1] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.97-7.108, 7.179, 7.233, 7.246, 7.258-7.259, 7.283, 7.382, 7.400, 7.428, 7.430, 7.442, 7.451, 7.455-7.456, 7.464-7.465, 7.492, 7.501, 7.503, 7.504, 7.541, 7.605, 7.607, 7.611, 8.2(b), 8.2(c), 8.3(b), 8.3(c), 8.5(b), 8.5(c) of the Panel Report.

The Panel's conclusion is an error and is based on erroneous findings on issues of law and legal interpretation.[2]

9. Particularly, the Panel erred in finding that the Appellate Body previously ruled on this issue. It further erred in finding that the eligibility criteria were applied in an even-handed manner. Instead, it should have found that the eligibility criteria lacked even-handedness and, therefore, by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction.

10. Mexico also requests the Appellate Body to find that the panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU in relation to the following factual findings: (i) changing its factual findings regarding unobserved adverse effects for dolphin sets from the original proceedings without any new evidence to support such a change; (ii) finding that other fishing methods have no unobservable adverse effects and omitting consideration of contrary evidence on the record; and (iii) finding that the Appellate Body found that dolphin sets are particularly more harmful to dolphins than other fishing methods when no such finding was made by the Appellate Body.[3]

11. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel, reverse the Panel's finding that the eligibility criteria are applied in an even-handed manner and find, instead, that by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction and, for this additional reason, the amended tuna measure is inconsistent with Article 2.1.

III. The Panel Erred in its Findings Regarding Independent Observers under the Certification Requirements when Assessing the Consistency of the Amended Tuna Measure with Article 2.1 of the TBT Agreement

12. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panel, with respect to the findings regarding independent observers under the certification requirements when assessing the consistency of the amended tuna measure with Article 2.1 of the TBT Agreement. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.[4]

13. Particularly, the Panel erred by not finding that (i) in respect of dolphin-safe certifications, captains in some cases may have an economic conflict of interest, making their certifications less reliable, and (ii) the justification for differing requirements provided by the United States that circumstances in the Eastern Tropical Pacific (ETP) are unique is in fact contradicted by evidence that tuna associate with dolphins in other ocean regions, in particular the Indian Ocean. Mexico requests the Appellate Body to find that the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU, with respect to these findings.

14. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reasons that dolphin sets are made outside of the ETP and captains' self-certifications create gaps in the dolphin-safe designation, that the certification requirements are not applied in an even-handed manner, and accordingly, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction, and for this additional reason the amended tuna measure is inconsistent with Article 2.1.

IV. The Panel Erred in its Findings Regarding the Eligibility Criteria when Assessing the Consistency of the Amended Tuna Measure under the Chapeau of Article XX

15. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panel, with respect to the findings regarding the eligibility criteria when assessing the consistency of the amended tuna measure under the chapeau of

[2] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.117-7.134 and 8.2(a) of the Panel Report.

[3] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.130, 7.135, 7.120, 7.130, 7.132, 7.134 and 7.135 of the Panel Report.

[4] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.208-7.211, 7.241-7.242 and 7.595-7.597 of the Panel Report.

Article XX of the GATT 1994. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.[5]

16. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel and find that for this additional reason that the eligibility requirements demonstrate that the amended tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail and, therefore, the requirements of the chapeau are not met.

[5] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.545, 7.577, 7.581-7.582, 7.584-7.585 and 8.5(a), of the Panel Report.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

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ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION

1. In the underlying dispute, the Appellate Body found that the U.S. dolphin safe labeling measure was inconsistent with Article 2.1 of the TBT Agreement. The United States took careful note of the concern identified by the Appellate Body and addressed it through the 2013 Final Rule. Specifically, the Appellate Body found that the original measure was inconsistent with Article 2.1 because tuna product produced from the ETP large purse seine fishery was ineligible for the dolphin safe label if a dolphin was killed or seriously injured in the set in which the tuna was caught, but this condition did not apply to tuna product produced from other fisheries.[1] Under the amended measure, this condition applies to all tuna product, regardless of the fishery in which the tuna was caught.[2] Thus the United States considers that the amended measure is consistent with Article 2.1 of the TBT Agreement and with the non-discrimination provisions of the GATT 1994.

2. The Panel disagreed, however, finding that certain aspects of the amended measure – namely the certification and tracking and verification requirements – were inconsistent with Article 2.1 of the TBT Agreement and Articles I:1: and III:4 of the GATT 1994 and not justified under the chapeau of Article XX. As described below, the United States considers that these findings of the Panel are in error and respectfully requests that the Appellate Body reverse the Panel's findings and find that the amended measure is fully consistent with the non-discrimination provisions of the TBT Agreement and the GATT 1994.

3. Section II of this submission sets out the context in which the U.S. measure must be understood and assessed. It explains that the harvest of fish around is governed by numerous national and supranational institutions. One – the AIDCP – was established in response to a unique dolphin mortality crisis specifically to document and mitigate dolphin bycatch due to tuna fishing. The unique requirements and programs that the AIDCP parties imposed on their tuna industries reflect this unique objective. The AIDCP requirements include mandatory on-board observers and a tuna tracking and verification system. No other fisheries management body has faced a situation similar to that in the ETP large purse seine fishery, and no other body has adopted requirements similar to the AIDCP.

4. Sections III through VI then set out the U.S. appeals of the Panel's findings.

1. ARTICLE 2.1 OF THE TBT AGREEMENT

5. In Section III of this submission, the United States explains that the Panel erred in finding the amended measure to be inconsistent with Article 2.1 of the TBT Agreement. Subsections A, B, and C provide an introduction to the U.S. arguments, summarize the legal standard of Article 2.1, and describe the applicable burden of proof in WTO dispute settlement proceedings. Subsections D and E describe the DSB recommendations and rulings in the original proceeding and the U.S. measure taken to comply, the 2013 Final Rule, which directly addressed those recommendations and rulings.

a. The Panel Erred in Finding that the Certification Requirements Are Inconsistent with Article 2.1

6. In Section III.G, the United States explains that the Panel erred in finding that the certification requirements of the amended measure accord less favorable treatment to Mexican tuna product than that accorded to like products from the United States and other Members.

7. In Section III.G.3, the United States explains that the Panel erred in finding that the certification requirements modify the condition of competition in the U.S. market to the detriment of Mexican tuna product. The United States considers that the Panel's findings are in error in three respects. If the Appellate Body were to find in favor of the United States on any one of these three

[1] *US – Tuna II (Mexico) (AB)*, paras. 289-292, 298.
[2] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.142.

appeals, the Appellate Body should consequently reverse the Panel's finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Such a reversal would mean that the Panel's finding that the certification requirements are inconsistent with of Article 2.1 would also need to be reversed.[3]

8. First, as explained in Section III.G.3.a, the Panel erred in its allocation of the burden of proof. The Appellate Body has been clear that nothing in its Article 2.1 analysis alters the traditional allocation of the burden of proof[4] whereby a complainant must establish a *prima facie* case for all the elements of its claims.[5] Here, Mexico argued that the certification requirements have a detrimental impact on Mexican tuna products due to differences in the *accuracy* of the certifications for tuna caught inside and outside the ETP large purse seine fishery.[6] The Panel made no "definitive finding" on this issue.[7] Instead, the Panel found a detrimental impact based on an entirely different theory, namely a difference in observer-related costs, that Mexico had never asserted or introduced evidence to support. Thus the Panel erred in making an alleged *prima facie* case for Mexico, and the Panel's finding of detrimental impact was in error.

9. Second, as explained in Section III.G.3.b, the Panel erred in finding that any difference in observer-related costs modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product. A panel may not assume that a measure provides less favorable treatment merely because treatment provided to the imported product is *different* from that accorded to other like products.[8] And, indeed, past panels have actually analyzed whether the conditions of competition in the respondent's market have been altered to the detriment of the imported product. The Panel's analysis represented a significant departure from the Appellate Body's guidance and the approach of previous panels. The Panel neither identified the cost that Mexican producers may incur nor analyzed whether such costs modified the conditions of competition in the U.S. market. Instead, the Panel's analysis derived from potential costs to other countries of establishing an observer program – an inaccurate proxy. Thus, the Panel did not conduct an analysis on which to base a finding that the certification requirements modify the conditions of competition to the detriment of Mexican tuna product. As such, the Panel's finding of detrimental impact was in error.

10. Third, as explained in Section III.G.3.d, the Panel erred in finding that a genuine relationship exists between the amended measure and the detrimental impact. First, because Mexican tuna product is produced using a fishing method that renders the product ineligible for the label, the Panel was wrong to conclude that any differences in observer-related costs incurred by Mexico is "attributable" to the amended measure. In fact, the amended measure does *not* require Mexican tuna products, which are non-dolphin safe, tuna products to be accompanied by proof of an observer certificate *at all*. Second, even aside from this, any difference in observer-related costs is not "attributable" to the amended measure because the requirement to have an observer onboard Mexican ETP large purse seine vessels stems from Mexico's obligations under the AIDCP, not U.S. law. In fact, the U.S. measure does not cause or affect in any way the observer-related costs that different fleets and industries bear. As such, the Panel erred in finding a genuine relationship between the U.S. measure and any preexisting differences in observer-related costs.

11. For these reasons, the Panel's erred in finding that the certification requirements of the amended measure have a detrimental impact on the competitive opportunities of Mexican tuna product, and the United States respectfully requests that this finding and the finding of inconsistency with Article 2.1, which rests on this detrimental impact finding, be reversed.[9]

12. In Section III.G.4, the United States explains that the Panel erred in finding that any detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions. The United States appeals two aspects of the Panel's analysis. Because these two aspects appear to form independent bases for the Panel's finding regarding the even-handedness of the certification requirements, if the Appellate Body were to rule in favor of

[3] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).
[4] *US – Tuna II (Mexico) (AB)*, para. 216 (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).
[5] *US – Gambling (AB)*, para. 140.
[6] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.152.
[7] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169.
[8] *See, e.g.*, *Korea – Various Measures on Beef (AB)*, paras. 141, 144.
[9] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.170, 7.179, 8.2(b).

the United States on both of these appeals, it should, as a consequence, reverse the Panel's finding and, consequently, the Panel's ultimate finding of inconsistency with Article 2.1.[10]

13. First, in Section III.G.4.a, the United States explains that the majority panelists erred in finding that any detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction due to differences in education and training between those that certify that the tuna was harvested in a "dolphin safe" manner in the ETP large purse seine fishery (captains and AIDCP-approved observers) and those that certify in other fisheries (captains). Specifically, the majority applied an incorrect legal standard, asking whether the detrimental treatment is explained by the objectives pursed by the measure at issue," when the question under the second step of Article 2.1 is whether the regulatory distinctions that account for that detrimental impact "are designed and applied in an even-handed manner."[11]

14. Under the correct legal analysis, there are two bases for why any detrimental impact caused by the certification requirements does, in fact, stem exclusively from a legitimate regulatory distinction. First, the majority's own findings prove that the certification requirements are even-handed in that they are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. Specifically, the requirements reflect that, as the Panel found, the ETP large purse seine fishery has a different (greater) "risk profile" for dolphin harm than other fisheries, and the certification requirements are calibrated to that different risk profile. Second, the certification requirements are even-handed in that they are explained by a legitimate, non-discriminatory reason: they reflect the fact that the parties to the AIDCP have consented to impose a unique observer program on their tuna industries. The fact that the amended measure requires an observer certificate where an observer is already onboard the vessel *for that very purpose* and does not impose such a requirement where no such certifier is onboard, has a legitimate, non-discriminatory basis, and the majority erred in not finding so.

15. Second, as explained in Section III.G.4.b, the Panel erred in finding that the determination provisions were a further basis to find that the detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction. First, the Panel erred in its allocation of the burden of proof. Mexico did not raise this issue at all – much less set out a *prima facie* case of inconsistency – and the Panel erred in relieving Mexico of its burden. Second, the Panel erred in its reasoning and finding by applying the incorrect legal analysis and acting inconsistently with DSU Article 11. Specifically, the Panel erred by not analyzing whether the determination provisions support a finding that the certification requirements "are designed and applied" in an even-handed manner, and acted inconsistently with Article 11 by arriving at a finding that is unsupported by the evidence in the record. The Panel also erred by applying the incorrect legal analysis and failing to find that the determination provisions can be reconciled with the objectives of the amended measure.

16. In light of the above, the Panel erred in finding that any detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions, and United States respectfully requests that the Appellate Body reverse this finding and the finding of a breach of Article 2.1, which rests on this finding of detrimental impact.[12]

b. The Panel Erred in Finding that the Tracking and Verification Requirements Are Inconsistent with Article 2.1

17. In Section III.H, the United States explains that the Panel erred in finding that the tracking and verification requirements of the amended measure accord less favorable treatment to Mexican tuna product than that accorded to like products from the United States and other Members.

18. In Section III.H.3, the United States explains that the Panel erred in finding that the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. The United States appeals the Panel's analysis in four respects. If the Appellate Body were to rule in favor of the United States on any one of these four appeals, the Appellate Body should, consequently, reverse the Panel's finding that the tracking and

[10] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[11] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92; *see also US – Tuna II (Mexico) (AB)*, n. 461; *US – COOL (AB)*, para. 271.

[12] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.233-234, 7.263, 8.2(b).

verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Such a reversal would mean that the Panel's ultimate finding that the requirements are inconsistent with Article 2.1 would also need to be reversed.[13]

19. First, Section III.H.3.a explains that, for the same reasons discussed in Section III.G.3.a, the Panel erred in its allocation of the burden of proof. On this issue, Mexico argued that the absence of sufficient record keeping requirements for tuna product produced outside the ETP large purse seine fishery causes Mexican tuna product to lose competitive opportunities to product that may be incorrectly labelled dolphin safe.[14] The Panel made no "definitive finding" with regard to this argument.[15] Rather, the Panel found that a detrimental impact existed based on a *different* theory, *i.e.* that the tracking and verification requirements impose a different "burden" on different tuna product industries that has modified the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Mexico never raised or presented evidence in support of this argument and, therefore, never established a *prima facie* case. The matter should have ended there as a panel may not take it upon itself "to make the case for a complaining party."[16] In raising *sua sponte* an argument that Mexico never argued or proved, the Panel acted inconsistently with the burden of proof in this proceeding. Thus, the Panel's finding of detrimental impact was in error.

20. Second, as explained in Section III.H.3.b, the Panel erred in coming to a finding that is legally unsupportable based on the evidence on the record. The Panel found that the AIDCP and NOAA tracking and verification regimes were different in three respects: "depth, accuracy, and degree of government oversight."[17] The Panel found that these differences proved "modify the conditions of competition," as the NOAA regime is "less burdensome." The Panel never identified what this meant or provided any additional analysis of how this difference in "burden" modifies the conditions of competition in the U.S. market, *equating* any difference in "burden" with detrimental impact. The evidence regarding the differences that the Panel identified does not prove that the NOAA regime is less "burdensome" to adhere to than the AIDCP regime in any way that modifies the conditions of competition to the detriment of Mexican tuna product. Thus the Panel erred in coming to a legal conclusion on burden and detrimental impact for which there is no basis in the record.

21. Third, Section III.H.3.c explains that, for similar reasons to those discussed in Section III.G.3.b, the Panel erred by not applying the correct legal analysis in making its detrimental impact finding. The Panel considered that its finding of a difference in "burden" between the AIDCP and NOAA regimes, *ipso facto*, established a *prima facie* case as to the first step of Article 2.1. In fact, a panel must examine whether any difference it has identified modifies the conditions of competition to the detriment of the group of imported products. The Panel's failure do so was a significant departure from the clear guidance of the Appellate Body and the actual approach of previous panels. The Panel's finding of detrimental impact was in error.

22. Fourth, Section III.H.3.e explains that, for the reasons discussed in Section III.G.3.d, the Panel erred in finding that a genuine relationship exists between the U.S. measure and any detrimental impact. As with the certification requirements, the Panel's finding is in error on two different bases. First, the Panel erred by not taking into account the fact that Mexican tuna product *is not eligible for the dolphin safe label*. As such, the amended measure does not incorporate the AIDCP requirements or create any regulatory distinction with respect to Mexican tuna product. Second, the Panel failed to properly take into account that the regulatory distinction of the amended measure reflects the fact that the parties to the AIDCP have consented to rules regarding the operation of their large purse seine vessels in the ETP that are not replicated in other fisheries. Indeed, if the United States eliminated all references to the AIDCP in the amended measure, the difference in "burden" identified by the Panel *would still exist*.

[13] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).
[14] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288.
[15] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382; *see also id.* para. 7.372.
[16] *Japan – Agricultural Products II (AB)*, para. 129.
[17] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.354 (emphasis omitted).

23. For these reasons, the Panel's erred in finding that the tracking and verification requirements of the amended measure have a detrimental impact on the competitive opportunities of Mexican tuna product, and the United States respectfully requests that this finding and the related finding of inconsistency with Article 2.1 be reversed.[18]

24. In Section III.H.4, the United States explains that the Panel erred in finding that any detrimental impact caused by the tracking and verification requirements does not stem exclusively from legitimate regulatory distinctions. The Panel erred by applying the incorrect legal standard in its analysis. The second step of the Article 2.1 analysis is not a single-factor test based on whether a "rational connection" exists between the detrimental impact and the objectives of the measure but an analysis of whether the regulatory distinctions that account for the detrimental impact "are designed and applied in an even-handed manner."[19]

25. If the Appellate Body were to find in favor of the United States on this appeal, it should, consequently, reverse the Panel's finding that the detrimental impact does not stem exclusively from a legitimate regulatory distinction. Such a reversal would mean, that the Panel's ultimate finding that the tracking and verification requirements are not consistent with Article 2.1 of the TBT Agreement" would need to be reversed.[20]

26. In Sections III.H.4.a and III.H.4.b, the United States explains the two separate bases for why any detrimental impact caused by the different tracking and verification requirements stems exclusively from a legitimate regulatory distinction.

27. First, as was the case with the certification requirements, the tracking and verification requirements are even-handed because they are "calibrated" to the risks to dolphins from different fishing methods in different fisheries. The Panel *agreed* with the United States that the ETP large purse seine fishery has a different "risk profile" for dolphin harm than other fisheries. In light of that fact, it is entirely appropriate for the United States to set different requirements for tuna produced in the ETP large purse seine fishery than for tuna produced in other fisheries. Thus the fact that the AIDCP and NOAA regimes *are* different – and *may* have different rates of accuracy – cannot, standing alone, be a basis on which to find that the difference in the regimes is not even-handed where the risk profiles between the ETP large purse seine fishery and all other fisheries are so different.

28. Second, as explained with respect to the certification requirements in Section III.H.3.e, the tracking and verification requirements are even-handed because they reflect the fact that the parties to the AIDCP have consented to impose a unique tracking and verification regime on their own tuna industries. By "incorporating" the AIDCP requirements, the amended measure appropriately recognizes the utility of the AIDCP regime for the purposes of the amended measure. They Panel's analysis, by contrast, suggests that having done so, the United States is now required to impose the *same* regime on all tuna product, even though no other RFMO has created a parallel regime. In short, the AIDCP requirements form the "floor" of requirements below which the United States may not go. But that is certainly not true – the United States, and Mexico's international legal obligations, sets the level of protection it considers "appropriate."

29. In light of the above, the Panel erred in finding that any detrimental impact caused by the tracking and verification requirements does not stem exclusively from legitimate regulatory distinctions, and United States respectfully requests that the Appellate Body reverse this finding and the related finding of a breach of Article 2.1.[21]

30. And for all the above reasons, the United States respectfully requests the Appellate Body to reverse the Panel's finding that the amended measure is inconsistent with Article 2.1 of the TBT Agreement.[22]

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[18] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.372, 7.382, 8.2(c).
[19] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92; *US – COOL (AB)*, para. 271.
[20] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).
[21] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.392, 7.400, 8.2(c).
[22] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b)-(c).

2. THE GATT 1994

31. In Sections IV and V of this submission, the United States explains that, for all the reasons discussed in terms of Article 2.1 of the TBT Agreement in III.G.3 and III.H.3, the Panel erred in finding that the certification requirements and the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna and tuna products. Accordingly, the United States respectfully requests the Appellate Body to reverse the Panel's findings that the certification and tracking and verification requirements of the amended measure are inconsistent with Articles I:1 and III:4 of the GATT 1994.[23]

32. In Section VI, the United States explains its conditional appeal of the Panel's finding that the amended dolphin safe labeling measure is not justified under Article XX of the GATT 1994.

33. In Section VI.B, the United States explains that the Panel erred in finding that amended measure does not meet the requirements of the Article XX chapeau. The United States considers that, with respect to both the certification requirements and the tracking and verification requirements, the Panel erred in two independent respects – in finding that these elements of the amended measure discriminate under the chapeau and in finding that any such discrimination is "arbitrary and unjustifiable." If the Appellate Body were to rule in favor of the United States on one of these appeals, the Appellate Body should consequently reverse the Panel's finding that the certification or tracking and verification requirements, as relevant, are not consistent with the Article XX chapeau.[24]

34. In Section VI.B.1, the United States explains that the Panel erred in applying the incorrect legal analysis in examining whether the certification requirements and the tracking and verification requirements "discriminate" for purposes of the chapeau. It is well established that "discrimination within the meaning of the chapeau of Article XX 'results . . . when countries in which the same conditions prevail are differently treated.'"[25] The Panel's analysis, however, deviated significantly from this principle and from the Appellate Body's application of it. Specifically, with regard to both the certification requirements and the tracking and verification requirements, the Panel did not conduct the appropriate analysis of whether the relevant "conditions" are the same across countries and did not appear to consider that the examination of whether discrimination under the chapeau *existed* was a separate analysis from whether such discrimination is "arbitrary or unjustifiable."

35. Section VI.B.1.a explains that the Panel applied the incorrect legal analysis in examining whether the certification requirements discriminate for purposes of the chapeau. The Appellate Body has considered that the most pertinent guidepost for determining the relevant "conditions" is "the particular policy objective under the applicable subparagraph," although the GATT 1994 provision with which the measure was found inconsistent "may also provide useful guidance."[26] The certification requirements were justified under Article XX(g) as relating to the protection of dolphins. In light of this objective, the relevant "condition" for purposes of the chapeau analysis is *the relative harm* (both observed and unobserved) suffered by dolphins from different fishing methods in different fisheries. And the findings of the Appellate Body in the original proceeding and the Panel in this dispute affirm that this "condition" is *not* the same in the ETP large purse seine fishery and all other fisheries. As such, no "discrimination" – as the term is understood for purposes of the chapeau – exists with respect to the certification requirements.

36. Furthermore, the Panel erred in seeming find that the certification requirements discriminated under the chapeau due to any difference in the accuracy of the dolphin safe certifications for tuna caught inside and outside the ETP large purse seine fishery. The Panel made no "definitive finding" as to whether any difference in accuracy discriminates against Mexican tuna product for purposes of Articles I:1 and III:4, noting in its Article 2.1 analysis that to do so would have required "a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled."[27] As such, even under the Panel's own view, there was insufficient evidence on the record to prove that the certification requirements discriminate on the grounds

[23] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.3(b), 8.3(c).
[24] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).
[25] *EC – Seal Products (AB)*, para. 5.303 (quoting *US – Shrimp (AB)*, para. 165).
[26] *EC – Seal Products (AB)*, para. 5.300; *see also id.* para. 5.317.
[27] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169.

that tuna product produced outside the ETP large purse seine fishery without an observer onboard has a "competitive advantage" over Mexican tuna product. Indeed, as discussed above in section III.G.3.c, the evidence on the record suggests just the opposite. The quantitatively and qualitatively different nature of dolphin interactions in the ETP large purse seine fishery is such that it is far more difficult to make an accurate certification in the ETP large purse seine fishery than in other fisheries. And there is no evidence on the record to suggest that any advantages in education and training that an AIDCP-approved observer may have over a captain fully compensate for this increased level of difficulty.

37. Section VI.B.1.b then explains that the Panel applied the incorrect legal analysis in examining whether the tracking and verification requirements discriminate for purposes of the chapeau. The Panel did not even mention the analysis of whether this aspect of the measure discriminated between countries where "the same conditions prevail" or make a finding in this regard. For the same reasons discussed with regard to the certification requirements, the tracking and verification requirements do not discriminate for purposes of the chapeau. Again, the United States considers that the relevant "condition" is *the relative harm* to dolphins caused by different fishing methods in different fisheries, and, as such, in light of the Panel's own factual findings the tracking and verification requirements do not treat countries differently where the prevailing conditions are the same.

38. In light of the above, the Panel erred in (implicitly) finding that the certification requirements and tracking and verification requirements discriminate "where the same conditions prevail" under the Article XX chapeau.[28] In the absence of any discrimination under the chapeau, the Panel's findings that the amended measure is not consistent with the Article XX chapeau should be reversed.[29]

39. Second, in Section VI.B.2, the United States explains that, even if the certification requirements and the tracking and verification requirements discriminate for purposes of the chapeau, the Panel erred in finding any such discrimination to be "arbitrary and unjustifiable."

40. In section VI.B.2.a, the United States explains that the Panel erred in finding the certification requirements impose "arbitrary or unjustifiable discrimination" under the chapeau. The United States appeals two aspects of the Panel's analysis. Because these two aspects appear to form independent bases for the Panel's finding regarding arbitrary and unjustifiable discrimination, if the Appellate Body were to rule in favor of the United States on both of these appeals, it should reverse the Panel's finding and, consequently, the Panel's ultimate finding that the certification requirements do not meet the chapeau requirements.[30]

41. First, the majority erred in finding that the certification requirements impose arbitrary or unjustifiable discrimination in light of the differences in education and training between captains and AIDCP-approved observers. To begin with, the Panel applied the wrong legal analysis as to whether the discrimination is "arbitrary or unjustifiable." Additionally, the majority erred because, in fact, the certification requirements do not impose arbitrary or unjustifiable discrimination because they are "calibrated to the risks to dolphins from different fishing methods in different fisheries." Finally, the certification requirements reflect the fact that the parties to the AIDCP consented to impose a unique observer program on their tuna industries.

42. Second, the Panel erred in finding that the determination provisions prove that the certification requirements impose arbitrary or unjustifiable discrimination. The Panel again applied the wrong legal analysis, considering it to be a single-factor test, rather than a cumulative test in which one element is the relationship of the discrimination to the measure's objective. Additionally, the Panel erred in finding that the design of the provisions is not reconcilable with the objective of dolphin protection. The Panel also erred because it improperly raised this argument in rebuttal to the U.S. *prima facie* case that the certification requirements were consistent with the chapeau. Mexico had not argued that the determination provisions rendered the certification requirements inconsistent with the chapeau. Thus the Panel's considering the determination provisions at all was contrary to the burden of proof in this proceeding. Also, for the reasons discussed in the context of

[28] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.605, 7.610-611.
[29] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).
[30] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.5(b).

Article 2.1, the Panel erred in finding that the design of the determination provisions are not rationally connected to the objective of dolphin protection.

43. In section VI.B.2.b, the United States explains that the Panel erred in finding the tracking and verification requirements impose "arbitrary or unjustifiable discrimination" under the chapeau. The United States considers that the Panel's analysis and finding are in error for many of the same reasons the United States has discussed with regard to the certification requirements: (1) the Panel applied the incorrect legal analysis; (2) the Panel erred in its application of the burden of proof; (2) the Panel erred in finding that the tracking and verification requirements impose arbitrary or unjustifiable discrimination because the different requirements are "calibrated" to the risks to dolphins from different fishing methods in different fisheries, and (4) the Panel erred in finding that the tracking and verification requirements impose arbitrary or unjustifiable discrimination because the different requirements reflect the consent of the AIDCP Parties to impose a unique regime on their own tuna industries.

44. In light of the above, the Panel erred in finding that the certification requirements and tracking and verification requirements impose "arbitrary or unjustifiable discrimination" under the Article XX chapeau[31] and respectfully requests that the Panel's findings that the amended measure is not consistent with the Article XX chapeau should be reversed.[32]

[31] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.605, 7.610-611.
[32] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).

ANNEX B-2

EXECUTIVE SUMMARY OF MEXICO'S OTHER APPELLANT'S SUBMISSION

1. The United States continues to highlight outdated information about the ETP to divert attention from the significant progress in reducing dolphin mortality in the ETP and the tremendous harm to dolphins taking place in other ocean regions, where there are no comparable measures for the protection or sustainability of dolphins. This is a genuine tragedy for the world's environment and also undermines the consumer information objectives that the United States purports to achieve.

2. In these compliance proceedings, Mexico's challenge focuses on the improper granting of access to the dolphin-safe label to products containing tuna caught by the fleets of other countries using fishing methods other than setting on dolphins in an AIDCP-compliant manner and fishing in oceans other than the ETP. These proceedings can be distinguished from the original proceedings on this basis. The difference is highlighted by the fact that, under the amended tuna measure, even if Mexican tuna products were granted the right to use the dolphin-safe label, there would still be a violation of the non-discrimination provisions raised in this dispute. This is because Mexican dolphin-safe tuna products would be losing competitive opportunities to like products from the United States and other countries under circumstances where the dolphin-safe status of those like products cannot be assured.

3. The measure at issue in this dispute is the "amended tuna measure", which comprises: (i) Section 1385 ("Dolphin Protection Consumer Information Act") (DPCIA), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (ii) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule; and (iii) the court ruling in Earth Island Institute v. Hogarth, 494 F.3d 757 (9th Cir. 2007).

4. In its argument that the detrimental impact of the amended tuna measure on Mexican tuna and tuna products did not stem exclusively from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement, Mexico identified three aspects of the amended tuna measure – i.e., three "labelling conditions and requirements" evidencing regulatory differences 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 – that are designed and applied in a manner that lacks even-handedness:

- Mexico's AIDCP-compliant fishing method is disqualified as a method for catching dolphin-safe tuna when other fishing methods are qualified for catching dolphin-safe tuna even though they have adverse effects on dolphins that are equal to or greater than Mexico's method (referred to by the Panel as the "eligibility criteria");

- the record-keeping and verification requirements (referred to by the Panel as the "tracking and verification requirements") for tuna caught inside the ETP are comprehensive, reliable and accurate, whereas there are no comparable requirements for tuna caught outside the ETP, which makes the information on the dolphin-safe status of that tuna unreliable and inaccurate; and

- in the ETP, the initial designation of the dolphin-safe status of tuna at the time of capture (referred to by the Panel as the "certification requirements") is reliable and accurate because it is done by an independent, specially-trained, AIDCP-approved observer on board the fishing vessel, whereas outside the ETP, the initial designation is unreliable and inaccurate because it is done by the captain of the vessel, who is not qualified to make the designation, may not be directly involved in the setting of nets and capturing of fish, and has financial and other incentives not to declare non-dolphin-safe sets.

5. Mexico raised the same three labelling conditions and requirements in its argument that the requirements of the chapeau of Article XX of the GATT 1994 had not been met, therefore, the general exceptions did not apply to the inconsistencies of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994.

6. The Panel concluded that the different certification requirements and the different tracking and verification requirements in the amended tuna measure are inconsistent with Article 2.1 of the TBT Agreement. It also concluded that the different certification requirements and different tracking and verification requirements are inconsistent with Articles I:1 and III:4 of the GATT 1994, and do not meet the requirements of Article XX of the GATT 1994. The Panel also found that the eligibility criteria of the amended tuna measure are consistent with Article 2.1 of the TBT Agreement and that, although they are inconsistent with Articles I:1 and III:4 of the GATT 1994, they are justifiable under Article XX of the GATT 1994.

7. Mexico requests the Appellate Body to reverse certain findings and conclusions of the Panel, with respect to the errors of law and legal interpretation discussed in this submission.

I. THE PANEL ERRED IN FINDING AND CONCLUDING THAT SPECIFIC REQUIREMENTS UNDER THE AMENDED TUNA MEASURE WERE INCONSISTENT WITH WTO PROVISIONS RATHER THAN THE MEASURE AS A WHOLE

8. Notwithstanding that Mexico challenged the amended tuna measure as a whole, and that the Appellate Body in the original proceedings found the original tuna measure as a whole to be WTO-inconsistent, the Panel did not specifically conclude that the amended tuna measure as a whole is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Rather, it concluded that two of the three elements that Mexico identified in its arguments were WTO-inconsistent, while claiming that the other element had purportedly already been found by the Appellate Body in the original proceedings to be even-handed and not WTO-inconsistent.[1] While Mexico agrees with some of the reasoning and findings in the Panel's Report, the Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with those provisions rather than ruling on some of its elements. The Panel's error is reflected, in part, in its finding that the amended tuna measure's modification of the competitive opportunities in the U.S. market to the detriment of Mexican tuna and tuna products comprises two "distinct type[s] of detrimental impact", such that "Mexico's arguments on the different certification and tracking and verification requirements constitute a clear and cognizable claim of detrimental impact *separate from* the detrimental impact identified by Mexico as the result of the eligibility criteria".[2] In its analysis the Panel confuses the "detrimental impact" of the amended tuna measure that is the focus of the first part of the test under Article 2.1 with the identification of the "relevant" regulatory distinction in the second part of the test, i.e., the regulatory distinction that accounts for the detrimental impact.[3] The Panel should have explicitly found that the amended tuna measure has a detrimental impact on the competitive opportunities for Mexican tuna products in the US market, and that the differences in the labelling conditions and requirements identified by Mexico demonstrate that the measure's relevant regulatory distinction is designed and applied in a manner that lacks even-handedness, such that the detrimental impact does not stem exclusively from a legitimate regulatory distinction. On this basis, the Panel should have concluded that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement.

9. Similarly, the Panel should have found that the amended tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994, and the inconsistencies were not justifiable under Article XX. The Panel's failure to do so is a legal error. As a result of this error, Mexico requests the Appellate Body to modify the conclusions of the Panel in respect of Article 2.1 of the TBT Agreement and Articles I:1, III:4 and XX of the GATT 1994 and conclude that the amended tuna measure is inconsistent with these provisions.

[1] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 8.2, 8.3.
[2] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.105.
[3] See, e.g., Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.

II. THE PANEL ERRED IN ITS FINDINGS REGARDING THE ELIGIBILITY CRITERIA WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE WITH ARTICLE 2.1 OF THE TBT AGREEMENT

10. Mexico argued that it was not even-handed for the amended tuna measure to completely disqualify the dolphin set fishing method from access to the dolphin-safe label, while allowing other fishing methods to be eligible, when it has been established that other fishing methods kill and seriously injure dolphins. In the context of Article 2.1 of the TBT Agreement, the fishing method eligibility criteria are relevant to assessing whether the detrimental impact on Mexican tuna caused by the amended tuna measure stems exclusively from a legitimate regulatory distinction. The eligibility criteria are included in the relevant regulatory distinction (i.e., the difference in labelling conditions and requirements). The Panel had to determine, based on the particular circumstances of this dispute, whether this regulatory distinction is designed and applied in an even-handed manner.

11. The Panel erred in finding that the Appellate Body previously made factual and legal findings on this issue.[4] Moreover, the Panel in effect applied the arbitrary benchmark for adverse effects on dolphins urged by the United States, rather than the "zero tolerance" benchmark actually incorporated into the amended tuna measure and its objectives. It further erred in finding that the eligibility criteria were applied in an even-handed manner. Instead, it should have found that the eligibility criteria lacked even-handedness and, therefore, by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction. These deficiencies were legal errors.

12. The Panel also acted inconsistently with Article 11 of the DSU in relation to the following factual findings: (i) changing its factual findings regarding unobserved adverse effects for dolphin sets from the original proceedings without any new evidence to support such a change; and (ii) finding that other fishing methods have no unobservable adverse effects and omitting consideration of contrary evidence on the record; (iii) finding that the Appellate Body found that dolphin sets are particularly more harmful to dolphins than other fishing methods when no such finding was made by the Appellate Body. These factual findings, once corrected, support Mexico's position that the eligibility criteria are applied in a manner that is not even-handed.

13. As a result of this error, Mexico requests that the Appellate Body modify the legal reasoning of the Panel, reverse the Panel's finding that the eligibility criteria are applied in an even-handed manner and find, instead, that by virtue of the lack of even-handedness in the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction and, for this additional reason, the amended tuna measure is inconsistent with Article 2.1.

III. THE PANEL ERRED IN ITS FINDINGS REGARDING INDEPENDENT OBSERVERS UNDER THE CERTIFICATION REQUIREMENTS WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE WITH ARTICLE 2.1 OF THE TBT AGREEMENT

14. In assessing Mexico's arguments that it was not even-handed for the amended tuna measure not to require independent observers to support dolphin-safe certifications outside the ETP, the Panel disagreed with Mexico's arguments that (i) in respect of dolphin-safe certifications specifically, captains in some cases may have an economic conflict of interest, making their certifications less reliable, and (ii) the justification for differing requirements provided by the United States that circumstances in the ETP are unique is in fact contradicted by evidence that tuna associate with dolphins in other ocean regions, in particular the Indian Ocean.

15. In rejecting Mexico's evidence regarding captains' economic self-interest, the Panel found that certifications by vessel captains are generally reliable "in a variety of fishing and environmental areas".[5] In doing so, the Panel acted inconsistently with Article 11 of the DSU. While Mexico does not suggest that fishing vessel captains are generally unreliable, the evidence on the record establishes that the inherent unreliability of captains' self-certifications specifically respecting the "dolphin-safe" status of the tuna caught by their own vessels means that in some instances the dolphin-safe designation will be inaccurate. This creates gaps in the accuracy of the

[4] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 7.118-7.126, 7.130.
[5] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.208.

dolphin-safe label for tuna caught outside the ETP by fishing methods other than AIDCP-compliant setting on dolphins.

16. In finding that dolphin sets are only made in the ETP, the Panel acted inconsistently with Article 11 of the DSU. Mexico presented evidence that the situation in the ETP is not unique or different in any way that could justify different treatment of the ETP purse seine fishery from other fisheries, and in particular presented a recent and comprehensive report on tuna-dolphin association in the Indian Ocean. The Panel rejected Mexico's position, stating that "although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically.'"[6] The failure of the Panel to even mention, let along address, the evidence Mexico submitted that dolphins associate with tuna and are intentionally set upon in the Indian Ocean was inconsistent with the Panel's obligations under DSU Article 11.

17. As a result of this error, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reasons that dolphin sets are made outside of the ETP and captains' self-certifications create gaps in the dolphin-safe designation, that the certification requirements are not applied in an even-handed manner and, therefore, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction, and the amended tuna measure is inconsistent with Article 2.1.

IV. THE PANEL ERRED IN ITS FINDINGS REGARDING THE ELIGIBILITY CRITERIA WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE UNDER THE CHAPEAU OF ARTICLE XX

18. The Panel found that the fishing method eligibility criteria in the amended tuna measure (i.e., the disqualification of the dolphin set and allowance of other methods) are applied in a manner that meets the requirements of the chapeau of Article XX. In making this finding, the Panel erred when it found that the conditions in the countries between which there was arbitrary and unjustifiable discrimination were not the same and it erred when it found that the application of the measure did not result in arbitrary or unjustifiable discrimination. In particular, the Panel erred when it found that the eligibility criteria are directly related to the objective of the amended measure and any discrimination that they (i.e. the eligibility criteria) cause is directly connected to the main goal of the amended tuna measure (i.e. to contribute to the protection of dolphins).

19. As a result of this error, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reason that the eligibility requirements demonstrate that the amended tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail, that the amended tuna measure does not meet the requirements of the chapeau.

[6] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.242.

ANNEX B-3

EXECUTIVE SUMMARY OF MEXICO'S APPELLEE'S SUBMISSION

1. The foundation of the United States' appeal is its insistence that the amended tuna measure is "calibrated" to risks of harm to dolphins outside the Eastern Tropical Pacific (ETP) large purse seine fishery. But it has been established – both in the original proceedings and in the compliance proceedings – that dolphins are at significant risk in tuna fisheries outside the ETP, from a variety of different fishing methods. Moreover, the United States does not contest the Panel's factual findings that vessel captains outside the ETP are not sufficiently trained to make reliable dolphin-safe certifications, and that the amended tuna measure does not require tracking and verification systems outside the ETP that can reliably ensure that a certification is legitimately matched to the tuna with which it is associated. In essence, therefore, the United States' position is that consumers do not need to know with any certainty whether non-ETP tuna products bearing the dolphin-safe label actually contain tuna that was caught without killing or seriously injuring a dolphin, or in a manner that does not adversely affect dolphins. There is no legitimate legal or policy justification for that position. The United States must apply the same standard to non-ETP tuna products as it does to ETP tuna products, including those from Mexico.

2. Mexico's AIDCP-compliant tuna fishing method protects dolphins, tuna fisheries stocks and the oceanic environment in a manner that is vastly superior to the alternative tuna fishing methods that are being promoted by the amended tuna measure. Nonetheless, Mexico acknowledges the rights of WTO Members to establish their own levels of protection. In this light, the findings of the Panel and the claims raised in Mexico's other appeal hold the United States to the standard that it has set for itself. Due to its gaps, deficiencies, lack of even-handedness and arbitrariness, the amended tuna measure is modifying the conditions of competition in the U.S. market to the detriment of Mexican tuna products in a WTO-inconsistent manner. The measure does not ensure that accurate information is provided to U.S. consumers and, accordingly, it does not meet the strict standard that the United States has set for itself or accomplish the measure's stated objectives.

I. MEASURE AS A WHOLE

3. The Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with the WTO provisions in question rather than making separate findings and conclusions in respect of specific requirements of the measure. The eligibility criteria, the certification requirements and the tracking and verification requirements relate to elements of the legal tests necessary to establish the WTO-inconsistency of the amended tuna measure as a whole. Specifically, they relate to the second part of the legal test in Article 2.1 of the TBT Agreement and to the legal test under the chapeau of Article XX of the GATT 1994. Mexico did not challenge these requirements independently as three separate measures and did not have to establish an independent prima facie case for each. This error of the Panel is replicated in the arguments of the United States.

II. ERRONEOUS ARGUMENTS THAT FORM THE FOUNDATION OF THE APPEAL

A. Modification of Conditions of Competition & Detrimental Impact

4. In the original proceedings, the Appellate Body found in the context of Article 2.1 that the tuna measure modified the conditions of competition in the U.S. market to the detriment of Mexican tuna products. The Appellate Body stated 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 U.S. 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 is 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. This detrimental impact is caused by the measure itself and therefore has a genuine relationship with the measure.

5. This is unchanged in the amended tuna measure and, therefore, the measure continues to deny competitive opportunities to Mexican tuna products. This conclusion under the first part of the legal test under Article 2.1 is sufficient, in the circumstances of this dispute, to establish that the amended tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994.

6. The amended measure's labelling conditions and requirements operate together to modify the conditions of competition to the detriment of imported Mexican tuna products. The detrimental impact involves not only the denial of the dolphin-safe label to Mexican tuna products, but also — at the same time — the granting of the label to tuna products from the United States and other countries that potentially may contain tuna caught in a manner that adversely affects dolphins, and therefore is not dolphin-safe. Like in EC – Seal Products, it is the combined operation of the prohibitive and permissive aspects of the measure that leads to the de facto discrimination in question. By focusing on the fact that the label is denied to Mexican tuna products, the United States is missing the important permissive aspects of the amended tuna measure which, in addition to their contribution to the detrimental impact, result in inaccurate labelling information being passed to U.S. consumers due to their deficiencies and gaps.

B. "Calibration" to Risks to Dolphins

7. The United States argues that the certification requirements and tracking and verification requirements are "calibrated" to the risks to dolphins from different fishing methods in different fisheries and, for that reason, are even-handed under Article 2.1 and do not impose arbitrary or unjustifiable discrimination on Mexican products under the chapeau of GATT Article XX. These arguments are flawed.

8. The jurisprudence developed by the Appellate Body in interpreting Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 does not include a "calibration test" that can override the even-handedness and arbitrary discrimination tests. Moreover, it is insufficient simply to assert, as the United States does, that a distinction reflects a Member's chosen level of protection in order to establish even-handedness or a lack of arbitrariness.

9. Tuna is either "dolphin-safe" or it is not. Eligibility for the dolphin-safe label cannot be viewed as a relative assessment. The United States' argument implies that the label means "probably dolphin-safe" or "might be dolphin-safe", rather than "dolphin-safe". A "zero tolerance" benchmark is incorporated in the design, architecture, revealing structure, operation, and application of the measure. The measure's objectives are in no way qualified to allow some level of "acceptable" mortality or serious injury or any "margin of error"; rather, the objectives are asserted in terms that are absolute in the goal of avoiding misleading consumers about whether the tuna they purchase was caught in a manner that adversely affects dolphins. Complete precision is required for both the certification process and the tracking and verification of tuna. Under these circumstances, a purported comparison of the magnitude or nature of dolphin harms caused by different fishing methods is not relevant.

10. Even if "calibration" were somehow permitted, in light of the adverse effects on dolphins from almost all fishing methods in all fisheries, the purported differences between the ETP and other tuna fisheries cited by the United States could not justify a difference in the regulatory requirements, such that untrained captains are allowed to make certifications and tuna cannot be accurately tracked back to the vessel well in which it was stored after capture.

C. Absence of a Rational Connection to the Objective

11. The Panel correctly interpreted and applied the law. Although the rational connection is "one of the most important factors" in assessing whether there is arbitrary or unjustifiable discrimination under Article XX and therefore even-handedness under Article 2.1, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment. Contrary to the U.S. "single factor" argument, the Panel provided the United States with the opportunity to explain why other factors establish that the measure is even-handed and not arbitrary and the United States was unable to do so.

D. Amended Tuna Measure Not the AIDCP

12. The United States incorrectly suggests that the tracking, verification and observer requirements imposed with respect to Mexican tuna products are exclusively the result of the AIDCP, and would exist without the amended tuna measure. To the contrary, the amended tuna measure expressly incorporates the AIDCP and other requirements for the purpose of conditioning access to the U.S. dolphin-safe label in the U.S. market. Moreover, the measure establishes requirements that apply to tuna caught in fisheries outside the scope of the AIDCP. The United States also repeatedly and incorrectly refers to the differences in the certification requirements and the tracking and verification requirements between the "AIDCP and NOAA" regimes. The relevant comparison is between the different ways in which the amended tuna measure conditions access to the dolphin-safe label under the different labelling conditions and requirements 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.

E. Unnecessary to Prove Mislabelling

13. For the purposes of establishing a lack of even-handedness under the second part of the legal test in Article 2.1 and arbitrary discrimination under the chapeau of Article XX, the Appellate Body made clear in *EC – Seal Products* that Mexico is only required to establish a *prima facie* case 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. Mexico has met its burden. That burden shifted to the United States, which was unable to rebut Mexico's *prima facie* case.

III. ARTICLE 2.1 – CERTIFICATION REQUIREMENTS

A. Detrimental Impact

14. As explained above, there was no need for the Panel to make an independent finding with respect to the certification requirements because the amended tuna measure as a whole has a detrimental impact on Mexican imports. Thus, even if the United States is correct in its arguments, they have no bearing on the first part of the legal test under Article 2.1. In the context of analyzing the denial of competitive opportunities, it is not necessary to demonstrate actual trade effects. If the Appellate Body finds that the differences in costs and burdens are relevant to the determination, it is sufficient that the Panel found that it is clear that the difference between having observers on-board large purse seine vessels in the ETP and not having observers on-board other vessels imposes a lighter burden on tuna products made from tuna caught other than by large purse seine vessels in the ETP, as observer coverage involves the expenditure of significant resources. The detailed cost and burden analysis put forward by the United States is not necessary in the circumstances of this dispute. Finally, there is a genuine relationship between the measure, which contains all of the prohibitive and permissive requirements, and the detrimental impact.

B. Whether Detrimental Impact Stems Exclusively from a Legitimate Regulatory Distinction

1. Lack of Even-Handedness

15. The Panel was correct to consider that the different certification requirements are designed in a manner that "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure" (i.e., because "captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured in a set or other gear deployment"), and to find, on this basis, that the "the different certification requirements are not even-handed," such that the detrimental impact cannot be said to stem exclusively from a legitimate regulatory distinction.[1] The Panel provided the United States

[1] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.233.

with an opportunity to justify the regulatory distinction, and the United States was unable to do so. Thus, there are no additional relevant factors that could outweigh the Panel's finding. As explained above, the U.S. arguments regarding "calibration" and the "AIDCP rather than the measure" have no merit.

2. The Panel's Findings Regarding the Determination Provisions Further Support Mexico's Case

16. Mexico agrees with the United States that Mexico did not argue that the determination provisions themselves directly result in detrimental impact. There was no need for Mexico to do so. In determining whether the regulatory distinctions of the measure are even-handed, the Panel was required to assess the design, architecture, revealing structure, operation, and application of the measure, and the determination provisions are an integral part of the amended tuna measure. There was considerable evidence in the record to support the Panel's findings. Moreover, the Panel was fully justified to apply the same logical deductions to tuna fishing outside the ETP that the United States applies to tuna fishing inside the ETP. It was both reasonable and appropriate for the Panel to conclude that dolphin association with fishing methods other than purse seine nets could be harmful to dolphins, and that purse seine fishing could cause dolphin mortalities even if an ocean region did not feature tuna-dolphin association similar to the ETP. The design of the determination provisions is completely at odds with the objective of the amended tuna measure, and the Panel was correct in unanimously finding that the regulatory distinction is arbitrary.

IV. ARTICLE 2.1 – TRACKING AND VERIFICATION REQUIREMENTS

A. Detrimental Impact

17. The above points regarding the detrimental impact associated with the certification requirements apply equally to the detrimental impact associated with the tracking and verification requirements.

B. The Panel Correctly Found that the Detrimental Impact Does Not Stem Exclusively from a Legitimate Regulatory Distinction

18. Contrary to the arguments of the United States, the Panel was correct that Mexico had established *prima facie* that there is no rational connection between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure. The Panel correctly ruled that Mexico could establish a *prima facie* case that tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe on the basis of evidence and arguments going to the design, architecture, and revealing structure of the amended tuna measure. The Panel made a number of factual findings in its assessment of the different tracking and verification requirements which demonstrate "major gaps in coverage" that could potentially contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery. These factual findings, together with the Panel's overall findings are sufficient to support the Panel's legitimate regulatory distinction analysis and its conclusion in the second step of the Article 2.1 legal test. However, in the event that the Appellate Body finds that the Panel erred in declining to make a definitive finding on the question of whether the different labelling conditions and requirements may permit non-dolphin-safe tuna harvested in fisheries outside the ETP to be inaccurately and unjustifiably granted the competitive advantage of the dolphin-safe label in the U.S. market, Mexico respectfully requests that the Appellate Body complete the analysis using the applicable standard of proof, as correctly found by the Panel, and the Panel's findings of fact.

19. Contrary to the arguments of the United States, the Panel committed no error in resolving the legitimate regulatory distinction analysis on the basis of the rational connection. There are no additional relevant factors in the present dispute that could outweigh the Panel's finding that the relevant regulatory distinction is designed and applied in a manner that permits inaccurate labelling. This is because incorrect labelling results in inaccurate and misleading information being provided to consumers who choose to purchase and consume tuna products which they believe have been produced in a dolphin-safe manner, which directly contradicts the objectives of the amended tuna measure.

20. For the same reasons discussed above for the certification requirements, the Panel committed no error as alleged by the United States in finding that the different tracking and verification requirements evidence that the detrimental impact caused by the amended tuna measure cannot be explained or justified on the basis of "calibration" to different risk profiles in different fisheries. In addition, tuna is either dolphin-safe or non-dolphin-safe at the point of capture. After the tuna has been harvested and stored aboard a fishing vessel, the risk profile of harm to dolphins is no longer a relevant consideration with respect to that tuna. It is only this post-harvest tuna — the storage, transportation and processing of which poses no risk of harm to dolphins — to which the different tracking and verification requirements apply. Therefore, there is no nexus or relationship at all between the tracking and verification of the dolphin-safe status of harvested tuna and the allegedly different risk profiles of harm to dolphins from different fishing methods in different areas of the ocean.

21. Finally, Mexico's claims are concerned with the amended tuna measure's differential regulatory treatment under the different labelling conditions and requirements that condition access to the competitive advantage of the "dolphin-safe" label in the U.S. market. The Panel expressly explained that it is the design and structure of the amended tuna measure, and not the AIDCP, that sets up the relevant regulatory distinction in two sets of rules that condition access to the dolphin safe label under a single regulatory framework. The AIDCP is not relevant to the determination of consistency with Article 2.1.

V. ARTICLES I:1 AND III:4 OF THE GATT 1994

22. The amended tuna measure conditions the extension of an advantage – namely, the "dolphin-safe" label – in a manner that modifies the conditions of competition between like imported tuna products in the U.S. market to the detriment of Mexican tuna products and therefore violates Article I:1. Moreover, the measure has a detrimental impact on the conditions of competition in the U.S. market to the detriment of Mexican tuna products *vis-à-vis* U.S. tuna products and therefore violates Article III:4. There is no merit to the United States' arguments that the Panel erred in finding that these provisions were violated.

VI. CHAPEAU OF ARTICLE XX OF THE GATT 1994

23. The Panel correctly set out the three elements of the legal test under the chapeau of Article XX and correctly concluded that, in the circumstances of this dispute, it was appropriate for it to rely on the reasoning and findings that it developed in the context of Article 2.1 in the course of its analysis under the chapeau of Article XX.

A. The Amended Tuna Measure Discriminates between Countries in which the Same Conditions Prevail

24. Contrary to the United States' arguments, it is clear from the Panel's reasoning under Article XX, read in conjunction with its reasoning under Article 2.1, that the Panel conducted an analysis of whether discrimination exists and it found that it does exist. Similar to *EU – Seal Products*, the causes of discrimination found to exist under Articles I:1 and III:4 are the same as those to be examined under the chapeau. Moreover, the Panel correctly found that this discrimination occurs between countries where the same conditions prevail. The same conditions exist in Mexico, the United States and other countries because dolphins may be killed or seriously injured by all fishing methods in all oceans, and accordingly accurate certification and tracking and verification is necessary regardless of the particular fishery in which tuna is caught.

B. The Amended Tuna Measure is Applied in a Manner that Constitutes a Means of Arbitrary or Unjustifiable Discrimination

25. Contrary to the United States' arguments, it is sufficient that the Panel elaborated upon the relationship between the chapeau of Article XX and Article 2.1 and explained why it was appropriate, in the circumstances of this dispute, to rely on the reasoning it had developed in the context of Article 2.1 in the course of its analysis under the chapeau of Article XX.

26. The Panel did not err, as the United States alleges, by merely applying a "single-factor" test to determine arbitrary or unjustifiable discrimination under the chapeau. Mexico acknowledges that, in principle, the chapeau analysis is not necessarily a single-factor test. In the present dispute, however, there are no additional relevant factors that could outweigh the Panel's finding that the different certification requirements and different tracking and verification requirements are applied in a manner that is arbitrarily or unjustifiably discriminatory because they permit inaccurate information to be passed to consumers with respect to the dolphin-safe status of the tuna in the products which consumers choose to purchase, contrary to the policy objective of conserving dolphins through informed consumer choice. The Panel also did not err in finding that the determination provisions are arbitrary.

27. For the same reasons explained above, the Panel also did not err in rejecting the United States' argument that the differences in the requirements are "calibrated" to the risks to dolphins arising from different fishing methods in different ocean areas and rejecting the argument that the differences reflect the fact that the parties to the AIDCP agreed to unique requirements.

ANNEX B-4

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

1. As described below, Mexico's legal and factual appeals of the Panel's findings are without merit. Accordingly, the United States respectfully requests the Appellate Body to reject Mexico's appeals in their entirety.

2. Section II of this submission addresses one particular incorrect characterization of fact that Mexico set out in the opening sections of its Other Appeal Submission. Specifically, it demonstrates that, at the time of signing the AIDCP, the parties *knew* that the United States had made any change to the standard dolphin safe label subject to the fulfillment of a particular condition, namely that setting on dolphins in the ETP was not having a significant adverse impact on depleted dolphin populations. As the original panel found, this condition was not fulfilled. Thus, Mexico is wrong to assert that the parties to the AIDCP agreed to impose the unique requirements on their tuna industries in exchange for the United States allowing access to its dolphin safe label for tuna product produced by setting on dolphins.

3. Sections III, IV, and V set out the U.S. response to Mexico's specific appeals.

1. THE THREE CHALLENGED ASPECTS OF THE AMENDED MEASURE

4. In Section III of this submission, the United States explains that Mexico's claim that the Panel erred in making separate findings as to the specific aspects of the amended measure challenged by Mexico and should have found the amended measure *as a whole* inconsistent with the covered agreements is in error. Subsections A and B provide an overview of Mexico's appeal and of the Panel's relevant analysis.

5. In Section III.C, the United States explains the several reasons why Mexico's appeal is in error. First, Mexico cites no basis for its assertion that the Panel's findings regarding the detrimental impact caused by the certification and tracking and verification requirements constituted *legal error*, in that Mexico puts forward no reason why it was not reasonable for the Panel to consider Mexico's claims of discrimination by interpreting Mexico's arguments as Mexico did. Second, the factual premise of Mexico's argument – that Mexico did not argue that the certification and tracking and verification requirements cause a "distinct" detrimental impact from the eligibility criteria – is in error. Third, it is unclear why Mexico's appeal, if accepted, would have any substantive effect on this proceeding.

2. ARTICLE 2.1 OF THE TBT AGREEMENT

6. In Section IV of this submission, the United States explains that Mexico's other appeals of the Panel's analysis and findings regarding Article 2.1 of the TBT Agreement should be rejected. In Section IV.A, the United States explains that Mexico's appeals regarding the eligibility criteria should fail. In Section IV.B, the United States explains that Mexico's appeals regarding the certification requirements should also fail.

a. The Eligibility Criteria

7. In Section IV.A, the United States explains that the Panel did not err in finding that the eligibility criteria are consistent with Article 2.1 of the TBT Agreement. Mexico makes several legal and factual appeals regarding the Panel's finding. Each of these appeals is without merit.

8. As explained in Section IV.A.1, Mexico's appeal of the Panel's finding that the Appellate Body had "definitively settled" that the eligibility criteria are even-handed should fail. Mexico is wrong to argue that the Appellate Body's even-handedness analysis was limited to the disqualification of tuna caught by setting on dolphins and did not cover the eligibility of tuna caught by other fishing methods. To the contrary, the issue of whether the United States could deny access to the label for tuna product produced from setting on dolphins while allowing other tuna product to be potentially eligible for the label *was squarely before* the Appellate Body. And the Panel did not err in finding that the Appellate Body "definitively settled" the issue. Mexico is also wrong to minimize the

importance of one of the statements of the Appellate Body on which the Panel relied, as that statement was made in response to a U.S. argument and offered guidance on how the United States could come into compliance with the covered agreements.

9. As explained in Section IV.A.2, Mexico's appeal of the Panel's legal analysis of whether the eligibility criteria are even-handed should fail.

10. First, Mexico's appeal is premised on an incorrect legal test. The Appellate Body has explained that, to analyze whether "detrimental impact stems exclusively from legitimate regulatory distinctions" a panel must examine whether the distinctions that account for the detrimental impact "are designed and applied in an even-handed manner such that they may be considered 'legitimate' for the purposes of Article 2.1."[1] For this dispute, the Appellate Body has been clear that this answer will depend on whether the regulatory distinction "is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean."[2] Mexico is wrong to argue that whether the eligibility criteria are calibrated to the different risks in different fisheries is irrelevant.

11. Second, Mexico's proposed "benchmarks" for purposes of an even-handedness analysis are in error. Under Mexico's "zero tolerance" benchmark, Article 2.1 would prohibit the United States from drawing *any* distinctions between fishing methods and Mexico's approach would prohibit the United States from labeling tuna product as dolphin safe even where no dolphin was harmed in producing that tuna. Such a position is *inconsistent* with the Appellate Body's even-handed analysis, and Mexico errs in arguing for such an approach. Mexico's alternate formulation of the "zero tolerance benchmark" (focused on whether a particular fishing method causes "systematic" adverse effects) was never presented to the Panel. As such, the Panel made no assessment of this issue, and the statements that Mexico references cannot be understood in this new context. And Mexico's other proposed benchmark (a comparison of fishery-specific Potential Biological Removal (PBR) levels) is both impossible to implement and not consistent with the objectives of the amended measure.

12. Third, the eligibility criteria are even-handed under the correct legal test. Setting on dolphins is the *only* fishing method in the world *that intentionally targets dolphins*. As such, it is *inherently* dangerous to dolphins, putting hundreds of dolphins in danger of sustaining both direct and unobservable harms in each and every set. The same cannot be said of other fishing methods, where "the nature and degree of the interaction is different in quantitative and qualitative terms."[3] Numerous factual findings of the Panel, as well as uncontested facts on the record, support the conclusion that the eligibility criteria are even-handed. The factual findings of the Panel establish that the ETP large purse seine fishery has a different, and greater, risk profile for dolphins – in terms of both direct and unobservable harms – than other fisheries. In addition, numerous uncontested facts on the record support this conclusion. Specifically, the United States has submitted fishery-by-fishery data, generated by RFMOs, national governments, and scientists, showing the clear difference between the ETP large purse seine fishery and other fisheries. Mexico has not refuted or challenged the accuracy of this data.

13. As explained in Section IV.A.3, Mexico's Article 11 claims also lack merit.

14. First, the Panel did not improperly change from the original proceeding its finding concerning the unobserved harms of dolphin sets. As an initial matter, Mexico does not explain how the Panel's alleged error in this regard is "so material" that it undermines the objectivity of the Panel's assessment of Mexico's claim, and, on this basis, Mexico's claim does not meet the standard for a proper Article 11 appeal.[4] Additionally, the Panel's characterization of the original panel as having made definitive findings concerning the "various adverse impacts [that] can arise from setting on dolphins, beyond observed mortalities" was accurate, as the Appellate Body's analysis in the original proceeding confirmed. Further, Mexico's suggestion that it introduced new evidence concerning exhibits on which the original panel relied is incorrect.

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[1] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92; *see also US – Tuna II (Mexico) (AB)*, n. 461; *US – COOL (AB)*, para. 271.

[2] *US – Tuna II (Mexico) (AB)*, para. 232.

[3] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240 (maj. op.).

[4] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

15. Second, the Panel did not err in finding that other fishing methods do not have unobservable effects similar to those associated with setting on dolphin in the ETP. Contrary to Mexico's assertion that the Panel ignored certain evidence, the Panel conducted a detailed analysis of the evidence on the record, including discussing the paragraphs of Mexico's submissions that Mexico asserts the Panel ignored. Further, the Panel's finding was amply supported by evidence on the record and reflected a weighing and balancing of that evidence of the sort committed to a panel's discretion.[5] In making this appeal, Mexico fails to confront the fact that the Panel was right that Mexico produced no evidence that fishing methods other than setting on dolphins cause unobservable harms that occur independently from direct, observable mortalities and whose existence "cannot be certified because it leaves no observable evidence."[6]

16. Third, the Panel did not err in its characterization of the Appellate Body's finding concerning setting on dolphins. First, the original proceeding clearly resolved that setting on dolphins, including under the AIDCP regime, causes "various adverse impacts … beyond observed mortalities," as the Appellate Body incorporated the original panel's finding in this regard.[7] Second, it is clear from the Appellate Body report that the finding that setting on dolphins is "particularly harmful to dolphins" was not limited to setting on dolphins other than under the AIDCP regime. Rather, what makes setting on dolphins "particularly harmful" includes the "various unobserved effects" that occur as a result of the chase itself and thus are not addressed by the AIDCP requirements, as well as the "substantial amount of dolphin mortalities and injuries" that continue to occur under the AIDCP regime.

b. The Certification Requirements

17. In Section IV.B, the United States explains that Mexico's appeals regarding the certification requirements of the amended measure should be rejected.

18. As explained in Section IV.B.1, Mexico's appeal of the Panel's finding regarding the reliability of captain's statements should fail. Mexico's explanation of this appeal is improperly vague in that Mexico does not specify whether it is making a legal or an Article 11 appeal, despite the Appellate Body's guidance that parties must do so.[8] Regardless of how one interprets Mexico's argument, however, the Panel's analysis and finding were not in error.

19. First, the Panel's finding regarding the reliability of captains' certifications was not inconsistent with Article 11. Mexico is wrong in arguing that the Panel failed to understand or address its argument that the "specific circumstances" associated with dolphin safe certifications render captains' certifications inherently unreliable or any evidence related to that argument. To the contrary, the Panel simply did not agree that Mexico had proven its case. Mexico is also wrong to argue that the Panel erred by finding that Mexico had not established that captains' statements were unreliable. In fact, the Panel's finding was supported by a significant amount of evidence on the record, which Mexico fails to confront in making this appeal. Further, Mexico does not even allege that the Panel's treatment of the evidence undermined its objectivity, as is required to meet the standard for a successful Article 11 claim.[9]

20. Second, the Panel did not err as a matter of law in its finding regarding the reliability of captains' certifications. Mexico has not identified a legal finding that it seeks reversal of, nor has it identified a legal error that the Panel has allegedly committed. However, to the extent that Mexico is alleging that the Panel committed a legal error, Mexico's appeal fails. In particular, any legal finding that Mexico would appeal is amply supported by the evidence on the record, and it cannot be said that the Panel's finding has *no* basis in the record. Mexico's complaint is, rather, that the Panel failed to accord to the evidence the weight that Mexico preferred and to make the factual and legal findings that Mexico sought. However, this does not constitute grounds for a legal appeal any more than it does for an Article 11 appeal.

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[5] *See Korea – Dairy (AB)*, para. 137.
[6] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.132, 7.134.
[7] *See US – Tuna II (Mexico) (AB)*, para. 251; *see also id.* para. 287.
[8] *See China – Rare Earths (AB)*, para. 5.173.
[9] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

21. As explained in Section VI.B.2, Mexico's appeal of the Panel's finding concerning the geographic distribution of dolphin sets should be rejected. First, the Panel *did* analyze Mexico's evidence and arguments concerning the existence of dolphin sets outside the ETP. However, the Panel had discretion to choose "which evidence . . . to utilize in making findings" and the fact that it did not rely on one of Mexico's exhibits in a particular place does not establish a failure under Article 11.[10] Second, the Panel's finding certainly had a "proper basis" in the evidence on the record, as the record contained no evidence *at all* that dolphins are *chased* to catch tuna anywhere other than the ETP large purse seine fishery, let alone on a routine basis. Third, the exhibit that Mexico asserts the Panel did not address in no way undermines the Panel's finding.

3. ARTICLE XX OF THE GATT 1994

22. In Section V, the United States explains that Mexico's appeals regarding Article XX of the GATT 1994 should be rejected. Subsections A and B provide an overview of the Panel's relevant analysis and Mexico's appeal. In Subsection V.C, the United States explains that Mexico's appeal is in error.

23. In Section V.C.1, the United States addresses Mexico's argument regarding whether the application of the measure results in discrimination. Mexico does not appear to allege that the Panel erred in this section, and Mexico does not make explicit why this section is relevant to its appeals under the chapeau. It does appear, however, that Mexico is asserting that the "discrimination" found to exist for purposes of positive GATT 1994 obligations must be the same for purposes of the chapeau. But that is not necessarily the case, as the Appellate Body has noted.[11] Rather, whether discrimination exists requires examination of "whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same.'"[12] Mexico also appears to argue that the Panel should have found that the same set of "conditions" are relevant for the analysis of all three aspects of the amended measure challenged by Mexico.

24. In Section V.C.2, the United States explains that Mexico's argument that the Panel erred in finding that the relevant "conditions" are the "same" is in error. As discussed elsewhere, the objectives of the measure – which the Panel found to have a close nexus with the policy objective of subparagraph (g) – relate to all adverse effects on dolphin due to commercial fishing practices inside and outside the ETP. As such, the relevant "conditions" relate to all adverse effects suffered by dolphins, including mortality and serious injuries and those unobservable harms that dolphins incur from being chased. And the *harm* to dolphins in the ETP large purse seine fishery and other fisheries *is different*, in terms of dolphin mortalities and serious injuries and unobservable harms. As the relevant "conditions" are not the "same," no discrimination exists for purposes of the chapeau and the eligibility criteria are thus justified under Article XX.

25. In Section V.C.3, the United States explains that Mexico's argument regarding whether the amended measure imposes arbitrary or unjustifiable discrimination is in error. Mexico is wrong to assert that it is arbitrary or unjustifiable to distinguish between setting on dolphins and other methods. This distinction is, in fact, reconcilable with, and rationally related to, the policy objective of protecting dolphins. Setting on dolphins is the *only* fishing method that intentionally targets dolphins. As such, every dolphin set must involve a sustained interaction with a school of dolphins and must pose significant risk of observed and unobserved harm to those animals. This *inherent* danger is simply not present in other fishing methods. This difference is borne out by the factual findings of the Panel, as well as RFMO and national government data and scientific studies. And Mexico is wrong that Article XX(g) *prohibits* Members from applying measures that are "calibrated" to different risks. Indeed, surely *the opposite* is true.[13]

26. For the foregoing reasons, the United States respectfully requests the Appellate Body to reject in their entirety Mexico's appeals of the Panel's report.

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[10] *China – Rare Earths (AB)*, para. 5.178.
[11] *See, e.g.*, *EC – Seal Products (AB)*, para. 5.298.
[12] *EC – Seal Products (AB)*, para. 5.317.
[13] *See US – Shrimp (AB)*, para. 165; *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 140-143.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

I. INTRODUCTION

1. Canada addresses: the scope of review under Article 21.5 of the DSU; the allocation of the burden of proof under Article 2.1 of the TBT Agreement; and the interpretation of the chapeau under Article XX of GATT 1994.

II. SCOPE OF REVIEW UNDER ARTICLE 21.5 OF THE DSU

2. Canada considers that a review under Article 21.5 allows a compliance panel to consider unchanged aspects of the amended measure because the amended measure, viewed as a whole, may alter the legal import of those unchanged aspects in the context of the amended measure.

3. Canada is of the view that it is unclear whether the Appellate Body found that the eligibility criteria are consistent with Article 2.1. It should clarify this point.

III. THE ALLOCATION OF THE BURDEN OF PROOF UNDER ARTICLE 2.1

4. The United States asserts that the complainant must demonstrate that the measure at issue satisfies both elements of the "less favourable treatment" test in Article 2.1. Canada disagrees.

5. The burden should lie on the *respondent* to demonstrate that the LRD element is satisfied once the complainant has demonstrated that the measure has caused such an impact. This allocation reflects the balance found in GATT 1994. Further, given the parallel nature of the LRD test under Article 2.1 and the chapeau of Article XX, it is reasonable and logical to conclude that the LRD test also functions as an exception and a defence.

IV. ARTICLE XX OF THE CHAPEAU

6. Canada agrees with the United States that the Compliance Panel erred in collapsing the separate analyses of whether there is discrimination and whether it is arbitrary or unjustifiable into one, and by considering the arbitrary and unjustifiable discrimination element before determining whether there was discrimination between countries where the same conditions prevail.

7. The Compliance Panel also failed to conduct the appropriate analysis of whether the relevant conditions were the same across *countries*. With respect to the eligibility requirements, instead of examining different fishing methods, it should have analysed whether these conditions occurred in countries.

8. Canada disagrees with the United States' characterization of the test for arbitrary or unjustifiable discrimination. The scope of the test to determine whether there is arbitrary and unjustifiable discrimination is dictated by the particular facts of the dispute. The rational connection test is particularly important and may be the only test needed, depending on circumstances.

ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

I. ARTICLE 2.1 TBT

A. US claims

1. Certification

1. Whether or not there is a detrimental impact is assessed by considering what the measure causes. The measure is the set of relevant *regulatory distinctions*. The increased certification requirements do not change this aspect of the assessment and thus do not bear on the question of detrimental impact.

2. Members must ensure that their SPS measures are adapted to the characteristics of the area from which the product originates. The issue of calibration arises in this case, in a particular way, in light of the argument Mexico is making. That argument is conceptually similar to the rule in Article 5.5 SPS, which requires comparable regulatory responses to comparable risks. We only get to these arguments because recognising the concept of *de facto* discrimination opens up the discussion to include all facts. Hence the US point that what Mexico is arguing for would mean that the US would have to impose the AIDCP standards on all its trading partners, who would no doubt argue that is unnecessary.

3. It is the private choice of the Mexican tuna fleet to continue setting on dolphins. The concept of *de facto* discrimination demands some consideration of this issue. Further, recalling that the covered agreements may encourage but do not mandate international harmonisation; and recalling that there is no pure proportionality test (no trade-off between the appropriate level of protection and trade-restrictiveness), because judges are neither mandated nor qualified to make political decisions – we think that there is such a thing as regulatory space. We have said in all the recent TBT cases that regulatory autonomy is as much a pillar of the WTO as MFN or national treatment. Regulatory space cannot be subjected to judicial scrutiny without limitation. Beyond the threshold of regulatory space, regulating Members have the right to choose: that is, there is some margin of appreciation. The chapeau of Article XX does not preclude this: it precludes arbitrary *discrimination*.

4. A cost-benefit analysis does not necessarily identify the only measure that can reasonably be adopted. It tests a measure for rationality by assessing whether its benefits outweigh its costs. This means that there may be more than one measure that satisfies a cost-benefit analysis. This is consistent with the concept of regulatory space, within which Members have a margin of appreciation. We do not think that, in order to be WTO consistent, a measure must be based on a cost-benefit analysis that takes into account the costs of a measure for trading partners, but this would be a strong indication that it falls within the concept of regulatory space. We would expect a cost-benefit analysis to take into account the welfare loss to consumers resulting from higher import prices. We recognise that some caution should be exercised when looking at these issues through the prism of costs and benefits, in the sense that it may be problematic when the benefits accrue to the domestic industry, whilst the costs are borne by the imported product. We do not, however, see this case in those terms.

5. We note that another way of looking at the kinds of issues that arise in this case is in terms of regulatory competition. Different Members have different regulations. Some are more burdensome than others. This can affect trade, and Members can disagree about whether the regulatory burden imposed by another Member is necessary. However, we again draw attention to the fact that Mexico's case is not directed at the removal of additional costs resulting from the US measure. Rather, Mexico's complaint is that the same costs should be imposed on everyone else. In this kind of situation, we wonder if it is not relevant, for the purposes of assessing such arguments, whether or not the complaining Member *itself* imposes such costs on everyone else.

2. Tracking and verification

6. The EU refers to the comments that it has already made with respect to the certification requirements. Our ability to comment more precisely is significantly hampered by the fact that the version of the Panel Report that has been circulated to the Members contains many instances in which allegedly confidential information has been extensively deleted. Furthermore, we situate this issue in the broader context of third party rights in the panel proceedings. We specifically request the Appellate Body to address this point in its Report.

7. Turning to the substance of the matter, we note that the Panel considers that the explanations provided by the US do not disclose any "rational connection" between the objective of the measure and the tracking and verification requirements. At the same time, the Panel states that it is not suggesting that there could not be a reason for such differences. We consider that the existence of a reasonable cost-benefit analysis could support the proposition that a measure is even-handed, particularly if such analysis would account for costs to foreign and domestic trade interests in an even-handed way, as well as the costs to US consumers resulting from the higher price of dolphin-safe tuna.

B. Mexico's claims

1. Whole measure

8. The measure and the set of regulatory distinctions complained of (viewed in the context of the measure as a whole) are conceptually the same thing. In this case Mexico complained about three regulatory distinctions: eligibility; certification; and tracking and verification. We agree with Mexico that a panel must determine whether or not the measure (that is, the set of regulatory distinctions complained of, not one of them considered in isolation) causes a detrimental impact. We also agree with Mexico that, in this particular case, the three factors on which the original finding of detrimental impact was based have not changed. We also agree with Mexico that, if a panel finds detrimental impact, it must go on to consider whether or not the measure is even-handed. We agree that, in this respect, a panel is entitled to consider the regulatory distinctions one at a time and/or collectively.

9. However, if a panel finds that one of the regulatory distinctions (in this case, eligibility) does not demonstrate a lack of even-handedness, then we think that that regulatory distinction is no longer problematic from a WTO law point of view, and should not be caught by the findings and conclusions of the panel. Therefore, if the Panel was correct to find that the eligibility criteria do not demonstrate a lack of even-handedness (a point that we address below), then we think that it is correct that the eligibility criteria should not be part of the final adverse ruling. Another way of saying the same thing is that the measure found to be WTO inconsistent consists of the second (certification) and third (tracking and verification) regulatory distinctions. We take note of Mexico's attempt to sweep up the eligibility criteria into the concept of the measure, *even if* the eligibility regulatory distinction would ultimately be found to be even-handed. We do not agree with that proposition.

2. Eligibility

10. We do not consider that Members are jurisdictionally "precluded" from making particular claims and arguments in compliance proceedings, as a function of what happened in the original proceedings. At the same time, we do consider that compliance adjudicators are expected to take into account the findings from the original proceedings. We do not agree with Mexico's assertion that "it is not possible to compare the raw numbers of dolphins killed [or injured] in different fisheries". We believe that a measure can and indeed must be calibrated or adapted to the characteristics of the area from which the product originates. Furthermore, we do not agree with Mexico's assertion that the burden of *generating* conclusive evidence in this respect falls on the regulating authority. We find contextual support for these propositions in Article 5.7 of the SPS Agreement and in Article 2.3 of the TBT Agreement.

3. Certification

11. In our experience, captain's certifications are one pillar of the overall system. Some infringements are *reported*, but they would appear to be the exception rather than the rule. In this respect, the Panel's assessment appears reasonable to us. Like the Panel, we would be hesitant about the "significant implications" of encroaching on Members' regulatory space based on the assumption that captain's certifications are inherently unreliable.

ANNEX C-3

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

I. Legal Test Under the Second Step of TBT Article 2.1

1. Rather than following the test articulated by the Appellate Body, the Panel majority focused its inquiry on whether the detrimental impact can be reconciled with, or is rationally related to, the policy pursued by the measure.[1] Japan believes that whether the regulatory distinctions causing detrimental impacts are calibrated to the risks they address is a critical question to determine even-handedness under Article 2.1. Japan encourages the Appellate Body to identify what risks each of the regulatory distinctions in the amended measure addresses, and to examine whether each regulatory distinction is "calibrated" to those risks.

II. The "Sufficient Flexibility" Criteria Under the Second Step of TBT Article 2.1 and the GATT Article XX Chapeau

2. The measure at issue involves a process or production method (PPM) like in *US – Shrimp*. Japan therefore considers that "arbitrary or unjustifiable discrimination" under the Article XX chapeau and the second step of the TBT Article 2.1 analysis in this case could have followed the approach taken for "arbitrary and unjustifiable discrimination" under the Article XX chapeau in *US – Shrimp*, where the Appellate Body agreed that "conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'."[2]

III. Interpretation of "Where The Same Conditions Prevail" in the GATT Article XX Chapeau

3. Regarding the eligibility criteria, the Panel and the United States appear to be of the same view that the "type of harm" caused by the two different fishing methods is the relevant "condition."[3] Japan believes that the relevant "conditions" are what would make the distinction or discrimination "comparable" for the purpose of the inquiry under the chapeau. Therefore, the presence, and not the degree, of risks addressed by the measures in question, should be the relevant "condition." Furthermore, conflating the cause of the regulatory distinction with the relevant "condition" will always result in a finding of dissimilar conditions.

IV. Legal Test Under GATT Article III:4

4. Japan continues to believe that the assessment of *de facto* less favourable treatment under GATT Article III:4 should 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. The application of different tests gives rise to incongruous outcomes.

[1] Panel Report, paras. 7.91 and 7.390.
[2] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144.
[3] Panel Report, para. 7.584.

ANNEX C-4

EXECUTIVE SUMMARY OF NEW ZEALAND'S THIRD PARTICIPANT'S SUBMISSION

New Zealand welcomes this opportunity to provide its views on matters at issue in the appeal of the Compliance Panel's report. In this submission, New Zealand draws attention to three matters concerning this appeal. First, in determining compliance of an implementing measure under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), a panel is required to consider the measure "as a whole". Second, in relation to the approach to "treatment no less favourable" in Article 2.1 of the Agreement on Technical Barriers To Trade (TBT Agreement), New Zealand considers that the so-called "calibration test" is simply part of the assessment of whether the regulatory distinction is even-handed and not a 'separate test'. Third, in New Zealand's view it would be unreasonable for the United States to impose observer requirements on other countries involved in tuna fisheries in other parts of the world where there is a different risk of dolphin mortality as a result of different fishing methods than occurs in the Eastern Tropical Pacific (ETP).

ANNEX D

PROCEDURAL RULING

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ANNEX D

PROCEDURAL RULING OF 21 JULY 2015

1.1. On 13 July 2015, the Division hearing this appeal informed the participants and the third participants that the oral hearing would take place on 7-8 September 2015. The scheduling of the oral hearing in this appeal was coordinated with the working schedules in the other proceedings simultaneously before the Appellate Body, in particular, in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (DS454) *and from the European Union* (DS460).

1.2. On 15 July 2015, the Division received a letter from Mexico requesting that the oral hearing not be scheduled on 7-8 September 2015 because a key member of Mexico's litigation team would not be available on those dates. Mexico submitted that attending the hearing with a reduced legal team would have an impact on its ability to present adequately its arguments before the Appellate Body. Mexico requested the Division to modify the date of the oral hearing to a date either before, or after, 7-8 September 2015. Mexico further requested the Division to take into consideration the fact that the same legal team will represent Mexico in the oral hearing in *United States – Certain Country of Origin Labelling (COOL) Requirements (Recourse by the United States to Article 22.6 of the DSU)* (DS386), scheduled for 15-16 September 2015. Mexico thus suggested that the Division reschedule the oral hearing in this appeal and hold it on, for instance, 3-4 September or 21-22 September 2015.

1.3. On 16 July 2015, the Division wrote to the United States and to the third participants soliciting their views on Mexico's request. On 16 July, comments were received from the European Union, and, on 17 July, comments were received from Japan and the United States.

1.4. In their comments, neither the United States nor any of the third participants objected to Mexico's request, at least with respect to the proposed dates of 21-22 September. Similar to Mexico, the United States wished to avoid a hearing during the week starting 14 September 2015, as it also has members of the same legal team engaged in both the current proceedings and those in *US – COOL (Article 22.6 – US)*. The United States indicated that, if it were not possible to move the hearing dates to the week starting 21 September 2015, then it would prefer to retain the currently scheduled dates of 7-8 September. The United States did not favour holding the oral hearing on 3-4 September, due to its own scheduling concerns.

1.5. The European Union indicated its flexibility with respect to the alternative dates proposed by Mexico, while stating that it would prefer to avoid a hearing on 14-17 September 2015, as its lawyers in the current appeal are due to participate in hearings in two other cases on those dates. The European Union expressed the view that requests to change dates in a working schedule should be approached on a case-by-case basis, and identified the following elements as potentially relevant to the decision as to whether to accept or reject such requests: (i) how far in advance the dates of the oral hearing have been known; (ii) the nature of the scheduling conflict; (iii) the capacity of Members, including developing country Members, to deal with several disputes at the same time; and (iv) the Appellate Body's own resource constraints and scheduling requirements. The European Union considered the Appellate Body best placed to weigh and balance these competing considerations.

1.6. Japan did not comment on the specific dates proposed by Mexico. Japan noted, however, that the hearing dates communicated by the Appellate Body, as well as the alternative dates suggested by Mexico, all fall outside the time-period stipulated in Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 27 of the Working Procedures for Appellate Review (Working Procedures). Japan expressed its understanding that the Division would, in any event, provide sufficient explanation for its determination of any hearing dates.

1.7. In considering Mexico's request, we recall that Rule 16(2) of the Working Procedures provides:

> In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

1.8. Mexico submits that attending the hearing with a reduced legal team would adversely impact its ability to present adequately its arguments before the Appellate Body. We recognize that, as a general principle, a Member's right to defend properly its case is instrumental to the exercise of its rights under the DSU.

1.9. We further observe that the WTO dispute settlement system is currently experiencing a high level of activity, which can be onerous for WTO Members engaged in multiple, parallel proceedings. In such circumstances, a Member's ability to engage effectively in all such proceedings may be impaired, especially if that Member is a developing country. Moreover, Members' capacity to manage limited resources across multiple disputes may be rendered all the more difficult given that the timeframes in appellate proceedings are set independently from those in other phases of WTO dispute settlement proceedings in other disputes.

1.10. In the circumstances of this appeal, we consider relevant the fact that at least some members of the legal teams representing the participants in this appeal are also representing the parties in *US – COOL (Article 22.6 – US)*, and that an oral hearing in those arbitral proceedings is scheduled for 15-16 September 2015. We further note that neither the United States nor any third participant in these proceedings has expressed any opposition to Mexico's request to reschedule the oral hearing for 21-22 September 2015, or suggested that holding the oral hearing on those days would prejudice its due process rights.

1.11. Taking account of the particular circumstances of this appeal, and in the light of the above considerations, taken together, we consider that Mexico has identified exceptional circumstances warranting modification of the dates for the oral hearing. We, therefore, decide to modify the Working Schedule in this appeal and to hold the oral hearing on 21-22 September 2015.

1.12. A revised Working Schedule is attached to this ruling.