United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products:

Recourse to Article 21.5 of the DSU by Mexico (DS381)

First Written Submission of
the United States of America

May 27, 2014

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TABLE OF ACRONYMS

Acronym	Full Name
2013 Final Rule	Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997 (July 9, 2013)
2013 Proposed Rule	Enhanced Document Requirements to Support use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 20,604 (proposed Apr. 5, 2013)
AIDCP	Agreement on the International Dolphin Conservation Program
CBP	Customs and Border Protection
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
C.F.R.	Code of Federal Regulations
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
DMLs	Dolphin Mortality Limits
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
EPO	Eastern Pacific Ocean
ETP	Eastern Tropical Pacific Ocean
EEZ	Exclusive Economic Zones
FAD	Fish Aggregating Device
FAO	United Nations Food and Agriculture Organization

FCO or Form 370	NOAA Fisheries Certificate of Origin
FTCA	Federal Trade Commission Act
HSDC	High Seas Driftnet Certification
HSDN	Large-Scale High Seas Driftnet Nation
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IDCP	International Dolphin Conservation Program
IDCPA	International Dolphin Conservation Program Act
IOTC	Indian Ocean Tuna Commission
IRP	International Review Panel
ISSF	International Seafood Sustainabilty Foundation
MMPA	Marine Mammal Protection Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
PBR	Potential Biological Removal Level
PLTRT	Pelagic Longline Take Reduction Team
RFMOs	Regional Fishery Management Organizations
SAR	Stock Assessment Report
SFSC	Southwest Fisheries Science Center
SPC	Secretariat of the Pacific Community
SPS	Sanitary and Phytosanitary
TBT Agreement	Agreement on Technical Barriers to Trade

TTF	Tuna Tracking Form
TTVT	Tuna Tracking and Verification Program
UNGA	United National General Assembly
U.S.C.	United States Code
WCPFC	Western and Central Pacific Fisheries Commission
WCPO	Western and Central Pacific Ocean
WTO	World Trade Organization

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Short title	Full Citation
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Brazil – Retreaded Tyres (Panel)	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R
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Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
Chile – Price Band System (Article 21.5 – Argentina)(AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
Chile – Price Band System (Article 21.5 – Argentina)(Panel)	Panel Report, Chile – *Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report WT/DS207/AB/RW
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001

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US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
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US – Shrimp (Article 21.5 – Malaysia) (Panel)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report WT/DS58/AB/RW
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Exhibit Number	Description
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19	IATTC, Active Purse Seine Vessel Register (updated May 19, 2014)
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80	International Dolphin Conservation Program Act, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630, 104th Cong. 2nd Sess. (April 30, 1996) (Statement of Senator Barbara Boxer); 149 Cong. Rec. S.203-01, The Truth in Tuna Labeling Act of 2003
81	*Convention on International Trade in Endangered Species*, 27 UST 1087, TIAS 8249, 993 UNTS 243 (1975)

I. INTRODUCTION

1. As in the original proceeding, Mexico considers the U.S. dolphin safe labeling requirements to be wholly illegitimate. In Mexico's view, it is simply impossible for the United States, consistent with its WTO obligations, to recognize some, but not all, fishing methods as "dolphin safe." As Mexico declares: "all tuna fishing methods should be either disqualified or qualified."[1] In Mexico's view, the United States must make a choice: either the United States must declare Mexico's preferred fishing method – setting on dolphins with a purse seine net – to be "dolphin safe," or the United States must eliminate the label entirely. Yet neither the facts nor law requires such a choice.

2. As to the facts, setting on dolphins is the *only* tuna fishing method that *targets* dolphins. The fishing practice is *inherently* harmful to dolphins. Indeed, the Appellate Body has recognized that "setting on dolphins is *particularly* harmful to dolphins."[2] It cannot be that the United States must permit tuna products produced by using such a fishing practice to be labeled as "dolphin safe." Moreover, the mere fact that dolphins can be killed or seriously injured in accidental interactions with different types of fishing gear does not mean that no tuna products produced using these other fishing techniques can be labeled as "dolphin safe."[3] It must be that the United States can look at the particular circumstances of the production of such tuna products.

3. As discussed below, the facts fully support the proposition that the United States can draw distinctions between tuna products produced using various fishing methods, and in doing so it can prevent tuna products produced in a manner that is not safe for dolphins from being able to employ the label. The distinctions the United States has drawn are fully supported by science and are applied in an "even-handed" manner.

4. As to the law, Mexico appears to misunderstand the nature of this compliance proceeding. The central question posed by Mexico's discrimination claim under the *Agreement on Technical Barriers to Trade* (TBT Agreement) is whether the United States has come into compliance with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceeding. Yet nothing in the DSB recommendations and rulings indicates that the United States must choose between allowing *all* tuna product to be labeled as "dolphin safe" and *no* tuna product labeled as "dolphin safe."

5. Mexico disagrees. It argues, in effect, that the DSB recommendations and rulings are substantively wrong and otherwise incomplete. Mexico asks the Panel to set out a new path for the United States to come into compliance – one that was not required (and, indeed, *was explicitly rejected*) in the original proceeding. Simply put, Mexico seeks to transform this compliance proceeding into an appeal of the adopted panel and Appellate Body reports. As such, Mexico's TBT Article 2.1 claim falls outside the Panel's terms of reference and is wholly inappropriate.

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[1] Mexico's First Written 21.5 Submission, para. 263.

[2] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

[3] *See US – Tuna II (Mexico) (Panel)*, para. 7.438.

6. In any event, the regulatory distinctions drawn by the challenged measure are entirely "even-handed." The challenged measure does not discriminate *de facto* against Mexican tuna products, and Mexico's Article 2.1 claim therefore fails.

7. Likewise, Mexico's parallel discrimination claims under the *General Agreement on Tariffs and Trade 1994* (GATT 1994) fail as well. The facts simply do not support a conclusion that the challenged measure discriminates *de facto* against Mexican tuna products. But in any event, the challenged measure is fully justified under Article XX of the GATT 1994.

8. The United States respectfully requests the Panel to reject Mexico's claims that the United States has not brought its measures into compliance with the DSB recommendations and rulings.

II. FACTUAL BACKGROUND

A. The Amended Dolphin Safe Labeling Measure

9. In the original proceeding, Mexico challenged three measures: 1) the Dolphin Protection Consumer Information Act (DPCIA); 2) the statute's implementing regulations; and 3) the 9th Circuit Court of Appeals decision in *Earth Island Institute v. Hogarth* (*Hogarth*).[4] The original panel and the Appellate Body found that these measures set out the conditions under which tuna products[5] may be labeled "dolphin safe," and referred to them collectively as the "measure at issue" or the "U.S. dolphin safe labeling provisions."[6] For purposes of this submission, we refer to the set of measures as originally challenged as the "original measure."

10. On July 9, 2013, the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) issued a final rule (2013 Final Rule), which amended the existing DPCIA implementing regulations. The 2013 Final Rule constitutes the measure taken to comply with the DSB recommendations and rulings pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).[7] The United States refers to all three measures – the statute, the implementing regulations (as amended by the 2013 Final Rule), and the *Hogarth* decision, collectively – as the "amended dolphin safe labeling measure" or "amended measure."

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[4] *US – Tuna II (Mexico) (Panel)*, para. 2.1; *US – Tuna II (Mexico) (AB)*, para. 172.

[5] Tuna products are defined as "a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days." *US – Tuna II (Mexico) (Panel)*, para. 4.31 (citing 16 U.S.C. § 1385(c)(5)).

[6] *US – Tuna II (Mexico) (AB)*, para. 172 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.24).

[7] Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997, 40,997 (2013 Final Rule) (Exh. MEX-7) ("This rule is intended . . . to ensure that the United States satisfies its obligations as a member of the World Trade Organization (WTO).").

1. Overview of the Original Measure

11. The original panel summarized the DPCIA, the regulations as originally challenged, and the *Hogarth* ruling in its report.[8] Neither the DPCIA, nor *Hogarth*, has been amended since the original panel circulated its report. However, NOAA has amended the regulations, as discussed below. We refer the Panel to the original panel's description of the unchanged elements of the original measure.

2. The 2013 Final Rule

12. The DSB adopted its recommendations and rulings in this dispute on June 13, 2012. Pursuant to Article 21.3(b) of the DSU, the parties agreed that the reasonable period of time (RPT) for the United States to come into compliance would be 13 months from that date, ending on July 13, 2013.

13. On April 5, 2013, NMFS published a proposal to amend the implementing regulations in order to come into compliance with the DSB recommendations and rulings.[9] After carefully reviewing the comments submitted on the proposed rule, NMFS published the final rule on July 9, 2013.[10] The 2013 Final Rule became effective on July 13, 2013.[11]

14. The dolphin safe labeling measure, as amended by the 2013 Final Rule, pursues the same two objectives as the original measure: 1) ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins, and 2) contributing to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.[12]

15. Under the regulations as originally challenged, tuna product containing tuna caught by purse seine vessels not subject to the observer requirements of the Agreement on the International Dolphin Conservation Program (AIDCP) could only be labeled "dolphin safe" if accompanied by a captain's certification that no purse seine net was intentionally deployed on or used to encircle dolphins during the voyage in which the tuna were caught.[13] Tuna product containing tuna caught other than by a purse seine vessel were subject to no documentation requirements.[14]

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[8] *See US – Tuna II (Mexico) (Panel)*, paras. 2.1-33.

[9] *See* Enhanced Document Requirements to Support use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 20,604 (proposed Apr. 5, 2013) (2013 Proposed Rule) (Exh. US-1).

[10] 2013 Final Rule, 78 Fed. Reg. at 40,997 (Exh. MEX-7).

[11] 2013 Final Rule, 78 Fed. Reg. at 40,997 (Exh. MEX-7).

[12] *See US – Tuna II (Mexico) (AB)*, para. 302; *US – Tuna II (Mexico) (Panel)*, paras. 7.401, 7.425; 2013 Final Rule, 78 Fed. Reg. at 40,997 (Exh. MEX-7).

[13] *US – Tuna II (Mexico) (Panel)*, para. 2.25.

[14] *US – Tuna II (Mexico) (Panel)*, paras. 2.14, 2.24.

16. The 2013 Final Rule enhances the documentation requirements of the original measure. Now, all tuna product must be accompanied by a certification by the captain of the harvesting vessel that "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught" in order to be eligible for the dolphin safe label.[15] The 2013 Final Rule leaves in place all previously existing documentation requirements, including that tuna product containing tuna harvested by a purse seine vessel, regardless of location, may not be labeled "dolphin safe" without a captain's certification that "no purse seine net was intentionally deployed on or used to encircle dolphins" during the voyage in which the tuna were caught.[16]

17. The 2013 Final Rule also revised the regulations pertaining to the NMFS Tuna Tracking and Verification Program (TTVP)[17] applying to tuna labeled dolphin safe. The 2013 Final Rule establishes that, for all tuna products designated "dolphin safe," the tuna must be stored separately from tuna caught in non-dolphin safe sets or gear deployments from the time of capture through the time of unloading.[18] Tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded and stored so as to maintain and safeguard this segregation.[19] The segregation must also be preserved during canning activities – dolphin safe and non-dolphin safe tuna products may not share the same storage containers, cookers, conveyers, or other machinery.[20] Generally, segregation on board the harvesting vessel will be achieved through the designation of dolphin safe and non-dolphin safe wells.[21] Where vessels do not have different wells, netting or other materials may be used to achieve segregation.[22]

18. The 2013 Final Rule took effect on July 13, 2013, and was mandatory as of that date.[23] The new requirements applied only to fishing trips beginning on or after the rule's effective

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[15] 2013 Final Rule, 78 Fed. Reg. at 41001, 41002 (Exh. MEX-7); 50 C.F.R. §§ 216.91(a)(2)(i), (a)(2)(iii)(A)-(B), (a)(4)(i)-(iii), 216.92(b)(2) (Exh. US-2).

[16] 50 C.F.R. §§ 216.91(a)(1), (a)(2), 216.92(b)(2) (Exh. US-2); NOAA Form 370, at 5(B)(5) (Exh. MEX-22). As discussed below, a certification by an observer participating in an approved national or international program may also be required.

[17] The TTVP is the body within the NOAA NMFS that administers the official dolphin safe certification program. The TTVP monitors the domestic production, as well as the importation, of all frozen and processed tuna products and verifies associated dolphin safe claims. For tuna products harvested in the ETP by large purse seine vessels, the TTVP relies on Inter-American Tropical Tuna Commission (IATTC) observer records as recorded on IATTC Tuna Tracking Forms. *See* NOAA, "Tuna Tracking and Verification Program," http://www.nmfs.noaa.gov/pr/dolphinsafe/ttvp.htm (Exh. US-3); *see US – Tuna II (Mexico) (Panel)*, paras. 2.31-32.

[18] 50 C.F.R. §§ 216.91(a)(5), 216.93(c)(1)(i), (c)(2)(i), (c)(3)(i) (Exh. US-2).

[19] 50 C.F.R. §§ 216.939(c)(1)(iv), (c)(2)(iii), (c)(3)(iii) (Exh. US-2).

[20] 50 C.F.R. § 216.93(d)(4) (Exh. US-2).

[21] 2013 Final Rule, 78 Fed. Reg. at 40,100 (Exh. MEX-7). The majority of tuna labeled dolphin safe that is harvested by U.S. purse seine vessels is harvested by vessels that have more than 10 storage wells. Consequently, using separate wells to store dolphin safe and non-dolphin safe tuna will not require any changes on most fishing vessels. *Id.*

[22] 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exh. MEX-7).

[23] *See* 2013 Final Rule, 78 Fed. Reg. at 40,998 (Exh. MEX-7).

date.[24] In light of the fact that it might not have been feasible for all affected entities to achieve 100 percent compliance immediately, the 2013 Final Rule states that "through January 1, 2014, NMFS will conduct an industry education and outreach program on the provisions and requirements of this rule" to "ensure that the industry effectively and rationally implements this final rule."[25] That said, given the significant lag time between when the tuna is caught and when the canned tuna product is sold at retail, any canned tuna product sold prior to January 1, 2014 would likely contain tuna caught on trips that began prior to July 13, 2013, and, therefore, would not have been subject to the new requirements in any event.[26]

19. Nevertheless, immediately following the publication of the 2013 Final Rule, captain statements consistent with the amended measure began appearing on Fisheries Certificates of Origin (Form 370s).[27] NMFS considers that the level of compliance with the additional requirements has been high from the very beginning. Furthermore, as noted in the 2013 Final Rule, the NMFS TTVP educated those entities that did not present complete documentation consistent with the 2013 Final Rule during the education period and ensured that the necessary documentation was provided.[28]

3. The Requirements of the Amended Dolphin Safe Labeling Measure

20. The amended dolphin safe labeling measure places three types of conditions on use of the dolphin safe label for tuna products: 1) conditions relating to fishing methods, 2) conditions relating to certifications, and 3) conditions relating to record-keeping (tracking and verification).

a. Fishing Methods

21. In terms of access to the dolphin safe label, the amended measure distinguishes two methods of fishing – large-scale driftnet fishing on the high seas and setting on dolphins – from other methods of harvesting tuna. The conditions relating to fishing methods apply equally to all tuna products, regardless of where the tuna is caught.

i. Large-Scale Driftnet Fishing on the High Seas

[24] *See* 2013 Final Rule, 78 Fed. Reg. at 40,998 (Exh. MEX-7).

[25] 2013 Final Rule, 78 Fed. Reg. at 40,998 (Exh. MEX-7). Among other things, NMFS publicized the Final Rule, prepared newly worded captain's statement templates, and, on July 12, 2013, mailed informational materials to over 500 entities (importers, processors, and vessels) that deal in tuna and tuna products to educate them about the new requirements. *See* William Jacobson Witness Statement, Appendix 1 (May 26, 2014) (Exh. US-4); NMFS, Letters to Tuna Producers Concerning the 2013 Final Rule (July 12, 2013) (Exh. US-5).

[26] William Jacobson Witness Statement, Appendix 1 (Exh. US-4).

[27] William Jacobson Witness Statement, Appendix 1 (Exh. US-4). Many of these forms were associated with imports of frozen tuna products, for which the lag-time between harvest and retail is less than for canned tuna products.

[28] William Jacobson Witness Statement, Appendix 1 (Exh. US-4).

22. Under the amended measure, as was the case under the original measure, tuna harvested using large-scale driftnets on the high seas is not eligible for the dolphin safe label.[29] The DPCIA provides that it is a violation of section 5 of the Federal Trade Commission Act for tuna harvested "on the high seas by a vessel engaged in driftnet fishing" to be labeled dolphin safe.[30]

23. Thus, Mexico is simply wrong to allege that tuna caught with large-scale driftnets on the high seas is eligible to be labeled dolphin safe.[31]

24. The condition relating to large-scale driftnets is implemented in several ways. U.S. tuna processors must submit monthly reports to the NMFS TTVP containing, *inter alia*, the dolphin safe status of tuna products and the type of gear used to harvest the tuna contained therein.[32] Tuna harvested with large-scale driftnets on the high seas would not be eligible for the dolphin safe label.[33] Additionally, all tuna and tuna products imported into the United States must be accompanied by a Form 370, which includes a statement of the type of gear used to harvest the fish.[34] Imports accompanied by a Form 370 where it is indicated that a large-scale driftnet on the high seas was used would not be eligible for dolphin safe labeling.[35]

25. This aspect of the DPCIA is one of several instruments of U.S. law that implement the UN General Assembly Resolution 46/215,[36] which calls for a moratorium on large-scale driftnet fishing on the high seas beginning December 31, 1992.[37] The Magnuson-Stevens Fishery

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[29] Under U.S. law, "driftnet" means "a gillnet composed of a panel of plastic webbing one and one-half miles or more in length." "Driftnet fishing" means "a fish-harvesting method in which a driftnet is placed in water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing." *See* DPCIA, 16 U.S.C. § 1385(c) (Exh. MEX-8) (incorporating the definitions set out in Section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987, 16 U.S.C. § 1822 note).

[30] DPCIA, 16 USC § 1385(d)(1)(A) (Exh. MEX-8); *see also* 50 C.F.R. § 216.91(a)(3) (Exh. US-2) (stating that it is a violation of Section 5 of the Federal Trade Commission Act (FTCA) for tuna harvested "[b]y a vessel engaged in large-scale driftnet fishing" to be labeled dolphin safe).

[31] *See* Mexico's First Written 21.5 Submission, para. 42.

[32] 50 C.F.R. §§ 216.93(d)-(e) (Exh. US-2); *see* U.S. Response to Original Panel Question No. 4.

[33] DPCIA, 16 USC § 1385(d)(1)(A) (Exh. MEX-8); 50 C.F.R. § 216.91(a)(3) (Exh. US-2).

[34] *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. § 216.93(f) (Exh. US-2); NOAA Form 370, at 2 (Exh. MEX-22).

[35] William Jacobson Witness Statement, Appendix 1 (Exh. US-4). The gear type would be indicated by writing "DN" for gear type. *See* NOAA Form 370, at 2 (Exh. MEX-22) (noting that "DN" refers to "Large Scale Driftnet (High Seas)").

[36] *See* United Nations General Assembly Res. 46/215, "Large-Scale Pelagic Drift-net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas" (Dec. 20, 1991) (UNGA Res. 46/215) (Exh. US-6).

[37] Importantly, the condition relating to large-scale driftnets in the amended dolphin safe labeling measure reflects the scope of the UN Resolution 46/215 moratorium in that it applies only to "large-scale driftnets" over 2.5 kilometers long and not to smaller drift gillnets, which are covered by the provisions relating to fishing methods not precluded from the dolphin safe label. *See* UNGA Res. 46/215 (Exh. US-6) (referring to the Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific, which defined driftnets as "a gillnet or other net or a combination of nets which is more than 2.5 kilometers in length); 50 C.F.R. § 216.91(3) (Exh. US-2); NOAA

Conservation and Management Act also prohibits large-scale driftnet fishing in all waters subject to U.S. jurisdiction and prohibits U.S. persons and flagged vessels from engaging in large-scale driftnet fishing on the high seas.[38] Additionally, under the High Seas Driftnet Fisheries Enforcement Act, if NOAA identifies a nation as a Large-Scale High Seas Driftnet Nation (HSDN), any Form 370 accompanying certain fish products exported from or harvested by a vessel of that nationality must contain a High Seas Driftnet Certification (HSDC).[39] Specifically, a responsible official of the government of the harvesting country must certify that the shipment does not include fish harvested by a large-scale driftnet on the high seas.[40] Tuna products harvested by a HSDN vessel and not accompanied by the required certification would be precluded from using the dolphin safe label.[41] Italy is the only country that NOAA has ever identified as an HSDN.[42]

26. Mexico appears confused with respect to the difference between the general requirements prohibiting the use of the dolphin safe label on tuna caught using large-scale driftnets on the high seas and the additional requirement applicable to an HSDN. The fact that the United States imposes an additional certification, *as a condition of importation*, on Italian fish does not change the clear fact that tuna caught with large-scale high seas driftnets are not eligible for the dolphin safe label.[43]

27. We would note, however, the issue does not appear to be particularly relevant to this dispute. Mexico's only evidence that large-scale driftnet fishing is occurring at all is a NOAA report stating that there is some evidence of illegal large-scale driftnet fishing for albacore tuna

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Form 370, at 2 (Exh. MEX-22). Other countries and RFMOs have implemented the UN moratorium through driftnet measures with the same scope. *See* NMFS, *2012 Report Of The Secretary Of Commerce to the Congress of the United States Concerning U.S. Actions Taken On Foreign Large-Scale High Seas Driftnet Fishing*, at 8, 12, 14, 16 (NMFS, 2012 Driftnet Report) (Exh. MEX-21) (describing various other instruments implementing the UN moratorium and having the same scope, including an EU regulation and WCPFC and IOTC resolutions).

[38] Magnuson-Stevens Fishery Conservation and Management Act § 307, codified as amended at 16.U.S.C. § 1857(1)(M) (Exh. US-7) ("It is unlawful… for any person… to engage in large-scale driftnet fishing that is subject to the jurisdiction of the United States, including use of a fishing vessel of the United States to engage in such fishing beyond the exclusive economic zone").

[39] 50 C.F.R. § 216.24(f)(4)(xiii) (Exh. US-9).

[40] NOAA Form 370, at 1 (Exh. MEX-22).

[41] *See* Identification of Italy as a Large-Scale High Seas Driftnet Nation, 64 Fed. Reg. 34217 (June 25, 1999) (Italy HSDN Designation) (Exh. US-8). Indeed, a shipment of fish or fish products from a vessel flagged to and HSDN may not be imported into the United States without an HSDC on the accompanying Form 370. *See* 50 C.F.R. § 216.24(f)(6)(ii) (Exh. US-9).

[42] NMFS, 2012 Driftnet Report, at 20 (Exh. MEX-21); Italy HSDN Designation, 64 Fed. Reg. 34217 (Exh. US-8) (stating that, due to the designation of Italy, "pursuant to the [DPCIA], the importation of certain fish and fish products into the United States from Italy is prohibited, unless Italy certifies that such fish and fish products were not caught with large-scale driftnets anywhere on the high seas" and that "[t]his action furthers the U.S. policy to support a United Nations moratorium on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins").

[43] *See infra*, sec. II.C.2.a (demonstrating that large-scale high-seas driftnet fishing is not a method of fishing that produces tuna for the U.S. tuna product market).

in the North Pacific,[44] and, specifically, that in 2012 the U.S. Coast Guard boarded a stateless vessel engaging in illegal driftnet fishing on the high seas in the North Pacific.[45] The report also states that there have been eye witness accounts of Iranian vessels operating large-scale driftnets on the high seas in the Indian Ocean.[46] None of this is relevant to the U.S. market for tuna products, however. Importations into the United States of tuna or tuna products from stateless vessels are prohibited under U.S. law,[47] and U.S. persons may not legally import tuna or tuna products from Iran.[48] Indeed, of the 160,332 vessel records submitted to NOAA in the five years between January 1, 2009 and December 31, 2013, *zero* designate the gear type as "DN - Large Scale Driftnet (High Seas)."[49]

28. This data simply confirms what the United States already understands – fulfillment of the UN General Assembly Resolution's call to prohibit this harmful fishing practice has been generally good. Numerous WTO Members, including Canada, China, the EU, Japan, Korea, Russia, and the United States, have taken steps to implement the UN resolution in their domestic laws.[50] Regional Fisheries Management Organizations (RFMOs), including the Western and Central Pacific Fisheries Commission (WCPFC), the Indian Ocean Tuna Commission (IOTC), and the International Commission for the Conservation of Atlantic Tunas (ICCAT), have also taken steps to implement the UN Resolution.[51] Likewise, we are not aware of any examples – and Mexico cites to none – of a fishing nation using large-scale driftnets to catch tuna in waters under its national jurisdiction (much less tuna destined for the U.S. tuna product market).[52]

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[44] Mexico's First Written 21.5 Submission, para. 46 (first bullet).

[45] Mexico's First Written 21.5 Submission, para. 46 (second bullet) (citing NMFS, 2012 Driftnet Report, at 8 (Exh. Mex-21)). The portion of the NMFS 2012 Driftnet Report that Mexico cites as the most recent example of illegal driftnet fishing on the high seas describes how a stateless vessel was apprehended engaging in illegal driftnet fishing in the Northern Pacific Ocean and seized by the U.S. Coast Guard. *See* NMFS, 2012 Driftnet Report, at 8 (Exh. Mex-21).

[46] Mexico's First Written 21.5 Submission, para. 46 (third bullet).

[47] *See* 50 C.F.R. § 216.24(f)(2), (f)(4), (g) (Exh. US-9); NOAA Form 370 (Exh. MEX-22).

[48] *See* 31 C.F.R. § 560.201 (Exh. US-10) ("Except as otherwise authorized pursuant to this part, . . . the importation into the United States of any goods or services of Iranian origin or owned or controlled by the Government of Iran . . . is prohibited.").

[49] *See* William Jacobson Witness Statement, Appendix 2 (Exh. US-4) (discussed *infra*, sec. II.C.2.a). Since the inception of the Form 370 database in 2002, only 3 vessel records indicated large-scale high seas driftnet as the gear type. *See id.* All three records were submitted to NOAA in 2006. For two of the forms, the listed duration of the trips (10 days) indicates that the DN code was almost certainly used in error – a large-scale driftnet vessel generally needs significantly longer than a week to make a trip profitable, plus a day on each side of the trip to reach the high seas. The trip duration on the third form (3 weeks) is also suspiciously short for a large-scale driftnet vessel. NOAA Form 370s are destroyed after 5 years, and, consequently, we cannot now confirm that the three forms were miscoded. *See id.*, Appendix 1.

[50] NMFS, 2012 Driftnet Report, at 10-12 (Exh. MEX-21).

[51] NMFS, 2012 Driftnet Report, at 12, 13, 16 (Exh. MEX-21).

[52] In this regard, we would note that Mexico wrongly implies that the United States allows large-scale driftnet fishing in U.S. EEZs. *See* Mexico's First Written 21.5 Submission, para. 43, n.32. That is not the case, of course. The United States has carried out its commitments under UNGA Res. 46/215 and also prohibits large-scale

29. In sum, Mexico fails to provide *any evidence* that even a single tuna product offered for sale in the United States as "dolphin safe" contains tuna caught in a large scale driftnet on the high seas or otherwise.

ii. Setting on Dolphins

30. Under the amended measure, tuna products containing tuna harvested anywhere in the world by setting on dolphins are not eligible to be labeled dolphin safe. This prohibition is unchanged from the original measure. It is implemented through section 50 C.F.R. § 216.91(a)(1), which applies to large purse seine vessels in the ETP, and section 216.91(a)(2), which applies to purse seine vessels outside the ETP.[53] Both provisions require certifications by the captain of the harvesting vessel that "no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna were harvested."[54] As the Appellate Body found, this condition reflects the fact that "setting on dolphins is particularly harmful to dolphins."[55]

31. This condition is consistent with the emerging international trend to prohibit fishing vessels from setting on cetaceans, including dolphins. In March 2012, the WCPFC adopted a measure requiring its members to ban setting on "a school of tuna associated with a cetacean" in the Convention Area.[56] The IOTC adopted a similar measure in 2013.[57] Both resolutions also committed the parties to require vessel captains, in the event a cetacean is unintentionally encircled, to take all reasonable steps to ensure the cetacean's safe release and to report the

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driftnet fishing in U.S. waters and by U.S.-flagged vessels anywhere beyond the EEZ of any nation, *see* 16 U.S.C. § 1857(1)(M) (Exh. US-7). The fisheries that Mexico points to are for gillnets, which, unlike large-scale driftnets, are less than 2.5 km long. *See* NOAA, List of Fisheries for 2013, 78 Fed. Reg. 53,336 (August 29, 2013) (Exh. MEX-19). Notably, the United States does not have a gillnet fishery targeting tuna.

[53] Pursuant to the *Agreement on the International Dolphin Conservation Program* (AIDCP), purse seine vessels smaller than 363 metric tons (400 short tons) are prohibited from setting on dolphins in the ETP. *See* AIDCP, Annex VIII(6) (Exh. MEX-30). 50 C.F.R. section 216.24(a)(2)(i) implements this prohibition for U.S. vessels. *See* 50 C.F.R. 216.24(a)(2)(i) (Exh. US-9).

[54] 50 C.F.R. §§ 216.91(a)(1)(i), (a)(1)(iii), (a)(2)(i)-(iii) (Exh. US-2).

[55] *US – Tuna II (Mexico) (AB)*, para. 289; *see also US – Tuna II (Mexico) (Panel)*, para. 7.438 ("It is undisputed, in particular, that the fishing method known as setting on dolphins may result in substantial amount of dolphin mortalities and serious injuries"); *id.*, para. 7.504 ("[S]ufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist" regarding setting on dolphins having "an adverse impact on dolphins beyond observed mortality.").

[56] WCPFC, "Conservation and Management Measure 2011-03" (Mar. 2013) (WCPFC Resolution 2011-03) (Exh. US-11). The resolution stated, in relevant part: "CMMs shall prohibit their flagged vessels from setting a purse seine net on a school of tuna associated with a cetacean in the high seas and exclusive economic zones of the Convention Area, if the animal is cited prior to commencement of the set."

[57] *See* IOTC, "Resolution 13/04 on the Conservation of Cetaceans" (2013) (IOTC Resolution 13/04) (Exh. US-12). The resolution stated: "2. Contracting Parties and Cooperating Non-Contracting Parties (collectively CPCs) shall prohibit their flagged vessels from intentionally setting a purse seine net around a cetacean in the IOTC area of competence, if the animal is sighted prior to the commencement of the set."

incident.[58] The United States has recently proposed similar measures for adoption by the ICCAT.[59]

iii. All Other Fishing Techniques

32. Tuna products harvested by fishing methods other than large-scale high seas driftnet fishing or setting on dolphins are eligible to be labeled dolphin safe only if no dolphins were killed or seriously injured in the gear deployments in which the tuna were caught. To ensure this condition is met, tuna products labeled dolphin safe are subject to the certification and record-keeping conditions discussed below. This treatment applies to all fisheries, whether inside or outside the ETP, and whether on the high seas or in waters under national jurisdiction. As discussed below, virtually all tuna sold in the U.S. tuna product market is caught by purse seine sets (other than by setting on dolphins), longline fishing, and pole and line fishing.[60]

b. Certifications

33. Under the amended measure, use of the dolphin safe label on any tuna product is conditioned on the product being accompanied by certain certifications by the captain of the harvesting vessel and, under some circumstances, an observer from an approved national or international program.

i. Captain Statements

34. The dolphin safe label may be used only if the tuna product is accompanied by a certification by the captain of the harvesting vessel that "no dolphins were killed or seriously injured" in the gear deployments in which the tuna were caught.[61]

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[58] *See* IOTC Resolution 13/04 (Exh. US-12); WCPFC Resolution 2011-03 (Exh. US-11).

[59] *See* ICCAT, "Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries," Doc. No. IMM-015/I 2014 (May 20, 2014) (Exh. US-13).

[60] *See infra*, sec. II.C.2.a.

[61] As regards imported tuna products, *see US – Tuna II (Mexico) (Panel)*, paras. 2.32 (finding that "every import of tuna product, regardless of whether the 'dolphin-safe' label is intended to be used, must be accompanied by a Fisheries Certificate of Origin"); NOAA Form 370 (Exh. MEX-22) (requiring, for each of the five categories of imported tuna products, a captain's certification that "no dolphins were killed or seriously injured" in the sets or gear deployments in which the tuna were caught"). As regards tuna caught by U.S.-flagged large purse seine vessel in the ETP, *see US – Tuna II (Mexico) (Panel)*, para. 2.31 (finding that "the US government collects information from domestic tuna processors [and] US tuna vessels . . . to verify whether tuna products labelled dolphin-safe meets the statutory conditions"), 50 C.F.R. §§ 216.93(d) and (e) (requiring all domestic tuna processors to submit reports that include, if the dolphin-safe label is used, "the certifications required by [§ 216.91]"), 216.91(a)(1)(i) (requiring, for tuna caught in the ETP by a large purse seine vessel, that the documentary requirements of § 216.92 and 216.93 be met), 216.93(a) (requiring that dolphin-safe and non-dolphin-safe sets be recorded on separate TTFs and that vessel captains and observers "review and sign both TTFs," for dolphin-safe and non-dolphin safe tuna," certifying that the information on the forms is accurate), and 216.93(c)(1)(i) (stating that fish may be identified as dolphin safe if "captured in a set in which no dolphin died or was seriously injured") (Exh. US-2). For tuna caught by other U.S. vessels, see *US – Tuna II (Mexico) (Panel)*, para. 2.31; 50 C.F.R. §§ 216.91(a)(2)(iii)(A) and (a)(4)(i) (Exh. US-2).

35. The DPCIA establishes this condition for all tuna harvested in the ETP by a large purse seine vessel.[62] For U.S.-flagged vessels, sections 216.92(a)(1) and 216.93(a) implement this condition by requiring that captain-certified Tuna Tracking Forms (TTF), which show whether a dolphin was killed or seriously injured in the set in which the tuna were caught, accompany all tuna caught by large purse seine vessels in the ETP.[63] For foreign-flagged vessels, section 216.24(f)(2) requires that all tuna imports be accompanied by a NOAA Form 370,[64] which indicates dolphin safe status and contains the certifications described in section 216.91(a) as necessary.[65]

36. Under the amended measure, a captain's certification that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught is also needed for tuna products containing tuna harvested in any other fishery to be labeled dolphin safe. Section 216.91(a)(2) implements this condition for tuna caught by a purse seine vessel outside the ETP on trips beginning on or after July 13, 2013.[66] Section 216.91(a)(4) establishes the same condition for tuna harvested in all other fisheries (*i.e.*, all fisheries other than the large purse-seine fishery in the ETP and purse seine fisheries outside the ETP).[67]

37. In addition to the certification that no dolphins were killed or seriously injured, tuna products containing tuna harvested by a purse seine vessel may be labeled dolphin safe only if accompanied by a certification by the vessel captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the trip in which the tuna were caught. Under the amended measure, this condition applies to tuna products containing tuna harvested by large purse seine vessels in the ETP,[68] and by purse seine vessels outside the ETP.[69]

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[62] *US – Tuna II (Mexico) (Panel)*, para. 215.

[63] *See* 50 C.F.R. §§ 216.92(a)(1) (Exh. US-2). TTFs are a component of the AIDCP. During any fishing trip in the ETP, large purse seine vessels are required to record on TTFs every purse seine set made and any dolphin mortalities or serious injuries. *See infra* sec. II.B.2.b. As required by the AIDCP, section 216.93(a) requires that separate TTFs be used to record tuna harvested in dolphin safe and non-dolphin safe sets. Subsection (c)(1)(i) provides that a set is "non-dolphin-safe" if a dolphin died or was seriously injured during the set. 50 C.F.R. §§ 216.93(a), (c)(1)(i) (Exh. US-2).

[64] 50 C.F.R. §§ 216.24(f)(2)(i) and (f)(2)(ii) (Exh. US-9) (requiring that a NOAA Form 370 accompany all imports of yellowfin and non-yellowfin tuna products harvested by a large purse seine vessel in the ETP).

[65] 50 C.F.R. § 216.24(f)(4) (Exh. US-9) (stating that NOAA Form 370s contains the dolphin safe designation and attaches additional certifications required by § 216.91(a) if necessary); NOAA Form 370, at 5(B)(5) (Exh. MEX-22).

[66] 50 C.F.R. §§ 216.91(a)(2)(i), (a)(2)(iii)(A), (a)(2)(iii)(B) (Exh. US-2).

[67] 50 C.F.R. §§ 216.91(a)(4)(i), (a)(4)(ii), (a)(4)(iii) (Exh. US-2).

[68] 50 C.F.R. § 216.92(b)(2) (Exh. US-2); NOAA Form 370, at 5(B)(5) (Exh. MEX-22).

[69] 50 C.F.R. §§ 216.91(a)(2)(i), (a)(2)(iii)(A), (a)(2)(iii)(B) (Exh. US-2). For tuna products processed by a U.S. tuna processor and sold in the United States (including products containing U.S.-caught tuna), this condition is implemented through the TTVP record keeping and verification requirements, as discussed further below. The monthly reports that all U.S. tuna processors must submit include, for any tuna products labeled dolphin safe, the certifications required under section 216.91. 50 C.F.R. § 216.93(d)(2)(i) (Exh. US-2). For imported tuna products, the captain's certification condition is implemented through the TTVP and the NOAA Form 370, which must

38. While Mexico alleges that captain statements are "meaningless" as to attestations of the dolphin safe character of tuna products,[70] Mexico fails to point to a single instance in which a captain's statement has proved to be inaccurate or fraudulent. As the 2013 Final Rule notes, NMFS considers the captain statement to provide accurate information.[71]

ii. Observers

39. Under the amended measure, access to the dolphin safe label is conditioned on an observer certification where the AIDCP requires an observer to be onboard the harvesting vessel. Observers are required to document serious mortalities and injuries of dolphins and sets on dolphins.[72]

40. Tuna products containing tuna caught by large purse seine vessels in the ETP may be labeled dolphin safe only if accompanied by valid documentation signed by a representative of the appropriate IDCP–member nation certifying that: (i) there was an IDCP-approved observer on board the vessel during the entire trip; and (ii) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught. In addition, the documentation must list the numbers for the associated Tuna Tracking Forms which contain the captain and observer certifications.[73]

41. For tuna caught by U.S. vessels, sections 216.91(a)(1) and 216.93(a) implement this condition by requiring that the IDCP observer onboard certify the TTF accompanying the tuna caught by that vessel.[74] By its nature, a dolphin safe TTF attests that no dolphins were killed or seriously injured in the set in which the tuna were caught.[75]

42. For tuna caught by foreign vessels, sections 216.92(b) and 216.24(f)(4) implement this provision by requiring that the NOAA Form 370 accompanying the tuna products contain the necessary observer certifications.[76] For tuna products to be labeled dolphin safe, the

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accompany all imported tuna products. *US – Tuna II (Mexico) (Panel)*, para. 2.31; *see* 50 C.F.R. 216.24(f)(2) (Exh. US-9). If tuna is labeled dolphin safe, the related NOAA Form 370 must include the captain's certifications required by section 216.91. *See* NOAA Form 370, at 5(B)(5) (Exh. MEX-22).

[70] *See* Mexico's First Written 21.5 Submission, para. 285.

[71] 2013 Final Rule, 78 Fed. Reg. at 40,998-99 (Exh. MEX-7).

[72] *See* AIDCP, Annex II (Exh. MEX-30).

[73] 50 C.F.R. §§ 216.91(a)(1), 216.92(a)(1), 216.92(a)(3), 216.92(b)(2) (Exh. US-2); NOAA Form 370, at 5(B)(5) (MEX-22).

[74] *See* 50 C.F.R. §§ 216.92(a)(1) (Exh. US-2). For U.S. vessels, NOAA's TTVP is the representative of IDCP-member nation (i.e. the United States) and U.S. certification is made by reviewing TTFs.

[75] *See* 50 C.F.R. §§ 216.93(a), (c)(1)(i) (Exh. US-2). Because no U.S. vessel has an AIDCP dolphin mortality limit (DML), no U.S. vessel may fish by setting on dolphins in the ETP. Any vessel that did so would be in violation of the AIDCP and U.S. law, *see* 50 C.F.R. § 216.24(a)(2)(i) (for small seiners) and (iv) (for large seiners) (Exh. US-9), and the action would be subject to review by the AIDCP's International Review Panel (IRP), with a referral made to NOAA for investigation.

[76] *See* 50 C.F.R. § 216.92(b) (Exh. US-2); 50 C.F.R. § 216.24(f)(4) (Exh. US-9).

accompanying Form 370 must be signed by a representative of the IDCP-member nation to which the vessel belongs, and the representative must certify that (i) there was an IDCP observer on the vessel during the entire trip, (ii) no purse seine net was intentionally deployed on or to encircle dolphins, and (iii) no dolphins were killed or seriously injured in the sets in which the tuna were caught.[77] The Form 370 must also list the numbers for the associated TTF, which contains captain and observer's certifications.[78]

43. The observer certification requirement for tuna caught by large purse seine vessels in the ETP reflects the unique AIDCP regime, which requires parties to ensure that 100 percent of their large purse seine vessels carry an IDCP-approved observer on all fishing trips in the ETP.[79] For vessels not subject to this requirement, the U.S. measure does not impose an observer certification condition unless the NMFS Assistant Administrator has made certain findings.[80]

c. Record-Keeping

44. The record-keeping provisions of the U.S. dolphin safe labeling regime reflect the international commitments that Mexico, the United States, and the other parties to the AIDCP have undertaken. As Mexico has itself conceded, detailed record-keeping requirements exist only for the tuna caught by large purse seine vessels operating in the ETP pursuant to the AIDCP.[81]

45. Under the amended measure, tuna harvested in the ETP by large purse seine vessels may be labeled dolphin safe only if the documentation requirements of sections 216.92 and 216.93 are met. For tuna caught by U.S.-flagged vessels, the dolphin safe label may be used if the tuna is accompanied by a TTF certified by the vessel captain and the IDCP-approved observer and delivered to a U.S. tuna processor that is in compliance with the tuna tracking and verification requirements of section 216.93.[82] As discussed further below, the AIDCP mandates that the United States, as a party to the AIDCP, require all U.S.-flagged large purse seine vessels in the ETP to use TTFs, which include, for each set the vessel made, the date, whether any dolphins were killed or seriously injured, where the tuna caught in that set is stored, the weight of the tuna caught, and other information.[83] When tuna caught by a U.S.-flagged large purse seine vessel in the ETP is delivered to a U.S. tuna processor, the associated TTF is transmitted to the TTVP.

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[77] NOAA Form 370 at 1 (Exh. MEX-22).

[78] NOAA Form 370 at 1 (Exh. MEX-22).

[79] AIDCP, Annex II (Exh. MEX-30).

[80] *US – Tuna II (Mexico) (Panel)*, paras. 2.21-24; 50 C.F.R. §§ 216.91(a)(2)(i), (a)(2)(iii)(B), (a)(4)(ii), (a)(4)(iii) (Exh. US-2).

[81] *See* Mexico's First Written 21.5 Submission, para. 110.

[82] 50 C.F.R. §§ 216.92(a)(1)-(2) (Exh. US-2).

[83] 50 C.F.R. § 216.93(a) (Exh. US-2).

The tuna processor's monthly report containing the information on such a delivery is sent to the TTVP before the last day of the month following the month being reported.[84]

46. As Mexico acknowledges, the same tracking and verification requirements apply to imported tuna products harvested in the ETP by large purse seine vessels.[85] Such tuna products may be labeled dolphin safe only if the tuna was harvested by a vessel flagged to an AIDCP party (or a country that is provisionally applying the AIDCP) that is adhering to all the requirements of the IDCP Tuna Tracking and Verification Plan.[86] This requirement is implemented by the Form 370, which requires that tuna harvested in the ETP by large purse seine vessels be accompanied by documentation from the appropriate IDCP-member country certifying that there was an IDCP observer on the vessel at all times and listing the numbers for the associated TTF(s).[87] Mexico has conceded that the amended measure does not impose any tracking and record-keeping requirements regarding tuna caught by large purse seine vessels in the ETP that go beyond what is required under the AIDCP.[88]

47. Mexico mischaracterizes the U.S. tracking conditions by stating that all tuna harvested in the ETP is subject to the documentation requirements of sections 216.92 and 216.93.[89] In fact, tuna harvested in the ETP by vessels of less than 400 short tons (362.8 metric tons) or by vessels not using purse seine nets is not subject to sections 216.92(b) or 216.93(c)(1), which cover only large purse seine vessels.[90] This reflects the fact that vessels other than large purse seine vessels are not subject to the AIDCP observer program and, therefore, are not subject to AIDCP record-keeping requirements.

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[84] *See US – Tuna II (Mexico) (Panel)*, para. 2.31. As a general matter, no U.S.-flagged large purse seine vessels currently operate in the ETP, although one is authorized to fish there and may do so should it choose to. *See* William Jacobson Witness Statement, Appendix 1 (Exh. US-4).

[85] Mexico's First Written 21.5 Submission, para. 84.

[86] 50 C.F.R. §§ 216.92(b)(1), (b)(2)(i) (Exh. US-2). Additionally, for imported yellowfin tuna products harvested by large purse seine vessels in the ETP, the flag state of the harvesting vessel must have obtained an affirmative finding under 50 C.F.R. § 216.24(f)(8). *See id.*, § 216.92(b)(1) (Exh. US-2). Since Mexico has obtained an affirmative finding, the requirements for yellowfin tuna products are the same as those for non-yellowfin tuna products.

[87] NOAA Form 370 at 1 (Exh. MEX-22); *see US – Tuna II (Mexico) (Panel)*, para. 2.32.

[88] *See* Mexico's First Written 21.5 Submission, para. 89 ("Compliance with the AIDCP brings with it strict obligations to comply with the tuna tracking system of the AIDCP – the same tracking system that the U.S. regulations implement for U.S. vessels through section 216.93(a), as described above") and 84 (stating: "the dolphin-safe documentation requirements are the same for all tuna products containing tuna caught by large purse seine vessels fishing in the ETP").

[89] Mexico's First Written 21.5 Submission, para. 80.

[90] *See* 50 C.F.R. § 216.91(a)(1)(i) (Exh. US-2).

48. However, contrary to Mexico's claims,[91] the amended U.S. measure *does* impose tracking and verification requirements to protect the integrity of the dolphin safe label for tuna harvested by vessels other than large purse seine vessels operating in the ETP.

49. First, every imported tuna product, regardless of where the tuna was caught and whether the dolphin safe label is used, must be accompanied by a NOAA Form 370 which designates the gear type with which the tuna was caught and, if the product is to be labeled dolphin safe, contains the necessary certifications.[92] At the time of importation, one copy of this form is submitted to Customs and Border Protection (CBP) and another is submitted, within 10 days of the importation, to the TTVP.[93]

50. Second, the amended measure requires that tuna, to be contained in tuna product labeled dolphin safe, be segregated from non-dolphin safe tuna from the time it was caught through unloading and processing. Section 216.93(c)(1) implements this requirement for tuna caught by large purse seine vessels in the ETP, requiring that dolphin safe tuna be loaded into designated wells and offloaded to trucks, storage facilities, or carrier vessels in such a way as to safeguard the distinction between dolphin safe and non-dolphin safe tuna.[94] Sections 216.93(c)(2) and (3) apply the same requirement to tuna caught by purse seine vessels outside the ETP and to tuna caught in other fisheries.[95] Any mixing in the affected wells or storage areas results in the tuna being designated non-dolphin safe.

51. These requirements implement, and indeed go beyond, the record-keeping requirements of RFMOs governing tuna fisheries other than the ETP. For example, the IOTC only requires vessel captains to record specific incidents of interactions with cetaceans.[96] The WCPFC's record-keeping requirement is similarly limited.[97] The ICCAT only requires that parties "report bycatch,"[98] and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) merely commits members to "collect and report data on ecologically related species."[99]

52. Additionally, through the TTVP, NMFS collects information from domestic tuna processors to verify whether tuna products labeled dolphin safe meet all the relevant

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[91] Mexico's First Written 21.5 Submission, para. 94.

[92] *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. § 216.93(f) (Exh. US-2); NOAA Form 370 at 2 (Exh. MEX-22).

[93] *US – Tuna II (Mexico) (Panel)*, para. 2.32.

[94] 50 C.F.R. §§ 216.93(c)(1)(i), (c)(1)(iv) (Exh. US-2).

[95] 50 C.F.R. §§ 216.93(c)(2)(i), (c)(2)(ii) (Exh. US-2).

[96] *See* IOTC Resolution 13/04 §§ 3(b) and 7 (Exh. US-12).

[97] WCPFC Resolution 2011-03 § 2 (Exh. US-11).

[98] ICCAT, "Recommendation by ICCAT on Information Collection and Harmonization of Data on Bycatch and Discards in ICCAT Fisheries" (Nov. 2011) (Exh. US-14).

[99] Commission for the Conservation of Southern Bluefin Tuna (CCSBT), "Recommendation to Mitigate the Impact on Ecologically Related Species of Fishing for Southern Bluefin Tuna" (Oct. 2011) (Exh. US-15).

conditions.[100] Whenever a U.S. cannery receives a shipment of domestic or imported tuna for processing, a NMFS representative may be present to monitor delivery and verify the dolphin safe designations.[101] Further, U.S. tuna processors are required to submit monthly reports to the TTVP for all tuna received at their processing facilities.[102] These reports contain, for all tuna received, whether the tuna is eligible to be labeled dolphin safe under section 216.91, species, condition of the tuna products, weight, ocean area of capture, catcher vessel, gear type, trip dates, carrier name, unloading dates, location of unloading and, if the tuna products are labeled dolphin safe, the required certifications for each shipment of tuna.[103] As mentioned above, all exporters, transshippers, importers, processors, and distributors of tuna or tuna products must maintain records related to that tuna for at least two years, including Form 370s and associated certifications, and all additional required reports.[104]

53. NMFS regularly audits U.S. tuna canneries and conducts "spot checks" of retail market tuna products.[105] A product found to have been wrongfully labeled will likely be seized as evidence and, subsequently, re-exported, destroyed, or forfeited, depending on the facts of the case.[106] NMFS regulations hold the U.S. importer of record responsible for the submission and accuracy of the information found on the Form 370.[107] Sanctions for offering for sale or export tuna products falsely labeled dolphin safe may be assessed against any producer, importer, exporter, distributor, or seller who is subject to the jurisdiction of the United States.[108] Violators may be prosecuted under the DPCIA provisions directly, under federal provision establishing false statement or smuggling prohibitions, or under federal labelling standards.[109] Sanctions against U.S. individuals and companies are the same regardless of whether the tuna is imported or domestically produced.

54. Mexico's argument that "the requirement for ETP tuna tracking forms imposes extremely little, if any, burden on the U.S. processing industry" because tuna from the ETP is only a small portion of the tuna used to make tuna products in U.S. canneries misstates the impact of AIDCP-required tracking on the U.S. tuna industry.[110] First, as shown above, canneries are subject to several tracking requirements – notably the separation and the monthly receipt report

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[100] *US – Tuna II (Mexico) (Panel)*, para. 2.31.

[101] 50 C.F.R. § 216.93(d)(1) (Exh. US-2).

[102] Panel Report, para. 2.32; 50 C.F.R. § 216.93(d) (Exh. US-2).

[103] Panel Report, para. 2.32; 50 C.F.R. §§ 216.93(d)(i), (d)(ii), (e) (Exh. US-2); *see* U.S. Response to Original Panel Question No. 4.

[104] 50 C.F.R. § 216.93(g)(1) (Exh. US-2).

[105] Panel Report, para. 2.32; 50 C.F.R. § 216.93(g)(3) (Exh. US-2).

[106] *See US – Tuna II (Mexico) (Panel)*, para. 2.33; U.S. Response to Original Panel Question No. 4.

[107] U.S. Response to Original Panel Question No. 4.

[108] *US – Tuna II (Mexico) (Panel)*, para. 2.33; *see* DPCIA, 16 U.S.C. § 1385(3) (MEX-16).

[109] *US – Tuna II (Mexico) (Panel)*, para. 2.33 (citing U.S. Response to Original Panel Question No. 50, para. 120).

[110] Mexico's First Written 21.5 Submission, para. 83.

requirements – regardless of whether the tuna it receives was harvested in the ETP or outside it. Second, the additional AIDCP tracking requirements on tuna products harvested by large purse seine vessels in the ETP impose considerable additional burdens on U.S. importers, as imports from the ETP make up a significant percentage of the U.S. canned tuna market.[111]

B. The AIDCP

55. The original panel discussed the AIDCP in its report, and we refer the Panel to its findings with respect to the history and purpose of the program.[112]

1. Overview of the AIDCP Regime

56. Briefly, the AIDCP is the international agreement among the members of the Inter-American Tropical Tuna Commission (IATTC) that governs fishing for tuna with purse seine nets in the ETP.[113] It entered into force in 1999. Today, all the Members whose vessels fish in the ETP purse seine tuna fishery are parties to the AIDCP or are applying it provisionally.[114]

57. As discussed in the original proceeding,[115] the United States has been, and continues to be, a strong supporter of the AIDCP, whether at meetings of the parties, IATTC meetings, or in other contexts. The United States supports the AIDCP because it recognizes that setting on dolphins to catch tuna occurs and that the conservation measures called for under the AIDCP are an effective means to reduce observed dolphin mortalities during dolphin sets. The United States has periodically proposed or supported efforts to strengthen implementation of the AIDCP.

58. This strong support for the AIDCP, however, should not be understood to mean that the United States supports the practice of setting on dolphins or that the United States believes the measures called for under the AIDCP are sufficient to protect dolphins from the harms associated

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[111] *See* NMFS, "U.S. Tuna Cannery Receipts" (2014) (Exh. US-16) (update to Orig. Exh. US-63) (showing that tuna sourced from the ETP made up 4.8 percent of imported tuna received by U.S. canneries in 2012 and 3.9 percent in 2013).

[112] *US – Tuna II (Mexico) (Panel)*, paras. 2.34-2.41.

[113] *See US – Tuna II (Mexico) (Panel)*, paras. 2.35-2.36.

[114] All countries that have fleets that fish for tuna in the ETP are members, cooperating non-parties, or cooperating fishing entities (referred to collectively as CPCs) of the IATTC. As part of their IATTC commitments, CPCs agree to place all vessels bearing their flag that fish for tuna in the ETP on the IATTC Regional Vessel Register. IATTC, "Resolution on a Regional Vessel Register" (June 2000) (Exh. US-17) (Orig. Exh. US-14). There are currently 4,726 vessels flagged to twenty-six countries on the IATTC Register, *see* IATTC, Regional Vessel Register (updated May 19, 2014) (Exh. US-18), and of those, 235 vessels flagged to thirteen countries appear on the IATTC Active Purse-Seine Vessel list, *see* IATTC, Active Purse Seine Vessel Register (updated May 19, 2014) (Exh. US-19). All of the flag states of these vessels are applying the AIDCP. *See* IATTC, "IATTC—International Dolphin Conservation Program (IDCP)" (Mar. 4, 2014) http://www.iattc.org/IDCPENG.htm (Exh. US-20). As noted in the original proceeding, decisions regarding implementation of the IDCP are taken by the parties to the AIDCP and not the IATTC. The IATTC has no legal authority to undertake activities or make decisions regarding the IDCP. The conventions that established the IATTC and the AIDCP are distinct legal instruments, each with their own objectives and obligations. U.S. Answer to the Original Panel Question No. 141.

[115] *See* U.S. Answer to Original Panel Question Nos. 26, 142.

with setting on them to catch tuna. Indeed, as discussed below, the AIDCP expressly contemplates that dolphins will be killed and seriously injured by dolphin sets.

2. Requirements of the AIDCP

59. As noted by the original panel, and by Mexico in this proceeding, the AIDCP establishes binding international obligations that relate to purse seine fishing in the ETP, including requirements relating to setting on dolphins, establishment of "a comprehensive program of monitoring, tracking, verification, and certification," observer requirements, and an optional dolphin safe labeling standard.[116]

a. AIDCP Requirements Relating to Setting on Dolphins

60. The AIDCP establishes an overall limit on annual observed incidental dolphin mortalities in the Agreement Area and a process for eligible vessels to request and receive a portion of the overall cap in the form of a Dolphin Mortality Limit (DML).[117] Only vessels that have a DML may set on dolphins to catch tuna in the Agreement Area.[118] Only large purse seine vessels, *i.e.*, vessels with carrying capacity over 363 metric tons, may obtain a DML;[119] smaller vessels are prohibited from setting on dolphins.[120]

61. Currently, the overall cap is set at 5,000 dolphin mortalities per year, but has been higher in the past.[121] In 2014, the AIDCP Secretariat set the per vessel DML at 59.04 dolphin mortalities. As Mexico maintains the largest fleet of purse seine vessels that sets on dolphins to catch tuna in the ETP, it is granted the highest quota of allowed dolphin kills in any given year. In 2014, consistent with Mexico's obligations under the AIDCP requirements, the maximum allowed mortality for the 38 Mexican large purse seine vessels is collectively set at 2,243.[122]

b. Record-Keeping Requirements

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[116] *US – Tuna II (Mexico) (Panel)*, paras. 2.39, 4.116; Mexico's First Written 21.5 Submission, paras. 36, 70.

[117] AIDCP, Annex IV (Exh. MEX-30).

[118] AIDCP, Annex VIII (Exh. MEX-30). The "Agreement Area" is defined as "the area of the Pacific Ocean bounded by the coastline of North, Central and South America and by the following lines: a. [t]he 40°N parallel from the coast of North America to its intersection with the 150° W meridian; b. [t]he 150°W meridian to its intersection with the 40°S parallel; c. [a]nd the 40°S parallel to its intersection with the coast of South America." *Id.*, Article II-V.

[119] AIDCP, Annex VIII(3)(g)-(h) (Exh. MEX-30).

[120] AIDCP, Annex VIII(6) (Exh. MEX-30).

[121] AIDCP, Article 5, para. 1 (Exh. MEX-30); *see* William H. Bayliff, IATTC, *Organization, Functions, and Achievements of the Inter-American Tropical Tuna Commission*, IATTC Special Report 13, at 89 (2001) (Exh. US-21).

[122] *See* "AIDCP Dolphin Mortality Limits 2012-2014" (Exh. US-22). Mexico's DML was 2,158 in 2012 and 2,068 in 2013. *Id.*

62. The AIDCP directs parties to establish a program to track and verify tuna harvested by vessels in the Agreement Area. The system must involve the following elements: (a) the use of weight calculation for tracking; (b) measures to "enhance current observer coverage"; (c) the designation and monitoring of wells for storing tuna; (d) reporting, receipt, and storage of forms related to tracking; (e) the shore-based verification of tuna tracking; (f) periodic audits and spot checks; and (g) the provision of timely access to relevant data.[123]

63. The "Resolution to Adopt the Modified System for Tracking and Verification of Tuna," adopted by the AIDCP parties on June 20, 2001, provides more detail concerning these requirements.[124] It provides that the Secretariat should produce TTFs and distribute them to the national authorities of each party and to IDCP observers.[125] Each TTF is identified by a unique number corresponding to one fishing trip in the ETP. Throughout the trip, IDCP observers record on the TTFs certain information concerning each set made in the ETP, including whether a dolphin was killed or seriously injured during the set and the storage location of tuna caught. At the end of the trip, the observer gives the TTF to the competent national authority of the party under whose jurisdiction the harvesting vessel operates or, if the tuna is processed within the jurisdiction of another party, to that other party. Within ten days of receiving a TTF, the national authority transmits it to the IATTC Secretariat.

64. The 2001 Resolution also sets out obligations relating to the unloading, storage, processing and marketing of tuna products to ensure that the distinction between tuna harvested in sets in which no dolphins were killed or seriously injured is kept separate from tuna harvested in other sets.[126] Processors are obligated to maintain records complete enough that lot numbers of processed tuna can be traced back to the corresponding TTF number.[127] Finally, parties are obligated to establish tracking systems that include periodic audits and spot checks and, for this purpose, may request the Secretariat to verify tuna by reference to the TTF number or, if relevant, the AIDCP Dolphin Safe Certificate number.[128]

65. As Mexico acknowledges, the U.S. regulations conform to the AIDCP requirements.[129]

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[123] AIDCP, Annex IX (Exh. MEX-30).

[124] *See* AIDCP Tracking and Verification Resolution (Exh. MEX-36).

[125] *See* AIDCP Tracking and Verification Resolution § 3 (Exh. MEX-36).

[126] *See* AIDCP Tracking and Verification Resolution §§ 5-6 (Exh. MEX-36). In particular, if tuna is unloaded and transported on a carrier vessel to a processing location, the party under whose jurisdiction the fishing vessel operates is responsible for obtaining the TTF(s) and retaining documentation of the unloading, including the separation of the tuna. *Id.* § 5(3). If tuna is unloaded at a processing facility, the national authority of the party under whose jurisdiction the tuna is to be processed is responsible for retaining the TTF(s) and documentation of the unloading. *Id.* § 5(4).

[127] AIDCP Tracking and Verification Resolution § 6 (Exh. MEX-36).

[128] AIDCP Tracking and Verification Resolution § 7 (Exh. MEX-36).

[129] Mexico's First Written 21.5 Submission, para. 89. As noted in original proceeding, the United States has jurisdiction to require and does require U.S. flag vessels to adhere to the AIDCP and its tuna tracking program. U.S. Answer to Original Panel Question No. 13 (citing 50 C.F.R. § 216.93(c)(5)).

c. Observer Requirements

66. Under the AIDCP, each party must ensure that all of its vessels with a carrying capacity greater than 363 metric tons (400 short tons) carry an observer during each fishing trip in the agreement area.[130] Observers' duties include documenting whether dolphins are killed or seriously injured in any sets and whether the vessel sets on dolphins without a DML or after its DML has been reached.[131] The AIDCP observer program focuses on observed dolphin mortalities and injuries; it does not monitor indirect mortalities (those that occur after a dolphin set or as a result of the chase that precedes the set) or other harms to dolphins caused by dolphin sets.[132]

67. Two sources fund the AIDCP On-Board Observer program and the general AIDCP operating budget, which includes all of the AIDCP Secretariat costs associated with administering the observer program and overall AIDCP program (*e.g.*, hiring, training and placing observers, training captains, collecting, inputting and analyzing observer reports/data, other general functions of the AIDCP Secretariat day-to-day and at AIDCP meetings). The IATTC (through contributions of the IATTC Members) contributes 30 percent to the overall AIDCP budget and 70 percent is funded through by assessments on vessels.[133] Assessments are based on well volume on each vessel required to carry an observer.[134] Payments can be paid by the vessel or by the flag-ship government on behalf of its vessel(s), but in practice most vessels make the payments through their flag governments.[135]

3. The AIDCP Dolphin Safe Labeling Regime

68. In 2001, the AIDCP parties adopted the non-binding "Procedures for AIDCP Dolphin Safe Certification System." This resolution explains that application of the procedures "shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of the party." The resolution establishes the procedures that would allow use of the "AIDCP dolphin-safe certification," should a party choose to adopt that system.

69. Mexico's characterization of the AIDCP labeling and tracking requirements as ensuring that tuna products to which the AIDCP label is affixed were "caught without harm to dolphins"

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[130] AIDCP, Annex II (Exh. MEX-30).

[131] AIDCP, Annex II (Exh. MEX-30).

[132] *See* U.S. First Written Submission in Original Proceeding, para. 80.

[133] IATTC, *Program and Budget for Fiscal Years 2014 and 2015*, Doc. CAF-01-05, 1st Mtg. of the Comm. on Admin. & Finance, Veracruz, Mexico (June 5, 2013), at 1 (Exh. US-23); AIDCP Annex II, para. 12 (Exh. MEX-30) ("The Parties shall contribute to the expenses necessary to achieve the objectives of this Agreement, through the establishment and collection of vessel fees, the level of which shall be determined by the Parties, without prejudice to other voluntary financial contributions."); AIDCP Res. A-13-01, "Resolution on Vessel Assessments and Financing" (June 14, 2013) (Exh. US-24) (setting out current fee structure for vessels).

[134] *See* AIDCP Res. A-13-01 (Exh. US-24).

[135] IATTC Res. C-11-04, "Financing for Fiscal Year 2012," para. 4 (July 8, 2011) (Exh. US-25).

misstates the meaning of the AIDCP label.[136] The AIDCP "dolphin safe" indicates that the tuna was captured in sets in which there were no observed dolphin mortalities or serious injuries.[137] Thus, the AIDCP dolphin safe labeling regime has a different meaning, and a different objective from the U.S. dolphin safe labeling regime, which has the objective of: (i) ensuring that consumers are not misled "about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins," and (ii) contributing to dolphin protection by "ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."[138]

C. Harms to Dolphins from Tuna Fishing

70. The amended dolphin safe labelling measure draws a distinction between products containing tuna caught using large-scale driftnets on the high seas or caught by setting purse seine nets on dolphins, which are ineligible for the dolphin safe label, and tuna products containing tuna caught using all other fishing methods, such as purse seine fishing (other than by setting on dolphins), longline fishing, and pole and line fishing, which are potentially eligible for the dolphin safe label.

71. Many fishing techniques have the potential to cause harm to marine mammals, including dolphins. The United States has never contested this fact, and does not do so now.[139] But that said, all fishing techniques are not equally dangerous to dolphins, and the original panel was correct to conclude that "certain fishing techniques seem to pose greater risks to dolphins than others."[140] In particular, the Appellate Body, after reviewing all of the evidence cited by the original panel, rightly concluded that "setting on dolphins is *particularly* harmful to dolphins."[141]

72. Mexico disagrees with the Appellate Body, and now argues that *all* other fishing techniques "have adverse effects on dolphins that are equal to or greater" than setting on dolphins.[142] Mexico draws this conclusion from an *ad hoc* collection of documents addressing the alleged harms of various other fishing methods employed in various parts of the world without any regard to the actual trade of tuna and tuna products. Notably, *not one* of these documents draws the same conclusion as Mexico – namely, that fishing methods potentially eligible for the label cause harm to dolphins in "equal" or "greater" measure than setting on dolphins does. As to the harms caused by setting on dolphins, Mexico appears to ignore entirely the DSB findings and the substantial scientific evidence on this point, although on appeal *it did*

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[136] Mexico's First Written 21.5 Submission, para. 89.

[137] *See* AIDCP Tracking and Verification Resolution § 1 (Exh. MEX-36).

[138] *See US – Tuna II (Mexico) (AB)*, para. 242; *see also US – Tuna II (Mexico) (Panel)*, paras. 7.401, 7.425, 7.442-44.

[139] *See US – Tuna II (Mexico) (AB)*, para. 247.

[140] *US – Tuna II (Mexico) (Panel)*, para. 7.438; *see also US – Tuna II (Mexico) (AB)*, para. 288 (quoting same).

[141] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

[142] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 13, 248, 263, 306.

not contest the original panel's findings in this regard.[143] Simply put, Mexico's comparison of the harms caused by setting on dolphins versus other fishing methods is incompatible with the previous findings of the original panel and the Appellate Body and is wholly without scientific merit.

73. The fact that Mexico fails in its quest to prove all fishing techniques are created equal is not surprising, as setting on dolphins is the *only* fishing technique that specifically *targets* dolphins. As such, it is predictable that the intentional encirclement of dolphins results in, on average, over 1,100 *observed* dolphin mortalities each year in the ETP.[144] Moreover, the *unobserved* harms resulting from the chase and intentional encirclement of the dolphins potentially occur in each dolphin set, and the number of dolphins that potentially suffer such harms is huge. Over the past five years, from 2009-2013, an average of 10,423 dolphin sets took place annually in the ETP, resulting in an average of 3.7 million dolphins captured each year and another 2.5 million dolphins chased (but not captured).[145] Scientists estimate that each individual northeastern offshore spotted dolphin in the ETP is chased 10.6 times and captured 3.2 times *each and every year of its life*.[146]

74. As discussed below, setting on dolphins is *inherently* harmful to dolphins, and this harm is not replicated in other fishing methods, which do not depend on the presence of dolphins, and, in fact, are often employed without any dolphin in sight of the vessel and without any interaction with dolphins at all.[147]

75. Simply willing two things equal does not make it so. As the Appellate Body has made perfectly clear, "the party that asserts a fact is responsible for providing proof thereof."[148] And Mexico fails to prove that other tuna fishing techniques "have adverse effects on dolphins that are equal to or greater" than setting on dolphins does. Mexico is simply wrong to disagree with the Appellate Body that "setting on dolphins is *particularly* harmful to dolphins" in comparison with other label-eligible fishing methods.[149]

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[143] *See, e.g., US – Tuna II (Mexico) (AB)*, n.513 (quoting the original panel as stating that, "setting on dolphins may result in observed and unobserved harmful effects on dolphins," and noting that "[i]n response to questioning at the oral hearing, Mexico indicated that *it did not contest this finding by the Panel*") (emphasis added).

[144] *See infra*, Table 1 at sec. II.C.1.b.iii (detailing observed dolphin mortality inside the ETP in the years 2003-2012, virtually all of which resulted from large purse seine sets on dolphins).

[145] IATTC, EPO Dataset 2009-2013 (May 9, 2014) (Exh. US-26); *see* U.S. Response to Panel's Original Question No. 31, para. 70; IATTC, *Effectiveness of Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds*, at 4, Table 2 (2003) (Exh. US-27) (Orig. Exh. US-29).

[146] Stephen B. Reilly et al., *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, at 26 (2005) (Exh. US-28) (Orig. Exh. US-19).

[147] Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192-92 (Exh. US-29) (Orig. Exh. US-60) (Gerrodette, "The Tuna-Dolphin Issue").

[148] *US – Tuna II (Mexico) (AB)*, para. 283 (quoting *Japan – Apples (AB)*, para. 157).

[149] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

1. Non-Eligible Fishing Practices: Large-Scale Driftnets and Setting on Dolphins

a. Large-Scale High Seas Driftnets

76. Driftnet fishing is a method in which mesh netting is held more or less vertically in the water column by a buoyant float-line at the top of the net and a weighted lead-line at the bottom. Driftnets catch target and non-target species alike and can be fished with comparatively little effort.[150] Any driftnet that is 1.5 miles (2.5 km) or greater in total length is considered to be a large-scale driftnet.[151]

77. In the heyday of large-scale driftnet fishing on the high seas, nets reached up to 50 kilometers in length.[152] The use of large-scale driftnets on the high seas is particularly threatening to marine resources as monitoring and enforcement are more difficult due to the greater distances involved, and because the high seas are a zone where some countries may have less incentive or capacity to conserve shared resources than those in their national waters. Indeed, in the 1970s and 80s, high seas large-scale driftnet fishing threatened the whole oceanic pelagic ecosystem.[153] The harm to marine mammals, including dolphins, of large-scale driftnet fishing on the high seas is not debatable.[154]

78. Mexico wholly ignores the harms to marine mammals caused by large-scale driftnet use, but in a sense, Mexico is not incorrect to do so. As mentioned above, none of the 160,332 vessel records submitted to NOAA in the last five years none designated the gear type as "DN - Large Scale Driftnet (High Seas)."[155] In other words, there is *no trade* in tuna caught by such a

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[150] A large-scale driftnet is left to fish passively, as marine animals swim into it and the meshes of the net become caught behind their gills or around other body parts. Driftnets may be attached to vessels, or they may be set to drift free and the catch and bycatch be retrieved later.

[151] The Wellington Convention was the first international instrument to define "driftnet" as a gillnet over 2.5 kilometers in length. *See* Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 25 PITSE [1989] (Nov. 24, 1989) (Exh. US-30). UNGA Resolution 46/215 cited to the Wellington Convention, *see* UNGA Res. 46/215 (Exh. US-6), and all national laws and international instruments have adopted this definition in implementing the UN moratorium, *e.g.* Magnuson-Stevens Fishery Conservation and Management Act § 3, codified as amended at 16 U.S.C. § 1802(25) (Exh. US-31); *see* NMFS 2012 Driftnet Report, at 12, 14, and 16 (Exh. MEX-21).

[152] *See* U.N. General Assembly Res. 44/225, "Large-Scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas," (Dec. 22, 1989) (UNGA Res. 44/225) (Exh. US-32).

[153] *See* Simon P. Northridge, *Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review*, FAO Fisheries Technical Paper No. 320 (1991) § 1.2.2 (Exh. US-33).

[154] *See, e.g.*, Northridge 1991 (Exh. US-33); U.N. Res. 44/225 (Exh. US-32).

[155] *See* William Jacobson Witness Statement, Appendix 2 (Exh. US-4) (discussed *infra*, sec. II.C.1.a). As mentioned above, the United States has discovered only 3 vessel records (dating from when the database was created in 2002) that indicate large-scale driftnet use. *See id.* All three records were submitted to NOAA in 2006, and there is reason to believe that all three were miscoded. *See id.*, Appendix 1.

method. This is true at least with regard to the United States (and presumably generally).[156] While Mexico points to certain illegal fishing of Iranians and pirates,[157] it makes no claim that such tuna is actually being shipped to the United States, Mexico, or anywhere else. As such, this fishing practice does not appear to be relevant to this dispute.

b. Setting on Dolphins

79. Although Mexico purports to compare the harms to dolphins from setting on dolphins to the harms of other fishing methods, Mexico largely ignores the harms caused by setting on dolphins. Instead, Mexico merely refers to the progress that has occurred under the AIDCP, citing to the nearly 1,000 dolphins actually killed annually in recent years by large purse seine vessels in the ETP.[158] The United States agrees with Mexico that the AIDCP parties have made great strides in protecting ETP dolphins since the AIDCP came into force. But, of course, it could hardly have gotten worse – an estimated 350,000-650,000 dolphins were killed *each year* in the fishery between 1959 and 1972,[159] and that number stood as high as 132,169 as late as 1986.[160]

80. But proving that setting on dolphins in the ETP is killing *fewer* dolphins now than in the past does not prove Mexico's case. In fact, by referencing these mortality statistics, Mexico *concedes* that setting on dolphins is dangerous to dolphins.[161] And, of course, this observed mortality data does not take into account the unobserved harms to dolphins caused by chase and encirclement, a point that Mexico simply ignores. Indeed, the original panel was correct to determine that setting on dolphins within the ETP is a method of fishing for tuna that "may result in substantial amount of dolphin mortalities and serious injury and has the capability of resulting

[156] Again, as noted above, fulfillment of the UN General Assembly Resolution moratorium on this harmful fishing practice has been generally good, with numerous WTO Members and RFMOs having implemented the prohibition. *See supra* sec. II.C.3.i; NMFS, 2012 Driftnet Report, at 10-12 (Exh. Mex-21) (referring to measures implemented by Canada, China, the EU, Japan, Korea, Russia, and the United States, as well as the WCPFC, the IOTC, and the ICCAT).

[157] Mexico's First Written 21.5 Submission, para. 46.

[158] *See* Mexico's First Written 21.5 Submission, para. 188 (citing AIDCP, *Report on the International Dolphin Conservation Program*, Document MOP-28-05 (October 18, 2013) (Exh. MEX-80) for the point that setting on dolphins caused 870 observed dolphin mortalities in the ETP in 2012 and 986 observed mortalities in 2011).

[159] Michael L. Gosliner, "The Tuna Dolphin Controversy," in Twiss & Reeves (eds.) *Conservation and Management of Marine Mammals* 120, 121 (1999) (Exh. US-34) (Orig. Exh. US-60).

[160] *See* IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2009*, at 71, Table 8 (2013) (2009 IATTC Annual Report) (Exh. US-35).

[161] *See also US – Tuna II (Mexico) (Panel)*, para. 7.493 ("[T]he existence of the DMLs established by the AIDCP shows that setting on dolphins, even in controlled conditions, may result in some dolphin mortality.").

in observed and unobserved effects on dolphins."[162] Mexico *did not contest this point* before the Appellate Body,[163] and fails to allege, much less prove, otherwise in this proceeding.

i. Setting on Dolphins Targets Dolphins

81. Setting on dolphins is a method of purse seine fishing for tuna that exploits the regular and sustained association between dolphins and yellowfin tuna that occurs in the ETP.[164] Before a dolphin set begins, fishermen use binoculars or radar to help detect dolphins, which, as air breathers, are visible on the ocean's surface, while the tuna are not. Helicopters are also often used to search for dolphin herds and assess the likely size of an associated tuna school. When the fishermen locate a herd likely to be associated with commercial quantities of tuna, the purse seine vessel sets out after the dolphins. Dolphins reportedly react to the vessels from a distance of 5-7 kilometers.[165]

82. Speedboats and helicopters then chase down the dolphins and force them together into a counter-clockwise circular movement that results in a tighter and tighter group.[166] The chase usually lasts 20-40 minutes but can take over two hours.[167] The tuna-dolphin association is so strong that the tuna stay underneath the dolphins throughout the chase. The purse seiner deploys the net, and speedboats herd the dolphins into the net's closing arc and drive around the opening to prevent dolphins from escaping. Helicopters are often flown extremely close to the water's surface during encirclement so that the air turbulence from their rotors creates a windstorm beneath the aircraft which, along with the loud noise from the engines, help deter dolphins from escaping. Floats and weights support the net while cables close it at the bottom like a purse, trapping the animals inside. Then the net is hauled aboard the purse seine vessel.

83. When the net is two-thirds of the way aboard, the purse seiner initiates a "backdown," which is a required AIDCP procedure for releasing dolphins over the net's corkline. A channel is formed at the end of the net away from the vessel, and the corkline is submerged so that dolphins can exit. Crewmen may enter the water with scuba gear or snorkels and hand-release live and dead dolphins over the corkline. Encirclement takes approximately 40 minutes, but dolphins may be confined for an additional hour or so, if problems occur.[168]

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[162] *US – Tuna II (Mexico) (AB)*, para. 251 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.438 and 7.493).

[163] *US – Tuna II (Mexico) (AB)*, n.513 (quoting the original panel as stating that, "setting on dolphins may result in observed and unobserved harmful effects on dolphins," and noting that "[i]n response to questioning at the oral hearing, Mexico indicated that *it did not contest this finding by the Panel*.") (emphasis added); *see also US – Tuna II (Mexico) (AB)*, para. 245 ("The Panel also noted that '*both parties* recognize that setting on dolphins may adversely affect dolphins.'") (emphasis added).

[164] Gosliner 1999, at 121 (Exh. US-34).

[165] Barbara E. Curry, *Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean*, NOAA Technical Memorandum NMFS, at 5 (1999) (Exh. US-36).

[166] *See US – Tuna II (Mexico) (Panel)*, paras. 7.604, 7.738.

[167] Curry 1999, at 6 (Exh. US-36).

[168] Curry 1999, at 6 (Exh. US-36).

84. As discussed below, setting on dolphins to catch tuna poses a number of threats to dolphins.[169] First, the air-breathing dolphins may drown when trapped under the net, or they may become entangled in the net and be killed or seriously injured. Additionally, as discussed further below, dolphins may suffer a number of other adverse effects from the chase and encirclement, including calf-cow separation, reduced reproduction rates, and stress-related harms.

ii. Where Setting on Dolphins Occurs

85. Mexico argues that the association between dolphins and tuna in the ETP is not "unique," and that fishing vessels set on dolphin elsewhere.[170] However, the United States takes note that the original panel found that while "there are indications that intentional setting on dolphins occurs outside the ETP," there are "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP."[171] In any event, the original panel also found that because tuna caught by setting on dolphins is ineligible for the dolphin safe label regardless of where it was caught, "[t]o the extent that setting on dolphins is or can be practiced outside the ETP, the impact of the requirement not to set on dolphins would be felt also in those fisheries."[172] We do not understand Mexico to contest these findings.[173]

86. The United States further notes that the IOTC and the WCPFC have recently prohibited fishing vessels operating in the Indian Ocean and Western Central Pacific from setting on all cetaceans, including dolphins.[174] The AIDCP's explicit allowance of setting on dolphins now

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[169] *See US – Tuna II (Mexico) (AB)*, para. 244 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.438).

[170] Mexico's First Written 21.5 Submission, para. 112.

[171] *US – Tuna II (Mexico) (Panel)*, para. 7.520; *US – Tuna II (Mexico) (AB)*, para. 248 (quoting same); *see also US – Tuna II (Mexico) (Panel)*, para. 7.306 ("The evidence before the Panel suggests that setting on dolphins *occurs especially in the ETP*, because of the regular association observed between tunas and dolphins in that area."). Indeed, in its submission, Mexico fails to provide any specific data as to how prevalent this fishing practice is outside the ETP. *See* Mexico's First Written 21.5 Submission paras. 113-25 (stating repeatedly that little data is available and citing several instances, *e.g.*, in para. 116, of accidentally setting on marine mammals, and a report by Australian officials that 3.2 percent of purse seine sets were set on whale sharks or cetaceans).

[172] *US – Tuna II (Mexico) (Panel)*, para. 7.306.

[173] *See* Mexico's First Written 21.5 Submission, para. 114 (stating that, in the WCPCA, "marine mammals were caught in a very small proportion of these observed sets, mainly from sets targeting tuna schools associated with either whales or dolphins"); *id.*, para. 116 (stating that, in the WCPFC there were "several interactions with [cetaceans]"); *id.*, para. 117 (stating that "Australian officials have reported that 3.2 percent of all purse seine sets are deliberately set on whale sharks or cetaceans").

[174] *See supra*, sec. II.A.3.a.i. The United States has long prohibited U.S. flagged vessels from setting on marine mammals anywhere in the world (except as allowed under the AIDCP). *See* 16 U.S.C. §§ 1372(a)(1) (Exh. US-37) (making it unlawful for any person or vessel "subject to the jurisdiction of the United States to take any marine mammal on the high seas") and (a)(2) (making it unlawful for any person "to take any marine mammal in the waters or on the lands under the jurisdiction of the United States," except as provided for by preexisting international treaty); 16 U.S.C. § 1362(13) (Exh. US-38) (defining "take" as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill").

runs contrary to an emerging international trend to protect cetaceans, including dolphins, from the harms caused by purse seine fishing.[175]

87. It is clear that setting on dolphins continues inside the ETP. According to AIDCP records, there were 9,220 intentional sets on dolphins inside the ETP in 2012, accounting for 40 percent of the total of 22,350 sets made in the ETP in that year.[176]

88. Under the AIDCP, the following countries have been granted DMLs (and thus can set on dolphins) for 2014: Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, and Venezuela.[177] Mexican vessels have been granted 46 percent of the total DML (2,243 out of 4,898).

iii. "Setting on Dolphins Is Particularly Harmful to Dolphins"

89. It is undisputed that setting on dolphins is harmful to dolphins.[178] The number of dolphins killed in the ETP tuna purse seine fishery since the fishery began in the late 1950s is estimated to be over 6,000,000 animals – the greatest known for any fishery.[179] Even at the present level of about 1,000 dolphins killed per year, however, dolphin mortality in the ETP remains among the world's largest recorded cetacean bycatches.[180] Furthermore, as the original panel correctly found, setting on dolphins causes both observed and unobserved harms to dolphins.[181]

90. As to observed harms, Mexico readily admits that the IDCP regime allows for any number of dolphins up to the DML to be killed each year in the course of setting on dolphins in

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[175] *See also* ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (Exh. US-13).

[176] IATTC, *Report on the International Dolphin Conservation Program*, Doc. MOP-28-05, 28th Meeting of the Parties, Del Mar, CA (Oct. 18, 2013) (Exh. MEX-3). In addition to the sets on dolphins, there were 5,420 unassociated sets and 7,710 sets on floating objects made in the ETP in 2012. *Id*.

[177] "AIDCP Dolphin Mortality Limits 2012-2014" (Exh. US-22).

[178] *US – Tuna II (Mexico) (AB)*, para. 244 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.438 (citing Orig. Exh. MEX-2, MEX-3, MEX-4, MEX-5, MEX-67, MEX-84, MEX-93, MEX-97, MEX-98, MEX-99, MEX-105 (containing information relating to harm caused to dolphins resulting from setting on dolphins and other fishing techniques); Orig. Exh. US-4, US-10, US-19, US-20, US-21, US-22, US-24, US-27, US-57, US-62, US-75 (referring to the negative effects on dolphins arising from the practice of setting purse-seine nets on them)).

[179] Gerrodette, "The Tuna Dolphin Issue," at 1192-92 (Exh. US-29); *see US – Tuna II (Mexico) (Panel)*, para. 7.493 ("The number of dolphins killed in the ETP before the adoption of the controls established by the AIDCP, and the ensuing degradation of the dolphins stocks in this area, are well-documented.").

[180] NOAA Southwest Fisheries Science Center, *The Tuna Dolphin Issue* (Nov. 6, 2008) (Exh. US-39).

[181] *US – Tuna II (Mexico) (Panel)*, paras. 7.493, 7.504, 7.738; *US – Tuna II (Mexico) (AB)*, para. 251 (citing same).

the ETP.[182] In the La Jolla Agreement of 1992, the parties agreed to an overall DML of 19,500 dolphins for 1993, decreasing the DML quota in each subsequent year until 1999, when it stabilized at 5,000 animals per year.[183] As the original panel noted, "the existence of the DMLs established by the AIDCP shows that setting on dolphins, even in controlled conditions, may result in some dolphin mortality."[184]

91. Table 1 depicts annual observed dolphin mortalities by species and stock for the past ten years inside the ETP:

Table 1[185]

Year	Offshore Spotted		Spinner		Common			Others	Total
	North-eastern	Western central	Eastern	White-belly	Northern	Central	Southern		
2003	288	335	290	170	133	140	97	39	1,492
2004	261	256	223	214	156	97	225	37	1,469
2005	273	100	275	108	114	57	154	70	1,151
2006	147	135	160	144	129	87	40	45	886
2007	189	116	175	113	55	69	95	26	838
2008	184	167	349	171	104	14	137	43	1,169
2009	226	254	228	222	30	49	21	1,239	1,239
2010	179	135	510	92	134	116	8	15	1,170
2011	172	124	467	139	35	12	9	28	986
2012	151	187	324	107	49	4	30	18	870

92. Nearly all of these mortalities occurred during dolphin sets, demonstrating the particular harm to dolphins that this fishing method poses. Over the past two decades, dolphin sets made up only about half of all sets in the ETP[186] – the other half are sets on floating objects and unassociated sets – but dolphin sets accounted for nearly all of the dolphin mortalities and serious injuries reported in the ETP each year.[187] In 2012, for example, dolphin sets accounted for 41.3 percent of all sets in the ETP (9,220 out of the 22,350), but accounted for 100 percent of

[182] Mexico's First Written 21.5 Submission, para. 66; *see also* US – *Tuna II (Mexico) (Panel)*, para. 7.493 ("In 2008, observed dolphin mortality in the ETP amounted to 1,168 dolphins, whereas in 2009, 1,239 dolphins were observed killed or seriously injured when set upon to catch tuna in the ETP.").

[183] Agreement for the Conservation of Dolphins (1992) (La Jolla Agreement) (Exh. US-40).

[184] *US – Tuna II (Mexico) (Panel)*, para. 7.493.

[185] 2009 IATTC Annual Report, at 71, Table 8 (Exh. US-35); AIDCP, *Report on the International Dolphin Conservation Program*, Doc. MOP-26-05, 26th Meeting of the Parties, La Jolla, CA, Oct. 23, 2012 (Exh. US-41); Jeremy Rusin, Observer Report at the 25th and 26th Meetings of the Parties to the AIDCP, La Jolla, CA (June 19, 2012 and Oct. 23, 2013) (Exh.US-42).

[186] *See* 2009 IATTC Annual Report, at 54, Table 5 (Exh. US-35).

[187] *See* IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2008*, at 50-51, Table 3c (2010) (2008 IATTC Annual Report) (Exh. US-43).

the dolphins killed (870) and injured (13).[188] Data from other years presents a similar picture,[189] as does data on annual bycatch.[190]

93. As the Appellate Body recognized, Mexico did not contest "that setting on dolphins even according to the AIDCP may still result in observed dolphin mortality or serious injury."[191] Indeed, it is simply not debatable that setting on dolphins causes observed mortalities and serious injuries to dolphins.[192]

94. As to *unobserved* harms, the original panel found, and the Appellate Body recognized, that:

> [V]arious adverse impacts can arise from setting on dolphins, beyond observed mortalities, including cow-calf separation during the chasing and encirclement, threatening the subsistence of the calf and adding casualties to the number of observed mortalities, as well as muscular damage, immune and reproductive systems failures and other adverse health consequences for dolphins, such as continuous acute stress.[193]

95. The panel referred scientific studies that have shown that dependent calves are often separated from their mothers during a chase and, as a result, die of starvation, predation, and other causes, even when their mothers are released from the sets alive.[194] These studies have

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[188] IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[189] In 2011, 976 of the 986 dolphins killed (99.0 percent) were killed during dolphin sets, although dolphin sets represented 44.0 percent of all sets in the ETP in that year. In 2010, 1,169 of the 1,170 dolphins killed (99.9 percent) were killed during dolphin sets, which represented 52.9 percent of all sets. In 2009, all but 2 of the 1,237 dolphins killed in the ETP purse seine fishery, 99.8 percent, were killed in dolphin sets, which accounted for 49.0 percent of all sets. *See* [189] IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[190] For 2005-2011, the average dolphin bycatch for dolphin sets was 6.1 kilograms per set – 2.2 kilograms of spotted dolphin, 2.3 kilograms of spinner dolphin, and 1.6 kilograms of common dolphin. IATTC, *Tunas and Billfishes in the Eastern Pacific Ocean in 2012*, Doc. IACCT-85-03 (June 10-14, 2013) at 115, Table K-1 (Exh. US-44) (IATTC, *Tunas and Billfishes*). The average dolphin bycatch per unassociated set and per set on floating object, by contrast, was 0.0 kilograms for all species of dolphin.

[191] *US – Tuna II (Mexico) (AB)*, para. 245 (quoting *US – Tuna II (Mexico) (Panel)*, para 7.493, n.686).

[192] *See, e.g.*, *US – Tuna II (Mexico) (AB)*, para. 245 ("Mexico does not deny that dolphins may be killed or seriously injured during purse-seine net fishing manoeuvres.").

[193] *US – Tuna II (Mexico) (Panel)*, para. 7.499; *see US – Tuna II (AB)*, parss. 246 (citing *US – Tuna II (Mexico) (Panel)* paras. 7.504, 7.737, 7.560) and 251 (citing *US – Tuna II (Mexico) (AB)*, para. 7.438).

[194] *Id.* para. 7.499 (citing Orig. Exh. US-4, US-11, US-19); *see* Shawn R Noren, & Elizabeth F. Edwards, "Physiological and Behavioral Development in Delphinid Calves: Implications for Calf Separation and Mortality Due to Tuna Purse-Seine Sets," 23 *Marine Mammal Science* 15, 16, 21 (2007) (Exh. US-45) (Orig. Exh. US-4). For example, one study of eastern spinner and northeast offshore spotted dolphins found that fewer young dolphins than expected were present in purse seine nets and that 75-95 percent of the lactating females killed during sets were not accompanied by calves, suggesting that the calves became separated from their mothers during the chase. *See* Frederick Archer et al., "Annual Estimates of the Unobserved Incidental Kill of Pantropical Spotted Dolphin (Stenella Attenuata Attenuata) Calves in the Tuna Purse-Seine Fishery of the Eastern Tropical Pacific," 102 *Fishery*

estimated that the number of orphaned calves that die following a chase as a result of mother-calf separation is about 14 percent higher than the observed dolphin calf mortality attributed to that set.[195] Thus, actual annual dolphin mortality caused by setting on dolphins is estimated to be at least 14 percent higher than observed dolphin mortality. Additional harms to dolphins from setting on dolphins include negative health effects,[196] diminished reproduction,[197] and increased predation (as predators may congregate outside the nets and prey on exhausted dolphins as they are released).[198]

96. Importantly, the original panel recognized "that such effects would arise *as a result of the chase in itself,* and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP."[199] Indeed, the original panel correctly determined that because the AIDCP standard allows for the setting on dolphins, the standard "*fails to address unobserved effects* derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase."[200]

Bulletin 233, 237 (2004) (Exh. US-46) (Orig. Exh. US-27) (cited by the original panel at *US – Tuna II (Mexico) (Panel)*, paras. 7.438, 7.495).

[195] *See* Archer et al. 2004, at 139 (Exh. US-46); Katie L. Cramer, Wayne L. Perryman & Tim Gerrodette, "Declines in Reproductive Output in Two Dolphin Populations Depleted by the Yellowfin Tuna Purse Seine Fishery, 369 *Marine Ecology Progress Series* 273, 282 (2008) (Exh. US-47) (Orig. Exh. US-26).

[196] *See* Reilly et al. 2005, at 68-69 (Exh. US-28) (reviewing the studies on observed stress responses following repeated exposures to stressors like chase and encirclement, which include massive muscle damage, disruption of foraging and social activity, and disruption of metabolism, growth, and reproduction); *id.* at 76 (stating: "As expected, the data are insufficient to quantify potential population-level impacts . . . . However, in the aggregate, the findings from the available data support the possibility that tuna purse-seining activities involving dolphins may have a negative impact on some individuals. In particular, the evidence of cow/calf separation leading to unobserved mortality warrants further study. Furthermore, there is some evidence for potential stress-related injury or unobserved mortality of dolphins involved in purse sine fishing operations, based on the combined documentation of: (a) moderately elevated stress hormones (catecholomines) and enzymes indicative of muscle damage observed in live fishery-involved dolphins; (b) evidence of past (healed) muscle and heart damage in dolphins killed during fishing operations; and (c) fatal heart damage in virtually all fishery-killed dolphins, which was most probably related to elevated catecholomines."); Albert C. Myrick & Peter C. Perkins, "Adrenocortical Color Darkness and Correlates as Indicators of Continuous Acute Premortem Stress in Chased and Purse-Seine Captured Male Dolphins," 2 *Pathophysiology* 191 (1995) (Exh. US-48) (Orig. Exh. US-11) (describing an original study of non-entanglement mortalities from purse seine fishing in which they found that all the dead dolphins had been in a state of continuous acute stress (CAS) for an hour or more up to the time they died and that CAS could have caused or contributed to the mortalities).

[197] *See* Reilly et al. 2005, at 68-69 (Exh. US-28).

[198] Reilly et al. 2005, at 33 (Exh. US-28).

[199] *US – Tuna II (Mexico) (Panel)*, para. 7.504 (emphasis added); Myrick & Perkins 1995, at 191 (Exh. US-48).

[200] *US – Tuna II (Mexico) (Panel)*, para. 7.738 (emphasis added); *see also id.*, para. 7.505 ("[T]o the extent that the US dolphin-safe provisions deny access to the label to products containing tuna caught by setting on

97. And these unobserved harms likely occur on a *massive* scale. As noted above, each year, large purse seine vessels chase many millions of dolphins in the ETP and capture approximately 3.6 million dolphins in their nets.[201] On average, each northeastern offshore spotted dolphin is chased 10.6 times per year and captured 3.2 times per year; each eastern spinner dolphin is chased 5.6 times per year and captured 0.7 times per year; and each coastal spotted dolphin is chased 2.0 times per year.[202] The inherent unobserved harms identified above may occur *in any or all* of these interactions.

98. The original panel concluded that while there was some "uncertainty" as "to the extent to which setting on dolphins" caused unobserved harms, "sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect."[203] Those findings were adopted by the DSB and so apply in this compliance proceeding as well.

99. The Appellate Body wholly affirmed the original panel's findings regarding the harms of setting on dolphins.[204] Notably, the Appellate Body recognized that it was *uncontested* in the original proceeding that the setting on dolphins may cause harm to dolphins, including observed[205] and unobserved harms.[206] For example, Mexico *did not contest* before the Appellate Body that setting on dolphins resulted in dolphins suffering unobserved harms, such as "cow-calf separation, potential muscle injury resulting from the chase, immune and reproductive systems failures, and other adverse health consequences for dolphins, such as continuous acute stress,"

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dolphins, they enable the US consumer to avoid buying tuna caught in a manner involving the types of observed and unobserved adverse impact on dolphins associated with this method."); *see also* Noren, & Edwards 2007 (Exh. US-45); Myrick & Perkins 1995, at 191 (Exh. US-48)).

[201] *See* IATTC, *Effectiveness of Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds*, at 4, Table 2 (2003) (Exh. US-27); *see also* U.S. Response to Original Panel Question No. 31, para. 70.

[202] Reilly, et al. 2005, at 26 (Exh. US-28).

[203] *US – Tuna II (Mexico) (AB)*, para. 246; *US – Tuna II (Mexico) (Panel)*, para. 7.504.

[204] *See, e.g.*, *US – Tuna II (Mexico) (AB)*, paras. 245-51.

[205] *US – Tuna II (Mexico) (AB)*, para. 245 ("The Panel also noted that 'both parties recognize that setting on dolphins may adversely affect dolphins.'"); *id.* ("Mexico does not deny that dolphins may be killed or seriously injured during purse-seine net fishing manoeuvres."); *id.* ("[Mexico] does not deny that setting on dolphins even according to the AIDCP may still result in observed dolphin mortality or serious injury, Mexico's second written submission, para. 204.").

[206] *US – Tuna II (Mexico) (AB)*, para. 246 ("The Panel further remarked that 'there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality.' Nonetheless, the Panel determined 'that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect.' The Panel also found that the United States had put forward sufficient evidence to raise a presumption 'that the method of setting on dolphins 'has the capacity' of resulting in observed and unobserved adverse effects on dolphins.'") (quoting *US – Tuna II (Mexico) (Panel)*, paras. 7.504, 7.737); *US – Tuna II (Mexico) (AB)*, n.513 ("as we have accepted earlier, setting on dolphins may result in observed and unobserved harmful effects on dolphins" and stating, "In response to questioning at the oral hearing, *Mexico indicated that it did not contest this finding by the Panel*.") (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.560) (emphasis added).

and that these harms occur even when sets on dolphins are performed consistently with the AIDCP rules, as they "arise as a result of the chase in itself."[207]

100. In sum, the Appellate Body recognized the important findings of the original panel that "setting on dolphins within the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed and unobserved effects on dolphins."[208] As such, the Appellate Body recognized that "the fishing technique of setting on dolphins is *particularly* harmful to dolphins."[209]

101. The recent prohibitions on setting on cetaceans by the IOTC and the WCPFC merely confirm what should be obvious – setting on these cetaceans with purse seine nets is harmful to them.[210]

iv. Dolphin Populations Inside the ETP

102. Mexico asserts that the two depleted dolphin stocks in the ETP – the northeastern offshore spotted dolphin and the eastern spinner dolphin – are, in fact, recovering.[211] As support, Mexico cites one scientific workshop and the fact that, in 2009, the United States agreed to increase the DMLs for these two dolphin stocks.[212] Mexico's argument rests on a misconstruction of the U.S. dolphin safe labeling measure and of the facts.

103. As the original panel found, the U.S. measure's objective is to protect dolphins "from all of these adverse effects [observed mortalities and other effects of setting on dolphins] . . . by ensuring that the US market is not used to encourage setting on dolphins to catch tuna."[213] Conserving dolphin populations is an objective of the measure only indirectly, in so far as

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[207] *US – Tuna II (Mexico) (AB)*, para. 330 ("We note, in this regard, the Panel's finding, *undisputed by the participants*, that dolphins suffer adverse impact *beyond observed mortalities* from setting on dolphins, even under the restrictions contained in the AIDCP rules.") (emphasis added) (citing Panel Report, paras. 7.491-7.506, and quoting para. 7.504).

[208] *US – Tuna II (Mexico) (AB)*, para. 251 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.438 and 7.493); *US – Tuna II (Mexico) (AB)*, para. 250, n.326 ("Mexico confirmed that it did not contest this fact in response to questioning at the oral hearing.").

[209] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added); *see also id.* para. 288 (noting that "[t]he Panel agreed with the United States that 'certain fishing techniques seem to pose greater risks to dolphins than others'") (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.438).

[210] *See* WCPFC Resolution 2011-03 (Exh. US-11) (noting that is "[m]indful that cetaceans are particularly vulnerable to being encircled by purse seine nets, due to the propensity of tuna to form schools around them, or for toothed cetaceans to be attracted to the same prey as tuna"); IOTC Resolution 13/04 (Exh. US-12) (noting that the IOTC is "[m]indful that cetaceans are particularly vulnerable to exploitation including from fishing" and that the IOTC is "[c]oncerned about the potential impacts of purse seine fishing operations on the sustainability of cetaceans").

[211] Mexico's First Written 21.5 Submission, para. 189.

[212] Mexico's First Written 21.5 Submission, paras. 189-194.

[213] *US – Tuna II (Mexico) (Panel)*, para. 7.485 (quoting U.S. Response to Original Panel Question No. 66(a), para. 151).

addressing adverse effects on dolphins "might also be considered as seeking to conserve dolphin populations."[214] In other words, the U.S. position in this dispute does not depend on whether dolphin populations in the ETP are recovering.[215]

104. Additionally, Mexico overstates the evidence that the ETP dolphin populations are, in fact, growing. Mexico's source for this argument is a workshop held by the International Seafood Sustainability Foundation (ISSF) in October 2012 and a study report presented at this workshop.[216] For the northeastern spotted dolphin, the study estimated an 82 percent probability that the annual rate of increase is positive and a 37 percent probability that it is greater than the expected rate of increase of 4 percent per year.[217] For eastern spinner dolphins the result was an estimated 84 percent probability that the annual rate of increase exceeded the expected rate.[218]

105. One basic point is that the workshop report is marked "Do Not Cite," presumably because its conclusions are still undergoing revision or peer review. Peer review is particularly important in areas like this one where different scientific studies report different results.

106. And even taking the workshop report on its face, it does not demonstrate what Mexico asserts. Although the report's data is more encouraging about the recovery of the dolphin populations in the ETP than most other scientific studies to date, it is far from conclusively positive. At best, the study showed that for one of the species covered, it is more likely than not that one depleted dolphin population is increasing at the rate at which scientists estimate it should be, absent harmful factors, while another is not. This illustrates why, although the populations may be increasing, scientists are focusing on "lack of recovery," as it is more doubtful that both are recovering at the rate scientists expected given observed mortality rates in the ETP.[219]

107. Further, the study did not investigate the coastal spotted dolphin or the southern or western offshore spotted dolphin.[220] According to previous studies, these populations were estimated to be declining, even as it was thought that the northeastern spotted and eastern spinner

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[214] *US – Tuna II (Mexico) (Panel)*, para. 7.486.

[215] *See US – Tuna II (Mexico) (Panel)*, paras. 7.735 (stating: "we are not persuaded that the objective of protecting dolphins through the US dolphin-safe provisions is to be understood exclusively, or even primarily, in terms of dolphin population recovery. Rather, both US objectives are defined in terms of 'adverse effect' of fishing practices on dolphins. . . . This suggests to us that the US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent on dolphin populations being depleted.").

[216] Mexico's First Written 21.5 Submission, para. 190.

[217] Mark N. Maunder, IATTC, *Evaluating Recent Trends in EPO Dolphin Stocks*, at 4 (unpublished paper presented at the ISSF Tuna-Dolphin Workshop, La Jolla, CA, Oct. 25-26, 2012) (Exh. MEX-81). The study applied Bayesian analysis to the problem of the abundance estimates for dolphin stocks in the ETP. *Id.*

[218] Maunder 2012, at 4 (Exh. MEX-81).

[219] *See* Andre E. Punt, *Independent Review of the Eastern Pacific Ocean Dolphin Population Assessment*, IATTC Special Report 21, at 5-6 (2013) (Exh. US-49); Reilly et al. 2005, at 31-32 (US-28); Victor R. Restrepo, *Chair's Report of the ISSF Tuna-Dolphin Workshop*, at 1, La Jolla, CA (Oct. 25-26, 2012) (Exh. MEX-82).

[220] Maunder 2012, at 1 (Exh. MEX-81).

dolphin populations might be growing.[221] One study suggested that the decline of the western/ southern spotted dolphin populations might indicate that any apparent increase in the northeastern offshore stock is due to dolphins moving across the boundary that defines the two stocks.[222]

108. Consequently, it may well be that the more modest assessment of previous studies ultimately proves to be more accurate. The last population study before this most recent one found that, while all but the western/southern and bottlenose dolphin populations were growing at or near their maximum expected rate for the 1998-2006 period, the 95 percent confidence intervals on the growth estimates included zero for both the coastal and northeastern offshore spotted and eastern spinner dolphins.[223] Other studies did not find that the populations were increasing at all.[224]

109. Finally, Mexico also misstates the significance of the 2009 DML revision. The DMLs for different species of dolphins were changed, but the overall DML remained at 5,000.[225] Thus, the U.S. policy to allow revision of the DMLs reflected not assurance that populations in the ETP were recovering but shifting concerns about different dolphin populations.

2. Other Fishing Techniques Do Not Present an "Equal" or "Greater" Harm to Dolphins than the Harm Caused By Setting on Dolphins

110. Mexico argues that the harms to dolphins posed by *all* potentially eligible methods of fishing for tuna, *e.g.*, purse seine fishing using FADs, longline fishing, and pole and line fishing, "have adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing

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[221] Tim Gerrodette et al., *Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific with Revised Estimates from 1986-2003*, NOAA Technical Memorandum, at 20 (Apr. 2008) (Exh. US-50) (Orig. Exh. US-20).

[222] Gerrodette et al. 2008, at 12 (Exh. US-50); *see also* Restrepo, *Chair's Report*, at 3 (Exh. MEX-82) ("[S]ome participants expressed concern that there is uncertainty in the stock structure for spotted dolphins, and that the trend in abundance would decline of the data for the NE region . . . were combined with data for the W/S region.").

[223] Gerrodette et al. 2008, at 12-13 and Table 13 (Exh. US-50).

[224] *See, e.g.*, Paul R. Wade et al., "Depletion of Spotted and Spinner Dolphins in the Eastern Tropical Pacific: Modeling Hypothesis for their Lack of Recovery," 343 *Marine Ecology Progress Series* 1, 10 (2007) (Exh. US-51) (Orig. Exh. US-21) (stating that the median population growth for NE offshore spotted and eastern spinner is, with 83% probability, less than 3 percent per year) and Tim Gerrodette & Jaume Forcada, "Non-Recovery of Two Spotted and Spinner Dolphin Populations in the Eastern Tropical Ocean," 29 *Marine Ecology Progress Series* 1, 16 (2005) (Exh. US-52) (Orig. Exh. US-22) (finding that "the data show that the stocks are not recovering at rates consistent with the estimated levels of depletion and current low reported levels of bycatch. . . . For both stocks, the estimates did not show any statistically significant trend, either upwards or downwards, during the 21 year period [from 1979 to 2000]").

[225] *See* IDCP, Scientific Advisory Board, *Updated Estimates of N_{min} and Stock Mortality Limits*, at 3, Table 2, 7th Meeting, La Jolla, CA (Oct. 30, 2009) (Exh. MEX-4).

method of setting on dolphins in an AIDCP-compliant manner."[226] The DSB has already determined, however, that "setting on dolphins is *particularly* harmful to dolphins."[227]

111. Even if Mexico were in a position to revisit the adopted DSB recommendations and rulings, which it is not, Mexico fails to put forward sufficient facts to prove that any other fishing method that actually produces tuna for the U.S. tuna product market is anywhere remotely as dangerous to dolphins in terms of observed *and* unobserved harms as setting on dolphins inside the ETP.

112. Mexico draws false comparisons with other fisheries, including by comparing fisheries of radically different sizes, and by including irrelevant data. Where actual comparisons can be drawn between the harms to dolphins caused by different fishing methods, the results are stark. As discussed below, the dolphin mortality caused by purse seine fishing using FADs in the ETP and longline fishing in other Pacific Ocean fisheries constitute *mere fractions* of the dolphin mortalities allowed under the AIDCP (approximately 5,000 dolphins per year) and of the dolphin mortalities actually caused by setting on dolphins in the ETP (on average 1,127 dolphins per year over the past ten years).[228]

113. Furthermore, Mexico essentially ignores the unobserved harms caused by setting on dolphins. As discussed above, setting on dolphins is the *only* fishing technique that specifically *targets* dolphins. The fishing method is *inherently* harmful to dolphins, which is not the case with other fishing methods, none of which depend on the presence (and capture) of dolphins. In fact, these other methods are often employed without any dolphin in sight of the vessel and without any interaction with dolphins at all.[229] Any dolphin interactions that occur, occur merely by accident. For this reason, *even if* there are tuna fisheries using these other gear types that produce the same number of dolphin mortalities and serious injuries allowed or caused in the ETP – a point we dispute – it is simply *not* the case that such fisheries are producing the same level of unobserved harms, such as cow-calf separation, muscular damage, immune and reproductive system failures, which "arise as a result of the chase in itself," as the purse seine fishery in the ETP.[230]

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[226] Mexico's First Written 21.5 Submission, para. 248 ("The situation is different for the fishing methods used to catch tuna outside the ETP. With the exception of driftnet fishing for tuna on the high seas by the Italian fleet, *all of the other tuna fishing methods* (including other driftnet fishing) are qualified to be used to catch tuna in a dolphin-safe manner, even though it is well documented *that these methods* cause substantial dolphin mortalities and serious injuries. As explained above in section III of this submission, *these "qualified" fishing methods* have adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing method of setting on dolphins in an AIDCP-compliant manner.") (emphasis added).

[227] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

[228] *See supra* sec. II.C.1.b.iii, Table 1.

[229] Gerrodette, "The Tuna-Dolphin Issue," at 1192 (Exh. US-29).

[230] *US – Tuna II (Mexico) (Panel)*, paras. 7.499, 7.504 (emphasis added); Myrick & Perkins 1995, at 191 (Exh. US-48).

114. Not one of the studies Mexico cites concludes what Mexico urges this Panel to accept – that fishing methods that interact with dolphins by accident are as (or more) harmful to dolphins than a fishing method that intentionally chases and captures dolphins.

115. In lieu of constructing a true comparison, Mexico exaggerates the harms caused to dolphins by these other fishing methods by referring to the harm caused to other marine species, such as sea turtles, whales, and whale sharks (a shark species).[231] Of course, virtually all fishing methods result in some bycatch of non-target species, but the fact that tuna fishing harms sea turtles and other sea creatures is not relevant to this dispute. The label does not declare the tuna product to be "turtle-safe," "whale-safe," or "shark-safe." The label only makes a declaration regarding whether the tuna product is "*dolphin safe*."

116. Mexico also attempts to confuse the legal question at issue by focusing on the allegedly harmful fishing practices of countries that do not export tuna products to the United States and by focusing on fishing methods, such as gillnets and trawling, that only produce *de minimis* amounts of tuna product for the U.S. tuna product market.

117. As to the former, vessels flagged to Thailand, the Philippines, Vietnam, Ecuador, Indonesia, and the United States produce tuna products accounting for over 96 percent of the U.S. market for canned tuna.[232] Mexico, however, fills its submission with discussions of the fishing practices of other nations, such as India, Iran, Pakistan, Sri Lanka, and Yemen, which export little to no tuna to the United States.[233] Of the 284,541 vessel records associated with the Form 370s submitted to NOAA since 2002 up to December 31, 2013, 340 (0.12%) were from India, 2 (0.00%) were from Pakistan, 401 (0.14%) were from Sri Lanka, and 0 (0.00%) were from Yemen.[234]

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[231] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 114, 116-18, 128, 134-38, 145 (citing Secretariat of the Pacific Community, "The Western and Central Pacific Tuna Fishery: 2006 Overview and Status Of Stocks", (2008), at 59-60 (Exh. MEX-41); "Proposed Conservation And Management Measure: Mitigating Fishing Impacts on Cetaceans", Paper Prepared by Australia, WCPFC7-20 I O-DP/17 (15 November 2010), at 1 (Exh. MEX-43); Australia and Maldives, "On The Conservation Of Whale Sharks (Rhincodon Typus)," IOTC–2013–S17–PropD[E] (April 5, 2013) (Exh. MEX-45); K.S.S.M. Yousuf et al., "Observations On Incidental Catch Of Cetaceans In Three Landing Centres Along The Indian Coast", *Marine Biodiversity Records*, Vol. 2 (2009), at 4 (Exh. MEX-50); Odontocete Bycatch, at E345-46 (Exh. MEX-55); M. Tetley, J. Kiszka & E. Hoyt, "Defining hotspots for toothed cetaceans involved in pelagic longline fishery depredation in the western Indian Ocean: a preliminary approach", IOTC-2012-WPEB08-40 (18 August 2012), at 1 (Exh. MEX-57); NOAA, "Pelagic Longline Take Reduction Team Key Outcomes Memorandum" (August 21-23, 2012) (PLTRT Key Outcomes Memorandum) (Exh. MEX-62); and M. Donoghue, R. Reeves & G. Stone, eds., Report Of The Workshop On Interactions Between Cetaceans And Longline Fisheries, New England Aquarium Aquatic Forum Series Report 03-1 (May 2003), at 3-4 (Exh. MEX-65)).

[232] *See* "The U.S. Market for Canned Tuna Products, by Source Country, 2010-2013" (Exh. US-53).

[233] Fishing practices in each of these countries, either past or present, are the subject of in-depth discussions by Mexico in its submission. *See* Mexico's First Written 21.5 Submission, paras. 46, 128, 129, 130 n.103, 153, 154.

[234] NMFS, "Individual Vessel Record Gear Types Since the Inception of the 370 Database: India, Pakistan, Sri Lanka, Yemen" (May 23, 2014) (Exh. US-54). As noted above, U.S. persons may not import Iranian origin tuna or tuna products. *See* 31 C.F.R. § 560.201 (Exh. US-10). Mexico also cites to Irish gillnet fishing even though the

118. As to the latter, as discussed below, purse seine sets (unassociated sets or sets on FADs), longline, and pole and line fishing accounts for 95.2 percent of vessel records associated with tuna imports since 2005.[235] For domestic tuna products, 99.9 percent of tuna products caught by U.S. vessels and processed by U.S. canneries for the U.S. market since 2002 were caught by purse seine, longline, or pole and line fishing. Other fishing methods, such as hand line, gillnet, and trawling, produce only *de minimis* amounts of tuna for the U.S. tuna product market.

119. Mexico's main argument is that the amended measure unfairly burdens Mexican producers by denying eligibility for the dolphin safe label to the fishing method that Mexican vessels elect to use while not denying eligibility to the fishing methods that their competitors in the U.S. market elect to use.[236] But Mexico cannot prove this claim by arguing that the amended measure disadvantages its tuna products in the U.S. market to the benefit of tuna products produced by countries and fishing methods that are not actually sold in the U.S. market, or are sold only in *de minimis* amounts.

120. Rather, Mexico's central factual allegation must succeed or fail on the basis of the *actual* tuna and tuna products in the U.S. market, which are generally from Thailand, the Philippines, Vietnam, Ecuador, Indonesia, and the United States and produced by purse seine, longline, and pole and line fishing. It is here that Mexico must make its case – with *these* Members and *these* fishing methods.[237] The fact that small, artisanal boats may be using gillnets to fish for tuna in the coastal waters of Pakistan, and causing substantial harm to the local dolphin populations in the process, is very unfortunate. But that tuna is being sold in small fish markets in Pakistan, *not* in the U.S. tuna product market. And, as such, these small boats, and the fishing methods that they may be using, are *irrelevant* to this dispute, which is about whether the amended dolphin safe labeling measure discriminates against Mexican tuna product vis-à-vis like products actually being sold in the U.S. tuna product market.

121. Additionally, it is important to recall that, under the amended dolphin safe labeling measure, no tuna product may be labeled dolphin safe if it contains tuna that was caught where a dolphin was killed or seriously injured, regardless of the level of harm that a fishing method causes dolphins generally.[238] Therefore, the fact that fishing methods eligible for the dolphin safe label are capable of causing dolphin mortalities does not mean that the United States allows tuna products to be labeled dolphin safe when the tuna contained therein was caught in gear deployments that resulted in dolphin mortalities or serious injuries.

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fishery was shut down in 2002 and Ireland has imported tuna products to the United States in only one year since then ($27,652 worth of products in 2008). *See* NMFS Trade Query: Ireland (Exh. US-55).

[235] *See infra*, sec. II.C.2.a.

[236] *See* Mexico's First Written 21.5 Submission, paras. 227-33.

[237] *See* Mexico's First Written 21.5 Submission, para. 314 (asserting that the "advantage" of the dolphin safe label "is made available to tuna products originating in other countries, *including Thailand and the Philippines*, who are the largest sources of imported tuna products into the United States") (emphasis added).

[238] *See supra*, sec. II.A.3.b.

122. For these reasons, and explained further below, Mexico fails to prove the fact it asserts.[239]

a. Members and Fishing Methods That Produce Tuna for the U.S. Tuna Product Market

123. Before addressing Mexico's arguments concerning each fishing method, it is useful to note which Members produce tuna for the U.S. tuna product market and how that tuna is caught.

124. Approximately half of the canned tuna sold in the U.S. tuna product market is produced at U.S. canneries, and about half is imported.[240] Thailand, the Philippines, Vietnam, Ecuador, and Indonesia produce the vast majority of the imported tuna products sold in the United States. Collectively, these six Members produce approximately 96 percent of the tuna sold in the U.S. tuna product market.[241]

125. As to gear type, Table 2 provides the information produced by cannery records as to tuna caught by U.S.-flagged vessels.

Table 2. U.S. Cannery Receipts from Domestic Vessels (Data from 2002 through December 31, 2013)[242]

GEAR TYPE	VESSEL RECORDS	% VESSEL RECORDS	TOTAL METRIC TONS (MT)	PERCENT MT
Purse Seine	1,925	40.6%	707,498	90.7%
Longline	1,939	40.9%	61,009	7.8%
Pole and Line	832	17.6%	11,222	1.4%
Rod and Reel	41	0.9%	738	0.1%
Total	4,737	100%	780,467	100%

126. Table 2 shows that purse seine fishing other than by setting on dolphins, longline fishing, and pole and line fishing make up nearly all, over 99.9 percent by product weight, of the tuna caught by U.S. vessels and sold as tuna products in the U.S. market in the years 2002 to 2013. Gillnet fishing and trawl fishing account for *none* of the U.S. caught tuna processed and sold in the United States.

127. For imported tuna and tuna products, the NMFS TTVP does not collect data in the Form 370 database that allows the United States to specifically tie quantities to gear type. However, the TTVP collects Form 370s for each shipment of imported tuna products and the associated

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[239] *See US – Tuna II (Mexico) (AB)*, para. 283 (stating that "the party that asserts a fact is responsible for providing proof thereof") (quoting *Japan – Apples (AB)*, para. 157).

[240] "The U.S. Market for Canned Tuna Products, by Source Country, 2010-2013" (Exh. US-53).

[241] "The U.S. Market for Canned Tuna Products, by Source Country, 2010-2013" (Exh. US-53).

[242] William Jacobson Witness Statement, Appendix 3 (Exh. US-4). It is notable that there are relatively few U.S. vessel records compared to foreign-caught tuna shipments. The reason for this is that a typical U.S.-flagged modern tuna seiner holds between 1,200 and 1,500 short tons of tuna (equivalent to 2-3 million pounds per trip), far more than other types of vessels. As the table shows, purse-seine-caught tuna accounts for over 90 percent of total domestic catch. *See id.*

vessel records tie each shipment to the gear type used by the harvesting vessel.[243] Table 3 below depicts the vessel records for each imported tuna from 2005 (when gear type began to be consistently entered into the database) through 2013.

Table 3. Individual Vessel Record Gear Types (From 2005 Data through December 31, 2013)[244]

GEAR TYPE	VESSEL RECORDS	PERCENT OF TOTAL
Purse seine	125,905	48.437%
Longline	93,148	35.835%
Pole and Line	38,387	14.768%
Hand Line	1,079	0.415%
Gillnet	683	0.263%
Other Gear	670	0.258%
Null	62	0.024%
Large-Scale Driftnet*	3	0.001%
TOTAL	259,937	100%

***** All three of the large-scale high seas driftnet records occurred in 2006.

128. As Table 3 shows, purse seine fishing (virtually all by setting on FADs or unassociated schools),[245] longline fishing, and pole-and-line fishing make up virtually all vessel records regarding imported tuna. Gillnet and "other gear," which would include trawl fishing and hand-held rod and reel,[246] make up around 0.5 percent of the total of these vessel records. While these percentages do not directly correlate with import quantities, they do indicate the level of tuna imports caught by each method. To the extent that the import quantities diverge from the number of vessel records as a percentage of the total, the quantities per record would be relatively greater for purse seine caught tuna, as the purse seine vessels are larger and tend to harvest more tuna per vessel than vessels using other fishing methods would, as shown in Table 2 above.[247]

[243] William Jacobson Witness Statement, Appendix 2 (Exh. US-4). Vessel records (one record for each harvesting vessels) are associated with the Form 370 submitted with any shipment of imported tuna. There are approximately 2.2 vessel record per import shipment. Note that we present data from 2005 onwards as, prior to 2005, gear type was not consistently entered into the database. *See id.*

[244] William Jacobson Witness Statement, Appendix 2 (Exh. US-4).

[245] William Jacobson Witness Statement, Appendix 2 (Exh. US-4). 9,878 of these records are associated with non-dolphin-safe tuna from Mexico. *See id.*

[246] *See* NOAA Form 370 (Exh. MEX-22).

[247] William Jacobson Witness Statement, Appendix 3 (Exh. US-4).

b. Fishing Methods Used to Produce Tuna Product for the U.S. Market

i. Purse Seine Fishing Other than by Setting on Dolphins

129. Purse seine sets other than sets on dolphins (namely unassociated or FAD sets) produce approximately 90.7 percent of U.S.-caught tuna products in the U.S. market and account for 44.6 percent of vessel records associated with imported tuna and tuna products.[248]

130. Purse seine vessels fish for tuna without setting on dolphins inside and outside the ETP. Vessels can make "unassociated sets" by locating free swimming schools of tuna near the surface and encircling them with a purse seine net. Unassociated sets can be performed by any purse seine vessel, including Mexico's ETP purse seine fleet.[249] In the ETP, countries that set on free swimming schools include Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Peru, El Salvador, Spain, and Venezuela.[250] Purse seine vessels can also set on floating objects. This type of set is performed around the world, exploiting the global phenomenon that tuna congregate around and under almost any structure at or near the ocean surface. In recent years, however, the majority of tuna fishing on floating objects occurs on man-made FADs.[251] All purse seine boats are capable of making sets on floating objects, including Mexico's ETP purse seine fleet.[252] For others, like the U.S. fleet in the Central and Western Pacific, setting on floating objects is the primary method of fishing.[253]

131. Mexico does not explicitly argue that these types of purse seine fishing maneuvers are as (or more) dangerous to dolphins than setting on dolphins, but appears to imply this at various times in its first submission.[254] To the extent Mexico is making this argument, it is incorrect.

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[248] *See* William Jacobson Witness Statement, Appendix 2 and 3 (Exh. US-4). This figure reflects the total number of vessel records associated with Form 370 designating purse seine as the gear type minus the 9,878 records associated with non-dolphin-safe tuna from Mexico harvested by setting on dolphins. ***Id.***

[249] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26); *see also* U.S. First Written Submission in Original Proceeding, para. 68. Commonly caught species include skipjack tuna and yellowfin tuna, but others species may be captured in this manner as well.

[250] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26); U.S. First Written Submission in Original Proceeding, para. 68. Globally, the list of countries that fish by unassociated set is significantly larger, although FADs have eclipsed unassociated sets as the dominant method of purse seine fishing. Martin Hall & Marlon Roman, *Bycatch and Non-Tuna Catch in the Tropical Purse Seine Fisheries of the World*, FAO Fisheries and Aquaculture Technical Paper 569, at 25, 28-29 (2013) (Exh. US-56).

[251] Hall & Roman 2013, at 21, 25 (Exh. US-56). Floating objects in general can aggregate a number of species of fish, but the primary target of FAD fisheries is skipjack tuna. *Id.* at 29.

[252] U.S. First Written Submission in Original Proceeding, para. 69.

[253] Western Pacific Regional Fishery Management Council, *Overview of the Fisheries - Pelagics* http://www.wpcouncil.org/managed-fishery-ecosystems/pacific-pelagic/historical-overview-of-the-fisheries-pelagics/ (accessed May 15, 2015) (Exh. US-57). Vessels can also set on seamounts, natural underwater formations that can have an effect on tuna similar to that of floating objects. Hall & Roman 2013, at 19-20 (Exh. US-56).

[254] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 2, 114, 119, 248.

Indeed, the argument that *not setting on* dolphins is as (or more) dangerous to dolphins than *setting on* dolphins *defies common sense*. And, of course, the available data confirms this.

132. Comparing the data on dolphin mortalities in the Western Central Pacific Ocean (WCPO) purse seine tuna fishery and ETP confirms this point. In the WCPO fishery in 2009, an estimated 44,292 sets took place, resulting in 1,184 dolphin mortalities, making for a dolphin mortality rate of 26.98 animals killed per 1,000 sets.[255] In 2010, mortality dramatically dropped to 110 dolphins in 41,871 sets, yielding a mortality rate of 2.64 dolphins per 1000 sets.[256] This is in stark contrast to the figures of the ETP, where, in 2009, 1,239 dolphin mortalities occurred in 22,096 sets, for a mortality rate of 56.1 dolphins per 1,000 sets, and in 2010, 1,170 dolphin mortalities occurred in 21,930 sets, for a mortality rate of 53.4 dolphins per 1000 sets.[257] In the ETP in 2009-2010, 40.1 percent and 44.8 percent of all sets were sets on dolphin,[258] whereas the sets in the WCPO were mostly unassociated sets and drifting FAD sets.[259]

133. In the ETP, dolphin sets make up only about half of the total number of sets each year – the other half are sets on floating objects and unassociated sets.[260] If it were correct that other fishing methods were as (or more) dangerous to dolphins as setting on dolphins, then it would follow that at least half of the observed mortalities in the ETP would result from unassociated sets or sets on FADs.[261] However, *virtually all* observed dolphin mortalities and serious injuries that take place in the ETP are the result of dolphin sets by large purse seine vessels.[262] In 2012, for example, dolphin sets accounted for 41.3 percent of all sets in the ETP (9,220 out of 22,350),[263] *but accounted for 100 percent* of observed dolphin mortalities and serious injuries (870 and 13, respectively).[264] Data from other years presents a similar picture[265] as does the data

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[255] *Summary Information on Whale Shark and Cetacean Interactions in the Tropical WCPFC Purse Seine Fishery*, at 5, Table 2a, Paper prepared by SPC-OFP, 8th Regular Session, Tumon, Guam, Mar. 26-30, 2012 (Jan. 18, 2012) (WCPFC Cetacean Interactions Paper) (Exh. US-58).

[256] WCPFC Cetacean Interactions Paper, at 6, Table 2b (Exh. US-58).

[257] *See* IATTC, *Tunas and Billfishes*, at 44, Table A-7 (Exh. US-44); IATTC, *Report on the International Dolphin Conservation Program*, at 15, Table 3, (Exh. MEX-3). These calculations use the total number of sets performed by purse seine vessels with carrying capacity over 363 metric tons, as the mortality figures cover only those vessels.

[258] IATTC, *Tunas and Billfishes*, at 43, Table A-7 (Exh. US-44).

[259] WCPFC Cetacean Interactions Paper, at 4, Table 1a (Exh. US-58).; *see also* Hall & Roman 2013, at 191 (Exh. US-56).

[260] *See* 2009 IATTC Annual Report, at 54, Table 5 (Exh. US-35).

[261] All large purse seine vessels carry observers in the ETP, whether they are setting on dolphins or not. *See* AIDCP, Annex II(2) (Exh. MEX-30).

[262] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26); 2008 IATTC Annual Report, at 50-51, Table 3c (Exh. US-43).

[263] *See* 2009 IATTC Annual Report, at 54, Table 5 (Exh. US-35).

[264] IATTC, EPO Dataset 2009-2013 (Exh. US-26); 2008 IATTC Annual Report, at 50-51, Table 3c (Exh. US-43). One dolphin was killed in an unassociated set, and none were killed in sets on floating objects. *Id.*

on annual bycatch.[266] Since 2001, the largest number of dolphins that have been killed in a year due to unassociated and floating object sets was 15 dolphins in 2002, and generally only 0-2 dolphins die per year in these sets,[267] compared to an average of 1,205 dolphin deaths per year from setting on dolphins in the ETP.[268]

134. It simply cannot be the case that two fishing methods are equally harmful where virtually all dolphins mortalities are caused by one fishing method and almost none are caused by another where the *different* fishing methods are being employed by the *same* vessels in the *same* fishery. And, of course, this is true without even referencing the unobserved harms caused by setting on dolphins. Indeed, Mexico does not even allege that performing unassociated sets or setting on FADs causes unobserved harms on dolphins, and certainly does not allege, much less prove, that such sets cause equal (or more) unobserved harms to dolphins than intentionally chasing, encircling, and capturing dolphins does.

ii. Longline Fishing

135. Longline fishing produces approximately 7.8 percent of U.S.-caught tuna products in the U.S. market and accounts for 35.8 percent of the vessel records associated with imported tuna and tuna products.[269]

136. Longline fishing is a widespread method of harvesting tuna. It involves attaching a large number of baited hooks to a long, single line via a number of shorter lines called branch lines.[270] Asian fishing nations are the dominant players in longline tuna fisheries, but longline vessels are used around the world and are also common in the fleets of developing countries, as they are generally much cheaper to buy and operate than large purse seine vessels. The United States

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[265] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26) (reporting similar numbers for years 2009-2013). Similarly, in 2007, 837 of the 838 dolphins killed (99.9 percent) were killed during dolphin sets, although dolphin sets represented 40.4 percent of all sets in the ETP in that year. In 2006, 884 of the 886 dolphins killed (99.8 percent) were killed during dolphin sets, which represented 36.8 percent of all sets. In 2005, 100 percent of the 1,151 dolphins killed in the ETP purse seine fishery were killed in dolphin sets, which were 50.3 percent of all sets. *See* 2008 IATTC Annual Report, at 50-51, Table 3c (Exh. US-43); 2009 IATTC Annual Report, at 54 Table 5 (Exh. US-35).

[266] For 2005-2011, the average dolphin bycatch for dolphin sets was 6.1 kilograms per set – 2.2 kilograms of spotted dolphin, 2.3 kilograms of spinner dolphin, and 1.6 kilograms of common dolphin. IATTC, *Tunas and Billfishes*, at 115, Table K-1 (Exh. US-44). The average dolphin bycatch per unassociated set and per set on floating object, by contrast, was 0.0 kilograms for all species of dolphin. *Id.*

[267] 2008 IATTC Annual Report, at 49-50, Table 3c (Exh. US-43); IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[268] For data covering 2001-2008, see 2008 IATTC Annual Report, at 49-50, Table 3c (Exh. US-43). For data covering 2009-2013, *see* IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[269] *See* William Jacobson Witness Statement, Appendix 2 and 3 (Exh. US-4).

[270] Food & Agriculture Organization (FAO), "Industrial Tuna Longlining," *available at* http://www.fao.org/fishery/fishtech/1010/en (Exh. MEX-53); *see* U.S. First Written Submission in Original Proceeding, para. 70.

also has longline fisheries. In particular, it has a tuna longline fishery in the Western and Central Pacific Ocean in the EEZ off Hawaii and on the high seas.

137. Attempting to show that longline fishing is as harmful to dolphin as setting on dolphins, Mexico first discusses the risk of depredation during longline fishing.[271] Specifically, Mexico states that "operational interactions between odontocetes and the longline industry [are] a problem" and that depredation by cetaceans "can have negative impacts" on the cetaceans and the fish.[272] The report Mexico cites is non-specific as to the target fish and the depredating marine mammal. Furthermore, the "interactions" on which the study is focused are not dolphin mortality or serious injury, but depredation, *i.e.*, cetaceans eating the target catch after it has been caught on longlines or consuming or deterring fish that might otherwise have become caught on the longline.[273] As the study acknowledges, the literature on depredation focuses on the impact on the fishery (reduction of catch) and not on harm to marine mammals. Further, only a fraction of interactions result in dolphin mortality or serious injury.[274] Thus the depredation study provides little evidence of harm to dolphins from longline fishing for tuna.

138. Mexico also cites the fact that the United States has implemented Take Reduction Plans under the Marine Mammal Protection Act (MMPA) for the Hawaii and Atlantic longline fisheries, as demonstrating that longline fishing is threatening to dolphins.[275] This fact does not support Mexico's argument, however.

139. The MMPA directs the NMFS to develop and implement a take reduction plan to protect marine mammal stocks for which, *inter alia*, the level of mortality incidental to commercial fishing operations exceeds the stock's potential biological removal level (PBR).[276] The goal of the take reduction plan is "to reduce incidental mortality and serious injury of marine mammals . . . to insignificant levels approaching a zero mortality and serious injury rate."[277] Thus, although the 2012 Stock Assessment Report (SAR) reported that the Hawaii longline in the U.S. EEZ fishery seriously injures or kills, on average, only 13.8 false killer whales per year, the population was designated a strategic stock because the number exceeded its PBR of 9.1 false killer whales per year.[278]

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[271] In the report Mexico cites, depredation is defined as follows: "Depredation occurs when an individual odontocete partially or completely consumes fish caught on longline hooks, or the consumption or deterrence of free swimming fish that may otherwise become caught on a longline hook." *See* Derek J. Hamer, Simon J. Childerhous & Nick J. Gales, "Odontocete bycatch and depredation in longline fisheries: A review of available literature and of potential solutions," *Marine Mammal Science*, Vol. 28, No. 4 (October 2012) E345, at 346 (Exh. MEX-55).

[272] Mexico's First Written 21.5 Submission, paras. 134-37.

[273] Hamer et al. 2012, at 346 (Exh. MEX-55)

[274] William Jacobson Witness Statement Appendix 1 (Exh. US-4).

[275] Mexico's First Written 21.5 Submission, paras. 139-43.

[276] *Hui Malama I Kohola v. Nat'l Mar. Fisheries Serv.*, Complaint, at 14 (Exh. MEX-59).

[277] *Hui Malama I Kohola v. Nat'l Mar. Fisheries Serv.*, Complaint, at 14 (Exh. MEX-59).

[278] *See* NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," at 267 (Jan. 8, 2013) (Exh. US-59).

140. The Atlantic longline fishery take reduction team was established in 2006 and the take reduction plan became effective in 2009. In this instance, the mortality of, pilot whales and Risso's dolphins (an average of 109 and 20 animals per year, respectively), was below the PBR but exceeded the insignificance threshold.[279] Recent SARs found that estimated average annual mortality and serious injury of pilot whales due to the longline fishery for 2005-2009 was 114 animals per year,[280] while estimated average annual mortality and serious injury of Risso's dolphins was 7.4 animals per year for 2006-2010.[281]

141. The PBRs for both species and the number of animals killed or seriously injured are a mere fraction of the number of dolphins allowed to be killed (approximately 5,000) or actually killed (approximately 1,127) each year in the ETP, even under the AIDCP monitoring regime.[282] Furthermore, it is important to note that the Atlantic fishery is not just a tuna fishery, but includes swordfish, sharks, and wahoo, and, consequently, not all of the mortality should be attributed to tuna fishing. Finally, the data from the Atlantic fishery includes serious injuries, whereas the IATTC data on dolphin mortality in the ETP does not.[283]

142. Thus, the establishment of Take Reduction Teams under the MMPA for the Hawaiian and Atlantic longline fisheries demonstrates that, to protect dolphin populations, the United States goes beyond the dolphin-safe legal regime and imposes additional restrictions on its own fishing industry. It does not suggest that longline fishing for tuna has caused in Hawaii or the Atlantic the level of harm to dolphins that purse seine setting on dolphins is allowed to cause or has caused in the ETP. Indeed, longline fishing has not caused and does not cause anywhere near that level of dolphin mortality.

143. Finally, Mexico asserts, sensationally, that "over 18,000 dolphins are killed annually by longline fishing in the Pacific Ocean."[284] This statistic is misleading. It is based on an

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

[280] NMFS, "Short-Finned Pilot Whale: Western North Atlantic Stock," at 75 (Dec. 2011) (Exh. US-61).

[281] NMFS, "Risso's Dolphin: Western North Atlantic Stock," at 53 (May 2013) (Exh. US-62). Both figures were below the PBRs of 165 and 95 animals per year, respectively. The PBR for pilot whales is 172 for short-finned pilot whales and 93 for long-finned pilot whales (for a total of 165 pilot whales per year). *See* NMFS, "Long-Finned Pilot Whale: Western North Atlantic Stock," at 60 (Dec. 2011) (Exh. US-63); NMFS, "Short-Finned Pilot Whale: Western North Atlantic Stock," at 73 (Exh. US-61). The PBR for Risso's dolphins in the Atlantic fishery is 95 animals per year, *see* NMFS, "Risso's Dolphin: Western North Atlantic Stock," at 52 (Exh. US-62).

[282] *See* Table 1, *supra* section II.C.1.b.iii. Additionally, a member of the Pelagic Longline Take Reduction Program review team believed that, once fishermen were made to comply with the 20 nautical mile requirement of the plan, the number would be lowered by nearly 80 percent to around 60 animals. PLTRT Key Outcomes Memorandum, at 4-5 (Exhibit MEX-62). Although this is just one team member's prediction, it illustrates that the harms to dolphins of methods of fishing other than setting on dolphins may be greatly reduced because dolphin interactions are merely an unintended byproduct of fishing for target species, rather than an intrinsic part of the fishing method.

[283] *See* PLTRT Key Outcomes Memorandum, at 4 (Exh. MEX-62); IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[284] Mexico's First Written 21.5 Submission, para. 144.

extrapolation of marine mammals caught in the Hawaii longline fishery from 1994 to 2002, which included animals released alive.[285] Additionally, the authors wrongly assume that marine mammal catch rates in all longline fisheries throughout the Pacific Ocean are the same. In fact, marine mammals are not uniformly dispersed and do not interact with longline gear in a consistent manner.

144. Additionally, this statistic is in no way comparable to the data on dolphins killed by purse seine fishing in the ETP. The Pacific Ocean is the largest in the world, and it is home to scores of fisheries targeting many types of fish, including the tuna purse seine fishery in the ETP. Even considering only tuna fisheries, there are many discrete fisheries operating in the Pacific, which involve approximately 3,500-5,500 vessels each year.[286] The ETP purse seine fishery, by contrast, has only 235 vessels on the active purse seine list.[287] It is, therefore, inappropriate to compare the number of dolphins killed by all longline fishing in the entire Pacific Ocean with the dolphin mortalities in the ETP.

145. The Hawaiian longline tuna fleet, which had 129 registered vessels in 2012,[288] is a more appropriate comparison. From 2002 to 2006, based on observer reports and vessel records,[289] estimated annual incidental mortality and serious injury of cetaceans totaled 25.23 animals, most of which were dolphins.[290] For the 2006-2010 period, that figure was 40.4 animals, again, mostly dolphins.[291] Thus, although the Hawaiian purse seine tuna fishery is half as large, in terms of vessels, as the ETP fishery, average annual dolphin mortality in 2006-2010 was only 3.8 percent of average annual dolphin mortality caused in the ETP in 2006-2010 (1,060.4) and 0.8 percent of what was allowed in those years (approximately 5,000).[292]

146. Far from showing that longline fishing harms dolphins as much or more as setting purse seines on them, Mexico's sources demonstrate just the opposite.

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[285] Of those animals caught, 91 percent were released alive.

[286] Secretariat of the Pacific Community (SPC), Oceanic Fisheries Program, "Longline," http://www.spc.int/oceanfish/en/tuna-fisheries/174-longline (accessed May 25, 2014) (Exh. US-64).

[287] IATTC, Active Purse Seine Regional Vessel Registrar (Exh. US-19).

[288] Pacific Islands Fisheries Science Center, *The Hawaii-Based Longline Logbook Summary Report January-December 2012*, at 1 (2012) (Exh. US-65).

[289] Observer coverage in the Hawaii deep-set longline fishery for tuna between 2002 and 2006 was about 20 percent. William A. Karp, Lisa L. Desfosse, & Samantha G. Brooke (eds.), NMFS, *U.S. National Bycatch Report*, at 372 (2011) (Exh. US-66).

[290] Karp et al. 2011, at 391, Table 4.6.C.1 and 394, Table 4.6.D.1 (Exh. US-66).

[291] *See* "U.S. National Bycatch Report First Edition Update," Table 8.3 (Exh. US-67); "U.S. National Bycatch Report First Edition Update," Table 8.4 (Exh. US-68).

[292] *See* "U.S. National Bycatch Report First Edition Update," Table 8.3 (Exh. US-67); "U.S. National Bycatch Report First Edition Update," Table 8.4 (Exh. US-68); *supra* sec. II.C.1.b.iii, Table 1; *see also* U.S. Response to Original Panel Question No. 15, paras. 47-48 (pointing out that marine mammal interactions in the Hawaiian longline fishery are relatively low and that Mexico's purse seine fleet likely exceeds the total annual number of marine mammal interactions in that fishery during its first set on dolphins in the ETP each year).

iii. Pole and Line

147. Pole and line fishing produces approximately 1.4 percent of U.S.-caught tuna products in the U.S. market and accounts for 14.8 percent of vessel records associated with imported tuna and tuna products.[293]

148. Pole and line fishing involves catching schooling tuna that are attracted to the surface by the use of live bait, which is chummed beside the boat and can also involve the use of artificial lures (*i.e.*, jigs) that are trailed behind a moving vessel.[294] Bamboo or fiberglass poles rigged with barbless hooks that have either artificial lures or live bait attached are then used to hook the fish and bring them on board. The U.S. albacore tuna fishery uses this technique where very little bycatch occurs.[295] Hydraulically operated rods or automatic angling machines may be used on larger pole and line vessels. The U.S. albacore tuna fishery also uses troll or jig fishing which involves trailing multiple monofilament lines rigged with artificial lures and barbless hooks behind a vessel. The vessel may either circle or tack back and forth between schools of tuna that are located using depth sounders, sonar and surface signs (*e.g.*, bird schools, temperature fronts, etc.). Very little bycatch occurs with this technique as well.

149. This technique is not associated with dolphin bycatch or bycatch of any large marine mammal, for that matter.[296] Indeed, Mexico does not even allege that this fishing method is as (or more) harmful to dolphins than setting on dolphins, even though this fishing method accounts for a significant percentage of imported tuna products, based on vessel records.

c. Fishing Methods That Are Not Used to Produce Tuna Product for the U.S. Market

i. Hand Line

150. Hand line fishing produces no U.S. caught tuna products in the U.S. market and accounts for approximately 0.42 percent of vessel records associated with imported tuna and tuna products.[297]

151. Hand-lining involves dropping a baited hook into the water and is an inexpensive and easy way to fish.[298] This technique is not associated with dolphin bycatch.[299] Indeed, Mexico

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[293] *See* William Jacobson Witness Statement, Appendix 2 and 3 (Exh. US-4).

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

[295] *See* Eric L. Gilman & Carl Gustaf Lundin, *Minimizing Bycatch of Sensitive Species Groups in Marine Capture Fisheries: Lessons from Tuna Fisheries*, at 3 (2009) (Exh. US-69); U.S. First Written Submission in Original Proceeding, para. 71.

[296] Gilman & Lundin 2009, at 3 (Exh. US-69).

[297] *See* William Jacobson Witness Statement, Appendix 2 and 3 (Exh. US-4)

[298] FAO Corporate Document Repository, "Handlining," http://www.fao.org/fishery/fishtech/1012/en (2014) (Exh. US-70).

[299] Gilman & Lundin 2009, at 3 (Exh. US-69).

does not even appear to allege that this fishing method is as (or more) harmful to dolphins than setting on dolphins.

ii. Gillnets

152. Gillnet fishing produces none of the U.S. caught tuna products in the U.S. market and accounts for approximately 0.24 percent of vessel records associated with imported tuna and tuna products.[300]

153. Gillnet fishing entails placing entangling nets floating in the water, attached at the top to a float line and weighted down at the bottom. Gillnets are used particularly in Southeast Asia, Indian waters, and the Western Mediterranean.[301] Many of the world's gillnet fisheries are small to medium scale fisheries in developing countries, particularly Southeast Asia.[302] The United States does not have a gillnet fishery for tuna, a point that Mexico appears to concede.[303]

154. Little is known about bycatch in these fisheries, and many of the statistics that exist are ad hoc studies and out of date. As a Food and Agricultural Organization (FAO) study recently noted that, "[t]he conclusion of Northridge (1991) is still valid: For most of the gillnet fisheries of the world, information on catch rates is too poor to make any reasonable estimate of total catches of non-target species."[304]

155. The studies on which Mexico relied illustrate this point. Mexico cites three studies that concern, respectively, three coastal fisheries in India, a coastal fishery in Pakistan, and a (now defunct) fishery in Ireland.[305] With respect to the study of the Indian fisheries, it should be noted that not all of the (admittedly alarming) figure of a possible 10,000 cetaceans caught per year can be attributed to tuna fishing or to dolphin mortalities. Of the three ports covered by the study, only Chennai included fisheries with tuna as a target fish, and it also included three other target species.[306] Additionally, the study did not specify the fate of the dolphin beyond "caught," so they may overstate mortalities or serious injuries. The data from the Pakistan fishery, while also alarming, totals approximately 360 dolphins per year, considerably fewer than die due to setting

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[300] *See* William Jacobson Witness Statement, Appendix 2 and 3 (Exh. US-4).

[301] FAO, "Tuna Driftnet Fishing" (Exhibit MEX-49).

[302] FAO, "Tuna Driftnet Fishing" (Exhibit MEX-49).

[303] *See* Mexico's First Written 21.5 Submission, n.32 (listing several U.S. gillnet fisheries)

[304] Robert Gillett, *Byatch in Small Scale Tuna Fisheries*, FAO Fisheries and Aquaculture Technical Paper 560, at 33 (2011) (quoting S. Northridge, *Driftnet Fisheries and their Impacts on Non-Target Species: A Worldwide Review*, Fisheries Technical Paper No. 320, at 115, 1991) (Exh. US-71).

[305] Mexico's First Written 21.5 Submission, para. 128-30.

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

on dolphins in the ETP.[307] Finally, the Irish driftnet fishery for albacore was shut down in 2002 by an EU regulation making it illegal to use gillnets to fish for tuna, among other fish.[308]

156. In sum, Mexico's evidence does not prove its factual contentions. First, as discussed above, the data that Mexico put forward appears to suggest that gillnet tuna fisheries, while causing harm to dolphins, does not cause the same amount of observable mortalities that setting on dolphins in the ETP does. This conclusion makes sense, of course, because gillnet fishing is not intended to catch dolphins, and where dolphins interact with gillnets, it is merely by accident. Setting on dolphins, on the other hand, is a fishing method that intentionally interacts with dolphins and setting on dolphins is always dangerous for dolphins because the dolphins must always be chased, encircled, and captured. Second, Mexico puts forward zero evidence that gillnet fishing is producing the same unobserved harms that setting on dolphins is causing. Third, Mexico is unable to prove that tuna produced from these local Pakistan and Indian gillnet fisheries is being sold in the U.S. tuna product market. In fact, almost no gillnet-caught tuna is – vessel records indicate that only a *de minimis* amount of tuna is imported for the U.S. tuna product market that is caught in such a manner – and the United States does not have a domestic gillnet tuna fishery. Mexico simply cannot prove its case based on such inconsequently small amounts of trade.

iii. Trawls

157. Trawl fishing produces none of the U.S. caught tuna products in the U.S. market and accounts for, at a maximum, 0.24 percent of vessel records for imported tuna and tuna products.[309] (Trawl fishing is so rare that it is not listed as an option on the NOAA Form 370, and tuna caught by this method would be designated as caught by "other gear." "Other gear" is designated on 0.24 percent of total vessel records, but this would also include rod and reel fishing, *inter alia*.[310])

158. A ship engaging in trawl fishing tows a large, cone-shaped net, either on the sea floor or in mid-water (called pelagic trawling).[311] Trawl fishing usually occurs on the sea floor to catch bottomfish or groundfish. Pelagic trawlers can be used to fish for tuna, but their slow speed makes them ill-suited to it.[312] One study commented: "trawlers cause less mortality of marine mammals compared to gillnetters and purse-seiners," speculating that this might be due to "the

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[307] *See* N.M. Young & S. Iudecello, *An Evaluation of the Most Significant Threats to Cetaceans, the Affected Species and the Geographic Areas of High Risk, and the Recommended Actions from Various Independent Institutions*, NOAA Technical Memorandum NMFS-OPR-36, at AA-15 (2007) (Exh. MEX-51).

[308] *See* Council Regulation (EC) No. 1239/98 of 8 June 1998 Amending Regulation (EC) No 894/97 Laying Down Certain Technical Measures for the Conservation of Fishery Resources (US-72).

[309] *See* William Jacobson Witness Statement, Appendix 2 and 3 (Exh. US-4).

[310] *See* William Jacobson Witness Statement, Appendix 2 (Exh. US-4).

[311] FAO, "Trawl Nets," available at http://www.fao.org/fishery/geartype/103/en (Exhibit MEX-69).

[312] William Jacobson Witness Statement, Appendix 1 (Exh. US-4); *see* Gilman & Lundin 2009, at 3 (Exh. US-69).

disturbance caused by the trawling action at the bottom and at midwater warning cetaceans before they get caught."[313]

159. Although Mexico does not acknowledge that trawl fishing for tuna is rare or that the United States has imported hardly any tuna in the past 12 years that was harvested by trawling,[314] Mexico's evidence is revealing these facts. Of the three studies cited, one is a fishery for tuna, hake and French sea bass, and another is for bass, tuna, and anchovy;[315] the third study involved four pairs of trawlers for a single season, in which 145 cetaceans were killed.[316] If this is the extent of the fishery, then the number, while large, is a mere fraction of the dolphins allowed to be killed or actually killed by setting on dolphins in the ETP each year. If the fishery is larger, Mexico provides no evidence of any greater impact on dolphins or that the phenomenon of common dolphins being caught in pelagic trawls is widespread.

160. Even if trawls were used more widely to fish for tuna and even if bycatch of dolphins were substantial, trawling would still be different from setting on dolphins because, like longlining and other methods, the risks it poses to dolphins can be greatly ameliorated. One study pointed out that excluder devices, placed on trawls, are effective for reducing bycatch of dolphins.[317]

161. And, again, Mexico fails to allege, much less prove, that trawling causes unobserved harms to dolphins at all.

3. Mexico Fails to Prove That Fishing Methods That Are Potentially Eligible for the Dolphin Safe Label Harm Dolphins to an "Equal" or "Greater" Extent Than Setting on Dolphins Does

162. Mexico thus fails to prove that the harms to dolphins posed by all potentially eligible methods of fishing for tuna "have adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing method of setting on dolphins in an AIDCP-compliant manner."[318]

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[313] Yousuf et al. 2009, at 4 (Exh. MEX-51).

[314] NMFS, "Individual Vessel Record Gear Types Since the Inception of the 370 Database: India, Iran, Pakistan, Sri Lanka, Yemen" (Exh. US-54).

[315] Mexico's First 21.5 Written Submission, paras. 154-555.

[316] Mexico's First 21.5 Written Submission, para. 153; *see* U.K. House of Commons, Environment, Food and Rural Affairs Committee, "Caught in the net: by-catch of dolphins and porpoises off the UK coast," Memorandum submitted by Whale and Dolphin Conservation Society, EV-26-27 (Jan. 21, 2004) (Exh. MEX-70) (Orig. Exh. MEX-99).

[317] Yousuf et al. 2009, at 4 (Exh. MEX-51).

[318] Mexico's First Written 21.5 Submission, para. 248 ("The situation is different for the fishing methods used to catch tuna outside the ETP. With the exception of driftnet fishing for tuna on the high seas by the Italian fleet, *all of the other tuna fishing methods* (including other driftnet fishing) are qualified to be used to catch tuna in a dolphin-safe manner, even though it is well documented *that these methods* cause substantial dolphin mortalities and serious injuries. As explained above in section III of this submission, *these "qualified" fishing methods* have

163. Indeed, Mexico appears to fail to even allege this with regard to two of the three fishing methods used to produce tuna for the U.S. tuna product market. With regard to purse seine fishing by unassociated and FAD sets, such an accusation would clearly fall flat. As discussed above, although setting on dolphins accounts for only 40-50 percent of the purse seine sets in the ETP, it accounts for *virtually all* of the dolphin mortalities. It simply cannot be the case that *not setting on* dolphins is as dangerous to dolphins as *setting on* dolphins is.

164. The only fishing method that actually produces tuna for the U.S. tuna product market that Mexico criticizes is longline fishing; but again, Mexico fails to prove that longline fishing produces a comparable level of harms to dolphins as setting on dolphins does. As discussed above, the evidence indicates that dolphin mortality from longline fishing results in only a fraction of the dolphin mortality caused by setting on dolphins in the ETP. And, of course, Mexico does not even allege that longline fishing causes any unobserved harms, such as cow-calf separation, muscular damage, and immune and reproductive systems failures,[319] which are the direct result of chasing and encircling dolphins in the ETP.[320]

165. Mexico's remaining arguments address gillnet fishing and trawl fishing, which produce only *de minimis* amounts of tuna for the U.S. tuna product market. And again, Mexico's case fails. While these fishing methods result in some dolphin mortality, Mexico is unable to prove that these methods cause the same level of dolphin mortality that is allowed or caused in the ETP. This makes sense, of course, as these fishing methods only capture dolphins by accident, while *the whole point* of setting on dolphins is to capture them in a purse seine net. And of course, Mexico puts forward *zero* evidence that fishing methods such as gillnet fishing and trawl fishing cause unobserved harms to dolphins.

166. The simple fact of the matter is that "setting on dolphins is *particularly* harmful to dolphins."[321] On average, over the past ten years, setting on dolphins in the ETP killed 1,127 dolphins each year.[322] Moreover, purse seine vessels set on dolphins an average of 10,423 times a year, with the result that millions of dolphins are repeatedly chased and captured every year. As discussed above, this repeated chasing and encirclement *is* harmful to dolphins, and results in various unobserved harms to dolphins, which cannot be ameliorated through observers or monitoring because they are inherent in the fishing method itself.

167. Mexico fails to prove the fact it asserts.[323]

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adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing method of setting on dolphins in an AIDCP-compliant manner.") (emphasis added).

[319] *See US – Tuna II (Mexico) (Panel)*, para. 7.499.

[320] *US – Tuna II (Mexico) (Panel)*, para. 7. 738.

[321] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

[322] *See supra* sec. II.C.1.b.iii, Table 1.

[323] *See US – Tuna II (Mexico) (AB)*, para. 283 (stating that "the party that asserts a fact is responsible for providing proof thereof") (quoting *Japan – Apples (AB)*, para. 157).

III. LEGAL ARGUMENT

A. Terms of Reference of the Article 21.5 Proceeding

168. Article 21.5 of the DSU provides an expedited proceeding in situations "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. Thus, the subject matter is narrower than it is for original proceedings under Articles 4 and 6 of the DSU, which may cover any measure and any of the covered agreements.[324] In an Article 21.5 proceeding, the only measures at issue are those taken to comply with the recommendations and rulings of the DSB, and to prevail, the complaining Member must establish either that those measures do not exist, or are themselves inconsistent with one of the covered agreements.

169. The DSB's recommendations and rulings as embodied in the panel and Appellate Body findings, are important guideposts in determining whether a measure taken to comply exists, and, if so, whether such a measure is consistent with the covered agreements. As the Appellate Body explained in *Chile – Price Band System (Article 21.5 – Argentina)*:

> Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a continuum of events. The text of Article 21.5 expressly links the 'measures taken to comply' with the recommendations and rulings of the DSB concerning the original measure. A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background.[325]

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[324] As the Appellate Body has observed, "[p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures taken to comply with the recommendations and rulings' of the DSB." *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 36 (emphasis in original); *see also US – Softwood Lumber IV (Article 21.5) (AB)*, para. 72 ("[T]he applicable time-limits are shorter than those in original proceedings, and there are limitations on the types of claims that may be raised in Article 21.5 proceedings. This confirms that the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings.").

[325] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 136; *see also US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 87 ("As the title of Article 21 makes clear, the task of panels under Article 21.5 forms part of the process of the 'Surveillance of Implementation of the Recommendations and Rulings' of the DSB. Toward that end, the task of a panel under Article 21.5 is to examine the 'consistency with a covered agreement of measures taken to comply with the recommendations and rulings' of the DSB."); *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107 ("The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. … The Panel had, *necessarily*, to consider our views on this subject…") (emphasis added); *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 5.5 ("In other words, although we are entitled to analyse fully the 'consistency with a covered agreement of measures taken to comply', our examination is not done from a completely fresh start. Rather, it has to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body.").

170. Accordingly, a complainant's discretion to raise claims before an Article 21.5 panel "is not unbounded" as certain claims will necessarily fall outside the Article 21.5 panel's terms of reference.[326] In this regard, Article 21.5 reports issued by the Appellate Body and panels have consistently drawn a distinction between claims made against new elements of a measure taken to comply and those elements that are *unchanged* from the original measure.[327] These reports have repeatedly found that the terms of reference of a compliance panel do not include re-examining the WTO-consistency of an *unchanged* aspect that was not found to be WTO-inconsistent in that dispute.[328]

171. If such a re-examination were permitted, complainants would have an "unfair second chance" with respect to any claims on which they did not prevail in original proceedings.[329]

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[326] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210 ("We agree with the United States that the scope of claims that may be raised in an Article 21.5 proceeding is not unbounded. As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO-consistent in the original proceedings."); *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.130 ("The Appellate Body ruled that the mandate of an Article 21.5 panel is limited by its terms of reference, which are based on the claims put forward by the complainant in the request for the establishment of the panel. The Appellate Body added, however, that not all claims in a request for the establishment of an Article 21.5 panel can automatically be considered to have been properly put before the panel and consequently to have become the mandate for the panel. Malaysia had presented claims against an unchanged aspect of a measure that had already been found to be WTO-consistent.").

[327] *See EC – Bed Linen (Article 21.5 – India) (AB)*, para. 88 (distinguishing the issue at hand from the one that arose in *Canada – Aircraft (Article 21.5 – Brazil) (AB)* where "Canada had implemented the recommendation of the DSB by adopting a new and different measure"); *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 89-96; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, paras. 210-213; *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, paras. 71-72, n.110; *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.74 ("In this dispute, this Panel confronts the issue of whether to consider new claims on aspects of the original measure that are unchanged and were not challenged in the original proceedings."); *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, paras. 7.130-7.133.

[328] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 89-96 (rejecting Malaysia's argument that "a panel must re-examine, for WTO consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* in that dispute, and that remain unchanged as part of the new measure"); *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210 ("As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO-consistent in the original proceedings."); *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 87-93; *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.138; *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, paras. 7.6-7.7; *see also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, paras. 415-439 (concluding that "claims in Article 21.5 proceedings cannot be used to re-open issues that were decided on substance in the original proceedings...").

[329] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210 ("Because adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed provide an unfair 'second chance' to that party."); *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.133 (noting that the Article 21.5 panel in *US –*

Providing this "unfair second chance" would not only be incompatible with the purpose of Article 21.5, which is to provide an "expeditious" resolution of the dispute,[330] but would "jeopardize the principles of fundamental fairness and due process."[331] Respondents are "entitled to assume" that *unchanged* aspects of the original measure are consistent "given the absence of a finding of violation in the original report."[332] Indeed, claims against such *unchanged* aspects of the original measure fall outside the terms of reference of the Article 21.5 proceeding entirely.[333]

Countervailing Measures on Certain EC Products "found that it was not legally empowered to consider new claims on aspects of the original measure that were unchanged and were not challenged in the original proceedings, since this would provide the complainant with a second chance to raise a claim that it had failed to raise in the original case and it would jeopardize the principles of fundamental fairness and due process.").

[330] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.74 ("The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings. Admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it failed to raise in the original proceedings."); *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.133 (quoting same); *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 212 ("Finally, we note that the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of 'measures taken to comply' with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience.") (internal quotes omitted); *see also US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 (noting that "Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO'").

[331] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.75 ("Moreover, the Panel is concerned that allowing a new claim on the likelihood-of injury in the current proceedings may jeopardize the principles of fundamental fairness and due process. In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report."); *Chile –Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.133 (quoting same).

[332] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.75 ("In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report."); *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.133 (quoting same); *see also US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body 'shall be' adopted by the DSB, by consensus, but also that such Reports 'shall be … unconditionally accepted by the parties to the dispute. …' Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, '… unconditionally accepted by the parties to the dispute,' and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO'").

[333] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 89-93, 96-98; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210; *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 87-88, 93; *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.138.

172. Finally, the burden of proof in an Article 21.5 proceeding is the same as it is for the original proceeding.[334] That is, the complaining party must establish a *prima facie* case by making arguments and adducing evidence sufficient to justify a presumption that its claim is correct. It is up to the responding party to make arguments and adduce evidence to counter that presumption.[335]

B. Mexico Fails To Establish that the Amended Dolphin Safe Labeling Measure Is Inconsistent with Article 2.1 of the TBT Agreement

173. The key facts for Mexico's Article 2.1 claim can be stated briefly. The Appellate Body reversed the original panel's Article 2.1 finding on the basis that the original measure prohibited tuna product from being labeled "dolphin safe" if the tuna was caught inside the ETP and a dolphin was killed or seriously injured, but allowed tuna product containing tuna caught outside the ETP to be so labeled, even if a dolphin had been killed or seriously injured. The Appellate Body found that this distinction is not "even-handed," proving the original measure inconsistent with Article 2.1.[336]

174. The United States directly addressed the Appellate Body's concern in the 2013 Final Rule. The amended regulations now require that *all* tuna product must be accompanied by a certification that "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught" in order to be eligible for the dolphin safe label.[337]

175. Yet Mexico appears to consider that the United States has wasted its time and energy in issuing the 2013 Final Rule. For in Mexico's view, the Appellate Body's analysis, which focused on this one regulatory distinction, was incomplete. According to Mexico, there were *three other things* wrong with the original measure, and because the 2013 Final Rule does not address these other (alleged) problems, the rule does not bring the United States into compliance with Article 2.1. Mexico, of course, fails to explain why the Appellate Body – in Mexico's view – wrongly analyzed the original measure.

176. Mexico's central grievance here is that the Appellate Body did not make its findings in the way Mexico wanted. Mexico appealed the original panel's Article 2.1 finding on the basis that the original measure discriminates against Mexican tuna product by denying eligibility for

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[334] *See, e.g., Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("[T]he burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence.").

[335] *See, e.g., EC – Hormones (AB)*, para. 98 ("The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.").

[336] *US – Tuna II (Mexico) (AB)*, paras. 289-292, 298.

[337] *See supra*, sec. II.A.2 (quoting and citing 2013 Final Rule, 78 Fed. Reg. at 41002 (Exh. MEX-7); 50 C.F.R. §§ 216.91(a)(2)(i), (a)(2)(iii)(A)-(B), (a)(4)(i)-(iii), 216.92(a)(1)-(3), (b)(2) (Exh. US-2); NOAA Form 370 (Exh. MEX-22).

the label to the fishing method that Mexico elects to use while allowing tuna product produced by fishing methods that other Members elect to use to carry the label.[338] But the Appellate Body rejected Mexico's argument. Instead, it found that Mexico's argument *only* proves that the measure causes a detrimental impact, *not* that the measure is discriminatory.[339]

177. Now, Mexico seeks to transform this compliance proceeding into an "appeal" of the Appellate Body's findings and have the Panel make findings on Mexico's alternative legal theory of the case. Thus, Mexico re-argues what it failed to convince the Appellate Body of (and the original panel before that), and adds two other arguments (regarding record-keeping and observers), despite the fact that all three of these elements are *unchanged* from the original measure and were part of the uncontested facts on the record in the original proceeding.[340]

178. For this reason, Mexico's claim falls outside the Panel's terms of reference. The DSU does not authorize Article 21.5 panels to reverse the DSB recommendations and rulings based on an alternative legal theory – indeed, the adopted Appellate Body report, together with the panel report as adopted, constitute "a final resolution" to Mexico's Article 2.1 claim.[341]

179. But even aside from the fact that Mexico's claim is outside the Panel's terms of reference, Mexico's claim surely fails on the merits. First, the Appellate Body has already rejected Mexico's three allegations, and the same result should apply in this proceeding. Second, Mexico fails to establish that any of the three regulatory distinctions it raises is even relevant to the Article 21.5 analysis. Third, Mexico fails to prove that the detrimental impact does not stem exclusively from legitimate regulatory distinctions. In particular, Mexico cannot establish that any of the distinctions are not "even-handed" where: 1) the substantive requirements of the measure make no distinction based on origin or fishery; 2) it has already been established that "setting on dolphins is *particularly* harmful to dolphins"[342]; and 3) the reason for any differences of the record-keeping and observers requirements across fisheries is that Mexico and the United States, and other Members fishing in the ETP, are parties to a binding international agreement that imposes requirements not replicated in other fisheries.

1. What Article 2.1 Requires

180. To establish an inconsistency with Article 2.1 of the TBT Agreement, the complainant must prove three elements:

> (i) that the measure at issue constitutes a 'technical regulation' within the meaning of Annex 1.1; (ii) that the imported products must be like the domestic product

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[338] *US – Tuna II (Mexico) (AB)*, paras. 241 (quoting Mexico's other appellant's submission, para. 129).

[339] *See US – Tuna II (Mexico) (AB)*, paras. 235, 284, 289, 297.

[340] Similarly, Mexico lists three measures as the "measure taken to comply." Mexico First Written 21.5 Submission, para. 11. Two of these measures (the statute and the court ruling) are unchanged from the original proceeding, so Mexico has no basis for challenging them again in this proceeding.

[341] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97.

[342] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

> and the products of other origins; and (iii) that the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries.[343]

181. In this proceeding, the United States does not contest the first two elements. Indeed, the United States would have no basis for contesting the second element since it is part of the DSB recommendations and rulings. The question before the Panel then is whether the amended measure accords less favorable treatment to imported products "than that accorded to like domestic products and like products from other countries."

182. For Mexico to prove that the amended measure accords less favorable treatment to its tuna products, and therefore discriminates *de facto* against Mexican tuna products, Mexico must prove that the amended measure: 1) "modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other country"; and 2) that "the detrimental impact on imports [does not] stem[] exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[344] Mexico must prove *both* elements – "[t]he existence of such a detrimental effect *is not sufficient* to demonstrate less favourable treatment under Article 2.1."[345]

183. As to the second element, it is well established that the complainant must prove this element by establishing that the relevant regulatory distinctions are not "even-handed."[346] The Appellate Body has explained that it uses the term "even-handed" in accordance with its ordinary meaning of not disadvantaging one group in favor of another without any basis for doing so.[347]

184. In this dispute, the Appellate Body determined that the regulatory distinctions of the original measure were not exclusively "even-handed" because tuna products could be labeled dolphin safe where the product contained tuna caught outside the ETP and a dolphin was killed or seriously injured but that same allowance was not provided to tuna products containing tuna caught inside the ETP.[348] This analysis is consistent with the analysis done by the Appellate

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[343] *US – Tuna II (Mexico) (AB)*, para. 202 (citing *US – Clove Cigarettes (AB)*, para. 87).

[344] *US – Tuna II (Mexico) (AB)*, para. 215.

[345] *US – Tuna II (Mexico) (AB)*, para. 215 (emphasis added).

[346] *US – Tuna II (Mexico) (AB)*, para. 216 (citing *US – Clove Cigarettes (AB)*, para. 182).

[347] *Merriam-Webster's Collegiate Dictionary*, at 401 ("even-handed: fair, impartial"), 417 ("fair: free from favor toward either or any side…impartial stresses an absence of favor or prejudice") (10th ed.) (1997) (Exh. US-73); *see also The Oxford English Dictionary*, at 475 (1989) (Exh. US-74) ("[S]howing no partiality"); *Encarta World English Dictionary*, at 617 (1999) (Exh. US-75) ("[T]reating everyone fairly, without favoritism or discrimination").

[348] *See US – Tuna II (Mexico) (AB)*, para. 297 ("We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP. In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the

Body in *US – Clove Cigarettes*,[349] *US – COOL*,[350] as well as in *US – Upland Cotton*, where the question was whether the panel had treated the evidence in an "even-handed" manner.[351] Mexico errs when it urges this Panel to substitute the analysis used by the Appellate Body in this very dispute for the one used by the panel in *EC – Seal Products*.[352]

185. Finally, the Appellate Body has been clear that nothing in its Article 2.1 analysis alters the traditional notions of burden of proof,[353] whereby a complainant, in the first instance, must establish a *prima facie* case for all the elements of its claims.[354]

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relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.") (emphasis in original, internal quotes omitted).

[349] In *US – Clove Cigarettes*, the Appellate Body determined that the relevant regulatory distinctions were the ban on the cigarettes with a characterizing flavor (other than menthol or tobacco) and the exemption from that ban for menthol-flavored cigarettes. *See US – Clove Cigarettes (AB)*, para. 224. However, the Appellate Body found that the prohibition on the sale of flavored cigarettes, which were subject to the ban because of their particular appeal to young people, was not even-handed because that same characteristic (youth appeal) existed in both U.S.-produced menthol cigarettes (which were not banned) and Indonesian-produced clove cigarettes (which were banned). *Id.* para. 225.

[350] In *US – COOL*, the Appellate Body found that the relevant regulatory distinctions were between the production steps and the different labels. *US – COOL (AB)*, para. 341. The Appellate Body determined that these distinctions were not even-handed. In particular, while the A label, which is affixed to domestic beef and pork, provided meaningful and accurate information on origin, the B and C labels, which are affixed to foreign beef and pork, did not, as the labels did not mention the production steps, the countries could be listed in any order, and the B and C labels would be less accurate than the A label due to commingling. *Id.* para. 343.

[351] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 292 ("[T]he Panel should have provided a reasoned explanation as to why it preferred one category of quantitative evidence over the other. Instead, the Panel dismissed the import of the re-estimates, which were the central piece of evidence relied on by the United States, on the basis of reasoning that, in our view, is internally incoherent, and compounded the matter by relying on evidence that suffered from the same limitation as the re-estimates. The Panel's treatment of the evidence submitted by the parties lacked even-handedness."); *see also US – Clove Cigarettes (AB)*, para. 149 (relying on *US – Upland Cotton (Article 21.5 – Brazil) (AB)*).

[352] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 238, 240. In *EC – Seal Products*, the panel adopted the same test for the second step of Article 2.1 and the chapeau of GATT Article XX. *EC – Seal Products (Panel)*, para. 7.258-59. The Appellate Body reversed the panel on this point. *EC – Seal Products (AB)*, para. 5.313.

That said, the United States does note that the *EC – Seal Products* panel's interpretation of the term "even-handedness" does appear consistent with the Appellate Body's analysis, as described above. Thus, the panel found that the distinction between the commercial and Inuit hunts was not, in fact, even-handed as it allowed seals killed in Greenland to be sold in the EU even though the Greenland Inuit hunt greatly approximated the Canadian commercial hunt, whose seals could not be sold in the EU. *See EC – Seal Products (Panel)*, para. 7.317; *see also id.* para. 7.351 (making a similar finding regarding the marine resource management exception where only EU Members would likely benefit from this exception and other evidence suggested "that [this] exception was designed with the situation of EU member States in mind"). As the Appellate Body determined that the EU measure was not a technical regulation, it did not address the Article 2.1 claim on appeal. *See EC – Seal Products (AB)*, para. 5.70.

[353] *US – Tuna II (Mexico) (AB)*, para. 216; *see also US – COOL (AB)*, para. 272.

[354] *US – Gambling (AB)*, para. 140 (A "*prima facie* case must be based on 'evidence and legal argument' put forward by the complaining party in relation to each of the elements of the claim.") (quoting *US – Wool Shirts and Blouses (AB)*, p. 16).

2. The DSB Recommendations and Rulings

186. In the proceeding before the original panel, Mexico limited its Article 2.1 claim to whether the original measure discriminates against Mexican tuna products by denying the label to tuna product containing tuna caught by setting on dolphins.[355] Accordingly, the original panel addressed whether Mexico had established a *prima facie* case in light of how Mexico itself had framed its own claim.[356] Following a careful analysis of the law and the facts, the original panel found that Mexico had failed to prove its claim of less favorable treatment.[357]

187. Mexico appealed that finding, and argued before the Appellate Body that the original panel had erred by not finding that the original measure provided less favorable treatment because it denied access to the dolphin safe label where tuna was caught by setting on dolphins.[358]

188. The Appellate Body analyzed the issue of whether the original measure provided less favorable treatment to Mexican tuna products in "two parts": 1) "whether the measure at issue modifies the conditions of competition in the US market to the detriment of Mexican tuna products as compared to US tuna products or tuna products originating in any other Member"; and 2) "whether any detrimental impact reflects discrimination against the Mexican tuna products."[359]

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[355] *See US – Tuna II (Mexico) (Panel)*, para. 7.255 ("In its rebuttal submission, Mexico also clarifies that its discrimination claims 'are not dependent [sic] on demonstrating that the treatment of ETP and non-ETP fisheries is different' and that 'the factual basis of Mexico's discrimination claims is that the *prohibition* against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like product from the United States and other countries.'") (quoting Mexico's Second Written Submission in Original Proceeding, para. 150) (emphasis in original); *see also id.* para. 7.280 ("As we understand it, therefore, Mexico does not challenge any differences in treatment arising from different regulatory categories for tuna caught in different fishing zones. Rather, Mexico's discrimination claim is based on the requirement of 'no setting on dolphins' that conditions access to the US dolphin-safe label, wherever the fish is caught, and its implications in practice for Mexican tuna products.") (citing Mexico's Response to Original Panel Question No. 145, para. 124).

[356] *US – Tuna II (Mexico) (Panel)*, paras. 7.304-7.378.

[357] *See US – Tuna II (Mexico) (Panel)*, paras. 7.374-7.378.

[358] *See US – Tuna II (Mexico) (AB)*, para. 241 (quoting Mexico as arguing: "[t]he U.S. dolphin-safe labelling provisions are discriminatory. Imports of tuna products produced from tuna harvested outside the ETP – in other words, virtually all of the tuna products currently sold in the U.S. market – can be labelled as dolphin-safe under relaxed compliance standards even though there are no protections for dolphins outside the ETP. Meanwhile, tuna products from Mexican producers – who have taken extensive and demonstratively highly successful measures to protect dolphins – are prohibited from using the label.") (quoting Mexico's Other Appellant's Submission, para. 129); *see also US – Tuna II (Mexico) (AB)*, para. 90 ("Thus, Mexico submits that the Panel could have confined its analysis to finding that access to the 'dolphin-safe' label was an 'advantage,' that access to the label was controlled by the US 'dolphin-safe' labelling provisions, and that most Mexican tuna products do not have access to the label, while all or most tuna products from the United States and other countries do have access. Mexico suggests that this would have been a sufficient basis to conclude that the US measure results in *de facto* discrimination.").

[359] *US – Tuna II (Mexico) (AB)*, para. 231.

189. As to the first part, the Appellate Body *agreed* with Mexico that "the lack of access to the 'dolphin-safe' label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market."[360] However, the Appellate Body *rejected* Mexico's argument that this was sufficient to prove the measure inconsistent with Article 2.1.[361] Rather, the Appellate Body proceeded to the second part of its analysis to determine "whether the detrimental impact "reflects discrimination."[362] Although the Appellate Body did determine that this was so, it did so on entirely different grounds from what Mexico had urged the Appellate Body to accept.

190. The Appellate Body then reviewed the uncontested facts on the record as they related to the original panel's analysis of Article 2.1 and Article 2.2,[363] as well as the DSU Article 11 appeals of the United States.[364]

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[360] *US – Tuna II (Mexico) (AB)*, para. 235. These factual findings are as follows:

> (i) the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP; (ii) at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins and is therefore fishing for tuna that would not be eligible to be contained in a dolphin-safe tuna product under the US dolphin-safe labelling provisions; (iii) the US fleet currently does not practice setting on dolphins in the ETP; (iv) as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label.

Id. para. 234 (internal quotes omitted); *see also id.* para. 284 ("In the light of the findings of fact made by the Panel, we concluded earlier that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a 'dolphin-safe' label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label.").

[361] *See, e.g., US – Tuna II (Mexico) (AB)*, para. 215 ("The existence of such a detrimental effect *is not sufficient* to demonstrate less favourable treatment under Article 2.1.") (emphasis added). The Appellate Body thus appeared to agree with the original panel on this point. *See US – Tuna II (Mexico) (Panel)*, para. 7.375 ("That these measures may, through the operation of origin-neutral regulatory categories, have a detrimental impact on certain imports does not, in our view, necessarily imply that the measures afford less favourable treatment to such imported products within the meaning of Article 2.1.").

[362] *US – Tuna II (Mexico) (AB)*, para. 240.

[363] The Appellate Body summarized these uncontested findings of the original panel as:

> [S]etting on dolphins within the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed and unobserved effects on dolphins.
>
> [T]he use of certain fishing techniques other than setting on dolphins causes harm to dolphins. With respect to tuna fishing outside the ETP, the participants do not contest that the vast majority of tuna caught in the western Pacific Ocean is caught with FADs, trolls, or gillnets, and that US and foreign vessels use these fishing techniques.
>
> It is also uncontested that the tuna-dolphin association does not occur outside the ETP as frequently as it does within the ETP, and that there are no records of consistent and widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP.

191. The Appellate Body next turned to what regulatory distinctions are relevant for this second part of the less favorable treatment analysis. As the Appellate Body noted, not every distinction is relevant in an Article 2.1 analysis – "we *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries."[365] Accordingly, the Appellate Body determined that:

> The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand. The question before us is thus whether the United States has demonstrated that *this* difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.[366]

192. The Appellate Body determined that it was not. The Appellate Body noted that while the original measure designated tuna products containing tuna caught by setting on dolphins inside and outside the ETP as ineligible for the label, the measure made a distinction as to when a certification would be necessary in the event a dolphin was killed or seriously injured during the capture of tuna. Specifically, the original measure prohibited tuna products from being labeled dolphin safe if containing tuna caught inside the ETP and a dolphin was killed or seriously injured, but allowed tuna products containing tuna caught outside the ETP to be so labeled even if dolphins had been killed or seriously injured.[367] The Appellate Body found that *this* distinction was "not even-handed in the way in which [the measure] address[es] the risks to dolphins arising from different fishing techniques in different areas of the ocean."[368] The Appellate Body noted that while "the US measure *fully* addresses the adverse effects on dolphins

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> [T]he US measure does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP, and that tuna caught in this area would be eligible for the US official label, even if dolphins have in fact been killed or seriously injured during the trip.

US – Tuna II (Mexico) (AB), para. 251.

[364] In particular, the Appellate Body upheld the original panel's findings that:

> It was not persuaded that "at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP under AIDCP monitoring"; and
>
> There exists "strong evidence that regular and significant mortality and serious injury of dolphins also exists outside the ETP."

US – Tuna II (Mexico) (AB), paras. 262, 266 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.617, 7.543.

[365] *US – Tuna II (Mexico) (AB)*, para. 286 (emphasis in original).

[366] *US – Tuna II (Mexico) (AB)*, para. 284 (emphasis in original).

[367] *US – Tuna II (Mexico) (AB)*, paras. 289-292.

[368] *US – Tuna II (Mexico) (AB)*, para. 298.

resulting from setting on dolphins in the ETP," "it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP." According to the Appellate Body, "*[i]n these circumstances*," the measure is not even-handed "in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins."[369]

193. As to *who* would certify that the requirement that no dolphin was killed or seriously injured from tuna fishing outside the ETP, the Appellate Body directly addressed the uncontested fact that observer statements are required for tuna caught by large purse seine vessels operating inside the ETP and no such similarly rigorous requirements exist with respect to observing and certifying dolphin interactions outside the ETP. The Appellate Body rightly concluded that:

> [N]owhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its 'dolphin-safe' labelling provisions to the risks that the Panel found were posed by fishing techniques other than setting on dolphins. We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.[370]

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

194. As recounted above, the Appellate Body considered that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the original measure prohibited tuna product from being labeled "dolphin safe" if it contained tuna caught inside the ETP where a dolphin was killed or seriously injured, but allowed tuna product to be so labeled if it contained tuna caught outside the ETP where a dolphin was killed or seriously injured.[371] In this context, the Appellate Body explicitly acknowledged that the United States did not have to require observers for all vessels operating outside the ETP for that tuna to be eligible for the label.[372]

195. The 2013 Final Rule *directly addresses* the Appellate Body's concern. As discussed above, 50 C.F.R. § 216.91 already required a captain's statement for purse seine vessels operating outside the ETP "to certify that no purse seine was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested."[373] The 2013 Final Rule amends the original regulation to now require "a captain's statement certifying that no

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[369] *US – Tuna II (Mexico) (AB)*, para. 297.

[370] *US – Tuna II (Mexico) (AB)*, para. 296 (emphasis in original).

[371] *US – Tuna II (Mexico) (AB)*, paras. 289-292.

[372] *US – Tuna II (Mexico) (AB)*, para. 296 (quoted above).

[373] 50 C.F.R. § 216.91(a)(2)(ii) (Exh. US-2).

dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught using any fishing gear type in all fishing locations."[374]

196. As to the conditions of eligibility for the dolphin safe label, the relevant substantive requirements of the challenged measure (as amended) currently provide that:

- *all* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*; and

- *all* tuna product containing tuna caught where a dolphin was killed or seriously injured is ineligible for the label, *regardless of the fishery, gear type, nationality of the vessel, and nationality of the processor*.[375]

The amended measure's substantive requirements are even-handed.

197. While Mexico disparages the 2013 Final Rule as making "merely cosmetic" changes,[376] Mexico does *not even appear to contest* that the amended measure fully addresses the Appellate Body's analysis with regard to the one regulatory distinction that the Appellate Body considered relevant to its inquiry. Indeed, Mexico does not even appear to consider that whether a dolphin is killed or injured inside or outside the ETP is, in fact, *a regulatory distinction relevant* to this analysis.[377] Mexico does not explain how it comes to this surprising conclusion.

198. As the Appellate Body has noted, Article 17.14 of the DSU provides that adopted Appellate Reports are to be "unconditionally accepted by the parties to the dispute, and, therefore, must be treated by the parties to a particular dispute *as a final resolution to that*

[374] 2013 Final Rule, 78 Fed. Reg. at 40,998 (Exh. MEX-7); *see also* 50 C.F.R. §§ 216.91(a)(2)(i), (a)(2)(iii), (a)(4)(i)-(iii) (Exh. US-2).

[375] *See supra*, sec. II.A.3.b. As also noted *supra*, all tuna caught in large-scale driftnets on the high seas is ineligible for the label, regardless of the fishery and nationality of the vessel. *See supra* sec. II.A.3.a.i.

[376] Mexico's First Written 21.5 Submission, para. 101.

[377] *See* Mexico's First Written 21.5 Submission, paras. 235-236.

dispute."[378] And it cannot be questioned that the Appellate Body in this case considered that its own analysis of Article 2.1 *resolved* the dispute as it relates the Article 2.1 claim.[379]

199. The United States accepted the Appellate Body analysis in this dispute, studied it carefully, and designed its measure taken to comply to directly respond to that analysis. Mexico takes a different tack, however. Not only does it not "unconditionally accept[]" the Appellate Body's analysis, it completely *ignores* the analysis.

200. Simply put, Mexico does not prove its Article 2.1 claim without putting forth a *prima facie* case that the United States has failed to make "even-handed" *the one regulatory distinction* that the Appellate Body considered was not even-handed in the original proceeding. Mexico has not done so – indeed, it *avoids* the issue entirely.[380]

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

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

202. Mexico's Article 2.1 claim fails for four separate, independent reasons:

1) The claim falls outside this Panel's terms of reference because Mexico's claim is premised entirely on the elements of the measure that the DSB did not find to be in breach of Article 2.1 and that are unchanged from the original measure;

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[378] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body 'shall be' adopted by the DSB, by consensus, but also that such Reports 'shall be … unconditionally accepted by the parties to the dispute. …' Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, '… unconditionally accepted by the parties to the dispute,' and, therefore, *must be treated by the parties to a particular dispute as a final resolution to that dispute*. In this regard, we recall, too, that Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO'") (emphasis added); *US – Continued Zeroing (AB)*, para. 362 (quoting same); *US – Upland Cotton (AB)*, para. 210 (citing same); *Chile – Price Band System (AB)*, para. 236 (citing same); *EC – Bed Linen (AB)*, para. 90 (quoting same).

[379] *US – Tuna II (Mexico) (AB)*, para. 300 ("We have already found that the Panel erred in finding that Mexico failed to establish that the measure at issue is inconsistent with the United States' obligations under Article 2.1 of the TBT Agreement. Therefore, *in order to resolve this dispute*, we need not determine whether, in assessing Mexico's claims under that provision, the Panel also failed to satisfy its obligations under Article 11 of the DSU.") (emphasis added).

[380] *See* Mexico's First Written 21.5 Submission, paras. 235-236.

2) The claim fails on the merits as the DSB has already rejected the proposition that these three elements prove the measure discriminatory;

3) The claim fails on the merits as Mexico has failed to prove that any of these three elements are relevant to the analysis; and

4) The claim fails on the merits as Mexico has failed to prove that any of these three elements are not even-handed.

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

203. As discussed above in section III.A, the scope of a compliance proceeding is narrower than an original proceeding and "there are limitations on the types of claims that may be raised in Article 21.5 proceedings."[381]

204. Mexico's *entire* Article 2.1 claim is premised on the theory that at least one of the following elements is not even-handed: 1) the distinction between the eligibility for the dolphin safe label for tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner and tuna caught by other fishing methods;[382] 2) the distinction between the differing record-keeping and verification requirements required for tuna caught inside and outside the ETP; and 3) the distinction between the differing observer requirements for tuna vessels operating inside and outside the ETP.[383] According to Mexico, if any one of these three elements is not even-handed, the detrimental impact already found to exist in the original proceeding would reflect discrimination, and Mexico's Article 2.1 claim would succeed.[384]

205. Yet these three elements are *unchanged* from the original measure and the Appellate Body *did not consider* that any of them proved the original measure discriminatory. The *only* regulatory distinction the Appellate Body found not to be even-handed was the requirement that tuna product containing tuna caught in the ETP is ineligible for the label where a dolphin had

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[381] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 72 ("[T]he applicable time-limits are shorter than those in original proceedings, and there are limitations on the types of claims that may be raised in Article 21.5 proceedings. This confirms that the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings."); *see also supra*, sec. III.A (citing *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210; *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 36).

[382] In this regard, we understand Mexico not to be arguing that the amended measure's denial of eligibility of tuna products containing tuna caught by setting on dolphins is *per se* illegitimate. Rather, Mexico considers it illegitimate that the amended measure denies eligibility to tuna products containing tuna caught by setting on dolphins inside the ETP (in an AIDCP-consistent manner) while allowing tuna products containing tuna caught via other means to remain potentially eligible. Mexico appears to makes no allegation regarding how the amended measure should address setting on dolphins outside the ETP.

[383] Mexico's First Written 21.5 Submission, para. 236.

[384] Mexico's First Written 21.5 Submission, paras. 236, 265, 282, and 304. The United States notes that, in its introduction, Mexico claims that there are four regulatory distinctions. *See id.* para. 13. However, for purposes of its legal argument, Mexico only refers to the three regulatory distinctions. *See id.* paras. 235-237. The United States addresses the argument Mexico has pursued.

been killed or seriously injured but tuna product containing tuna caught outside the ETP could be so labeled where a dolphin had been killed or seriously injured.[385] And it is *this* distinction that the 2013 Final Rule addresses.

206. By urging the Panel to find the United States in breach of Article 2.1 on entirely different grounds from the Appellate Body, Mexico seeks an unprecedented expansion of the terms of reference of an Article 21.5 panel. As discussed above, previous reports of the Appellate Body and panels have consistently found that claims against *unchanged* elements of the original measure fall outside the compliance panel's limited terms of reference.[386] Indeed, a respondent, in designing and issuing its measure taken to comply, is "entitled to assume" that *unchanged* aspects of the original measure are consistent with the covered agreements in "the absence of a finding of violation in the original report."[387]

207. This is the exact situation here. The Appellate Body's Article 2.1 analysis surveyed the original panel's findings and uncontested facts on the record and determined that one particular regulatory distinction was not even-handed. Indeed, the Appellate Body did not limit its analysis to the facts and findings as they related to the original panel's Article 2.1 analysis, but reviewed the *entire* record.[388] The Appellate Body's analysis and findings have resolved this dispute as it pertains to the Article 2.1 claim.[389] By urging the Panel to find the amended measure inconsistent with Article 2.1 on entirely different grounds from the Appellate Body, Mexico "jeopardize[s] the principles of fundamental fairness and due process" given that the United

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[385] *US – Tuna II (Mexico) (AB)*, para. 297.

[386] *See supra*, sec. III.A (citing *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 89-96; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210; *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 87-93; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, paras. 415-39; *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 78-80; *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.138).

[387] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.75 ("In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report."); *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.133 (quoting same); *see also US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210 ("[A]llowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed provide an unfair 'second chance' to that party").

[388] *See US – Tuna II (Mexico) (AB)*, paras. 243-52, 258-81.

[389] *US – Tuna II (Mexico) (AB)*, para. 300 ("We have already found that the Panel erred in finding that Mexico failed to establish that the measure at issue is inconsistent with the United States' obligations under Article 2.1 of the TBT Agreement. Therefore, *in order to resolve this dispute*, we need not determine whether, in assessing Mexico's claims under that provision, the Panel also failed to satisfy its obligations under Article 11 of the DSU.") (emphasis added); *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, … unconditionally accepted by the parties to the dispute, and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute.") (internal quotes omitted).

States was "entitled to assume" that these *unchanged* elements are consistent with the covered agreements.[390]

208. Under Mexico's approach, the Appellate Body reports *need not* be "unconditionally accepted" by the parties pursuant to DSU Article 17.14, and the Appellate Body report *cannot* be considered a "final resolution" to the dispute. Rather, a complainant is allowed to raise, and re-raise claims and arguments time and time again – without limit. Such an approach is incompatible with the "prompt settlement of disputes," which is "essential to the effective functioning of the WTO."[391]

209. Of course, Mexico is free to claim that the *new* elements of the amended measure not only fail to bring the measure into compliance with the provisions that were the subject of the DSB recommendations and rulings, but are inconsistent with any part of the covered agreements, without causing terms of reference issues.[392] But Mexico has chosen not to make such a claim. Rather, Mexico urges the Panel to find that the amended measure is inconsistent with Article 2.1 based on unchanged elements of the measure (that the DSB did not find to be inconsistent). Previous reports have been clear on this point – such claims fall outside the terms of reference of an Article 21.5 proceeding.

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

[390] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.75 ("Moreover, the Panel is concerned that allowing a new claim on the likelihood-of injury in the current proceedings may jeopardize the principles of fundamental fairness and due process. In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report."); *Chile –Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.133 (quoting same).

[391] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, … unconditionally accepted by the parties to the dispute, and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the prompt settlement of disputes is essential to the effective functioning of the WTO") (internal quotes omitted).

[392] *See EC – Bed Linen (Article 21.5 – India) (AB)*, para. 88 ("We agree with the Panel that the *Canada – Aircraft (Article 21.5 – Brazil)* dispute involved a *new* claim challenging a *new* component of the measure taken to comply which was not part of the original measure. The situation in *Canada – Aircraft (Article 21.5 – Brazil)* was thus different from the situation in this appeal."); *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body 'shall be' adopted by the DSB, by consensus, but also that such Reports 'shall be … unconditionally accepted by the parties to the dispute. …' Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, '… unconditionally accepted by the parties to the dispute,' and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO.'").

210. Even aside from the fact that Mexico's Article 2.1 claim falls outside the Panel's terms of reference, Mexico's claim should be rejected on the basis that the Appellate Body has already considered – and rejected – the entirety of the claim.

211. As noted above, Mexico claims that the Panel should find that the amended measure is inconsistent with Article 2.1 because the detrimental impact stems from three elements that Mexico alleges are regulatory distinctions that are not even-handed.[393]

212. Yet a compliance panel's analysis does not begin from the "fresh start" that Mexico presumes. Rather, that analysis must be "done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the original panel and subsequently by the Appellate Body."[394] In other words, a compliance panel may not simply ignore the previous analyses done in this dispute. As the Appellate Body noted in reviewing an Article 21.5 panel report:

> The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. … The Panel had, *necessarily*, to consider our views on this subject…[395]

213. And in this dispute the Appellate Body found *only one* regulatory distinction to be relevant to the analysis – the requirement that tuna product containing tuna caught in the ETP is ineligible for the label where a dolphin had been killed or seriously injured but tuna product containing tuna caught outside the ETP could be so labeled where a dolphin had been killed or seriously injured.[396] The Appellate Body thus did not consider any of the numerous other regulatory distinctions contained in the original measure proved the measure discriminatory – either because the particular regulatory distinction was not relevant to the analysis, or because the regulatory distinction, while relevant, was even-handed. That is to say, the Appellate Body has already *rejected* all other alternative legal theories relating to this claim. If this were not true, the Appellate Body's report could not be considered a "final resolution" of Mexico's Article 2.1 claim, which it clearly is.[397]

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[393] *See supra*, sec. III.B.4.a (summarizing Mexico's First Written 21.5 Submission, para. 236).

[394] *US – Shrimp (Article 21.5 – Malaysia) (Panel)*, para. 5.5 ("In other words, although we are entitled to analyse fully the consistency with a covered agreement of measures taken to comply, our examination is not done from a completely fresh start. Rather, it has to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body.") (internal quotes omitted).

[395] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107 (emphasis added).

[396] *US – Tuna II (Mexico) (AB)*, paras. 289-292.

[397] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97 ("Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, … unconditionally accepted by the parties to the dispute, and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute.") (internal quotes omitted); *see also US – Tuna II (Mexico) (AB)*, para. 300 ("We have already found that the Panel erred in finding that Mexico failed to establish that the measure at issue is inconsistent with the United States' obligations under Article 2.1 of the

i. The First Element: Setting on Dolphins

214. Nowhere is it clearer that the Appellate Body has already rejected Mexico's claim than it is with regard to the first element Mexico raises – the distinction between the eligibility for the dolphin safe label for tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner and by other fishing methods.[398]

215. As recounted above, the original panel has already found that Mexico did not prove a breach of Article 2.1 under this exact legal theory.[399] Mexico appealed that finding, arguing that the original panel erred in this regard.[400] While the Appellate Body agreed with Mexico that Mexico's theory proved a detrimental impact on Mexican tuna products,[401] it *rejected* Mexico's contention that a detrimental impact alone proves a breach of Article 2.1.[402]

216. Yet with regard to this argument, Mexico contends that, in fact, a detrimental impact *is sufficient* to prove less favorable treatment. That is, for the first part of the less favorable treatment analysis, Mexico argues that the amended measure has a detrimental impact on Mexican tuna product because the fishing method its vessels elect to use is ineligible for the label while other fishing methods are eligible.[403] And for the second part, Mexico argues that this detrimental impact does not stem from an even-handed regulatory distinction because the fishing method its vessels elect to use is ineligible for the label while other fishing methods are eligible.[404]

TBT Agreement. Therefore, *in order to resolve this dispute*, we need not determine whether, in assessing Mexico's claims under that provision, the Panel also failed to satisfy its obligations under Article 11 of the DSU.") (emphasis added).

[398] Mexico's First Written 21.5 Submission, para. 236 (first bullet).

[399] *See supra*, sec. III.B.2; *US – Tuna II (Mexico) (Panel)*, paras. 7.374-78.

[400] *See US – Tuna II (Mexico) (AB)*, para. 241 (quoting Mexico's Other Appellant Submission, para. 129); *see also US – Tuna II (Mexico) (AB)*, para. 90 ("Thus, Mexico submits that the Panel could have confined its analysis to finding that access to the 'dolphin-safe' label was an 'advantage,' that access to the label was controlled by the US 'dolphin-safe' labelling provisions, and that most Mexican tuna products do not have access to the label, while all or most tuna products from the United States and other countries do have access. Mexico suggests that this would have been a sufficient basis to conclude that the US measure results in *de facto* discrimination.").

[401] *US – Tuna II (Mexico) (AB)*, paras. 234-235.

[402] *US – Tuna II (Mexico) (AB)*, paras. 284-297. That detrimental impact is not enough to prove a breach of Article 2.1 is not only clear from the Appellate Body's statements in this dispute, *see id.* para. 215, but in the other TBT cases as well. Indeed, the Appellate Body *reversed* the *US – COOL* panel on this very point, finding that the panel erred in finding a breach of Article 2.1 based only on a detrimental impact. *US – COOL (AB)*, para. 293; *see also US – Clove Cigarettes (AB)*, paras. 181-182.

[403] Mexico's First Written 21.5 Submission, paras. 227, 232 (citing *US – Tuna II (Mexico) (AB)*, para. 234). The United States notes that tuna product containing tuna caught via means other than setting on dolphins is only potentially eligible. The tuna must not have been caught where a dolphin was killed or seriously injured as well.

[404] Mexico's First Written 21.5 Submission, para. 236 (first bullet); *see also id.*, para. 250 ("The facts and circumstances related to the design and the application of the measure at issue – which results not only in the disqualification of Mexico's primary fishing method from ever being used to catch dolphin-safe tuna, but also in the

217. Leaving aside the highly circular nature of Mexico's argument, the fact of the matter is that the Appellate Body was well aware of Mexico's legal theory – indeed, Mexico appealed *on this very ground* – and the Appellate Body *did not agree with Mexico*. This fact must be taken into account when addressing Mexico's contrary approach.[405] Consequently, Mexico's claim as to this regulatory distinction should be rejected.

ii. The Second and Third Regulatory Elements: Record-Keeping, Verification, and Observers

218. It is also clear that the Appellate Body rejected Mexico's claim as it relates to the two other elements: the differing record-keeping and verification requirements required for tuna caught inside and outside the ETP, and the differing observer requirements for tuna vessels operating inside and outside the ETP, neither of which, in Mexico's view, are even-handed regulatory distinctions.[406]

219. As discussed above,[407] the AIDCP mandates certain record-keeping, verification, and observer requirements for large purse seine vessels operating inside the ETP that other vessels, operating both inside and outside the ETP, are not subject to. And this fact – that the AIDCP requires something different from other fishing authorities – was *uncontested* in the original proceeding,[408] and clearly fell within the Appellate Body's review of the record, which included all uncontested facts as well as all factual findings of the original panel.[409] Yet the Appellate Body did not consider either element as proving the original measure discriminatory.[410] This result is unsurprising, of course, as these two elements are not relevant to the Article 2.1 analysis, and, in any event, are completely even-handed, as discussed below.[411]

220. The Appellate Body was, of course, well aware that observer requirements differed between the ETP and other fisheries.[412] Not only did the Appellate Body acknowledge that this

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qualification of other fishing methods to catch "dolphin-safe" tuna – clearly establish that the regulatory distinction, i.e., the difference in labeling conditions and requirements, is not even-handed.").

[405] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107.

[406] Mexico's First Written 21.5 Submission, para. 236 (second and third bullets).

[407] *See supra*, sec. II.B.2.b-c.

[408] *See US – Tuna II (Mexico) (Panel)*, paras. 2.39-41, 7.331-33, 7.438.

[409] *See US – Tuna II (Mexico) (AB)*, paras. 243-281.

[410] *US – Tuna II (Mexico) (AB)*, paras. 289-292, 298.

[411] *See infra*, sec. III.B.4.c-d.

[412] *US – Tuna II (Mexico) (AB)*, paras. 293-296 ("The United States further argues that the imposition of a condition that an observer certify that no dolphins were killed or seriously injured on a particular fishing trip outside the ETP 'would have significant monetary and infrastructure implications for most nations whose vessels fish for tuna outside the ETP and export to the United States.'").

difference exists, it explicitly *rejected* the suggestion that the United States could only come into compliance by unilaterally requiring observers on vessels operating outside the ETP.[413]

221. Mexico is thus wrong to allege that either of these two elements prove the original measure discriminatory. The two elements are *unchanged* from the original measure, and the Appellate Body took them into account in concluding that a *different* regulatory distinction proved the original measure discriminatory. The Appellate Body's analysis (and finding) need to be taken into account when addressing Mexico's contrary argument. Consequently, Mexico's claim as to these two elements should be rejected.

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

222. As noted above, the question posed in the second step of the Article 2.1 analysis is whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[414] In conducting this analysis, the Appellate Body has instructed that not every distinction is relevant to an Article 2.1 analysis. According to the Appellate Body:

> [W]e *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries.[415]

223. Yet *none* of the three elements Mexico raises "accounts" for the detrimental impact. Indeed, Mexico's first element *is* the detrimental impact.[416] But, of course, "[t]he existence of such a detrimental effect is not sufficient to demonstrate less favourable treatment under Article 2.1."[417] Further, the detrimental impact does not stem from either of the other two elements that Mexico raises. That is to say, if the AIDCP parties agreed to eliminate the record-keeping and observer requirements, the detrimental impact would not be affected in the least bit. Mexican tuna product containing tuna caught by setting on dolphins would still be ineligible for the

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[413] *US – Tuna II (Mexico) (AB)*, paras. 296 ("[W]e note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its 'dolphin-safe' labelling provisions to the risks that the Panel found were posed by fishing techniques other than setting on dolphins. We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.") (emphasis in original).

[414] *See supra*, sec. III.B.1 (quoting *US – Tuna II (Mexico) (AB)*, para. 215).

[415] *US – Tuna II (Mexico) (AB)*, para. 286 (emphasis in original).

[416] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 250 ("The facts and circumstances related to the design and the application of the measure at issue – which results not only in the disqualification of Mexico's primary fishing method from ever being used to catch dolphin-safe tuna, but also in the qualification of other fishing methods to catch "dolphin-safe" tuna – clearly establish that the regulatory distinction, i.e., the difference in labeling conditions and requirements, is not even-handed.").

[417] *US – Tuna II (Mexico) (AB)*, para. 215; *see also US – COOL (AB)*, para. 293.

"dolphin safe" label, and tuna product containing tuna caught using other fishing methods would still be potentially eligible for the label. Mexico simply cannot establish a causal connection between the detrimental impact and either one of these two regulatory distinctions. The three regulatory distinctions raised by Mexico are not relevant to this analysis.

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

224. As discussed above, in the second step of the less favorable treatment analysis, a panel must "analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[418] To do so, the panel must examine whether the regulatory distinctions are "even-handed" or not with respect to the group of imported products, on the one hand, and the group of like domestic products (or products originating in any other country) on the other hand.[419] A regulatory distinction will not be found to be even-handed if it disadvantages one group in favor of another without any basis for doing so.[420]

225. Mexico's claim that the detrimental impact does not stem exclusively from legitimate regulatory distinctions must fail. Each one of the three elements that Mexico raises is entirely even-handed.

226. With regard to the first distinction, Mexico is unable to explain why an element that is entirely neutral as to origin and fishery is not even-handed. Indeed, the original panel determined that the eligibility conditions of the original measure do not put Mexican tuna product at a disadvantage compared to the like U.S. tuna product and the like product originating in any other Member,[421] a point that Mexico notably ignores. Moreover, Mexico is unable to prove that certain other fishing techniques have adverse effects on dolphins that are equal to or greater than what setting on dolphins has on dolphins.[422] With regard to the other two elements Mexico raises, Mexico is also unable to prove that the *amended measure* establishes any differences whatsoever. Indeed, if the United States eliminated all references to the AIDCP (and its requirements) from the amended measure, the differences in record-keeping and observers that Mexico complains about *would still exist*.

227. Mexico's goal is clear enough – the United States should not be able to draw distinctions between fishing methods, notwithstanding the significant scientific evidence underlying those

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[418] *US – Tuna II (Mexico) (AB)*, para. 215 (quoting *US – Clove Cigarettes (AB)*, para 182).

[419] *US – Tuna II (Mexico) (AB)*, paras. 215-16.

[420] *See supra*, sec. III.B.1; *US – Tuna II (Mexico) (AB)*, paras. 289-292, 297 (determining that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the challenged measure prohibited tuna product from being labeled "dolphin safe" if it contained tuna caught inside the ETP where a dolphin was killed or seriously injured, but allowed tuna product to be so labeled if it contained tuna caught outside the ETP where a dolphin was killed or seriously injured).

[421] *US – Tuna II (Mexico) (Panel)*, para. 7.374-78.

[422] *See supra*, sec. II.C.

distinctions. Thus, Mexico requests the Panel to find that either the United States must allow Mexican tuna product to carry the dolphin safe label or the United States must end the program.[423] But what Mexico asks for is exactly what the Appellate Body did not give Mexico, and Mexico is wrong to needlessly continue this dispute in an attempt to gain what it lost in the original proceeding.

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

228. Mexico's first reason that the amended measure's detrimental impact reflects discrimination is that the eligibility conditions are not even-handed. Mexico fails to prove what it asserts. On the contrary, the relevant eligibility conditions are completely even-handed:

- *all* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*; and

- *all* tuna product containing tuna caught where a dolphin was killed or seriously injured is ineligible for the label, *regardless of the fishery, gear type, nationality of the vessel, and nationality of the processor*.[424]

229. The amended measure contains no exceptions or carve outs, as was the case in *EC – Seal Products*[425] and *US – Clove Cigarettes*.[426] The requirements are <u>*equal*</u> for all products and nothing in the design or structure of the amended measure indicates that Mexican producers are disadvantaged in any way vis-à-vis their competitors in the United States, Thailand, the Philippines, or elsewhere.

230. Mexico's argument – that the measure disadvantages Mexican tuna product (and is thus not "even-handed") because tuna product containing tuna caught by setting on dolphins is ineligible for the label while tuna product containing tuna caught by other methods is potentially eligible for the label – is identical in substance to what it argued before the original panel.[427] Yet

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[423] Mexico's First Written 21.5 Submission, para. 263 ("There is no justification for the different treatment. In the circumstances of this dispute, all tuna fishing methods should be either disqualified or qualified.").

[424] *See supra*, secs. II.A.3.a-b, III.B.3.

[425] *EC – Seal Products (Panel)*, para. 7.317 (determining that the indigenous communities exemption was not even-handed in light of the fact that the seal products of the Greenland hunt could benefit from the exemption, but the seal products of the Canadian hunt could not, even though the two hunts greatly approximated one another); *id.*, para. 7.351 (determining that the marine resource management exception was not even-handed where only EU Members would likely qualify for this exception and other evidence suggested that the "exception was designed with the situation of EU member States in mind").

[426] *See US – Clove Cigarettes (AB)*, paras. 224-225 (exempting menthol cigarettes from the ban on flavored cigarettes).

[427] *Compare* Mexico's First Written 21.5 Submission, para. 250 ("The facts and circumstances related to the design and the application of the measure at issue – which results not only in the disqualification of Mexico's primary fishing method from ever being used to catch dolphin-safe tuna, but also in the qualification of other fishing

Mexico ignores that the original panel has already fully addressed Mexico's argument and found it lacking.

231. As the original panel noted, "the ETP is accessible to – and is in fact used by – a number of fleets," and "any fleet deciding to fish for tuna in the ETP could set on dolphins."[428] As such, "to the extent that the requirement of not setting on dolphins is based on a fishing method that may be used by vessels of *any nationality* operating where this method can be practiced, tuna of any nationality, including US and Mexican, as well as others, could potentially meet (or not meet) the requirements for dolphin-safe labelling."[429] The design and structure of the condition regarding setting on dolphins "does not suggest that this requirement in itself, places Mexican tuna products at a disadvantage as compared to US and other imported tuna products."[430]

232. As to whether the application of the original measure put Mexican tuna producers at a disadvantage vis-à-vis tuna producers of the United States or other Members, the original panel noted that the history of the dolphin safe label confirms that the challenged measure does not disadvantage Mexican producers. Indeed, at the time of the enactment of the first version of the DPCIA in 1990, "the United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins."[431] As the original panel correctly noted, "[b]oth of these fleets had therefore to adapt their fishing methods in order to catch tuna eligible for the US dolphin-safe label."[432] As "the choice facing the fleets of the United States, of Mexico and other foreign origins *was the same*," the original panel was "not persuaded that any current discrepancy in their relative situations is a result of the measures rather than the result of their own choices."[433]

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methods to catch "dolphin-safe" tuna – clearly establish that the regulatory distinction, i.e., the difference in labeling conditions and requirements, is not even-handed."), *with US – Tuna II (Mexico) (Panel)*, paras. 7.280-83 (stating, that "Mexico's discrimination claim is based on the requirement of 'no setting on dolphins' that conditions access to the US dolphin-safe label . . . . What Mexico argues, in essence, is that this distinction *in fact* operates so as to exclude most Mexican tuna products from access to the label, while most US tuna products and those of a number of other countries, will benefit from it." And: "Mexico's claim in the present case is that it is *de facto* deprived of the benefit of access to the label, and thus at a competitive disadvantage on the US market because it fishes in the ETP by setting on dolphins while the US and other fleets fish outside the ETP by other methods").

[428] *US – Tuna II (Mexico) (Panel)*, para. 7.307; *see also* "AIDCP Dolphin Mortality Limits 2012-2014" (Exh. US-22).

[429] *US – Tuna II (Mexico) (Panel)*, para. 7.309.

[430] *US – Tuna II (Mexico) (Panel)*, para. 7.311.

[431] *US –Tuna II (Mexico) (Panel)*, para. 7.324.

[432] *US – Tuna II (Mexico) (Panel)*, para. 7.324.

[433] *US – Tuna II (Mexico) (Panel)*, paras. 7.333-34 (emphasis added). As the original panel correctly pointed out: it is possible that a technical regulation, by setting out certain requirements that must be complied with, would affect different operators on the market differently, depending on a range of factors such as their geographical circumstances, their existing practices or their technical capacities. Such factors may have an impact on how easily products of various origins will or will not be able to meet the requirements at issue. *Id.*, para. 7.345.

233. In light of these findings, the original panel correctly determined that the "particular adverse impact felt by Mexican tuna products on the US market" is not a consequence of the measure itself putting Mexican producers at a disadvantage vis-à-vis the producers of the United States, Thailand, the Philippines, etc., but rather the "fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices" of the different tuna producers."[434]

234. These findings are undoubtedly correct; and, as such, it is difficult to conceive how the amended measure's distinction between setting on dolphins and other fishing methods is anything but "even-handed." Indeed, the Appellate Body appears to analyze whether a regulatory distinction is even-handed in much the same way that the original panel analyzed Mexico's discrimination argument in the original proceeding. It is thus not surprising that the Appellate Body rejected Mexico's argument that the denial of eligibility of setting on dolphins for the label disadvantages Mexican tuna product producers, as discussed above.

235. Mexico has no answer for any of this. In fact, Mexico constructs its entire argument as if neither the original panel nor the Appellate Body has ever examined these issues. For example, Mexico argues that the eligibility conditions suggest that they are "designed with the situation of the fleets of the United States and other countries in mind as distinguished from the Mexican fleet."[435] Yet, the original panel has already found that this is incorrect – at the time of the enactment of the first version of the DPCIA in 1990, "the choice facing the fleets of the United States, of Mexico and other foreign origins *was the same*."[436] As discussed above, it is simply improper for Mexico to set out its Article 2.1 claim in a vacuum, and urge the Panel to ignore all of the findings and analysis of the original panel and the Appellate Body.[437]

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[434] *US – Tuna II (Mexico) (Panel)*, para. 7.378. In addition, the original panel correctly noted that Mexico had failed to prove that there was, in fact, a causal connection between the measure and any trade impact felt by Mexican producers given the evidence that suggests that companies would not alter their purchasing practices because these practices are based on consumer preferences not to buy tuna caught by setting on dolphins, regardless of whether the label says "dolphin-safe" or not. *Id.*, paras. 7.363-64 ("To the extent that these companies would maintain their practices on the basis of their perception of consumer preferences, independently of any change in the US standard, the causal relationship between the US measures and the refusal of processors to purchase tuna caught by setting on dolphins is unclear. Indeed, these elements suggest that *there is only a marginal relationship* between the measures themselves and the practices of tuna processors, and that what these companies consider to be the determining factor in their decision *is an absence of setting on dolphins, rather than compliance with the terms of the US measures*.") (emphasis added); *see also id.*, paras. 7.348-49 (noting that that it does not "follow[] from the fishing practices of the national fleet that the tuna *products* of the same origin are in the same situation" in that origin is conferred by the location of the processor, not the flag of the vessel. "The fact that the Mexican tuna fleet fishes in the ETP by setting on dolphins while the US fleet does not, in itself does not imply that tuna processors of Mexican and US origin are necessarily similarly affected, as Mexico argues, in such a manner that the relative situation of US and Mexican tuna *products* on the US market is affected.").

[435] Mexico's First Written 21.5 Submission, para. 263 (emphasis added) (referring to *EC – Seal Products (Panel)*).

[436] *US – Tuna II (Mexico) (Panel)*, para. 7.333 (emphasis added).

[437] *See supra*, sec. III.A.

236. Rather than addressing the original panel's analysis, Mexico relies on the assertion that eligible fishing methods "have adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing method of setting on dolphins in an AIDCP-compliant manner."[438] As discussed above,[439] Mexico utterly fails to prove its assertion:

- As to purse seine fishing without setting on dolphins and pole and line fishing, which collectively produce the majority of tuna sold in the U.S. tuna product market, Mexico appears to fail to even allege – much less prove – that either method harms dolphins anywhere remotely near the level that setting on dolphins does.[440] As should be obvious, *setting on dolphins is more dangerous to dolphins than not setting on dolphins is*.

- As to longline fishing, the *only* other fishing method that Mexico raises that actually produces more than *de minimis* amounts of tuna for the U.S. tuna product market, the evidence establishes that the fishing method causes only a mere fraction of the observed harms that occurs due to setting on the dolphins in the ETP (much less the level of harm that is allowed).[441] Moreover, Mexico puts forward *zero* evidence that longline fishing causes the unobserved harms that setting on dolphins does, such as cow-calf separation, muscular damage, and immune and reproductive systems failures.[442]

- As to gillnet fishing and trawl fishing, which collectively produce only a *de minimis* amount of tuna for the U.S. tuna product market, Mexico fails to put forward sufficient evidence to prove that these fishing methods produce the observed harms to dolphins that occurs due to setting on dolphins in the ETP (much less the level of harm that is allowed).[443] And, again, Mexico submits *zero* evidence that these methods cause the unobserved harms that setting on dolphins does. This conclusion makes perfect sense, of course, as these fishing methods only capture dolphins by accident, while *the whole point* of setting on dolphins is to capture them in a purse seine net.[444]

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[438] Mexico's First Written 21.5 Submission, para. 248.

[439] *See supra*, sec. II.C.3.

[440] *See supra*, sec. II.C.2.a-b. Mexico likewise fails to submit any evidence that hand line fishing producers an equal or greater amount of harm to dolphins that setting on dolphins does. *See supra*, sec. II.C.2.c.i.

[441] *See supra*, sec. II.C.2.b.ii.

[442] *See US – Tuna II (Mexico) (Panel)*, para. 7.499; *see also id.*, para. 7.738 (stating that the AIDCP standard "fails to address unobserved adverse effects derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase").

[443] *See supra*, sec. II.C.3.c.ii-iii.

[444] As noted above, Mexico is wrong when it alleges that tuna caught by large-scale driftnets is eligible for the dolphin safe label. *See supra*, sec. II.A.3.a.i.

237. While Mexico contends that the amended measure "assumes" that setting on dolphins has adverse effects on dolphins and "assumes" that other methods do not,[445] nothing could be farther from the truth. As demonstrated above, the science ***supports*** the distinctions of the amended measure, and ***directly contradicts*** Mexico's approach. And, of course, it is this science that underlies the Appellate Body's conclusion that "setting on dolphins is *particularly* harmful to dolphins";[446] a finding, like so many others, that Mexico is forced to ignore.[447] Indeed, Mexico ignores the amended measure itself – tuna products containing tuna caught by any method are *ineligible* for the label where a dolphin was killed or seriously injured.

238. Finally, Mexico's attempt to find support in other TBT disputes also fails. For example, Mexico seeks to draw a comparison between the facts here and those underlying *EC – Seal Products* where the panel had found that the Inuit exception "was *de facto* available exclusively to Greenland" and the facts surrounding the hunting exception "suggested that the exception was designed with the situation of EU member States in mind."[448]

239. But those facts ***directly undercut*** Mexico's position. As the original panel found, "to the extent that the requirement of not setting on dolphins is based on a fishing method that may be used by vessels of *any nationality* operating where this method can be practiced, tuna of *any nationality*, including US and Mexican, as well as others, could potentially meet (or not meet) the requirements for dolphin-safe labelling."[449] Moreover, the original panel also found that the history of the measure suggests that the eligibility conditions do not directly target Mexican producers to the benefit of U.S. producers.[450] Indeed, the original panel was entirely correct when it concluded that the design and structure of the condition regarding setting on dolphins

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[445] Mexico's First Written 21.5 Submission, para. 263.

[446] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

[447] Mexico also appears to argue that that the ineligibility of setting on dolphins is not even-handed because it is "permanent" even if it is proved that certain dolphin populations in the ETP are recovering. *See* Mexico's First Written 21.5 Submission, para. 247. Mexico is incorrect. As the original panel found, the purpose of the U.S. measure is to protect dolphins from the direct and indirect harms of setting on dolphins, which are intrinsic to this method of fishing, and only secondarily to conserve the dolphin populations in the ETP. *See US – Tuna II (Mexico) (Panel)*, paras. 7.485-86, 7.735. Consequently, even if the dolphin populations *were* recovering, the United States would be under no obligation to re-visit the eligibility for the dolphin safe label of tuna caught by setting on dolphins. *See id.*, para. 7.735 ("[T]he US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent upon dolphin populations being depleted."). Additionally, of course, Mexico has not demonstrated that those populations are recovering but has only presented evidence that they *might* be recovering, although they are currently still depleted. *See supra*, sec. II.C.1.b.iv. And, in any event, Mexico is simply incorrect as a matter of law. The U.S. measure is no more "permanent" than any other Member's measure. The United States is free to revisit, revise, or modify its measure at any time.

[448] Mexico's First Written 21.5 Submission, para. 262 (citing *EC – Seal Products (Panel)*, paras. 7.317-19, 7.350-52).

[449] *US – Tuna II (Mexico) (Panel)*, para. 7.309 (emphasis added).

[450] *US –Tuna II (Mexico) (Panel)*, para. 7.324 (noting that at the time of the enactment of the first version of the DPCIA in 1990, "the United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins").

"does not suggest that this requirement in itself, places Mexican tuna products at a disadvantage as compared to US and other imported tuna products."[451]

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

240. Mexico's second reason that the amended measure's detrimental impact reflects discrimination is that the AIDCP mandates certain record-keeping and verification requirements for tuna caught by large purse seine vessels inside the ETP and the U.S. measure does not require those same AIDCP-mandated requirements for all other vessels catching tuna contained in tuna products sold labeled as "dolphin safe."[452]

241. As discussed above, the AIDCP provides for tracking and verification requirements regarding tuna caught by large purse seine vessels operating in the ETP.[453] The amended measure acknowledges these requirements as well as imposes certain other requirements on tuna caught by vessels other than AIDCP-covered large purse seine vessels.[454] These requirements apply equally to all tuna and tuna products, regardless of nationality of the vessel or origin of the tuna product.

242. With regard to tuna caught by large purse seine vessels operating in the ETP, the amended measure requires that the AIDCP-mandated records accompany the tuna (U.S. vessels) or be referenced in the Form 370 (foreign vessels) in order for the resulting tuna products to be eligible for the dolphin safe label.[455] With regard to tuna caught by all other vessels,[456] the

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[451] *US – Tuna II (Mexico) (Panel)*, para. 7.311; *see also id.*, paras. 7.334-45, 7.374-75, 7.505. Finally, Mexico wrongly insists that the analysis adopted by the panel in *EC – Seal Products* is relevant to this analysis, given that this analysis differs from the one applied by the Appellate Body *in this dispute*.

[452] *See* Mexico's First Written 21.5 Submission, paras. 266, 273. As a threshold matter, the United States notes that at times Mexico treats this particular regulatory distinction as an independent basis by which the amended dolphin safe labeling measure could be found to be discriminatory. *See id.* However, later in its submission, Mexico appears to characterize these requirements as subsidiary to the observer requirements, and that even if the United States imposed the AIDCP-mandated record-keeping and verification requirements on all trading partners, the United States would not have increased the accuracy of the labeling of tuna products derived from tuna caught by non-AIDCP-covered vessels if the United States did not also require all trading partners to adopt an observer program similar to the AIDCP one as well. *See id.*, para. 287; *see also id.*, paras. 283-284 ("[T]o the extent that legitimate dolphin-safe tuna can be caught by, and landed on, a fishing vessel outside the ETP, *it will not matter* if a comprehensive and meticulous audit trail is implemented downstream to the U.S. consumer if the initial dolphin-safe designation is inaccurate. *The entire audit trail will be tainted*.") (emphasis added). However, as discussed below, regardless of whether this is a subsidiary argument or not, Mexico's position regarding record-keeping and verification is incorrect.

[453] *See supra*, sec. II.B.2.

[454] *See supra*, sec. II.A.3.c.

[455] *See supra*, sec. II.A.3.c; 50 C.F.R. §§ 216.92(a)(1)-(2) (Exh. US-2). As noted above, for imported tuna products harvested by large purse seine vessel in the ETP, the United States does not distribute or collect the TTF itself, but, rather, ensures that the flag state is in compliance with the IDCP Tracking Plan. Of course, the required records must indicate that the tuna products contain tuna caught consistent with the eligibility conditions of the amended measure to be eligible for the label.

regulations provide that, to be labeled dolphin safe, the tuna products must be accompanied by documentation that substantiates that the tuna or tuna product is dolphin-safe in accordance with U.S. law.[457] The amended measure provides for certain record-keeping and verification requirements for U.S. processors (but not foreign ones).[458] (As discussed above, approximately half of the canned tuna product sold in the United States is produced by U.S. canneries.[459])

243. As these facts indicate, the record-keeping and verification requirements imposed by the challenged measure are entirely even-handed as to Mexican producers vis-à-vis tuna producers from the United States and other Members. These requirements are, in fact, entirely neutral as to the nationality of vessel and origin of the tuna product. Indeed, where the regulations draw distinctions based on nationality, it is the U.S. canneries and other processors that suffer the greater regulatory burden, not their foreign competitors.[460] To the extent that the regulations draw other distinctions, they do so not between Members, or even the fishing methods of Members, but rather between tuna caught by AIDCP-covered large purse seine vessels and tuna caught by all other vessels.[461]

244. And this is where Mexico makes its argument – the AIDCP imposes requirements that are not required of producers operating in (or sourcing) from other fisheries. The problem with this argument is obvious – Mexico complains of a "distinction" created by the AIDCP, not the U.S. measure.[462] Indeed, if the United States eliminated all references to the AIDCP (and its

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[456] *I.e.*, small purse seine vessels operating inside the ETP, and all other vessels (regardless of size or type) operating inside or outside the ETP.

[457] *See* 50 C.F.R. §§ 216.93(d)-(f) (Exh. US-2). All vessels, AIDCP-covered or otherwise, must segregate dolphin safe tuna from non-dolphin safe tuna. *Id.* § 216.93(c)(2)-(3). Any breakdown in the segregation results in all of the tuna being designated non-dolphin-safe. *Id.* §§ 216.93(c)(1)(i), (c)(2)(i), (c)(3)(i) (Exh. US-2). Offloaded tuna must be stored so as to preserve the identification of the tuna. *Id.* § 216.93(c)(2)-(3) (Exh. US-2).

[458] *See supra*, sec. II.A.3.c.

[459] *See* "U.S. Canned Tuna Market, by Source Country, 2010-2013" (Exh. US-53) (In 2010, U.S. canneries produced 47.23% of the canned tuna products sold in the United States; in 2011, that figure was 48.26%; and in 2012, that figure was 52.24%).

[460] 50 C.F.R. §§ 216.93(d), (g) (Exh. US-2).

[461] In this regard, we note that Mexico is wrong to argue that "[u]nder the Amended Tuna Measure, the record-keeping and verification requirements differ depending on the geographic area in which the tuna are caught." Mexico's First Written 21.5 Submission, para. 268. The record-keeping and verification requirements are exactly the same for small purse seine vessels and non-purse seine vessels operating in the ETP as they are for all other vessels operating outside the ETP. The difference in requirements is between AIDCP-covered large purse seine vessels and all other vessels. The fact that this difference exists was *uncontested* in the original proceeding. *See, e.g., US – Tuna II (Mexico) (AB)*, para. 101 (referencing AIDCP Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001) (Orig. Exh. MEX-55); and AIDCP Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification (20 June 2001) (Orig. Exh. MEX-56)).

[462] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 88 ("The AIDCP requires that member nations implement detailed tracking systems for dolphin-safe tuna, and Mexico has done so."). Of course, the U.S. requirement *itself* is hardly burdensome – all it requires of the foreign producer is to provide to the United States the number associated with the AIDCP TTF along with the NOAA Form 370 at the time of import.

requirements) from the amended measure, the regulatory distinction that Mexico criticizes *would still exist*.[463]

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

246. Instead, Mexico alleges that its producers are disadvantaged vis-à-vis their non-AIDCP competitors to the extent that the competitors are allowed to inaccurately designate their tuna products as "dolphin safe" (even though they do not meet the eligibility conditions), whereas Mexican producers, due to the strict record-keeping requirements of AIDCP, are not able to commit this same level of fraud.[464] Indeed, Mexico does not just allege that *it is a possibility* that these non-AIDCP competitors are fraudulently designating their non-dolphin safe tuna products as "dolphin-safe," but that *it is a certainty* that this is so. In Mexico's view, it is "impossible" for the non-AIDCP competitors to be in compliance with the amended measure,[465] and "none" of the resulting tuna "can be accurately designated as dolphin-safe."[466]

247. But Mexico puts forward *no* evidence to support the assertion that the U.S. Government and its citizens have been defrauded on an industry-wide scale for over the past two decades. And Mexico's argument fails right here. It simply cannot be the case that a complainant establishes a *prima facie* case on the basis of a bare allegation – without *any* evidence – a point

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We would further note that Mexico appears to exaggerate these "differences." For example, as discussed above, the challenged measure has requirements the same or similar to the requirements of the AIDCP, a point ignored by Mexico when discussing the AIDCP requirements. *See, e.g.*, Mexico's First Written 21.5 Submission, para. 269 (listing several requirements of the AIDCP without noting that the U.S. measure requires something similar as the second, fifth, and seventh bullets do).

[463] Of course, the United States is not in a position to do so in light of the fact that *the United States is a party to the AIDCP*.

[464] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 267 ("If tuna products from the United States or other countries that are not dolphin-safe are permitted to be inaccurately labeled as dolphin-safe, then they will be granted a competitive advantage over Mexican tuna products in circumstances that are inconsistent with the objectives of the Amended Tuna Measure.").

[465] Mexico's First Written 21.5 Submission, para. 179 ("[I]t is impossible for those vessels to comply with the Amended Tuna Measure's requirement that tuna caught in a set that harms dolphins be segregated from tuna caught in dolphin-safe sets.") (emphasis in original).

[466] Mexico's First Written 21.5 Submission, para. 271 ("[N]one of the tuna caught using "qualified" fishing methods can be accurately designated as dolphin-safe …"); *see also id.* para. 275 ("[T]he requirements and procedures for tracking and verifying tuna caught outside the ETP *are unreliable and do not provide accurate information* on the dolphin-safe status of the tuna products comprising this tuna. Thus, U.S. consumers *are not receiving accurate information* on such tuna products and could be misled or deceived or could encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.") (emphasis added).

that the Appellate Body has repeatedly found.[467] As the Appellate Body has emphasized in this very dispute, "the party that asserts a fact is responsible for providing proof thereof."[468]

248. Of course, the United States is not aware of fraud on the industry-wide scale that Mexico suggests is occurring. As noted above, NOAA conducts extensive verification of U.S. canneries, which process both U.S. and foreign tuna, through inspections, audits, and spot checks. Any product found to have been wrongfully labeled is subject to seizure, re-exportation, destruction, or forfeiture.[469] Sanctions for offering for sale or export tuna products falsely labeled dolphin safe may be assessed against any producer, importer, exporter, distributor, or seller who is subject to the jurisdiction of the United States.[470] Notably, Mexico does not even allege – much less prove – that NOAA is not fulfilling its legal obligation to strictly enforce the DPCIA and the implementing regulations. Indeed, Mexico cites to several enforcement actions *taken by NOAA* for violations of the MMPA.[471] Moreover, as Mexico itself points out, the U.S. Federal Trade Commission (FTC) has the authority to investigate allegations from the private sector regarding the accuracy of a company's advertising, including advertising that the company's product is "dolphin safe."[472] While Mexico points to one such complaint, it is notable that the FTC has never found that any particular company, *much less the entire industry*, is inaccurately labeling their tuna products as "dolphin-safe."

249. Mexico thus fails to prove that that the U.S. measure disadvantages its producers in this regard. The fact that Mexico may consider that the U.S. law imposes "insufficient requirements and procedures" on non-AIDCP-covered large purse seine vessels is entirely beside the point.[473] The Appellate Body's legitimate regulatory distinction analysis is not meant to be a vehicle for any and all criticisms of the challenged measure that the complainant sees fit to make. Indeed, the sixth preambular recital of the TBT Agreement "recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*,'" a point that the Appellate Body has repeatedly affirmed.[474] The fact that Mexico considers the level of record-keeping and verification the amended measure provides to be "insufficient" is simply irrelevant to Mexico's claim of discrimination.

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[467] *See, e.g., US – Wool Shirts and Blouses (AB)*, p. 14 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof.").

[468] *US – Tuna II (Mexico) (AB)*, para. 283 (quoting *Japan – Apples (AB)*, para. 157).

[469] *See US – Tuna II (Mexico) (Panel)*, para. 2.33; U.S. Response to Original Panel Question No. 4, para. 10.

[470] *See* 16 U.S.C. § 1385(d) (Exh. MEX-8).

[471] *See* Exh. MEX-46, 21, and 80.

[472] *See* Mexico's First Written 21.5 Submission, para. 187.

[473] Mexico's First Written 21.5 Submission, para. 272.

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

250. Appearing to acknowledge that the United States cannot relieve Mexico of its own international legal commitments, Mexico argues that the United States can only make this element "even-handed" by increasing the regulatory burden outside the ETP to the level that already exists inside the ETP.[475] Mexico thus appears to argue that the record-keeping and verification requirements that Mexico has agreed to form the "floor" for the requirements that the United States *must* impose on itself and all other trading partners.

251. Mexico cites no legal support for such a proposition, and it is surely incorrect. As noted above, a Member may take measures "at the levels that it considers appropriate," a point that Article 2.4 of the TBT Agreement confirms.[476] However, a Member does not act inconsistently with its WTO obligations by applying domestic measures that reflect the international agreements (or lack thereof) of different Members. *Under no circumstances*, does Mexico set the appropriate level for the United States. The United States sets its own "floor."

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

252. Mexico's third reason that the amended measure's detrimental impact reflects discrimination is that the AIDCP mandates 100 percent observer coverage for large purse seine vessels operating in the ETP while the amended measure does not contain a like requirement for all other vessels (*i.e.*, small purse seine vessels operating inside the ETP, and all other vessels (regardless of size or type) operating inside or outside the ETP).[477] According to Mexico, the AIDCP-mandated observers "ensure the accuracy" of the information regarding the tuna caught by that vessel.[478] In contrast, captain statements are "meaningless," as captains are neither qualified nor reliable.[479] Given that this alleged "distinction" stems from Mexico's own international legal commitment, Mexico is forced to argue that the *only* permissible way for the United States to adjust this element is to require 100 percent observer coverage for all vessels – operating anywhere in the world – that intend to produce "dolphin safe" eligible tuna for the U.S. tuna product market.[480]

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[475] Mexico's First Written 21.5 Submission, paras. 272-73 (asserting that, with respect to "tuna from outside the ETP," "there are insufficient requirements and procedures under the Amended Tuna Measure to provide the necessary audit trail for tracking the tuna" and, which establishes "that the relevant regulatory distinction . . . is not even-handed").

[476] TBT Article 2.4 (stating that Members need not adopt international standards where "such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems"); *see also* SPS Article 3.3 (stating that Members need not adopt international standards where the Member is able to provide a "scientific justification" for the higher level of protection).

[477] *See* Mexico's First Written 21.5 Submission, paras. 284-85.

[478] Mexico's First Written 21.5 Submission, para. 284.

[479] Mexico's First Written 21.5 Submission, para. 285.

[480] Mexico's First Written 21.5 Submission, para. 295 ("[A] mandatory independent observer requirement for tuna fishing outside the ETP is both appropriate and necessary if this element of the Amended Tuna Measure is to be applied in an even-handed manner.").

253. As discussed above, given the enormous amount of dolphin mortalities caused by setting on dolphins in the ETP historically, large purse seine vessels operating inside the ETP have long carried observers, and there has been 100 percent coverage on such vessels since 1995.[481] As Mexico readily concedes, the requirements of the AIDCP observer coverage program are contained in the AIDCP and related documents.[482] These requirements are ***not*** repeated in U.S. law.[483]

254. Rather, the amended measure requires that, for U.S.-flagged AIDCP-covered large purse seine vessels, the tuna must be accompanied by the AIDCP-mandated TTF which has been certified by the AIDCP-mandated observer (as well as the captain).[484] For other AIDCP-covered large purse seine vessels, the tuna must be accompanied by a Form 370 and valid documentation, signed by the representative of the appropriate IDCP member nation, that certifies, among other things, that there was an IDCP-approved observer on board for the entire trip.[485] For tuna caught in other fisheries, the tuna must be accompanied a captain's statement certifying that: "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught"; and, for tuna caught by purse seine vessel, "no purse seine net was intentionally deployed on or used to encircle dolphins."[486]

255. The U.S. measure's treatment of observers is entirely even-handed.

256. The requirement for large purse seine vessels operating in the ETP to carry observers (while other vessels are not similarly required) *stems from the AIDCP*, not U.S. law. Indeed, if the United States eliminated all references to the AIDCP-mandated observer requirement from the amended measure, the "distinction" that Mexico criticizes *would still exist*.

257. Mexico claims that requiring observers for some vessels and not requiring it for others is "arbitrary," but, in fact, it is anything but.[487] The amended measure requires an observer certification where one particular international agreement requires observers, and does not require an observer certification where the relevant authority for the fishery does not require observers to certify as to the tuna's eligibility for a "dolphin safe" label.

258. Of course, the Appellate Body was well aware of the uncontested fact that large purse seine vessels operating in the ETP are required to carry observers while other vessels are not, and

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[481] *See supra*, sec. II.B.1.

[482] *See* Mexico's First Written 21.5 Submission, paras. 70-72; *see also* Agreement on the International Dolphin Conservation Program, as amended Oct. 2009, Annex II (Exh. MEX-30); Inter-American Tropical Tuna Commission, Quarterly Report (April-June 2013), p. 14 (Exh. MEX-29).

[483] *See supra*, sec. II.A.3.b.ii; *see generally* 50 C.F.R. §§ 216.91, 216.92 (Exh. US-2).

[484] *See* 50 C.F.R. § 216.92(a) (Exh. US-2).

[485] *See supra*, sec. II.A.3.b.ii; 50 C.F.R. §§ 216.92(b)(2), 216.24(f)(2) (Exh. US-2); NOAA Form 370, at 5(B)(5) (Exh. MEX-22).

[486] *See* 50 C.F.R. §§ 216.91(a)(2)(i)-(iii), (a)(4)(i) (Exh. US-2); *see also* Form 370 (Exh. MEX-22).

[487] Mexico's First Written 21.5 Submission, para. 303.

did not find that difference proved the challenged measure discriminatory.[488] Indeed, the Appellate Body went further, and explicitly acknowledged that the United States could "calibrate" its measure without requiring all of its trading partners to put independent observers on their respective tuna fleets:

> [W]e note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its 'dolphin safe' labeling provisions . . . . We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.[489]

259. Mexico now wrongly urges the Panel *to ignore* the Appellate Body's conclusion because "neither the Panel nor the Appellate Body had before it the facts regarding adverse effects on dolphins set out in section III of this submission or the facts regarding the unreliability of captain certifications …"[490] But Mexico is not free in an Article 21.5 proceeding to "appeal" the findings of the DSB.

260. Furthermore, the supposed "facts" that Mexico is now alleging are not new. Mexico was, of course, free to have asserted these "facts" in the original proceeding. The facts that Mexico now raises are *unchanged* from the original proceeding: 1) there is 100 percent observer coverage for large purse seine vessels operating in the ETP; 2) the U.S. measure relies on the certifications of those observers; 3) other vessels do not carry observers to certify as to the tuna's eligibility for a "dolphin safe" label; and 4) the U.S. measure requires a captain statement to certify that the tuna caught by such vessels is eligible for the label.[491] These facts were *uncontested* by the parties in the original proceeding.[492]

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[488] *See, e.g., US – Tuna II (Mexico) (AB)*, paras. 293-295; *see also id.*, para. 264 ("In its analysis, the Panel acknowledged that, due in particular to the AIDCP On-Board Observers Program and the AIDCP System for Tracking and Verifying Tuna, detailed information is available concerning dolphin mortalities resulting from tuna fishing in the ETP, and that, by contrast, evidence relating to dolphin bycatch outside the ETP is contained in a 'limited amount of *ad-hoc* studies.'") (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.519).

[489] *US – Tuna II (Mexico) (AB)*, para. 296. We further note that Mexico appears to misunderstand the Appellate Body's statement that requiring observers "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury," *id.*, n.612, to mean that it may be "appropriate *and necessary*" for the United States to unilaterally impose an observer certification on other Members to be consistent with its WTO obligations. Mexico's First Written 21.5 Submission, para. 295 (emphasis added). The Appellate Body said no such thing. Rather, the Appellate Body merely recognized that there may be circumstances where a Member *could* unilaterally impose an observer requirement on the vessels of certain Members (and not other Members) consistent with Article 2.1. At no time did the Appellate Body ever suggest what Mexico claims it did – that there are circumstances that a Member *must* unilaterally impose an observer requirement on the vessels of certain Members *in order to be consistent with Article 2.1*.

[490] Mexico's First Written 21.5 Submission, para. 295.

[491] As discussed above, that certification was (and is) that "no purse seine net was intentionally deployed on or used to encircle dolphins." *See supra*, sec. II.A.3.b.ii (citing 50 C.F.R. §§ 216.91(a)(2)(i)-(iii) (Exh. US-2);

261. Mexico understood these facts, and also understood that any eventual adopted Appellate Body report would constitute a "final resolution" in this dispute.[493] It was Mexico's *own decision* to limit its discrimination claim (and the evidence submitted in support of that claim),[494] and Mexico cannot now complain that it is unsatisfied with the consequences of its own decision. As discussed above, Mexico should not get an unfair "second chance" to re-argue its claim as to *unchanged* elements of the challenged measure.[495]

262. Mexico appears to ground its argument on two assertions: 1) the tuna product containing tuna caught by vessels other than AIDCP-covered large purse seine ones is inaccurately or fraudulently labeled;[496] and 2) the captain statement is "inherently unreliable" and "meaningless."[497] Mexico fails to prove either assertion.

263. First, and as discussed above, Mexico puts forward *not a single piece of evidence* that any tuna product has been marketed in the United States as "dolphin safe," when, in fact, it did not meet the conditions of U.S. law.[498] NOAA conducts extensive verification of U.S. canneries, which process both U.S. and foreign tuna, through inspections, audits, and spot checks. The fact that NOAA has brought enforcement actions against certain tuna vessels for setting on whales and dolphins – in violation of U.S. law – does not mean that any tuna on the offending vessel ended up being sold in the U.S. tuna product market as "dolphin safe." If anything, such enforcement actions prove just the opposite – NOAA takes its enforcement responsibility very seriously and punishes violators to the extent permitted by U.S. law.

264. Second, Mexico is wrong to argue that a captain's statement is "inherently unreliable" and otherwise "meaningless."[499]

NOAA Form 370 (Exh. MEX-22)). Under the amended measure, of course, vessel captains must also certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught for a tuna product to be labeled dolphin safe. *See* 50 C.F.R. §§ 216.92(b)(2), 216.24(f)(2) (Exh. US-2); NOAA Form 370, at 5(B)(5) (Exh. MEX-22).

[492] *See, e.g., US – Tuna II (Mexico) (AB)*, para. 174 ("Depending on the fishery in which the tuna contained in a tuna product is harvested, the DPCIA requires either one or both of the following certifications as a condition for a 'dolphin-safe' label: (1) a certification that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught; (2) a certification that no dolphins were killed or seriously injured in the sets in which the tuna were caught. *The DPCIA further prescribes whether these certifications are to be provided: (1) by the captain of the vessel; or (2) by the captain of the vessel and an observer*.") (emphasis added).

[493] *See supra*, sec. III.B.4.a (quoting *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97).

[494] *US – Tuna II (Mexico) (Panel)*, paras. 7.255, 7.280.

[495] *See supra*, sec. III.B.4.a (quoting *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210).

[496] Mexico's First Written 21.5 Submission, paras. 285, 297-298.

[497] Mexico's First Written 21.5 Submission, para. 285.

[498] *See supra*, sec. III.B.4.d.ii.

[499] Mexico's First Written 21.5 Submission, para. 285.

265. As a general matter, the United States relies on "self-certification," as Mexico puts it, in numerous different contexts. Mexico's suggestions – that such an approach is inherently unreliable – would be, if true, *hugely trade disruptive*. Members simply do not have the resources to require the independent verification of all the activities of domestic and foreign producers.

266. This is certainly the case with trade in fish where the vessels operate on the high seas or in the territorial waters of other Members and an importing Member cannot independently verify every action taking place (or not taking place) on every vessel that may produce fish for the domestic market. As such, captain statements, logbooks, and the like have always been a core implementation tool for Members to verify compliance with the applicable fishing rules. Thus, for example, under the FAO *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Port State Measures Agreement),[500] each party shall require that vessels, prior to entering port, self-report various information regarding the vessel, its fishing authorizations, and the total catch on board.[501] RFMOs, including the ICCAT, to which both the United States and Mexico are members, have begun adopting instruments based on this model.[502] The United States also relies on the self-reporting by vessels for implementation of its domestic laws, such as the MMPA.[503]

267. The simple fact is that a captain's statement is an effective vehicle to determine the eligibility of tuna for the label. As discussed above, the U.S. measure has long relied on a captain statement to certify that the vessel did not set on dolphins, and the original panel found that this certification does, in fact, address the observed and unobserved mortality arising from setting on dolphins.[504] This finding was not only affirmed by the Appellate Body, *it constituted*

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[500] *See Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, art. 8, Annex A (Exh. US-76) (Port State Measures Agreement). The Port State Measures Agreement has not yet entered into force, although the United States has signed the agreement and the U.S. Senate has provided its advice and consent to ratification.

[501] Port State Measures Agreement (Exh. US-76).

[502] ICCAT, "Recommendation 12-07 by ICCAT for an ICCAT Scheme for Minimum Standards for Inspection in Port," para. 11 (2012) (Exh. US-77) (requiring that nations mandate that foreign fishing vessels seeking to use their ports for the purpose of landing and/or transshipment to provide, at least 72 hours before the estimated time of arrival, various information regarding the vessel, fishing authorizations, and quantities of ICCAT species and/or fish products). In addition, as discussed above, the WCPFC and IOTC resolutions banning intentional encirclement of cetaceans also rely on the reporting of captains. *See* IOTC Resolution 13/04 (Exh. US-12); WCPFC Resolution 2011-03 (Exh. US-11).

[503] Under MMPA, all fisherman participating in a state or federal fishery that operates in U.S. waters a required to report all injuries and mortalities of marine mammals associated with fishing operations to NMFS within 48 hours of returning to port. NMFSA, *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs* at 28 (2004) (Exh. MEX-77).

[504] *US – Tuna II (Mexico) (Panel)*, para. 7.544 ("To summarize, therefore, the US dolphin-safe labelling provisions, as currently applied, address observed and unobserved mortality resulting from setting on dolphins, *in any fishery*, as well as observed mortality from other fishing methods within the ETP. However, they do not address mortality (observed or unobserved) arising from fishing methods *other than setting on dolphins outside the ETP*.") (emphasis added).

the basis of the Appellate Body's finding on the Article 2.1 claim.[505] Tthe United States has a right to rely on this (and other statements) of the Appellate Body (and original panel before it) in designing its measure to comply.[506]

268. Yet, Mexico disagrees, arguing, in essence, that the original panel and Appellate Body were incorrect, and appealing to the Panel to correct this (alleged) error. To buttress its argument, Mexico points to an ad hoc collection of comments from industry stakeholders, an academic paper, a NOAA publication, and an enforcement action by NOAA. Of course, *none* of these documents concludes what Mexico asserts – that the captain's statement is "meaningless" – and much of what is contained in these documents directly contradicts Mexico's own argument.

269. Thus, while the three major U.S. tuna processors apparently consider that requiring a captain's statement to be "unnecessary," these companies take that position because, in their view, "dolphin interactions with these tuna fisheries [*i.e.*, outside the ETP] and gear types are *negligible and incidental*."[507] Indeed, these companies acknowledge that they would support the additional certification "[w]ere there a legitimate need to address the risk to dolphins" outside the ETP.[508]

270. As to the accuracy of self-reporting, despite its limitations, NOAA has not concluded that self-reporting from logbooks is "meaningless." Indeed, such reporting is a valuable source of information given that "logbooks as compared to other sampling methods … are usually required of all fishery participants, and therefore represent a near-census of the fishery. There are few other sources of data for estimating fleet-wide effort by time and area."[509] This is in direct contrast to relying on observers, which are expensive, and therefore required only in those

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[505] *US – Tuna II (Mexico) (AB)*, para. 297 ("We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does 'not address mortality (observed or unobserved) arising from fishing methods *other than setting on dolphins outside the ETP*.'") (quoting Panel Report, para. 7.544) (emphasis in original and added); *see also id.*, para. 292 ("The Panel noted that the only requirement currently applicable to purse seine vessels fishing outside the ETP is to provide a certification by the captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip. This requirement, however, does not address risks from other fishing methods, such as FADs.").

[506] *See supra* sec. III.A.

[507] Bumble Bee, Chicken of the Sea, and StarKist Comments on Proposed Rule at 2 (May 1, 2013) (Exh. MEX-25); *see also id.* ("The WTO arguments and exhibits cite little current or specific science or data indicating adverse interactions with dolphins and these other fisheries and gear types. We feel the requirement for captain/observer statements of absence of dolphin mortality is unnecessary in these fisheries and fleets."); *see also* American Tuna Assoc. Comments on Proposed Rule at 1 (April 29, 2013) (Exh. MEX-33) (stating that tuna caught by U.S. flagged vessels has long been "dolphin safe"); Davis Wright Tremaine Comments on Proposed Rule at 2 (April 30, 2013) (Exh. MEX-34); Read, *et al.*, "Bycatch of Marine Mammals in U.S. and Global Fisheries," at 6 (2006) (Exh. MEX-6) (noting that instituting a monitoring program to detect rare events "would be enormously costly and inefficient").

[508] Bumble Bee, Chicken of the Sea, and StarKist Comments on Proposed Rule at 2 (Exh. MEX-25).

[509] NMFS, *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs*, at 31 (Exh. MEX-77).

fisheries "with known or suspected high levels of bycatch."[510] These conclusions are entirely consistent with the fact that the AIDCP mandates that large purse seine vessels carry observers for the specific purpose of recording detailed information regarding dolphin interactions, but tuna RFMOs regulating other fisheries, such as the WCFPC and IOTC, do not impose similarly rigorous requirements with respect to observing and certifying dolphin interactions.

271. Finally, Mexico appears to imply that the Panel should assume that the conduct of one captain is typical of the entire industry.[511] Specifically, Mexico quotes Captain Maughan as stating that he had "nothing to do with setting the nets or saying about fish" to bolster its case that a captain's statement is "inherently unreliable."[512] Of course, whether the captain is in charge of setting the nets does not speak to the issue of whether the captain can provide an accurate statement as to whether the nets were set on dolphins. Indeed, Captain Maughan stated that he "considered his duties as captain to ensure the safety of the vessel and the crew and *make sure all the regulations were obeyed*."[513] In any event, Captain Maughan and his cohorts on the *Ocean Conquest* hardly seem to be model fishermen. Indeed, NOAA determined that the defendants violated U.S. law and fined the defendants US$215,776.77. Of course, Mexico puts forward *zero* evidence that any action (or inaction) of Captain Maughan is typical of the captains of tuna vessels producing tuna for the U.S. tuna product market.[514] If anything, the *Freitas* case proves just the opposite of what Mexico argues – NOAA takes its enforcement responsibilities very seriously and will prosecute violators to the full extent allowed under U.S. law.

272. Mexico contends that the *only* way the United States can make this alleged regulatory distinction even-handed is to unilaterally require 100 percent observer coverage throughout the world.[515] That is, the United States must require, as a condition of eligibility for the label, that all tuna caught anywhere in the world be certified by an independent, on board observer as "dolphin safe" in accordance with U.S. law.

273. Again, Mexico considers that whatever commitment it has made to other AIDCP parties must be the "floor" that all other Members must comply with for continued access to the dolphin

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[510] NMFS, *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs*, at 40 (Exh. MEX-77); *see also id.* ("The logistics associated with implementing observer programs and deploying observers can be substantial. Considerations include procurement of observer services, observer training, moving observers around, minimizing down time, and deployment of observers in highly mobile fisheries or fisheries operating out of many ports.").

[511] *See* Mexico's First Written 21.5 Submission, para. 285 (seventh bullet).

[512] *In the Matter of Matthew James Freitas, et al.*, at 26 (Exh. MEX-6).

[513] *In the Matter of Matthew James Freitas, et al.*, at 25 (Exh. MEX-6) (emphasis added).

[514] *In the Matter of Matthew James Freitas, et al.*, at 2, 27-30 (Exh. MEX-6).

[515] Mexico's First Written 21.5 Submission, para. 295 ("[A] mandatory independent observer requirement for tuna fishing outside the ETP is both appropriate and necessary if this element of the Amended Tuna Measure is to be applied in an even-handed manner."). In this regard, Mexico appears to claim that dolphins face "much higher" risks from tuna fishing outside the ETP than to fishing inside the ETP. *Id.* Given that Mexico cannot prove the lower standard it asserts (equal or greater harm), it certainly fails to prove this higher standard. *See supra*, sec. II.C.

safe label. The tuna or tuna product produced by a Member whose producers are not in a position to meet such an expensive requirement (because, for example, there is no international organization that administers an observer program as is the case in the ETP[516]) must be denied access to the label, *even though* the tuna caught by that Member's vessels did not harm dolphins.

274. Of course, such an approach is entirely unworkable for many Members given the expense of administering an observer program, particularly without the support of the RFMO. Indeed, the IATTC Secretariat administers the AIDCP observer program and the IATTC funds 30 percent of the program's budget.[517] And, of course, mandating an observer requirement in fisheries where there is little to no interaction between tuna and dolphins raises additional legal concerns.[518]

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

5. Conclusion on Article 2.1

276. For the above reasons, Mexico's Article 2.1 claim fails.

C. Mexico Fails To Establish that the Amended Dolphin Safe Labelling Measure Is Inconsistent with Article I:1 of the GATT 1994

277. Mexico claims that the amended dolphin safe labeling measure is inconsistent with Article I:1 because it denies eligibility for the label for tuna product containing tuna caught by setting on dolphins while tuna product containing tuna caught via other fishing methods is

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[516] *See supra*, sec. II.B.2.b.

[517] *See supra*, sec. II.B.2.b (citing to IATTC, Doc. CAF-01-05, *Program and Budget for Fiscal Years 2014 and 2015*, 1st Meeting of the Comm. on Admin. & Finance, Veracruz, Mexico (June 5, 2013), at 1 (Exh. US-23) ("As in prior years, [the financial activities] includes costs relating to 30% of the Observer Program costs for the implementation of the Agreement on the International Dolphin Conservation Program (AIDCP), which is further reviewed in Document MOP-27-06.")).

[518] In this regard, the United States would reiterate that, if accepted, Mexico's approach would put the United States in the impossible position of having to face accusations that it has acted inconsistently with TBT Article 2.2 by imposing an unilateral requirement that all tuna sold in the U.S. tuna product market be accompanied by an observer certification even though the interaction between tuna and dolphins is very low in the particular fishery in which the tuna was caught in. *See* U.S. Second Written Submission in Original Proceeding, para. 150.

potentially eligible for the label.[519] As was the case in the original proceeding, Mexico makes no claim here as to any other requirements of the amended measure, including those related to record-keeping and observers.[520] Mexico fails to establish that the U.S. dolphin safe labeling measure is inconsistent with Article I:1 of the GATT 1994.

278. To establish that the amended measure is inconsistent with Article I:1, Mexico must prove the following:

> (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are 'like' products within the meaning of Article I:1; (iii) that the measure at issue confers an 'advantage, favour, privilege, or immunity' on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended 'immediately' and 'unconditionally' to 'like' products originating in the territory of all Members.[521]

279. The United States does not contest that the first three elements are satisfied here. We do, however, disagree with Mexico that the "advantage" has not been "immediately" and "unconditionally" accorded to like products originating in Mexico.

280. In this regard, the United States considers that the "advantage" for purposes of Article I:1 is the access to the dolphins safe label. The United States would note, however, that no tuna product of a Member has *a right* to the label.[522] As we explained above, no product (whether of U.S., Mexican, or any other national origin) is *entitled* to be labeled dolphin safe under U.S. law.[523] Rather, the advantage is subject to eligibility requirements that all tuna products must meet in order to be labeled consistent with U.S. law. Those conditions are: 1) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip; and 2) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.[524]

281. According to the Appellate Body, the "fundamental purpose" of Article I:1 is "to preserve the equality of competitive opportunities for like imported products from all Members."[525] However, the Appellate Body also noted that Article I:1 does not prohibit a Member from attaching any conditions to the granting of an advantage, and "permits regulatory

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[519] Mexico's First Written 21.5 Submission, para. 315.

[520] *See US – Tuna II (Mexico) (Panel)*, paras. 7.255, 7.280.

[521] *EC – Seal Products (AB)*, para. 5.86.

[522] *See also US – Poultry (China) (Panel)*, para. 7.433 (defining the advantage at issue as "the opportunity to export poultry products to the United States, pending a successful finding of initial or ongoing equivalence and certification of individual poultry producers").

[523] *See supra*, secs. II.A.2 and II.C.2 (describing the conditions of access to the U.S. dolphin safe label).

[524] *See supra*, sec. II.A.3.b. As also noted *supra*, all tuna caught in large-scale driftnets on the high seas is ineligible for the label, regardless of the fishery and nationality of the vessel. *See supra* sec. II.A.3.a.i.

[525] *EC – Seal Products (AB)*, para. 5.87.

distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member."[526]

282. Mexico must, therefore, prove that the opportunity under U.S. law to label tuna product as "dolphin safe" if certain conditions are met is not immediately and unconditionally accorded to Mexican products. This, Mexico fails to do. In fact, the amended measure provides the *same* opportunity for all tuna products to be labeled "dolphin safe." The fact that some Members elect to take advantage of that opportunity, while others do not, does not amount to discrimination, as the original panel correctly found.

283. As discussed above, the original panel correctly determined that the original measure distinguishes among tuna products not based on origin but based on the method by which the tuna was caught, a distinction that "is not inherently tied to the 'national' origin of the fish."[527] Setting on dolphins and not setting on dolphins are both fishing methods that any fleet in the ETP (or, as Mexico contends, outside the ETP) could employ.[528] As such, "tuna of any nationality, including US and Mexican, as well as others, could potentially meet (or not meet) the requirements for dolphin-safe labelling."[529] Nothing prevents Mexican vessels from fishing in a manner that would yield tuna products eligible for the dolphin safe label, and nothing prevents vessels of other countries from fishing in a manner that would preclude access to the label.[530]

284. As noted in the original proceeding, Mexico had previously brought a challenge to the DPCIA under the same claim – Article I:1 – under the GATT 1947. The GATT 1947 panel in *US – Tuna I* made essentially the same finding, concluding that, under the U.S. measure, the "requirement to provide evidence that [setting on dolphins] had not been used in respect of tuna caught in the ETP . . . applied to all countries whose vessels fished in the [ETP] and thus did not distinguish between products originating in Mexico and products originating in other countries."[531] The amended measure, of course, is even further divorced from national origin, as

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[526] *EC – Seal Products (AB)*, para. 5.88; *see also Canada – Autos (Panel)*, para. 10.40 ("[W]e do not contest the validity of the proposition that Article I:1 does not prohibit the imposition of origin-neutral terms and conditions on importation that apply to importers."); *id.* para. 10.30 (stating that the test is "whether [the] condition[] amounts to discrimination between like products of different origins."); *US – Poultry (China) (Panel)*, para. 7.437 ("[C]onditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 of the GATT 1994 only when such conditions discriminate with respect to the origin of the products.").

[527] *US – Tuna II (Mexico) (Panel)*, para. 7.305; *see also supra*, sec. III.B.4.d.i (summarizing the original panel's analysis).

[528] *US – Tuna II (Mexico) (Panel)*, paras. 7.307-09.

[529] *US – Tuna II (Mexico) (Panel)*, para. 7.309.

[530] In this regard, and as the original panel correctly found, the eligibility of a tuna product to bear the dolphin safe label does not necessarily relate to the manner in which the fleet of the same country fishes. *US – Tuna II (Mexico) (Panel)*, para. 7.310. The origin of a tuna product is determined not by the origin of the vessel that harvested the fish it contains, but by the place of its processing. Thus, even if Mexican fleets, opted to continue setting on dolphins, precluding eligibility for the dolphin safe label, Mexican processors "could choose to make their products from tuna of other origins meeting the requirements of the label." *Id.*

[531] *US – Tuna (Mexico) (GATT)*, para. 5.43.

all vessels, whether they fish within or outside the ETP, must provide evidence that tuna labeled dolphin safe was not caught by setting on dolphins.[532]

285. Mexico must, therefore, prove that the opportunity under U.S. law to label tuna product as "dolphin safe" if certain conditions are met is not immediately and unconditionally accorded to Mexican products. This, Mexico fails to do. In fact, the amended measure provides the *same* opportunity for all tuna products to be labeled "dolphin safe." The fact that some Members elect to take advantage of that opportunity, while others do not, does not amount to discrimination, as the original panel correctly found.

286. Mexico has not provided any reason that the findings of either of the two panels do not control the result here. And indeed, Mexico could not do so. The fact is that the original panel was entirely correct when it determined that any discrepancy in access to the label between Members is due to the different choices Members have made, rather than the requirements of the challenged measure.[533] The eligibility condition regarding setting on dolphins does not "discriminate[] with respect to the origin of the products."[534]

287. The facts here are in contrast to the ones in *EC – Seal Products* where the Appellate Body recently found a breach of Article I:1. There, the market access advantage was subject to eligibility conditions related to immutable characteristics (such as the racial/cultural identity of the seal hunters)[535] such that while virtually all of the products of Greenland were likely to qualify for access under the measure at issue, the vast majority of the products of Canada and Norway were not.[536]

288. But here, the conditions of eligibility relate to fishing methods. And there is no one way to fish for tuna.[537] Fishermen have a choice about how they fish. By no means is setting on dolphins *required* inside (or outside) the ETP to catch tuna. Indeed, even in the ETP, only 40

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[532] *See supra*, sec. II.C.2.i.

[533] *US – Tuna II (Mexico) (Panel)*, para. 7.334.

[534] *US – Poultry (China) (Panel)*, para. 7.437; *see also Canada – Autos (Panel)*, para. 10.30 (noting that the test is "whether [the] conditions amounts to discrimination between like products of different origins").

[535] *EC – Seal Products (Panel)*, para. 7.20 (noting that "to qualify for the indigenous communities (IC) exception (and thus gain market access to the EU), seal products must originate from seal hunts that satisfy the following three conditions: 1) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region; 2) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions; and 3) seal hunts which contribute to the subsistence of the community").

[536] *EC – Seal Products (Panel)*, paras. 7.160-61, n.214 (noting that 90 percent of the Greenland population is Inuit).

[537] *See, e.g.*, William Jacobson Witness Statement, Appendix II (listing various methods for fishing for tuna) (Exh. US-4).

percent of the sets by large purse seine vessels are sets on dolphins.[538] The eligibility conditions – and therefore *the opportunity* for the label – *are the same for everyone*.

289. The flaws in Mexico's argument can be easily shown with a simple hypothetical. As noted above, tuna product may not be labeled as "dolphin safe" where a dolphin was killed or seriously injured in the production of that tuna product. However, suppose a Member's vessels found it economically advantageous to fish for tuna by intentionally killing all dolphins captured in the purse seine nets. The tuna products produced by that Member would not, obviously, be eligible for the dolphin safe label. But under Mexico's theory, the measure would be inconsistent with Article I:1 if at least one other Member's vessels did not intentionally kill dolphins (and thereby qualify for the label). In Mexico's view, the United States would have to either declare that the intentional killing of dolphins is "dolphin safe" or eliminate the program entirely.[539] The (presumably) undisputed fact that intentionally killing dolphins is not safe for dolphins, and thus the correctness of the information on the label, *is entirely irrelevant* to whether the measure is inconsistent with Article I:1 in Mexico's view. Such an extreme approach is simply unsupportable.

290. Mexico's Article I:1 claim fails.

D. Mexico Fails To Establish that the Amended Dolphin Safe Labeling Measure Is Inconsistent with Article III:4 of the GATT 1994

291. Mexico claims that the amended dolphin safe labeling measure is inconsistent with Article III:4 because it denies eligibility for the label to tuna products containing tuna caught by setting on dolphins while tuna products containing tuna caught via other fishing methods is potentially eligible for the label.[540] As is the case for its Article I:1 claim, Mexico makes no claim here as to any other requirements of the amended measure, including those related to tracking and observers.[541]

292. Article III:4 of the GATT 1994 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are

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[538] IATTC, EPO Data Set 2009-2013 (Exh. US-26).

[539] Mexico's First Written 21.5 Submission, para. 263 ("There is no justification for the different treatment. In the circumstances of this dispute, all tuna fishing methods should be either disqualified or qualified.").

[540] Mexico's First Written 21.5 Submission, paras. 329-330. As this is a national treatment claim, the only fishing methods that would be relevant are those actually used to produce U.S. tuna product.

[541] *See also US – Tuna II (Mexico) (Panel)*, paras. 7.255, 7.280.

based exclusively on the economic operation of the means of transport and not on the nationality of the product.

293. Article III:4 therefore contains three elements: 1) whether the measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase or use of goods; 2) whether the products at issue are like; and 3) whether imported products are accorded less favorable treatment than that accorded to like domestic products.[542]

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

1. Mexico Fails To Prove that the Amended Dolphin Safe Labeling Measure Provides Less Favorable Treatment to Mexican Tuna Products

295. Mexico fails to prove that the amended measure provides less favorable treatment to Mexican tuna products. The Article III:4 non-discrimination obligation is "concerned, fundamentally, with prohibiting discriminatory measures."[543] In that light, it requires "effective equality of opportunities for imported products to compete with like domestic products."[544] Thus Mexico has to prove that the U.S. measure has a "detrimental impact on the conditions of competition" for its products, which requires a "genuine relationship between the measure at issue and the adverse impact on competitive opportunities for imported products."[545]

296. Mexico fails to meet this standard.

297. First, Mexico fails to establish the threshold element that the challenged measure accords different treatment to U.S. and Mexican tuna products.[546] As discussed above, the measure sets the *same* eligibility requirements for all tuna products sold in the United States – no tuna may be caught by setting on dolphins and no tuna may be caught where a dolphin was killed or seriously injured. Those requirements apply to *all* tuna product.[547] The requirements do not differ based

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[542] *Korea – Various Measures on Beef (AB)*, para. 133.

[543] *EC – Seal Products (AB)*, para. 5.82.

[544] *EC – Seal Products (AB)*, para. 5.101.

[545] *EC – Seal Products (AB)*, para. 5.101; *see also id.*, para. 5.336 (In applying the Article XX chapeau, the Appellate Body considered the European Union's burden to show that there was not a "genuine relationship" between the measure and the exclusivity of the IC exception. The Appellate Body stated: "We consider that, if the current *de facto* exclusivity of the IC exception could be attributed *entirely* to private choice, there would be no 'genuine relationship' between this exclusivity and the EU Seal Regime.").

[546] *Korea – Various Measures on Beef (AB)*, paras. 143-44 (finding that the measures at issue accorded different treatment to imported and like domestic products, before proceeding to consider whether the different treatment constituted less favorable treatment).

[547] *See also US – Tuna II (Mexico) (Panel)*, para. 7.280 ("As we understand it, therefore, *Mexico does not challenge any differences in treatment* arising from different regulatory categories for tuna caught in different

on the nationality of the vessel or processor, the fishery where the tuna was caught, or the fishing gear (or method) used to catch the tuna.[548]

298. Second, Mexico completely ignores the original panel's well-reasoned discrimination analysis, which Mexico apparently considers to be entirely irrelevant to the analysis of its Article III:4 claim. Mexico is incorrect.

299. In conducting its discrimination analysis, the original panel noted, among other things, that:

- "[T]o the extent that the requirement of not setting on dolphins is based on a fishing method that may be used by vessels of *any nationality* operating where this method can be practiced, tuna of any nationality, including US and Mexican, as well as others, could potentially meet (or not meet) the requirements for dolphin-safe labelling."[549]

- The design and structure of the requirement to not set on dolphins "does not suggest that this requirement in itself, places Mexican tuna products at a disadvantage as compared to US and other imported tuna products."[550]

- "[T]he United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins," and "[b]oth of these fleets had therefore to adapt their fishing methods in order to catch tuna eligible for the US dolphin-safe label."[551]

- The original panel was "not persuaded that any current discrepancy in their relative situations is a result of the measures rather than the result of their own choices."[552]

- "The fact that the Mexican tuna fleet fishes in the ETP by setting on dolphins while the US fleet does not, in itself does not imply that tuna processors of Mexican and US origin are necessarily similarly affected, as Mexico argues, in such a manner that the relative situation of US and Mexican tuna *products* on the

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fishing zones. Rather, Mexico's discrimination claim is based on the requirement of 'no setting on dolphins' that conditions access to the US dolphin-safe label, wherever the fish is caught, and its implications in practice for Mexican tuna products.") (emphasis added) (citing Mexico's Answer to Original Panel Question 145, para. 124).

[548] *US – Tuna II (Mexico) (Panel)*, para. 7.334 (noting that the panel is "not persuaded that any current discrepancy in their relative situations is a result of the measures rather than the result of their own choices.") (citing *Korea – Various Measures on Beef (AB)*, para. 149).

[549] *US – Tuna II (Mexico) (Panel)*, para. 7.309.

[550] *US – Tuna II (Mexico) (Panel)*, para. 7.311.

[551] *US – Tuna II (Mexico) (Panel)*, para. 7.324.

[552] *US – Tuna II (Mexico) (Panel)*, para. 7.334.

> US market is affected. We now consider the situation of Mexican tuna products on the US market."[553]
>
> - "To the extent that [U.S. tuna processors] would maintain their practices on the basis of their perception of consumer preferences, independently of any change in the US standard, the causal relationship between the US measures and the refusal of processors to purchase tuna caught by setting on dolphins is unclear. Indeed, these elements suggest that there is only a marginal relationship between the measures themselves and the practices of tuna processors, and that what these companies consider to be the determining factor in their decision is an absence of setting on dolphins, rather than compliance with the terms of the US measures."[554]
>
> - The "particular adverse impact felt by Mexican tuna products on the US market" is not a consequence of the measure itself putting Mexican producers at a disadvantage vis-à-vis the producers of the United States, Thailand, the Philippines, etc., but, rather, of the "fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices" of the different tuna producers.[555]

300. Mexico does not address any one of these findings, relying simply on the argument that every complainant whose producers elect not to satisfy another Member's requirement has a cognizable discrimination claim against that Member.

301. Even if Mexico did attempt to prove that the distinction that the U.S. measure draws between setting on dolphins and other fishing methods is unfounded, such an attempt would surely fail. As discussed above,[556] Mexico puts forward no evidence that setting on dolphins could ever be considered "dolphin-safe." Indeed, the Appellate Body has already recognized that "setting on dolphins is *particularly* harmful to dolphins," a finding that Mexico studiously avoids.[557] As such, it is not surprising that Mexico fails to prove that tuna caught through fishing methods that are eligible for the label "have adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing method of setting on dolphins in an AIDCP-compliant manner."[558]

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[553] *US – Tuna II (Mexico) (Panel)*, paras. 7.348-49.

[554] *US – Tuna II (Mexico) (Panel)*, paras. 7.363-64.

[555] *US – Tuna II (Mexico) (Panel)*, para. 7.378.

[556] *See supra*, sec. II.C.1.b.

[557] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added).

[558] Mexico's First Written 21.5 Submission, para. 248.

2. Mexico's Attempt To Eliminate Any Examination of the Basis on Which the Member Is Regulating Must Fail

302. Mexico's approach may serve Mexico's offensive interests in this dispute, but, if accepted, would greatly undermine a Member's ability to regulate in the public interest.

303. Under Mexico's approach, the *sole* relevant consideration is the effect of the measure – the amended dolphin safe labeling measure provides less favorable treatment simply based on the following points:

- the "dolphin-safe" label constitutes an "advantage" on the U.S. market;
- most Mexican tuna product is ineligible for the label because it contains tuna that was caught by setting on dolphins; and
- most U.S. tuna product is eligible for the label because it contains tuna that was not caught by setting on dolphins.[559]

304. In other words, a complainant succeeds on a discrimination claim simply on the grounds that most of the respondent's producers elect to meet a standard and most of the complainant's producers elect not to meet it. According to Mexico, no other analysis is warranted. A responding Member is simply not afforded the opportunity to explain, nor would a panel have the ability to examine, the underlying rationale and operation of the standard in the discrimination analysis. The basis of the requirements – indeed, *the accuracy of the label* – are wholly immaterial to the national treatment analysis. The consequences of such an approach cannot be overstated. Many legitimate measures would be vulnerable to attack where they had not been before.

305. For example, many Members determine the conditions under which a food product can be labeled as "organic" when sold at retail. Such measures typically set out standards for the type and amount of chemicals and other substances that can be present for the product to be so labeled. Products that qualify for the label can often demand a higher price at retail. Applying Mexico's approach, even where the requirements have a strong scientific basis and do not single out any particular Member, a complainant would merely need to prove that the domestically produced food product (say, strawberries) qualifies for the organic label (and thus can be sold at a premium price), while the majority of the complainant's strawberries do not because its producers elected to use pesticides, rather than pursue an organic farming regime. The legitimacy of the responding Member's desire to provide its citizens with information about the food products they purchase and the fact that it would *actually be incorrect* to allow the labeling of complainant's strawberries as "organic" *is irrelevant* to the Article III:4 analysis in Mexico's view.

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[559] *See* Mexico's First Written 21.5 submission, para. 329 (citing *US – Tuna II (Mexico) (AB)*, paras. 234-235).

306. Similarly, under Mexico's approach, a measure found in breach of Article III:4 at one point in time would be consistent with Article III:4 at a later point in time (perhaps within a few months), if the producers in the complaining party chose to change their production methods. In the hypothetical, if the complaining Member itself adopted an "organic" labeling measure and its strawberry producers decided to increase their production of organic strawberries to take advantage of the domestic law, that change would mean the responding Member's measure was suddenly consistent with Article III:4, even though the responding Member's measure had not changed nor had its own producers changed their practices. But then if exporters in *another* Member started exporting "conventional" strawberries (*i.e.*, ones that did not meet the requirements to be labeled "organic"), the responding Member's measure would once again suddenly become inconsistent with Article III:4, again without any change to the measure or the responding Members' own producers' practices.

307. But this approach ignores the realities of international trade. Different producers in different Members alter their production for any number of reasons. These normal variations in trade should not be enough in themselves to cause a Member's measure to switch from being consistent to inconsistent with Article III:4 on a fluctuating basis with the Member unable to control whether its measure is in breach.

308. Members want to abide by their WTO obligations. Mexico's approach deprives them of that ability. It is not an approach that was ever negotiated among Members nor was it ever agreed to by Members.

309. What Mexico's approach suggests, therefore, is that a Member must, prior to applying a measure that sets legitimate standards, survey all current and potential trading partners of products affected by the measure to determine whether the affected products of those countries either meet that standard (or whether its producers are willing to adapt to the new standard).[560] Where a particular country's products do not meet that standard (and that country's producers are not willing to adapt), the Member must *lower* its standards to avoid breaching Article III:4. Such a "least common denominator" approach greatly undermines a Member's ability to regulate in the public interest generally.[561] Indeed, it hardly seems possible that a Member could set *any*

[560] *See US – Tuna II (Mexico) (Panel)*, paras. 7.324-7.331 (noting that at the time the United States prohibited tuna products from carrying the "dolphin-safe" label where that tuna was caught through the intentional encirclement of dolphins, both the U.S. and Mexican fleets engaged in this fishing practice. However, the U.S. fleet adapted to the new standard and ceased its intentional encirclement of dolphins while Mexico continued the fishing practice.).

[561] This would, of course, be particularly problematic where the Member pursues legitimate governmental objectives *not* listed in Article XX of the GATT 1994, such as ensuring the quality of its exports, an objective explicitly affirmed in the preamble to the TBT Agreement, or in the case of an organics regime, which typically is not an SPS measure but rather provides consumer information. *See, e.g.*, Canada's Revised TBT Notification, G/TBT/N/CAN/177/Rev.1 (Jan. 15, 2007); Canada's Revised TBT Notification, G/TBT/N/CAN/177/Rev.2 (March 2, 2009) (Exh. US-78) (stating that the objective of the Canadian organics measure is the "prevention of deceptive and misleading labeling practices"); *see also* "Members TBT Notifications of Various Technical Regulations" (Exh. US-79) (summarizing 68 different TBT Committee notifications of standards or technical regulations that consumer information; prevent deceptive, misleading, and fraudulent practices; and ensure the compatibility and efficiency of telecommunication goods).

standard consistent with Article III:4, given that there will always be some producers that elect to adapt to the respondent Member's new standard (often domestic producers) and some producers (often foreign ones) that elect not to. Of course, producers have the choice not to meet the new standard, but a Member cannot be said to act inconsistently with Article III:4 simply because a particular Member's producers have made that choice. As we have noted previously, the TBT Agreement, for example, explicitly acknowledges that a Member may implement technical regulations "necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'"[562]

310. The Appellate Body's analysis in *EC – Seal Products* does not suggest a different conclusion. In that dispute, Canada and Norway challenged an EU import ban on seal products that provided for two notable exceptions: seal products produced by qualifying indigenous communities (IC) and products from managed resource management (MRM) hunts were allowed to be sold in the EU.[563] The panel found, and the Appellate Body did not disagree, that these two exceptions were drawn in a way that benefited only EU member States, while the seal products of the two complainants were almost completely excluded from the EU market.[564] Furthermore, in light of the fact that eligibility for the IC exemption depended on immutable characteristics (such as the racial/cultural identity of the seal hunters),[565] the vast majority of complainants' products could *never* qualify for this exception.[566]

311. In sum, there were sufficient facts on the record for the panel and Appellate Body to determine that the challenged measure was *de facto* inconsistent with Article III:4.

312. But those type of facts are not present here. The amended measure has no exceptions – the eligibility requirements apply to all tuna products. And those eligibility requirements relate

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[562] *US – COOL (AB)*, para. 373 (emphasis added); *see also US – Tuna II (Mexico) (AB)*, paras. 315-316.

[563] *EC – Seal Products (AB)*, para. 1.4.

[564] *EC – Seal Products (AB)*, para. 5.329 ("We note, in this respect, the Panel's findings that 'the IC exception is available *de facto* exclusively to Greenland,' and that this outcome is 'directly attributable to the regime itself and not to the actions of the operators in countries like Canada.'") (quoting *EC – Seal Products (Panel)*, paras. 7.317 and 7.318); *EC – Seal Products (Panel)*, para. 7.351 (finding that only EU Members would likely benefit from the MRM exception and other evidence suggested "that the MRM exception was designed with the situation of EU member States in mind").

[565] *EC – Seal Products (Panel)*, para. 7.20 (noting that "to qualify for the indigenous communities (IC) exception (and thus gain market access to the EU), seal products must originate from seal hunts that satisfy the following three conditions: 1) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region; 2) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions; and 3) seal hunts which contribute to the subsistence of the community").

[566] *EC – Seal Products (Panel)*, para. 7.161 ("Relevant data before us also demonstrate that most if not all of Greenlandic seal products are expected to conform to the requirements under the IC exception, as compared to roughly 5% in Canada, where only a small portion of the overall seal harvest is hunted by Inuit communities. Therefore, the share of the total production that would not be eligible to be placed on the market under the IC exception is relatively high (i.e. some 95%) for Canada, whereas most if not all of Greenland's seal products are eligible.").

to fishing methods, which is not an immutable condition. Any Member may produce non-eligible tuna products one year and eligible products the next year, depending on the different choices that its fleet makes year to year. Indeed, at the time of the enactment of the DPCIA, a substantial amount of tuna product produced by the U.S. fleet was not, in fact, eligible for the label, and that portion of production only became eligible after a few years had passed.[567] Finally, there is simply no evidence on the record that the amended measure singles out Mexico and its producers. Setting on dolphins really is dangerous for dolphins. That was (and is) the focus of the concern. *Who* produces the tuna product is entirely irrelevant to the United States.

313. Of course, *EC – Seal Products* was not a labeling case at all – it involved an import ban.[568] As such, neither the panel nor the Appellate Body addressed the *key* question at issue for this Article III:4 claim – whether a labeling regime provides less favorable treatment where the content of the label is entirely correct and there is no evidence that the eligibility requirements were drawn to single out the products of any particular Member. The United States considers the answer to this question to be "no."

314. Mexico's Article III:4 claim fails.

E. The Amended Dolphin Safe Labeling Measure Is Justified Under Article XX of the GATT 1994

315. Even if the amended dolphin safe labeling measure were found to be inconsistent with Article I:1 or III:4 of the GATT 1994, the amended measure is justified under Article XX.[569]

316. Article XX states, in relevant part:

> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any member of measures: . . .
>
> (b) necessary to protect human, animal or plant life or health; . . . [or]

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[567] *US – Tuna II (Mexico) (Panel)*, para. 7.315.

[568] In this regard, we note that the measure at issue in *EC – Seal Products* was not even a technical regulation. *EC – Seal Products (AB)*, para. 5.70. As such, the Appellate Body did not directly address any number of issues relevant to this case, including whether the meaning of less favorable treatment as used in TBT Article 2.1 provides context to the meaning of the same term as used in GATT Article III:4 when the challenged measure is a technical regulation.

[569] The United States considers that an Article XX defense is not needed in this dispute. As discussed above, Mexico fails to prove the amended measure inconsistent with either Article III:4 or I:1.

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

317. The amended measure meets the requirements of both subparagraphs (b) and (g), and is applied consistently with the chapeau of Article XX. We begin by considering the two subparagraphs before examining the amended measure's consistency with the chapeau, in accordance with the Appellate Body's analysis.[570]

1. The Amended Dolphin Safe Labeling Measure Satisfies the Standard of Article XX(b)

318. Whether a measure satisfies the standard of Article XX(b) involves an inquiry into two elements: 1) whether the measure's objective is "to protect human, animal or plant life or health"; and 2) whether the measure is "necessary" to the achievement of its objective.[571]

319. As to the first element, the findings of the original panel, affirmed by the Appellate Body, demonstrate that there is "a sufficient nexus between the measure and the interest protected."[572] It has already been determined that one of the two objectives of the original measure was to "contribut[e] to the protection of dolphins[] by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."[573] The original panel found, and the Appellate Body affirmed, that the original measure "relate[d] to genuine concerns in relation to the protection of the life or health of dolphins,"[574] and was "intended to protect animal life or health or the environment."[575] The original panel found this objective to be "legitimate" for purposes of Article 2.2,[576] a point the Appellate Body affirmed.[577] As the amended measure pursues this same objective,[578] these findings apply equally here.

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[570] *See US – Shrimp (AB)*, paras. 118-19.

[571] *See Brazil – Retreaded Tyres (AB)*, para. 134.

[572] *EC – Seal Products (AB)*, para. 5.169.

[573] *US – Tuna II (Mexico) (AB)*, para. 325 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.425 and 7.401).

[574] *US – Tuna II (Mexico) (Panel)*, para. 7.438.

[575] *US – Tuna II (Mexico) (AB)*, para. 303 (citing *US – Tuna II (Panel)*, para. 7.437); *see also US – Tuna II (Mexico) (Panel)*, para. 7.442 ("As established above, the US dolphin-safe provisions aim at protecting dolphins.").

[576] *US – Tuna II (Mexico) (Panel)*, para. 7.440 ("Moreover, nothing prevents Members from using the incentives created by consumer preferences to encourage or discourage particular behaviours that may have an impact on the protection of animal life or health. Hence, the Panel considers that regulating the information that appears on a label to ensure that consumers may safely exercise their preference is a legitimate mechanism to ensure this purpose. Consequently, we find the objective of contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing methods that adversely affect dolphins *to be legitimate*.") (emphasis added).

[577] *US – Tuna II (Mexico) (AB)*, para. 342 ("[W]e reject Mexico's claim that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective . . .").

320. The amended measure is also "necessary" to the achievement of its objective for purposes of Article XX(b). As the Appellate Body has explained:

> [A] necessity analysis involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken.[579]

The amended measure easily satisfies such an analysis.

321. First, it is hardly debatable that the protection of dolphins is an important objective to the United States. As the original panel found, U.S. legislative findings "reveal a *preoccupation* . . . with the protection of dolphins and other marine mammals."[580] In hearings on the International Dolphin Conservation Program Act, which implemented the Panama Declaration, Senator Barbara Boxer testified:

> In 1990, the American people spoke. They wanted to end the deaths of tens of thousands of dolphins every year associated with tuna fishing and called for an end to tuna caught by chasing and capturing dolphins. . . . You can't tell me that the American people, and the millions of school children who pressed for an end to the harassment and injury and death of dolphins, will stand by and let us call [setting on dolphins] dolphin safe.[581]

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[578] *See supra*, sec. II.A.2.

[579] *EC – Seal Products (AB)*, para. 5.169 (citing *Korea – Various Measures on Beef (AB)*, para. 164, 166; *US – Gambling (AB)*, para. 306-07; and *Brazil – Retreaded Tyres (AB)*, para. 182).

[580] *US – Tuna II (Mexico) (Panel)*, para. 7.418 (emphasis added); *see also id.* (The original panel continued by stating that "[t]he US Congress seemed concerned in particular about the harmful effects suffered by these species arising from two sources: tuna fishing operations in the ETP, on one hand; and driftnet fishing in the high seas worldwide, on the other hand.").

[581] *See* International Dolphin Conservation Program Act, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess. (April 30, 1996) (Statement of Senator Barbara Boxer) (Exh. US-80); *see also* 149 Cong. Rec. S.203-01, The Truth in Tuna Labeling Act of 2003 (Exh. US-80), where Senator Hollings stated:

> The "dolphin safe" label came about as an entirely voluntary consumer label. It was created in reaction to *public outrage* about fishing methods specific to the eastern tropical Pacific Ocean, ETP, where dolphins that swim with schools of yellowfin tuna were intentionally encircled by purse seine vessels and killed in fishing operations. Hundreds of thousands of dolphins died as a result of this practice over the years. *A massive consumer boycott of tuna was launched.* The U.S. tuna industry stepped up to the plate and voluntarily committed to abandon this "encirclement practice." This commitment is what the 1990 dolphin safe labeling provision recognized.

In any event, "the preservation of animal and plant life and health, which constitutes an essential part of the protection of the environment, is an important value, recognized in the WTO Agreement."[582]

322. Second, as both the original panel and Appellate Body have confirmed, the original measure contributed to its objective. As such, it is clear that the amended measure does also. Indeed, the amended measure actually contributes even more to the objective, given the new requirement that no dolphin has been killed or seriously injured for tuna products containing tuna caught outside the ETP to be labeled dolphin safe.[583] As the Appellate Body has recently clarified, there is no "generally applicable pre-determined threshold" that measures must meet to be determined "necessary."[584] In any event, the amended measure clearly contributes to its objective at a very high level.

323. Third, in analyzing the trade-restrictiveness of the measure, the Appellate Body has inquired whether a reasonably available, WTO-consistent measure exists.[585] While it is the complainant's responsibility to identify such an alternative measure,[586] Mexico cannot do so. Indeed, the Appellate Body has already found that the alternative measure Mexico identified for purposes of TBT Article 2.2 did not prove the original measure "more trade restrictive than necessary"[587] This is powerful evidence that Mexico will be unable identify a suitable WTO-consistent alternative for purposes of Article XX(b).[588]

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[582] *Brazil – Retreaded Tyres (Panel)*, para. 7.112; *see also Brazil – Retreaded Tyres (AB)*, para. 179 ("The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered – correctly, in our view – important.").

[583] In the ETP, where the original measure imposed the two substantive requirements discussed above, the Appellate Body concluded that the original measure "*fully* addresses the adverse effects on dolphins." *See US – Tuna II (Mexico) (AB)*, para. 297; *see also id.*, para. 327 ("Similarly, regarding the question of the degree to which the measure at issue contributes to the United States' dolphin protection objective, the Panel found that the US 'dolphin-safe' labelling provisions are capable of protecting dolphins by ensuring that the US market is not used to encourage fishing practices that may kill or seriously injure dolphins, only within the ETP."); *id.*, para. 330 (finding that the AIDCP dolphin safe label would not "achieve the United States' objectives *to the same extent* as the existing US dolphin-safe labelling provisions") (emphasis added).

[584] *See EC – Seal Products (AB)*, para. 5.216; *see also US – Tuna II (Mexico) (AB)*, para. 315 (concluding that a challenged measure does not have to achieve its objective to the fullest extent possible; rather, Members have discretion to choose the level at which they want the objective to be fulfilled); *EC – Asbestos (AB)*, para. 168 ("[I]t is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation."); *EC – Seal Products (AB)*, para. 5.273.

[585] *See EC – Seal Products (AB)*, para. 5.214 (citing *US – Gambling (AB)*, para. 307; *Korea – Various Measures on Beef (AB)*, para. 166).

[586] *See, e.g., EC – Seal Products (AB)*, para. 5.169.

[587] *US – Tuna II (Mexico) (AB)*, para. 330 (finding that Mexico's TBT Article 2.2 claim failed as Mexico's proposed alternative "would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue …").

[588] *See EC – Seal Products (AB)*, paras. 5.260-80 (analyzing complainants' TBT Article 2.2 comparison in determining that the challenged EU measure was "necessary" for purposes of GATT Article XX(a)).

324. The amended measure satisfies Article XX(b).

2. The Amended Dolphin Safe Labeling Measure Satisfies the Standard of Article XX(g)

325. Whether a measure satisfies the standard of Article XX(g) involves an inquiry into three elements: 1) whether an "exhaustible natural resource" is at issue; 2) whether the measure is "relating to the conservation" of that resource; and 3) whether the measure is made effective "in conjunction with restrictions on domestic production or consumption."[589]

326. First, dolphins are a living natural resource and, as such, are finite and exhaustible. Numerous international agreements recognize the exhaustible nature of dolphins and seek to protect them.[590] Indeed, six species of dolphins are listed in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) as threatened with extinction, and all other species of dolphin are listed as species whose trade must be controlled to avoid utilization incompatible with the species' survival.[591]

327. Second, the amended measure is clearly "relating to" the conservation of dolphins. The original panel found, and the Appellate Body affirmed, that one of the original measure's objectives is the "protection" of dolphins.[592] As such, the required "substantial relationship" between the amended measure and its legitimate objective clearly exists.[593] Indeed, the amended measure "fully addresses" the risks caused by the "particularly" harmful practice of setting on dolphins.[594]

328. Third, the amended measure imposes comparable restrictions on domestic and imported products. In fact, the relevant requirements *are the same*:

- *all* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*; and

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[589] *See US – Shrimp (AB)*, paras. 127, 135, 143. The Appellate Body has previously recognized that the "relating to" standard is an easier standard to meet than is the "necessary" one. *US – Gasoline (AB)*, pp. 16-18. Further, as was the case in *US – Shrimp*, there is "a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." *US – Shrimp (AB)*, para. 133.

[590] *See, e.g.*, AIDCP, preamble (Exh. Mex-30).

[591] Convention on International Trade in Endangered Species (CITES), art. II, Appendix II and III, 27 U.S.T. 1087, TIAS 8249, 993 UNTS 243 (1975) (Exh. US-81).

[592] *US – Tuna II (Mexico) (AB)*, para. 242 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.401); *see also supra*, sec. II.A.2.

[593] *See US – Gasoline (AB)*, p. 19,

[594] *US – Tuna II (Mexico) (AB)*, paras. 289, 297; *see also supra*, sec. II.C.1.a.

- *all* tuna product containing tuna caught in a set or gear deployment where a dolphin was killed or seriously injured is ineligible for the label, *regardless of the fishery, gear type, nationality of the vessel, and nationality of the processor*.[595]

329. The amended measure satisfies Article XX(g).

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

330. Whether a measure is applied consistently with the Article XX chapeau involves an inquiry into three elements: 1) whether the measure is applied in a manner that constitutes "discrimination" between countries where the same conditions prevail; 2) if so, whether that discrimination is "arbitrary or unjustifiable," and 3) whether the measure is applied in a manner that would constitute a disguised restriction on trade.

331. "Discrimination," for purposes of the chapeau, does not refer to the same standard by which a breach of any substantive rule of the GATT 1994 has been determined.[596] Rather, "discrimination" under the chapeau occurs when "countries in which the same conditions prevail are treated differently."[597] Only where the panel finds such "different regulatory treatment" exists, should the panel analyze "whether the resulting discrimination is 'arbitrary or unjustifiable.'"[598]

332. But here the eligibility conditions are the same for everyone – the amended measure *is neutral* as to nationality. Any tuna product containing tuna caught by setting on dolphins is ineligible for the label – the nationality of the vessel (or processor) *is irrelevant*.

333. Rather, whether tuna product is eligible for the dolphin safe label depends on the choices made by vessel owners, operators, and captains.[599] In the ETP, vessels of some Members catch tuna by setting on dolphins;[600] vessels of other Members catch tuna by not setting on dolphins;[601] most Members' fleets mix setting on dolphins and other types of sets.[602] Regardless, the

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[595] *See supra*, secs. II.A.3.a.i, II.A.3.b.i, III.B.3. As also noted *supra*, all tuna caught in large-scale driftnets on the high seas is ineligible for the label, regardless of the fishery and nationality of the vessel.

[596] *EC – Seal Products AB)*, para. 5.298 (quoting *US – Gasoline (AB)*, p. 23).

[597] *See EC – Seal Products (AB)*, para 5.303 (citing *US – Shrimp (AB)*, para. 165).

[598] *EC – Seal Products (AB)*, para. 5.303.

[599] *See US – Tuna II (Mexico) (Panel)*, para. 7.333 ("[T]he choice facing the fleets of the United States, of Mexico, and other foreign origin was the same, and that US and other fleets operating in the ETP could equally have chosen to continue to set on dolphins in the ETP under the conditions set out in the AIDCP . . . . In that respect, the situation arising from the measure was the same for both fleets.").

[600] *US – Tuna II (Mexico) (Panel)*, para. 7.307; IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[601] *See US – Tuna II (Mexico) (Panel)*, para. 7.330 ("Ecuador decided to fish for tuna in the ETP using techniques other than setting on dolphins"); IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[602] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26).

eligibility conditions are the same for everyone. Moreover, there is no evidence to suggest that this particular eligibility requirement singles out Mexico. As the original panel found, at the time of the DPCIA enactment, most U.S. vessels, as well as other large vessels in the ETP, fished by setting on dolphins.[603] The fact that, over the past 20 years, vessels flagged to some Members have adopted methods of fishing that are less harmful to dolphins (while others have not) does not mean the U.S. measure "discriminat[es] between countries."

334. "Discrimination," for purposes of the chapeau, does not exist here.

335. In any event, the eligibility conditions regarding setting on dolphins are neither arbitrary nor unjustified. As the Appellate Body has recently emphasized, "[o]ne of the most important factors" in making this assessment is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[604] This is clearly the case here.

336. The relevant objective for both subparagraphs (b) and (g) is to "contribut[e] to the protection of dolphins[] by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."[605] It is without question that the two relevant eligibility conditions are rationally related to this policy objective: 1) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught; and 2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip.[606]

337. It could hardly be questioned whether the first eligibility condition is rationally related to the objective, and we do not read Mexico's First Written Submission to the contrary.

338. As to the second eligibility condition, the United States has already detailed the substantial harms that setting on dolphins causes dolphins.[607] Indeed, "setting on dolphins is *particularly* harmful to dolphins,"[608] as it results in observed and unobserved harms,[609] even when done in an AIDCP-consistent manner. In fact, the original panel determined that the AIDCP standard "fails to address unobserved adverse effects derived from repeated chasing,

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[603] *US – Tuna II (Mexico) (Panel)*, paras. 7.307, 7.315, 7.320 ("It is undisputed that, at the time of enactment of the measures, there were a number of vessels of different fleets fishing in the ETP by setting on dolphins, including a number of US and Mexican vessels").

[604] *EC – Seal Products (AB)*, para. 5.306.

[605] *US – Tuna II (Mexico) (AB)*, para. 325 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.425 and 7.401).

[606] *See supra*, sec. II.A.3.

[607] *See supra*, sec. II.C.1.b.

[608] *US – Tuna II (Mexico) (AB)*, para. 289 (referring to *US – Tuna II (Mexico) (Panel)*, para. 7.438) (emphasis added).

[609] *US – Tuna II (Mexico) (Panel)*, para. 7.737.

encircling and deploying purse seine nets on dolphins . . ."[610] By making tuna product containing tuna caught by setting on dolphins ineligible for the dolphin safe label, the amended measure seeks to "minimize observed and unobserved mortality and injury to dolphins."[611]

339. The other fishing methods that produce tuna for the U.S. tuna product market do not cause the same level of harm to dolphins that setting on dolphins does. As discussed above, these other fishing methods cause no unobserved harms, and, at most, only a fraction of the observed harms that occurs due to setting on the dolphins in the ETP (and even less than what is allowed under the AIDCP).[612] As to the fishing methods that only produce *de minimis* amounts of tuna for the U.S. tuna product market, the evidence indicates that these fishing methods, again, cause no unobserved harms, and do not cause the same level of observed harms to dolphins that occurs due to setting on dolphins in the ETP (and even less than what is allowed under the AIDCP).[613]

340. Consequently, the eligibility condition of not setting on dolphins is rationally related to the objective of the measure.[614] And, again, these conclusions make perfect sense – *all* of the potentially eligible fishing methods capture dolphins only by accident, while *the whole point* of setting on dolphins is to capture them in a purse seine net. Setting on dolphins is the *only* fishing method that *targets* dolphins.

341. As the United States has demonstrated, the science ***supports*** the eligibility conditions of the amended measure, and ***directly contradicts*** Mexico's approach.[615] The eligibility conditions are rationally related to the objective of the measure.

342. Nor is the amended measure applied so as to constitute a disguised restriction on trade. As noted, the measure was adopted at a time when it affected the U.S. industry – it was not a

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[610] *US – Tuna II (Mexico) (Panel)*, para. 7.738 (noting that these unobserved adverse effects include: "separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase").

[611] *US – Tuna II (Mexico) (Panel)*, para. 7.735; *supra*, sec. II.A.1.

[612] *See supra*, sec. II.C.2.

[613] *See supra*, sec. II.C.2.

[614] We would further note that whether the DPCIA allows NOAA to revisit the question of whether setting on dolphins is harmful to dolphins, should certain ETP populations recover, is irrelevant the question of whether the eligibility conditions are rationally related to this objective. *See* Mexico's First Written 21.5 Submission, para. 255. As the original panel found, the purpose of the U.S. measure is to protect dolphins from the direct and indirect harms of setting on dolphins, which are intrinsic to this method of fishing, and only secondarily to conserve the dolphin populations in the ETP. *See US – Tuna II (Mexico) (Panel)*, paras. 8.485-86, 7.735. As such, even if the dolphin populations *were* recovering, the amended measure would be no less linked to this objective. *See supra*, sec. III.B.4.d.i; *see also id.*, para. 7.735 ("[T]he US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent upon dolphin populations being depleted."). Additionally, and as noted above, Mexico has not demonstrated that those particular dolphin populations are recovering. *See supra*, sec. II.C.1.b.iv.

[615] *See supra*, sec. II.C.

measure that would protect U.S. production. And the dolphin safe label is available regardless of nationality of the fishing vessel or the origin of the product.

343. The amended measure is justified under Article XX of the GATT 1994.

IV. CONCLUSION

For the above reasons, we respectfully request the Panel to deny Mexico's claims in their entirety.