



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

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

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

AB-2017-9

Report of the Appellate Body

Table of Contents

1 INTRODUCTION	11
2 ARGUMENTS OF THE PARTICIPANTS	18
3 ARGUMENTS OF THE THIRD PARTICIPANTS.....	18
4 ISSUES RAISED IN THIS APPEAL	18
5 BACKGROUND AND MEASURE AT ISSUE	18
5.1 US participation in multilateral initiatives.....	19
5.2 US domestic dolphin-safe labelling regime: the measure at issue and its evolution over the course of the <i>Tuna II</i> dispute	20
6 ANALYSIS OF THE APPELLATE BODY	25
6.1 Article 2.1 of the TBT Agreement.....	25
6.1.1 Introduction.....	25
6.1.2 "Treatment no less favourable" under Article 2.1 of the TBT Agreement	27
6.1.2.1 Whether the Panels erred in their articulation of the legal standard	27
6.1.2.2 Whether the Panels erred in rejecting Mexico's argument concerning the relevance of the sustainability of tuna stock and the marine ecosystem	29
6.1.3 What the legal standard under Article 2.1 of the TBT Agreement entails in this dispute.....	32
6.1.3.1 Whether the Panels erred in failing to consider the nexus between the regulatory distinctions of the measure and its objectives	33
6.1.3.1.1 Whether the Panels' calibration analysis took into account the accuracy of the dolphin-safe label in light of the objectives of the 2016 Tuna Measure	33
6.1.3.1.2 Whether the risks of label inaccuracy form part of the risks to which the 2016 Tuna Measure must be calibrated.....	37
6.1.3.1.3 Whether the Panels erred in referring to "margin of error" in their calibration analysis.....	39
6.1.3.2 Whether the Panels erred by limiting aspects of their calibration analysis to a comparison of the risk profiles of different fishing methods	41
6.1.3.3 Conclusion	47
6.1.4 The Panels' assessment of risk profiles	47
6.1.4.1 The Panels' findings.....	48
6.1.4.2 Whether the Panels erred by failing to assess the risk profiles of individual fisheries.....	51
6.1.4.3 Whether the Panels erred by using the risk profile of setting on dolphins in the ETP as a benchmark	53
6.1.4.4 Whether the Panels erred by relying primarily on per set data and excluding other relevant factors	58
6.1.4.4.1 Risks to dolphin populations	60
6.1.4.4.2 Absolute levels of adverse effects.....	63
6.1.4.4.3 Insufficient regulatory oversight.....	66
6.1.4.5 Conclusion	67
6.1.5 The Panels' assessment of whether the 2016 Tuna Measure is calibrated to the risks to dolphins.....	67
6.1.5.1 Introduction	67
6.1.5.2 Eligibility criteria	69

6.1.5.3 Certification requirements	72
6.1.5.4 Tracking and verification requirements	81
6.1.5.4.1 Summary of the findings from the first compliance proceedings regarding tracking and verification requirements under the 2013 Tuna Measure	81
6.1.5.4.2 Summary of the Panels' findings regarding tracking and verification requirements under the 2016 Tuna Measure	83
6.1.5.4.3 Legal analysis	85
6.1.5.4.4 Conclusion for tracking and verification requirements	91
6.1.5.5 The 2016 Tuna Measure "as a whole"	91
6.1.6 Conclusion under Article 2.1 of the TBT Agreement	93
6.2 Article XX of the GATT 1994	93
6.2.1 The Panels' findings	93
6.2.2 Whether the Panels erred in finding that the 2016 Tuna Measure complies with the requirements of the <i>chapeau</i> of Article XX of the GATT 1994	94
6.2.3 Conclusion	101
6.3 The Panels' decision to hold a partially open meeting	102
6.3.1 Procedural background	102
6.3.2 Sufficiency of Mexico's Notice of Appeal	103
6.3.3 Whether the Appellate Body should rule on this issue	107
7 FINDINGS AND CONCLUSIONS.....	108
7.1 Whether the Panels erred in their findings under Article 2.1 of the TBT Agreement	108
7.2 Whether the Panels erred in their findings under Article XX of the GATT 1994	110
7.3 The Panels' decision to hold a partially open meeting	111
7.4 Recommendation.....	111

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
2013 Rule	USDOC, NOAA, Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, <i>United States Federal Register</i> , Vol. 78, No. 131 (9 July 2013), pp. 40997-41004
2013 Tuna Measure	DPCIA; <i>United States Code of Federal Regulations</i> , Title 50, Part 216, Subpart H (Dolphin Safe Tuna Labeling), as amended by the 2013 Rule; and the <i>Hogarth</i> ruling
2016 implementing regulations	<i>United States Code of Federal Regulations</i> , Title 50, Part 216, Subpart H (Dolphin Safe Tuna Labeling), as amended by the 2013 Rule and the 2016 Rule
2016 Rule	Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products, <i>United States Federal Register</i> , Vol. 81, No. 56 (23 March 2016)
2016 Tuna Measure	DPCIA; the 2016 implementing regulations; and the <i>Hogarth</i> ruling
AIDCP	Agreement on the International Dolphin Conservation Program
Assistant Administrator	United States Assistant Administrator for Fisheries, NMFS, NOAA, or his/her designee
Captain Training Course	NMFS Tuna Tracking and Verification Program dolphin-safe training course
CC	catch certificate
CDS	catch documentation scheme
CFR	<i>United States Code of Federal Regulations</i>
DML	dolphin mortality limit
DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in <i>United States Code</i> , Title 16, Section 1385
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ETAO	Eastern Tropical Atlantic Ocean
ETP	Eastern Tropical Pacific
FAD	fish aggregating device
FAO	Food and Agricultural Organization of the United Nations
First Compliance Panel Report	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW, Add.1 and Corr.1
GATT 1994	General Agreement on Tariffs and Trade 1994
<i>Hogarth</i> ruling	United States Court of Appeals for the Ninth Circuit, <i>Earth Island Institute v. Hogarth</i> , 494 F.3d 757 (9th Cir. 2007); United States Court of Appeals for the Ninth Circuit, <i>Earth Island Institute v. Hogarth</i> , 494 F.3d 1123 (9th Cir. 2007)
IATTC	Inter-American Tropical Tuna Commission
IDCP	International Dolphin Conservation Program
IDCPA	International Dolphin Conservation Program Act
ISSF	International Seafood Sustainability Foundation
IUU	illegal, unreported, and unregulated
Mexico's panel request	Request for the Establishment of a Panel by Mexico pursuant to Article 21.5 of the DSU, WT/DS381/38
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
Original Panel Report	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R

Abbreviation	Description
Original Tuna Measure	DPCIA; <i>United States Code of Federal Regulations</i> , Title 50, Sections 216.91 and 216.92 (Dolphin Safe Tuna Labeling), as of 13 September 2004; and the <i>Hogarth</i> ruling
Panel Reports	Panel Reports, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS381/RW/USA and Add.1 / <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW2 and Add.1
PBR	Potential Biological Removal
RFMO	Regional Fishery Management Organization
TBT Agreement	Agreement on Technical Barriers to Trade
TTF	Tuna Tracking Form
United States' panel request	Request for the Establishment of a Panel by the United States pursuant to Article 21.5 of the DSU, WT/DS381/32
USDOC	United States Department of Commerce
WCPO	Western and Central Pacific Ocean
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit Number	Short Title (if applicable)	Description
<u>Original Panel Record</u>		
Original Panel Exhibit MEX-11	AIDCP	Agreement on the International Dolphin Conservation Program (Annexes I, IV(I)(3)(c), and VII(6))
Original Panel Exhibit MEX-29		United States District Court for the Northern District of California, <i>Earth Island Institute et al. v. Donald Evans et al.</i> , 34 ELR 20069 (N.D. Cal. 2004)
Original Panel Exhibit MEX-30		United States Court of Appeals for the Ninth Circuit, <i>Earth Island Institute et al. v. William T. Hogarth</i> , 484 F.3d 1123 (9th Cir. 2007)
Original Panel Exhibit MEX-31		United States Court of Appeals for the Ninth Circuit, <i>Earth Island Institute et al. v. William T. Hogarth</i> , 494 F.3d 757 (9th Cir. 2007)
Original Panel Exhibit MEX-55		AIDCP, Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001)
Original Panel Exhibit US-5	DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in <i>United States Code</i> , Title 16, Section 1385
Original Panel Exhibit US-6		<i>United States Code of Federal Regulations</i> , Title 50, Sections 216.91 and 216.92
Original Panel Exhibit US-58		<i>United States Code of Federal Regulations</i> , Title 50, Sections 216.91-216.95
<u>First Compliance Panel Record</u>		
First Compliance Panel Exhibit MEX-7	2013 Rule	USDOC, NOAA, Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, <i>United States Federal Register</i> , Vol. 78, No. 131 (9 July 2013), pp. 40997-41004

Exhibit Number	Short Title (if applicable)	Description
First Compliance Panel Exhibit MEX-8	DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in <i>United States Code</i> , Title 16, Section 1385
First Compliance Panel Exhibit MEX-20		<i>United States Code of Federal Regulations</i> , Title 50, Section 216
First Compliance Panel Exhibit MEX-30		AIDCP, as amended October 2009, Article I:8 and Annex II, paras. 1-3
First Compliance Panel Exhibit MEX-36		AIDCP, Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001)
First Compliance Panel Exhibit US-2	2013 implementing regulations	USDOC, NMFS/NOAA, Dolphin Safe Tuna Labeling, <i>United States Code of Federal Regulations</i> , Title 50, Part 216, Subpart H (Sections 216.90-216.95)
First Compliance Panel Exhibit US-113		Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, <i>United States Federal Register</i> , Vol. 79, No. 134 (14 July 2014), pp. 40718-40720
First Compliance Panel Exhibit US-114		NMFS, <i>National Observer Program FY 2012 Annual Report</i> (2013)
Panel Record in these Compliance Proceedings		
Panel Exhibit MEX-1	DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in <i>United States Code</i> , Title 16, Section 1385
Panel Exhibit MEX-2	2016 implementing regulations	USDOC, NMFS/NOAA, Dolphin Safe Tuna Labeling, <i>United States Code of Federal Regulations</i> , Title 50, Part 216, Subpart H, Sections 216.90-216.95
Panel Exhibit MEX-3	<i>Hogarth</i> ruling	United States Court of Appeals for the Ninth Circuit, <i>Earth Island Institute et al. v. William T. Hogarth</i> , 484 F.3d 1123 (9th Cir. 2007) and United States Court of Appeals for the Ninth Circuit, <i>Earth Island Institute et al. v. William T. Hogarth</i> , 494 F.3d 757 (9th Cir. 2007)
Panel Exhibit MEX-8		AIDCP, <i>Report on the International Dolphin Conservation Program</i> , Doc. MOP-28-05, 18 October 2013
Panel Exhibit MEX-15		Food and Agricultural Organization of the United Nations, "Tuna Drifting Gillnet", http://www.fao.org/fishery/fishtech/1011/en , accessed 17 March 2014
Panel Exhibit MEX-18		Natural Resources Defense Council, <i>Net Loss: The Killing of Marine Mammals in Foreign Fisheries</i> (New York, January 2014)
Panel Exhibit MEX-26		Food and Agricultural Organization of the United Nations, "Industrial Tuna Longlining", http://www.fao.org/fishery/fishtech/1010/en , accessed 17 March 2014
Panel Exhibit MEX-37		Food and Agricultural Organization of the United Nations, "Trawl Nets", http://www.fao.org/fishery/geartype/103/en , accessed 23 March 2014
Panel Exhibit MEX-38		Food and Agricultural Organization of the United Nations, "Tuna Handlining", http://www.fao.org/fishery/fishtech/1012/en , accessed 5 September 2016
Panel Exhibit MEX-47		Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products, <i>United States Federal Register</i> , Vol. 81, No. 56 (23 March 2016), pp. 15444-15449
Panel Exhibit MEX-104		National Oceanic and Atmospheric Administration, 2015 NOAA Marine Debris Program Report, <i>Impact of "Ghost Fishing" via Derelict Fishing Gear</i> (Charleston, March 2015)

Exhibit Number	Short Title (if applicable)	Description
Panel Exhibit MEX-127		ISSF, <i>RFMO Catch Documentation Schemes: A Summary</i> (Washington, DC, 14 September 2016)
Panel Exhibit USA-1	DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in <i>United States Code</i> , Title 16, Section 1385
Panel Exhibit USA-2	2016 implementing regulations	USDOC, NMFS/NOAA, Dolphin Safe Tuna Labeling, <i>United States Code of Federal Regulations</i> , Title 50, Part 216, Subpart H, Sections 216.90-216.95
Panel Exhibit USA-3		Taking and Related Acts Incidental to Commercial Fishing Operations by Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean, <i>United States Code of Federal Regulations</i> , Title 50, Section 216.24 (2016)
Panel Exhibit USA-4	NOAA Form 370	NOAA, Form 370: Fisheries Certificate of Origin (2016)
Panel Exhibit USA-12		T. Gerrodette, "The Tuna-Dolphin Issue", in Perrin, Wursig, and Thewissen (eds.), <i>Encyclopedia of Marine Mammals</i> , 2nd edn (Elsevier, 2009), pp. 1192-1195
Panel Exhibit USA-15		AIDCP, <i>Report on the International Dolphin Conservation Program</i> , Doc. MOP-32-05, 20 October 2015
Panel Exhibit USA-60		Food and Agriculture Organization of the United Nations, FAO Fisheries and Aquaculture Technical Paper 568, <i>Bycatch and Non-Tuna Catch in the Tropical Purse Seine Fisheries of the World</i> (Rome, 2013)
Panel Exhibit USA-90		International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015)
Panel Exhibit USA-111		Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries
Panel Exhibit USA-166		<i>United States Code</i> , Title 18, Section 545
Panel Exhibit USA-167		<i>United States Code</i> , Title 18, Section 3571
Panel Exhibit USA-169		<i>United States Code</i> , Title 16, Section 3372
Panel Exhibit USA-170		Civil Monetary Penalty Adjustments for Inflation, <i>United States Federal Register</i> , Vol. 81, No. 109 (7 June 2016), pp. 36454-36458
Panel Exhibit USA-171		<i>United States Code</i> , Title 16, Section 3373
Panel Exhibit USA-172		<i>United States Code</i> , Title 16, Section 3374
Panel Exhibit USA-173		<i>United States Code</i> , Title 18, Section 1001
Panel Exhibit USA-174		<i>United States Code</i> , Title 16, Section 1375

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739

Short Title	Full Case Title and Citation
<i>China – HP-SSST (EU)</i>	Appellate Body Report, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/AB/RW and Add.1, adopted 28 May 2018
<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
<i>EU – Fatty Alcohols (Indonesia)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , WT/DS442/AB/R and Add.1, adopted 29 September 2017
<i>EU – PET (Pakistan)</i>	Appellate Body Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/AB/R and Add.1, adopted 28 May 2018
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9

Short Title	Full Case Title and Citation
<i>Indonesia – Iron or Steel Products</i>	Appellate Body Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

Short Title	Full Case Title and Citation
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Tax Incentives</i>	Panel Report, <i>United States – Conditional Tax Incentives for Large Civil Aircraft</i> , WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
<i>US – Tuna II (Mexico)</i> (Article 21.5 – Mexico)	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
<i>US – Tuna II (Mexico)</i> (Article 21.5 – Mexico)	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW, DSR 2015:X, p. 5409 and DSR 2015:XI, p. 5653
<i>US – Tuna II (Mexico)</i> (Article 21.5 – US) / <i>US – Tuna II (Mexico)</i> (Article 21.5 – Mexico II)	Panel Reports, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS381/RW/USA and Add.1 / <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW2 and Add.1, circulated to WTO Members 26 October 2017
<i>US – Tuna II (Mexico)</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS381/ARB, 25 April 2017
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Recourse to Article 21.5 of the DSU by the United States

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

Second Recourse to Article 21.5 of the DSU by Mexico

Mexico, *Appellant*
United States, *Appellee*

Australia, *Third Participant*
Brazil, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
Ecuador, *Third Participant*
European Union, *Third Participant*
Guatemala, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
New Zealand, *Third Participant*
Norway, *Third Participant*

AB-2017-9

Appellate Body Division:

Bhatia, Presiding Member
Graham, Member
Zhao, Member

1 INTRODUCTION

1.1. Mexico appeals certain issues of law and legal interpretations developed by the Panels in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States* and *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*.¹ The Panels were established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to consider the claims by the United States² and Mexico³ concerning the measure taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceedings⁴ and first compliance proceedings⁵ in this dispute.⁶

¹ WT/DS381/RW/USA; WT/DS381/RW2, 26 October 2017. The Panels explained that they decided to issue their findings in a single document, with separate conclusions for each of the two proceedings. We refer to both Reports collectively as the "Panel Reports". (See Panel Reports, para. 7.4)

² Request for the Establishment of a Panel by the United States pursuant to Article 21.5 of the DSU, WT/DS381/32 (United States' panel request).

³ Request for the Establishment of a Panel by Mexico pursuant to Article 21.5 of the DSU, WT/DS381/38 (Mexico's panel request).

⁴ The recommendations and rulings of the DSB resulted from the adoption by the DSB, on 13 June 2012, of the Appellate Body report (WT/DS381/AB/R) and the panel report (WT/DS381/R) in *US – Tuna II (Mexico)*.

⁵ The recommendations and rulings of the DSB resulted from the adoption by the DSB, on 3 December 2015, of the Appellate Body report (WT/DS381/AB/RW) and the panel report (WT/DS381/RW) in *US – Tuna II (Mexico) (Article 21.5 – Mexico)*.

⁶ In this Report, we refer to the panel that considered the original complaint brought by Mexico as the "original panel" and to its report as the "original panel report". We refer to the panel that considered Mexico's

1.2. This dispute concerns the United States' labelling regime for dolphin-safe tuna products. In the original proceedings, Mexico raised claims under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT Agreement) challenging the consistency with these Agreements of certain US measures relating to the importation, marketing, and sale of tuna and tuna products.⁷ Specifically, Mexico challenged: (i) the Dolphin Protection Consumer Information Act of 1990, codified in *United States Code*, Title 16, Section 1385⁸ (DPCIA); (ii) *United States Code of Federal Regulations* (CFR), Title 50, Sections 216.91 and 216.92⁹ (original implementing regulations); and (iii) a ruling by a United States Federal Appeals Court in *Earth Island Institute v. Hogarth*¹⁰ (*Hogarth* ruling).¹¹ The original panel and the Appellate Body referred to these measures, collectively, as the "measure at issue" or the "US dolphin-safe labelling provisions".¹² In these compliance proceedings, we refer to them as the "original Tuna Measure".

1.3. The original Tuna Measure specified the conditions to be fulfilled in order for tuna products sold in the United States to be labelled "dolphin-safe" or to make similar claims on their labels.¹³ The original Tuna Measure thus prohibited the use of the "dolphin-safe" label on a tuna product sold in the US market unless the conditions specified in the measure are met. At the same time, it did not make the use of a dolphin-safe label obligatory for the importation or sale of tuna products in the United States.¹⁴ Nonetheless, the preferences of retailers and consumers are such that the dolphin-safe label has "significant commercial value", and access to that label constitutes an "advantage" on the US market for tuna products.¹⁵

1.4. Mexico alleged that the original Tuna Measure was inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement.¹⁶ The original panel found that: (i) the US "dolphin-safe" labelling provisions constituted a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement¹⁷; (ii) the measure was not inconsistent with Article 2.1 of the TBT Agreement¹⁸; (iii) the measure was inconsistent with Article 2.2 of the TBT Agreement¹⁹; and (iv) the Agreement on the International Dolphin Conservation Program²⁰ (AIDCP) dolphin-safe definition and certification were a relevant international standard within the meaning of Article 2.4 of the TBT Agreement²¹, and the measure was not inconsistent with that provision.²² The original

complaint in the first compliance proceedings as the "first compliance panel" and to its report as the "first compliance panel report".

⁷ In the original proceedings, Mexico clarified that its claims under Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement were made only in relation to tuna products, and not tuna. For that reason, the original panel limited its findings in this respect to tuna products. (Original Panel Report, para. 6.10)

⁸ Original Panel Exhibit US-5.

⁹ Original Panel Exhibit US-6 and US-58.

¹⁰ *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Original Panel Exhibit MEX-31); *Earth Island Institute v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007) (Original Panel Exhibit MEX-30). See *infra*, fn 104.

¹¹ Original Panel Report, para. 2.1.

¹² The original panel and the Appellate Body considered it appropriate to treat these legal instruments as a single measure for the purpose of analysing Mexico's claims and reaching findings. (Original Panel Report, para. 7.26. See also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 2 and 172 and fn 357 thereto)

¹³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 172. The original panel found that the DPCIA defines "tuna product" 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". (Original Panel Report, paras. 2.5 and 7.60 (quoting DPCIA (Original Panel Exhibit US-5), Section 1385(c)(5)) See also Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), fn 101 to para. 6.1)

¹⁴ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 172 and 196-199.

¹⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 233 (referring to Original Panel Report, paras. 7.289-7.291). The factual aspects of the original proceedings are set forth in greater detail in paragraphs 2.1-2.41 of the original panel report, and paragraphs 172-177 of the Appellate Body report in the original proceedings.

¹⁶ Original Panel Report, para. 3.1.

¹⁷ Original Panel Report, paras. 7.62, 7.78, and 7.145. This finding was upheld on appeal. (See Appellate Body Report, *US – Tuna II (Mexico)*, para. 199)

¹⁸ Original Panel Report, paras. 7.374 and 8.1(a).

¹⁹ Original Panel Report, paras. 7.620 and 8.1(b).

²⁰ Original Panel Exhibit MEX-11.

²¹ Original Panel Report, para. 7.707. (Both Mexico and the United States are parties to the AIDCP, an agreement among 14 countries that entered into force in February 1999. (Original Panel Report, para. 2.35) The AIDCP, administered by the Inter-American Tropical Tuna Commission (IATTC), addresses a particular tuna-fishing method (purse seine fishing) in a specific area of the ocean, namely, the Eastern Tropical Pacific (ETP). (Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 6.4))

²² Original Panel Report, paras. 7.740 and 8.1(c).

panel exercised judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.²³

1.5. On appeal, the Appellate Body reversed the original panel's finding under Article 2.1 of the TBT Agreement. The Appellate Body found, instead, that the United States had not demonstrated that the detrimental impact of the measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction. The Appellate Body thus concluded that the original Tuna Measure accorded less favourable treatment to Mexican tuna products than that accorded to like products from the United States and other countries, and it was inconsistent with Article 2.1 of the TBT Agreement.²⁴ Furthermore, the Appellate Body found that the panel had erred in concluding that the original Tuna Measure was more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking into account the risks non-fulfilment would create, and therefore reversed the finding of inconsistency under Article 2.2 of the TBT Agreement.²⁵ The Appellate Body also reversed the original panel's finding that the AIDCP dolphin-safe definition and certification constituted a relevant international standard, but left undisturbed the panel's finding that the original Tuna Measure was not inconsistent with Article 2.4 of the TBT Agreement.²⁶ Finally, the Appellate Body found that the original panel acted inconsistently with Article 11 of the DSU in deciding to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.²⁷ In conclusion, the Appellate Body recommended that the DSB request the United States to bring its measure into conformity with its obligations under the TBT Agreement.²⁸

1.6. On 13 June 2012, the DSB adopted the original panel and Appellate Body reports.²⁹ On 17 September 2012, Mexico and the United States informed the DSB that they had agreed on a reasonable period of time – 13 months from 13 June 2012 – to comply with the recommendations and rulings of the DSB. The reasonable period of time expired on 13 July 2013.³⁰

1.7. On 9 July 2013, the United States published amendments to Sections 216.91 and 216.93 of CFR Title 50³¹ (2013 Rule).³² According to the United States, the 2013 Rule constituted the measure taken to comply with the recommendations and rulings of the DSB pursuant to Article 21.5 of the DSU.³³

1.8. Mexico considered that the United States had not brought its labelling regime into compliance with the recommendations and rulings of the DSB, and that the regime remained inconsistent with its obligations under the covered agreements.³⁴ On 2 August 2013, Mexico and the United States

²³ Original Panel Report, paras. 7.748 and 8.2.

²⁴ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 298-299 and 407(b).

²⁵ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 331 and 407(c).

²⁶ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 401 and 407(f).

²⁷ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 405 and 407(g).

²⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 408.

²⁹ On 2 August 2012, Mexico and the United States informed the DSB that additional time was required to discuss a mutually agreed reasonable period of time for the United States to implement the recommendations and rulings of the DSB. (First Compliance Panel Report, para. 1.12 (referring to Communication from Mexico and the United States concerning Article 21.3(c) of the DSU, WT/DS381/16))

³⁰ First Compliance Panel Report, para. 1.12 (referring to Agreement under Article 21.3(b) of the DSU, WT/DS381/17).

³¹ United States Department of Commerce (USDOC), National Oceanic and Atmospheric Administration (NOAA), Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, *United States Federal Register*, Vol. 78, No. 131 (9 July 2013), pp. 40997-41004 (First Compliance Panel Exhibit MEX-7). Section 216.92 of the original implementing regulations, the DPCIA, and the *Hogarth* ruling remained unchanged. (First Compliance Panel Report, paras. 3.32 and 3.39)

³² First Compliance Panel Report, para. 1.13 (referring to United States' first written submission to the first compliance panel, para. 10). We note that the first compliance panel referred to these amendments as the "2013 Final Rule", whereas the Panels referred to them as the "2013 Rule". (First Compliance Panel Report, paras. 1.13 and 2.1; Panel Reports, para. 2.1) For the purpose of this Report, we refer to them as the "2013 Rule".

³³ First Compliance Panel Report, para. 1.13.

³⁴ First Compliance Panel Report, para. 1.14.

informed the DSB of their Agreed Procedures under Articles 21 and 22 of the DSU.³⁵ On 14 November 2013, Mexico requested the establishment of a panel under Articles 6 and 21.5 of the DSU, Article 14 of the TBT Agreement, and Article XXIII of the GATT 1994.³⁶ In its panel request, Mexico indicated that the measure taken to comply with the recommendations and rulings of the DSB (2013 Tuna Measure) comprised: (i) the DPCIA; (ii) Subpart H of Part 216 of CFR Title 50 as amended by the 2013 Rule (2013 implementing regulations)³⁷; (iii) the *Hogarth* ruling³⁸; and (iv) any implementing guidance, directives, policy announcements, or any other document issued in relation to instruments (i) through (iii), including any modifications or amendments in relation to those instruments.³⁹ Mexico claimed that the 2013 Tuna Measure was inconsistent with Article 2.1 of the TBT Agreement, Article I:1 of the GATT 1994, and Article III of the GATT 1994.⁴⁰

1.9. The first compliance panel considered that the question before it was whether the 2013 Tuna Measure brought the United States into compliance with the covered agreements.⁴¹ The first compliance panel found that: (i) the eligibility criteria were consistent with Article 2.1 of the TBT Agreement⁴², but inconsistent with Articles I:1 and III:4 of the GATT 1994⁴³; (ii) the certification requirements and the tracking and verification requirements were inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994⁴⁴; (iii) the eligibility criteria, certification requirements, and tracking and verification requirements under the 2013 Tuna Measure were provisionally justified under Article XX(g) of the GATT 1994⁴⁵; and (iv) the eligibility criteria met the requirements of the *chapeau* of Article XX, whereas the certification requirements and the tracking and verification requirements constituted arbitrary or unjustifiable discrimination, and accordingly did not satisfy the requirements of the *chapeau* of Article XX of the GATT 1994.⁴⁶

1.10. On appeal, the Appellate Body reversed the first compliance panel's findings under Article 2.1 of the TBT Agreement, Articles I:1 and III:4 of the GATT 1994, and the *chapeau* of Article XX of the GATT 1994.⁴⁷ In particular, the Appellate Body considered that the first compliance panel had conducted isolated analyses of, and reached separate findings with respect to, each of the three components of the 2013 Tuna Measure, without accounting for the manner in which these elements were interrelated.⁴⁸ The Appellate Body also found that the first compliance panel erred by failing to consider whether the differences in the relevant labelling conditions under the measure were

³⁵ First Compliance Panel Report, para. 1.15 (referring to WT/DS381/19). The parties agreed that, in the event that the DSB, following a proceeding under Article 21.5 of the DSU, ruled that a measure taken to comply does not exist or is inconsistent with a WTO covered agreement, Mexico may request authorization to suspend the application of concessions or other obligations under the covered agreements to the United States pursuant to Article 22 of the DSU and that the United States would not assert that Mexico is precluded from obtaining such authorization on the grounds that the request was made outside the 30-day time period specified in Article 22.6 of the DSU. (WT/DS381/19, para. 5)

³⁶ First Compliance Panel Report, para. 1.1 (referring to WT/DS381/20). See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 1.8.

³⁷ USDOC, National Marine Fisheries Service (NMFS)/NOAA, Dolphin Safe Tuna Labeling, 2013 implementing regulations, Sections 216.90-216.95. (First Compliance Panel Exhibit US-2)

³⁸ See para. 5.10 below and fn 104 thereto.

³⁹ First Compliance Panel Report, para. 2.1.

⁴⁰ First Compliance Panel Report, para. 2.2. Mexico also claimed that the 2013 Tuna Measure nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

⁴¹ First Compliance Panel Report, para. 7.24. The first compliance panel agreed with both parties that the 2013 Tuna Measure was a "technical regulation" for the purpose of the TBT Agreement, and that the relevant tuna products were "like". (Ibid., para. 7.71) The first compliance panel disagreed with the United States that the [2013 Rule] is "separable from the rest of the tuna measure". The first compliance panel instead expressed the view that the 2013 Final Rule was "an integral component" of the 2013 Tuna Measure and "the fact that it add[ed] new requirements rather than changing pre-existing requirements ... d[id] not have the effect of removing the rest of the tuna measure, which was the object of the DSB's rulings and recommendations, from [the first compliance panel's] jurisdiction." (Ibid., para. 7.41 (fn omitted))

⁴² First Compliance Panel Report, paras. 7.135 and 8.2.a.

⁴³ First Compliance Panel Report, paras. 7.451, 7.499, and 8.3.a.

⁴⁴ First Compliance Panel Report, paras. 7.233, 7.263, 7.400, 7.456, 7.465, 7.501, 7.503, 8.2.b-c, and 8.3.b-c.

⁴⁵ First Compliance Panel Report, paras. 7.541 and 8.4.

⁴⁶ First Compliance Panel Report, paras. 7.585, 7.605, 7.611, and 8.5.

⁴⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.230, 7.282, 7.335, and 8.1.

⁴⁸ See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.14-7.21, 7.169, 7.229, and 7.335.

calibrated to, or explained by, differences in the relative risks of harm to dolphins from different fishing methods in different areas of the ocean.⁴⁹

1.11. Having reversed the first compliance panel's findings, the Appellate Body completed the analysis and found that: (i) the 2013 Tuna Measure modified the conditions of competition to the detriment of Mexican tuna products in the US market; (ii) such detrimental impact did not stem exclusively from a legitimate regulatory distinction; and, thus, (iii) the 2013 Tuna Measure accorded less favourable treatment to Mexican tuna products compared to like tuna products from the United States and other countries.⁵⁰ Therefore, the Appellate Body found that the 2013 Tuna Measure was inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body also found that the 2013 Tuna Measure was inconsistent with Articles I:1 and III:4 of the GATT 1994, and that the United States had not demonstrated that the measure was applied in a manner that did not constitute arbitrary or unjustifiable discrimination as required by the *chapeau* of Article XX of the GATT 1994.⁵¹ The Appellate Body thus recommended that the DSB request the United States to bring its measure into conformity with its obligations under the TBT Agreement and the GATT 1994.⁵²

1.12. The DSB adopted the first compliance panel report and the Appellate Body report on 3 December 2015.⁵³ On 22 March 2016, the United States published a new rule modifying the 2013 Tuna Measure⁵⁴ (2016 Rule) with the aim of bringing the 2013 Tuna Measure into compliance with the recommendations and rulings of the DSB.⁵⁵ Following the issuance of the 2016 Rule, the United States and Mexico each requested the establishment of a compliance panel under Article 21.5 of the DSU.⁵⁶ On 29 July 2016, the Panels in the proceedings brought by the United States and the proceedings brought by Mexico adopted a harmonized timetable for these compliance proceedings and thereafter held a consolidated substantive meeting with the parties on 24 and 25 January 2017.⁵⁷

1.13. In these compliance proceedings, the United States requested the Panels to find that the United States has brought itself into compliance with the recommendations and rulings of the DSB and that the measure taken to comply with the recommendations and rulings of the DSB is consistent with Article 2.1 of the TBT Agreement and justified under Article XX of the GATT 1994.⁵⁸ Mexico requested the Panels to reject the United States' claims in their entirety and to find that the measure taken to comply with the recommendations and rulings of the DSB is inconsistent with Article 2.1 of

⁴⁹ See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.169, 7.229, and 7.334.

⁵⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.238, 7.266, 7.340, 7.360, and 8.1.

⁵¹ Panel Reports, para. 7.2 (referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 8.1).

⁵² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 8.2.

⁵³ On 10 March 2016, Mexico requested authorization from the DSB to suspend concessions to the United States in the amount of US\$472.3 million annually (WT/DS381/29). On 25 April 2017, while the compliance proceedings were pending before the Panels, the Arbitrator circulated its decision to WTO Members. The Arbitrator determined that the level of nullification or impairment suffered by Mexico as a result of the 2013 Tuna Measure is US\$163.23 million annually. The Arbitrator concluded that, in accordance with Article 22.4 of the DSU, Mexico may request authorization from the DSB to suspend concessions or other obligations up to a level not exceeding US\$163.23 million annually. (Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 7.1) On 11 May 2017, Mexico requested authorization from the DSB to suspend the application of certain tariff concessions and related obligations to the United States under the GATT 1994 in the amount of US\$163.23 million. (WT/DS381/44) At its meeting on 22 May 2017, the DSB authorized Mexico to suspend the application to the United States of concessions or other obligations. (WT/DSB/M/397)

⁵⁴ Panel Reports, para. 2.3. See also Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products, *United States Federal Register*, Vol. 81, No. 56 (23 March 2016) (Panel Exhibit MEX-47).

⁵⁵ Panel Reports, para. 7.3.

⁵⁶ WT/DS381/32; WT/DS381/38. In addition to Article 21.5 of the DSU, Mexico's request was also made pursuant to Article 6 of the DSU, Article 14 of the TBT Agreement, and Article XXIII of the GATT 1994. (See WT/DS381/38. See also Panel Reports, para. 1.7)

⁵⁷ Panel Reports, paras. 1.11-1.13.

⁵⁸ Panel Reports, para. 3.1.

the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, and cannot be justified under Article XX of the GATT 1994.⁵⁹

1.14. During the Panel proceedings, the United States and certain third parties⁶⁰ requested the Panels to lift the confidentiality of their statements at the Panels' consolidated substantive meeting with the parties and at the third-party session.⁶¹ Mexico objected to such request, arguing that the Panels could open their substantive meeting with the parties to public viewing only with the consent of both parties.⁶² The Panels, after consulting with the parties, adopted Additional Working Procedures on Partially Open Meetings.⁶³ Pursuant to their Additional Working Procedures, the Panels permitted the partial public observation of the Panels' consolidated substantive meeting with the parties and session with the third parties through delayed viewing, to ensure that the confidentiality of Mexico's statements and the statements of non-disclosing third parties was not breached.⁶⁴

1.15. The Panel Reports were circulated to Members of the World Trade Organization (WTO) on 26 October 2017. The Panels identified the measure at issue in these compliance proceedings (2016 Tuna Measure), as consisting of the following instruments: (i) the DPCIA; (ii) Subpart H of Part 216 of CFR Title 50 as amended by the 2013 Rule and the 2016 Rule (collectively, the 2016 implementing regulations); and (iii) the *Hogarth* ruling.⁶⁵ The Panels noted the parties' agreement that: (i) the 2016 Tuna Measure is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement; (ii) Mexican tuna products are "like" tuna products produced by the United States and other countries; (iii) the 2016 Tuna Measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market under Article 2.1 of the TBT Agreement; (iv) the 2016 Tuna Measure is inconsistent with both Article I:1 and Article III:4 of the GATT 1994; and (v) the 2016 Tuna Measure is provisionally justified under Article XX(g) of the GATT 1994.⁶⁶

1.16. The Panels considered that the parties' disagreement centred on the question whether the detrimental impact accords "treatment no less favourable" within the meaning of Article 2.1 of the TBT Agreement because such detrimental impact stems exclusively from a legitimate regulatory distinction.⁶⁷ The Panels found that, to address this question, the applicable legal standard under Article 2.1 of the TBT Agreement required them to assess whether the relevant regulatory distinctions under the measure at issue are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁶⁸ On the basis of their findings regarding the risks to dolphins⁶⁹, the Panels found that each of the elements of the 2016 Tuna Measure⁷⁰ and the 2016 Tuna Measure as a whole are calibrated in accordance with the applicable legal standard.⁷¹ Relying on their analysis under Article 2.1 of the TBT Agreement, the Panels found that the

⁵⁹ Panel Reports, para. 3.2.

⁶⁰ Australia, Canada, the European Union, Japan, New Zealand, and Norway supported the United States' request, while Brazil, China, Ecuador, Guatemala, India, and Korea opposed it. (Panel Reports, paras. 7.14-7.15)

⁶¹ Panel Reports, para. 1.14.

⁶² Panel Reports, paras. 7.10-7.13.

⁶³ Panel Reports, para. 1.19. See also Annex A-4 to the Panel Reports (Panels' Additional Working Procedures).

⁶⁴ Panel Reports, paras. 1.20 and 7.5-7.34. In addition, upon request by both parties, the Panels adopted Additional Working Procedures of the Panels Concerning Business Confidential Information. (See Panel Reports, paras. 1.22-1.23; Annex A-3 to the Panel Reports)

⁶⁵ Panel Reports, paras. 2.1 and 7.47. In addition to the three items referred to above, the Panels noted that Mexico, in its panel request in these compliance proceedings, also referred to "[a]ny implementing guidance, directives, policy announcements or any other document issued in relation to instruments [(i)] through [(iii)] above, including any modifications or amendments in relation to those instruments". (Ibid., para. 7.43 (quoting Mexico's panel request, p. 2)) Having reviewed all of Mexico's submissions and evidence in these compliance proceedings, the Panels observed that Mexico's description had referred to this additional element "in the abstract, without arguing that in fact there exists such an element which is subsumed within the definition of the measure taken to comply subject to these proceedings". (Ibid., para. 7.44) Furthermore, the Panels considered that "the claims and arguments that Mexico has presented in these proceedings [did] not in any way pertain to this alleged additional element of the 2016 Tuna Measure." (Ibid.)

⁶⁶ Panel Reports, paras. 7.74-7.75 and 7.729-7.730.

⁶⁷ Panel Reports, para. 7.79.

⁶⁸ Panel Reports, para. 7.103.

⁶⁹ Panel Reports, section 7.7.

⁷⁰ These elements of the 2016 Tuna Measure are explained in section 5.2 below.

⁷¹ Panel Reports, paras. 7.547, 7.611, 7.676, and 7.717.

2016 Tuna Measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX of the GATT 1994.⁷²

1.17. On this basis:

- a. with respect to the United States' and Mexico's claims under Article 2.1 of the TBT Agreement, the Panels concluded that the 2016 Tuna Measure is not inconsistent with Article 2.1 of the TBT Agreement⁷³; and
- b. with respect to Mexico's claims under the GATT 1994, and the United States' defence under Article XX of the GATT 1994, the Panels concluded that the 2016 Tuna Measure is inconsistent with Articles I:1 and III:4 of the GATT 1994⁷⁴, but is justified under Article XX(g), and meets the requirements of the *chapeau* of Article XX.⁷⁵

1.18. The Panels therefore considered that the United States has implemented the recommendations and rulings of the DSB in the original and first compliance proceedings of this dispute to bring its measure into conformity with its obligations under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). Thus, the Panels did not find it necessary to make any recommendations under Article 19.1 of the DSU.⁷⁶

1.19. On 1 December 2017, Mexico notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports, and certain legal interpretations developed by the Panels, and filed a Notice of Appeal and an appellant's submission.⁷⁷ On 19 December 2017, the United States filed an appellee's submission.⁷⁸ On 4 January 2018, Australia, Brazil, the European Union, and Japan each filed a third participant's submission.⁷⁹ On 3-4 January 2018, Canada, China, Ecuador, Guatemala, India, New Zealand, and Norway each notified its intention to appear at the oral hearing as a third participant.⁸⁰ Subsequently, Korea also notified its intention to appear at the oral hearing as a third participant.⁸¹

1.20. By letter dated 29 January 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, for the reasons mentioned therein.⁸² For the reasons explained in the letter, work on this appeal could gather pace only in May 2018. On 20 November 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated to WTO Members no later than 14 December 2018.

1.21. The oral hearing in this appeal was held on 30-31 July 2018. The participants and five of the third participants (Brazil, Canada, the European Union, Japan, and Norway) made opening oral

⁷² Panel Reports, para. 7.740.

⁷³ Panel Reports, paras. 8.2 and 8.6.

⁷⁴ Panel Reports, para. 8.7.

⁷⁵ Panel Reports, paras. 8.3 and 8.7.

⁷⁶ Panel Reports, paras. 8.4-8.5 and 8.8-8.9.

⁷⁷ Pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010 (Working Procedures).

⁷⁸ Pursuant to Rule 22 of the Working Procedures.

⁷⁹ Pursuant to Rule 24(1) of the Working Procedures. According to the Working Schedule drawn up by the Division hearing this appeal, the third participants' submissions and executive summaries were due on 3 January 2018. On 20 December 2017, the Appellate Body Division issued a procedural ruling extending the deadline to 4 January 2018 for all third participants following a request by Japan dated 19 December 2017 to extend the deadline. The Procedural Ruling is contained in Annex D of the Addendum to this Report, WT/DS381/AB/RW/USA/Add.1; WT/DS381/AB/RW2/Add.1.

⁸⁰ Pursuant to Rule 24(2) of the Working Procedures. Canada, New Zealand, and Norway each notified its intention on 3 January 2018, and the other third participants did so on 4 January 2018.

⁸¹ On 27 July 2018, Korea submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purpose of this appeal, we have interpreted this action as a notification expressing Korea's intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

⁸² WT/DS381/46. The letter is contained in Annex E of the Addendum to this Report, WT/DS381/AB/RW/USA/Add.1; WT/DS381/AB/RW2/Add.1.

statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.⁸³ The Notice of Appeal and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS381/AB/RW/USA/Add.1, WT/DS381/AB/RW2/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Australia, Brazil, the European Union, and Japan) are reflected in the executive summaries of their written submissions provided to the Appellate Body⁸⁴ and are contained in Annex C of the Addendum to this Report, WT/DS381/AB/RW/USA/Add.1, WT/DS381/AB/RW2/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. whether the Panels erred in finding that the 2016 Tuna Measure accords to Mexican tuna products treatment no less favourable than that accorded to like products originating in the United States and other countries and is therefore consistent with Article 2.1 of the TBT Agreement. Specifically, in determining whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction, whether the Panels erred:
 - i. by failing to include risks relating to inaccurate labelling in their calibration analysis, and thereby failing to assess whether the regulatory distinctions under the 2016 Tuna Measure are rationally related to its objectives;
 - ii. by failing to properly assess the risk profiles of different fishing methods and ocean areas for the purpose of their calibration analysis; and
 - iii. by finding that the individual components of the 2016 Tuna Measure (i.e. the eligibility criteria; the certification requirements; and the tracking and verification requirements), as well as the 2016 Tuna Measure as a whole, are calibrated to the risks to dolphins arising from the use of different fishing methods in different ocean areas;
- b. whether the Panels erred in finding that the 2016 Tuna Measure is not applied in a manner that constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and is therefore justified under Article XX of the GATT 1994; and
- c. whether the Panels erred in finding that they had the authority to conduct a partially open meeting of the parties without the consent of both parties.

5 BACKGROUND AND MEASURE AT ISSUE

5.1. These compliance proceedings represent the third time that the dispute between Mexico and the United States over the WTO-consistency of the United States' labelling regime for dolphin-safe tuna products is before us. As the Appellate Body in the first compliance proceedings described,

⁸³ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

⁸⁴ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

commercial tuna fishing can have harmful effects on marine mammals, including dolphins, and these effects may vary depending on factors such as the method of fishing used, the size of the fishing vessel, and the area of the ocean in which the vessel engages in tuna fishing.⁸⁵ As we describe below, the United States has undertaken certain domestic measures, and participated in certain multilateral initiatives, aimed at reducing the adverse effects on dolphins associated with commercial fishing operations.

5.1 US participation in multilateral initiatives

5.2. The United States and Mexico are parties to the AIDCP, which entered into force in February 1999.⁸⁶ The AIDCP, administered by the Inter-American Tropical Tuna Commission (IATTC), addresses a particular tuna-fishing method (purse seine fishing) in a specific area of the ocean, namely the Eastern Tropical Pacific (ETP).⁸⁷

5.3. As the original panel described, there is a regular association between tuna and dolphins in the ETP, meaning that schools of tuna tend to aggregate and swim beneath certain species of dolphins.⁸⁸ Certain vessels operating in this area employ a fishing method known as setting on dolphins, which takes advantage of this association. This fishing method involves chasing and encircling the dolphins with a purse seine net in order to catch the tuna swimming beneath them.⁸⁹ The ETP is a "traditional fishing ground" for Mexico, and its tuna fleet operates almost exclusively therein using the method of setting on dolphins.⁹⁰

5.4. As the original panel noted, the AIDCP was negotiated in response to evidence that many dolphins were dying in the ETP each year⁹¹ and is recognized to have made an important contribution to dolphin protection and to the dramatic reduction of observed dolphin mortality in the ETP.⁹² The AIDCP regulates the fishing methods of purse seine vessels in the ETP according to the size of the vessel, by prohibiting small purse seine vessels from setting on dolphins and permitting large purse seine vessels to set on dolphins only within specified dolphin mortality limits (DMLs), and subject to a number of requirements.⁹³

5.5. The AIDCP establishes a dolphin-safe scheme for the ETP that is separate from the US domestic scheme.⁹⁴ Under the AIDCP, "*dolphin-safe* tuna" is a term that is used to describe "tuna captured in sets in which there is no mortality or serious injury of dolphins".⁹⁵

⁸⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.2.

⁸⁶ Belize, Colombia, Costa Rica, Ecuador, El Salvador, the European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, the United States, and Venezuela are parties to the AIDCP. Bolivia and Vanuatu apply the AIDCP provisionally. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, fn 106 to para. 6.4)

⁸⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.4.

⁸⁸ Original Panel Report, para. 7.306; Appellate Body Report, *US – Tuna II (Mexico)*, fn 355 to para. 172.

⁸⁹ Appellate Body Report, *US – Tuna II (Mexico)*, fn 355 to para. 172. See also *ibid.*, para. 248; Original Panel Report, para. 7.306.

⁹⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 234. See also Original Panel Report, para. 7.308; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.5.

⁹¹ Original Panel Report, para. 2.35.

⁹² Original Panel Report, paras. 2.39 and 7.609.

⁹³ Large purse seine vessels are defined as vessels with a carrying capacity greater than 363 metric tons. The AIDCP does not apply to other fishing vessels in the ETP, such as longline vessels and pole and line vessels. According to the United States, this is because such vessels are not capable of setting on dolphins. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.6 and fn 116 thereto (referring to United States' appellant's submission in the first compliance proceedings, fn 61 to para. 65; AIDCP, Annexes I, IV(I)(3)(c), and VII(6) (Original Panel Exhibit MEX-11); AIDCP, as amended October 2009, Article I:8 and Annex II, paras. 1-3 (First Compliance Panel Exhibit MEX-30)))

⁹⁴ Original Panel Report, para. 2.34.

⁹⁵ Original Panel Report, para. 2.40 (quoting AIDCP, Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001) (Original Panel Exhibit MEX-55)). (emphasis original)

5.2 US domestic dolphin-safe labelling regime: the measure at issue and its evolution over the course of the *Tuna II* dispute

5.6. As indicated in para. 1.15 above, the Panels described the 2016 Tuna Measure (the measure at issue in these compliance proceedings) as consisting of the following three elements "on which both parties agree, and to which both parties' claims and arguments pertain"⁹⁶:

- a. the DPCIA;
- b. Subpart H of Part 216 of CFR Title 50 (Dolphin Safe Tuna Labeling), as amended by the Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997 (9 July 2013) (2013 Rule) and the Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 81 Fed. Reg. 15,444 (23 March 2016) (2016 Rule) (collectively, the 2016 implementing regulations); and
- c. the *Hogarth* ruling.⁹⁷

5.7. On appeal, Mexico does not challenge the Panels' definition of the 2016 Tuna Measure. Consequently, for the purpose of these appellate proceedings, we too understand the 2016 Tuna Measure to comprise the above instruments.

5.8. The Panels found that, like the original and 2013 Tuna Measures, the 2016 Tuna Measure pursues two objectives: (i) to ensure that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) to contribute 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.⁹⁸ Similarly, like its predecessors, the 2016 Tuna Measure provides that the use of the term "dolphin-safe", or any other term that claims or suggests that the tuna contained in a tuna product was harvested using a method of fishing that is not harmful to dolphins, is prohibited if the tuna was not harvested and processed in compliance with the applicable labelling conditions.⁹⁹ Thus, like its predecessors, the 2016 Tuna Measure prohibits the use of the dolphin-safe label on a tuna product sold in the US market unless the conditions specified in the measure are met.

5.9. The 2016 Tuna Measure broadly places three types of conditions on the use of the dolphin-safe label for tuna products exported from or offered for sale in the United States: (i) conditions relating to the automatic disqualification of certain tuna products (eligibility criteria); (ii) conditions relating to certifications (certification requirements); and (iii) conditions relating to record keeping and the segregation of dolphin-safe and non-dolphin-safe tuna (tracking and verification requirements).¹⁰⁰ Additionally, the certification requirements and tracking and verification requirements, applicable to fisheries other than the ETP large purse seine fishery, may become stricter in certain circumstances, owing to an element of the 2016 Tuna Measure referred to as the "determination provisions".¹⁰¹

5.10. As regards the eligibility criteria, the DPCIA excludes from bearing the "dolphin-safe" label tuna products "exported from or offered for sale in the United States" containing either: (i) tuna harvested on the high seas by a vessel engaged in driftnet fishing; or (ii) tuna harvested by vessels using purse seine nets to encircle, or "set on", dolphins anywhere in the world.¹⁰² The DPCIA's disqualification of tuna products containing tuna caught by setting on dolphins was briefly suspended, in 2002 and 2003, following administrative action by the United States Secretary of

⁹⁶ Panel Reports, para. 7.47 and *supra*, fn 65.

⁹⁷ Panel Reports, para. 2.1.

⁹⁸ Panel Reports, paras. 7.49, 7.186, and 7.705. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 302; Original Panel Report, paras. 7.401 and 7.425.

⁹⁹ Panel Reports, para. 2.4 (referring to DPCIA (Panel Exhibits MEX-1 and USA-1), Section 1385(d); 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)). See also *ibid.*, para. 7.49.

¹⁰⁰ Panel Reports, para. 7.70; First Compliance Panel Report, para. 3.33.

¹⁰¹ Panel Reports, paras. 7.67-7.69 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(v)). As further explained in paragraph 5.15 below, the 2013 Tuna Measure also contained certain determination provisions, elements of which were modified under the 2016 Tuna Measure.

¹⁰² DPCIA (Original Panel Exhibit US-5), Section 1385(b)-(d).

Commerce.¹⁰³ However, the *Hogarth* ruling overturned that action and restored this condition of access to the US dolphin-safe labelling regime.¹⁰⁴

5.11. The 2016 Tuna Measure makes no changes to the eligibility criteria set out in the DPCIA and the *Hogarth* ruling. Thus, under the 2016 Tuna Measure, the following tuna products are automatically ineligible for the dolphin-safe label: (i) tuna harvested using large-scale driftnets on the high seas; and (ii) tuna products containing tuna harvested by setting on dolphins anywhere in the world.¹⁰⁵ All other tuna products may be labelled dolphin-safe *only if* no dolphins were killed or seriously injured in the gear deployments in which the tuna was caught. To this end, these tuna products must satisfy the certification and tracking and verification requirements of the 2016 Tuna Measure.¹⁰⁶

5.12. Apart from large-scale driftnet fishing on the high seas¹⁰⁷, the certification requirements under the 2016 Tuna Measure make a distinction between the ETP large purse seine¹⁰⁸ fishery¹⁰⁹, on the one hand, and all other fisheries, on the other hand.¹¹⁰ For tuna caught in the ETP large purse seine fishery, the 2016 Tuna Measure, like the 2013 Tuna Measure, mandates that certification must be

¹⁰³ In 1997, the US Congress adopted the International Dolphin Conservation Program Act (IDCPA), which attempted to amend the DPCIA and change the criterion of accessing the US dolphin-safe label from "no encirclement of dolphins" (i.e. no setting on dolphins) to "no dolphin *mortality* or serious injury", akin to the standard under the AIDCP as described in paragraph 5.5 above. However, the US Congress made this amendment of the DPCIA contingent upon the outcome of scientific studies on the effects of setting on dolphins, to be undertaken by US agencies in cooperation with the IATTC. On 31 December 2002, the US Secretary of Commerce determined that there was insufficient evidence to conclude that intentional encirclement of dolphins with purse seine nets was having a significant adverse effect on "depleted dolphin stock in the ETP". (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.9 and fn 127 thereto)

¹⁰⁴ The determination by the US Secretary of Commerce was challenged in the US District Court for the Northern District of California by the Earth Island Institute and a number of other organizations. The court ruled in *Earth Island Institute v. Evans* that the Secretary's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law". The court also clarified that "dolphin-safe" shall continue to mean that: (i) no tuna was caught on the trip in which such tuna was harvested using a purse seine net intentionally deployed on or used to encircle dolphins; and (ii) no dolphins were killed or seriously injured during the sets in which the tuna was caught. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.9 and fn 128 thereto (referring to *Earth Island Institute v. Evans*, 34 ELR 20069 (N.D. Cal. 2004) (Original Panel Exhibit MEX-29), pp. 23-24)) On 13 July 2007, the ruling in *Earth Island Institute v. Evans* was affirmed on appeal in United States Court of Appeals for the Ninth Circuit, *Earth Island Institute et al. v. William T. Hogarth*, 484 F.3d 1123 (9th Cir. 2007) and United States Court of Appeals for the Ninth Circuit, *Earth Island Institute et al. v. William T. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Panel Exhibit MEX-3) (*Hogarth* ruling).

¹⁰⁵ Panel Reports, para. 7.50 (referring to DPCIA (Panel Exhibits MEX-1 and USA-1), Section 1385(d); 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)).

¹⁰⁶ Panel Reports, para. 7.50.

¹⁰⁷ Panel Reports, para. 7.51 and fn 88 thereto (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)).

¹⁰⁸ Large purse seine vessels are defined as vessels with a carrying capacity greater than 363 metric tons. See *supra*, fn 93.

¹⁰⁹ As the Appellate Body in the first compliance proceedings noted, for the purpose of this dispute, the term "fishery" may be defined by the geographic region in which the fishing occurs, the vessel and fishing method used, and the target species. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, fn 130 to para. 6.10)

¹¹⁰ Panel Reports, paras. 7.51 and 7.54 (referring to 2016 implementing regulations, Section 216.91(a)(1) and (3) (Panel Exhibits MEX-2 and USA-2)). This differs from the 2013 Tuna Measure, which distinguished between three general categories of fisheries: (i) large purse seine vessels in the ETP (the ETP large purse seine fishery); (ii) purse seine vessels outside the ETP (the non-ETP purse seine fishery); and (iii) other fisheries, which include non-purse seine vessels in any ocean area and small purse seine vessels in the ETP. (See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 6.10-6.11 (referring to DPCIA (First Compliance Panel Exhibit MEX-8), Section 1385(d)(1)(B)-(D) and Section 1385(d)(2); 2013 implementing regulations (First Compliance Panel Exhibit US-2), Section 216.91(a)(1)-(2) and (4)))

provided by the captain of the vessel *and* an International Dolphin Conservation Program¹¹¹ (IDCP)-approved observer, indicating that: (i) none of the tuna was caught on a trip using a purse seine net intentionally deployed on or used to encircle (i.e. set on) dolphins; and (ii) no dolphins were killed or seriously injured during the sets in which the tuna was caught.¹¹²

5.13. As for all fisheries other than the ETP large purse seine fishery, for fishing trips that began on or after 21 May 2016, captains of all vessels must certify that: (i) no purse seine net or other fishing gear was intentionally deployed on or used to encircle (i.e. set on) dolphins during the fishing trip in which the tuna was caught; and (ii) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught.¹¹³ Additionally, under the 2016 Tuna Measure, the captains of the vessels in all fisheries *other than* the ETP large purse seine fishery must certify that they have completed the National Marine Fisheries Service (NMFS) Tuna Tracking and Verification Program dolphin-safe training course (Captain Training Course).¹¹⁴ In addition to the captain's certification, in certain circumstances, certifications from an observer participating in a national or international programme acceptable to the Assistant Administrator¹¹⁵ will be required pursuant to the following two elements of the 2016 Tuna Measure.

5.14. The first element concerns seven US domestic fisheries for which the Assistant Administrator has determined that observers are qualified and authorized to make the relevant certifications.¹¹⁶ In these fisheries, certification by such an observer is required when the observer is already on board the fishing vessel for other reasons (i.e. reasons unrelated to the dolphin-safe labelling regime).¹¹⁷

5.15. The second element concerns what the first compliance panel described as the "determination provisions" under the 2013 Tuna Measure.¹¹⁸ The 2013 Tuna Measure provided that the Assistant Administrator could make a determination: (i) within a non-ETP purse seine fishery, that there is a regular and significant association between dolphins and tuna, similar to the association between dolphins and tuna in the ETP; or (ii) with respect to non-purse seine vessels in any ocean area and small purse seine vessels in the ETP, that there is a regular and significant mortality or serious injury of dolphins.¹¹⁹ In those situations, not only the captain of the vessel but also an observer had to

¹¹¹ The United States explained in the first compliance proceedings that the IDCP was established by the AIDCP. According to the United States, one of the tools of enforcing the IDCP is the on-board observer program that is described in Annex II to the AIDCP. Pursuant to Annex II, an observer must be on board a large purse seine vessel in the ETP during each fishing trip. The observer must: (i) have completed the specific training required by the guidelines established under the AIDCP; (ii) be a national of one of the IATTC parties; and (iii) be included in the list of observers maintained by the IATTC or, if part of a national observer program, by the party maintaining such a program. (United States' appellant's submission in the first compliance proceedings, paras. 65-66; AIDCP, as amended October 2009, Article I:8 and Annex II, paras. 1-3 (First Compliance Panel Exhibit MEX-30))

¹¹² Panel Reports, para. 7.54 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(1) and (b)(2)(iii)). See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.92.

¹¹³ Panel Reports, paras. 7.51 and 7.53 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)).

¹¹⁴ Panel Reports, para. 7.53 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(iii)(B)).

¹¹⁵ United States Assistant Administrator for Fisheries, NMFS, NOAA, or his/her designee. (*United States Code of Federal Regulations*, Title 50, Section 216.3 (First Compliance Panel Exhibit MEX-20))

¹¹⁶ In the first compliance panel proceedings, the United States identified the seven domestic fisheries where tuna is regularly harvested as: (i) American Samoa Pelagic Longline Fishery; (ii) Atlantic Bluefin Tuna Purse Seine Fishery; (iii) Atlantic Highly Migratory Species Pelagic Longline Fishery; (iv) California Deep-set Pelagic Longline Fishery; (v) California Large-mesh Drift Gillnet Fishery; (vi) Hawaii Deep-set Longline Fishery; and (vii) Hawaii Shallow-set Longline Fishery. (United States' second written submission to the first compliance panel, para. 128 and fn 244 thereto (referring to Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, *United States Federal Register*, Vol. 79, No. 134 (14 July 2014) (First Compliance Panel Exhibit US-113), p. 40720). See also United States' appellee's submission, fn 679 to para. 624)

¹¹⁷ Thus, tuna caught on a trip where no observer is already on board may still be labelled dolphin-safe with only a captain's certification. (See First Compliance Panel Report, para. 3.46; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.23 and fn 171 thereto. See also para. 6.173 and fn 613 below)

¹¹⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.11 (referring to First Compliance Panel Report, paras. 7.249 and 7.256).

¹¹⁹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.11 (referring to First Compliance Panel Report, paras. 7.249 and 7.256).

certify that: (i) no fishing gear was intentionally deployed on or used to encircle dolphins during the trip on which the tuna was caught; and (ii) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught.¹²⁰

5.16. The determination provisions have been modified under the 2016 Tuna Measure. Pursuant to the 2016 Tuna Measure, tuna caught in all fisheries *other than* the ETP large purse seine fishery¹²¹ may require an observer certification, in addition to the captain certification described in paragraph 5.13 above, where the Assistant Administrator has determined that in such a fishery: (i) there is a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP); or (ii) a regular and significant mortality or serious injury of dolphins is occurring. In those situations, both the captain and the observer must certify that: (i) no purse seine net or other fishing gear was intentionally deployed on or used to encircle (i.e. set on) dolphins during the trip on which the tuna was caught; and (ii) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught.¹²²

5.17. As was the case with the 2013 Tuna Measure, the tracking and verification requirements under the 2016 Tuna Measure concern the physical segregation of dolphin-safe tuna from non-dolphin-safe tuna, from the moment of harvest and throughout the processing chain.¹²³ Specifically, like its predecessor, the 2016 Tuna Measure prescribes the documentation requirements for recording and verifying segregation and the corresponding regulatory oversight. These requirements distinguish between: (i) the ETP large purse seine fishery, which must comply with the AIDCP Tracking and Verification System¹²⁴; and (ii) all other fisheries, which must comply with the requirements prescribed in the 2016 implementing regulations that the United States refers to as the "NOAA regime".¹²⁵ Thus, the ETP large purse seine fishery is subject to the AIDCP regime, while all other fisheries are subject to the NOAA regime.

5.18. The AIDCP Tracking and Verification System is based on the use of Tuna Tracking Forms (TTFs). Every TTF has a unique number. On every fishing trip, ETP large purse seine vessels must maintain two TTFs, one to record tuna harvested in dolphin-safe sets, and one to record tuna harvested in non-dolphin-safe sets.¹²⁶ At the end of each fishing trip, the IDCP-approved observer and the captain of the fishing vessel initial both TTFs to certify that the information on the forms is accurate.¹²⁷

5.19. At the time of unloading, the relevant TTF must be transmitted to the competent authority of an AIDCP party.¹²⁸ The relevant TTF number must then accompany the tuna through sales of portions

¹²⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 6.10-6.11. The Appellate Body upheld the first compliance panel's findings that the determination provisions in the 2013 Tuna Measure were not even-handed. The first compliance panel found that the design of the determination provisions meant that, in some cases, fisheries other than the ETP large purse seine fishery may be treated differently, and less stringently, under the amended tuna measure even where the conditions in that fishery mirror those in the ETP large purse seine fishery, either in terms of the level of dolphin mortality or serious injury, on the one hand, or the degree of tuna-dolphin association, on the other hand. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.182, 7.188, and 8.1.a.v; First Compliance Panel Report, para. 7.263)

¹²¹ We recall that, under the 2013 Tuna Measure, these fisheries were further subdivided into: (i) the non-ETP purse seine fishery; and (ii) non-purse seine vessels in any ocean area and small purse seine vessels in the ETP. (See para. 5.15 above and *supra*, fn 110. See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 6.10-6.11)

¹²² Panel Reports, paras. 7.51 and 7.68 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(v)).

¹²³ Panel Reports, paras. 7.55-7.66.

¹²⁴ Panel Reports, paras. 7.56-7.61. See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(a)-(c)(1).

¹²⁵ Panel Reports, para. 7.62 (quoting United States' first written submission to the Panels, para. 143). See also *ibid.*, paras. 7.63-7.67; 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(4)-(5) and Section 216.93(c)(2)-(4).

¹²⁶ Panel Reports, para. 7.57 (referring to International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015) (Panel Exhibit USA-90), Section 3(2); Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.19).

¹²⁷ Panel Reports, para. 7.57 (referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.19).

¹²⁸ Panel Reports, para. 7.59 (referring to International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015) (Panel Exhibit USA-90), Section 5(2)-(5)).

of the catch and through every processing step of those portions.¹²⁹ A tuna product exported as AIDCP dolphin-safe must be accompanied by a certificate of its dolphin-safe status issued by a competent authority, which must also include a reference to the relevant TTF number.¹³⁰ The AIDCP Tracking and Verification System also provides that the national programs established by the parties to the AIDCP should include periodic audits and spot checks for tuna products, as well as mechanisms for cooperation among national authorities.¹³¹

5.20. In addition, all tuna products imported into the United States, regardless of where the tuna was caught and whether the dolphin-safe label is used, must be accompanied by NOAA Form 370, which designates, *inter alia*, whether the tuna is dolphin-safe.¹³² This means that, for imported tuna caught in the ETP large purse seine fishery, both TTFs and Form 370 are required. By contrast, for imported tuna caught in all other fisheries, only Form 370 is required.

5.21. Moreover, as regards all other fisheries, the NOAA regime requires US tuna processors to submit monthly reports to the US Tuna Tracking and Verification Program for all tuna received at their processing facilities. These reports contain the same information contained in NOAA Form 370, as well as additional information, such as unloading dates and the condition of the tuna products.¹³³ Furthermore, under the NOAA regime, the NMFS is empowered to undertake verification activities, including dockside inspections of vessels, monitoring of Form 370s, monitoring of cannery reports, audits of US canneries, and retail market spot checks.¹³⁴ Other US agencies may also conduct on-board inspections on the high seas and in US waters.¹³⁵

5.22. Furthermore, while the 2016 Tuna Measure has made no changes to the tracking and verification requirements applicable to the ETP large purse seine fishery, it has introduced some additional requirements under the NOAA regime, which governs all other fisheries. As the Panels observed, the 2016 Tuna Measure establishes new chain of custody record-keeping requirements for tuna products harvested from all other fisheries. Specifically, the US processors and importers of such tuna products must collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna products, including information on all storage facilities, trans-shippers, processors, and wholesalers or distributors. This information must be provided to the NMFS upon request, and must be sufficient for the NMFS to conduct a trace-back of any tuna product marketed as dolphin-safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements. These new requirements apply to all tuna products labelled dolphin-safe if those products contain tuna harvested on a fishing trip beginning on or after 21 May 2016.¹³⁶

5.23. Importantly, the breach of these new chain of custody record-keeping requirements may lead to the imposition of sanctions under US law. Sanctions for offering for sale or export tuna products falsely labelled dolphin-safe may be assessed against any producer, importer, exporter, distributor, or seller that is subject to the jurisdiction of the United States.¹³⁷ They may be prosecuted under

¹²⁹ Panel Reports, para. 7.59 (referring to International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015) (Panel Exhibit USA-90), Section 5(7)).

¹³⁰ Panel Reports, para. 7.59 (referring to International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015) (Panel Exhibit USA-90), Section 6(d)).

¹³¹ Panel Reports, para. 7.60 (referring to International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015) (Panel Exhibit USA-90), Section 7).

¹³² Panel Reports, para. 7.63 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (*Article 21.5 – Mexico*), para. 6.13; Taking and Related Acts Incidental to Commercial Fishing Operations by Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean, *United States Code of Federal Regulations*, Title 50, Section 216.24 (2016) (Panel Exhibit USA-3), Section 216.24(f)(2)(i)-(ii); 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(f); NOAA Form 370 (Panel Exhibit USA-4)).

¹³³ Panel Reports, para. 7.64 (referring to Original Panel Report, para. 2.32; 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(d)-(e)).

¹³⁴ Panel Reports, para. 7.64 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(d)(1)-(3), (f), and (g)(3)).

¹³⁵ Panel Reports, para. 7.64.

¹³⁶ Panel Reports, para. 7.65 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(5)).

¹³⁷ Panel Reports, para. 7.66 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(g)(3); NOAA Form 370 (Panel Exhibit USA-4); United States' response to Panel question No. 29, paras. 148-149).

the DPCIA provisions, the federal provisions prohibiting false statements and smuggling, or the federal labelling standards.¹³⁸

5.24. Additionally, in fisheries where the Assistant Administrator has made a determination under the determination provisions described in paragraph 5.16 above, the following conditions apply. Any imported tuna or tuna product made from tuna caught on a trip, in those fisheries, beginning on or more than 60 days after the publication of a notice of the determination in the *Federal Register*, and which is intended to be labelled as dolphin-safe, must be accompanied by valid documentation signed by a representative of the vessel flag nation or the processing nation (if processed in another nation) certifying that: (i) the catch documentation recorded on NOAA Form 370 is correct; (ii) the tuna or tuna products meet the US dolphin-safe labelling standards; and (iii) the chain of custody information is correct.¹³⁹

5.25. In sum, we observe that the eligibility criteria, the certification requirements, and the tracking and verification requirements all form part of a single measure, the 2016 Tuna Measure, and thus work together in pursuing the same objectives. Hence, following the Appellate Body's findings in the first compliance proceedings, in our review of the Panels' evaluation of the 2016 Tuna Measure, we "take account of the fact that its various elements – the eligibility criteria, the certification requirements, and the tracking and verification requirements – establish a series of conditions of access to the dolphin-safe label that are cumulative and highly interrelated".¹⁴⁰

6 ANALYSIS OF THE APPELLATE BODY

6.1 Article 2.1 of the TBT Agreement

6.1.1 Introduction

6.1. As noted above, in the present compliance proceedings, the United States requested the Panels to find that the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement. Mexico asked the Panels to find that the 2016 Tuna Measure is inconsistent with the same provision. The Panels recalled that a finding of inconsistency with Article 2.1 must be based on the following three elements: (i) the measure at issue is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement; (ii) the relevant products are "like" products; and (iii) the measure at issue accords less favourable treatment to imported products than to the relevant group of like products.¹⁴¹ Noting the similarity in the factual circumstances underlying the first two elements in the first compliance proceedings, the Panels in these compliance proceedings agreed with the parties that the 2016 Tuna Measure is a technical regulation and that the relevant products are like.¹⁴²

6.2. Regarding the third element, the Panels recalled the Appellate Body's finding that assessing whether the measure accords less favourable treatment under Article 2.1 requires two distinct steps: (i) determining whether the challenged measure modifies the conditions of competition to the detriment of the relevant imported products vis-à-vis like products of domestic origin and/or like products originating in any other country; and, if the panel makes such a finding, (ii) determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.¹⁴³ The Panels noted that the 2016 Tuna Measure maintains the overall architecture and structure of the original and

¹³⁸ Panel Reports, para. 7.66 (referring to NOAA Form 370 (Panel Exhibit USA-4); *United States Code*, Title 18, Section 545 (Panel Exhibit USA-166); *United States Code*, Title 18, Section 3571 (Panel Exhibit USA-167); *United States Code*, Title 16, Section 3372 (Panel Exhibit USA-169), Section 3372(d); Civil Monetary Penalty Adjustments for Inflation, *United States Federal Register*, Vol. 81, No. 109 (7 June 2016) (Panel Exhibit USA-170); *United States Code*, Title 16, Section 3373 (Panel Exhibit USA-171), Section 3373(d)(3); *United States Code*, Title 16, Section 3374 (Panel Exhibit USA-172), Section 3374(a)(1); *United States Code*, Title 18, Section 1001 (Panel Exhibit USA-173), Section 1001(a); *United States Code*, Title 16, Section 1375 (Panel Exhibit USA-174), Sections 1375(a)(1) and 1375(b))).

¹³⁹ Panel Reports, para. 7.69 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(5)(ii)).

¹⁴⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.166.

¹⁴¹ Panel Reports, para. 7.73 (referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.25).

¹⁴² Panel Reports, para. 7.74.

¹⁴³ Panel Reports, para. 7.73 (referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.26).

2013 Tuna Measures and that the parties agreed that the relevant factual situation has not changed from the original or the first compliance proceedings.¹⁴⁴ The Panels thus found that, by excluding most Mexican tuna products from accessing the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the 2016 Tuna Measure, like the original and the 2013 Tuna Measures, modifies the conditions of competition to the detriment of Mexican tuna products in the US market.¹⁴⁵

6.3. The Panels therefore noted that the parties' disagreement on the consistency of the 2016 Tuna Measure with Article 2.1 of the TBT Agreement centred on the question whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction. The Panels understood their task in these proceedings to be ascertaining "whether the relevant regulatory distinctions are appropriately 'calibrated' and 'tailored' to, and commensurate with", the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean.¹⁴⁶

6.4. The Panels went on to establish "the risk profiles of the relevant fishing methods in different areas of the ocean, taking into account data on both observable and unobservable harms".¹⁴⁷ Thereafter, the Panels examined whether the 2016 Tuna Measure, including its relevant constituent elements, is calibrated to different risks to dolphins. In this regard, the Panels examined, sequentially, the eligibility criteria, the certification requirements, the tracking and verification requirements, and the determination provisions¹⁴⁸, before providing an overall assessment of the consistency of the 2016 Tuna Measure with Article 2.1.¹⁴⁹

6.5. On appeal, Mexico claims that the Panels erred in their interpretation and application of Article 2.1 of the TBT Agreement in finding that the 2016 Tuna Measure is not inconsistent with that provision. Mexico raises four main grounds of appeal. First, Mexico contends that the Panels relied on a legal standard that fails to take into account whether the regulatory distinctions of the 2016 Tuna Measure are rationally related to its objectives. In this regard, Mexico argues that the Panels erred in their calibration analysis because they failed to consider the risks of inaccurate labelling under the 2016 Tuna Measure.¹⁵⁰ Second, Mexico contends that the Panels erred in their application of Article 2.1 by limiting aspects of their calibration analysis to a comparison of the risk profiles of different fishing methods.¹⁵¹ Third, Mexico alleges that the Panels erred in their assessment of the risks to dolphins arising from the use of different fishing methods in different areas of the ocean by: (i) failing to adequately evaluate the risk profiles of different fisheries¹⁵²; (ii) using setting on dolphins in the ETP as the benchmark¹⁵³; and (iii) ignoring relevant measurements of risks.¹⁵⁴ Fourth, Mexico alleges that the Panels erred in their application of Article 2.1 of the TBT Agreement in finding that the eligibility criteria, the certification requirements, the tracking and verification requirements, as well as the 2016 Tuna Measure as a whole, are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.¹⁵⁵

6.6. The United States claims that the Panels correctly determined that the regulatory distinctions of the 2016 Tuna Measure are properly calibrated to different risks to dolphins arising from the use of different fishing methods in different areas of the oceans, based on the Appellate Body's guidance in the first compliance proceedings. First, the United States contends that, in the first compliance proceedings, the Appellate Body examined the interplay between the rational connection and calibration analyses and made clear that, in this dispute, the concept of calibration "reflects the

¹⁴⁴ Panel Reports, para. 7.77.

¹⁴⁵ Panel Reports, para. 7.78 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.238).

¹⁴⁶ Panel Reports, para. 7.103 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.252).

¹⁴⁷ Panel Reports, para. 7.149.

¹⁴⁸ In response to questioning at the hearing, Mexico and the United States agreed that the Panels acted appropriately in undertaking this sequential analysis.

¹⁴⁹ Panel Reports, para. 7.529.

¹⁵⁰ Mexico's Notice of Appeal, para. 8.a; appellant's submission, paras. 99-142.

¹⁵¹ Mexico's Notice of Appeal, para. 8.b; appellant's submission, paras. 159-172, 181-185, and 230-234.

¹⁵² Mexico's Notice of Appeal, para. 8.c; appellant's submission, paras. 162-171 and 235-240.

¹⁵³ Mexico's Notice of Appeal, para. 8.c; appellant's submission, paras. 175-191.

¹⁵⁴ Mexico's Notice of Appeal, para. 8.c; appellant's submission, paras. 192-225 and 241-246.

¹⁵⁵ Mexico's Notice of Appeal, para. 9; appellant's submission, paras. 226-307.

nexus between the distinctions of the measure and the measure's objective[s]".¹⁵⁶ Second, in the United States' view, the Panels acted in accordance with the requirements of Article 2.1 in examining the relevant regulatory distinctions under the 2016 Tuna Measure.¹⁵⁷ Third, the United States also considers that the Panels appropriately examined the risk profiles of fishing methods and fisheries.¹⁵⁸ Fourth, the United States submits that the Panels' "intermediate conclusions" concerning the eligibility criteria, certification requirements, and tracking and verification requirements were "correct and not in error".¹⁵⁹ The United States adds that, contrary to Mexico's arguments, the Panels' overall assessment of the 2016 Tuna Measure was not only based on their intermediate analyses but also their examination as to how the different parts of the measure interact to address the risks to dolphins arising from the use of different fishing methods in different ocean areas.¹⁶⁰

6.7. We begin by briefly recalling the relevant legal standard under Article 2.1, before assessing whether the Panels erred in their articulation thereof. Thereafter, we turn to the Panels' application of that standard in the context of this dispute, by first addressing Mexico's two overarching arguments regarding the Panels' analysis under Article 2.1, namely, that the Panels: (i) failed to examine the nexus between the regulatory distinctions under the measure at issue and its objectives; and (ii) erred by limiting aspects of their calibration analysis to a comparison of the risk profiles of different fishing methods. Next, we address Mexico's arguments pertaining to specific aspects of the Panels' assessment of risk profiles, including the allegations that the Panels did not adequately assess the risks arising from tuna fishing in different fisheries, adopted a wrong benchmark, and ignored relevant measurements of risks. Finally, we examine Mexico's arguments that the Panels erred in concluding that the eligibility criteria, certification requirements, and tracking and verification requirements, as well as the 2016 Tuna Measure as a whole, are calibrated to the relevant risk profiles.

6.1.2 "Treatment no less favourable" under Article 2.1 of the TBT Agreement

6.1.2.1 Whether the Panels erred in their articulation of the legal standard

6.8. Article 2.1 of the TBT Agreement provides that:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

6.9. The Appellate Body has identified a two-step analysis for examining whether the technical regulation at issue accords less favourable treatment to imported products under Article 2.1 of the TBT Agreement: (i) whether it modifies the conditions of competition to the detriment of such imported products vis-à-vis like products of domestic origin and/or like products originating in any other country; and (ii) whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.¹⁶¹ Where the detrimental impact caused by a technical regulation is found to stem exclusively from a legitimate regulatory distinction, "such a technical regulation does not accord less favourable treatment to imported products and is therefore consistent with Article 2.1 of the TBT Agreement."¹⁶²

6.10. To determine whether the detrimental impact stems exclusively from a legitimate regulatory distinction, "a panel must carefully scrutinize whether the technical regulation at issue is

¹⁵⁶ United States' appellee's submission, para. 32 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras. 7.92, 7.98, and 7.101. See also *ibid.*, paras. 35-85.

¹⁵⁷ United States' appellee's submission, paras. 116-123.

¹⁵⁸ United States' appellee's submission, paras. 96-203.

¹⁵⁹ United States' appellee's submission, para. 353. See also *ibid.*, paras. 204-353.

¹⁶⁰ United States' appellee's submission, para. 354.

¹⁶¹ See Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.26 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 180, 182, and 215; *US – COOL*, paras. 268 and 271; *US – Tuna II (Mexico)*, para. 215).

¹⁶² Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.96. In interpreting Article 2.1 as such, the Appellate Body took into account the context provided by the definition of "technical regulation" found in Annex 1.1 to the TBT Agreement, as well as Article 2.2 and the sixth recital of the preamble of the TBT Agreement. (*Ibid.*, para. 7.87. See also Appellate Body Reports, *US – COOL*, para. 271; *US – Clove Cigarettes*, paras. 171-174; *US – Tuna II (Mexico)*, paras. 212-213).

even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case."¹⁶³ The Appellate Body has found that there may be different ways to demonstrate that a measure does not stem exclusively from a legitimate regulatory distinction, including, "for example", by showing that the measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination.¹⁶⁴ At the same time, the Appellate Body has emphasized that "an examination of whether a measure is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination is not the *only* way to assess whether a measure lacks even-handedness".¹⁶⁵

6.11. The Appellate Body has said that, in light of the "important parallels" between the analyses under Article 2.1 of the TBT Agreement and the *chapeau* of Article XX of the GATT 1994¹⁶⁶, relevant jurisprudence under the latter, particularly that relating to the concept of "arbitrary or unjustifiable discrimination", may provide useful insight as to how the concept should be understood in the context of the second step of the "treatment no less favourable" analysis under Article 2.1.¹⁶⁷ In this connection, "[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination [under the *chapeau* of Article XX] is the question of 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."¹⁶⁸ To the Appellate Body, the "same considerations ... are valid in the context of the second step of the analysis of 'treatment no less favourable' under Article 2.1".¹⁶⁹ Thus, for the purpose of Article 2.1 of the TBT Agreement, in examining whether a technical regulation constitutes a means of arbitrary or unjustifiable discrimination, "it is likely that this assessment [will] involve[] consideration of the nexus between the regulatory distinctions found in the measure and the measure's policy objectives"¹⁷⁰, although "consideration of other factors ... may also be relevant to the analysis."¹⁷¹

6.12. In the original proceedings, the United States sought to demonstrate that the detrimental impact under the original Tuna Measure stemmed exclusively from a legitimate regulatory distinction by introducing the notion of calibration. More specifically, the United States contended that the regulatory distinctions drawn under the original Tuna Measure "between different tuna fishing methods and different areas of the oceans could be explained or justified by differences in the risks associated with such fishing methods and areas of the oceans".¹⁷² This led the Appellate Body to examine the legitimacy of the original Tuna Measure's regulatory distinctions "through the lens of ... 'calibration'".¹⁷³ The Appellate Body emphasized that its use of the terms "even-handed" and "calibrated":

[D]id not constitute different legal tests, since the entire inquiry by the Appellate Body revolved around whether the United States had properly substantiated its argument

¹⁶³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.31 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182). See also Appellate Body Reports, *US – Clove Cigarettes*, para. 215; *US – COOL*, para. 340; *US – Tuna II (Mexico)*, para. 216.

¹⁶⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.31. See also Appellate Body Reports, *US – COOL*, para. 271; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.94.

¹⁶⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.94. (emphasis original) See also *ibid.*, para. 7.31.

¹⁶⁶ Appellate Body Reports, *EC – Seal Products*, para. 5.310; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.89. We recall that the *chapeau* of Article XX of the GATT 1994 provides that WTO Members may resort to measures that fall within one of the discrete categories of general exceptions contained in Article XX of the GATT 1994 "[s]ubject 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". Given that the sixth recital of the preamble of the TBT Agreement "serves as relevant context for understanding Article 2.1, and the language of that recital has important commonalities with the *chapeau* of Article XX of the GATT 1994", the jurisprudence under the *chapeau* of Article XX is relevant to understanding the content of the second step of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.88)

¹⁶⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.91.

¹⁶⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.92 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.306, in turn referring to Appellate Body Reports, *US – Shrimp*, para. 165; *Brazil – Retreaded Tyres*, paras. 227-228 and 232).

¹⁶⁹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.92.

¹⁷⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.97.

¹⁷¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.95.

¹⁷² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.98.

¹⁷³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.98.

that the original tuna measure *was even-handed*, and thus not inconsistent with Article 2.1, *because it was "calibrated"* to the risks to dolphins arising from different fishing methods in different areas of the oceans.¹⁷⁴

6.13. Thus, rather than being a separate legal test, calibration is *the means* to assess whether the detrimental impact of the measure at issue in this dispute stems exclusively from a legitimate regulatory distinction, in the context of the second step of the "treatment no less favourable" analysis under Article 2.1. As we explain in greater detail in section 6.1.3 below, if done *properly*, the calibration analysis should encompass consideration of the rational relationship between the regulatory distinctions and the objectives of the 2016 Tuna Measure. Thus, if calibrated properly, these regulatory distinctions will not amount to arbitrary or unjustifiable discrimination and will thus comply with the requirements of Article 2.1 of the TBT Agreement.

6.14. In articulating the applicable legal standard under Article 2.1 in these compliance proceedings, the Panels recalled the Appellate Body's findings as set forth above. The Panels considered that, "while there may in theory be a number of ways" to assess whether the measure satisfies the second step of the analysis under Article 2.1¹⁷⁵, in this dispute it was appropriate to assess whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction through the lens of calibration.¹⁷⁶

6.15. On appeal, Mexico highlights the Appellate Body's statement that a rational relationship test is "[o]ne of the most important factors" in assessing arbitrary and unjustifiable discrimination under the *chapeau* of Article XX of the GATT 1994.¹⁷⁷ Thus, Mexico argues that, given the "close relationship" between the notion of even-handedness under Article 2.1 and the *chapeau* of Article XX, "an assessment of whether the detrimental impact can be reconciled with, or is rationally related to, the policy objective pursued by the measure" is required in the analysis under Article 2.1.¹⁷⁸

6.16. As indicated above, the assessment of whether the detrimental impact of a measure amounts to arbitrary or unjustifiable discrimination in the context of Article 2.1 will likely involve consideration of the nexus between the regulatory distinctions of the measure and its objectives. This does not mean that such consideration necessarily constitutes a step that is separate and distinct from a proper calibration analysis, as Mexico appears to suggest. At the same time, we do not understand Mexico's arguments on appeal to relate primarily to the Panels' articulation of the legal standard under Article 2.1. Rather, as further discussed in section 6.1.3 below, Mexico contends that the Panels, in their calibration analysis, failed to include an examination of the nexus between the regulatory distinctions giving rise to the detrimental impact, on the one hand, and the 2016 Tuna Measure's objectives, on the other hand. Therefore, while Mexico indicates that its claims relate, *inter alia*, to the Panels' interpretation of Article 2.1, we observe that its arguments mainly concern the Panels' application of the legal standard under Article 2.1 in the context of the present dispute. We address these arguments in section 6.1.3 below. However, before turning to the issue of what constitutes a proper calibration analysis in this dispute, we address Mexico's argument that the Panels should have taken into account the objective of sustainable development set out in the preamble of the WTO Agreement when interpreting and applying Article 2.1 of the TBT Agreement in this dispute.

6.1.2.2 Whether the Panels erred in rejecting Mexico's argument concerning the relevance of the sustainability of tuna stock and the marine ecosystem

6.17. Before the Panels, Mexico argued that, "while the reference to sustainable development in the preamble of the WTO Agreement does not itself create any obligations, nevertheless the text of *all*

¹⁷⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.98. (emphasis added)

¹⁷⁵ Panel Reports, para. 7.102.

¹⁷⁶ Panel Reports, para. 7.102. The Panels noted that the Appellate Body had, in the first compliance proceedings, repeatedly emphasized that the appropriate way, in the context of this dispute, for a panel to assess whether the detrimental impact caused by the Tuna Measure stems exclusively from a legitimate regulatory distinction is to assess whether the Measure is properly "calibrated" to different risks to dolphins. (See Panel Reports, para. 7.84 (referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.155))

¹⁷⁷ Mexico's appellant's submission, para. 325 (quoting Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.92). (emphasis added)

¹⁷⁸ Mexico's appellant's submission, para. 86.

WTO obligations that in any way relate to the objective of sustainable development or environmental protection must be interpreted and clarified within [the] ... context" provided by the preamble.¹⁷⁹ Therefore, Mexico contended that, while WTO Members are free to choose their own objectives, the Members would be acting inconsistently with their WTO obligations "if the means ... to achieve" such objectives "are inconsistent with the objectives of sustainable development".¹⁸⁰ Mexico submitted that the principle of sustainable development has risen to the status of a principle of international law applicable to all countries.¹⁸¹

6.18. The Panels rejected Mexico's argument, finding that this argument "appear[ed] to elevate the preambular language to the level of substantive obligation, despite Mexico's assertion to the contrary".¹⁸² Furthermore, the Panels emphasized that the 2016 Tuna Measure is not concerned with sustainable development, but rather with the protection and well-being of dolphins, and that the WTO Agreement does not obligate a Member to regulate only for the objective of "sustainable development".¹⁸³

6.19. On appeal, Mexico argues that, where the obligations at issue in a dispute relate to sustainable development, they must be interpreted consistently with the objective of sustainable development. For Mexico, this requirement arises under Article 2.1 in the determination of whether the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction.¹⁸⁴ In Mexico's view, applying a technical regulation that is inconsistent with or undermines the objective of sustainable development results in "unjustifiable discrimination".¹⁸⁵ Mexico highlights that, by encouraging the use of fish aggregating devices (FADs) and other forms of tuna fishing outside the ETP as alternatives to the fishing method of setting on dolphins, the 2016 Tuna Measure "does grievous harm to fisheries and to the overall marine ecosystem" and "must therefore be seen as inconsistent with the objective of sustainable development".¹⁸⁶ Mexico contends that the application of the 2016 Tuna Measure results in "unjustifiable discrimination", and therefore that the regulatory distinctions under the measure "cannot be 'legitimate'" for the purpose of the second step of the analysis under Article 2.1.¹⁸⁷

6.20. The United States responds that Mexico seeks to transform preambular language regarding sustainable development into a substantive obligation.¹⁸⁸ In addition, the United States argues that, to make its argument, "Mexico is forced to substantially change the objectives of the 2016 measure" and transform the dolphin-protection and consumer-information objectives of the measure into labelling requirements that relate to "the sustainability of tuna stocks and of the marine ecosystem generally".¹⁸⁹

6.21. We observe that the issue raised by Mexico is twofold. First, we must determine whether, under the "treatment no less favourable" requirement in Article 2.1 of the TBT Agreement, the means through which a technical regulation achieves its objectives must be compatible with the principle of sustainable development in the preamble of the WTO Agreement. Second, if we find that there is such a requirement under Article 2.1, we must determine whether, in the circumstances of the present dispute, the 2016 Tuna Measure is incompatible with this requirement because it encourages the use of FADs and other forms of fishing that are unsustainable for tuna stock.

6.22. The Appellate Body has said that, in assessing whether a technical regulation accords less favourable treatment to imported products under Article 2.1, a panel's task lies, in part, in ascertaining whether the detrimental impact caused by a technical regulation stems exclusively from

¹⁷⁹ Panel Reports, para. 7.128. (emphasis added)

¹⁸⁰ Panel Reports, para. 7.128.

¹⁸¹ Panel Reports, para. 7.128.

¹⁸² Panel Reports, para. 7.130.

¹⁸³ Panel Reports, para. 7.131.

¹⁸⁴ Mexico's appellant's submission, paras. 147-148.

¹⁸⁵ Mexico's appellant's submission, para. 149.

¹⁸⁶ Mexico's appellant's submission, para. 148. For instance, Mexico argues that the floating object/FAD method "attracts and kills immature as well as mature tuna, as well as a wide variety of other bycatch, including sea turtles, sharks, and other species". (Mexico's appellant's submission, para. 25 (referring to Original Panel Report, para. 4.10))

¹⁸⁷ Mexico's appellant's submission, para. 149.

¹⁸⁸ United States' appellee's submission, para. 91.

¹⁸⁹ United States' appellee's submission, para. 92 (referring to Mexico's appellant's submission, para. 148). (emphasis omitted)

a legitimate regulatory distinction.¹⁹⁰ The Appellate Body has also indicated that the preamble of the TBT Agreement informs "the ambit of the 'treatment no less favourable' requirement in Article 2.1, by making clear that technical regulations may pursue the objectives listed therein".¹⁹¹

6.23. We consider that the preamble of the WTO Agreement may also inform interpretations of the covered agreements in appropriate circumstances. In this regard, the Appellate Body has found that the preamble of the WTO Agreement "add[s] colour, texture and shading" to the interpretation of the covered agreements.¹⁹² Thus, while the preamble of the WTO Agreement does not itself create substantive obligations, it can provide important context for the interpretation of the covered agreements, for example, by shedding light on the kinds of policy objectives a Member may pursue.

6.24. We note that the legitimacy of the objectives of the 2016 Tuna Measure is not at issue before us in this dispute. Indeed, in response to questioning at the hearing, Mexico indicated that it did not challenge the right of the United States or other WTO Members to determine the objectives of their measures.¹⁹³ Mexico also acknowledged that "the reference to sustainable development in the preamble of the WTO Agreement does not itself create any obligations."¹⁹⁴ At the same time, Mexico maintains that "[w]here ... obligations [at issue in a dispute] relate to sustainable development, they must be interpreted consistently with the objective of sustainable development."¹⁹⁵ In Mexico's view, "this interpretive requirement arises under Article 2.1 of the TBT Agreement" when determining whether the detrimental impact under the Tuna Measure stems exclusively from a legitimate regulatory distinction.¹⁹⁶

6.25. Mexico's argument thus appears to be premised on its view that Article 2.1 is an obligation that "relate[s] to sustainable development".¹⁹⁷ However, Article 2.1 is concerned with ensuring that technical regulations are designed and applied in a manner that affords "treatment no less favourable" to like imported products. In our view, Mexico seems to conflate the nature of the *obligation* in Article 2.1 with the nature of the *technical regulations* that Members may choose to adopt. For instance, Mexico indicates that "[n]ot all technical regulations will relate to sustainable development, but, where they do, they will be inconsistent with [Article 2.1] if their effects are unsustainable."¹⁹⁸ Thus, Mexico's argument appears to suggest that the relevance of the principle of sustainable development to the interpretation of Article 2.1 may differ depending on whether a measure "relates to", or has "effects" on, sustainable development. We fail to see why the interpretation of Article 2.1 should vary depending on the kind of technical regulation that a Member adopts. While a Member's technical regulation may, depending on the circumstances, relate to sustainable development, the nature and scope of the obligation in Article 2.1 remain unchanged.

6.26. In any event, we recall that the objectives of the 2016 Tuna Measure are: (i) to ensure that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) to contribute 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.¹⁹⁹ Given that the legitimacy of the objectives of the 2016 Tuna Measure is not at issue in these compliance proceedings, we consider that the question before the Panels was whether

¹⁹⁰ See para. 6.9 above.

¹⁹¹ Appellate Body Report, *US – Clove Cigarettes*, para. 173.

¹⁹² Appellate Body Report, *US – Shrimp*, para. 153. We recall that, in *US – Shrimp*, the Appellate Body relied on the objective of sustainable development contained in the preamble of the WTO Agreement to determine whether a measure aimed at protecting sea turtles could fall within the ambit of the policy objective of conservation of "exhaustible natural resources" within the meaning of Article XX(g) of the GATT 1994. The Appellate Body indicated that the expression "exhaustible natural resources" contained in this provision should be read in light of the objective of sustainable development contained in the preamble of the WTO Agreement, and interpreted to refer not only to the conservation of exhaustible mineral or other non-living natural resources but also to living natural resources including sea turtles, the protection of which was sought by the measure at issue in that dispute. (Appellate Body Report, *US – Shrimp*, para. 131)

¹⁹³ See also Panel Reports, para. 7.128 (quoting Mexico's second written submission to the Panels, para. 32).

¹⁹⁴ Panel Reports, para. 7.128 (referring to Mexico's response to Panel question No. 84, para. 130).

¹⁹⁵ Mexico's appellant's submission, para. 147.

¹⁹⁶ Mexico's appellant's submission, para. 148.

¹⁹⁷ Mexico's appellant's submission, para. 147. In Mexico's view, "[a]s expressed in the preamble of the WTO Agreement, the objective of every WTO Member is to act sustainably", and this objective must "inform the interpretation of the Article 2.1 of the TBT Agreement". (Ibid., para. 149)

¹⁹⁸ Mexico's appellant's submission, para. 149.

¹⁹⁹ See para. 5.8 above.

the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction in light of the objectives the United States chose to pursue through the measure. On the basis of the above considerations, we do not need to examine whether, in the circumstances of the present dispute, the 2016 Tuna Measure is incompatible with Article 2.1 because it encourages the use of FADs and other forms of fishing that are unsustainable for tuna stock.

6.27. We now turn to examine what the legal standard under Article 2.1 of the TBT Agreement, as articulated above, entails in the context of the present dispute, and whether the Panels erred in their articulation and application thereof.

6.1.3 What the legal standard under Article 2.1 of the TBT Agreement entails in this dispute

6.28. As noted in paragraph 6.3 above, the Panels considered that, in light of the specific circumstances of this dispute, their task in examining the parties' respective claims under Article 2.1 was to ascertain "whether the relevant regulatory distinctions are appropriately 'calibrated' and 'tailored' to, and commensurate with", the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean.²⁰⁰ After establishing "the risk profiles of the relevant fishing methods in different areas of the ocean, taking into account data on both observable and unobservable harms"²⁰¹, the Panels examined the relevant constituent elements of the 2016 Tuna Measure. They then synthesized their intermediate analyses "to reach an overall, holistic conclusion" regarding whether the labelling conditions under the measure are calibrated to the relevant risk profiles.²⁰² On this basis, the Panels ultimately found that the 2016 Tuna Measure is consistent with Article 2.1.²⁰³

6.29. On appeal, Mexico claims that the Panels erred in their "legal interpretation" of the calibration test under Article 2.1.²⁰⁴ We recall, however, that calibration is not a separate legal standard under Article 2.1 but, rather, a case-specific analytical tool used to assess whether the 2016 Tuna Measure is consistent with this provision. As explained above, we understand Mexico's arguments to concern whether, in applying the calibration analysis, the Panels properly assessed the nexus between the regulatory distinctions and the measure's objectives.²⁰⁵

6.30. Mexico argues in this regard that, in assessing the consistency of the 2016 Tuna Measure with Article 2.1, the Panels erred in determining that the measure is calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans, without at the same time considering whether the regulatory distinctions that the measure draws are rationally related to its objectives. In particular, Mexico contends that the Panels failed to consider risks relating to inaccurate labelling in examining the risk profiles of relevant fishing methods and ocean areas for the purpose of the calibration analysis. In Mexico's view, because the 2016 Tuna Measure cannot achieve its objectives without label accuracy, a proper calibration analysis should have included considerations of such risks of inaccurate labelling.²⁰⁶

6.31. Mexico also alleges several errors in the Panels' "establishment and assessment of the risk profiles of different fishing methods in different ocean areas", which, in Mexico's view, "resulted in deficiencies that caused the Panels to subsequently err in conducting their assessment of whether the relevant regulatory distinctions [under the 2016 Tuna Measure] are calibrated".²⁰⁷ Specifically, Mexico claims that the Panels erred in assessing and comparing the risk profiles of different fishing methods without differentiating between different ocean areas.²⁰⁸ Mexico contends that, as a result,

²⁰⁰ Panel Reports, para. 7.103 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.252).

²⁰¹ Panel Reports, paras. 7.149 and 7.525.

²⁰² Panel Reports, paras. 7.529 and 7.704.

²⁰³ Panel Reports, para. 7.717.

²⁰⁴ Mexico's appellant's submission, para. 78.

²⁰⁵ See para. 6.16 above.

²⁰⁶ Mexico's appellant's submission, paras. 99 and 117-118.

²⁰⁷ Mexico's appellant's submission, para. 154.

²⁰⁸ Mexico's appellant's submission, paras. 159-172, 235-240, and 254-260.

the Panels' calibration analysis is deficient because it fails to examine whether the relevant regulatory distinctions under the measure are calibrated on a fishery-by-fishery basis.²⁰⁹

6.32. Addressing Mexico's arguments calls for us to establish what a proper calibration analysis entails for the purpose of this dispute, before assessing whether the Panels erred in their calibration analysis. Specifically, we address: (i) how the objectives of the 2016 Tuna Measure, and the risk of inaccuracy of the dolphin-safe label, should be taken into account in a proper calibration analysis; and (ii) whether the Panels erred by limiting aspects of their calibration analysis to a comparison of the risk profiles of different fishing methods.²¹⁰

6.1.3.1 Whether the Panels erred in failing to consider the nexus between the regulatory distinctions of the measure and its objectives

6.33. Mexico raises three interconnected arguments in support of its claim that the Panels failed to assess the nexus between the regulatory distinctions of the measure and its objectives in their calibration analysis. Mexico argues that: (i) the Panels' calibration analysis failed to recognize the relevance of label accuracy in light of the objectives of the 2016 Tuna Measure; (ii) the Panels failed to include risks of inaccuracy as part of the risk profiles of the different ocean areas to which the 2016 Tuna Measure should be calibrated; and (iii) by finding that the 2016 Tuna Measure contemplates a margin of error, the Panels erroneously considered that the measure tolerates label inaccuracy. We examine these arguments in turn.

6.1.3.1.1 Whether the Panels' calibration analysis took into account the accuracy of the dolphin-safe label in light of the objectives of the 2016 Tuna Measure

6.34. Based on the Appellate Body's findings in the first compliance proceedings, Mexico submits that a proper calibration analysis "must take into account the nexus between the regulatory distinctions and the objectives of the measure".²¹¹ In Mexico's view, "[c]onsideration of the nexus between the detrimental impact and the objectives of the measure as a part of the 'calibration' test helps to ensure that a WTO Member's regulatory space is respected without undermining the disciplines set forth in the TBT Agreement and other WTO Agreements."²¹² Mexico argues that, "[a]s a consumer labelling measure", the 2016 Tuna Measure "cannot achieve [its] objectives without label accuracy".²¹³ For Mexico, a claim that the regulatory distinctions of the measure are "'calibrated' to the different risks posed to dolphins by different fishing methods in different ocean areas ... cannot justify the detrimental impact on Mexican tuna products if the measure fails to ensure that the label provides accurate information to consumers".²¹⁴ Mexico thus alleges that the Panels' calibration analysis was "narrow"²¹⁵ and "incomplete"²¹⁶ because the Panels failed to recognize the relevance of label accuracy to the calibration analysis.

²⁰⁹ Mexico's appellant's submission, paras. 230-240, 252-260, and 273-274, and fn 207 to para. 166.

²¹⁰ We address the other specific errors alleged by Mexico regarding the Panels' assessment of risk profiles in section 6.1.4, and whether the 2016 Tuna Measure is properly calibrated in section 6.1.5, below.

²¹¹ Mexico's appellant's submission, para. 97 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.155). In its appellant's submission, Mexico argues that "*both* an examination of the nexus between the regulatory distinctions and the objectives of the measure *and* an examination of whether the measure is 'calibrated' are relevant factors for consideration in the assessment of whether the 2016 tuna measure is designed and applied in an even-handed manner." (Ibid., para. 98 (emphasis added)) This statement suggests that, in Mexico's view, consideration of the rational relationship may not be encompassed in the calibration analysis, such that the Panels should have determined separately whether there is, indeed, a rational relationship between the regulatory distinctions of the 2016 Tuna Measure and its objectives. However, Mexico clarified at the hearing that, in order to be *properly* calibrated, the regulatory distinctions of the 2016 Tuna Measure would have to be rationally related to its objectives.

²¹² Mexico's appellant's submission, para. 100. Mexico also indicated at the hearing that, for a measure to be properly calibrated, it must not be designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and the primary factor for examining whether the measure constitutes such discrimination is to assess whether the detrimental impact can be reconciled with, or is rationally related to, the objectives of the measure.

²¹³ Mexico's appellant's submission, para. 99.

²¹⁴ Mexico's appellant's submission, para. 99.

²¹⁵ Mexico's appellant's submission, para. 116.

²¹⁶ Mexico's appellant's submission, para. 117.

6.35. The United States contends that Mexico is wrong in claiming that the Panels erred in following the Appellate Body's guidance in the previous compliance proceedings.²¹⁷ The United States argues that the Appellate Body clearly set out what it considered to be the appropriate calibration analysis by repeatedly referring to the risk profiles of different fishing methods in different areas of the ocean, and by indicating that those risk profiles should reflect the relative risks of observed and unobserved mortalities and injury.²¹⁸ In the United States' view, the Panels correctly assessed the WTO-consistency of the 2016 Tuna Measure by considering whether its distinctions are calibrated to different risks to dolphins.

6.36. We begin by recalling the Appellate Body's relevant findings in the original and first compliance proceedings regarding the calibration analysis in this dispute. We recall that the United States sought to demonstrate that the detrimental impact under the original Tuna Measure stemmed exclusively from a legitimate regulatory distinction by introducing the notion of calibration.²¹⁹ As a result, the Appellate Body used the notion of calibration as an analytical tool to assess the consistency of the original Tuna Measure under the second step of the analysis of "treatment no less favourable". However, the Appellate Body found that the United States had not demonstrated that the original Tuna Measure was calibrated to the risks to dolphins.²²⁰ Rather, the Appellate Body shared the original panel's view that, while the risks to dolphins arising from purse seine fishing by setting on dolphins – a fishing method predominantly used by Mexican fleets – were fully addressed in the original Tuna Measure²²¹, the risks to dolphins arising from the use of other fishing methods – predominantly used by US and other fishing fleets – were not.²²² In the original proceedings, the Appellate Body thus accepted the premise that the original Tuna Measure would not violate Article 2.1 if it was properly calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the oceans.²²³

6.37. Referring to the original proceedings, the Appellate Body indicated in the first compliance proceedings that it was therefore appropriate to conduct an analysis involving the following:

[F]irst, an identification of whether different tuna fishing methods in different areas of the oceans pose different risks to dolphins; and, second, examination of whether, in the light of these risks, the different treatment created by the relevant regulatory distinction shows that, as between different groups, the treatment accorded to each group is commensurate with the relevant risks, taking account of the objectives of the measure.²²⁴

6.38. The Appellate Body further noted that "the reasoning set out in adopted Appellate Body and panel reports" provides guidance for WTO Members to bring their inconsistent measures into compliance with their obligations under the covered agreements.²²⁵ In light of the fact that the United States had defended its 2013 Tuna Measure under Article 2.1 in terms very similar to those used in the original proceedings, the Appellate Body considered that the first compliance panel's inquiry in those proceedings should have encompassed: (i) an assessment of the "overall relative risks or levels of harm to dolphins" arising from different fishing methods in different ocean areas²²⁶;

²¹⁷ United States' appellee's submission, para. 47.

²¹⁸ United States' appellee's submission, para. 48. According to the United States, "at no time did the Appellate Body ever suggest that the risk profiles reflect anything other than observed and unobserved mortality or injury to dolphins." (Ibid. (referring to Panel Reports, para. 7.108))

²¹⁹ See para. 6.12 above.

²²⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.

²²¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 287 (referring to Original Panel Report, para. 7.505).

²²² Appellate Body Report, *US – Tuna II (Mexico)*, para. 292 (referring to Original Panel Report, para. 7.534 and fn 767 thereto).

²²³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.154-7.155 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 297).

²²⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.155.

²²⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.156.

²²⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.252 and 7.353.

and (ii) an assessment as to whether the differences in the dolphin-safe labelling conditions under the measure are appropriately tailored to²²⁷, or commensurate with²²⁸, those respective risks.²²⁹

6.39. Thus, under the calibration analysis set out by the Appellate Body in the original and first compliance proceedings, the risks to which the regulatory distinctions must be calibrated are risks to dolphins from the use of different fishing methods in different areas of the ocean. In our view, therefore, the Panels correctly considered that "the relevant inquiry is one that focuses on the risks that dolphins face as a result of the use, in different areas of the ocean, of different fishing methods."²³⁰

6.40. Moreover, as the Appellate Body found in the first compliance proceedings, the examination of whether the regulatory distinctions are commensurate with different risks to dolphins must be conducted "taking account of the objectives of the measure".²³¹ Indeed, aspects of the Appellate Body's reasoning as to why the first compliance panel erred in its application of Article 2.1 illustrate how considerations of the 2013 Tuna Measure's objectives, and the related issue of label accuracy, form part of the calibration analysis. Specifically, the Appellate Body noted that the first compliance panel had dismissed the United States' argument that the different tracking and verification requirements are justified or explained in light of the higher degree of risk to dolphins in the ETP large purse seine fishery.²³² According to the first compliance panel, the different risk profiles of different fisheries do not explain regulatory distinctions in the tracking and verification requirements because such distinctions are triggered *after* the tuna has been caught.²³³ The Appellate Body, however, disagreed with the first compliance panel's view that considerations of the similarities and differences in risks to dolphins were irrelevant to evaluating the even-handedness of the tracking and verification requirements. To the Appellate Body, the first compliance panel's disregard of the "considerations of the similarities and differences in risks [to dolphins]" did not comport with its own reasoning that "the *accuracy of the US dolphin-safe label* can be compromised at any stage of the tuna production stage, *in contradiction with the objectives of the amended tuna measure*".²³⁴

6.41. Thus, in the first compliance proceedings, the Appellate Body found that the tracking and verification requirements should have been calibrated to the risks to dolphins arising from the different fishing methods in different areas of the ocean so as to avoid compromising the accuracy of the dolphin-safe label and contradicting the measure's objectives.²³⁵ These findings confirm that considerations regarding label accuracy should have informed the calibration analysis, precisely because the accuracy of the dolphin-safe label was directly related to the objectives of the 2013 Tuna Measure. Thus, considerations of the nexus between the regulatory distinctions and the measure's objectives, rather than being a separate inquiry, are encompassed in a proper calibration analysis.

²²⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.163 and 7.252-7.253.

²²⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.155, 7.160, and 7.252-7.253.

²²⁹ See e.g. Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.252.

²³⁰ Panel Reports, para. 7.109.

²³¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.155.

²³² We recall that the Appellate Body also found that the first compliance panel had not performed a proper analysis under Article 2.1 of the TBT Agreement due to the following errors: (i) the panel's segmented analysis of the 2013 Tuna Measure; (ii) its erroneous assumption that disqualifying the method of setting on dolphins from the dolphin-safe label was found to be consistent with Article 2.1 of the TBT Agreement in the original proceedings; (iii) its failure to take due account of the different risks associated with tuna fishing in different fisheries by focusing solely on *unobserved* harms to dolphins; and (iv) its focus on the technique of setting on dolphins in assessing the respective risk profiles of different fishing methods and areas of the ocean. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.126, 7.159, 7.161, and 7.165)

²³³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.142 (referring to Original Panel Report, para. 7.398).

²³⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.166. (Ibid., fn 611 to para. 7.166 (referring to First Compliance Panel Report, para. 7.233) (emphasis added)) The Appellate Body also noted that the first compliance panel had indicated that the different tracking and verification requirements that apply outside the ETP large purse seine fisheries are less burdensome, making it more likely that tuna caught other than by ETP large purse seine vessels will be incorrectly labelled as dolphin-safe. (See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.253)

²³⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.166 and fn 611 thereto, and para. 7.169.

6.42. Turning to the Panels' findings in these proceedings, the Panels recalled that the Appellate Body's findings in the first compliance proceedings made clear that:

[W]hile there may in theory be a number of ways in which a panel could assess the 'even-handedness' of a measure challenged under Article 2.1 of the TBT Agreement, in the specific context of these proceedings, the appropriate legal standard for the Panels to apply is one that focuses on the relationship between the risks posed to dolphins by different fishing methods in different areas of the ocean, on the one hand, and the relevant regulatory distinctions, on the other hand.²³⁶

Thus, the Panels understood their task to be that of ascertaining "whether the relevant regulatory distinctions are appropriately 'calibrated' and 'tailored' to, and commensurate with, the different risks to dolphins arising in different fisheries."²³⁷ If the relevant regulatory distinctions are so calibrated, the Panels considered that this would indicate that the 2016 Tuna Measure is not inconsistent with Article 2.1.

6.43. The Panels found that, insofar as Mexico considered that they should assess the existence of a rational relationship between the detrimental impact and the objectives of the 2016 Tuna Measure as a separate or distinct step in their analysis, such an approach was not supported by the Appellate Body's reports in the original or the first compliance proceedings.²³⁸ In this regard, the Panels did not read the Appellate Body's reports as requiring, beyond calibration, "any additional, separate analysis" of the relationship between the objectives of the measure and the detrimental impact.²³⁹ In our view, the Panels' statements comport with the Appellate Body's findings, as reviewed in paragraphs 6.36-6.41 above, that considerations of the nexus between the regulatory distinctions and the measure's objectives, rather than being a separate inquiry, are an integral part of a proper calibration analysis.

6.44. To the Panels, the Appellate Body's statement that the calibration analysis must be conducted "taking account of the measure's objectives" meant that those objectives must "inform the criteria in respect of which calibration is to be assessed", and that the Panels had to "bear in mind" those objectives in applying the calibration analysis to the facts of this dispute.²⁴⁰ The Panels recalled that the objectives of the 2016 Tuna Measure are: (i) "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins"; and (ii) "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins".²⁴¹ Thus, the Panels considered that the 2016 Tuna Measure "aims to convey accurate information to consumers in order to ensure that the US tuna market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."²⁴² In the Panels' view, calibration to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean would take into account the objectives of the 2016 Tuna Measure.²⁴³ The Panels' findings correctly suggest that the design, structure, and expected operation of the tuna measure reveal that the measure seeks to achieve both its objectives in concert. We thus share the Panels' view that these objectives are "mutually complementary and reinforcing, and work together to 'address [the adverse effects of] fishing techniques on dolphins'".²⁴⁴

6.45. In this respect, we recall Mexico's argument that, "[a]s a consumer labelling measure", the 2016 Tuna Measure "cannot achieve [its] objectives without label accuracy", and that a claim that the regulatory distinctions of the measure are "'calibrated' to the different risks posed to dolphins by different fishing methods in different ocean areas ... cannot justify the detrimental impact on Mexican tuna products if the measure fails to ensure that the label provides accurate information to

²³⁶ Panel Reports, para. 7.102.

²³⁷ Panel Reports, para. 7.103 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.252).

²³⁸ Panel Reports, para. 7.115.

²³⁹ Panel Reports, para. 7.115.

²⁴⁰ Panel Reports, paras. 7.116-7.117.

²⁴¹ Panel Reports, para. 7.117 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.16).

²⁴² Panel Reports, para. 7.125 (referring to Original Panel Report, para. 7.427). (fn omitted)

²⁴³ Panel Reports, para. 7.117.

²⁴⁴ Panel Reports, para. 7.125 (quoting Original Panel Report, para. 7.550). Mexico agrees that the objectives of the measure are "inseparable". (Mexico's appellant's submission, para. 144)

consumers".²⁴⁵ As discussed above, the Appellate Body's findings in the first compliance proceedings indicate that considerations regarding label accuracy are encompassed in a proper calibration analysis. Accordingly, we disagree that a calibration analysis, on the basis of risks to dolphins, would fail to ascertain whether the labels granted under the relevant labelling conditions are accurate and, as a consequence, whether the regulatory distinctions in such conditions are rationally related to the measure's objectives.

6.46. Instead, we consider that, where the calibration analysis is conducted properly, taking account of the objectives pursued by the 2016 Tuna Measure, this exercise should also ascertain whether the label granted under the measure at issue conveys the information regarding the dolphin-safe nature of the tuna products to consumers.²⁴⁶ This is because, if the calibration analysis shows that the strictness of the different labelling conditions is indeed commensurate with the risks of harms to dolphins, it indicates that the labels granted under these conditions would allow consumers to obtain information regarding whether the tuna in the tuna products is harvested in a manner that harms dolphins. Therefore, we agree with the Panels that a proper calibration to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean would take into account the objectives of the 2016 Tuna Measure²⁴⁷, and would help to ascertain the nexus between such objectives and the different labelling conditions under the measure. In the same vein, we also agree with the Panels that the existence of a rational relationship between the regulatory distinctions and the objectives of the 2016 Tuna Measure need not be assessed *as a separate or distinct step* in their analysis.²⁴⁸

6.1.3.1.2 Whether the risks of label inaccuracy form part of the risks to which the 2016 Tuna Measure must be calibrated

6.47. Mexico contends that the Panels erred in finding that calibration under Article 2.1 "requires a panel to simply 'bear in mind the objectives of the ... Measure'".²⁴⁹ Rather, Mexico emphasizes that the objectives of the measure "must be reflected in the substantive criteria for assessing whether the measure's regulatory distinctions are designed and applied in an even-handed manner, including on the basis of 'calibration'".²⁵⁰ As the 2016 Tuna Measure can only achieve its objectives through label accuracy²⁵¹, such criteria must include factors relating to the risk of inaccurate labelling.²⁵² Thus, Mexico argues that the Panels erred in finding that, for the purpose of the calibration analysis, risks relating to inaccurate labelling are not part of the risk profiles of the different fishing methods and ocean areas. Mexico submits that, in doing so, the Panels' approach "preclude[d] an assessment from taking full account of the particular circumstances of the case"²⁵³, and "did not give meaningful relevance" to the nexus between the detrimental impact caused by the regulatory distinctions and the objectives of the measure.²⁵⁴

6.48. The Appellate Body's findings reviewed above support Mexico's view that considerations regarding label accuracy are relevant to assessing the nexus between the regulatory distinctions under the 2016 Tuna Measure and its policy objectives.²⁵⁵ However, the Appellate Body did not suggest that the risk of label inaccuracy constitutes a risk to which the relevant regulatory distinctions must be calibrated. Rather, as noted above, the Appellate Body emphasized that the risks to which the regulatory distinctions must be calibrated were risks to dolphins arising from tuna fishing in different fisheries.²⁵⁶ Thus, while accuracy of the information conveyed to consumers through the dolphin-safe label is a consideration that should inform the calibration analysis, we share the Panels' view that this is "different from saying that the applicable legal standard ... requires the

²⁴⁵ Mexico's appellant's submission, para. 99. (fn omitted)

²⁴⁶ As noted in para. 5.11 above, under the 2016 Tuna Measure, tuna products labelled as dolphin-safe must not contain tuna harvested in a manner that adversely affects dolphins.

²⁴⁷ See para. 5.8 above.

²⁴⁸ Panel Reports, para. 7.115. In sections 6.1.4 and 6.1.5 below, we examine whether the Panels conducted the calibration analysis properly in this dispute.

²⁴⁹ Mexico's appellant's submission, para. 138 (quoting Panel Reports, para. 7.118).

²⁵⁰ Mexico's appellant's submission, para. 138.

²⁵¹ Mexico's appellant's submission, para. 99.

²⁵² See Mexico's appellant's submission, paras. 99, 114, and 124.

²⁵³ Mexico's appellant's submission, para. 123.

²⁵⁴ Mexico's appellant's submission, para. 127.

²⁵⁵ See paras. 6.36-6.41 above. See also Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.166 and fn 611 thereto (referring to First Compliance Panel Report, para. 7.398).

²⁵⁶ See e.g. Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.155.

Panels to determine whether the 2016 Tuna Measure is calibrated, *inter alia*, to the risk of inaccurate dolphin-safe information being passed to consumers".²⁵⁷

6.49. Mexico additionally argues that, in finding that risk profiles of different fisheries do not encompass risks of label inaccuracy²⁵⁸, the Panels failed to recognize that the risks to dolphins "are inextricably linked to the characteristics of ocean areas and fisheries that impact the accuracy of the dolphin-safe label".²⁵⁹ Specifically, "[f]or a given fishing method capable of causing harms to dolphins, dolphins will be at a greater relative risk of harms from that fishing method in ocean areas that are unregulated or that have insufficient regulatory oversight, resulting in unreliable reporting, significant [illegal, unreported, and unregulated] IUU fishing, and/or significant transshipment at sea, than in ocean areas that have sufficient regulatory oversight and reliable reporting."²⁶⁰ In Mexico's view, for tuna caught in such ocean areas, "stricter certification requirements and tracking and verification requirements are justified (and required) on the basis that they are calibrated to the higher relative risks of harms to dolphins".²⁶¹ Mexico therefore contends that the Panels erroneously focused the calibration assessment solely on the impact of fishing methods in terms of their harm to dolphins, and that such an approach is "incomplete" and "legally erroneous".²⁶²

6.50. The United States contends that "Mexico makes a new factual allegation not made (or supported) before the Panels", namely, that "'the reliability of applicable systems' is 'inextricably linked' with actual, physical harm to dolphins"²⁶³, and that dolphins will therefore be at a greater risk of harms in unregulated or insufficiently regulated ocean areas, resulting in unreliable reporting, significant IUU fishing, and/or significant trans-shipment at sea, than in sufficiently regulated ocean areas.²⁶⁴ The United States points out that Mexico never provided any evidence to the Panels of a link between the risks of harm to dolphins, on the one hand, and the low reliability of applicable systems, on the other hand.²⁶⁵ The United States highlights that "Mexico never even argued this point before the Panels – and the Panels made no such finding of fact."²⁶⁶

6.51. By arguing that "dolphins will be at a greater relative risk of harms from [a given] fishing method in ocean areas that are unregulated or that have insufficient regulatory oversight, resulting in unreliable reporting, significant IUU fishing, and/or significant transshipment at sea"²⁶⁷, we understand Mexico to suggest that tuna fishing in ocean areas with less reliable regulatory systems is more likely to lead to "actual, physical harm to dolphins".²⁶⁸ However, Mexico has not substantiated such an assertion. In these circumstances, we see no reason to disagree with the Panels' statement that "the risks of inaccurate certification, reporting, and/or record-keeping are *not* risks that affect dolphins themselves", or "risks that arise from the use of different fishing methods in different areas of the ocean".²⁶⁹

6.52. At the same time, we emphasize that issues regarding label inaccuracy are relevant to assessing whether the labelling conditions under the measure are properly calibrated. As the Panels also acknowledged, the risks of inaccurate certification, reporting, and/or record-keeping may "have an indirect influence on the extent to which different fishing methods are used to catch tuna intended for the US market".²⁷⁰ Furthermore, the Panels recognized that "fish caught in different areas of the ocean through the use of different fishing methods may be associated with a greater or smaller risk

²⁵⁷ Panel Reports, para. 7.112.

²⁵⁸ Panel Reports, para. 7.112.

²⁵⁹ Mexico's appellant's submission, para. 124.

²⁶⁰ Mexico's appellant's submission, para. 109.

²⁶¹ Mexico's appellant's submission, para. 110.

²⁶² Mexico's appellant's submission, para. 124.

²⁶³ United States' appellee's submission, para. 45 (quoting Mexico's appellant's submission, para. 124).

²⁶⁴ United States' appellee's submission, para. 45 (quoting Mexico's appellant's submission, para. 109).

²⁶⁵ United States' appellee's submission, para. 53.

²⁶⁶ United States' appellee's submission, para. 53 (referring to Panel Reports, para. 7.110).

²⁶⁷ Mexico's appellant's submission, para. 109.

²⁶⁸ United States' appellee's submission, para. 45 (referring to Mexico's appellant's submission, paras. 120 and 124).

²⁶⁹ Panel Reports, para. 7.110. (emphasis added)

²⁷⁰ Panel Reports, para. 7.110. This is because "one of the objectives of the label is to provide consumers with information as to the dolphin-safe status of tuna products in order to ensure 'that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins'." (Panel Reports, fn 222 to para. 7.110 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 6.3))

of inaccurate labelling depending on a range of interconnected factors, including the persons involved in the catch, available technology, and applicable domestic and international regulatory requirements."²⁷¹ To the Panels, these risks were "relevant"²⁷², and even "central", to their application of the calibration analysis, precisely because, in doing so, they were required to take the objectives of the measure into account.²⁷³ We therefore consider that the Panels did not, as Mexico contends, adopt an approach to calibration that is "narrow" and "incomplete".²⁷⁴

6.53. Furthermore, by noting that the risk of inaccuracy depends on a range of interconnected factors, including "the persons involved in the catch, available technology, and applicable domestic and international regulatory requirements"²⁷⁵, the Panels expressly recognized that the risk of inaccuracy encompasses the factors leading to such inaccuracy. Indeed, as the Panels explained, the expression "risk of inaccuracy" means "the risk that *an error* in the recording and reporting of information *somewhere in the catch and processing chain* could result in a batch of tuna being designated as dolphin-safe while in fact containing tuna that should have been designated as non-dolphin-safe."²⁷⁶ Our review of the Panels' findings therefore does not support Mexico's argument that the Panels erred in defining the risk of inaccuracy "narrowly to relate to the symptom or outcome (i.e. an inaccurate label) rather than the risk factors that cause such an outcome".²⁷⁷

6.1.3.1.3 Whether the Panels erred in referring to "margin of error" in their calibration analysis

6.54. Mexico also takes issue with the Panels' discussion of the margin of error in the context of their analysis regarding risks of inaccuracy. Mexico disagrees with the Panels that the existence of margins of error in the certification and tracking and verification requirements is not necessarily inconsistent with the objectives of the measure.²⁷⁸ Rather, Mexico contends that "the measure does not contemplate a 'margin of error' or a tolerance threshold for inaccurate labelling, and it does not incorporate a *de minimis* test for accuracy."²⁷⁹ Mexico also argues that the Panels erroneously "took the position that fisheries that have lower risk profiles ... will always have a lower risk of conveying incorrect information to consumers", and that, by doing so, "determined that allowing inaccurate labels is consistent with the objectives of the measure".²⁸⁰

6.55. The United States contends that Mexico's argument is based on a fundamental misunderstanding of the Panels' analysis to the extent that it suggests that the Panels' approach is driven to tolerate less accurate labelling for tuna products from outside the ETP large purse seine fisheries.²⁸¹ In the United States' view, the Panels properly recognized that the risk of inaccurate labelling is not a constant²⁸², and that "the U.S. measure need not 'be completely error-proof in order to be calibrated' (and, thus consistent with Article 2.1)."²⁸³ Rather, the Panels correctly indicated that "the more pertinent question is whether the *possibility* of error is tailored to, or commensurate with, the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean."²⁸⁴ Therefore, the United States argues that the Panels did not err in relying on the concept of margin of error in discussing the certification and tracking and verification requirements, and that this concept is entirely consistent with the guidance provided by the Appellate Body in both the original proceedings and the first compliance proceedings.²⁸⁵

²⁷¹ Panel Reports, para. 7.110.

²⁷² Panel Reports, para. 7.113.

²⁷³ Panel Reports, para. 7.118.

²⁷⁴ Mexico's appellant's submission, para. 124.

²⁷⁵ Panel Reports, para. 7.110. (fn omitted)

²⁷⁶ Panel Reports, para. 7.119. (emphasis added)

²⁷⁷ Mexico's appellant's submission, para. 139.

²⁷⁸ Mexico's appellant's submission, para. 133 (referring to Panel Reports, para. 7.122).

²⁷⁹ Mexico's appellant's submission, para. 140.

²⁸⁰ Mexico's appellant's submission, para. 135.

²⁸¹ United States' appellee's submission, para. 66.

²⁸² United States' appellee's submission, para. 68.

²⁸³ United States' appellee's submission, para. 74 and fn 168 thereto (quoting Panel Reports, paras. 7.601 and 7.605).

²⁸⁴ United States' appellee's submission, para. 74 (quoting Panel Reports, para. 7.605). (emphasis added)

²⁸⁵ United States' appellee's submission, para. 75.

6.56. In our view, by equating "margin of error" with "a tolerance threshold of inaccurate labelling"²⁸⁶, Mexico's above arguments are based on its understanding of the term "margin of error" as being synonymous with the ultimate inaccuracy of a dolphin-safe label. However, the Panels' discussion of "margin of error", when read in its totality, suggests that the Panels did not equate the term with label inaccuracy. Rather, we understand the Panels' reference to the term "margin of error" as relating to the different degrees of strictness of the certification and tracking and verification requirements under the 2016 Tuna Measure. Pursuant to this understanding, the ultimate accuracy of the label depends not only on the different degrees of the strictness of the relevant requirements, but also on the level of risks to dolphins in a given fishery to which these requirements apply.

6.57. We recall that the Panels introduced the notion of margin of error in discussing the "risk of inaccuracy".²⁸⁷ To this effect, the Panels indicated that "the existence of a margin of error in certification, and tracking and verification requirements does not necessarily equate or give rise to a risk that the information ultimately conveyed to a consumer by a dolphin-safe label will itself be incorrect."²⁸⁸ Rather, to the Panels, "the risk of inaccurate information being passed to consumers by the label will depend not only on the referred margin of error, but also, and importantly, on the *extent of events that require recording whether a dolphin mortality or serious injury was observed* in a given fishery."²⁸⁹ The Panels explained that the risk profile of relevant fisheries "is a good proxy to measure the extent of [such] events that require recording".²⁹⁰ Therefore, the Panels reasoned that "in applying the calibration test, it is appropriate ... to consider whether the certification, and tracking and verification requirements applied in different fisheries are commensurate with, and tailored to, the particular risk profiles of those fisheries."²⁹¹ More specifically:

[I]n a fishery where the risks to dolphins are low, it may be calibrated to apply certification, and tracking and verification requirements that tolerate a higher margin of error than the certification, reporting, and/or record-keeping requirements that apply in respect of fisheries with a high risk profile. This is because the risk that the dolphin-safe label will communicate inaccurate information is a function of numerous factors, including not only the regulations in place, but also the different levels of dolphin interaction, mortality, and serious injury in different fisheries. Thus, in fisheries with high dolphin interactions and harms, *more sensitive certification*, and tracking and verification requirements may be needed to ensure the ultimate accuracy of the dolphin-safe label, whereas in fisheries with low dolphin interactions and harms, *less sensitive requirements* may be sufficient.²⁹²

6.58. Thus, the Panels' findings as set forth above indicate that the term "margin of error" relates to the strictness of the relevant certification and tracking and verification requirements, such that the less sensitive they are, the more likely that adverse effects on dolphins might go undetected and unreported. This, however, does not automatically translate into inaccuracy of the ultimate dolphin-safe label. Rather, as the Panels' statements quoted above make clear, the accuracy of the ultimate label depends not only on the sensitivity of the labelling conditions, but also on the level of risks to dolphins in a fishery. Where such risks are higher, the corresponding labelling conditions may need to be more "sensitive"²⁹³, or strict, to ensure the accuracy of the label in conveying the

²⁸⁶ Mexico's appellant's submission, para. 140.

²⁸⁷ As noted above, the Panels defined the "risk of inaccuracy" as the risk that, due to "an error in the recording and reporting of information", a batch of tuna containing tuna that should have been designated as non-dolphin-safe is nonetheless designated as dolphin-safe. (Panel Reports, para. 7.119)

²⁸⁸ Panel Reports, para. 7.120.

²⁸⁹ Panel Reports, para. 7.120. (emphasis added) The Panels indicated that, for example, where the margin of error is high but the occurrence of such events is low in a given fishery, the risk of inaccurate information being conveyed to consumers would be low. Conversely, where the margin of error is low but occurrence of such events is high, the resulting risk of inaccurate information would be high. (Ibid., para. 7.121) The Panels further explained that the "events that require recording" include "not only the events, such as death or serious injury of dolphins, which make up the risk profile of the relevant fishery, but also other events, such as the fact that dolphins were observed by the vessel captain or independent observer; whether or not dolphin-safe and non-dolphin-safe tuna were segregated in the wells on board the vessel; and whether that segregation was maintained during the trans-shipment and unloading of the tuna". (Ibid., fn 235 to para. 7.121)

²⁹⁰ Panel Reports, para. 7.121. (fn omitted)

²⁹¹ Panel Reports, para. 7.123.

²⁹² Panel Reports, para. 7.123. (emphasis added)

²⁹³ Panel Reports, para. 7.123.

information regarding the dolphin-safe nature of the tuna products. Conversely, where such risks are lower, less sensitive labelling conditions may be sufficient to ensure accuracy. Thus, we understand the Panels to have meant that the sensitivity of the labelling conditions should correspond, or be calibrated, to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean, so as to ensure accurate labelling.

6.59. We thus disagree with Mexico's contention that the Panels erroneously "took the position that fisheries that have lower risk profiles ... will always have a lower risk of conveying incorrect information to consumers", and that, by doing so, "determined that allowing inaccurate labels is consistent with the objectives of the measure".²⁹⁴ In our view, Mexico's argument conflates the strictness of the relevant labelling conditions with the inaccuracy of the ultimate dolphin-safe label. While the term "margin of error", read in isolation, may be understood in the sense Mexico suggests, our above analysis indicates that the Panels used this term to denote the possibility of error as a result of different levels of strictness in the certification and tracking and verification requirements, and did not equate it to the accuracy of the ultimate label. Rather, the latter depends not only on the sensitivity of the labelling conditions but also, importantly, on the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

6.60. This being said, we do not consider that a reference to the term "margin of error" was necessary to the Panels' assessment of whether the 2016 Tuna Measure is *properly* calibrated.²⁹⁵ Indeed, the Panels highlighted that the question whether margins of error in the certification and tracking and verification requirements are consistent with the objectives of the measure "cannot be answered by looking at the regulations in isolation" but must be assessed "in the light of the relevant risk profiles in different fisheries".²⁹⁶ Read in its totality, the Panels' discussion rightly focused on the question whether the relevant regulatory distinctions are properly calibrated to the risks to dolphins.

6.1.3.2 Whether the Panels erred by limiting aspects of their calibration analysis to a comparison of the risk profiles of different fishing methods

6.61. Mexico argues that the Panels erred in assessing and comparing the risk profiles of different fishing methods without distinguishing between different ocean areas.²⁹⁷ Mexico considers that, in order to assess whether the measure is properly calibrated to the risks to dolphins, the Panels were required to examine whether the 2016 Tuna Measure makes all relevant regulatory distinctions on the basis of both fishing methods and ocean areas.²⁹⁸ This is because, according to Mexico, risks to dolphins depend not only on the fishing methods used but also on the relevant characteristics of the ocean areas where those fishing methods are used.²⁹⁹ Mexico considers this view to be supported

²⁹⁴ Mexico's appellant's submission, para. 135.

²⁹⁵ Indeed, we observe that certain statements by the Panels regarding the term "margin of error", when read in isolation, could potentially give rise to the understanding Mexico suggests. Specifically, the Panels stated that "a measure that tolerates a larger margin of error where a risk is low, but tolerates a lower margin of error where the risk is high, may very well be calibrated." (Panel Reports, para. 7.606) To the extent "a larger margin of error" in this statement could be read to suggest a higher degree of label inaccuracy, this would be contradicted by other statements by the Panels and the totality of their calibration analysis.

²⁹⁶ Panel Reports, para. 7.123.

²⁹⁷ Mexico's appellant's submission, paras. 159-172.

²⁹⁸ Mexico's appellant's submission, para. 166 and fn 207 thereto. In Mexico's view, fisheries "with relatively higher risk profiles" must be distinguished from fisheries with "relatively lower risk profiles", and should be ineligible for the label. (Ibid., para. 167) Mexico refers to certain gillnet, longline, and trawl fisheries that the Panels found to have particularly high-risk profiles, and argues that "[p]ermitt[ing] access to the label to tuna caught by such methods in those ocean areas contradicts and undermines the objective of the tuna measure to discourage fishing practices that adversely affect dolphins." (Ibid., para. 167)

²⁹⁹ Mexico's response to questioning at the hearing. The Appellate Body in the first compliance proceedings explained that "[f]or purposes of this dispute, the term 'fishery' may be defined by the geographic region in which the fishing occurs, the vessel and fishing method used, and the target species." (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, fn 130 to para. 6.10)

by the Appellate Body's articulation of the calibration analysis in previous proceedings in this dispute, as well as the "design, architecture, and revealing structure of the measure".³⁰⁰

6.62. The United States argues that the eligibility criteria relevant to this dispute draw distinctions on a fishing-method-by-fishing-method basis, and that it has not been suggested in any of the previous proceedings in this dispute, by panels, the Appellate Body, or Mexico, that addressing eligibility on a fishing-method-by-fishing-method basis is inconsistent with Article 2.1 of the TBT Agreement.³⁰¹ The United States considers that Mexico has not explained why this type of distinction is not permitted under Article 2.1 of the TBT Agreement.³⁰² In particular, the United States explains that, in the first compliance proceedings, the Appellate Body did not reverse the panel's findings on the basis that the panel had failed to make findings on a fishery-by-fishery basis with respect to the eligibility criteria.³⁰³ The United States also highlights that Mexico's approach would render the determination provisions redundant.³⁰⁴

6.63. We note at the outset that what Mexico considers is required of the 2016 Tuna Measure, in order for it to be consistent with Article 2.1 is based at least in part on the Appellate Body's statement that the dolphin-safe labelling regime "will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods *in different areas of the oceans*".³⁰⁵ The Appellate Body also explained that applying the calibration analysis entails an "identification of whether different tuna fishing methods *in different areas of the oceans* pose different risks to dolphins" and examining whether, in light of these risks, "the different treatment created by the relevant regulatory distinction shows that, as between different groups, the treatment accorded to each group is commensurate with the relevant risks."³⁰⁶ However, these statements do not prescribe that the regulatory distinctions under the 2016 Tuna Measure must be drawn on the basis of different ocean areas in order for the measure to be consistent with Article 2.1. Rather, the foregoing guidance by the Appellate Body acknowledges that the risks to dolphins may differ across different ocean areas and that, in conducting an assessment of risks to dolphins for the purpose of assessing whether the regulatory distinctions under the measure are indeed calibrated to different risks to dolphins, it is necessary to assess the risks across all relevant ocean areas in which a particular fishing method is practised (i.e. individual fisheries).

6.64. The essential question before the Panels was whether the relevant regulatory distinctions under the measure are calibrated to different risks to dolphins. The nature of this analysis (i.e. how the Panels were required to apply the calibration analysis) is informed by the nature of the regulatory distinctions made under the measure itself. In this respect, we recall that, in determining whether detrimental impact stems exclusively from a legitimate regulatory distinction, "a panel must carefully scrutinize whether the technical regulation at issue is even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case."³⁰⁷ It is therefore useful to briefly recall certain features of the measure for the purpose of assessing Mexico's arguments.

6.65. The 2016 Tuna Measure makes several sets of distinctions between different tuna products. In terms of the eligibility criteria, the measure distinguishes between: (i) tuna products containing

³⁰⁰ Mexico's appellant's submission, para. 166 and fn 207 thereto. Mexico highlights that tuna caught by driftnet fishing on the high seas is ineligible for the dolphin-safe label and argues on this basis that the measure, in setting out the eligibility criteria, makes distinctions involving both fishing methods and ocean areas. In response to questioning at the hearing, Mexico stated that the design of the measure is subject to the legal analysis; so even if the eligibility requirement was assessed under the measure on a fishing-method-by-fishing-method basis, that would not shield it from challenge and it would not shield the measure from being assessed for calibration on a fishery-by-fishery basis.

³⁰¹ United States' appellee's submission, paras. 117-118.

³⁰² United States' appellee's submission, para. 118.

³⁰³ United States' appellee's submission, paras. 122-123.

³⁰⁴ United States' appellee's submission, para. 119. The United States explains that, since the determination provisions increase the certification and tracking and verification requirements in specific high-risk fisheries, the determination provisions would be "meaningless" if such high-risk fisheries were in any event ineligible for the label.

³⁰⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.155. (emphasis added) See also Mexico's appellant's submission, para. 159.

³⁰⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.155. (emphasis added)

³⁰⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.31 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182). See also Appellate Body Reports, *US – Clove Cigarettes*, para. 215; *US – COOL*, para. 340; *US – Tuna II (Mexico)*, paras. 216 and 225.

tuna caught by setting on dolphins or caught by driftnet fishing on the high seas; and (ii) tuna products containing tuna caught by other fishing methods.³⁰⁸ While the former are automatically ineligible for the dolphin-safe label, the latter are eligible for the label subject to certain certification and tracking and verification requirements. Such certification and tracking and verification requirements distinguish between: (i) tuna products containing tuna caught in the ETP large purse seine fishery; and (ii) tuna products containing tuna caught in all other fisheries.³⁰⁹ Thus, at the level of the eligibility criteria, the 2016 Tuna Measure draws a distinction on the basis of *fishing methods* insofar as the ineligibility of tuna caught by setting on dolphins is concerned.³¹⁰ Furthermore, at the level of the certification and tracking and verification requirements, the 2016 Tuna Measure makes a distinction on the basis of different *fisheries* (i.e. the use of a particular fishing method in a particular ocean area).³¹¹ Specifically, these requirements distinguish between tuna products containing tuna caught in the ETP large purse seine fishery and tuna products containing tuna caught in all other fisheries.³¹² In order for a tuna product to receive the dolphin-safe label, it must satisfy all of these requirements (in other words, the tuna must have been caught using an eligible fishing method, and it must have been certified, as well as tracked and verified, in accordance with the relevant requirements applicable to the fishery in which the tuna was caught).

6.66. Turning to the relevant findings by the Panels, we recall that the parties do not contest on appeal the Panels' finding that the 2016 Tuna Measure has a detrimental impact on Mexican tuna products. In this regard, the Panels highlighted the Appellate Body's finding in the first compliance proceedings that "'most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions', while 'most tuna caught by US vessels is potentially eligible for the label'".³¹³ The Panels noted that "the 2016 Tuna Measure maintains the overall architecture and structure of the original and 2013 Tuna Measures", including "the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods".³¹⁴ The Panels considered that, in light of the unchanged factual situation, "by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the 2016 Tuna Measure, similar to the original and the 2013 Tuna Measure, modifies the conditions of competition to the detriment of Mexican tuna products in the US market."³¹⁵

6.67. The Panels proceeded to examine whether this detrimental impact stems exclusively from a legitimate regulatory distinction. The Panels began by assessing the evidence before them concerning the use of all relevant fishing methods in different areas of the ocean (i.e. fisheries)³¹⁶ before arriving at an overall conclusion regarding the risk profile of each fishing method. Following their examination of the relevant risk profiles, the Panels considered it appropriate to examine "whether each of the elements of the measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean, and then synthesizing [their] intermediate analyses to reach an overall, holistic conclusion about the WTO-consistency of the Measure".³¹⁷ For the purpose of assessing whether the eligibility criteria are properly calibrated, the Panels compared the risk profile of setting on dolphins with the risk profiles of other fishing methods.³¹⁸ By contrast, in examining the certification and tracking and verification requirements, the Panels compared the risk profiles of the relevant fisheries (i.e. fishing methods and ocean areas) with respect to which the 2016 Tuna Measure draws a distinction, namely, the ETP large purse seine

³⁰⁸ See paras. 5.10-5.11 above.

³⁰⁹ See paras. 5.12-5.13 and 5.17 above.

³¹⁰ Panel Reports, para. 7.568.

³¹¹ See Panel Reports, para. 7.568. As explained above, for the purpose of this dispute, the term "fishery" may be defined by the geographic region in which the fishing occurs, the vessel and fishing method used, and the target species. See *supra*, fn 299.

³¹² See Panel Reports, para. 7.568. We also note that, since tuna products containing tuna caught by driftnet fishing on the high seas are *ineligible* for the dolphin-safe label, any certification (or tracking and verification) of tuna caught by driftnet fishing on the high seas would only have the effect that such tuna products would not receive the dolphin-safe label.

³¹³ Panel Reports, para. 7.76 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.236, in turn quoting Original Panel Report, para. 7.317).

³¹⁴ Panel Reports, para. 7.77.

³¹⁵ Panel Reports, para. 7.78.

³¹⁶ To the extent that Mexico argues that the Panels failed to take into account all the relevant evidence in making this assessment, we address these arguments in section 6.1.4 below.

³¹⁷ Panel Reports, para. 7.529.

³¹⁸ See Panel Reports, paras. 7.539-7.546.

fishery and all other fisheries.³¹⁹ The Panels explained that, "unlike the eligibility requirements, the certification requirements (and the tracking and verification requirements) ... draw distinctions on the basis of different fisheries, rather than different fishing methods."³²⁰

6.68. As explained above, Mexico contends that the Panels erred by comparing the risk profiles of different fishing methods, and not of individual fisheries.³²¹ As indicated, in the context of assessing the *certification* and *tracking and verification* requirements, the Panels compared the risk profiles of different fisheries. Since that approach appears consistent with Mexico's preferred approach, we understand that this aspect of Mexico's arguments pertains specifically to the Panels' assessment of the *eligibility* criteria, with respect to which the Panels compared the risk profiles of fishing methods, but not of individual fisheries.³²²

6.69. In this regard, Mexico argues that the Panels' approach is "incorrect" because the eligibility criteria under the measure "clearly distinguish based on method and area".³²³ Mexico considers that this is illustrated by the fact that tuna caught by driftnet fishing on the high seas is also ineligible for the dolphin-safe label.³²⁴

6.70. We note that the distinction under the eligibility criteria between driftnet fishing on the high seas and other fisheries is indeed on the basis of both fishing method *and* ocean area.³²⁵ However, we recall that the second step of the "less favourable treatment" analysis under Article 2.1 "focuses on the regulatory distinction(s) causing the detrimental impact on imported products".³²⁶ Our above review of the Panels' findings and the Appellate Body's findings in the first compliance proceedings indicates that the relevant regulatory distinctions giving rise to the detrimental impact in this dispute do not concern driftnet fishing on the high seas. Mexico has not demonstrated how the treatment under the measure of driftnet fishing on the high seas is related to the Panels' findings of detrimental impact.³²⁷ Furthermore, one of the regulatory distinctions causing the detrimental impact on Mexican tuna products is that tuna products containing tuna caught by *setting on dolphins* are ineligible for the dolphin-safe label, while tuna products containing tuna caught by *other fishing methods* are provisionally eligible for the label.³²⁸ As noted above, the distinction underlying the ineligibility of tuna caught by setting on dolphins is made on the basis of fishing method, without reference to any particular ocean area or fishery. In our view, therefore, the fact that the measure at issue also disqualifies from the dolphin-safe label tuna products containing tuna caught by driftnet fishing on the high seas does not, in itself, undermine the Panels' approach in assessing, *inter alia*, whether the distinction between setting on dolphins and other fishing methods is calibrated to different risks to dolphins.

6.71. Mexico nonetheless argues that, "[e]ven if the measure did not apply the eligibility criteria on an ocean area basis, legally the calibration assessment must be undertaken on a fishing method and ocean area basis and, in certain circumstances, requires that the measure apply the eligibility criteria

³¹⁹ See Panel Reports, paras. 7.568-7.573, 7.578, 7.599-7.603, 7.613, 7.651-7.652, 7.671-7.673, and 7.709-7.716.

³²⁰ Panel Reports, para. 7.568.

³²¹ See para. 6.61 above.

³²² We are aware of Mexico's view that the Panels unduly focused on fishing methods in conducting their assessment of risk profiles, such that the Panels failed to adequately assess the risks in each individual fishery. (See paras. 6.91 and 6.100 below) Since that aspect of Mexico's arguments relates more specifically to the way in which the Panels conducted their assessment of risk profiles, we address it in section 6.1.4 below, rather than this section, which concerns more broadly whether the Panels correctly framed the calibration analysis.

³²³ Mexico's appellant's submission, fn 207 to para. 166.

³²⁴ Mexico's appellant's submission, fn 207 to para. 166.

³²⁵ See paras. 5.10-5.11 above.

³²⁶ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.93. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.

³²⁷ We note that, on appeal, Mexico only raises the measure's distinct treatment of driftnet fishing on the high seas in support of its view that the Panels erred by making a fishing-method-by-fishing-method analysis. Mexico does *not* argue in its appellant's submission that: (a) the distinction between driftnet fishing on the high seas and other individual fisheries causes the detrimental impact on Mexican tuna products; or (b) the Panels erred by failing to examine whether this particular distinction is calibrated to different risks to dolphins.

³²⁸ Panel Reports, paras. 7.76-7.78; Appellate Body Report, *US – Tuna II (Mexico)* (*Article 21.5 – Mexico*), para. 7.236; Original Panel Report, para. 7.317.

on an ocean area basis in order to be in compliance with Article 2.1.³²⁹ In Mexico's view, because risks to dolphins depend not only on fishing methods but also on the characteristics of the ocean areas in which those fishing methods are used, eligibility criteria that are based solely on a distinction between different fishing methods (without identifying specific ocean areas in which those methods are used) would undermine the measure's objective of protecting dolphins from the risks of tuna fishing. As Mexico further explained at the hearing, in its view, the distinction between setting on dolphins and other fishing methods is *per se* inconsistent with Article 2.1, in light of the objectives of the measure, the manner in which the Appellate Body has previously articulated the calibration analysis, and the fact that certain fisheries may have a risk profile equivalent to that of setting on dolphins in the ETP.

6.72. We recall that, under the second step of the "less favourable treatment" analysis under Article 2.1 of the TBT Agreement, the relevant question is whether the detrimental impact caused by the measure at issue stems exclusively from a legitimate regulatory distinction.³³⁰ In our view, in order to answer this question, it is necessary to examine the distinction that gives rise to the detrimental impact. As indicated above, the detrimental impact in this dispute results, in part, from the distinction under the eligibility criteria between setting on dolphins and other fishing methods. Consequently, the test of whether the measure is even-handed requires assessing, *inter alia*³³¹, whether *this* distinction is a legitimate regulatory distinction.

6.73. Furthermore, in this dispute, the Appellate Body has accepted the premise that the Tuna Measure would not violate Article 2.1 if the relevant regulatory distinctions leading to detrimental impact are properly "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.³³² Thus, to the extent that Mexico's argument suggests that the distinction between setting on dolphins and other fishing methods is not even-handed simply because it is drawn on the basis of fishing methods, we do not consider Mexico's approach to be consistent with the findings from the original and first compliance proceedings. To the contrary, whether this distinction is legitimate for the purpose of Article 2.1 must be assessed through a comparison of the risk profiles of these different fishing methods.

6.74. In response to questioning at the hearing, Mexico argued that a fishing-method-by-fishing-method distinction for the purpose of the eligibility criteria would undermine the measure's objective of protecting dolphins from the risks of tuna fishing.³³³ We recall, however, that the Appellate Body has accepted that if it is shown that the regulatory distinctions under the measure are calibrated to different risks to dolphins, then the detrimental impact under the measure would stem exclusively from a legitimate regulatory distinction.³³⁴ This approach by the Appellate Body reflected the understanding that, given the design and structure of the Tuna Measure (including the distinction between setting on dolphins and other fishing methods), if it can be shown that the distinctions are calibrated to different risks to dolphins, this would also indicate that such distinctions are rationally related to, and hence capable of contributing to, the measure's objectives (including the objective of protecting dolphins). Indeed, as discussed in section 6.1.3.1.1 above, we consider that the calibration analysis as set out by the Appellate Body encompasses considerations of the nexus between the regulatory distinctions under the measure and the measure's objective. However, under Mexico's approach, the 2016 Tuna Measure would be *per se* inconsistent with Article 2.1, solely on the basis that such a distinction would undermine the objective of protecting dolphins. In our view, Mexico has not demonstrated why a distinction on the basis of fishing methods would undermine the objective of protecting dolphins.

³²⁹ Mexico's appellant's submission, fn 207 to para. 166.

³³⁰ See para. 6.9 above.

³³¹ As part of this assessment, the Panels were also required to examine whether the regulatory distinctions underlying the certification and tracking and verification requirements are calibrated to the risk profiles of the ETP large purse seine fishery and all other fisheries. As noted in paragraph 6.67 above, we understand the Panels to have compared the risk profiles of the relevant fisheries for the purpose of this analysis, and we examine in section 6.1.5 below whether the Panels properly concluded that the relevant regulatory distinctions are calibrated to these risk profiles.

³³² See para. 6.36 above. See also Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.155.

³³³ We note that Mexico does not contest that the objectives of the 2016 Tuna Measure include the protection of dolphins. (Mexico's appellant's submission, para. 71)

³³⁴ See *supra*, fn 332. See also Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.98.

6.75. We also note Mexico's argument that, because the Panels "disregarded"³³⁵ the fact that certain fisheries may have risk profiles equivalent to, or higher than, the risk profile of *setting on dolphins in the ETP*, the Panels also failed to recognize that permitting access to the dolphin-safe label to tuna caught in such ocean areas undermines the measure's objectives.³³⁶ However, from our review of the Panels' findings, it is clear that the 2016 Tuna Measure does not draw a regulatory distinction between the ETP setting-on-dolphins-fishery and other fisheries. As explained above, the eligibility criteria distinguish between *setting on dolphins* and other fishing methods, while the certification requirements and tracking and verification requirements distinguish between the *ETP large purse seine* fishery (whether by setting on dolphins or by other methods of purse seine fishing) and all other fisheries.³³⁷ It is on the basis of these regulatory distinctions that the Panels were required to compare the risk profiles of different fishing methods (with respect to the eligibility criteria) and fisheries (with respect to the certification and tracking and verification requirements), having established such risk profiles on the basis of their review of all relevant evidence of the risks to dolphins from different fishing methods as used in different ocean areas.

6.76. In any event, to the extent that Mexico is asserting that the Panels' analysis of risk profiles should have addressed all ocean areas because risks differ across different ocean areas, we have already addressed this argument above.³³⁸ As discussed, we agree that information pertaining to the risks to dolphins in individual fisheries is relevant, and should be taken into account, in assessing and comparing the overall relative risks of different fishing methods.³³⁹ On the basis of the evidence concerning the use of different fishing methods in different ocean areas, the Panels would then be able to compare the relative risks of specific fishing methods in order to examine whether the eligibility criteria are calibrated to such risks. To the extent that Mexico is asserting that the Panels failed to assess relevant evidence regarding the use of fishing methods in specific ocean areas, we address this argument in the context of our discussion of the Panels' assessment of risk profiles below.³⁴⁰

6.77. In sum, given that the eligibility criteria under the 2016 Tuna Measure distinguish between setting on dolphins and other fishing methods, and Mexico has not demonstrated how such a distinction would undermine the objective of protecting dolphins, we consider that assessing whether this distinction is calibrated to different risks to dolphins required the Panels to compare, *inter alia*, the risk profiles of the relevant fishing methods. Based on the foregoing, we consider that Mexico has not demonstrated that the Panels erred by comparing the risk profiles of different fishing methods in applying the calibration analysis to the eligibility criteria. Specifically, we consider that the Panels were correct to compare, in the context of the eligibility criteria, the risk profiles of different fishing methods, given that the relevant regulatory distinction under the eligibility criteria is indeed on the basis of fishing methods. We also consider that the Panels acted appropriately by comparing the risk profiles of individual fisheries in the context of applying the calibration analysis to the certification and tracking and verification requirements, since those requirements make a distinction on the basis of fisheries (i.e. both fishing method and ocean area).

6.78. In setting out the foregoing analysis, we are mindful of the need to avoid assessing each element of the measure at issue in isolation. We recall that, in the first compliance proceedings, the Appellate Body recognized that it may be appropriate for a panel "to proceed by assessing different elements of [a] measure in a sequential manner", provided that doing so does not "lead to the isolated consideration of a particular element" where the elements of a measure are closely interrelated.³⁴¹ Thus, a segmented approach may raise concerns "when a panel fails to make an overall assessment that synthesizes its reasoning or intermediate conclusions concerning related elements of a measure at issue so as to reach a proper finding of consistency or inconsistency in respect of that measure".³⁴² In our view, the Panels' approach as described above³⁴³, whereby they compared the risks of *fishing methods* in the context of the eligibility criteria, and risks of *fishing methods as used in specific ocean areas* in the context of the certification and tracking and verification requirements, appears to comport with the Appellate Body's guidance in the original and

³³⁵ Mexico's appellant's submission, para. 167.

³³⁶ Mexico's appellant's submission, paras. 159-162 and 164-171.

³³⁷ See para. 6.65 above.

³³⁸ See para. 6.63 above.

³³⁹ See para. 6.63 above.

³⁴⁰ See section 6.1.4 below.

³⁴¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.14-7.15.

³⁴² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.15.

³⁴³ See para. 6.67 above.

first compliance proceedings.³⁴⁴ Such an approach adapted the calibration analyses to reflect the specific distinctions made under the measure and allowed the Panels to evaluate the way in which the different interconnected aspects of the measure work together. We also recall that, having examined sequentially, the eligibility criteria, the certification requirements, the tracking and verification requirements, and the determination provisions, the Panels provided an overall assessment of the consistency of the 2016 Tuna Measure with Article 2.1.³⁴⁵

6.1.3.3 Conclusion

6.79. Under Article 2.1 of the TBT Agreement, in order to determine whether the detrimental impact stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinize whether the technical regulation at issue is even-handed in light of the particular circumstances of the case. In the present dispute, an examination of whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement entails an assessment of whether the regulatory distinctions of the measure are calibrated to the risks to dolphins arising from different fishing methods in different areas of the ocean. Such assessment involves: (i) an assessment of the overall relative risks of harm to dolphins arising from the use of different fishing methods in different ocean areas; and (ii) an assessment as to whether the differences in the dolphin-safe labelling conditions under the measure are appropriately tailored to, or commensurate with, those respective risks. If conducted properly, this calibration analysis would encompass consideration of the rational relationship between the regulatory distinctions drawn by the 2016 Tuna Measure and its objectives. Thus, there is no need to separately assess the rational relationship between the regulatory distinctions drawn by the measure and its objectives. Furthermore, while risks of inaccurate labelling are relevant to the calibration analysis, this does not mean that the applicable legal standard requires the Panels to determine whether the 2016 Tuna Measure is calibrated, *inter alia*, to the risk of inaccurate dolphin-safe information being passed to consumers.

6.80. In conducting the calibration analysis, it is necessary to examine the risks to dolphins across all relevant ocean areas in which different fishing methods are practised. This does not mean that, under Article 2.1 of the TBT Agreement, a measure that seeks to protect dolphins must make all relevant regulatory distinctions on the basis of both fishing method and ocean area. Rather, the nature of the calibration analysis to be conducted is informed by the nature of the regulatory distinctions made under the measure itself, and it is the regulatory distinctions causing the detrimental impact on imported products that must be calibrated to different risks to dolphins. The relevant regulatory distinctions that need to be examined for the purpose of calibration in this dispute include the distinction between setting on dolphins and other fishing methods (in the context of the eligibility criteria) and the distinction between the ETP large purse seine fishery and all other fisheries (in the context of the certification and the tracking and verification requirements).

6.81. For these reasons, we do not consider that Mexico has established that the Panels, in considering that they were required to examine whether the 2016 Tuna Measure was calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean, failed to include an inquiry into the nexus between the relevant regulatory distinctions and the objectives of the measure. We also disagree with Mexico that the Panels erred by comparing the risk profiles of different fishing methods in applying the calibration analysis to the eligibility criteria. In our view, in the specific context of the 2016 Tuna Measure, in order to assess whether the detrimental impact on Mexican tuna products stems exclusively from a legitimate regulatory distinction, the Panels were required to assess whether the regulatory distinctions causing that detrimental impact are calibrated to different risks to dolphins, in terms of the overall relative risks to dolphins, taking into account the objectives of the measure.

6.1.4 The Panels' assessment of risk profiles

6.82. Mexico makes three sets of arguments with respect to the Panels' assessment of different risk profiles, alleging that the Panels erred by: (i) failing to adequately evaluate the risk profiles of different fisheries; (ii) using the risk profile of setting on dolphins in the ETP as the benchmark for assessing the risk profiles of other fisheries; and (iii) relying predominantly on "per set" evidence for measuring the level of risks to dolphins, and ignoring other relevant evidence in their evaluation

³⁴⁴ We address whether the Panels' analysis took into account the manner in which the discrete elements of the 2016 Tuna Measure are cumulative and highly interrelated in section 6.1.5 below.

³⁴⁵ See Panel Reports, section 7.8.6. See also section 6.1.5.5 below.

of the risk profiles.³⁴⁶ The United States submits that the Panels correctly assessed the risk profiles of different fishing methods, as used in different areas of the ocean.³⁴⁷ The United States argues that certain aspects of Mexico's arguments appear to pertain to the Panels' appreciation of the facts and therefore fall outside the scope of this appeal, since Mexico did not raise any claims of error under Article 11 of the DSU.³⁴⁸ Furthermore, in the United States' view, the Panels acted correctly in relying primarily on per set evidence, and not relying on evidence that would have been misleading and inapposite for comparing the relative risk profiles of different fishing methods and fisheries.³⁴⁹ We begin by recalling the Panels' assessment of different risk profiles, before turning to address each of the three sets of arguments put forward by Mexico.³⁵⁰

6.1.4.1 The Panels' findings

6.83. The Panels recalled that the Appellate Body criticized the first compliance panel for failing to analyse "the overall levels of risks in different fisheries, and how these fisheries compared to each other" despite "considerable evidence" before it in this regard, in particular because it had failed to consider the relative risks arising from observed mortalities and serious injuries to dolphins.³⁵¹ The Panels therefore considered that it was necessary "to establish the risk profiles of the relevant fishing methods in different areas of the ocean, taking into account data on both observable and unobservable harms".³⁵²

6.84. In establishing the risk profiles of different fishing methods in different areas of the ocean, the Panels considered it appropriate to "rely to the greatest extent possible on a quantitative analysis, and recur to a qualitative assessment in cases where this seem[ed] to be the most reasonable avenue to properly gauge and describe the risks at issue."³⁵³ The Panels also highlighted the importance of a "standardized benchmark or metric when determining and comparing the different risk profiles", emphasizing that "[b]ecause the different scientific evidence on the record does not necessarily follow the same methodology or present its results in a homogeneous and consistent manner, there is a need to use a standardized benchmark so that comparisons across studies are meaningful and adequate."³⁵⁴ The Panels considered several different possible standardized metrics and ultimately adopted a "per set" methodology that entailed averaging the total number of a particular indicator of adverse effects to dolphins by the number of operations of

³⁴⁶ Mexico's appellant's submission, paras. 154-225. As further discussed below, per set evidence involves averaging the total number of a particular indicator of adverse effects to dolphins, such as mortalities and serious injuries, by the number of operations of a particular type of fishing gear used in a particular fishery in a given time period. (See para. 6.84 below)

³⁴⁷ United States' appellee's submission, paras. 96-203.

³⁴⁸ See e.g. United States' appellee's submission, paras. 114, 138, 152, 172-173, and 192.

³⁴⁹ United States' appellee's submission, paras. 151-203.

³⁵⁰ We note that, in its appellant's submission, Mexico states that, although "the evaluation of the risk profiles in certain respects required scientific expertise ..., the Panels declined to consult with experts ... [and i]n Mexico's view, the Panels did not make an appropriate exercise of their discretion under Article 13 of the DSU in declining to request technical advice from experts". (Mexico's appellant's submission, paras. 155 and 157) The United States, in its appellee's submission, stated that "Mexico makes no appeal with respect to the Panels' decision not to consult experts, and thus there is no reason, or basis, for the Appellate Body to engage on this aspect of the Panel Reports." (United States' appellee's submission, para. 98 (fn omitted)) However, Mexico clarified at the hearing that it was not asserting any legal error by the Panels in this respect, and that its comments regarding Article 13 of the DSU were not relevant to the specific issues before the Appellate Body. We therefore do not address this aspect of Mexico's appellant's submission.

³⁵¹ Panel Reports, para. 7.146 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.243).

³⁵² Panel Reports, para. 7.149.

³⁵³ Panel Reports, para. 7.170.

³⁵⁴ Panel Reports, para. 7.171.

a particular fishing gear used in a particular fishery in a given time period.³⁵⁵ The Panels found that relevant indicators included observed mortalities, serious injuries, and tuna-dolphin interactions.³⁵⁶

6.85. The Panels also made several distinctions between different types of harm occurring to dolphins.³⁵⁷ The Panels first distinguished between *observable* harm (i.e. any type of harm that *can* be detected and reported) and *unobservable* harm (i.e. the type of harm that occurs but cannot be detected during the set itself). As regards observable harm, the Panels also distinguished between *observed* harm (i.e. the harm that is observable and that has, as a matter of fact, been detected and reported during the conduct of a set) and *unobserved* harm (i.e. the type of harm that is observable but that has *not* been detected or reported during the conduct of a set). Given that, by definition, there can be no observer-based evidence of such unobserved but observable harm, the Panels looked at the level of association between dolphins and tuna as a proxy in order to determine probable levels of unobserved but observable harm.³⁵⁸ Finally, the Panels distinguished between *direct* harm (caused by direct interaction with fishing gear) and *indirect* harm (consequent upon other harm sustained as a result of direct interaction with fishing gear).

6.86. The Panels proceeded to conduct their analysis of risk profiles by distinguishing between seven different fishing methods, namely: purse seine fishing by setting on dolphins; purse seine fishing without setting on dolphins; gillnet fishing; longline fishing; trawl fishing; tuna handlining; and pole and line fishing. The Panels found that purse seine fishing by *setting on dolphins*³⁵⁹ causes serious injuries to dolphins.³⁶⁰ In particular, the Panels found that, in the ETP, while the evidence suggested that setting on dolphins does not pose a very high risk of observable serious injury³⁶¹, such serious injury is less frequent than mortality³⁶², and the likelihood of unobserved mortality or serious injury is present in every set, as a consequence of the tuna-dolphin association in that ocean area.³⁶³ The Panels also found that setting on dolphins causes unobservable harms as a result of the chase and encirclement process itself³⁶⁴, including "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".³⁶⁵

³⁵⁵ Panel Reports, para. 7.214. The Panels considered Mexico's proposed methodologies, consisting of: (a) a Potential Biological Removal (PBR) methodology, measuring the maximum number of animals that may be removed from an animal stock without affecting that stock's optimum sustainable population; and (b) either as an alternative to a PBR methodology, or to be read in conjunction with PBR evidence, a comparison of the absolute levels of dolphin mortalities and serious injury from different fishing methods and fishing areas. The Panels rejected the PBR methodology and relied on evidence of absolute levels of adverse effects to dolphins in situations where the Panels considered the per set evidence to be insufficient. (Ibid., paras. 7.175-7.195. See also Mexico's first written submission to the Panels, para. 247) As discussed in section 6.1.4.4 below, Mexico appeals the Panels' rejection of such benchmarks.

³⁵⁶ Panel Reports, para. 7.204.

³⁵⁷ Panel Reports, paras. 7.245-7.251.

³⁵⁸ Panel Reports, para. 7.253. The Panels explained that "the magnitude of interactions does not indicate the number of dolphins that actually do suffer unobserved harms, but rather, the upper bound of dolphins that could suffer such harms. The lower the interaction the less likely it is for the relevant fishing method to cause harms to dolphins." (Ibid.)

³⁵⁹ Purse seine fishing by setting on dolphins consists of "chasing and encircling the dolphins with a purse-seine net in order to catch the tuna swimming beneath the dolphins" in areas where there is an association between tuna and dolphins. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.5) According to the Panel Reports, "[s]peedboats are used to chase down the dolphins and herd them into a tight group; then the net is set around them. The tuna-dolphin bond is so strong that the tuna stay with the dolphins during this process, and tuna and dolphins are captured together in the net. ... If all goes well, the dolphins are released alive, but ... things can go wrong, and when they do, dolphins may be killed." (Panel Reports, para. 7.258 (quoting T. Gerrodette, "The Tuna-Dolphin Issue", in Perrin, Wursig, and Thewissen (eds.), *Encyclopedia of Marine Mammals*, 2nd edn (Elsevier, 2009) (Panel Exhibit USA-12), p. 1192))

³⁶⁰ Panel Reports, para. 7.281.

³⁶¹ Panel Reports, para. 7.282.

³⁶² The Panels found that the mortality rate per 1,000 sets associated with setting on dolphins in the ETP ranged between 69.42 in 2015 and 113.38 in 2009, with an average of 91.15 mortalities. (Panel Reports, para. 7.280)

³⁶³ Panel Reports, para. 7.285.

³⁶⁴ Panel Reports, para. 7.308.

³⁶⁵ Panel Reports, para. 7.309 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, fn 663 to para. 330, in turn referring to Original Panel Report, paras. 7.491-7.506).

6.87. Regarding purse seine fishing *without setting on dolphins*³⁶⁶, the Panels looked at evidence of mortalities and serious injuries to dolphins in the ETP, Western and Central Pacific Ocean (WCPO), Indian Ocean, and Eastern Tropic Atlantic Ocean (ETAO).³⁶⁷ The Panels concluded that while purse seine fishing without setting on dolphins has killed and seriously injured dolphins in the past and has the potential of doing so in the future, the risk profile of this fishing method is generally low as it does not require interaction with dolphins in order to spot tuna.³⁶⁸ The Panels considered that this fishing method has a "relatively low risk profile in terms of both observed and unobserved mortality and serious injury".³⁶⁹ The Panels further concluded that the extent of *unobserved harm* in the ETP may be low, but that without direct evidence on the record they were unable to base their finding on a precise quantification.³⁷⁰ The Panels also found that the likelihood of unobserved harm to dolphins in the WCPO, the Indian Ocean, and the ETAO is low because interactions with dolphins are infrequent.³⁷¹ Additionally, the Panels found that purse seine fishing without setting on dolphins in the ETP, the WCPO, the Indian Ocean, and the ETAO does not cause the kinds of unobservable harms caused by purse seine fishing by setting on dolphins in the ETP, since purse seine fishing without setting on dolphins does not require interaction with dolphins.³⁷²

6.88. With respect to *gillnet* fishing³⁷³, the Panels found that this fishing method poses high levels of observable harm to dolphins in certain areas of the ocean, but does not pose the same level of harm in other areas.³⁷⁴ The Panels further noted that the evidence presented in relation to "ghost fishing"³⁷⁵ indicated that ghost fishing does give rise to unobserved harms, but that such harms were at least *observable*, and not like the kinds of unobservable harm that are caused by setting on dolphins.³⁷⁶

6.89. As regards *longline*³⁷⁷ and *handline*³⁷⁸ fishing, the Panels found that the risk profiles of these methods were low in terms of observable harms, and that they do not cause the kinds of unobservable harm caused by setting on dolphins.³⁷⁹ With regard to *trawl fishing*³⁸⁰, the Panels found that this method is a low-to-moderate-risk fishing method in terms of observed mortalities and observable harm, as it entails very little, if any, interaction with dolphins.³⁸¹ The Panels also found that trawl fishing does not cause the kinds of unobservable harm caused by setting on dolphins.³⁸² Regarding the *pole and line* fishing method, the Panels found no reports of any dolphins being killed

³⁶⁶ In addition to setting on dolphins, purse seine fishing is also conducted by setting on: (i) seamounts (a category of oceanic ridges); (ii) floating objects; or (iii) schools of tuna (i.e. where the set is not based on the tuna's association with any other marine feature/object/animal). (Panel Reports, paras. 7.313-7.316 (referring to Food and Agricultural Organization of the United Nations (FAO), FAO Fisheries and Aquaculture Technical Paper 568, *Bycatch and Non-Tuna Catch in the Tropical Purse Seine Fisheries of the World* (Rome, 2013) (Panel Exhibit USA-60), pp. 17-24))

³⁶⁷ Panel Reports, paras. 7.326-7.399.

³⁶⁸ Panel Reports, para. 7.400.

³⁶⁹ Panel Reports, para. 7.401.

³⁷⁰ Panel Reports, para. 7.334.

³⁷¹ Panel Reports, paras. 7.334, 7.367, 7.385, and 7.398.

³⁷² Panel Reports, para. 7.401.

³⁷³ Gillnets are nets "set on the seafloor ... or floated vertically" using buoys (i.e. driftnets or drift gillnets). (Panel Reports, paras. 7.404-7.405 (referring to Natural Resources Defense Council, *Net Loss: The Killing of Marine Mammals in Foreign Fisheries* (New York, January 2014) (Panel Exhibit MEX-18), p. 13; FAO, "Tuna Drifting Gillnet" (Panel Exhibit MEX-15)))

³⁷⁴ Panel Reports, para. 7.444.

³⁷⁵ Ghost fishing occurs when fishing gear (such as gillnets) continue to cause harm to marine life (such as dolphins) after being lost or discarded. (Panel Reports, paras. 7.410 and 7.447 (referring to NOAA, 2015 NOAA Marine Debris Program Report, *Impact of "Ghost Fishing" via Derelict Fishing Gear* (Charleston, March 2015) (Panel Exhibit MEX-104), p. 6))

³⁷⁶ Panel Reports, paras. 7.450-7.457.

³⁷⁷ Tuna longlining is "a passive type of fishing technique making use of lines with baited hooks as fishing gear", with a typical set consisting of "200 or more units or "baskets" connected together, with a buoy at each connection, and a total of about 3,000 hooks". (Panel Reports, para. 7.458 (quoting FAO, "Industrial Tuna Longlining" (Panel Exhibit MEX-26), pp. 2-3))

³⁷⁸ A tuna handline is a "single vertical line with one barbed hook at the distal point", or several barbed hooks connected to branchlines along the mainline at regular intervals. (Panel Reports, para. 7.495 (quoting FAO, "Tuna Handlining" (Panel Exhibit MEX-38)))

³⁷⁹ Panel Reports, paras. 7.481 and 7.511.

³⁸⁰ Trawl fishing consists of "towing a net ... either with bottom contact or in midwater", catching fish and shellfish by filtering the water. (Panel Reports, para. 7.482 (quoting FAO, "Trawl Nets" (Panel Exhibit MEX-37)))

³⁸¹ Panel Reports, paras. 7.493-7.494.

³⁸² Panel Reports, para. 7.494.

or seriously injured as a result of pole and line fishing, and no evidence that any unobservable harm is caused to dolphins.³⁸³ The Panels concluded that the risk profile is very low.³⁸⁴

6.90. Having set forth their analysis of the seven fishing methods, the Panels conducted an overall relative assessment, in which they "provide[d] a comparative assessment of method-specific findings".³⁸⁵ The Panels concluded that, given the differences between setting on dolphins and each of the other six methods with respect to observable harm to dolphins, and taking into account that none of the other methods causes the kinds of unobservable harms caused by setting on dolphins, "overall, the risk profile of setting on dolphins is much higher than that of each of the other six fishing methods used to catch tuna."³⁸⁶

6.1.4.2 Whether the Panels erred by failing to assess the risk profiles of individual fisheries

6.91. We first turn to Mexico's argument that the Panels did not properly determine the risk profiles of different fishing methods as used in different areas of the oceans, but erroneously limited their assessment of risk profiles to the seven tuna-fishing methods, without assessing the risk profiles for individual ocean areas.³⁸⁷ Mexico acknowledges that the Panels did address evidence with respect to ocean areas for certain of the fishing methods they assessed³⁸⁸, but argues that the Panels erred by forming conclusions on the fishing methods as a whole, and thereby "effectively averaged or sampled the overall relative risks or levels of harm over all of the fisheries that use the method".³⁸⁹ In particular, Mexico submits that the Panels effectively "disregarded that there are very high risks to dolphins" from gillnet fishing, longline fishing, and trawl fishing, in certain ocean areas.³⁹⁰ Mexico also argues that the Panels erred by failing to address the risk profile of purse seine fishing by setting on dolphins in ocean areas other than the ETP.³⁹¹

6.92. The United States submits that the Panels did assess the risks to dolphins in individual fisheries.³⁹² The United States indicates that, with respect to *observable* harms, the Panels assessed "each fishery for which there was probative evidence on the record", and, on this basis, "drew conclusions about the risk of observable harms posed by the different fishing methods".³⁹³ With respect to *unobservable* harms, the United States asserts that the Panels concluded that "none of the other fishing methods is capable of causing the sort of unobservable harms caused by dolphin sets", and that this conclusion is applicable "to each and all of the fisheries where these fishing methods are employed".³⁹⁴ The United States indicates that it was on the basis of these findings that the Panels "drew conclusions about the risk profile of each tuna fishing method 'as used in

³⁸³ Panel Reports, para. 7.515.

³⁸⁴ Panel Reports, para. 7.516.

³⁸⁵ Panel Reports, para. 7.517. The Panels explained that the reason for conducting this comparative assessment was that "the issue before [them was] whether the 2016 Tuna Measure, under which tuna products obtained from tuna caught by setting on dolphins are ineligible for the dolphin-safe label whereas tuna products obtained from tuna caught by the other six methods cited above are conditionally eligible for that label, is calibrated to different levels of risks posed to dolphins by different fishing methods in different areas of the ocean." (Ibid.)

³⁸⁶ Panel Reports, para. 7.525.

³⁸⁷ Mexico's appellant's submission, para. 161.

³⁸⁸ Specifically, purse seine fishing without setting on dolphins, gillnet fishing, longlining, trawl fishing, and handlining. (See Mexico's appellant's submission, para. 162)

³⁸⁹ Mexico's appellant's submission, para. 164 (referring to Panel Reports, para. 7.517).

³⁹⁰ Mexico's appellant's submission, para. 167. See also Mexico's appellant's submission, paras. 168-170 (referring to Panel Reports, paras. 7.438, 7.440-7.443, 7.466-7.467, 7.473-7.474, 7.489-7.490, and 7.493-7.494).

³⁹¹ Mexico's appellant's submission, para. 162. We note that Mexico's appellant's submission additionally states that "[t]he Panels did not address ocean areas in the context of the risk profile for pole-and-line fishing." (Ibid.) However, Mexico also indicated in its appellant's submission that "the parties agreed during the first compliance proceeding that this method is not known to harm dolphins." (Ibid., fn 21 to para. 22) Mexico clarified at the hearing that pole and line fishing was included in paragraph 162 to be complete in describing what the Panels said, and that Mexico does not take issue with the Panels' findings on pole and line fishing.

³⁹² United States' appellee's submission, paras. 125-126.

³⁹³ United States' appellee's submission, para. 125 (referring to Panel Reports, paras. 7.401 (purse seine fishing other than by setting on dolphins), 7.475 (longline fishing), 7.494 (trawl fishing), 7.511 (handlining), 7.514-7.515, and 7.520 (gillnet fishing)).

³⁹⁴ United States' appellee's submission, para. 125 (referring to Panel Reports, paras. 7.332-7.334, 7.365-7.367, 7.383-7.385, 7.396-7.398, 7.440-7.444, 7.466-7.471, 7.475, 7.488-7.494, 7.511, 7.514-7.515, and 7.521).

different areas of the ocean".³⁹⁵ The United States further argues that Mexico's assertion that certain fisheries are "high risk" is based on Mexico's own definitions of "high risk", as well as certain misstatements of the Panels' analysis of the evidence, and reflects arguments that the Panels rejected.³⁹⁶

6.93. We recall that, in order to properly assess whether the relevant regulatory distinctions under the 2016 Tuna Measure are properly calibrated to the risks to dolphins, the Panels were, *inter alia*, required to compare the risk profile of "setting on dolphins" with the risk profiles of other individual fishing methods. In order to make such a comparison, the Panels were necessarily required to establish the risk profiles of different fishing methods. We therefore consider it appropriate for the Panels to have formed a conclusion for each individual fishing method, for the purposes of conducting the calibration analysis.

6.94. We note, however, that, in forming a conclusion on each fishing method, the Panels were required to take into account all evidence provided to them with respect to each ocean area in which each fishing method is used. Furthermore, it is uncontested that, in the context of assessing whether the certification and tracking and verification requirements are calibrated to the risks to dolphins, the Panels were required to compare the risk profiles of the ETP large purse seine fishery and other individual fisheries.³⁹⁷ It was therefore incumbent on the Panels to not *only* draw conclusions on each fishing method as a whole, but also examine the risks to dolphins in each individual fishery.

6.95. In this respect, Mexico has not raised any claims under Article 11 of the DSU alleging that the Panels failed to assess any individual fishery for which evidence was placed before them. We also note that the Panels explicitly referred to evidence regarding individual fisheries for the purpose of examining the relevant fishing methods.³⁹⁸ Furthermore, certain of the evidence provided to the Panels was of a general nature, such that it pertained to *every* fishery in which that fishing method was practised.³⁹⁹ We therefore consider that Mexico has not demonstrated that the Panels failed to examine each individual fishery for which evidence was provided.

6.96. Mexico additionally argues that, in drawing an overall conclusion on the risk profile for each fishing method examined, the Panels effectively averaged or sampled the overall relative risks or levels of harm over all of the fisheries that use that method, and, in doing so, disregarded that there are very high risks to dolphins in certain ocean areas.⁴⁰⁰ For example, Mexico contrasts the Panels' finding that "gillnet fisheries, and driftnet fisheries in particular, have caused, in some circumstances and in certain regions, levels of observable harms greater than those caused by setting on dolphins in the ETP" with the Panels' conclusion that "while gillnet fishing may be harmful to dolphins, it does not *necessarily* cause such harms in every area of the ocean".⁴⁰¹

6.97. We do not see a contradiction between a finding that a particular fishing method poses high risks in *some* fisheries, but not others, and a conclusion that the fishing method as a whole has a lower risk profile than the method of setting on dolphins. We recall that, according to the Panels, setting on dolphins poses a high risk to dolphins in *all* fisheries for which evidence was provided to the Panels⁴⁰², whereas, for gillnet fishing, the Panels found that "gillnet fishing causes considerable

³⁹⁵ United States' appellee's submission, para. 125 (quoting Panel Reports, para. 7.517; referring to Panel Reports, paras. 7.402, 7.457, 7.480, 7.493-7.494, 7.511, 7.516-7.518, 7.520-7.523, and 7.525).

³⁹⁶ United States' appellee's submission, para. 126 (referring to Mexico's appellant's submission, paras. 168-170). The United States elaborates that Mexico specifically refers to the Panels' findings on Indian Ocean gillnet fisheries, absolute levels of mortalities caused by longline fishing in the Pacific Ocean, PBR evidence concerning an additional longline fishery, and per set evidence of mortalities in a North Atlantic trawl fishery. The United States recalls that the Panels "rejected" the exhibits that Mexico relied on in defining the Pacific Ocean longline fishery and North Atlantic trawl fisheries as "high risk", and explained why they chose not to rely on PBR evidence. Furthermore, with respect to the Indian Ocean gillnet fisheries, the Panels explained that the 2016 Tuna Measure "appropriately addresses the risks to dolphins in that fishery". (See *ibid.*, fn 285 to para. 126)

³⁹⁷ Mexico's and the United States' responses to questioning at the hearing.

³⁹⁸ For example, with respect to purse seine fishing without setting on dolphins, the Panels assessed the risks to dolphins in the ETP, the WCPO, the Indian Ocean, and the ETAO. (Panel Reports, paras. 7.326-7.399)

³⁹⁹ For example, with respect to pole and line fishing, the Panels examined evidence pertaining to the fishing method in general, without specifying any particular fisheries. (Panel Reports, paras. 7.514-7.516)

⁴⁰⁰ Mexico's appellant's submission, paras. 164 and 167.

⁴⁰¹ Mexico's appellant's submission, para. 168 (quoting Panel Reports, paras. 7.441-7.442 (emphasis original)).

⁴⁰² Panel Reports, paras. 7.256-7.311.

observable harms to dolphins in different areas of the ocean"⁴⁰³ but also that "there are other areas where this particular method does not cause such harms."⁴⁰⁴ Furthermore, we do not consider that, merely by forming conclusions on each fishing method as a whole, the Panels necessarily conflated the risk profiles of individual fishing *methods* with the risk profiles of individual *fisheries*. In light of the different sets of distinctions drawn under the measure, the Panels were required to compare the risk profiles of fishing methods in the context of assessing the eligibility criteria, and to compare the risk profiles of individual fisheries when assessing the certification and tracking and verification requirements. The Panels were therefore obliged to form conclusions on the risk profiles of different fishing methods, in the process of which the Panels were also required to look at the evidence of risks to dolphins in individual ocean areas. In our view, the fact that the Panels made conclusions on fishing methods in assessing the eligibility criteria does not indicate that they inappropriately applied the calibration analysis to the certification and tracking and verification requirements.

6.98. In any event, to the extent that Mexico considers that the Panels' conclusions on each individual fishing method were flawed, because the Panels incorrectly weighed and balanced the risk profiles of each individual *fishery* in drawing generalized conclusions on each *fishing method* as a whole, we consider that such a question relates to the Panels' appreciation of the evidence and the facts, rather than the Panels' application of the legal standard under Article 2.1 of the TBT Agreement. However, Mexico has not challenged the Panels' appreciation of the evidence under Article 11 of the DSU. Consequently, we do not consider it necessary or appropriate to review whether the Panels' conclusions on each fishing method were justified on the basis of the evidence placed before them.⁴⁰⁵

6.99. It therefore suffices for our purposes to note that the Panels assessed each individual fishery for which evidence was given to them, and, on the basis of these assessments, drew conclusions on the risk profile of different fishing methods.⁴⁰⁶ We therefore do not consider that Mexico has demonstrated that the Panels failed to assess the risk profiles of individual fisheries or that the Panels erred in drawing conclusions on the risk profile of each fishing method on the basis of their examination of the evidence before them (including evidence pertaining to each individual fishery).

6.1.4.3 Whether the Panels erred by using the risk profile of setting on dolphins in the ETP as a benchmark

6.100. We turn now to Mexico's argument that the Panels erred by using the risk profile of setting on dolphins in the ETP as a benchmark – referred to by Mexico as the "ETP benchmark"⁴⁰⁷ – for assessing the risk profiles of other fisheries. Mexico asserts that a "benchmark cannot be used to objectively assess the circumstances that constitute the benchmark itself".⁴⁰⁸ Rather, Mexico asserts that the Panels should have relied on an "independent and objective standard or point of reference against which the overall relative risks or levels of harm arising from each" fishery could be assessed.⁴⁰⁹ Mexico also argues that the Panels erred by distinguishing setting on dolphins in the ETP from other fisheries, because the "mere fact that the risk profiles of other [fisheries] ... may be different from or comparatively lower than the risk profile of [setting on dolphins] in the ETP does not mean that the regulatory distinctions are 'calibrated' to the different overall relative risks or levels of harm arising from different [fisheries]".⁴¹⁰ Mexico further submits that the Panels' reliance on the "ETP benchmark" for comparing the risk profiles of other fisheries resulted in the Panels focusing their analysis on "qualitative attributes that are unique" to the ETP setting-on-dolphins fishery.⁴¹¹ Mexico refers to the Panels' findings on unobservable harms with respect to "alleged stress effects on dolphins in the ETP"⁴¹², and considers that the Panels' emphasis on this kind of

⁴⁰³ Panel Reports, para. 7.440.

⁴⁰⁴ Panel Reports, para. 7.442.

⁴⁰⁵ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 955-958. See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 274.

⁴⁰⁶ We note that the only evidence adduced to the Panels with respect to any individual fishery where setting on dolphins is practised was evidence related to the ETP. (See Panel Reports, paras. 7.270-7.311)

⁴⁰⁷ Mexico's appellant's submission, paras. 173 and 178.

⁴⁰⁸ Mexico's appellant's submission, para. 176.

⁴⁰⁹ Mexico's appellant's submission, para. 179.

⁴¹⁰ Mexico's appellant's submission, para. 181.

⁴¹¹ Mexico's appellant's submission, para. 186.

⁴¹² Mexico's appellant's submission, para. 187 (referring to Panel Reports, para. 7.310).

unobservable harm caused the Panels "to disregard the Appellate Body's direction to take into account the overall effects of each fishing method".⁴¹³

6.101. The United States argues that the Panels' approach was fully in line with the calibration analysis as set forth by the Appellate Body in previous proceedings.⁴¹⁴ The United States notes that Mexico itself has consistently argued that "the ETP large purse [seine] fishery is a proper comparator to determine whether the regulatory distinctions are even-handed, both in the previous compliance proceeding and before the Panels."⁴¹⁵ As for Mexico's arguments regarding different types of harm, the United States considers that the Panels did take into account all evidence related to any kinds of unobservable harms, including those identified by Mexico.⁴¹⁶ According to the United States, "the Panels found that, while some evidence suggested that 'ghost fishing linked to gillnets poses some risks to dolphins, ... its extent is unclear' ... [and] 'the absolute numbers of marine mammals involved are relatively small'."⁴¹⁷

6.102. As discussed in paragraphs 6.72-6.73 above, in order to be consistent with Article 2.1 of the TBT Agreement, it is the regulatory distinctions causing the detrimental impact under the 2016 Tuna Measure that must be calibrated to different risks to dolphins. Thus, a proper calibration analysis in this dispute does not mean that the Panels were required to examine whether the 2016 Tuna Measure makes all relevant regulatory distinctions on a fishery-by-fishery basis.⁴¹⁸ We have also noted that, in light of the relevant distinctions made under the measure at issue, the Panels were correct to have compared the risk profile of purse seine fishing by setting on dolphins with the risk profiles of other fishing methods for the purpose of examining the eligibility criteria, and to have compared the risk profile of the ETP large purse seine fishery with the risk profiles of all other fisheries for the purpose of examining the certification and tracking and verification requirements.⁴¹⁹

6.103. We further note that the Panels did not, as Mexico contends, use setting on dolphins in the ETP as a "benchmark". Indeed, the Panels did not use the expression "ETP benchmark" in their analysis of risk profiles. Rather, the Panels referred to this expression solely in the context of describing the United States' explanation regarding the determination provisions under the 2016 Tuna Measure.⁴²⁰ In contrast, in their analysis of risk profiles, the Panels used the word "benchmark" to describe a "standardized benchmark or metric" when assessing and comparing different risk profiles.⁴²¹ In this respect, the Panels were referring to the use of an appropriate metric, or methodology, for comparing the risks to dolphins in different fisheries. As explained above, the Panels relied primarily on data reflecting the numbers of observed mortalities, serious injuries, and tuna-dolphin interactions on a per set basis, in different fisheries, to compare the risks to dolphins from different fishing methods and in different fisheries.⁴²² Where such data were unavailable, the

⁴¹³ Mexico's appellant's submission, para. 189 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras. 7.152 and 7.155-7.156).

⁴¹⁴ United States' appellee's submission, paras. 139-143.

⁴¹⁵ United States' appellee's submission, para. 142 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.112; First Compliance Panel Report, paras. 7.111-7.112; Mexico's first written submission to the Panels, para. 256; Mexico's second written submission to the Panels, paras. 248, 256, and 263). (fns omitted)

⁴¹⁶ United States' appellee's submission, para. 147.

⁴¹⁷ United States' appellee's submission, para. 148 (quoting Panel Reports, para. 7.448).

⁴¹⁸ See paras. 6.64-6.77 above.

⁴¹⁹ See paras. 6.65-6.77 above.

⁴²⁰ Panel Reports, paras. 7.417 and 7.685. The Panels noted the United States' explanation that NOAA compared the bycatch rates (i.e. number of dolphins killed per ton of tuna landed) of the Indian Ocean gillnet fishery to those caused by setting on dolphins in the ETP (the "ETP benchmark" to which Mexico refers). NOAA concluded, on this basis, that there was a "regular and significant" dolphin mortality rate in the Indian Ocean gillnet fishery. Under the structure of the 2016 Tuna Measure, this formal determination resulted in tuna from the Indian Ocean gillnet fishery being subject to stricter certification and tracking and verification requirements than would otherwise have been required to gain access to the dolphin-safe label. (See also *ibid.*, paras. 7.67-7.69)

⁴²¹ Panel Reports, para. 7.171.

⁴²² See para. 6.84 above. Furthermore, Mexico clarified at the hearing that the Panels' reliance on per set evidence constitutes an independent and objective standard or point of reference on which the Panels should have relied. Mexico nonetheless argued that, in addition to relying on per set evidence, the Panels should have also taken into account evidence related to the sustainability of different dolphin populations, as well as absolute levels of adverse effects in different areas. We address these aspects of Mexico's arguments in section 6.1.4.4 below.

Panels relied on other sources of information, including general information that relates to all fisheries in which a particular fishing method is practised.⁴²³

6.104. Once the Panels had assessed the risk profiles of different fishing methods and fisheries on the basis of per set data and other relevant evidence, the Panels did compare the risk profile of setting on dolphins with the risk profiles of other fishing methods in the context of both their assessment of risk profiles and their examination of whether the eligibility criteria are calibrated to different risks to dolphins.⁴²⁴ As we have discussed above, such a comparison of fishing methods was, *inter alia*, required in light of the applicable legal standard and the circumstances of this dispute.⁴²⁵ As to Mexico's contention that the Panels' assessment of the eligibility criteria was based on a comparison of the risk profile of setting on dolphins *in the ETP* with the risk profiles of other fishing methods⁴²⁶, we note that certain aspects of the Panels' assessment of the risk profile of setting on dolphins were indeed limited to the use of this fishing method in the ETP.⁴²⁷ This, however, was due to the fact that the only fishery-specific evidence provided to the Panels concerning the use of setting on dolphins pertained to the use of this method in the ETP.⁴²⁸ Furthermore, other aspects of the Panels' examination of the risks associated with setting on dolphins were *not* limited to the ETP, but more broadly pertained to setting on dolphins anywhere in the world.⁴²⁹

6.105. We note Mexico's argument that, by "distinguishing Mexico's fishing method [i.e. setting on dolphins] in the ETP from all other fishing methods in all other areas of the oceans ... the Panels did not assess whether tuna caught by other fishing methods in other ocean areas should also be excluded from access to the label".⁴³⁰ In Mexico's view, the "mere fact that the risk profiles of other fishing methods in other ocean areas may be different from or comparatively lower than the risk profile of [setting on dolphins] in the ETP does not mean that the regulatory distinctions are 'calibrated' to the different overall relative risks or levels of harm arising from different fishing methods in different ocean areas".⁴³¹ Mexico refers to the Appellate Body's statement that even-handedness depends not only on the level of risk associated with the fishing method suffering from a denial of access, but "also on whether the risks associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles, in the labelling conditions that apply in respect of tuna caught in such other fisheries".⁴³² In Mexico's view, the Panels did not assess "whether the risks or levels of harm associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles, in the labelling conditions that apply in respect of tuna caught in such other fisheries".⁴³³

6.106. In the United States' view, Mexico's approach "directly conflicts not only with the design, architecture, and revealing structure of the [Tuna Measure], but also with the Appellate Body's analysis in the first compliance proceeding".⁴³⁴ The United States argues that the relevant question under Article 2.1 is whether the differences arising under the relevant regulatory distinctions are commensurate with different risks to dolphins. According to the United States, perfection is not an

⁴²³ See e.g. Panel Reports, paras. 7.212, 7.434, 7.446-7.456, 7.476-7.481, and 7.514.

⁴²⁴ See paras. 6.67 and 6.90 below.

⁴²⁵ See para. 6.77 above.

⁴²⁶ Mexico's appellant's submission, paras. 175 and 186.

⁴²⁷ Specifically, the Panels' assessment of observed mortality and serious injury, observable serious injury, and unobserved mortality and serious injury appears to be based on evidence that is specific to the ETP. (See Panel Reports, paras. 7.279-7.285) By contrast, we note that the Panels' conclusion that "setting on dolphins causes unobservable harms" is not specific to the ETP and, consequently, applies to the fishing method as a whole. (See *ibid.*, para. 7.309)

⁴²⁸ See *supra*, fn 406.

⁴²⁹ For instance, with respect to unobservable harms, the Panels referred to the first compliance panel's findings that certain unobservable harms "occur as a result of the 'chase itself'". (Panel Reports, para. 7.286 (referring to Original Panel Report, para. 7.504)) Further, on examining the evidence submitted by the parties, the Panels concluded that "because chasing and encirclement are essential elements of the process of setting on dolphins, setting on dolphins cannot be used without putting dolphins at risk, even though that risk may not eventuate in every set." (*Ibid.*, para. 7.310)

⁴³⁰ Mexico's appellant's submission, para. 182.

⁴³¹ Mexico's appellant's submission, para. 181.

⁴³² Mexico's appellant's submission, para. 182 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.126). Mexico argues that "[p]ermitting access to the label to tuna caught by such methods in [high-risk] ocean areas contradicts and undermines the objective of the tuna measure to discourage fishing practices that adversely affect dolphins." (*Ibid.*, para. 167)

⁴³³ Mexico's appellant's submission, para. 183.

⁴³⁴ United States' appellee's submission, para. 145.

appropriate benchmark under the covered agreements. Furthermore, in the United States' view, the question whether there is a measure that would better contribute to a particular objective is more pertinent to an analysis under Article 2.2 of the TBT Agreement, rather than under Article 2.1.⁴³⁵

6.107. We highlight that Mexico raises this argument in support of its view that the Panels erred in their evaluation of risk profiles, by relying on "setting on dolphins in the ETP" as a "benchmark" by which to compare the risk profiles of different fisheries. However, as explained above, the Panels did not refer to the "ETP benchmark" in their analysis.⁴³⁶ Furthermore, based on our review of the Panels' findings, the Panels did not compare, or "distinguish", the risk profile of "setting on dolphins in the ETP" with the risk profiles of all other individual fisheries. To the contrary, the Panels compared the risk profile of *setting on dolphins* as a fishing method (used anywhere in the world) with the risk profiles of other fishing methods (also used anywhere in the world), in the context of examining the eligibility criteria⁴³⁷, and compared the risk profile of the *ETP large purse seine* fishery with other individual fisheries in the context of examining the certification and tracking and verification requirements.⁴³⁸ Thus, the Panels did not compare the risk profile of the *ETP setting-on-dolphins* fishery with the risk profile of other fisheries. Since Mexico's argument is incorrectly premised on the assertion that the Panels compared "setting on dolphins in the ETP" with other fisheries, we consider Mexico's argument to be moot.

6.108. In any event, we also note that Mexico's argument suggests that the Panels erred by failing to assess whether certain individual *fisheries* should be ineligible for the dolphin-safe label. This argument appears to rely on Mexico's understanding that, in order to be properly calibrated, the eligibility criteria under the 2016 Tuna Measure must make distinctions on a fishery-by-fishery basis. We have addressed, and rejected, this argument above.⁴³⁹ As explained, the nature of the calibration analysis is defined by the nature of the regulatory distinctions under the measure itself.⁴⁴⁰ Since the eligibility criteria distinguish between different fishing methods, it would have been inappropriate for the Panels to compare the risk profiles of individual *fisheries* for the purpose of assessing whether the eligibility criteria under the measure are properly calibrated. We therefore do not consider that this aspect of Mexico's arguments demonstrates that the Panels erred by comparing the risk profile of setting on dolphins with the risk profiles of other fishing *methods* in the context of examining the eligibility criteria. We also reiterate that, in examining whether the certification and tracking and verification requirements are properly calibrated, the Panels were indeed required to compare the risk profiles of different fisheries.⁴⁴¹ We examine whether the Panels properly conducted this analysis in section 6.1.5 below.

6.109. Turning to Mexico's argument that the Panels erred by focusing their analysis on qualitative attributes that are unique to setting on dolphins in the ETP, thereby "further ingraining" their mistake in adopting the single "ETP benchmark" for the purpose of the calibration analysis⁴⁴², we note that this argument relates to the Panels' findings on unobservable harms with respect to "alleged stress effects on dolphins in the ETP".⁴⁴³ Specifically, Mexico considers that the Panels emphasized different "kinds" of unobservable harms, which "caused them to disregard the Appellate Body's direction to take into account the overall effects of each fishing method".⁴⁴⁴ Mexico highlights that, although the Panels referred to the harms caused by "ghost fishing" (whereby lost or discarded gillnets continue

⁴³⁵ United States' response to questioning at the hearing.

⁴³⁶ See para. 6.103 above.

⁴³⁷ See para. 6.67 above. In the context of determining the risk profile of *setting on dolphins* (anywhere in the world), the Panels relied to a significant extent on evidence related to the use of this fishing method in the ETP in particular. (See *supra*, fn 406) Nevertheless, the Panels did not *compare* setting on dolphins in the ETP – as a distinct fishery – with other fisheries. Rather, the Panels took into account the evidence regarding the ETP setting-on-dolphins fishery in assessing the overall risk profile of setting on dolphins that the Panels proceeded to compare with the overall risk profiles of other fishing methods.

⁴³⁸ See para. 6.67 above. The ETP large purse seine fishery refers to all purse seine fishing in the ETP by large purse seine vessels, including by setting on dolphins and by other means.

⁴³⁹ See section 6.1.3.2 above.

⁴⁴⁰ See para. 6.64 above.

⁴⁴¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.165.

⁴⁴² Mexico's appellant's submission, paras. 173 and 186.

⁴⁴³ Mexico's appellant's submission, para. 187 (referring to Panel Reports, para. 7.310).

⁴⁴⁴ Mexico's appellant's submission, para. 189 (referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.152 and 7.155-7.156).

to cause harm to marine life, including dolphins⁴⁴⁵), the Panels concluded that such harms "are not the *kind* of unobservable harms caused by setting on dolphins".⁴⁴⁶

6.110. As explained above, in conducting their assessment of risk profiles for the purpose of the calibration analysis, the Panels distinguished between, *inter alia*, *observable* harm (any type of harm that can be detected and reported) and *unobservable* harm (the type of harm with respect to which no evidence of its occurrence is produced during the set).⁴⁴⁷ In our view, drawing distinctions between different types of harm is not *per se* inconsistent with an assessment of overall relative harm to dolphins for the purpose of the calibration analysis. Indeed, the Appellate Body in the first compliance proceedings also distinguished between observed harms and unobserved harms (the Panels referred to the latter as "unobservable" harms⁴⁴⁸) in setting forth the parties' disagreement over the risks associated with different fishing practices.⁴⁴⁹

6.111. Furthermore, the evidence examined by the Panels differed depending on the specific type of harm being examined. With respect to "observed" mortalities and significant injuries, the Panels tended to look at quantitative evidence, primarily in the form of per set data, but also relying on other data when per set data were lacking.⁴⁵⁰ This included quantitative data in the form of absolute levels of mortalities and serious injuries as well as qualitative evidence where no quantitative information was available.⁴⁵¹ By contrast, as indicated above, in assessing "unobserved but observable" harm (in other words, harm that *could* be detected during a fishing set, but was not detected), the Panels focused on the level of association between dolphins and tuna as a proxy for evidence of such unobserved harm.⁴⁵² Finally, in assessing "unobservable" harms, the Panels looked at evidence revealing the extent to which dolphins are harmed during a particular fishing operation even though no evidence of that harm is actually produced *during* the fishing operation itself.⁴⁵³

6.112. Given that the Panels were examining different types of evidence for each "type" of harm that they examined, we do not consider that the Panels erred merely by drawing distinctions between different types of harm to dolphins. At the same time, we recall that the Appellate Body in the first compliance proceedings faulted the first compliance panel, and found itself unable to complete the analysis, because the first compliance panel had focused its analysis exclusively on differences in *unobserved* harms, without comparing the *overall* relative harms.⁴⁵⁴ Thus, in the present proceedings, if the Panels had focused exclusively on a particular "kind" of harm in assessing the overall relative harms of different fishing methods and fisheries, such an approach would not have comported with the nature of the required calibration analysis as articulated by the Appellate Body. In this respect, we note that Mexico highlights the evidence reviewed by the Panels regarding harms caused by "ghost fishing" in the context of gillnet and longline fishing, and contends that the Panels "omit[ted] a comparative assessment" of such harms because the Panels considered that such harms are not the "kinds" of unobservable harms caused by setting on dolphins.⁴⁵⁵

6.113. In addressing this issue, we recall that the Panels found that "setting on dolphins" causes unobservable harms such as cow-calf separation, potential muscle injury resulting from the chase, immune and reproductive system failures, and other adverse health consequences for dolphins, such as continuous acute stress.⁴⁵⁶ The Panels found that no other fishing method poses similar unobservable harms.⁴⁵⁷ We further note that the Panels discussed the impact of ghost fishing specifically.⁴⁵⁸ The Panels ultimately considered that the harms posed to dolphins by ghost fishing were indeed relevant to their assessment of the risk profile of gillnet fishing, but that such harms were observable in nature in that they result from interaction with the fishing gear. The Panels explained that, although the harms from ghost fishing may not be observed, this "does not change

⁴⁴⁵ See *supra*, fn 375.

⁴⁴⁶ Mexico's appellant's submission, para. 188 (quoting Panel Reports, para. 7.450 (emphasis original)).

⁴⁴⁷ See para. 6.85 above (referring to Panel Reports, paras. 7.245-7.251).

⁴⁴⁸ Panel Reports, para. 7.251.

⁴⁴⁹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.248.

⁴⁵⁰ See e.g. Panel Reports, paras. 7.327-7.332 and 7.434.

⁴⁵¹ See e.g. Panel Reports, paras. 7.170, 7.310, and 7.514.

⁴⁵² See e.g. Panel Reports, paras. 7.333 and 7.385. See also para. 6.85 above.

⁴⁵³ See e.g. Panel Reports, paras. 7.289-7.310.

⁴⁵⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.246-7.251.

⁴⁵⁵ Mexico's appellant's submission, para. 188.

⁴⁵⁶ Panel Reports, para. 7.309.

⁴⁵⁷ See e.g. Panel Reports, para. 7.525.

⁴⁵⁸ Panel Reports, paras. 7.447-7.450.

the observable nature of such harms", and that harms posed by ghost fishing "are not the *kind* of unobservable harms caused by setting on dolphins", because the latter "may be inflicted even in cases where no dolphin is caught in the net, or where any caught dolphin is released without apparent injury".⁴⁵⁹ The Panels nevertheless considered, with respect to "observable harms to dolphins", that "gillnet fishing poses high levels of observable harms to dolphins in certain areas of the ocean, but does not pose the same harms in other areas."⁴⁶⁰ The Panels considered that the same considerations applied with respect to ghost fishing in the context of longline fishing⁴⁶¹, and concluded, with respect to observable harms caused by longline fishing, that "dolphins may suffer some observable mortality and serious injury as a result of [longline fishing] in some fisheries."⁴⁶² Subsequently, when assessing whether the regulatory distinctions under the 2016 Tuna Measure are calibrated to different risks to dolphins, the Panels took into account all relevant types of harm in assessing and comparing different risk profiles.

6.114. In our view, the Panels' analysis is consistent with the requirement that they assess the "overall relative risks" to dolphins from different fishing methods as used in different ocean areas. Specifically, the Panels took into account ghost fishing in the context of gillnet and longline fishing, and highlighted that certain gillnet fisheries pose a particularly high risk to dolphins, and that certain longline fisheries do cause observable mortalities and serious injuries to dolphins. The Panels also looked at similar observable harm to dolphins caused by setting on dolphins, as well as unobservable harms. The Panels relied on all such information when comparing the risk profiles of setting on dolphins with other fishing methods. We therefore consider that the Panels took into account all relevant types of harm in conducting an assessment of the overall relative risks from different fishing methods, as used in different fisheries, before reaching an overall conclusion regarding the risk profile of each fishing method.

6.115. We briefly note that aspects of Mexico's arguments relate solely to the Panels' appreciation of the evidence in their role as factfinder. Specifically, to the extent that Mexico considers that "the Panels relied [on] speculative hypotheses" and that "there is no conclusive evidence that dolphin sets ... cause a material level of stress to dolphins"⁴⁶³, we consider that these aspects of Mexico's arguments pertain to the Panels' appreciation of the evidence.⁴⁶⁴ In the absence of any claim under Article 11 of the DSU, we consider that such arguments pertain to issues outside the scope of this appeal.

6.116. On the basis of the foregoing, we do not consider that Mexico has demonstrated that the Panels relied on the risk profile of setting on dolphins in the ETP as a benchmark by which to assess different fishing methods. Additionally, we do not consider that Mexico has demonstrated that the Panels erred by distinguishing between different types of harm to dolphins.

6.1.4.4 Whether the Panels erred by relying primarily on per set data and excluding other relevant factors

6.117. We now turn to Mexico's arguments regarding the factors or methodology on which the Panels relied in assessing the risks of harm to dolphins. Mexico argues that, although the Panels were correct to rely on per set data to assess the overall relative risks to dolphins, the Panels' analysis was incomplete.⁴⁶⁵ In Mexico's view, "[a]ll factors that have a bearing on the measure achieving its objectives must be included" in order to properly measure the risks to dolphins.⁴⁶⁶ Mexico asserts that the Panels incorrectly omitted from their assessment: (i) the impact of tuna-fishing methods on the sustainability of dolphin stocks through Potential Biological Removal (PBR) data; (ii) data with respect to absolute dolphin mortalities and serious injuries in ocean areas; and (iii) data concerning the risks created in certain ocean areas through insufficient regulatory oversight, unreliable reporting, IUU fishing, and/or trans-shipment at sea.⁴⁶⁷

⁴⁵⁹ Panel Reports, para. 7.450 (quoting First Compliance Panel Report, para. 7.134). (emphasis original)

⁴⁶⁰ Panel Reports, para. 7.444.

⁴⁶¹ Panel Reports, para. 7.480.

⁴⁶² Panel Reports, para. 7.475.

⁴⁶³ Mexico's appellant's submission, fn 231 to para. 187.

⁴⁶⁴ See *supra*, fn 405.

⁴⁶⁵ Mexico's responses to questioning at the hearing.

⁴⁶⁶ Mexico's appellant's submission, para. 193. See also *ibid.*, paras. 192 and 194.

⁴⁶⁷ Mexico's appellant's submission, para. 194.

6.118. The United States argues that the Panels were correct not to rely on the data to which Mexico refers.⁴⁶⁸ In the United States' view, Mexico's arguments concerning per set data are unsupported by any evidence and, in any event, relate to the Panels' appreciation of the evidence and are therefore outside the scope of this appeal in the absence of a claim under Article 11 of the DSU.⁴⁶⁹ The United States also submits that the Panels' approach to PBR evidence, as well as to absolute levels of mortalities and serious injuries, was in accordance with the approach taken by the Appellate Body in prior proceedings in this dispute.⁴⁷⁰ The United States also considers that Mexico has not demonstrated that the Panels erred by failing to take into account a lack of regulatory oversight, or the risks of inaccurate certification or tracking, in assessing the risks to dolphins.⁴⁷¹

6.119. As an initial matter, we note that Mexico's arguments concerning the Panels' reliance on per set data have evolved during these appellate proceedings. In its appellant's submission, Mexico argued that the Panels' reliance on per set data was inconsistent, because the Panels disregarded such data for gillnet fisheries and trawl fishing, and relied on a "very small sample as the basis for [their] analysis of the risk profile of gillnet fishing".⁴⁷² Mexico also stated that "[s]imilarly, although acknowledging that trawl fishing has resulted in significant dolphin mortalities, and the Panels identified a trawl fishery with a much higher per 1,000 set number than the ETP, they relied on anecdotal information to conclude that trawl fishing has a 'low-to-medium' risk profile."⁴⁷³ At the hearing, Mexico clarified that, in its view, the Panels did not err by including per set data in their assessment and did examine all evidence relating to per set data. Rather, Mexico argued, the Panels erred in *excluding* other relevant factors, and that, in order to properly apply the calibration analysis, an assessment of risks to dolphins should take into account all relevant factors, in order to capture all aspects of adverse effects on dolphins.⁴⁷⁴

6.120. In our view, Mexico's clarifications at the hearing indicate that it is not challenging the Panels' reliance on per set evidence *per se*. We therefore do not consider it necessary to address Mexico's arguments concerning alleged errors in the Panels' reliance on per set evidence. In any event, to the extent that Mexico continues to assert that the Panels "disregarded" certain evidence, or that the Panels' "sample size" was too small with respect to one particular fishing method, we consider that such arguments concern the Panels' appreciation of the evidence. Mexico has not claimed that the Panels' evaluation of per set data was inconsistent with their obligation under Article 11 of the DSU to make an objective assessment of the matter before them. Consequently, we consider that arguments relating to such a claim fall outside the scope of this appeal.

6.121. We therefore address, in turn, Mexico's arguments that, *in addition to* looking at per set evidence, the Panels also should have taken into account: (i) evidence pertaining to the risks to dolphin populations in certain ocean areas; (ii) evidence of absolute levels of harm to dolphins in certain ocean areas; and (iii) evidence concerning lack of sufficient regulatory oversight in certain ocean areas.⁴⁷⁵ We note in this regard that Mexico does not argue on appeal that the Panels acted inconsistently with Article 11 of the DSU in making their assessment of different risk profiles.⁴⁷⁶ In the absence of such a claim, we limit our analysis below to the question whether Mexico has demonstrated that the Panels erred in applying Article 2.1 of the TBT Agreement, in making their assessment of different risk profiles.

⁴⁶⁸ United States' appellee's submission, paras. 151-203.

⁴⁶⁹ United States' appellee's submission, paras. 162-174.

⁴⁷⁰ United States' appellee's submission, paras. 177-194 and 197-198.

⁴⁷¹ United States' appellee's submission, para. 202.

⁴⁷² Mexico's appellant's submission, para. 200.

⁴⁷³ Mexico's appellant's submission, para. 200. The United States argues that these aspects of Mexico's arguments pertain to the Panels' appreciation of the facts, and that, in any event, the Panels did examine per set data for trawl fishing, and, with respect to gillnet fishing, the Panels relied on per set data as far as possible and relied on other evidence when per set data were not available. (United States' appellee's submission, paras. 167-173 (referring to Panel Reports, paras. 7.433-7.434, 7.441-7.443, and 7.489-7.494))

⁴⁷⁴ Mexico's response to questioning at the hearing.

⁴⁷⁵ At the hearing, Mexico clarified that it is arguing that PBR evidence should have been taken into account in addition to per set evidence, and that all relevant factors should have been taken into account.

⁴⁷⁶ Mexico does raise a claim under Article 11 of the DSU pertaining to the Panels' assessment of whether the 2016 Tuna Measure is adequately calibrated to different risks to dolphins. We address this claim in section 6.1.5.4 below.

6.1.4.4.1 Risks to dolphin populations

6.122. Mexico argues that, in addition to looking at per set evidence, the Panels also should have taken into account evidence pertaining to dolphin sustainability in certain ocean areas, specifically evidence reflecting PBR levels. Mexico notes that PBR levels indicate the "maximum number of animals, not including natural mortalities, that may be removed from an animal stock (such as dolphins) while allowing that stock to reach or maintain its optimum sustainable population".⁴⁷⁷ In Mexico's view, the Panels erred by failing to take into account PBR evidence that shows high risks to dolphin populations in certain ocean areas, because, in Mexico's view, such risks to dolphin populations are relevant to an assessment of the overall relative risk profiles of certain fisheries.⁴⁷⁸ Mexico considers that this view is supported by the findings of the original panel concerning adverse effects to dolphins⁴⁷⁹, findings by the first compliance panel concerning the objective of the measure⁴⁸⁰, and the design and structure of the 2016 Tuna Measure.⁴⁸¹

6.123. In the United States' view, the Panels' decision to disregard PBR evidence was in accordance with both the design and structure of the measure, as well as relevant prior findings by previous panels and the Appellate Body in this dispute.⁴⁸² The United States highlights, and agrees with, the Panels' finding that the objective of the measure is primarily to protect individual dolphins, and that a PBR methodology is focused on the effect that dolphin mortalities have on a dolphin stock, rather than the actual likelihood of dolphins being adversely affected.⁴⁸³ To the extent that dolphin sustainability may be an objective of the measure, the United States maintains that it is indirect (i.e. "due to a relationship between reducing 'adverse effects' on individual dolphins and conserving dolphin populations").⁴⁸⁴ The United States submits that the Panels fully explained their decision not to rely on a PBR methodology⁴⁸⁵, and argues that Mexico has not challenged under Article 11 of the DSU the Panels' factual finding that the measure at issue is concerned more with the risks to individual dolphins than the risks to dolphin populations.⁴⁸⁶

6.124. The Panels found that PBR evidence reveals "the maximum possible number of animals, in this case dolphins, which can be removed from an animal stock without affecting the population or its sustainability".⁴⁸⁷ The Panels considered that a PBR methodology is "suitable in the context of policies that concern the sustainability of marine mammal stocks and where a certain level of mortalities or serious injury is tolerated".⁴⁸⁸ The Panels considered that "there is no particular indication that the Tuna Measure is directly concerned with the protection of the population levels of dolphins" and that, while "mortality or serious injury suffered by individual dolphins may also have population-level consequences[,] ... [t]hat, however, is not directly relevant to the findings that [they would] make about the overall levels of relative risks posed to dolphins by different fishing methods

⁴⁷⁷ Mexico's appellant's submission, para. 202 (referring to Panel Reports, para. 7.184 and fn 328 thereto).

⁴⁷⁸ Mexico's appellant's submission, paras. 202 and 211.

⁴⁷⁹ Mexico's appellant's submission, paras. 207 and 209 (referring to Original Panel Report, paras. 7.419-7.420, 7.433, 7.485-7.486, 7.490, 7.550-7.552, 7.562, 7.574, 7.600, 7.621, 7.718, and 7.726).

⁴⁸⁰ Mexico's appellant's submission, para. 210 (quoting First Compliance Panel Report, para. 7.528, in turn referring to Original Panel Report, paras. 7.485-7.486).

⁴⁸¹ Mexico's appellant's submission, paras. 212-213.

⁴⁸² United States' appellee's submission, paras. 177-184.

⁴⁸³ United States' appellee's submission, para. 178 (referring to Panel Reports, paras. 7.186-7.190 and 7.473). The United States notes that, under a PBR methodology, "huge numbers of dolphin mortalities in one fishery may be tolerated while *de minimis* levels in another are deemed unacceptable." (Ibid.) The United States highlights findings by the Appellate Body in the first compliance proceedings that the calibration analysis relates to the "likelihood that dolphins would be adversely affected in the course of tuna fishing operations in different fisheries". (Ibid., para. 179 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.157; referring to paras. 7.101, 7.110, 7.122, 7.157, 7.162, 7.239, 7.245-7.251, 7.288, 7.325, and 7.330)) In the United States' view, the original panel's reference to "dolphin populations" should be read as referring to "risks to groups of dolphins in different areas" rather than risks to dolphin stocks, and this is "confirmed" by relevant findings of the Appellate Body in the original proceedings. (Ibid., paras. 181-182)

⁴⁸⁴ United States' appellee's submission, para. 183 (referring to Original Panel Report, paras. 7.419-7.420, 7.485-7.486, 7.490, 7.550-7.551, and 7.528).

⁴⁸⁵ United States' appellee's submission, paras. 185-189 (referring to Panel Reports, paras. 7.186, 7.188-7.189, 7.469, and 7.473).

⁴⁸⁶ United States' appellee's submission, paras. 191-192 (referring to Panel Reports, paras. 7.186-7.187).

⁴⁸⁷ Panel Reports, para. 7.184.

⁴⁸⁸ Panel Reports, para. 7.184.

in different areas of the ocean."⁴⁸⁹ The Panels highlighted that, "[b]y allowing the existence of some dolphin mortalities and focusing primarily on the population levels, the PBR methodology prioritizes the sustainability of the population rather than the well-being of individual dolphins", which would be "difficult to reconcile with the objectives of the Tuna Measure".⁴⁹⁰ The Panels also noted that "the architecture of the measure ... by its own terms is concerned with the mortality and serious injury of individual dolphins, on a per set basis, rather than with the overall sustainability of dolphin stocks."⁴⁹¹

6.125. We observe that Mexico has not made any claims under Article 11 of the DSU regarding the Panels' appreciation of the facts, and that Mexico has clarified that its argument with respect to PBR evidence relates to the Panels' omission of a relevant "factor"⁴⁹² or "methodology"⁴⁹³ in their assessment of risk profiles. The legal issue before us is therefore whether the Panels erred in their application of Article 2.1 of the TBT Agreement by declining to take into account PBR evidence in assessing and comparing the risk profiles of different fishing methods and fisheries for the purpose of the calibration analysis.

6.126. We recall that, in order to properly conduct the calibration analysis, the Panels were required to assess the overall relative risks of different fishing methods and fisheries.⁴⁹⁴ Furthermore, the purpose of this analysis was to assess whether the detrimental impact from the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction. As our analysis above reveals, the nature of the calibration analysis, including the relevant risks to be assessed, is informed by the nature of the relevant regulatory distinctions causing the detrimental impact.⁴⁹⁵

6.127. Under the 2016 Tuna Measure, a tuna product is ineligible for the label if it contains tuna "caught in a set or gear deployment in which dolphins were killed or seriously injured".⁴⁹⁶ Furthermore, the 2016 Tuna Measure "is generally applied on a per gear deployment basis in respect of how often captains have to make non-dolphin safe certifications, or how frequently non-dolphin safe tuna must be segregated from dolphin-safe tuna."⁴⁹⁷ Thus, the relevant regulatory distinctions made by the measure itself apply on a per set basis. Based on the design and structure of the measure, we agree with the Panels that the dolphin-safe label is concerned with the well-being of individual dolphins, and that the design and structure of the relevant regulatory distinctions reveal that the relevant risks to dolphins, for the purpose of the calibration analysis, are the risks of individual dolphins being killed or seriously injured in the fishing process.⁴⁹⁸

6.128. We note Mexico's argument that the Panels' characterization of the Tuna Measure as "'mainly concerned with the risks facing dolphins at an individual level, rather than at a population level', is flatly contradicted by the measure itself".⁴⁹⁹ In Mexico's view, this is because the 2016 Tuna Measure expressly contemplated that the prohibition on the use of the dolphin-safe label for tuna derived from setting on dolphins could be removed following "an evaluation of the potential impact of dolphin sets on the populations of the dolphin stocks in the ETP".⁵⁰⁰ In our view, however, the Panels' understanding of the measure as "mainly concerned with the risks facing dolphins at an

⁴⁸⁹ Panel Reports, para. 7.186.

⁴⁹⁰ Panel Reports, para. 7.188.

⁴⁹¹ Panel Reports, para. 7.190.

⁴⁹² Mexico's appellant's submission, para. 202.

⁴⁹³ Mexico's appellant's submission, para. 204.

⁴⁹⁴ See e.g. para. 6.81 above.

⁴⁹⁵ See e.g. para. 6.64 above.

⁴⁹⁶ Panel Reports, para. 7.190.

⁴⁹⁷ Panel Reports, para. 7.213.

⁴⁹⁸ Panel Reports, para. 7.190. The Panels also explained that the 2016 Tuna Measure is concerned with "the protection of the well-being of dolphins, and with informing consumers whether the tuna used in the production of particular tuna products was caught in a set that harmed dolphins". (Ibid., para. 7.186)

⁴⁹⁹ Mexico's appellant's submission, para. 214 (quoting Panel Reports, para. 7.473). (emphasis omitted)

⁵⁰⁰ Mexico's appellant's submission, para. 214 (referring to Original Panel Report, para. 2.16).

Section 1385(g) of the DPCIA requires the Secretary of Commerce to make a finding regarding whether setting on dolphins "is having a significant adverse impact on any depleted dolphin stock in the [ETP]".

Section 1385(h)(2) further requires that the certification requirements regarding tuna caught by large purse seine vessels in the ETP are inapplicable if the Secretary of Commerce determines that setting on dolphins is not having a significant adverse impact on depleted dolphin stock in the ETP. (See Original Panel Report, para. 2.16; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, fn 127 to para. 6.9. See also DPCIA (Panel Exhibits MEX-1 and USA-1)) As noted in paragraph 5.10 above, although the Secretary of Commerce made such a determination, it was overturned by the *Hogarth* ruling.

individual level"⁵⁰¹ does not suggest that the risks to dolphin populations are irrelevant, or that the 2016 Tuna Measure is not at least indirectly concerned with protecting dolphin populations. We see no reason to disagree with the Panels' finding that "mortality or serious injury suffered by individual dolphins may also have population-level consequences."⁵⁰² We recall the original panel's findings that "the adverse effects on dolphins targeted by the US dolphin-safe provisions, as described by the United States, relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations" and that "the US objectives also incorporate, at least indirectly, considerations regarding the conservation of dolphin stocks."⁵⁰³ On this basis, we also disagree with Mexico's argument that, because the dolphin-safe labels are granted under conditions that primarily take into account the risks to individual dolphins, consumers are misled and deceived about whether or not the tuna that they are purchasing was caught in a manner that threatens or endangers dolphin populations.⁵⁰⁴

6.129. We recall Mexico's argument that, if the measure is truly concerned with the protection of individual dolphins, any "fishing method that is capable of harming a dolphin should be ineligible" for the dolphin-safe label.⁵⁰⁵ As explained above, we consider that the 2016 Tuna Measure will not violate Article 2.1 if the relevant regulatory distinctions leading to detrimental impact are properly "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.⁵⁰⁶ Furthermore, if it can be shown that the distinctions are calibrated to different risks to dolphins, this would also indicate that such distinctions are rationally related to, and hence capable of contributing to, the measure's objectives.⁵⁰⁷ In our view, the fact that the 2016 Tuna Measure grants a dolphin-safe label to certain fishing methods that may be capable of harming a dolphin does not imply that the 2016 Tuna Measure is not concerned with informing consumers of the risks to individual dolphins.

6.130. Thus, we agree with the Panels that the essential question for the purpose of assessing the calibration of the 2016 Tuna Measure is whether the relevant regulatory distinctions are calibrated to different risks that dolphins will be killed or seriously injured in the process of harvesting tuna.⁵⁰⁸ It is uncontested that PBR evidence does *not* reveal the likelihood of dolphins being killed or seriously injured in a particular fishing operation.⁵⁰⁹ Rather, it indicates the number of dolphins that can be safely removed without jeopardizing the sustainability of the dolphin population as a whole.

6.131. We recall that, before the Panels, Mexico contended that the Panels should have adopted the PBR methodology, *rather than* the per set methodology, in assessing the risks to dolphins.⁵¹⁰ On appeal, Mexico acknowledges the utility of per set evidence where dolphin mortalities per set are high, but challenges the Panels' reliance on per set evidence in circumstances in which PBR evidence indicates that even a low level of mortalities per set would endanger the dolphin population of a fishery.⁵¹¹ However, Mexico has not explained how reliance on PBR evidence in these circumstances relates to, or reveals, the actual risks that dolphins were killed or seriously injured in the fishing process. Thus, as noted by the Panels, relying on PBR evidence would have resulted in an assessment of a *different* kind of risk to dolphins than the risks of which the measure seeks to inform consumers.⁵¹² We therefore agree with the Panels' assessment that the PBR methodology prioritizes the sustainability of the population in a way that would have prevented the Panels from adequately assessing whether the measure is calibrated to different risks that a dolphin was harmed or killed in

⁵⁰¹ Panel Reports, para. 7.473. (emphasis omitted)

⁵⁰² Panel Reports, para. 7.186.

⁵⁰³ Original Panel Report, para. 7.486. The first compliance panel also found that "there is an essential and inextricable link between the protection of dolphins on an individual scale and the 'replenishment of [an] endangered species', for it is only through protecting individual dolphins that a population itself can be protected, replenished, and maintained." (First Compliance Panel Report, para. 7.527 (quoting Appellate Body Reports, *China – Rare Earths*, para. 5.89))

⁵⁰⁴ Mexico's response to questioning at the hearing.

⁵⁰⁵ Mexico's appellant's submission, para. 216.

⁵⁰⁶ See para. 6.36 above.

⁵⁰⁷ See para. 6.74 above.

⁵⁰⁸ Panel Reports, para. 7.186.

⁵⁰⁹ In contrast, per set evidence, revealing the risk of a dolphin being injured in any *individual set*, is indeed a relevant and useful measure of the risk that dolphins are killed or seriously injured in the fishing process. (Panel Reports, para. 7.204)

⁵¹⁰ Panel Reports, para. 7.175 (stating that "[f]or Mexico, the use of the PBR methodology would capture all of the relevant factors that need to be taken into account by the Panels").

⁵¹¹ Mexico's appellant's submission, para. 215; responses to questioning at the hearing.

⁵¹² Panel Reports, paras. 7.186-7.190.

the fishing process, and that "the PBR methodology ... sits uncomfortably with the design and structure of the 2016 Tuna Measure."⁵¹³

6.132. Mexico further maintains that its position comports with the Appellate Body's statement in the first compliance proceedings that it did "not exclude that reference to ... objective indicators [such as PBR evidence] might assist in an assessment of whether regulatory differences in the treatment of different fisheries can be explained on the basis that such treatment is calibrated to, or commensurate with, the relative risks to dolphins arising from different fishing methods in different areas of the oceans".⁵¹⁴ This statement by the Appellate Body acknowledging the possible relevance of PBR evidence does not state that a panel is necessarily required to rely on such evidence as an objective indicator or means of assessing whether the measure is properly calibrated. To the contrary, the Appellate Body avoided taking a position on that issue and explained that a panel should rely on evidence reflecting appropriate objective indicators in assessing the risks to dolphins. In our view, the Panels adequately explained their decision to rely primarily on per set evidence, and not PBR evidence, in accordance with the Appellate Body's guidance to rely on objective indicators.

6.133. Additionally, we recall Mexico's assertion that the Panels arbitrarily included, within their analysis, "unobservable harms 'whose realization cannot be definitely established'" and excluded "measured and realized harms that threaten the sustainability of entire dolphin populations in areas of the oceans".⁵¹⁵ We consider that the appropriate "measured and realized harms" that the Panels were obliged to take into account were the risks of harm to individual dolphins (e.g. mortality and serious injury), which the Panels did take into account in their reliance on per set evidence.⁵¹⁶ In the same vein, we also disagree with Mexico's assertion that the Panels did not explain how the use of a fishing method that causes or threatens dolphin population collapse could not be considered as "adversely affecting dolphins".⁵¹⁷ Rather, the Panels explicitly recognized "that mortality or serious injury suffered by individual dolphins may also have population-level consequences."⁵¹⁸ Furthermore, as indicated above, we agree with the Panels that the protection of individual dolphins can indeed contribute to the conservation of dolphin populations.

6.134. For these reasons, we consider that Mexico has not demonstrated that the Panels erred in applying Article 2.1 by not taking into account PBR evidence when assessing the overall relative risks to dolphins of different fishing methods in different ocean areas. This is not meant to imply that the Panels failed to take into consideration risks to dolphin populations. Rather, we understand the Panels to have considered that the 2016 Tuna Measure seeks to protect dolphin populations by protecting individual dolphins and, consequently, their analysis focused on evidence revealing the risks that individual dolphins are harmed or killed in the fishing process. In our view, this approach is consistent with the nature of the calibration analysis the Panels were required to undertake.

6.1.4.4.2 Absolute levels of adverse effects

6.135. Mexico argues that the Panels erred by failing to compare the absolute levels of mortalities and serious injuries to dolphins in different fisheries. Mexico explains that, in fisheries with many sets, the "overall" adverse effects will be "masked" by the per set data, such that "tuna caught in an ocean area where tuna fishing is causing tens of thousands of deaths per year could be found eligible for the dolphin-safe label."⁵¹⁹ To Mexico, these absolute levels of adverse effects constitute "'overall adverse effects on dolphins' for the fishing method/area".⁵²⁰ Mexico argues that "fishing practices in such ocean areas should be discouraged"⁵²¹, and that "the omission of these overall adverse effects contradicts the two objectives of the measure."⁵²²

6.136. In the United States' view, a comparison of absolute levels of adverse effects fails to take into account unobservable harms, and does not "'contextualize' the adverse effects on dolphins in

⁵¹³ Panel Reports, para. 7.190.

⁵¹⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, fn 827 to para. 7.251.

⁵¹⁵ Mexico's appellant's submission, para. 212 (quoting Panel Reports, para. 7.544).

⁵¹⁶ Panel Reports, paras. 7.186-7.191, 7.204-7.214, and 7.251.

⁵¹⁷ Mexico's appellant's submission, para. 213.

⁵¹⁸ Panel Reports, para. 7.186.

⁵¹⁹ Mexico's appellant's submission, para. 218.

⁵²⁰ Mexico's appellant's submission, para. 218.

⁵²¹ Mexico's appellant's submission, para. 218.

⁵²² Mexico's appellant's submission, para. 219.

different fisheries", given the different sizes and effort levels of fisheries.⁵²³ The United States explains that "a fishery with a few vessels would be compared directly with a fishery comprising thousands of vessels" and the "'absolute' numbers of dolphin mortalities might be greater in the second fishery, even if dolphins were hardly ever killed or even seen in the fishery, simply due to its far greater size."⁵²⁴ The United States also points out that Mexico has "never defined or explained the 'ocean regions' or 'fisheries' that should be assessed", but has "consistently compared the dolphin mortalities caused by the 80-90 vessels setting on dolphins with those caused by thousands of other vessels around the world", which "perversely" distorts the comparison, since setting on dolphins "has been banned almost everywhere in the world".⁵²⁵

6.137. We note as an initial matter that the Panels did not completely exclude evidence of absolute levels of dolphin mortalities and serious injuries. Rather, the Panels opted to rely on such evidence in assessing certain fishing methods and fisheries where they considered that the available per set evidence was lacking.⁵²⁶ Furthermore, Mexico has not identified any specific evidence of absolute levels of mortalities or serious injuries that the Panels disregarded. We also note that calculating levels of harm on a per set basis necessarily takes into account absolute levels of harm as part of the calculation.⁵²⁷ We therefore understand that Mexico's argument pertains not to the Panels' "rejection" of such "absolute" evidence, but to the Panels' decision to rely on per set evidence, rather than absolute evidence, as their primary methodology by which to assess and compare the risks to dolphins.⁵²⁸

6.138. The Panels opted not to rely primarily on evidence of absolute levels of dolphin mortalities and significant injuries, on the basis that:

[S]uch a methodology would not necessarily deal with the issue of how to compare the levels of adverse effects on dolphins arising from different fishing methods in different areas of the ocean, or contextualize them in the light of the relative extent and intensity to which different fishing methods are used, in such a way as to allow an *apples-to-apples* assessment of the relative harmfulness of different fishing methods as used in different areas of the oceans.⁵²⁹

6.139. As explained above⁵³⁰, an assessment as to whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement calls for an analysis of the overall *relative* risks to dolphins.⁵³¹ The Panels were therefore required to use a metric, or methodology, that allowed for a proper comparison of risks to dolphins across fisheries. In light of the *relative* nature of the comparison to be undertaken, we agree with the Panels that any comparison of risks to dolphins in different tuna fisheries should, in principle, be an "apples-to-apples" comparison, such that relevant differences between the fisheries are appropriately taken into account.⁵³² We also note the Panels' findings that the "extent and intensity to which different fishing methods are used" varies from fishery to fishery.⁵³³

6.140. The Panels considered that data reflecting the number of absolute dolphin mortalities or serious injuries in a particular fishery do not account for such differences. In the Panels' view, absolute levels of mortalities or serious injuries present a number that is independent of the specific

⁵²³ United States' appellee's submission, para. 198 (quoting Panel Reports, para. 7.195).

⁵²⁴ United States' appellee's submission, para. 198.

⁵²⁵ United States' appellee's submission, para. 199. (fn omitted)

⁵²⁶ See e.g. Panel Reports, paras. 7.434, 7.438, 7.441, and 7.467.

⁵²⁷ As the Panels explained, "a per set or per gear deployment comparison entails averaging some of the relevant indicators identified in paragraph 7.169 [of the Panel Reports], including observed mortalities, serious injuries, and interactions, by the number of operations of the fishing gear used in a particular fishery in a given time period." (Panel Reports, para. 7.204)

⁵²⁸ Mexico has not argued that the Panels' appreciation of the evidence was inconsistent with Article 11 of the DSU, and we therefore proceed by assessing only whether the Panels' primary reliance on per set evidence was inconsistent with the legal standard under Article 2.1 of the TBT Agreement.

⁵²⁹ Panel Reports, para. 7.195. (emphasis original)

⁵³⁰ See e.g. para. 6.38 above.

⁵³¹ See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.169, 7.229, and 7.248. The Appellate Body emphasized in the first compliance proceedings the "relational and comparative nature of the analysis of whether the amended measure is calibrated and even-handed" under Article 2.1 of the TBT Agreement. (Ibid., para. 7.126)

⁵³² Panel Reports, para. 7.195. (emphasis added)

⁵³³ Panel Reports, para. 7.195. See also *ibid.*, para. 7.204.

features of the fishery (for instance, the number of fishing operations conducted per year in that fishery).⁵³⁴ The Panels stated that "such a methodology would not necessarily ... allow an *apples-to-apples* assessment of the relative harmfulness of different fishing methods as used in different areas of the oceans."⁵³⁵ In contrast, the Panels found that the per set methodology, which entailed "averaging" the total number of a particular indicator of adverse effects⁵³⁶ to dolphins by the number of operations of a particular type of fishing gear used in a particular fishery in a given time period, would "control for the intensity of a given fishing operation in a given area of the ocean".⁵³⁷

6.141. Furthermore, it is uncontested, as the Panels found, that the 2016 Tuna Measure "is generally applied on a per gear deployment basis in respect of how often captains have to make non-dolphin safe certifications, or how frequently non-dolphin safe tuna must be segregated from dolphin-safe tuna".⁵³⁸ As we have explained above, we understand that the regulatory distinctions drawn under the measure are intended to address the risks that dolphins were killed or seriously injured in the fishing process.⁵³⁹ In our view, a proper examination as to whether such distinctions are calibrated to the relevant risks to dolphins should take into account the relevant differences across fisheries. The Panels' reasoning as set forth above indicates that a per set methodology is well suited to the kind of comparative analysis that Article 2.1 required the Panels to perform in this dispute. The Panels' factual findings also demonstrate that a comparison of absolute levels of mortalities or serious injuries would be less likely to reveal the relative likelihood of a dolphin being killed or injured in the fishing process than a comparison of per set data.⁵⁴⁰

6.142. We recall Mexico's argument that "overall" adverse effects will be "masked" by the per set data, and that the absolute levels of adverse effects constitute "overall adverse effects on dolphins' for the fishing method/area".⁵⁴¹ In the first compliance proceedings, the Appellate Body faulted the panel for not examining all relevant relative risks of harm to dolphins, including both observed and unobserved harms.⁵⁴² Thus, an assessment of the *overall* relative risks to dolphins requires a panel to assess all relevant risks of harm to dolphins. We do not discount that, depending on the particular evidence provided to the Panels, evidence of absolute levels of adverse effects might indeed be useful in this regard. However, as explained above, the Panels were not only required to assess the *overall* risks, but the overall *relative* risks to dolphins.⁵⁴³ As indicated above, comparing absolute levels of mortalities or serious injuries across different fisheries would not take into account important differences between those fisheries. By contrast, a comparison of per set data does indeed take into account such differences.⁵⁴⁴

6.143. For these reasons, we consider that Mexico has not demonstrated that, in deciding to rely primarily on a per set methodology rather than comparing absolute levels of harm, the Panels acted inconsistently with the requirement to assess the overall relative risks to dolphins from different fishing methods and fisheries.

⁵³⁴ Panel Reports, paras. 7.195 and 7.204.

⁵³⁵ Panel Reports, para. 7.195. (emphasis original)

⁵³⁶ These include observed mortalities, serious injuries, and interactions with dolphins of the fishing method in a given area of the ocean. (Panel Reports, paras. 7.169 and 7.204)

⁵³⁷ Panel Reports, para. 7.204. We note that this tension between per set evidence and "absolute" evidence was demonstrated in the Panels' assessment of longline fishing, with respect to which Mexico presented evidence of high levels of absolute annual mortalities in the Pacific Ocean. (Ibid., para. 7.467) The Panels declined to accord much weight to this data, on the basis that the data reflected many different longline fisheries, and relevant per set data for certain individual longline fisheries covered by the absolute data revealed a low rate of dolphin interactions. (Ibid., para. 7.468)

⁵³⁸ Panel Reports, para. 7.213.

⁵³⁹ See para. 6.127 above.

⁵⁴⁰ Panel Reports, para. 7.195.

⁵⁴¹ Mexico's appellant's submission, para. 218.

⁵⁴² Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.161.

⁵⁴³ Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras. 7.169, 7.229, and 7.248.

⁵⁴⁴ See Panel Reports, para. 7.204. Notwithstanding that such absolute levels of harm are less helpful in comparing the risks to dolphins for the purpose of the calibration analysis, we see no reason for the Panels not to rely on such evidence in assessing the risks to dolphins in situations where the relevant per set evidence was lacking.

6.1.4.4.3 Insufficient regulatory oversight

6.144. Mexico argues that the Panels erred by omitting evidence of insufficient regulatory oversight in certain ocean areas, because "dolphins will be at a greater relative risk of harms from ... fishing method[s] used] in ocean areas that have insufficient regulatory oversight including unreliable reporting, significant IUU fishing and/or significant transshipment at sea than in ocean areas that do not."⁵⁴⁵ In Mexico's view, the omission of the "reliability of reporting as a criterion in the risk profiles of the fishing areas contradicts the objectives of the measure".⁵⁴⁶ Mexico explains that, in "unreliable" fisheries there is a "greater risk that adverse effects on dolphins will be unreported ... and, therefore, that actions that adversely affect dolphins in unreliable fisheries will not be discouraged by the measure".⁵⁴⁷

6.145. The United States considers that Mexico makes two distinct arguments: (i) insufficient regulatory oversight causes greater risk of harm to dolphins; and (ii) insufficient regulatory oversight should be included in the risk profiles of fisheries "because it can affect the reliability of reporting of harms to dolphins".⁵⁴⁸ The United States considers that it fully addressed Mexico's first argument in the context of Mexico's claim that the Panels erred in their interpretation of Article 2.1 of the TBT Agreement.⁵⁴⁹ As to Mexico's second argument, the United States highlights that this argument was "fully considered and rejected by the Panels", and argues that the Panels correctly explained that the risks of inaccuracy are not themselves risks of harm to dolphins.⁵⁵⁰ In the United States' view, such risks of inaccuracy rather "may be relevant to assessing whether the distinctions of the 2016 measure are calibrated to the risk profiles of different fisheries".⁵⁵¹

6.146. As explained above⁵⁵², the question whether the relevant regulatory distinctions under the 2016 Tuna Measure are properly calibrated to different risks to dolphins does not require assessing whether the 2016 Tuna Measure is also calibrated to the "risk of inaccuracy". As discussed in paragraph 6.51 above, Mexico has not substantiated its assertion that tuna fishing in ocean areas with less reliable regulatory systems is more likely to lead to harm to dolphins.⁵⁵³ We therefore see no reason to disagree with the Panels' statement that "the risks of inaccurate certification, reporting, and/or record-keeping are not risks that affect dolphins themselves."⁵⁵⁴

6.147. As noted, the Panels did not exclude the possibility that factors such as a lack of regulatory oversight may affect the accuracy of the label.⁵⁵⁵ We have explained above that such risks of inaccuracy are relevant to the assessment of whether the measure is calibrated to the risks to dolphins.⁵⁵⁶ It was, however, incumbent upon Mexico to provide relevant evidence in support of its argument that a lack of regulatory oversight in a fishery will increase the risk that labelling of tuna

⁵⁴⁵ Mexico's appellant's submission, para. 220.

⁵⁴⁶ Mexico's appellant's submission, para. 223 (referring to Panel Reports, paras. 7.186 and 7.705).

⁵⁴⁷ Mexico's appellant's submission, para. 223.

⁵⁴⁸ United States' appellee's submission, para. 202.

⁵⁴⁹ United States' appellee's submission, para. 202. See also paras. 6.47-6.50 above. The United States argued in that context that, contrary to Mexico's preferred approach, the Panels' approach was consistent with the Appellate Body's guidance in the first compliance proceedings. (Ibid., paras. 47-50) The United States also argued that Mexico's approach implies that the Panels should have applied a different type of calibration analysis to the certification and tracking and verification requirements than to the eligibility criteria, and that Mexico has never argued as a factual matter that dolphins are at a greater risk of harm in areas where the reliability of applicable systems is low. (Ibid., paras. 51-53)

⁵⁵⁰ United States' appellee's submission, para. 202 (referring to Panel Reports, paras. 7.109-7.113 and 7.119-7.124).

⁵⁵¹ United States' appellee's submission, para. 202 (referring to Panel Reports, paras. 7.119-7.124).

⁵⁵² See section 6.1.3.1 and para. 6.79 above.

⁵⁵³ We further note that Mexico has not argued that the Panels erred under Article 11 of the DSU by omitting specific evidence of a heightened risk to dolphins in any particular fishery in their examination of risks to dolphins in different fisheries.

⁵⁵⁴ Panel Reports, para. 7.110. Although Mexico has described its arguments on appeal as relating to "insufficient regulatory oversight", we note that Mexico specifically takes issue with the Panels' findings with respect to "inaccurate certification, reporting, and/or record-keeping". (Mexico's appellant's submission, paras. 220-222) We therefore see no distinction between Mexico's references to "regulatory oversight" and the Panels' discussion of "inaccurate certification, reporting, and/or record-keeping".

⁵⁵⁵ See para. 6.52 above.

⁵⁵⁶ See para. 6.52 above.

products containing tuna caught in such a fishery will not accurately reflect the dolphin-safe nature of the tuna. We address this issue in section 6.1.5 below.

6.1.4.5 Conclusion

6.148. In conducting their examination of the risk profiles of different fishing methods as used in different ocean areas, the Panels reviewed all relevant evidence of risks to dolphins as provided to them by the parties, including all evidence pertaining to individual fisheries. Additionally, the Panels appropriately took into account all relevant types of harm to dolphins in assessing the risk profiles of different fishing methods and fisheries. Moreover, the Panels did not err in relying on per set data as the primary measurement of the risks to dolphins, despite three additional measurements proposed by Mexico. First, because the relevant risks to be assessed for the purpose of calibration are the risks of individual dolphins being harmed or killed in the fishing process, the Panels were correct not to rely on PBR evidence to assess the risks to dolphins. Second, given the comparative nature of the calibration analysis, the Panels did not err by relying primarily on a per set methodology instead of a comparison of absolute levels of harm. Finally, Mexico did not substantiate its assertion that tuna fishing in ocean areas with less reliable regulatory systems is more likely to lead to harm to dolphins, and therefore the Panels did not err by excluding evidence pertaining to regulatory oversight from their assessment of the overall relative risks to dolphins from the use of different fishing methods as used in different areas of the ocean. We therefore find no error in the Panels' assessment of the risks to dolphins arising from the use of different fishing methods in different ocean areas or in their conclusions regarding the risk profiles of relevant fishing methods on the basis of that assessment.

6.1.5 The Panels' assessment of whether the 2016 Tuna Measure is calibrated to the risks to dolphins

6.1.5.1 Introduction

6.149. As noted above, in assessing whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction, the Panels examined whether (i) the eligibility criteria; (ii) the certification requirements; (iii) the tracking and verification requirements; and (iv) the determination provisions of the 2016 Tuna Measure are calibrated to the difference in the overall risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁵⁵⁷ After concluding their intermediate analyses of these component elements of the 2016 Tuna Measure, the Panels "synthesize[d]" their analysis in order to reach their conclusion as to the consistency of the 2016 Tuna Measure with the TBT Agreement.⁵⁵⁸ Following their analyses, the Panels came to the "general conclusion" that:

[T]he 2016 Tuna Measure, as a whole, is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Therefore, the Panels find that the distinctions made by that Measure between setting on dolphins and the other fishing methods (except, of course, high seas driftnet which is also disqualified from the dolphin-safe label) stem exclusively from legitimate regulatory distinctions. Consequently, the Panels conclude that the 2016 Tuna Measure accords to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries, and therefore is consistent with Article 2.1 of the TBT Agreement.⁵⁵⁹

6.150. On appeal, Mexico requests us to reverse several of the intermediate findings that led to the above "general conclusion" by the Panels, which Mexico also contests.⁵⁶⁰ Specifically, Mexico challenges the Panels' assessment of the following aspects of the 2016 Tuna Measure: (i) the eligibility criteria; (ii) the certification requirements; (iii) the tracking and verification

⁵⁵⁷ Panel Reports, para. 7.530. See also *ibid.*, paras. 7.547, 7.611, 7.676, 7.702, and 7.704.

⁵⁵⁸ Panel Reports, para. 7.530 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (*Article 21.5 – Mexico*), para. 7.21). See also *ibid.*, paras. 7.703-7.716.

⁵⁵⁹ Panel Reports, para. 7.717.

⁵⁶⁰ Mexico's Notice of Appeal, para. 9; appellant's submission, paras. 75, 76, and 307.

requirements; and (iv) the 2016 Tuna Measure as a whole. In its Notice of Appeal, Mexico does not separately challenge the Panels' findings regarding the determination provisions.⁵⁶¹

6.151. We begin with a few preliminary observations. First, we recall that the Appellate Body criticized the first compliance panel's analysis because, while the first compliance panel had initially emphasized the interlinkages between elements of the 2013 Tuna Measure:

[I]t subsequently conducted a segmented analysis that isolated consideration of each element of the measure without accounting for the manner in which the elements are interrelated, and without aggregating or synthesizing its analyses or findings relating to those elements before reaching its ultimate conclusions as to the consistency or inconsistency of the [2013 Tuna Measure].⁵⁶²

6.152. In the first compliance proceedings, the Appellate Body recognized that it may be appropriate for a panel "to proceed by assessing different elements of [a] measure in a sequential manner", provided that doing so does not "lead to the isolated consideration of a particular element" where the elements of a measure are closely interrelated.⁵⁶³ Similarly, an assessment of the even-handedness of the 2016 Tuna Measure "must take account of the fact that its various elements – the eligibility criteria, the certification requirements, and the tracking and verification requirements – establish a series of conditions of access to the dolphin-safe label that are cumulative and highly interrelated".⁵⁶⁴

6.153. In these compliance proceedings, as described in paragraph 6.149 above, the Panels first examined the different elements of the 2016 Tuna Measure (i.e. the eligibility criteria, the certification requirements, the tracking and verification requirements, and the determination provisions) in a sequential manner before synthesizing their analysis in order to reach their conclusion as to the consistency of the 2016 Tuna Measure with the WTO Agreement.⁵⁶⁵ As indicated above, analysing the measure in a sequential manner does not, in itself, render the analysis erroneous. Rather, in reviewing the Panels' analysis, we examine whether it resulted in an "isolated consideration of a particular element"⁵⁶⁶, or whether the Panels' analysis took into account the manner in which the discrete elements of the 2016 Tuna Measure are "cumulative and highly interrelated".⁵⁶⁷

6.154. Second, we take note that, in challenging the Panels' assessment of the component elements of the 2016 Tuna Measure, Mexico contends, in several places, that the Panels' erroneous evaluation of the relevant risk profiles resulted in an error in the Panels' assessment of the 2016 Tuna Measure.⁵⁶⁸ In sections 6.1.3.2 and 6.1.4 above, we addressed Mexico's claim that the Panels erred in their evaluation of the risk profiles. Thus, to the extent that Mexico's arguments in support of its claim that the Panels erred in their assessment of the component elements of the 2016 Tuna Measure mirror Mexico's arguments that we addressed and rejected above, we refer to our analysis in those sections and do not revisit Mexico's arguments. Instead, we focus our review of the Panels' analysis on Mexico's arguments that are not premised on the alleged errors in the Panels' evaluation of the risk profiles.

6.155. We now turn to Mexico's challenges to the Panel's assessment of the following aspects of the 2016 Tuna Measure: (i) the eligibility criteria; (ii) the certification requirements; (iii) the tracking and verification requirements; and (iv) the 2016 Tuna Measure as a whole.

⁵⁶¹ These findings are contained in paragraphs 7.677-7.702 of the Panel Reports.

⁵⁶² Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.21. We note that the Panels in these compliance proceedings took account of this reasoning by the Appellate Body in setting out their approach to their assessment of the 2016 Tuna Measure. (Panel Reports, paras. 7.527-7.530)

⁵⁶³ Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras. 7.14-7.15.

⁵⁶⁴ Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.166.

⁵⁶⁵ Panel Reports, para. 7.530 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.21). See also *ibid.*, paras. 7.703-7.716.

⁵⁶⁶ Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.15.

⁵⁶⁷ Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.166.

⁵⁶⁸ See e.g. Mexico's appellant's submission, paras. 233-237, 241-246, 252, 267, 273-274, and 306.

6.1.5.2 Eligibility criteria

6.156. Mexico claims that the Panels erred in finding that the eligibility criteria embodied in the 2016 Tuna Measure are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁵⁶⁹ Mexico contends that the Panels undertook an incomplete calibration assessment that failed to assess the eligibility of all fishing methods and ocean areas, by failing to assess and take into consideration the risk profiles of different ocean areas, and by omitting relevant and important factors from the calibration assessment.⁵⁷⁰

6.157. The United States asserts that all of Mexico's arguments are without merit and should be rejected. In this regard, the United States argues that: (i) Mexico's attempt to undermine the Panels' factual findings concerning the nature and content of the eligibility criteria is inappropriate and incorrect; (ii) the Panels' analysis of the eligibility criteria encompassed both the ineligibility of setting on dolphins and the potential eligibility of the other relevant fishing methods; (iii) the Panels did not fail to conduct the necessary analysis of the risk profiles of the relevant fishing methods, including as used in different ocean areas; and (iv) the Panels' analysis did not omit critical factors.⁵⁷¹

6.158. Under the 2016 Tuna Measure, the following tuna products are automatically ineligible for the dolphin-safe label: (i) tuna harvested using large-scale driftnets on the high seas; and (ii) tuna harvested by vessels using purse seine nets to encircle (i.e. set on) dolphins anywhere in the world.⁵⁷² All other tuna products are eligible and may be labelled dolphin-safe *only if* no dolphins were killed or seriously injured in the gear deployments in which the tuna was caught. To this end, these tuna products must satisfy the certification and tracking and verification requirements of the 2016 Tuna Measure.⁵⁷³

6.159. As part of the 2016 Tuna Measure, the relevant regulatory distinction under the eligibility criteria is that tuna products containing tuna caught by *setting on dolphins* are ineligible for the dolphin-safe label, while tuna products containing tuna caught by *other fishing methods* are, in principle, eligible for the label.⁵⁷⁴ Thus, to assess whether this distinction is properly calibrated, the Panels were required to compare the risk profiles of relevant fishing methods. As discussed in paragraphs 6.94-6.95 above, in assessing and comparing the overall relative risks of the seven different fishing methods⁵⁷⁵, the Panels took account of relevant information pertaining to the risks to dolphins in individual fisheries, to the extent that evidence with respect to such individual fisheries was presented to the Panels.⁵⁷⁶ In particular, the Panels found that setting on dolphins poses a much higher risk of observed dolphin mortality and serious injury, on a per set basis, than other fishing methods.⁵⁷⁷ Moreover, in terms of the magnitude of observed harms, the Panels found that the greater risks caused by setting on dolphins appeared to justify the finding of the original and first compliance panels that setting on dolphins is "particularly harmful" to dolphins.⁵⁷⁸ The Panels also determined that the method of setting on dolphins is more likely than other fishing methods to cause unobserved mortality and serious injury.⁵⁷⁹ In addition, the Panels accepted, based on their assessment of the evidence on the record, that setting on dolphins causes a unique kind of unobservable harm that by its nature cannot be certified. The Panels noted that this contrasted with

⁵⁶⁹ Mexico's Notice of Appeal, para. 9.a (referring to Panel Reports, paras. 7.539-7.547).

⁵⁷⁰ Mexico's appellant's submission, para. 247 (referring to Panel Reports, paras. 7.538-7.547).

⁵⁷¹ United States' appellee's submission, para. 206.

⁵⁷² Panel Reports, para. 7.50 (referring to DPCIA (Panel Exhibits MEX-1 and USA-1), Section 1385(d); 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)). See also *ibid.*, para. 7.532.

⁵⁷³ Panel Reports, para. 7.50.

⁵⁷⁴ As noted in paragraph 6.158 above, the measure also automatically disqualifies tuna caught using large-scale driftnets on the high seas from the dolphin-safe label. Before the Panels, the parties did not submit "arguments concerning the disqualification of tuna caught by driftnet on the high seas". (Panel Reports, fn 936 to para. 7.532) For the reasons stated in paragraphs 6.69-6.70 above, this regulatory distinction is not relevant for assessing whether the detrimental impact found in this dispute stems exclusively from a legitimate regulatory distinction.

⁵⁷⁵ We recall that the seven fishing methods that the Panels discussed are: purse seine fishing by setting on dolphins; purse seine fishing without setting on dolphins; gillnet fishing; longline fishing; trawl fishing; tuna handling; and pole and line fishing. (See para. 6.86 above)

⁵⁷⁶ See e.g. Panel Reports, para. 7.541.

⁵⁷⁷ Panel Reports, para. 7.541.

⁵⁷⁸ Panel Reports, para. 7.542 (quoting First Compliance Panel Report, para. 7.120).

⁵⁷⁹ Panel Reports, para. 7.543.

other fishing methods, which, based on the evidence before the Panels, do not cause the same kinds of unobservable harms as setting on dolphins.⁵⁸⁰

6.160. For these reasons, the Panels concluded that "overall, the risk profile of setting on dolphins is much higher than that of each of the other six fishing methods used to catch tuna."⁵⁸¹ The Panels relied on this conclusion⁵⁸² in finding that, "[t]aking into account the relative risk profiles of setting on dolphins, on the one hand, and other fishing methods on the other hand, ... the eligibility criteria are appropriately calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."⁵⁸³

6.161. Mexico's arguments⁵⁸⁴ in support of its claim that the Panels erred in their assessment of the eligibility criteria of the 2016 Tuna Measure largely repeat Mexico's arguments that we addressed and rejected in our review of the Panels' evaluation of the relevant risk profiles. In particular, we recall that, under Article 2.1 of the TBT Agreement, the relevant question is whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction. As described above, the detrimental impact in this dispute results, in part, from the distinction under the eligibility criteria between setting on dolphins and other fishing methods. Consequently, the test of whether the eligibility criteria are even-handed requires an assessment of whether the distinction between setting on dolphins and other fishing methods in the eligibility criteria is explained by the differences in the risk profiles of the fishing methods.

6.162. As we found above, for the purpose of this assessment, the Panels adopted the correct approach by comparing the risk profiles of the different fishing methods, on the basis of their examination of the evidence concerning the use of these fishing methods in different ocean areas.⁵⁸⁵ Moreover, following our review of the Panels' evaluation of the relevant risk profiles, we found that Mexico has not demonstrated that the Panels erred by drawing conclusions on the risk profile of each fishing method on the basis of their examination of the evidence before them (including evidence pertaining to individual fisheries).⁵⁸⁶ Having found no legal error in the Panels' assessment of risk profiles, we see no reason to vacate the Panels' conclusion, following that assessment, that "setting on dolphins is significantly more dangerous to dolphins than are other fishing methods."⁵⁸⁷

6.163. We now turn to Mexico's arguments that concern whether the eligibility criteria under the measure are properly calibrated. Mexico points to evidence that it submitted to the Panels concerning the dangers of other fishing methods, arguing that this evidence demonstrates that, for these fishing methods and ocean areas, there are regular and substantial dolphin mortalities and serious injury. Mexico asserts that the failure of the eligibility criteria to "*designate such tuna as ineligible*" demonstrates that the tuna measure is not calibrated to differences in the risk profiles of different fishing methods in different ocean areas.⁵⁸⁸

6.164. These arguments by Mexico fail to take account of how the various elements of the 2016 Tuna Measure work together. As the Appellate Body explained in the first compliance proceedings, the eligibility criteria are the "substantive conditions for access to [a] dolphin-safe label".⁵⁸⁹ However, the eligibility criteria are not the *only* conditions for access to a dolphin-safe label. The certification requirements and the tracking and verification requirements "work together" with the eligibility criteria of the 2016 Tuna Measure "to limit access to the dolphin-safe label".⁵⁹⁰ This means that, with respect to the category of tuna products that are not automatically disqualified by the eligibility criteria, these products must still satisfy the certification requirements and the tracking and verification requirements before they can access the dolphin-safe label. For example,

⁵⁸⁰ Panel Reports, paras. 7.544-7.546.

⁵⁸¹ Panel Reports, para. 7.525.

⁵⁸² Panel Reports, para. 7.539.

⁵⁸³ Panel Reports, para. 7.540.

⁵⁸⁴ Mexico's appellant's submission, paras. 230-247.

⁵⁸⁵ See para. 6.77 above.

⁵⁸⁶ See para. 6.99 above.

⁵⁸⁷ Panel Reports, para. 7.539.

⁵⁸⁸ Mexico's appellant's submission, paras. 238-240. (emphasis added)

⁵⁸⁹ Panel Reports, para. 7.532 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.19).

⁵⁹⁰ Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.159.

the certification requirements, which the Panels addressed in a later section of their Reports⁵⁹¹, provide that tuna intended to be labelled as dolphin-safe in the US market must be accompanied by, *inter alia*, a certificate attesting that: (i) no dolphins were killed or seriously injured during the sets in which the tuna was caught; and (ii) no purse seine net or other fishing gear was intentionally deployed on or used to set on dolphins during the fishing trip in which the tuna was caught.⁵⁹² Thus, contrary to Mexico's arguments, under the 2016 Tuna Measure, tuna caught with fishing methods that, while provisionally eligible under the eligibility criteria, cause adverse effects to dolphins would not have access to the dolphin-safe label if they do not fulfil the other labelling conditions under the 2016 Tuna Measure (i.e. the certification requirements and the tracking and verification requirements).

6.165. Mexico also contends that the Panels erred by omitting from their assessment factors related to the circumstances affecting the regulatory reliability of different ocean areas. According to Mexico, "[d]olphins are at a greater overall risk in ocean areas with insufficient regulatory oversight, unreliable reporting, IUU fishing and trans-shipment at sea than in ocean areas that do not have these attributes."⁵⁹³ Thus, Mexico stresses that tuna caught in such ocean areas by any fishing method that causes adverse effects to dolphins "*should be ineligible for the label and therefore discouraged*".⁵⁹⁴

6.166. However, as discussed in section 6.1.3.1.2 above, we share the Panels' view that the risks of inaccurate certification, reporting, and/or record-keeping are not:

[R]isks that arise from the use of different fishing methods in different areas of the ocean, even though fish caught in different areas of the ocean through the use of different fishing methods may be associated with a greater or smaller risk of inaccurate labelling depending on a range of interconnected factors, including the persons involved in the catch, available technology, and applicable domestic and international regulatory requirements.⁵⁹⁵

6.167. Accordingly, we find that the Panels did not err in stating that "the risks of inaccurate certification, reporting, and/or record-keeping are *not* risks that affect dolphins themselves".⁵⁹⁶ In any event, in response to questioning at the hearing, Mexico conceded that there was no evidence on the record substantiating its assertion that "[d]olphins are at a greater overall risk in ocean areas with insufficient regulatory oversight, unreliable reporting, IUU fishing and transshipment at sea than in ocean areas that do not have these attributes."⁵⁹⁷

6.168. We have found that the Panels did not err in finding that "setting on dolphins is significantly more dangerous to dolphins than are other fishing methods."⁵⁹⁸ This finding implies that the

⁵⁹¹ Panel Reports, section 7.8.3. We review the Panels' findings concerning the certification requirements under the 2016 Tuna Measure in section 6.1.5.3 below.

⁵⁹² Panel Reports, para. 7.549.

⁵⁹³ Mexico's appellant's submission, para. 246. In response to questioning at the hearing, Mexico indicated that there was evidence on the Panel record illustrating the existence of risks arising from insufficient regulatory oversight, IUU fishing, and trans-shipment at sea. However, Mexico conceded that there was no evidence on the record to demonstrate that dolphins are at a greater overall risk in ocean areas where these attributes exist than in ocean areas where the method of setting on dolphins is practised. Instead, Mexico clarified that the assertion, in its appellant's submission, about "dolphins [being] at a greater overall risk in ocean areas with insufficient regulatory oversight, unreliable reporting, IUU fishing and trans-shipment at sea" was made merely as "a point of argument" in support of its view that the Panels should have turned their attention to all of the factors that are relevant to the general objective of discouraging fishing practices that harm dolphins.

⁵⁹⁴ Mexico's appellant's submission, para. 246. (emphasis added)

⁵⁹⁵ Panel Reports, para. 7.110 (referring to First Compliance Panel Report, paras. 7.169 and 7.372, and fn 464 to para. 7.258, fn 681 to para. 7.463, and fn 711 to para. 7.502).

⁵⁹⁶ Panel Reports, para. 7.110. (emphasis added)

⁵⁹⁷ Mexico's appellant's submission, para. 246. As discussed in section 6.1.3.1 above, factors that affect the ultimate accuracy of the dolphin-safe label are relevant to assessing whether the labelling conditions under the measure are properly calibrated. In this vein, we recall that the certification requirements and the tracking and verification requirements, which, *inter alia*, address such factors, "work together" with the eligibility criteria of the 2016 Tuna Measure "to limit access to the dolphin-safe label". (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.159) We review the Panels' examination of the certification requirements and the tracking and verification requirements in sections 6.1.5.3 and 6.1.5.4 below.

⁵⁹⁸ Panel Reports, para. 7.539. See also *ibid.*, para. 7.525.

distinction in the eligibility criteria between setting on dolphins, on the one hand, and other fishing methods, on the other hand, is, as the Panels found, "appropriately calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean".⁵⁹⁹ Accordingly, we find that Mexico has not demonstrated that the Panels erred in reaching the intermediate finding that the eligibility criteria embodied in the 2016 Tuna Measure are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁶⁰⁰

6.1.5.3 Certification requirements

6.169. Mexico asserts that the Panels erred in finding that the different certification requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁶⁰¹ In addition to its arguments challenging the Panels' assessment of the risk profiles⁶⁰², Mexico also contends that the Panels erred: (i) by not addressing the fact that the 2016 Tuna Measure requires observer certifications in seven US domestic fisheries when the observers are on board for other reasons⁶⁰³; (ii) by finding that the measure can be considered calibrated where it allows higher margins of error for certifications in all ocean areas other than the ETP; and (iii) by finding that the determination provisions contribute to the calibration of the measure, even though the determination provisions are only potentially applicable to a fishery that has a much higher risk profile than the one found by the Panels for the ETP large purse seine fishery.⁶⁰⁴

6.170. The United States maintains that: (i) Mexico is wrong to argue that the Panels erred in not addressing the observer certification requirements on the seven US domestic fisheries⁶⁰⁵; (ii) the Panels' analysis and conclusions concerning margins of error did not constitute legal error⁶⁰⁶; and (iii) the Panels did not err in their analysis and conclusions concerning the determination provisions.⁶⁰⁷

6.171. As described in section 5 above, with respect to the certification requirements, apart from large-scale driftnet fishing on the high seas⁶⁰⁸, the 2016 Tuna Measure makes a distinction between the ETP large purse seine fishery, on the one hand, and all other fisheries, on the other hand.⁶⁰⁹ For tuna caught in the ETP large purse seine fishery, the 2016 Tuna Measure mandates that certification must be provided by the captain of the vessel *and* an IDCP-approved observer that: (i) none of the tuna was caught on a trip using a purse seine net intentionally deployed on or used to encircle dolphins; and (ii) no dolphins were killed or seriously injured during the sets in which the tuna was caught.⁶¹⁰

6.172. As for all fisheries other than the ETP large purse seine fishery, for fishing trips that began on or after 21 May 2016, captains of all vessels must certify that: (i) no purse seine net or other fishing gear was intentionally deployed on or used to encircle (i.e. set on) dolphins during the fishing trip in which the tuna was caught; and (ii) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught.⁶¹¹ Additionally, under the 2016 Tuna Measure,

⁵⁹⁹ Panel Reports, para. 7.540.

⁶⁰⁰ Panel Reports, para. 7.547. See also *ibid.*, para. 7.540.

⁶⁰¹ Mexico's Notice of Appeal, para. 9.b (referring to Panel Reports, paras. 7.571-7.573 and 7.600-7.611).

⁶⁰² Mexico's appellant's submission, para. 252. See also para. 6.154 above.

⁶⁰³ Mexico's appellant's submission, para. 258 (referring to First Compliance Report, para. 3.46; United States' first written submission to the Panels, fn 225 to para. 116).

⁶⁰⁴ Mexico's appellant's submission, para. 267.

⁶⁰⁵ United States' appellee's submission, para. 264.

⁶⁰⁶ United States' appellee's submission, para. 244.

⁶⁰⁷ United States' appellee's submission, para. 244.

⁶⁰⁸ Panel Reports, para. 7.51 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)).

⁶⁰⁹ Panel Reports, paras. 7.51 and 7.54 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(1) and (3)).

⁶¹⁰ Panel Reports, para. 7.54 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(1)). See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.92.

⁶¹¹ Panel Reports, para. 7.51 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(iii)).

the captains of the vessels in all fisheries *other than* the ETP large purse seine fishery must certify that they have completed the Captain Training Course.⁶¹²

6.173. Moreover, in addition to the captain's certification described above, in certain circumstances, certifications from an observer participating in a national or international programme acceptable to the Assistant Administrator will also be required. First, certification by the observer is also required in the seven US domestic fisheries for which the Assistant Administrator has determined that observers are qualified and authorized to make the relevant certifications⁶¹³, and when such an observer is already on board the fishing vessel for reasons unrelated to the dolphin-safe labelling regime.⁶¹⁴

6.174. Furthermore, pursuant to the 2016 Tuna Measure, tuna caught in all fisheries *other than* the ETP large purse seine fishery may, under specified circumstances, require an observer⁶¹⁵ certification in addition to the captain certification. This is the case where the Assistant Administrator has determined that in a fishery other than the ETP large purse seine fishery: (i) there is a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP); or (ii) a regular and significant mortality or serious injury of dolphins is occurring. The captain and observer must certify that: (i) no purse seine net or other fishing gear was intentionally deployed on or used to encircle (i.e. set on) dolphins during the trip on which the tuna was caught; and (ii) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught.⁶¹⁶

6.175. In their analysis of the certification requirements, the Panels noted that, unlike the eligibility requirements, the certification requirements (and the tracking and verification requirements) draw distinctions based on both fishing methods and ocean areas (i.e. fisheries), rather than solely on different fishing methods. Specifically, the distinctions are made between the ETP large purse seine fisheries and all other fisheries. Thus, the certification requirements that apply in the ETP large purse seine fishery apply to *all* large purse seine vessels fishing in the ETP, regardless of whether those vessels actually set on dolphins. Therefore, the Panels considered the question before them to be whether the distinction that the 2016 Tuna Measure makes between the ETP large purse seine fishery and all other fisheries is calibrated.⁶¹⁷

6.176. In this regard, the Panels considered that the finding, from the original and first compliance proceedings, that setting on dolphins is practised routinely and systematically only in the ETP continued to be relevant to these compliance proceedings.⁶¹⁸ The Panels also found relevant the finding of the original panel that "the association between schools of tunas and dolphins does not occur outside the ETP as *frequently* as it does within the ETP."⁶¹⁹ In addition, the Panels recalled their conclusion that setting on dolphins is a particularly dangerous fishing method that is liable to

⁶¹² Panel Reports, para. 7.53 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(iii)(B)).

⁶¹³ In the first compliance panel proceedings, the United States identified the seven domestic fisheries where tuna is regularly harvested as: (i) American Samoa Pelagic Longline Fishery; (ii) Atlantic Bluefin Tuna Purse Seine Fishery; (iii) Atlantic Highly Migratory Species Pelagic Longline Fishery; (iv) California Deep-set Pelagic Longline Fishery; (v) California Large-mesh Drift Gillnet Fishery; (vi) Hawaii Deep-set Longline Fishery; and (vii) Hawaii Shallow-set Longline Fishery. (United States' second written submission to the first compliance panel, para. 128 and fn 244 thereto (referring to Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, *United States Federal Register*, Vol. 79, No. 134 (14 July 2014) (First Compliance Panel Exhibit US-113), p. 40720))

⁶¹⁴ Thus, in these fisheries, tuna caught on a trip where no observer is already on board may still be labelled dolphin-safe with only a captain's certification. (See First Compliance Panel Report, para. 3.46; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.23 and fn 171 thereto)

⁶¹⁵ This observer is described as one "participating in a national or international program acceptable to the Assistant Administrator". (2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(v). See also Panel Reports, para. 7.68)

⁶¹⁶ Panel Reports, para. 7.68 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(v)).

⁶¹⁷ Panel Reports, para. 7.568.

⁶¹⁸ Panel Reports, para. 7.570.

⁶¹⁹ Panel Reports, para. 7.569 (quoting Original Panel Report, para. 7.520 (fn omitted; emphasis original)). We also take note of the Panels' observation, in the context of their assessment of the risk profiles, that "due to the significant and regular association between tuna and dolphins in the ETP, even purse seine fishing without setting on dolphins might end up, inadvertently, interacting with dolphins, perhaps even at a higher rate than purse seine fishing by setting on dolphins or other fishing methods in other areas of the ocean." (Ibid., para. 7.333)

cause observable and unobservable harms to dolphins at rates significantly in excess of those caused by other fishing methods.⁶²⁰ The Panels observed that, in the ETP, unlike in other areas of the ocean, large purse seine vessels *are permitted to* and *actually can* set on dolphins in a consistent and systematic manner. The Panels highlighted that one of the purposes of the certification requirements in the ETP is precisely to certify that dolphins were *not* set on, even though the fishing vessels could, both technically and legally, have set on dolphins. Thus, in the Panels' view, it is both the technical and legal possibilities of setting on dolphins and the fact that dolphin sets occur in a consistent and systematic manner in the ETP large purse seine fishery that give this fishery its special risk profile.⁶²¹

6.177. On appeal, Mexico challenges the Panels' finding that the ETP large purse seine fishery has a "special risk profile", arguing that the Panels failed to compare individual fisheries.⁶²² We first note that Mexico's arguments concerning the Panels' alleged failure to assess individual fisheries repeat Mexico's arguments addressed in section 6.1.4 above.⁶²³ In particular, we recall that, in assessing whether there is "treatment no less favourable" under Article 2.1 of the TBT Agreement for the purpose of this dispute, the analysis should "focus[] on the regulatory distinction(s) causing the detrimental impact on imported products".⁶²⁴ With respect to the certification requirements, the 2016 Tuna Measure makes a distinction between the ETP large purse seine fishery and all other fisheries.⁶²⁵ We also recall our finding that, with respect to the certification requirements (and the tracking and verification requirements), the Panels adopted the correct approach in comparing the risk profiles of individual fisheries, because these requirements make a distinction on the basis of both fishing method and ocean area.⁶²⁶ Moreover, as discussed in section 6.1.4 above, the Panels examined all available evidence before them regarding the risks to dolphins in individual fisheries, and Mexico has not substantiated its claim that the Panels erred in assessing such risks. On the basis of their assessment of risks to dolphins in individual fisheries, the Panels established that "in the ETP, unlike in other areas of the ocean, large purse seine vessels *are permitted to* and *actually can* set on dolphins in a consistent and systematic manner."⁶²⁷ Thus, we understand that, having assessed the risk profiles of individual fisheries, the Panels established that, when compared to the ETP large purse seine fishery, which has a "special risk profile", all the other fisheries are similar in their risk profiles insofar as in none of them is setting on dolphins practised consistently or systematically.

6.178. In this regard, we take note of Mexico's allegation that the Panels did not address the fact that only *certain* large purse seine vessels in the ETP, i.e. those that have been assigned an individual DML, "are permitted to and actually can set on dolphins in a consistent and systematic manner".⁶²⁸ As a preliminary matter, we observe that Mexico's argument that vessels either set on dolphins or do not, and that the ETP fishery can be divided into vessels with and without DMLs, was not made before the Panels and finds no support on the Panel record.⁶²⁹

6.179. More importantly, in their evaluation of the certification requirements, the Panels expressly addressed the issue of why the ETP large purse seine fisheries have a special risk profile, regardless of whether setting on dolphins is actually practised. In particular, the Panels noted that:

[T]he crucial point is that in the ETP, unlike in other areas of the ocean, large purse seine vessels *are permitted to* and *actually can* set on dolphins in a consistent and

⁶²⁰ Panel Reports, para. 7.571.

⁶²¹ Panel Reports, para. 7.572.

⁶²² Mexico's appellant's submission, para. 255 (quoting Panel Reports, para. 7.572).

⁶²³ Mexico's appellant's submission, para. 252.

⁶²⁴ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.93. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.

⁶²⁵ See para. 6.65 above. See also Panel Reports, paras. 7.51-7.54; 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(1) and (3).

⁶²⁶ See para. 6.77 above.

⁶²⁷ Panel Reports, para. 7.572. (emphasis original)

⁶²⁸ Mexico's appellant's submission, para. 256.

⁶²⁹ To the contrary, the United States, in its appellee's submission, points us to evidence on the Panel record that indicates that vessels with DMLs may not set on dolphins during particular trips either because they choose not to or because they have reached their DML for the year. Further, DMLs can be transferred or changed mid-year, so the fact that a vessel was not given a DML does not mean that it can never legally set on dolphins that year. (United States' appellee's submission, para. 262 (referring to AIDCP, *Report on the International Dolphin Conservation Program*, Doc. MOP-28-05, 18 October 2013 (Panel Exhibit MEX-8), pp. 2-3; AIDCP, *Report on the International Dolphin Conservation Program*, Doc. MOP-32-05, 20 October 2015 (Panel Exhibit USA-15), pp. 2-3))

systematic manner. ... Thus, it is not simply the fact that dolphins *are* set on in the ETP large purse seine fishery that gives it its "special risk profile", but the fact that only in the ETP are large purse vessels actually able and permitted to set on dolphins. Thus, in our view, it is both the technical and legal possibility of setting on dolphins and the fact that dolphin sets occur in a consistent and systematic manner in the ETP large purse seine fishery that gives this fishery its special risk profile.⁶³⁰

6.180. Beyond its argument concerning DMLs, which we have addressed above, Mexico does not offer additional reasons why the above-quoted statements from the Panels are erroneous. Moreover, as we found in section 6.1.4.2 above, Mexico has not demonstrated that the Panels failed to assess the risk profiles of individual fisheries.⁶³¹ Having found no legal error in the Panels' assessment of risk profiles, we see no reason to void the Panels' finding that "it is both the technical and legal possibility of setting on dolphins and the fact that dolphin sets occur in a consistent and systematic manner in the ETP large purse seine fishery that gives this fishery its special risk profile."⁶³²

6.181. Mexico also alleges that the Panels failed to address the fact that the 2016 Tuna Measure requires observer certifications in seven US domestic fisheries when the observers are on board for other reasons.⁶³³ For Mexico, this raises questions such as whether those seven fisheries are "high risk", or whether the enhanced certification requirements are imposed for reasons other than those identified by the Panels.⁶³⁴ The United States points out that, before the Panels, Mexico never put forward any argument that the additional observer requirement imposed on some US vessels in US fisheries renders the 2016 Tuna Measure not even-handed. The United States adds that Mexico has not suggested a reason for claiming that the Panels' failure to refer to this observer certification requirement renders their analysis "legally in error".⁶³⁵ In response to questioning at the hearing, Mexico clarified that its argument was not that the observer certification requirement, in and of itself, renders the measure not even-handed. Rather, Mexico was referring to the Panels' failure, in their analysis, to address this requirement as yet another illustration of the incoherence of the Panels' calibration analysis and of their failure to take account of all relevant factors.

6.182. We observe that Mexico's argument concerns an aspect of the certification requirements on which the Panels made no finding. Before the Panels in these compliance proceedings, Mexico referred to the observer certifications reflected in the first compliance panel report in describing the certification requirements under the 2016 Tuna Measure.⁶³⁶ However, Mexico did not raise specific concerns regarding these observer certifications, either during the first compliance proceedings or before the Panels in these compliance proceedings.

6.183. We recall that, in the first compliance proceedings, the United States identified seven domestic fisheries where tuna is regularly harvested.⁶³⁷ These seven US fisheries have a certain level of observer coverage, meaning that observers may be on board the fishing vessels in these fisheries for reasons unrelated to the dolphin-safe labelling regime.⁶³⁸ As noted by the first compliance panel and the Appellate Body, the Assistant Administrator has determined that, in addition to the captain's certification, the observers in these fisheries are qualified and authorized

⁶³⁰ Panel Reports, para. 7.572. (emphasis original; fns omitted)

⁶³¹ See para. 6.99 above.

⁶³² Panel Reports, para. 7.572.

⁶³³ See para. 6.173 and fn 613 above.

⁶³⁴ Mexico's appellant's submission, para. 258 (referring to First Compliance Panel Report, para. 3.46; United States' first written submission to the Panels, fn 225 to para. 116, in turn referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(iv); First Compliance Panel Report, para. 3.45).

⁶³⁵ United States' appellee's submission, para. 264.

⁶³⁶ Mexico's first written submission to the Panels, para. 128 (referring to First Compliance Panel Report, para. 3.46).

⁶³⁷ See *supra*, fn 613.

⁶³⁸ United States' second written submission to the first compliance panel, para. 128 and fn 245 thereto (referring to NMFS, *National Observer Program FY 2012 Annual Report* (2013) (First Compliance Panel Exhibit US-114), pp. 29-38).

to make the certifications required for the dolphin-safe label.⁶³⁹ Thus, with respect to these seven US fisheries, the 2016 Tuna Measure, similar to the 2013 Tuna Measure, conditions access to the dolphin-safe label on the provision of both captain and observer certifications, but only when an observer is already on board the vessel. It is unclear to us why the presence of observers on board fishing vessels in the seven US fisheries, for reasons unrelated to the dolphin-safe labelling regime, "raises questions such as whether those seven fisheries are 'high-risk'".⁶⁴⁰

6.184. In any event, regardless of the reasons for which such an observer may already be on board the vessel under the 2016 Tuna Measure, we note that the observer is required to prepare a written statement certifying that: (i) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught; and (ii) in purse seine fisheries, no purse seine net was intentionally deployed on or used to encircle dolphins during the trip on which the tuna was caught.⁶⁴¹ We recall that the aim of the Panels' calibration analysis was to establish whether "the distinctions drawn between different tuna fishing methods and different areas of the oceans could be explained or justified by the differences in risk associated with such fishing methods and areas of the oceans."⁶⁴² On its face, this requirement appears to reduce the differences in the requirements applicable to the ETP large purse seine fishery and those applicable to all other fisheries, by making use of an already available observer resource on board the vessel to complement the efforts of the captain of the vessel in meeting the certification requirements. In our view, therefore, Mexico has not demonstrated how this observer requirement renders the treatment accorded under the 2016 Tuna Measure to the different fisheries not even-handed.

6.185. We now turn to Mexico's contention that the Panels did not approach the calibration test from the perspective of accuracy, taking account of the objectives of the measure, but rather from the perspective of how much inaccuracy should be tolerated, notwithstanding the objectives. Mexico points to the Panels' statement that "[w]e ... do not believe that, by tolerating a higher or lower margin of error, the certification requirements conflict with the objectives of the 2016 Tuna Measure."⁶⁴³ Mexico contends that the Panels did not explain how tolerating error can be reconciled with, or rationally connected to, the consumer-information and dolphin-protection objectives of the measure. Mexico posits that, if the Panels had done so, they may have found that the detrimental impact caused by the 2016 Tuna Measure cannot be justified on the basis of regulatory distinctions that tolerate different margins of error.

6.186. The United States argues that the Panels' statements concerning margins of error in these compliance proceedings do not suggest that there are differences in label accuracy for tuna produced from the ETP large purse seine fishery and other fisheries. For the United States, a more sensitive mechanism does not necessarily mean a more accurate label. Rather, the risk profile of a fishery must also be taken into account.⁶⁴⁴

6.187. As described in section 6.1.3.1.3 above, the Panels first introduced the term "margin of error" when examining, as a general matter, the relevance of the risk of inaccurate labelling to their calibration analysis. As analysed in that section, the Panels used this term to refer to the sensitivity of the relevant labelling conditions. In that context, we find that the Panels correctly recognized that the accuracy of the ultimate label depends not only on the sensitivity of the labelling conditions, but

⁶³⁹ First Compliance Panel Report, para. 3.46; Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), fn 171 to para. 6.23. See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(iv). The United States pointed to evidence on the record of the first compliance panel indicating that the NMFS relies on fishery observers to collect data from US commercial fishing and processing vessels, as well as from some shore-side processing plants. In response to questioning at the hearing in these compliance proceedings, the United States indicated that the information collected by fisheries observers is used for a wide range of assessment and monitoring purposes, and supports the management and conservation of fisheries, protected resources, and ecosystems throughout the United States. (NMFS, *National Observer Program FY 2012 Annual Report* (2013) (First Compliance Panel Exhibit US-114), pp. vi-vii and 1-4)

⁶⁴⁰ Mexico's appellant's submission, para. 258.

⁶⁴¹ 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(iv).

⁶⁴² Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.108 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 282-284).

⁶⁴³ Mexico's appellant's submission, para. 263 (quoting Panel Reports, para. 7.607).

⁶⁴⁴ United States' appellee's submission, para. 269 (referring to Panel Reports, paras. 7.599, 7.603-7.604, and 7.607).

also on the level of risks to dolphins in a fishery. In our view, the Panels used the term "margin of error" in the same sense in their evaluation of the certification requirements.

6.188. Mexico takes issue with the Panels' statement that, "[i]n the context of the certification requirements, ... it is calibrated for the United States to tolerate a higher margin of error in respect of fisheries other than the ETP large purse seine fishery and to tolerate a lower margin of error inside the ETP large purse seine fishery."⁶⁴⁵ The Panels' statement that Mexico refers to should be understood in its proper context. Specifically, the Panels were addressing Mexico's argument that the use of a less sensitive mechanism outside the ETP large purse seine fishery cannot be even-handed if it would result in the label becoming less accurate.⁶⁴⁶ In the Panels' view, Mexico's argument appeared to be premised on the notion that certification can guarantee accurate labelling in every case. However, the Panels considered the more pertinent question to be whether the *possibility* of error is commensurate with the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Accordingly, the Panels considered that "it is calibrated"⁶⁴⁷ for the United States to require a more sensitive mechanism in the ETP large purse seine fishery, while "tolerating" a less sensitive mechanism in other fisheries, which have relatively lower risk profiles. For the Panels, this distinction addresses the relative risks posed to dolphins in the ETP large purse seine fishery, on the one hand, and other fisheries, on the other hand, in a way that is calibrated to the risk profiles of those fisheries.⁶⁴⁸

6.189. The Panels' statements above, read in their proper context, confirm our view that the Panels correctly focused on the question whether the sensitivity of the labelling conditions under the measure is calibrated to the level of risks to dolphins so as to ensure the accuracy of the ultimate label. Indeed, as the Panels noted, the mere fact that a vessel has an observer on board does not necessarily, or by itself, mean that that vessel will produce a more accurate certification.⁶⁴⁹ Rather, accuracy is a function of potentially many variables, including not only the reporting requirements in place, but also the different levels of dolphin interaction, mortality, and serious injury in different fisheries.⁶⁵⁰ Thus, while an observer may strengthen the certification, such additional strength may not always be needed, for example, in fisheries where the risk profile is relatively low.⁶⁵¹

6.190. Still with regard to the potential risk of inaccuracy of the dolphin-safe label, we take note of Mexico's assertion that the panel in the first compliance proceedings found that "it may be *easier* or *more likely* for dolphin-safe certifications made only by captains to be inaccurate", with "the consequence" that "it may be more likely that tuna caught by vessels other than large purse seine vessels in the ETP will be inaccurately labelled as dolphin-safe."⁶⁵² However, the first compliance panel did not make a definitive finding on this issue. Rather, the first compliance panel, in making the statements to which Mexico refers, also explained that, although the United States seemed to have made the "concession that observer certification heightens or increases the accuracy and reliability of the label", such a concession "does not entail the conclusion that, without observers, captains' certifications are always and necessarily 'inherently unreliable'".⁶⁵³ The first compliance panel added that, in its view, it was "not necessary to make a definitive finding on this point".⁶⁵⁴

6.191. In any event, the first compliance panel was addressing the 2013 Tuna Measure. The Panels in these compliance proceedings noted that, under the architecture of the 2016 Tuna Measure, the private tuna companies that supply the US tuna market are subject to the requirements of the 2016 Tuna Measure, and it is they that must ensure that the products they sell meet the conditions of US law, "including that the captain certifications are accurate".⁶⁵⁵ The Panels considered that, unlike the situation under the 2013 Tuna Measure, the training course incorporated in the 2016 Tuna Measure contains meaningful information concerning key aspects of the certification

⁶⁴⁵ Panel Reports, para. 7.602.

⁶⁴⁶ Panel Reports, para. 7.604 (referring to Mexico's response to Panel question No. 86, para. 147).

⁶⁴⁷ Panel Reports, paras. 7.602 and 7.606.

⁶⁴⁸ Panel Reports, para. 7.606 (referring to Appellate Body Reports, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.122; *US – Tuna II (Mexico)*, para. 292).

⁶⁴⁹ Panel Reports, para. 7.608.

⁶⁵⁰ Panel Reports, paras. 7.123 and 7.608.

⁶⁵¹ Panel Reports, para. 7.608.

⁶⁵² Mexico's appellant's submission, para. 263 (quoting First Compliance Panel Report, para. 7.168 (emphasis original)).

⁶⁵³ First Compliance Panel Report, para. 7.168. See also United States' appellee's submission, para. 268.

⁶⁵⁴ First Compliance Panel Report, para. 7.169.

⁶⁵⁵ Panel Reports, para. 7.591.

process that would assist captains to understand and properly carry out their responsibility to certify the dolphin-safe status of a set or other gear deployment. The Panels also considered that the training requirement is embedded within a sufficiently enforceable regulatory framework and is therefore not meaningless or unenforceable, as Mexico contended. In addition, the Panels took note that the Captain Training Course is now available online in nine languages, including the languages of all of the largest suppliers of tuna and tuna products, such as the Philippines, Chinese Taipei, and Thailand, which Mexico argues are significantly deficient in the control and monitoring of fishing activities.⁶⁵⁶ As the Panels explained, the training course was being actively disseminated by the United States itself to facilitate the effective implementation of the training requirement.⁶⁵⁷ In our view, the above findings illustrate the ways in which the Panels took account of the potential risks of inaccuracy when undertaking their calibration analysis.

6.192. Finally, we address Mexico's allegation that the Panels erred in finding that the determination provisions "help to ensure that the 2016 Tuna Measure treats similar situations similarly" and "help to establish a mechanism for enforcing the eligibility criteria that are properly calibrated to the different risk profiles in different fisheries".⁶⁵⁸ Mexico argues that the Panels failed to take fully into account Mexico's assertion that the determination provisions do not allow calibration of the certification requirement to the extreme danger to dolphins in fisheries where stock sustainability is being threatened and a small number of dolphin mortalities can have disastrous consequences. For Mexico, the Panels' approach also ignored the high number of dolphin mortalities and serious injury when measured on an absolute basis.⁶⁵⁹

6.193. We recall that, pursuant to the 2016 Tuna Measure, tuna caught in all fisheries *other than* the ETP large purse seine fishery may require an observer⁶⁶⁰ certification in addition to the captain certification where the Assistant Administrator has determined that in a fishery other than the ETP large purse seine fishery: (i) there is a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP); or (ii) a regular and significant mortality or serious injury of dolphins is occurring. The captain and observer must certify that: (i) no fishing gear was intentionally deployed on or used to encircle dolphins during the trip on which the tuna was caught; and (ii) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught.⁶⁶¹

6.194. We note that Mexico's arguments concerning dolphin-stock sustainability and the Panels' reliance on the per set methodology (as opposed to absolute levels of mortalities and serious injuries) mirror its arguments relating to the Panels' evaluation of the risk profiles. These arguments have already been addressed and rejected in section 6.1.4.4 above.⁶⁶²

6.195. In addition, Mexico contends that the Panels failed to fully take into account the fact that, in applying the determination provisions, the United States relies on "a 20-year average of direct dolphin mortalities caused by dolphin sets in the ETP" between 1997-2017 for determining whether there is a regular and significant mortality or serious injury of dolphins in a particular fishery.⁶⁶³

⁶⁵⁶ Panel Reports, paras. 7.594 and 7.675.

⁶⁵⁷ Panel Reports, paras. 7.594-7.595.

⁶⁵⁸ Mexico's appellant's submission, para. 265 (quoting Panel Reports, para. 7.710).

⁶⁵⁹ Mexico's appellant's submission, para. 266 (referring to Panel Reports, para. 7.683).

⁶⁶⁰ An observer is described as one "participating in a national or international program acceptable to the Assistant Administrator". (2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(v). See also Panel Reports, para. 7.68)

⁶⁶¹ Panel Reports, para. 7.68 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.91(a)(3)(v)). We take note of the Panels' explanation that the determination provisions under the 2016 Tuna Measure have been applied on at least one occasion. On 28 September 2016, the Assistant Administrator issued a determination, based on the best information available, that a regular and significant mortality of dolphins was occurring in the Indian Ocean gillnet fisheries. The determination provided that, for any tuna product produced from these fisheries to be marketed as dolphin-safe in the United States, the product would have to be accompanied by a certification by an observer from a qualified and authorized observer program and a certification attesting to the catch documentation, the substance of the dolphin-safe labelling standards, and the chain of custody information. (See Panel Reports, paras. 7.685-7.686)

⁶⁶² See also paras. 6.122-6.143 above.

⁶⁶³ Mexico's appellant's submission, para. 266 (referring to Panel Reports, para. 7.683). The 20-year average encompasses a period that starts two years before the entry into force of the AIDCP regime when mortalities were higher. The 20-year period also covers the years when there was dramatic reduction of observed dolphin mortality in the ETP, following the entry into force of the AIDCP regime. (See para. 5.2 above; Original Panel Report, paras. 2.39 and 7.609)

Mexico contends that, because the 20-year average encompasses a period when dolphin mortalities were higher in the ETP, the US benchmark under the determination provisions is materially higher than the average mortalities between 2009 and 2015, on which the Panels relied "elsewhere".⁶⁶⁴ According to Mexico, the Panels did not address this inconsistency in the data on which they relied. Mexico further contends that the Panels' finding suggests an approach under which, if a fishery is found to have a lower per set mortality rate than the ETP (based on a 20-year average), it is *automatically* assumed that there are no, or *de minimis*, risks to dolphins. Mexico considers this to be "an erroneous application of the test for calibration".⁶⁶⁵

6.196. We recall that, in its Notice of Appeal, Mexico expressly challenges the Panels' evaluation of: (i) the eligibility criteria; (ii) the certification requirements; (iii) the tracking and verification requirements; and (iv) the 2016 Tuna Measure as a whole.⁶⁶⁶ Mexico's Notice of Appeal does not include a claim challenging the Panels' discrete findings with respect to the determination provisions.⁶⁶⁷ Yet, in its appellant's submission, Mexico appears to challenge these very findings. Moreover, we note that this allegation by Mexico does not directly concern the heightened certification requirements, which follow once the Assistant Administrator has made the determination: (i) that a fishery other than the ETP large purse seine fishery has either a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP); or (ii) that a regular and significant mortality or serious injury of dolphins is occurring in a given fishery.⁶⁶⁸ Rather, Mexico's allegation concerns the methodology adopted by the United States to allow the Assistant Administrator to make such determinations, which the Panels did not address in their evaluation of the certification requirements, and which Mexico does not separately challenge on appeal. Furthermore, in response to questioning at the hearing, Mexico explicitly stated that it was not challenging the Panels' discrete findings on the determination provisions. Instead, Mexico explained that its reference to the Panels' findings was merely aimed at pointing out that the determination provisions do not remedy the lack of even-handedness of the 2016 Tuna Measure.

6.197. An assessment of the even-handedness of the 2016 Tuna Measure "must take account of the fact that its various elements ... establish a series of conditions of access to the dolphin-safe label that are cumulative and highly interrelated".⁶⁶⁹ Thus, to the extent that Mexico's arguments concerning the US methodology for applying the determination provisions impact the even-handedness of the 2016 Tuna Measure, owing to the "cumulative and highly interrelated" aspects of the various conditions of access to the dolphin-safe label, we consider Mexico's arguments to be properly before us.

6.198. Mexico's arguments on appeal suggest that there is an inconsistency between the Panels' reliance on 2009-2015 data from the ETP in arriving at one finding and the Panels' review of the data drawn from a 20-year average covering 1997 and 2017 in their evaluation of the US methodology for applying the determination provisions.⁶⁷⁰ Mexico's arguments appear to conflate two different aspects of the Panels' analyses. First, we recall that, in assessing whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement, the Panels first examined the risk profiles of the different fishing methods, as used in different areas of the ocean. In this regard, the Panels found that setting on dolphins caused both observable and unobservable harms to dolphins.⁶⁷¹ Specifically, the Panels found that, "[w]ith regard to observable harms, ... setting on dolphins in the ETP has caused on average 91.15 dolphin mortalities between 2009 and 2015."⁶⁷² For the purpose of reviewing the eligibility criteria under the 2016 Tuna Measure, the Panels relied on, *inter alia*, this finding to conclude that "overall, the risk profile of setting on dolphins is much higher than that of each of the other six fishing methods used to catch tuna."⁶⁷³

⁶⁶⁴ Mexico's appellant's submission, para. 266.

⁶⁶⁵ Mexico's appellant's submission, para. 266.

⁶⁶⁶ Mexico's Notice of Appeal, para. 9.a-d.

⁶⁶⁷ Panel Reports, paras. 7.677-7.702.

⁶⁶⁸ Panel Reports, para. 7.677.

⁶⁶⁹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.166.

⁶⁷⁰ Mexico's appellant's submission, para. 266. In challenging these findings of the Panels, we note that Mexico does not question the objectivity of the Panels' assessment of the facts, as required by Article 11 of the DSU.

⁶⁷¹ Panel Reports, para. 7.518.

⁶⁷² Panel Reports, para. 7.519.

⁶⁷³ Panel Reports, para. 7.525.

6.199. Second, in assessing the determination provisions under the 2016 Tuna Measure, the Panels examined, *inter alia*, the methodology that the United States uses under the determination provisions to assess the levels of mortality and serious injury to dolphins. In this regard, the Panels observed that the United States uses an "average of per set data" collected in the ETP between 1997 and 2017 (which the United States calculated as 0.1265 dolphin mortalities per set).⁶⁷⁴ Thus, in the context of the determination provisions, the Panels did not choose the data to rely on and were instead tasked with examining whether the methodology relied on by the United States in applying their determination provisions was arbitrary, as had been alleged by Mexico.

6.200. Therefore, unlike what Mexico's arguments suggest, there is no inconsistency between the Panels' reliance on 2009-2015 data to examine the risk profiles of different fishing methods (based on the evidence on the record of their use in different areas of the ocean), on the one hand, and the Panels' assessment of the US methodology for applying the determination provisions based on data drawn from a 20-year average covering 1997-2017, on the other hand.⁶⁷⁵

6.201. Mexico also contends that the Panels' finding, in connection with the determination provisions, suggests an approach pursuant to which, if a fishery is deemed to have a lower per set mortality rate than the ETP (based on a 20-year average), and therefore not designated under the determination provisions as requiring heightened certification requirements, "it is *automatically* assumed that there are no or *de minimis* risks to dolphins."⁶⁷⁶ We consider that Mexico's argument fails to recognize that, even absent a designation under the determination provisions, pursuant to the 2016 Tuna Measure, all tuna products exported from, or offered for sale in, the United States are subject to certification and tracking and verification requirements, regardless of the fishery from which they originate. Likewise, Mexico's argument finds no support on the Panel record or in the Reports of the Panels. The Panels, having reviewed the evidence on the record of risks to dolphins arising from the use of different fishing methods in different areas of the ocean, concluded that, at present, while some of the other fisheries manifested some risks to dolphins⁶⁷⁷, the vast majority of the world's fisheries have a lower risk profile than the ETP large purse seine fishery.⁶⁷⁸

6.202. Moreover, the question before the Panels was not whether the fisheries, other than the ETP large purse seine fishery, manifested any risk to dolphins. Rather the question before the Panels was whether the determination provisions, by imposing stricter certification and tracking and verification requirements in specific circumstances, allow the 2016 Tuna Measure to address similar risks in a similar manner, therefore ensuring that the 2016 Tuna Measure is properly calibrated to the risks to dolphins. The Panels answered this question and found that the determination provisions create flexibility "that helps to ensure that the 2016 Tuna Measure is calibrated to the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean".⁶⁷⁹ In light of the above analysis, we see no reason to disagree with this finding by the Panels.

⁶⁷⁴ Panel Reports, para. 7.698 (referring to Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries (Panel Exhibit USA-111)).

⁶⁷⁵ We understand that Mexico's main argument on appeal repeats its argument before the Panels that the 20-year average (between 1997-2017) artificially inflates the benchmark that the United States relies on in applying its determination provisions. At the same time, as indicated in paragraph 6.196 above, Mexico explicitly stated that it was not challenging the Panels' discrete findings on the determination provisions where the Panels addressed the US methodology. In any event, given the Panels' uncontested finding that the additional requirements imposed by the AIDCP had significantly reduced the extent of mortality and serious injury in the ETP large purse seine fishery, we see no reason to disagree with the Panels' explanation that, for the purpose of the determination provisions, it would be misleading to compare, as Mexico suggests, the risk profile of the ETP in 2015, following the adoption of heightened certification and tracking and verification requirements pursuant to the AIDCP, with the risk profile of other fisheries that are not subject to similar requirements. (See Panel Reports, para. 7.699) Moreover, even under the 2009-2015 data, with the exception of the Indian Ocean gillnet fishery, the Panels explained that, based on their review of the available evidence on the record, the other fisheries have a lower risk profile than the ETP large purse seine fishery. (Panel Reports, paras. 7.441, 7.572, 7.685, and 7.699)

⁶⁷⁶ Mexico's appellant's submission, para. 266. (emphasis original) In response to questioning at the hearing, Mexico acknowledged that the use of "*de minimis*" in its argument may have overstated the issue. However, Mexico insisted that the point that it was making was that the determination provisions were deficient because they did not take into account certain relevant factors, such as the mortality rates in a given fishery.

⁶⁷⁷ Panel Reports, para. 7.541.

⁶⁷⁸ Panel Reports, para. 7.700.

⁶⁷⁹ Panel Reports, para. 7.691. See also *ibid.*, para. 7.702.

6.203. In sum, we have found that the Panels adopted the correct approach in comparing the risk profiles of individual fisheries, because the certification requirements make a distinction on the basis of both fishing method and ocean area. Having found no legal error in the Panels' assessment of risk profiles, we consider that the Panels did not err in finding that the ETP large purse seine fishery has a special risk profile that distinguishes it from other fisheries. We have also addressed and rejected all of Mexico's arguments challenging the Panels' assessment of the certification requirements, including the allegation that the Panels did not take into account the risks of inaccuracy in their calibration analysis.

6.204. For all of these reasons, we find that Mexico has not demonstrated that the Panels erred in arriving at the intermediate finding that the different certification requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁶⁸⁰

6.1.5.4 Tracking and verification requirements

6.205. Mexico claims that the Panels erred in finding that, although there remain differences between the NOAA and AIDCP regimes with respect to tracking and verification, such differences have been considerably narrowed in the 2016 Tuna Measure, and that the remaining differences are calibrated to the differences in the risk profile of the ETP large purse seine fishery compared to other fisheries.⁶⁸¹

6.206. As described in section 5 above, the tracking and verification requirements under the 2016 Tuna Measure concern the physical segregation of dolphin-safe from non-dolphin-safe tuna, from the moment of harvest and throughout the entire processing chain.⁶⁸² Specifically, the 2016 Tuna Measure prescribes the documentation requirements for recording and verifying segregation and the corresponding regulatory oversight. Like the certification requirements, the tracking and verification requirements distinguish between the ETP large purse seine fishery⁶⁸³ and all the other fisheries.⁶⁸⁴

6.207. We observe that Mexico's arguments on appeal, as well as the Panels' analysis of the tracking and verification requirements, make extensive reference to the evolution of the tracking and verification requirements under the 2016 Tuna Measure from those that were under the 2013 Tuna Measure, in light of the first compliance panel and Appellate Body findings thereon. Accordingly, in order to situate the issue on appeal in its proper context, we provide a brief background of the tracking and verification requirements under the 2013 Tuna Measure and the first compliance panel and Appellate Body's findings thereon. Next, we briefly describe the tracking and verification requirements under the 2016 Tuna Measure before summarizing the Panels' findings. Thereafter, we address Mexico's claims that the Panels erred in making their findings on the tracking and verification requirements under the 2016 Tuna Measure.

6.1.5.4.1 Summary of the findings from the first compliance proceedings regarding tracking and verification requirements under the 2013 Tuna Measure

6.208. Under the 2013 Tuna Measure, the tracking and verification requirements primarily concerned the physical segregation of dolphin-safe from non-dolphin-safe tuna, from the moment of harvest and throughout the entire processing chain. Like the 2016 Tuna Measure, the 2013 Tuna Measure prescribed the documentation requirements for recording and verifying segregation and the corresponding regulatory oversight. The first compliance panel observed that there were differences between the tracking and verification requirements that applied to the ETP large purse seine fishery, on the one hand, which was governed by the AIDCP Tracking and Verification System, and all other fisheries, on the other hand. The first compliance panel considered that these differences related

⁶⁸⁰ Panel Reports, para. 7.611.

⁶⁸¹ Mexico's Notice of Appeal, para. 9.c (referring to Panel Reports, paras. 7.650, 7.652, and 7.671-7.676).

⁶⁸² Panel Reports, para. 7.613 (referring to 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(c)(1)-(3); Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.12).

⁶⁸³ Panel Reports, paras. 7.56-7.61. See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(a)-(c)(1).

⁶⁸⁴ Panel Reports, para. 7.62 (quoting United States' first written submission to the Panels, para. 143). See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Sections 216.91(4)-(5) and 216.93(c)(2)-(3) and (d)(4).

"broadly to the depth, accuracy, and degree of government oversight of the tracking and verification systems".⁶⁸⁵

6.209. The first compliance panel used the word "depth" to refer to the point to which tuna can be traced back. According to the first compliance panel, pursuant to the record-keeping requirements applicable to the ETP large purse seine fishery, tuna could be traced all the way back to the particular set in which the tuna was caught and the particular well in which it was stored.⁶⁸⁶ By contrast, in all other fisheries, tuna could only be traced back to the vessel and trip on which it was caught.⁶⁸⁷

6.210. The first compliance panel used the word "accuracy" to describe the degree to which a captain's (or, where applicable, observer's) statement properly describes the lot of tuna to which it is assigned. The first compliance panel found that the accuracy attributable to the records required under the ETP large purse seine fishery was much more robust than that of the records required with respect to all other fisheries.⁶⁸⁸

6.211. Finally, the first compliance panel used the term "government oversight" to refer to the extent to which a national, regional, or international authority was involved in the tracking and verification process. The first compliance panel found that, unlike in the other fisheries, in the ETP large purse seine fishery, information concerning every stage of the tuna catch and canning process was made available to national and regional authorities. Thus, these authorities were, in principle, able to verify at any stage of the catch and canning process whether a particular batch of tuna harvested in the ETP large purse seine fishery was dolphin-safe.⁶⁸⁹

6.212. Hence, the first compliance panel found that the differences in depth, accuracy, and government oversight showed that the tracking and verification system in place outside the ETP large purse seine fishery is less burdensome than that inside the ETP. Therefore, the first compliance panel found that the different tracking and verification requirements modify the conditions of competition in the US tuna market to the detriment of like Mexican tuna and tuna products.⁶⁹⁰ The first compliance panel further concluded that the 2013 Tuna Measure was inconsistent with Article 2.1 of the TBT Agreement because, *inter alia*, the United States had failed to show that the detrimental impact caused by the tracking and verification requirements stems exclusively from a legitimate regulatory distinction.⁶⁹¹

6.213. On appeal, the Appellate Body found certain flaws in the first compliance panel's reasoning underpinning its findings of inconsistency. With particular respect to the tracking and verification requirements, the Appellate Body found, *inter alia*, that the first compliance panel's analysis had failed to encompass consideration of: (i) the relative risks to dolphins from different fishing techniques in different areas of the oceans; and (ii) whether the distinctions that the 2013 Tuna Measure drew in terms of the different conditions of access to the dolphin-safe label were explained in light of the relative profiles. In addition, the Appellate Body found that the first compliance panel had failed to take full account of the particular circumstances of this case. The Appellate Body considered these circumstances to include the "design, architecture, revealing structure, operation, and application" of the 2013 Tuna Measure, as well as of the manner in which similar issues pertaining to the original Tuna Measure had been assessed in the original proceedings.⁶⁹² In making these findings, the Appellate Body did not specifically review the first compliance panel's findings regarding the depth, accuracy, and government oversight of the tracking and verification requirements under the 2013 Tuna Measure.

6.214. However, following its review, the Appellate Body still found that: (i) the 2013 Tuna Measure modified the conditions of competition to the detriment of Mexican tuna products in the US market; (ii) such detrimental impact did not stem exclusively from a legitimate regulatory distinction; and

⁶⁸⁵ First Compliance Panel Report, para. 7.354. (emphasis omitted)

⁶⁸⁶ First Compliance Panel Report, para. 7.355 (referring to AIDCP, Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001) (First Compliance Panel Exhibit MEX-36)).

⁶⁸⁷ First Compliance Panel Report, para. 7.356.

⁶⁸⁸ First Compliance Panel Report, paras. 7.360-7.363.

⁶⁸⁹ First Compliance Panel Report, paras. 7.364-7.369.

⁶⁹⁰ First Compliance Panel Report, paras. 7.370 and 7.382.

⁶⁹¹ First Compliance Panel Report, paras. 7.400 and 8.2.

⁶⁹² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.169.

thus (iii) the 2013 Tuna Measure accorded less favourable treatment to Mexican tuna products as compared to like tuna products from the United States and other countries.⁶⁹³

6.1.5.4.2 Summary of the Panels' findings regarding tracking and verification requirements under the 2016 Tuna Measure

6.215. As described in section 5 above, the tracking and verification requirements under the 2016 Tuna Measure prescribe the documentation requirements for recording and verifying segregation and the corresponding regulatory oversight. These requirements distinguish between: (i) the ETP large purse seine fishery, which must comply with the AIDCP Tracking and Verification System⁶⁹⁴; and (ii) all other fisheries, which must comply with the requirements prescribed in the 2016 implementing regulations, referred to as the "NOAA regime".⁶⁹⁵ Thus, the ETP large purse seine fishery is subject to the AIDCP regime, while all other fisheries are subject to the NOAA regime.

6.216. The Panels considered that the question before them was whether the distinctions with respect to tracking and verification made by the 2016 Tuna Measure between the ETP large purse seine fishery and all other fisheries are calibrated to the different risk profiles of the relevant fisheries.⁶⁹⁶ Regarding the difference in the risk profiles that the Panels took into account in their analysis, the Panels recalled their finding that "the ETP large purse seine fishery has a special risk profile that sets it apart from other fisheries around the world."⁶⁹⁷

6.217. The Panels recognized that the Appellate Body had found fault with the first compliance panel's "segmented approach" to its analysis of the tracking and verification requirements under the 2013 Tuna Measure. However, the Panels highlighted that the Appellate Body had *not* found fault with the first compliance panel's conceptual approach to assessing the 2013 Tuna Measure's tracking and verification requirements. In particular, the Panels noted that the Appellate Body had not criticized the first compliance panel for analysing the differences between the different regimes from the perspective of depth, accuracy, and degree of government oversight. The Panels pointed out that, during the course of these compliance proceedings, the parties had themselves presented their arguments from the same perspective. Therefore, being mindful of the Appellate Body's criticism of the fact that the first compliance panel had failed to take "full account ... of the manner in which similar circumstances pertaining to the original tuna measure had been assessed in the original proceedings"⁶⁹⁸, the Panels found it appropriate to follow the conceptual framework devised by the first compliance panel with respect to *depth, accuracy, and degree of government oversight*, in assessing the 2016 Tuna Measure.⁶⁹⁹

6.218. Regarding *depth*, the Panels found that, like the 2013 Tuna Measure, the 2016 Tuna Measure subjects the tuna caught in the ETP large purse seine fishery to the requirements of the AIDCP regime, whereby such tuna can be potentially traced back all the way to the particular set in which the tuna was caught and the particular well in which it was stored, or to a particular TTF, if the well or wells in which the tuna subject to the TTF was stored contained tuna from several sets. The Panels found that, under the NOAA regime, following the amendments introduced in the 2016 Tuna Measure regarding the new chain of custody record-keeping requirements, tuna can be traced back to one or more storage wells or other storage locations for a particular fishing trip. Thus, on the basis of the evidence on the record, it appeared to the Panels that, under both the AIDCP and the NOAA regimes, it is possible to trace tuna back to one or more wells in which it was stored. Accordingly, it seemed to the Panels that there is no longer any meaningful difference with respect to the depth of the requirements between the AIDCP regime and the NOAA regime.⁷⁰⁰

⁶⁹³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 8.1.a.viii. See also para. 1.11 above.

⁶⁹⁴ Panel Reports, paras. 7.56-7.61. See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Section 216.93(a)-(c)(1).

⁶⁹⁵ Panel Reports, para. 7.62 (quoting United States' first written submission to the Panels, para. 143). See also 2016 implementing regulations (Panel Exhibits MEX-2 and USA-2), Sections 216.91(4)-(5) and 216.93(c)(2)-(3) and (d)(4).

⁶⁹⁶ Panel Reports, para. 7.651.

⁶⁹⁷ Panel Reports, para. 7.652.

⁶⁹⁸ Panel Reports, para. 7.622 (quoting Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.169).

⁶⁹⁹ Panel Reports, paras. 7.622 and 7.653.

⁷⁰⁰ Panel Reports, paras. 7.654-7.656.

6.219. As regards *accuracy*, the Panels noted that, under the 2016 Tuna Measure, and, in particular, under the new NOAA regime chain of custody record-keeping requirement for tuna products produced from "other fisheries", US processors and importers of tuna or tuna products are now required to collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna product. This information must be provided to the NMFS upon request and must be sufficient for the NMFS to conduct a trace-back of any product marketed as dolphin-safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements. For the Panels, these modifications seem to directly address the first compliance panel's concern that, under the 2013 Tuna Measure, the accuracy attributable to the records required under the ETP large purse seine fishery had appeared to be much more robust than that of the records required with respect to all other fisheries.⁷⁰¹

6.220. Concerning *government oversight*, the Panels recalled that the first compliance panel had explained that, under the AIDCP regime, information concerning every stage of the tuna catch and canning process is made available to national and regional authorities, which must be sent copies of TTFs and are thus able to verify at any stage of the catch and canning process whether a particular batch of tuna is dolphin-safe. By contrast, the first compliance panel had expressed concern with respect to the inability of the US government under the NOAA regime to go "behind the documents" in order to verify the movements of the tuna prior to its arrival at the cannery.⁷⁰²

6.221. The Panels noted that the 2016 Tuna Measure maintains the requirement, under the 2013 Tuna Measure, that US tuna processors submit monthly reports to the US Tuna Tracking and Verification Program for all tuna received at their processing facilities. At the same time, the Panels noted that the new NOAA regime chain of custody record-keeping requirement for tuna products harvested from "other fisheries", referred to in paragraph 6.219 above, addresses the previous inability of the US government under the NOAA regime to go "behind the documents", because NMFS now has the ability to check the information on the movement of the tuna, even before it arrives at the cannery. For the Panels, this modification seems to bridge the previous existing difference between the AIDCP regime and the NOAA regime.⁷⁰³

6.222. However, with particular respect to the delegation of responsibility for developing tracking and verification systems, the Panels noted that differences remained between the two regimes. The Panels observed that, under the AIDCP regime, the Secretariat⁷⁰⁴ brokers requests for the data and documentation that would allow a party to obtain information from processors of another party sufficient to trace back a tuna product through its chain of custody to the harvesting vessel and trip.⁷⁰⁵ By contrast, the Panels agreed with Mexico that the process of collecting and keeping the information under the NOAA regime still seems to rely heavily on importers and processors. Moreover, under the 2016 Tuna Measure, the degree of government oversight of the catch and processing operations that take place outside the United States seemed to the Panels to be somewhat limited.⁷⁰⁶

6.223. Thus, the Panels considered that, although the 2016 Tuna Measure had narrowed the differences between the AIDCP and the NOAA regimes in several aspects of the tracking and verification requirements, there were still differences between the two regimes regarding the extent of government oversight. In assessing the legal significance of these differences, the Panels noted that the measure may be calibrated to the risks to dolphins where it uses a more sensitive mechanism in areas where risks are high but a less sensitive mechanism in areas where the risks are low. The Panels considered that, owing to the special risk profile of the ETP large purse seine fishery, "it is calibrated" for the 2016 Tuna Measure to apply less strict (i.e. less sensitive) requirements with respect to fisheries other than the ETP large purse seine fishery and to pose stricter (i.e. more sensitive) requirements inside the ETP large purse seine fishery.⁷⁰⁷ For the Panels,

⁷⁰¹ Panel Reports, para. 7.657 (referring to First Compliance Panel Report, paras. 7.360-7.361).

⁷⁰² Panel Reports, paras. 7.658-7.660 (referring to First Compliance Panel Report, paras. 7.364-7.368).

⁷⁰³ Panel Reports, paras. 7.661-7.663.

⁷⁰⁴ The word "Secretariat" refers to the staff of the IATTC. (International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015) (Panel Exhibit USA-90), Section 1.i.)

⁷⁰⁵ Panel Reports, para. 7.665 (referring to International Dolphin Conservation Program, System for Tracking and Verifying Tuna, as amended (2015) (Panel Exhibit USA-90), Section 7).

⁷⁰⁶ Panel Reports, paras. 7.664-7.666.

⁷⁰⁷ Panel Reports, para. 7.671.

the differences in the requirements are commensurate with the difference in the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁷⁰⁸

6.224. Moreover, in the Panels' view, the determination provisions create flexibility that enables the 2016 Tuna Measure to treat similar situations similarly. According to the Panels, the determination provisions work together with the tracking and verification requirements to ensure that the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁷⁰⁹

6.225. The Panels also took note of Mexico's contention that a number of the countries that are the largest suppliers of tuna and tuna products, such as the Philippines, Chinese Taipei, and Thailand are significantly deficient in the control and monitoring of fishing activities and have been identified as extremely vulnerable to IUU fishing. However, the Panels recalled that the NOAA regime provides that breaches of the tracking and verification requirements may lead to the imposition of sanctions. In particular, sanctions for offering for sale or export tuna products falsely labelled as dolphin-safe may be assessed against any producer, importer, exporter, distributor, or seller who is subject to the jurisdiction of the United States. Thus, even in the absence of jurisdiction by the US Department of Commerce to audit foreign fishing vessels, carrier vessels, and foreign processors, or vulnerability to IUU fishing in some countries, the Panels considered that the United States, through the 2016 Tuna Measure, has the necessary tools to induce compliance of US processors and importers.⁷¹⁰

6.226. For these reasons, the Panels found that, although there remained differences between the NOAA and AIDCP regimes with respect to tracking and verification, such differences had been considerably narrowed in the 2016 Tuna Measure. The Panels also found that these remaining differences are calibrated to the differences in the risk profile of the ETP large purse seine fishery compared to other fisheries.⁷¹¹

6.1.5.4.3 Legal analysis

6.227. Mexico contends that the Panels erred in their calibration analysis of the tracking and verification requirements: (i) by rejecting the reliability of reporting and fisheries management as relevant to evaluating the calibration of the tracking and verification requirements, and by finding that the measure can be considered calibrated where it allows higher margins of error for certifications in all ocean areas other than the ETP⁷¹²; (ii) by finding that the determination provisions contribute to the calibration of the measure⁷¹³; and (iii) by applying an incorrect analysis to conclude that differences between the requirements for the ETP large purse seine fishery and other fisheries have been narrowed.⁷¹⁴ In addition, Mexico contends that the Panels acted inconsistently with Article 11 of the DSU by refusing to give any consideration to evidence that, according to Mexico, was directly relevant and material to the outcome of the Panels' legal analysis.⁷¹⁵

6.228. The United States posits that Mexico's challenge to the Panels' evaluation of the tracking and verification requirements should be dismissed. The United States argues that: (i) the Panels did not omit any relevant factors in their assessment of whether the 2016 Tuna Measure is calibrated to the risk profiles of different fishing methods in different ocean areas⁷¹⁶; (ii) Mexico's claim against the Panels' reasoning concerning the determination provisions contributing to the calibration of the tracking and verification requirements should be rejected⁷¹⁷; and (iii) Mexico puts forward no reason as to why the Panels' analysis of the differences between the AIDCP and NOAA tracking and

⁷⁰⁸ Panel Reports, paras. 7.671-7.673.

⁷⁰⁹ Panel Reports, para. 7.674.

⁷¹⁰ Panel Reports, para. 7.675.

⁷¹¹ Panel Reports, para. 7.676.

⁷¹² Mexico's appellant's submission, paras. 275-277.

⁷¹³ Mexico's appellant's submission, para. 280.

⁷¹⁴ Mexico's appellant's submission, paras. 285-299. Mexico also argues that the Panels' calibration analysis is flawed, owing to alleged errors in the Panels' assessment of risk profiles. (Mexico's appellant's submission, paras. 273-274) We recall that these arguments were addressed in section 6.1.4 above.

⁷¹⁵ Mexico's Notice of Appeal, para. 9.c (referring to Panel Reports, paras. 6.57 and 7.656); appellant's submission, para. 306.

⁷¹⁶ United States' appellee's submission, para. 281.

⁷¹⁷ United States' appellee's submission, para. 300.

verification regimes constitutes legal error.⁷¹⁸ The United States further asserts that Mexico's claim under Article 11 of the DSU should be rejected.⁷¹⁹

6.229. We begin with Mexico's allegation that the Panels erred in their calibration analysis by failing to take into account several relevant criteria including "the sufficiency of regulatory oversight, the reliability of reporting, the existence of IUU fishing and the existence of transshipment at sea".⁷²⁰ Instead, according to Mexico, the Panels erroneously based their calibration analysis on "the likelihood of AIDCP-compliant setting on dolphins in the ETP producing dolphin-safe and non-dolphin safe tuna compared to the likelihood in all other fisheries ... and the perceived 'margin of error' in the label associated with such likelihood".⁷²¹

6.230. As a preliminary observation, we note that, by referring to "AIDCP-compliant setting on dolphins in the ETP", Mexico's argument seems to suggest that the Panels examined the tracking and verification requirements through the lens of the AIDCP regime. We recall that the AIDCP applies only to the ETP. While the 2016 Tuna Measure applies the AIDCP Tracking and Verification System to the ETP large purse seine fishery, the 2016 Tuna Measure does not apply the AIDCP system to the other fisheries in the ETP. Instead, the other fisheries are subject to the NOAA regime. Thus, the Panels were not focused on what distinctions manifested between AIDCP-compliant methods and non-AIDCP-compliant methods. Rather, in our view, the Panels rightly focused their analysis on the distinctions in the tracking and verification requirements under the 2016 Tuna Measure, taking account of the differences in the risk profiles of the different fisheries. We recall that, having assessed the risk profiles of the individual fisheries, the Panels established that, when compared to the ETP large purse seine fishery, which has a "special risk profile", all the other fisheries are similar in their risk profiles insofar as in none of them is setting on dolphins practised consistently or systematically.⁷²²

6.231. Turning to Mexico's assertion that "[t]he Panels' reasoning regarding the margin of error suffered from the same errors identified above in respect of the risks of inaccurate information and the certification requirements", we recall that we addressed these arguments in section 6.1.5.3 above. Thus, our discussion in paragraphs 6.187-6.189 above applies equally to our review of the Panels' reasoning in their evaluation of the tracking and verification requirements.

6.232. Moreover, specifically in their evaluation of the tracking and verification requirements, the Panels explained that:

In our view, the difference in the risk profile of the ETP large purse seine fishery compared to other fisheries indicates that there is a greater likelihood that a vessel in the ETP large purse seine fishery will produce both dolphin-safe and non-dolphin-safe tuna on any fishing trip, and that the two groups of tuna will have to be segregated and tracked. Conversely, there would be a lower likelihood that a set produces non-dolphin-safe tuna in other fisheries that would need to be segregated as a consequence of this. This justifies, in our view, the need for a stricter regime of tracking and verification in the ETP large purse seine fishery. ... We thus consider that it is reasonable for the United States to apply a more sensitive tracking and verification mechanism in respect of high-risk fisheries. Doing so is "commensurate with" the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁷²³

6.233. We share the Panels' view as quoted above. The key question before the Panels was whether the differences in the sensitivity of the labelling conditions are properly calibrated to the differences in risk profiles of the fisheries. If the sensitivity of the labelling conditions is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean, then the 2016 Tuna Measure addresses these different levels of risks to dolphins in such a way as to ensure

⁷¹⁸ United States' appellee's submission, para. 281.

⁷¹⁹ United States' appellee's submission, para. 281.

⁷²⁰ Mexico's appellant's submission, para. 278.

⁷²¹ Mexico's appellant's submission, para. 278. See also *ibid.*, paras. 275-277.

⁷²² See para. 6.177 above.

⁷²³ Panel Reports, para. 7.672.

accurate labelling (i.e. less sensitive requirements in fisheries with lower risks, and more sensitive requirements in fisheries with higher risks).

6.234. This leads us to Mexico's contention that the Panels erred by completely omitting the sufficiency of regulatory oversight, the reliability of reporting, the existence of IUU fishing, and the existence of trans-shipment at sea as criteria for their calibration assessment.⁷²⁴ As we explain below, Mexico's contention fails to take into account the Panels' explanations regarding these factors.

6.235. First, concerning government oversight, the Panels noted that the new NOAA regime chain of custody record-keeping requirement for tuna products harvested from other fisheries, referred to in paragraph 6.219 above, addresses the previous inability of the US government under the NOAA regime to go "behind the documents", because NMFS now has the ability to check the information of the movement of the tuna, even before it arrives at the cannery. For the Panels, this modification seemed to bridge the previous existing difference between the AIDCP regime and the NOAA regime.⁷²⁵ In response to questioning at the hearing, Mexico accepted that the new custody-keeping requirements under the 2016 Tuna Measure appeared to have narrowed the differences between the AIDCP regime and the NOAA regime. However, Mexico stressed that the differences had not been eliminated.

6.236. We recall that the calibration analysis is not intended to test for uniformity in the requirements applicable to the different fisheries. Rather, the sensitivity of the labelling conditions under the 2016 Tuna Measure should be calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Thus, requiring the 2016 Tuna Measure to be calibrated to the risks to dolphins does not mean that the differences between the AIDCP regime and the NOAA regime must be eliminated under the 2016 Tuna Measure, given that the ETP large purse seine fishery has a special risk profile that distinguishes it from other fisheries.

6.237. Second, the Panels took note of Mexico's contention that a number of the countries that are the largest suppliers of tuna and tuna products, such as the Philippines, Chinese Taipei, and Thailand are significantly deficient in the control and monitoring of fishing activities, and have been identified as extremely vulnerable to IUU fishing. Mexico had also argued that the US Department of Commerce lacks jurisdiction to audit foreign fishing vessels, carrier vessels, and foreign processors. However, as indicated in paragraph 6.225 above, the Panels recalled that the NOAA regime provides that breaches of the tracking and verification requirements may lead to the imposition of sanctions. Thus, even in the absence of jurisdiction by the US Department of Commerce to audit foreign fishing vessels, carrier vessels, and foreign processors, or vulnerability to IUU fishing in some countries, the Panels considered that the United States, through the 2016 Tuna Measure, has the necessary tools to induce compliance of US processors and importers.⁷²⁶

6.238. Thus, contrary to Mexico's arguments, in their calibration analysis, the Panels did not "completely omit[] the sufficiency of regulatory oversight, the reliability of reporting, the existence of IUU fishing and the existence of transshipment at sea".⁷²⁷ Still in this regard, and as discussed in paragraph 6.147 above, we do not exclude the possibility that the above-mentioned factors highlighted by Mexico may affect the ultimate accuracy of the dolphin-safe label. Such risks of inaccuracy are relevant to the assessment of whether the measure is calibrated to the risks to dolphins. However, as the United States suggests⁷²⁸, it was incumbent upon Mexico to provide relevant evidence in support of its assertion that, in fisheries where factors affecting regulatory reliability persist, there is an increased risk that the labels for tuna products would not accurately reflect the dolphin-safe nature of those products. Mexico has pointed to no evidence on the Panel record that pertains specifically to the risk of inaccurate labelling under the 2016 Tuna Measure, owing to "the sufficiency of regulatory oversight, the reliability of reporting, the existence of IUU fishing and the existence of transshipment at sea".⁷²⁹ Nor has Mexico identified any evidence on the Panel record that would suggest that these factors undermine the ability "of the

⁷²⁴ Mexico's appellant's submission, para. 278.

⁷²⁵ Panel Reports, paras. 7.661-7.663.

⁷²⁶ Panel Reports, para. 7.675.

⁷²⁷ Mexico's appellant's submission, para. 278.

⁷²⁸ United States' appellee's submission, para. 53 and fn 122 thereto.

⁷²⁹ Mexico's appellant's submission, para. 278.

US government under the NOAA regime to go 'behind the documents' in order to verify the movements of the tuna prior to the arrival to the cannery".⁷³⁰

6.239. With respect to the determination provisions, Mexico contends that the Panels erred in finding that the determination provisions create flexibility that enables the 2016 Tuna Measure to treat similar situations similarly. In support of its contention, Mexico relies on the arguments that it made in connection with the Panels' calibration analysis of the certification requirements.⁷³¹ We recall that we addressed these arguments in section 6.1.5.3 above. Thus, our discussion in paragraphs 6.192-6.202 above applies equally to our review of the Panels' reasoning in their evaluation of the tracking and verification requirements. In particular, we note that Mexico relies on its argument regarding the relevance of PBR evidence, which we have rejected above. Furthermore, we do not share Mexico's view that the Panels relied on inconsistent sets of data in assessing the eligibility criteria, on the one hand, and the application of the determination provisions, on the other hand.

6.240. We now turn to Mexico's argument that the Panels applied a faulty analysis to conclude that the 2016 Tuna Measure had narrowed the differences between the requirements for the ETP large purse seine fishery and the other fisheries.⁷³² Mexico relies heavily on the findings of the first compliance panel to argue that the different approach taken by the Panels in these compliance proceedings is faulty.⁷³³ However, we note that the first compliance panel was addressing a different measure that did not incorporate: (i) the new custody record-keeping requirements that introduce a legal requirement that can be enforced through the sanctions existing in the measure; (ii) the new Captain Training Course available online in nine languages; and (iii) the amended determination provisions.

6.241. Specifically, Mexico highlights that the first compliance panel, in addressing the "accuracy" of the NOAA regime, found that the United States had "submitted no evidence showing that canneries actually do ensure that the tuna they receive matches a particular captain's statement".⁷³⁴ The first compliance panel also considered that the United States had "not provided any evidence explaining how canneries are able to ensure that captains' certifications remain with the tuna batches they identify throughout this process".⁷³⁵ Moreover, the first compliance panel considered that, under the 2013 Tuna Measure, "there [did] not appear to be any legal requirement that the canneries verify the accuracy of the records, or that the records in fact correctly describe the particular batches of tuna to which they are assigned."⁷³⁶ Contrary to Mexico's suggestion that the Panels did not pay attention to the first compliance panel's findings, the Panels in these compliance proceedings explicitly took into account these findings identified by Mexico⁷³⁷ and explained why the 2016 Tuna Measure addressed the first compliance panel's concerns. The Panels stated:

We note, however, that under the 2016 Tuna Measure, and in particular, under the new chain of custody record-keeping requirements for tuna products produced from "other fisheries", *this situation has changed*. Specifically, US processors and importers of tuna or tuna products are now required to collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna product and this information must be provided to the NMFS upon request and must be sufficient for the NMFS to conduct a trace-back of any product marketed as dolphin-safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements. Thus, these modifications seem to directly address the first compliance panel's concerns with the 2013 Tuna Measure, in particular, because they require US processors and importers of tuna or tuna products to collect and retain information on each point in the chain of custody of the tuna or tuna product.⁷³⁸

⁷³⁰ Panel Reports, para. 7.660. See also *ibid.*, paras. 7.659-7.663.

⁷³¹ Mexico's appellant's submission, paras. 279-280.

⁷³² Mexico's appellant's submission, paras. 285 and 299.

⁷³³ We note that the findings of the first compliance panel that Mexico seeks to rely on were not the subject of appeal in the first compliance proceedings.

⁷³⁴ Mexico's appellant's submission, para. 288 (quoting First Compliance Panel Report, para. 7.361).

⁷³⁵ Mexico's appellant's submission, para. 289 (quoting First Compliance Panel Report, para. 7.362).

⁷³⁶ Mexico's appellant's submission, para. 290 (referring to First Compliance Panel Report, para. 7.363).

⁷³⁷ Panel Reports, para. 7.657.

⁷³⁸ Panel Reports, para. 7.657. (emphasis added)

6.242. In addition, we note that Mexico refers to the first compliance panel's "government oversight" findings.⁷³⁹ Mexico points to the first compliance panel's statement that, under the 2013 Tuna Measure, the United States had to rely on the canneries for information about the movement of the tuna prior to its arrival at the cannery and was not able to go "behind the documents" to verify that a particular dolphin-safe certification describes the batch of tuna with which it is associated.⁷⁴⁰ However, the first compliance panel explained that it had seen "no evidence suggesting that canneries and other importers in fact do this, and, as [it understood] the measure, canneries and other importers are not *legally required* to conduct such checks".⁷⁴¹

6.243. We observe that the Panels in these compliance proceedings expressly took account of the first compliance panel's findings in this regard.⁷⁴² The Panels identified the main concern of the first compliance panel with respect to government oversight as the inability of the US government under the NOAA regime to go "behind the documents" in order to verify the movements of the tuna prior to its arrival at the cannery.⁷⁴³ The Panels then explained how, in their view, the modifications under the 2016 Tuna Measure addressed these concerns. Specifically, the Panels stated:

Under the modifications in 50 CFR 216.91(a)(5), US processors and importers of tuna or tuna products from such "other fisheries" are now required to collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna product ... This information must be provided to the NMFS upon request and must be sufficient for the NMFS to conduct a trace-back of any product marketed as dolphin-safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements. To us, this addresses the previous inability of the US government under the NOAA regime to go "behind the documents", as NMFS will have the ability to check the information of the movement of the tuna, even before it arrives at the cannery. Indeed, these modifications require US processors and importers to have information relating to the storage facilities, trans-shippers, processors, and wholesalers/distributors of tuna, and such information must be sufficient for the NMFS to trace any non-dolphin-safe tuna loaded onto the harvesting vessel back to one or more storage wells or other storage locations. Therefore, *the US government may now go behind the documents* and check the movements of the tuna along the various steps of the catch and processing of tuna.⁷⁴⁴

6.244. Thus, contrary to Mexico's arguments, we consider that the Panels in these compliance proceedings followed the Appellate Body's guidance by taking full account of the "particular circumstances" of this case, including "the manner in which similar circumstances" pertaining to the 2013 Tuna Measure had been assessed in the first compliance proceedings.⁷⁴⁵ Moreover, on the basis of our above review of the Panels' reasoning, we share their view that the amendments incorporated in the 2016 Tuna Measure – including (i) the new custody record-keeping requirements that introduce a legal requirement that can be enforced through the sanctions existing in the measure; (ii) the new Captain Training Course available online in nine languages; and (iii) the amended determination provisions – have narrowed the differences between the AIDCP and NOAA regimes.⁷⁴⁶

6.245. Finally, Mexico considers that the Panels' finding that the differences between the AIDCP and NOAA regimes have been "narrowed" in the 2016 Tuna Measure is faulty because the Panels did not comply with their duty under Article 11 of the DSU by failing to take into account the evidence contained in Panel Exhibit MEX-127.⁷⁴⁷ Specifically, Mexico challenges the following finding of the Panels, contained in the interim review section of their Reports:

Mexico requests that a sentence be added ... to better describe Mexico's argument regarding the complex supply chain for tuna by referring to evidence submitted by

⁷³⁹ Mexico's appellant's submission, para. 292.

⁷⁴⁰ Mexico's appellant's submission, para. 293 (quoting First Compliance Panel Report, para. 7.365).

⁷⁴¹ Mexico's appellant's submission, para. 294 (quoting First Compliance Panel Report, para. 7.368 (emphasis original)).

⁷⁴² Panel Reports, paras. 7.658-7.664.

⁷⁴³ Panel Reports, para. 7.659.

⁷⁴⁴ Panel Reports, para. 7.662. (emphasis added)

⁷⁴⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.169.

⁷⁴⁶ Panel Reports, paras. 7.670 and 7.676.

⁷⁴⁷ Mexico's appellant's submission, para. 305. See also *ibid.*, paras. 300-304.

Mexico on this point, namely, a recent report of the International Seafood Sustainability Foundation. ... We note that the argument that Mexico requests the Panels to reflect ... pertains to the issue of whether tuna companies are able to track a particular catch to the individual vessel that caught it and to other points in the supply chain. The present proceedings, however, concern whether the 2016 Tuna Measure is calibrated to different levels of risks posed to dolphins by different fishing methods in different parts of the ocean, among others, in terms of its tracking and verification requirements. Therefore, the argument that Mexico requests us to reflect in the paragraph at issue is not directly relevant to our inquiry. We therefore deny Mexico's request.⁷⁴⁸

6.246. Article 11 of the DSU provides, in relevant part, that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case." As the Appellate Body has explained, in accordance with Article 11, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual

findings have a proper basis in that evidence".⁷⁴⁹ Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings"⁷⁵⁰, and the mere fact that a panel did not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish that the panel applied an improper standard of review.⁷⁵¹

6.247. Turning to the claim before us, we note that, on appeal, Mexico refers to the content of Panel Exhibit MEX-127⁷⁵² to argue that, if market participants sourcing tuna from the Western and Central Pacific and the Indian Oceans are unable to track tuna to the vessel from which it was caught, the differences between the requirements for tuna sourced from large purse seine vessels in the ETP and tuna from those other ocean areas cannot, as the Panels found, have been "narrowed".⁷⁵³

6.248. We note that Panel Exhibit MEX-127 is a document produced by the International Seafood Sustainability Foundation (ISSF) entitled *Regional Fishery Management Organization (RFMO) Catch Documentation Schemes: A Summary*. This document defines catch documentation schemes (CDSs) as:

[G]lobal traceability systems that certify a unit of legal catch, providing a catch certificate (CC) to the legal owner of the fish (at the point of capture) and then trace the movement of this unit of catch from unloading through international trade (export and re-export), into the end market (the first point of sale/import).⁷⁵⁴

6.249. The document explicitly states that it "provides an overview of the current activities regarding the development, implementation, review and amendment of CDS by RFMOs and the FAO Technical Consultation on the Development of Voluntary Guidelines for CDS".⁷⁵⁵ Indeed, in opting not to rely on this exhibit, the Panels explained that Mexico's argument in connection with Panel Exhibit MEX-127 pertained to the "complex supply chain for tuna" and "to the issue of whether tuna companies are able to track a particular catch to the individual vessel that caught it and to other points in the supply chain".⁷⁵⁶ However, the Panels highlighted that these compliance

⁷⁴⁸ Panel Reports, para. 6.57.

⁷⁴⁹ Appellate Body Reports, *China – Rare Earths*, para. 5.178; *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132-133). See also Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258.

⁷⁵⁰ Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, para. 5.87; *China – Rare Earths*, para. 5.178; *EC – Hormones*, para. 135.

⁷⁵¹ Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, para. 5.87; *EC – Fasteners (China)*, paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.

⁷⁵² Mexico's appellant's submission, para. 300 (referring to ISSF, *RFMO Catch Documentation Schemes: A Summary* (Washington, DC, 14 September 2016) (Panel Exhibit MEX-127), paras. 1 and 9).

⁷⁵³ Mexico's appellant's submission, para. 305.

⁷⁵⁴ ISSF, *RFMO Catch Documentation Schemes: A Summary* (Washington, DC, 14 September 2016) (Panel Exhibit MEX-127), para. 1. See also United States' appellee's submission, para. 335.

⁷⁵⁵ ISSF, *RFMO Catch Documentation Schemes: A Summary* (Washington, DC, 14 September 2016) (Panel Exhibit MEX-127), para. 3.

⁷⁵⁶ Panel Reports, para. 6.57.

proceedings concern whether the 2016 Tuna Measure, including the tracking and verification requirements, is calibrated to different levels of risks posed to dolphins by different fishing methods in different parts of the ocean. Therefore, the Panels considered that the information that Mexico sought to rely on in Panel Exhibit MEX-127 was not directly relevant to their inquiry.⁷⁵⁷

6.250. Mexico appears to draw a correlation between the experiences of CDSs recorded in Panel Exhibit MEX-127 and the potential operation of the 2016 tracking and verification requirements.⁷⁵⁸ However, Mexico has provided no reasons for such a correlation, especially given that the data point for certification under a CDS, by "unit of legal catch", is not applicable to either the AIDCP or NOAA regimes.⁷⁵⁹ Rather, as the Panels in these compliance proceedings found, unlike a CDS, both the AIDCP and NOAA regimes under the 2016 Tuna Measure require that the records that accompany the tuna from harvest through processing must be sufficient to allow the verification or "trace-back" of the tuna products to the storage wells of a particular vessel for each fishing trip.⁷⁶⁰ Moreover, to the extent that the 2016 Tuna Measure applies the AIDCP Tracking and Verification System with respect to the ETP large purse seine fishery, we note that Panel Exhibit MEX-127 contains a discussion of the AIDCP. The document states that the AIDCP "does not track all yellowfin catch from all gears nor all parties fishing for yellowfin tuna in the eastern Pacific Ocean and as such is not a true CDS".⁷⁶¹ Thus, our review of the content of Panel Exhibit MEX-127 supports the Panels' view that Mexico's arguments regarding CDSs, contained in this exhibit, was not relevant to the Panels' calibration analysis of the 2016 Tuna Measure.

6.251. For these reasons, we find that Mexico has not demonstrated that the Panels failed to make an objective assessment of the facts of the case as required under Article 11 of the DSU by omitting Panel Exhibit MEX-127 from their analysis of the tracking and verification requirements.

6.1.5.4.4 Conclusion for tracking and verification requirements

6.252. As with the certification requirements, we have found that, with respect to the tracking and verification requirements, the Panels adopted the correct approach in comparing the risk profiles of individual fisheries, because these requirements make a distinction on the basis of both fishing method and ocean area. Having found no legal error in the Panels' assessment of risk profiles, we consider that the Panels did not err in finding that it is both the technical and legal possibilities of setting on dolphins and the fact that dolphin sets occur in a consistent and systematic manner in the ETP large purse seine fishery that give this fishery its special risk profile. Moreover, we have rejected Mexico's claims that: (i) the Panels erred in their evaluation of the tracking and verification requirements, including the allegation that the Panels did not take into account the risks of inaccuracy; and (ii) the Panels failed to make an objective assessment of the facts of the case as required under Article 11 of the DSU. Consequently, we find that Mexico has not demonstrated that the Panels erred in arriving at the intermediate finding that:

[A]lthough there remain differences between the NOAA and AIDCP regimes with respect to tracking and verification, the Panels are of the view that such differences have been considerably narrowed in the 2016 Tuna Measure and the Panels find that the remaining differences are calibrated to the differences in the risk profile of the ETP large purse seine fishery compared to other fisheries.⁷⁶²

6.1.5.5 The 2016 Tuna Measure "as a whole"

6.253. Mexico argues that, because the Panels' reasoning of the 2016 Tuna Measure as a whole was based entirely on their findings and conclusions with respect to the calibration of the eligibility criteria, the certification requirements, and the tracking and verification requirements, respectively, all of the erroneous findings made in those assessments flowed through and were the exclusive basis for the Panels' assessment of the measure as a whole. Accordingly, Mexico contends that the Panels

⁷⁵⁷ Panel Reports, para. 6.57.

⁷⁵⁸ Mexico's appellant's submission, para. 305.

⁷⁵⁹ United States' appellee's submission, paras. 335-337.

⁷⁶⁰ Panel Reports, paras. 7.57-7.59 and 7.63-7.66. See also United States' appellee's submission, para. 336.

⁷⁶¹ ISSF, *RFMO Catch Documentation Schemes: A Summary* (Washington, DC, 14 September 2016) (Panel Exhibit MEX-127), para. 22.

⁷⁶² Panel Reports, para. 7.676.

incorrectly assessed the calibration and consistency with Article 2.1 of the TBT Agreement of the 2016 Tuna Measure as a whole.⁷⁶³

6.254. The United States posits that the Panels' intermediate conclusions concerning the eligibility criteria, certification requirements, and tracking and verification requirements were correct and not in error. In addition, the United States submits that, contrary to Mexico's arguments, the Panels' intermediate conclusions were not the exclusive basis for the Panels' overall assessment of the measure as a whole. The United States indicates that the Panels also considered how the different parts of the measure interact to address the risks to dolphins arising from different fishing methods in different ocean areas, and explained how the components of the measure "work together" to "achieve the objectives of the 2016 Tuna Measure".⁷⁶⁴

6.255. We have found above that Mexico has failed to demonstrate that the Panels erred in their evaluation leading to their intermediate findings regarding the calibration of the eligibility criteria, certification requirements, and tracking and verification requirements. We recall that analysing the measure in a sequential manner does not, in itself, render the analysis erroneous, provided that such sequential analysis does not "lead to the isolated consideration of a particular element" where the elements of a measure are closely interrelated.⁷⁶⁵

6.256. Based on a review of the Panels' examination of the 2016 Tuna Measure, we consider that the Panels took into account the "cumulative and highly interrelated" nature of the different aspects of the 2016 Tuna Measure. For instance, the Panels repeatedly noted that the determination provisions work together with and reinforce the certification and tracking and verification requirements. Therefore, the Panels' consideration of the certification and tracking and verification requirements included a consideration of the determination provisions.⁷⁶⁶ As a second example, the Panels found that the certification requirements, including the newly introduced Captain Training Course, are "embedded within a sufficiently enforceable regulatory framework", referring to the tracking and verification requirements.⁷⁶⁷ Furthermore, the Panels synthesized their findings about the various elements of the measure, "taking into account the important interlinkages among such elements".⁷⁶⁸ In this regard, the Panels explained that:

Without the certification, and tracking and verification requirements, as well as the determination provisions, however, the distinction made through the eligibility criteria would not have achieved the Measure's objective of dolphin protection. In our view, the interlinkage among these four elements of the Measure is so crucial that without one of them the 2016 Tuna Measure, as we know it, could not function. We see the certification, and the tracking and verification requirements, as well as the determination provisions, as tools that enforce the eligibility criteria with a view to achieving the objective of protecting dolphins from harmful fishing methods.⁷⁶⁹

6.257. We thus consider that the Panels' analyses of each of the elements of the 2016 Tuna Measure, as well as their examination of the measure as a whole, were properly informed by the interlinkages between these elements and the fact that they operate together to regulate access to the dolphin-safe label. Furthermore, we recall that Mexico's appeal in this regard is consequential upon its challenge of the Panels' assessment of the eligibility criteria, certification requirements, and tracking and verification requirements. Having reviewed and rejected Mexico's arguments against the Panels' assessment of each of these elements of the 2016 Tuna Measure, we find that Mexico has not demonstrated that the Panels erred in their assessment of the 2016 Tuna Measure, as a whole, or in finding that the 2016 Tuna Measure, as a whole, is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁷⁷⁰

⁷⁶³ Mexico's appellant's submission, para. 307 (referring to Panel Reports, paras. 7.703-7.717).

⁷⁶⁴ United States' appellee's submission, para. 353 (quoting Panel Reports, paras. 7.711 and 7.713; referring to *ibid.*, paras. 7.709 and 7.712).

⁷⁶⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.15.

⁷⁶⁶ Panel Reports, paras. 7.530, 7.609-7.610, and 7.674.

⁷⁶⁷ Panel Reports, para. 7.593.

⁷⁶⁸ Panel Reports, para. 7.704.

⁷⁶⁹ Panel Reports, para. 7.707.

⁷⁷⁰ Panel Reports, para. 7.717.

6.1.6 Conclusion under Article 2.1 of the TBT Agreement

6.258. Based on our analyses and findings in sections 6.1.1 to 6.1.5 above, we uphold the Panels' conclusion that the 2016 Tuna Measure accords to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries and therefore is consistent with Article 2.1 of the TBT Agreement.⁷⁷¹

6.2 Article XX of the GATT 1994

6.259. At the outset of their analysis, and noting the parties' agreement in this regard, the Panels found that the 2016 Tuna Measure is inconsistent with Articles I:1 and III:4 of the GATT 1994⁷⁷², but is provisionally justified under subparagraph (g) of Article XX of the GATT 1994.⁷⁷³ The Panels hence focused their analysis on the disagreement between the parties as to whether the 2016 Tuna Measure meets the requirement of the *chapeau* of Article XX, and concluded:

[H]aving found, in our analysis under Article 2.1 of the TBT Agreement, that the Measure is calibrated to different levels of risks posed to dolphins by different fishing methods in different areas of the ocean, we also find that the Measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and is therefore justified under Article XX of the GATT 1994.⁷⁷⁴

6.260. Mexico appeals the above conclusion, arguing that the Panels erred in relying on their reasoning developed under Article 2.1 of the TBT Agreement, and thereby failed to consider whether the discrimination caused by the measure is rationally related to its objectives as required by the applicable legal standard under the *chapeau* of Article XX of the GATT 1994.⁷⁷⁵ We begin by recalling the relevant findings by the Panels, before analysing the issues raised by Mexico's appeal.

6.2.1 The Panels' findings

6.261. The Panels recalled that three analytical elements must be demonstrated with respect to arbitrary or unjustifiable discrimination under the *chapeau* of Article XX, namely: (i) the application of the measure results in discrimination; (ii) the conditions prevailing between countries are the same; and (iii) the discrimination is arbitrary or unjustifiable.⁷⁷⁶ With respect to the existence of discrimination, the Panels noted the Appellate Body's finding in the first compliance proceedings that, by excluding most Mexican tuna products from access to the "dolphin-safe" label while granting conditional access to such label to like products from the United States and other countries, the 2013 Tuna Measure, similar to the original Tuna Measure, modified the conditions of competition to the detriment of Mexican tuna products in the US market.⁷⁷⁷ Since the 2016 Tuna Measure maintains the overall architecture and structure of the original and 2013 Tuna Measures, the Panels found that "the 2016 Tuna Measure continues to cause the same detrimental impact resulting from the discriminatory treatment between tuna products containing tuna caught in the ETP large purse seine fishery and those containing tuna caught in other fisheries."⁷⁷⁸

6.262. With respect to the second element, the Panels recalled that, in the first compliance proceedings, the Appellate Body found that, in this dispute, the conditions prevailing between countries are the same for the purpose of the *chapeau* of Article XX, namely, "the risks of adverse

⁷⁷¹ Panel Reports, paras. 7.717, 8.2, and 8.6.

⁷⁷² Panel Reports, para. 7.729 (referring to First Compliance Panel Report, paras. 7.404-7.416, 7.434, 7.469-7.481, and 7.494-7.495; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 8.1(d)(ii)).

⁷⁷³ Panel Reports, para. 7.730 (referring to First Compliance Panel Report, para. 7.541; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.341).

⁷⁷⁴ Panel Reports, para. 7.740.

⁷⁷⁵ Mexico's Notice of Appeal, para. 10; appellant's submission, paras. 308-309.

⁷⁷⁶ Panel Reports, para. 7.731.

⁷⁷⁷ Panel Reports, para. 7.732 (referring to Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.238).

⁷⁷⁸ Panel Reports, para. 7.732.

effects on dolphins arising from tuna fishing practices".⁷⁷⁹ The Panels noted that, with regard to the first two elements, neither of the parties had argued otherwise before them.⁷⁸⁰

6.263. With respect to the third element, that is, whether the measure is applied in a manner that constitutes a means of "arbitrary or unjustifiable discrimination", the Panels found that, based on the guidance provided by the Appellate Body in the first compliance proceedings, "so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other".⁷⁸¹ The Panels then recalled that, following the guidance provided by the Appellate Body in the first compliance proceedings, they had conducted their analysis under Article 2.1 "on the basis of the concept of calibration, and found that the 2016 Tuna Measure is calibrated to different risks to dolphins arising from the use of different fishing methods in different areas of the ocean".⁷⁸² On this basis, the Panels recalled that they had concluded that the detrimental impact caused by the 2016 Tuna Measure "stems exclusively from legitimate regulatory distinctions, and that, therefore, the Measure is consistent with Article 2.1 of the TBT Agreement".⁷⁸³

6.264. The Panels found that, in the circumstances of the present compliance proceedings, and in light of the Appellate Body's guidance in the first compliance proceedings, it was appropriate to use their factual and legal findings under Article 2.1 in their assessment of whether the 2016 Tuna Measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX.⁷⁸⁴ In this regard, the Panels did not consider that the 2016 Tuna Measure, "which is tailored to and commensurate with the relevant risks, can be said to applied in a manner that constitutes a means of 'arbitrary or unjustifiable discrimination'" within the meaning of Article XX of the GATT 1994.⁷⁸⁵ Therefore, in light of their finding under Article 2.1, the Panels concluded that the 2016 Tuna Measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination within the meaning of the *chapeau* and is therefore justified under Article XX of the GATT 1994.⁷⁸⁶

6.2.2 Whether the Panels erred in finding that the 2016 Tuna Measure complies with the requirements of the *chapeau* of Article XX of the GATT 1994

6.265. Mexico claims on appeal that the Panels erred in relying on their analysis under Article 2.1 to conclude that the 2016 Tuna Measure is not inconsistent with the requirements of the *chapeau* of Article XX. Mexico submits that, to examine whether a measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination under the *chapeau*, a panel must consider "whether the detrimental impact caused by the measure can be reconciled with, or rationally connected to, the policy objective ... that was provisionally found to justify the measure" under one of the subparagraphs of Article XX.⁷⁸⁷ Mexico contends that the Panels made no substantive findings, under Article 2.1, with respect to arbitrary or unjustifiable discrimination. Thus, according to Mexico, by relying on their analysis under Article 2.1 for the purpose of the *chapeau* of Article XX, the Panels did not properly take into account the differences between the legal analyses required under these provisions.⁷⁸⁸

6.266. Mexico recalls the Appellate Body's finding in the first compliance proceedings that, if the similarities and differences between Article 2.1 and Article XX are taken into account, it may be

⁷⁷⁹ Panel Reports, para. 7.733 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.308).

⁷⁸⁰ Panel Reports, paras. 7.732-7.733 (referring to Mexico's first written submission to the Panels, para. 204; response to Panel question No. 110; United States' first written submission to the Panels, para. 69; response to Panel question No. 110).

⁷⁸¹ Panel Reports, paras. 7.727 and 7.734 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.347).

⁷⁸² Panel Reports, para. 7.738. In the Panels' view, they did not repeat the first compliance panel's errors found by the Appellate Body, namely, the first compliance panel's segmented analysis under Article 2.1 of the TBT Agreement and its erroneous assumption that disqualifying tuna products containing tuna caught by setting on dolphins from accessing the label was consistent with that provision. (Ibid., paras. 7.735-7.736)

⁷⁸³ Panel Reports, para. 7.738.

⁷⁸⁴ Panel Reports, para. 7.739.

⁷⁸⁵ Panel Reports, para. 7.739.

⁷⁸⁶ Panel Reports, para. 7.740.

⁷⁸⁷ Mexico's appellant's submission, para. 309.

⁷⁸⁸ Mexico's appellant's submission, para. 315.

permissible to rely on reasoning developed under one provision for the analysis under the other.⁷⁸⁹ Mexico highlights that, in the first compliance proceedings, the panel conducted its analyses under Article 2.1 and Article XX on the basis of the same legal test, that is, whether the measure at issue was designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination.⁷⁹⁰ In Mexico's view, due to the Panels' failure to examine the rational relationship between the regulatory distinctions of the 2016 Tuna Measure and its objectives under Article 2.1, the Panels' findings under Article 2.1 could not be used to resolve the assessment of arbitrary or unjustifiable discrimination under Article XX.⁷⁹¹

6.267. The United States argues that the Panels did not err in relying on their findings under Article 2.1 for their analysis under the *chapeau* of Article XX. The United States submits that, as the Appellate Body indicated in the first compliance proceedings, the analysis of whether the requirements under the 2016 Tuna Measure are calibrated to the risks to dolphins posed by tuna fishing is "relevant for an analysis of arbitrary or unjustifiable discrimination under the *chapeau* of Article XX".⁷⁹² Moreover, the United States recalls that the Appellate Body reversed the first compliance panel's analyses under both Article 2.1 and Article XX for identical reasons, namely, because the panel had conducted a segmented analysis that failed to assess whether the measure, as a whole, was calibrated to the risks to dolphins posed by different fishing methods in different ocean areas.⁷⁹³ Given that the Panels conducted a proper calibration analysis under Article 2.1, the United States contends that the differences between the Panels' assessment and the first compliance panel's assessment only "confirm that the Panels did not err in relying on their analysis and conclusions under Article 2.1".⁷⁹⁴

6.268. The United States further contends that, contrary to Mexico's arguments, the Panels' analysis under Article 2.1 encompassed an assessment of whether the regulatory distinctions of the 2016 Tuna Measure were rationally related to the objectives of the measure. This is because the Panels explained that the objectives of the measure inform both the form and the content of the calibration analysis, and thus the rational relationship test does not exist as a separate legal step, but rather is assessed through the calibration analysis itself.⁷⁹⁵ The United States adds that the Appellate Body's analysis in the two previous proceedings confirms that the calibration assessment, "done correctly, ... reflects the relationship between the distinctions of the measure and the measure's objective that renders the measure not discriminatory".⁷⁹⁶

6.269. The participants' disagreement on appeal centres on whether it was permissible for the Panels, in the circumstances of these compliance proceedings, to rely on their calibration analysis under Article 2.1 in reaching their conclusion that the 2016 Tuna Measure is not applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX. The *chapeau* of Article XX provides, in relevant part, that:

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

⁷⁸⁹ Mexico's appellant's submission, para. 317 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras. 7.345-7.347).

⁷⁹⁰ Mexico's appellant's submission, para. 318.

⁷⁹¹ Mexico's appellant's submission, paras. 319-330 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.320). Mexico also argued in its appellant's submission that the 2016 Tuna Measure results in "unjustifiable discrimination" because the United States did not seek a multilateral solution before imposing a unilateral measure. Mexico referred in this regard to the Appellate Body Report in *US – Shrimp*, and argued that of importance in the present proceedings is the fact that there is a fully functioning and highly effective multilateral process already in place that the United States helped to create in the form of the IATTC and its dolphin-protection program, which the United States chose to ignore. (Ibid., paras. 333-334) However, during the hearing, Mexico indicated that it was not pursuing a decision by the Appellate Body on this issue but merely included it in its appellant's submission as relevant background. (Mexico's response to questioning at the hearing) Therefore, we do not address this claim.

⁷⁹² United States' appellee's submission, para. 365 (quoting Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.330).

⁷⁹³ United States' appellee's submission, para. 367 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras. 7.229 and 7.334-7.335).

⁷⁹⁴ United States' appellee's submission, para. 367.

⁷⁹⁵ United States' appellee's submission, para. 368 (referring to Panel Reports, paras. 7.115-7.127).

⁷⁹⁶ United States' appellee's submission, para. 370.

the same conditions prevail ... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

6.270. By its terms, the *chapeau* of Article XX is concerned with the "manner" in which a measure that falls under one of the subparagraphs of Article XX is "applied".⁷⁹⁷ The Appellate Body has noted that the manner in which a measure is *applied* "can most often be discerned from [its] design, ... and ... revealing structure".⁷⁹⁸ The Appellate Body has explained that there are three constitutive elements in assessing the requirements under the *chapeau*: (i) the application of the measure must result in discrimination; (ii) the discrimination must occur between countries where the same conditions prevail; and (iii) the discrimination must be arbitrary or unjustifiable in character.⁷⁹⁹

6.271. The Appellate Body has found that "the analysis of whether discrimination is arbitrary or unjustifiable 'should focus on the cause of the discrimination, or the rationale put forward to explain its existence'".⁸⁰⁰ Such analysis "'should be made in the light of the objective of the measure', and ... discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination 'bear no rational connection to the objective' or 'would go against that objective'".⁸⁰¹ Thus, "[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of 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."⁸⁰²

6.272. The Appellate Body has further found that there are important parallels between the analyses under the *chapeau* of Article XX and Article 2.1. In particular, the Appellate Body has noted that the concept of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" is found both in the *chapeau* of Article XX and in the sixth recital of the preamble of the TBT Agreement, which the Appellate Body has found to provide relevant context for the interpretation of Article 2.1.⁸⁰³ At the same time, the Appellate Body has cautioned that there are also differences between these provisions, *inter alia*, in terms of their legal standards⁸⁰⁴, as well as their main function and scope. In particular, the Appellate Body has noted that, while the analysis under Article 2.1 concerns the regulatory distinction that accounts for the detrimental impact on imported products, the discrimination examined under the *chapeau* of Article XX is not necessarily the same as the discrimination found to be inconsistent with the relevant provisions of the GATT 1994, "such as Articles I and III".⁸⁰⁵

6.273. In the first compliance proceedings, the Appellate Body stated that, "so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other."⁸⁰⁶ The Appellate Body noted that the first compliance panel had conducted its analyses under both Article 2.1 and Article XX "on the basis of a legal test developed in the context of assessing arbitrary or unjustifiable discrimination, namely, whether the discrimination can be reconciled with, or is

⁷⁹⁷ See also Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, para. 115; *Brazil – Retreaded Tyres*, para. 215.

⁷⁹⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120.

⁷⁹⁹ Appellate Body Report, *US – Shrimp*, para. 150.

⁸⁰⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.

⁸⁰¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.316 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).

⁸⁰² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.316 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.306). The Appellate Body has also explained that this is not the sole test, and that, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors may also be relevant to the overall assessment. (Ibid. (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.321))

⁸⁰³ Appellate Body Reports, *US – Clove Cigarettes*, para. 173; *US – Tuna II (Mexico)*, para. 213; *EC – Seal Products*, para. 5.310.

⁸⁰⁴ Specifically, Article 2.1 of the TBT Agreement requires panels to consider whether the detrimental impact on imported products caused by a measure stems from a legitimate regulatory distinction. Under the *chapeau* of Article XX, by contrast, the question is whether a measure is applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. (See Appellate Body Reports, *EC – Seal Products*, para. 5.311)

⁸⁰⁵ Appellate Body Reports, *EC – Seal Products*, para. 5.312.

⁸⁰⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.347.

rationally related to, the policy objective with respect to which the measure has been provisionally justified".⁸⁰⁷ In these circumstances, the Appellate Body considered that it was appropriate for the first compliance panel, "in principle, to have referred to and relied on" the reasoning it had developed in the context of Article 2.1 in its analysis under the *chapeau* of Article XX.⁸⁰⁸

6.274. The Appellate Body emphasized that, in the circumstances of this dispute, "an assessment of whether the requirements of the amended tuna measure are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions" was "*relevant* for an analysis of arbitrary or unjustifiable discrimination under the *chapeau* of Article XX".⁸⁰⁹ This was because the first compliance panel was required to examine the United States' claim that "any differences in the regulatory requirements of the [2013 Tuna Measure] are justified by reference to the objective of dolphin protection because such differences reflect the differences in risks" to dolphins arising from the use of different fishing methods in different ocean areas.⁸¹⁰ However, the Appellate Body recalled its criticism of the first compliance panel's findings under Article 2.1, including that the first compliance panel had failed to conduct a proper calibration analysis, and that the first compliance panel's "decision to adopt a segmented analytical approach prevented it from properly applying the legal standard that it had articulated"⁸¹¹, namely, "whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue".⁸¹² In the Appellate Body's view, "these criticisms concern aspects of the [first compliance panel's] reasoning and findings that it also relied upon in the context of its analysis under the *chapeau* of Article XX" of the GATT 1994.⁸¹³ In light of these errors⁸¹⁴, the Appellate Body reversed the first compliance panel's findings under the *chapeau* of Article XX.⁸¹⁵

6.275. The above findings indicate that, in the circumstances of this dispute, it was appropriate for the first compliance panel to "rel[y] on a similar analytical process under" both Article 2.1 and the *chapeau* of Article XX.⁸¹⁶ This process should have involved ascertaining the existence of arbitrary or unjustifiable discrimination through an examination of whether such discrimination can be reconciled with, or is rationally related to, the measure's policy objective.⁸¹⁷ Furthermore, for this analytical process, it was relevant to examine whether the regulatory distinctions under the measure at issue were calibrated to different risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁸¹⁸ However, because the first compliance panel had failed to conduct a proper calibration analysis under Article 2.1, and had adopted a segmented approach to analysing the requirements under the measure, the panel had also failed to examine properly the rational relationship between the measure's objectives and the regulatory distinctions giving rise to the discrimination. As a result, the first compliance panel's findings under Article 2.1 had not in fact ascertained the existence of arbitrary or unjustifiable discrimination. Thus, by relying on the same reasoning and analysis developed under Article 2.1, the errors committed by the first compliance

⁸⁰⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.347.

⁸⁰⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.320.

⁸⁰⁹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.330. (emphasis added)

⁸¹⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.330.

⁸¹¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.332.

⁸¹² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.229 (quoting First Compliance Panel Report, para. 7.91).

⁸¹³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.332.

⁸¹⁴ In addition to the above-mentioned errors, the Appellate Body also considered that the first compliance panel had failed to properly analyse whether the existing discrimination is between countries where the same conditions prevail. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.333) As noted above, this issue is not in dispute in the present proceedings. (See paras. 6.261-6.262 above)

⁸¹⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.333-7.335. At the same time, the Appellate Body recalled that, in completing the analysis in the context of its findings under Article 2.1 of the TBT Agreement, it had examined other features of the Tuna Measure that were not dependent on the first compliance panel's calibration analysis. In this regard, the Appellate Body agreed with the panel that the determination provisions left a "gap" in that fisheries other than the ETP large purse seine fishery may be treated differently, and less stringently, even where the conditions in that fishery mirror those in the ETP large purse seine fishery. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.354-7.359) Therefore, the Appellate Body found that, with respect to the determination provisions, the United States had not demonstrated that the 2013 Tuna Measure was applied in a manner that did not constitute arbitrary or unjustifiable discrimination. Consequently, the Appellate Body found that the 2013 Tuna Measure was not justified under Article XX of the GATT 1994. (Ibid., para. 7.359)

⁸¹⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.320.

⁸¹⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.320 and 7.347.

⁸¹⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.330.

panel therein also undermined its finding regarding arbitrary or unjustifiable discrimination under the *chapeau* of Article XX.

6.276. Turning to Mexico's appeal in these compliance proceedings, we recall that its claim under the *chapeau* of Article XX is premised on its view that the calibration analysis conducted by the Panels under Article 2.1 of the TBT Agreement did not encompass consideration of the rational relationship between the regulatory distinctions of the 2016 Tuna Measure and its objectives.⁸¹⁹ According to Mexico, because an assessment of such a relationship is required for examining arbitrary or unjustifiable discrimination under the *chapeau* of Article XX, the Panels erred by relying on their findings, made under Article 2.1, for their analysis under the *chapeau* of Article XX.⁸²⁰

6.277. We recall that, in this dispute, the "discrimination between countries where the same conditions prevail" for the purpose of the *chapeau* of Article XX arises from the fact that "the 2016 Tuna Measure continues to cause the same detrimental impact resulting from the discriminatory treatment between tuna products containing tuna caught in the ETP large purse-seine fishery and those containing tuna caught in other fisheries."⁸²¹ Thus, while the discrimination examined under the *chapeau* of Article XX may not be the same as the discrimination found to be inconsistent with the relevant provisions of the GATT 1994, in the present dispute, the relevant discrimination for the analysis under the *chapeau* of Article XX is the same as the detrimental impact caused by the relevant regulatory distinctions examined by the Panels in the context of Article 2.1. Furthermore, we recall that two elements of the legal test under the *chapeau* – namely, the existence of discrimination between countries, and whether the same conditions prevail in those countries – are not at issue between the parties.⁸²² This means that the issue before us concerns, exclusively, whether the 2016 Tuna Measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.

6.278. In this regard, we recall that "[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of 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."⁸²³ As discussed in section 6.1.3.1 above, considerations of the rational relationship between the regulatory distinctions causing such detrimental impact and the objectives of the 2016 Tuna Measure, rather than being a separate inquiry, are encompassed in a proper calibration analysis under Article 2.1. This is because, where the calibration analysis is conducted properly, it would also ascertain whether the label granted under the measure at issue conveys the information regarding the dolphin-safe nature of the tuna products to consumers. Thus, as explained, we consider that a proper assessment of whether the measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean would take into account the objectives of the 2016 Tuna Measure regarding dolphin protection and consumer information.⁸²⁴ Such an assessment would also help to ascertain the nexus between such objectives and the regulatory distinctions drawn under the measure.

6.279. Furthermore, in sections 6.1.4 and 6.1.5 above, we have found that the Panels conducted a proper calibration analysis of the 2016 Tuna Measure by assessing whether the regulatory distinctions of the 2016 Tuna Measure are calibrated to different risks to dolphins arising from the use of different fishing methods in different areas of the ocean. We consider that the Panels' sequential analyses of each of the elements of the 2016 Tuna Measure, as well as their examination of the measure as a whole, were properly informed by the interlinkages between these elements and the fact that they operate together to regulate access to the dolphin-safe label.⁸²⁵ We thus agree with the Panels that they were "mindful" of the Appellate Body's guidance in the previous compliance proceedings, and that they conducted their calibration analysis accordingly.⁸²⁶ In our view, unlike the first compliance panel's assessment of the 2013 Tuna Measure, the Panels' calibration analysis under Article 2.1 encompassed consideration of the rational relationship

⁸¹⁹ Mexico's appellant's submission, para. 319.

⁸²⁰ Mexico's appellant's submission, para. 315.

⁸²¹ Panel Reports, para. 7.732.

⁸²² See paras. 6.261-6.262 above.

⁸²³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.316 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.306).

⁸²⁴ Panel Reports, para. 7.125.

⁸²⁵ See paras. 6.256-6.257 above.

⁸²⁶ Panel Reports, paras. 7.736-7.737.

between the regulatory distinctions of the 2016 Tuna Measure and its objectives. Thus, the Panels' analysis under Article 2.1 also demonstrates that the 2016 Tuna Measure is not designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX.

6.280. In sum, the calibration analysis is the tool in the circumstances of this dispute to assess whether the 2016 Tuna Measure is consistent with Article 2.1. It follows that, if the 2016 Tuna Measure is *properly* calibrated and hence not inconsistent with Article 2.1, it will also not be found to be applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, given the "important parallels" between the analyses under Article 2.1 and the *chapeau* of Article XX discussed above, the 2016 Tuna Measure, which is not applied in a manner that amounts to arbitrary or unjustifiable discrimination under the former, would also be found not to amount to such discrimination under the latter. Hence, in the circumstances of this dispute, a proper calibration analysis is a tool that also serves to determine whether the measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination for the purpose of the *chapeau* of Article XX.

6.281. In light of the above considerations, we share the Panels' view that, because "the 2016 Tuna Measure is 'tailored to', and 'commensurate with', the different risks to dolphins caused by different fishing methods in different parts of the ocean", this also demonstrates that the discrimination under the measure "can[not] be said to be applied in a manner that constitutes a means of 'arbitrary or unjustifiable discrimination' within the meaning of Article XX".⁸²⁷ Therefore, we disagree with Mexico that the Panels "declin[ed] to conduct, either under Article 2.1 or the *chapeau* of Article XX, a full assessment of whether the [2016 Tuna Measure] is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination".⁸²⁸

6.282. Mexico additionally contends that there is "an apparent conflict" in the Panels' reasoning.⁸²⁹ This is because, on the one hand, the 2016 Tuna Measure is provisionally justified as relating to "conservation of exhaustible natural resources" under Article XX(g).⁸³⁰ On the other hand, according to Mexico, the Panels "refus[ed] to consider", in their calibration analysis under Article 2.1, "PBR data and evidence demonstrating that certain fishing methods in certain areas of the oceans are causing adverse effects that threaten the collapse of dolphin populations".⁸³¹ Mexico argues that the Panels' calibration analysis focuses on the risks to individual dolphins and "overlook[s] ... mortalities that do endanger the population of dolphins in [three longline] fisheries".⁸³² Thus, to Mexico, by relying on their erroneous calibration analysis for the purpose of the *chapeau* of Article XX, the Panels failed to properly examine whether the discrimination under the 2016 Tuna Measure can be reconciled with, or is rationally related to, the policy objective of conserving exhaustible natural resources, with respect to which the measure has been provisionally justified under Article XX(g).⁸³³ In Mexico's view, this conflict in the Panels' reasoning shows that their refusal to consider "PBR data and evidence demonstrating that certain fishing methods in certain areas of the oceans are causing adverse effects that threaten the collapse of dolphin populations is not objective and is legally incorrect".⁸³⁴

6.283. We recall that, in the first compliance proceedings, the Appellate Body rejected Mexico's argument that the panel erred in articulating the legal standard under the *chapeau* of Article XX as consisting of a focus on whether there is a rational connection with the objectives of the 2013 Tuna Measure, rather than the objective reflected in Article XX(g).⁸³⁵ The Appellate Body considered such a distinction to be "somewhat artificial" given that, "by virtue of an examination of whether a measure is provisionally justified under one of the subparagraphs, the objective of the measure will

⁸²⁷ Panel Reports, para. 7.739.

⁸²⁸ Mexico's appellant's submission, para. 315.

⁸²⁹ Mexico's appellant's submission, para. 316.

⁸³⁰ Mexico's appellant's submission, para. 316.

⁸³¹ Mexico's appellant's submission, para. 316.

⁸³² Mexico's appellant's submission, para. 215. (emphasis omitted) We recall that PBR evidence calculates the "maximum possible number of animals ... which can be removed from an animal stock without affecting the population or its sustainability". (Panel Reports, para. 7.184) These three fisheries are the Main Hawaii Island Insular Stock Longline fishery, the West North Atlantic Longline fishery, and the Pelagic Hawaii Longline fishery. (Mexico's appellant's submission, para. 215. See also Panel Reports, para. 7.473)

⁸³³ Mexico's responses to questioning during the hearing.

⁸³⁴ Mexico's appellant's submission, para. 316.

⁸³⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.318.

already have been tested against, and will have been found to be aligned with, one of the objectives set out in Article XX."⁸³⁶ The Appellate Body did not understand how, in the circumstances of this dispute, where the first compliance panel found that the objective of dolphin protection relates to the conservation of exhaustible natural resources, "reliance on the objective of Article XX(g), rather than that of the measure, would yield a different analytical result".⁸³⁷

6.284. We consider that Mexico's argument in the present compliance proceedings introduces a similar artificial distinction between the objective of the 2016 Tuna Measure of protecting individual dolphins and the objective of "conservation of exhaustible natural resources" within the meaning of Article XX(g). In section 6.1.4.4 above, we reviewed Mexico's argument that the Panels erred in not relying on PBR evidence for assessing the risks to dolphins arising from the use of different fishing methods in different ocean areas. We agreed with the Panels' assessment that the PBR methodology prioritizes the sustainability of the population in a way that would have prevented the Panels from adequately assessing whether the measure is calibrated to different risks that a dolphin was killed or seriously injured in the fishing process.⁸³⁸ That said, the fact that the Panels sought to examine whether the measure is calibrated to risks to individual dolphins does not mean that their calibration analysis failed to take into account the rational connection between the regulatory distinctions giving rise to the discrimination and the goal of conserving exhaustible natural resources.

6.285. We also recall that the Panels noted the original and first compliance panel's findings that the Tuna Measure is "more concerned with the 'well-being of individual dolphins'"⁸³⁹, and the dolphin-protection objective thereof is not to "be understood exclusively, or even primarily, in terms of dolphin population recovery".⁸⁴⁰ The Panels further noted that addressing adverse effects to individual dolphins "might also be considered as seeking to conserve dolphin populations" and that, consequently, the objectives of the measure "also incorporate" considerations regarding conservation.⁸⁴¹ The Panels highlighted that "mortality or serious injury suffered by individual dolphins may also have population-level consequences."⁸⁴² We further recall that, as the first compliance panel found, "the preservation of individual dolphin lives is just as much an act of conservation as is a program to encourage recovery of a particular population", and that "there is an essential and inextricable link between the protection of dolphins on an individual scale and the 'replenishment of [an] endangered species', for it is only through protecting individual dolphins that a population itself can be protected, replenished, and maintained."⁸⁴³

6.286. We therefore disagree with Mexico's assertion that, because tuna harvested in three fisheries with low PBR levels may be eligible to receive "dolphin-safe" labels under the 2016 Tuna Measure, the measure is "not concerned" with the risks related to fishing methods that threaten the sustainability of dolphin populations.⁸⁴⁴ As explained above, findings by the original and first compliance panels, as well as the present Panels, indicate that, while the 2016 Tuna Measure may, first and foremost, be "concerned" with the protection of individual dolphins, the measure also protects dolphin populations by ensuring that tuna producers who seek to have access to the "dolphin-safe" label are deterred from harvesting tuna in a manner that harms dolphins.⁸⁴⁵ Therefore, the fact that the 2016 Tuna Measure does not disqualify tuna caught in the three fisheries concerned from accessing the dolphin-safe label does not mean that it fails to address the conservation of dolphin populations. Rather, by seeking to ensure that individual dolphins are not being harmed in the fishing process, the 2016 Tuna Measure is also related to the conservation of these populations.

⁸³⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.318.

⁸³⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.318.

⁸³⁸ See paras. 6.130-6.131 above.

⁸³⁹ Panel Reports, fn 331 to para. 7.187 (referring to Original Panel Report, para. 7.596; quoting First Compliance Panel Report, para. 7.527).

⁸⁴⁰ Panel Reports, para. 7.187 (quoting Original Panel Report, paras. 7.550 and 7.735).

⁸⁴¹ Panel Reports, fn 331 to para. 7.187 (referring to Original Panel Report, para. 7.596; First Compliance Panel Report, para. 7.527).

⁸⁴² Panel Reports, para. 7.186.

⁸⁴³ First Compliance Panel Report, para. 7.527. The first compliance panel also indicated that "the fact that the [2013 Tuna Measure] is more concerned with the effects of tuna fishing on the well-being of individual dolphins rather than on the state of a particular dolphin population, considered globally or statistically, does not in itself negate the nexus between the measure and the goal of conserving exhaustible natural resources." (Ibid.) Mexico did not appeal these findings in the first compliance proceedings.

⁸⁴⁴ Mexico's appellant's submission, para. 316.

⁸⁴⁵ Panel Reports, para. 7.186.

6.287. In any event, by acknowledging that the 2016 Tuna Measure is provisionally justified under Article XX(g) of the GATT 1994, Mexico accepted that the measure and its objectives, including the protection of individual dolphins, are "designed" to address, and are "related to", the "conservation of exhaustible natural resources".⁸⁴⁶ Therefore, given that the regulatory distinctions causing the discrimination under the 2016 Tuna Measure are rationally related to the protection of individual dolphins, we do not consider that this discrimination "bears no rational connection to", or would "go against", the objective of "conservation of exhaustible natural resources".⁸⁴⁷ As the Appellate Body found in the first compliance proceedings, once the measure at issue in this dispute is found to be provisionally justified under Article XX(g), whether the rational relationship requirement under the *chapeau* of Article XX is analysed through the lens of the objectives pursued by the measure, or the policy objectives contained in Article XX(g), the analysis should not yield a different result.⁸⁴⁸ In light of this finding, and the considerations set out above, we disagree with Mexico's contention that, because of the Panels' rejection of the PBR evidence, their calibration analysis cannot support a finding that the regulatory distinctions giving rise to the discrimination under the 2016 Tuna Measure are rationally related to the conservation of exhaustible natural resources.

6.2.3 Conclusion

6.288. In sum, one of the most important factors in the assessment of arbitrary or unjustifiable discrimination under the *chapeau* of Article XX of the GATT 1994 is the question of 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. As indicated above, the Appellate Body's guidance in the first compliance proceedings indicates that the calibration analysis is the tool in the circumstances of this dispute to assess whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement. If done properly, the calibration analysis would encompass consideration of the rational relationship between the regulatory distinction of the 2016 Tuna Measure and its objectives. As also indicated, it was appropriate for the Panels, in the circumstances of these compliance proceedings, to rely on their calibration analysis under Article 2.1 in their assessment of whether the 2016 Tuna Measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX. This is because, where the differences between Article 2.1 and Article XX are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for the purpose of conducting an analysis under the other.

6.289. We also indicated in section 6.1.5 above that the Panels did not err in finding that the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Therefore, given that consideration of the rational relationship between the regulatory distinctions and the objectives of the 2016 Tuna Measure was encompassed in this analysis, we find that the Panels did not err in relying on the reasoning developed under Article 2.1 of the TBT Agreement in assessing the conformity of the 2016 Tuna Measure with the *chapeau* of Article XX of the GATT 1994. We also reject Mexico's contention that, due to the Panels' reliance on per set evidence, rather than PBR evidence, in assessing the risks to dolphins, their calibration analysis cannot be relied on for assessing whether the 2016 Tuna Measure is rationally related to the conservation of exhaustible natural resources.

⁸⁴⁶ The Appellate Body has found that the provisional justification of a measure under one of the exceptions requires, first, that the measure be *designed* to "address the particular interest specified in that paragraph" and, second, that "there be a sufficient nexus between the measure and the interest protected". (Appellate Body Report, *US – Gambling*, para. 292. See also Appellate Body Reports, *EC – Seal Products*, para. 5.169 and fn 1178 thereto) The required nexus is specified in the language of the paragraphs themselves through the use of terms such as "necessary to", "essential to", or – as in the case of Article XX(g), which is relevant to the present dispute – "relating to". (Appellate Body Report, *Colombia – Textiles*, para. 5.67 (referring to Appellate Body Report, *US – Gambling*, para. 292)) We also observe that the United States agree with Mexico that the 2016 Tuna Measure is provisionally justified under Article XX(g). (Panel Reports, para. 7.730) The issue of the provisional justification of the 2016 Tuna Measure is not on appeal before us.

⁸⁴⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.316 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).

⁸⁴⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.318.

6.290. For the foregoing reasons, we uphold the Panels' finding that the 2016 Tuna Measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination and is therefore justified under Article XX of the GATT 1994.⁸⁴⁹

6.3 The Panels' decision to hold a partially open meeting

6.291. Mexico appeals "the findings and conclusion of the Panels that they had the authority to conduct a partially open meeting of the parties without the consent of both Parties".⁸⁵⁰ In response, the United States contends that Mexico's appeal is not properly raised due to deficiencies in Mexico's Notice of Appeal in light of Article 17.6 of the DSU and Rule 20(2)(d) of the Working Procedures for Appellate Review (Working Procedures).⁸⁵¹

6.3.1 Procedural background

6.292. At the organizational meetings of the Panels in these proceedings, held on 10 June 2016 and 14 July 2016, respectively, the United States proposed a change to the Panels' working procedures to allow the Panels' substantive meeting to be publicly observed. Alternatively, if Mexico did not agree to this, the United States requested the Panels to allow a party to request a partially open meeting, whereby that party's statements during the Panel's meeting with the parties could be viewed by the public, either simultaneously or through a delayed broadcast. The statements of a party that wished to maintain the confidentiality of these statements could not be so viewed.⁸⁵² Mexico opposed the United States' request that the Panels conduct an open meeting either fully or partially. Mexico argued that the Panels could only open their substantive meetings with the parties to public viewing with the consent of both parties.⁸⁵³

6.293. On 4 July 2016, the Panel in the proceedings brought by the United States sought the views of the third parties on this procedural issue. Nine third parties provided their views. Six third parties⁸⁵⁴ opposed the United States' request, whereas three⁸⁵⁵ did not.⁸⁵⁶

6.294. On 29 July 2016, the Panels informed the parties that they considered themselves to have the authority to authorize the United States to lift the confidentiality of its statements at the substantive meeting with the parties.⁸⁵⁷ Subsequently, in response to a formal request by the United States, and following their consultation with the parties, the Panels adopted their Additional Working Procedures on 22 December 2016.⁸⁵⁸

6.295. We understand Mexico's challenge, in its Notice of Appeal, to the Panels' conduct of a "partially open meeting of the parties" to refer to the implementation of the Panels' Additional Working Procedures.⁸⁵⁹ Pursuant to these procedures, the Panels permitted the United States' request to disclose, through public viewing, the statements of its own positions made during the Panels' substantive meeting with the parties. The Panels also permitted any third parties that so requested to disclose, through public viewing, the statements of their own positions made during the Panels' session with the third parties.⁸⁶⁰ The Panels granted these permissions on condition that

⁸⁴⁹ Panel Reports, para. 7.740.

⁸⁵⁰ Mexico's Notice of Appeal, para. 11. See also Mexico's appellant's submission, para. 353(g). While previous panels and the Appellate Body have held meetings and hearings that were open to public observation, this is the first time that a WTO adjudicator authorized such a meeting without the express consent of both parties to the dispute. (See e.g. Panel Report, *US – Tax Incentives*, para. 1.20; Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 1.30)

⁸⁵¹ United States' appellee's submission, paras. 381-384.

⁸⁵² Panel Reports, paras. 1.14 and 1.16.

⁸⁵³ Panel Reports, para. 1.18.

⁸⁵⁴ The six third parties were Brazil, China, Ecuador, Guatemala, India, and Korea. (Panel Reports, para. 7.14)

⁸⁵⁵ The three third parties were Australia, Japan, and Norway. (Panel Reports, para. 7.15)

⁸⁵⁶ Panel Reports, para. 1.15.

⁸⁵⁷ The Panels informed the parties of their decision through a joint communication with the Arbitrator acting under Article 22.6 of the DSU in the same dispute. (Panel Reports, para. 1.17)

⁸⁵⁸ Panel Reports, paras. 1.18-1.19. The Panels elaborated on their reasons for adopting these procedures in section 7.7.2 of their Reports.

⁸⁵⁹ Panel Reports, Annex A-4.

⁸⁶⁰ Seven third parties sought and were given permission to disclose statements of their own positions during the Panels' session with the third parties (Australia, Canada, the European Union, Japan, Korea, New Zealand, and Norway). (Panel Reports, fn 54 to para. 7.34)

the public viewing take the form of delayed (rather than simultaneous) viewing. The Panels also required that any parts of the meeting, including the third-party session, opened for partial public observation should not disclose statements of Mexico's positions or the positions of non-disclosing third parties. To this end, these parts of the meeting that were eventually opened for partial public observation were subjected to redaction prior to the public viewing.⁸⁶¹

6.296. In explaining their reasons for the adoption of these Additional Working Procedures, the Panels stated that:

[I]t is ... permissible for a WTO adjudicator to authorize a request for a partially open meeting if the conduct of such a meeting does not impair or interfere with (a) a non-disclosing party's or non-disclosing third party's right to confidentiality protection of statements of its own position, (b) due process, (c) the prompt settlement of disputes, or (d) the careful and efficient discharge, or the integrity, of the adjudicative function.⁸⁶²

6.297. According to the Panels, their Additional Working Procedures "fully protect[ed] Mexico's and non-disclosing third parties' right to confidentiality protection, satisf[ied] the requirements of due process, and [we]re sufficiently workable and efficient to safeguard the promptness of dispute settlement and the proper discharge and integrity of [the Panels'] adjudicative function".⁸⁶³

6.3.2 Sufficiency of Mexico's Notice of Appeal

6.298. Mexico's Notice of Appeal identifies the alleged claim of error by the Panels as follows:

Mexico also seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusion of the Panels that they had the authority to conduct a partially open meeting of the parties without the consent of both Parties.⁸⁶⁴

6.299. The United States challenges the sufficiency of Mexico's Notice of Appeal, arguing that it fails to meet the requirements of Rule 20(2)(d) of the Working Procedures.⁸⁶⁵ The United States contends that Mexico's Notice of Appeal fails to list any legal provision of any covered agreement that the Panels are alleged to have erred in interpreting or applying. The United States adds that Mexico's Notice of Appeal fails to indicate any paragraph of the Panel Reports containing the alleged errors.⁸⁶⁶ The United States also asserts that, "[m]ore fundamentally", Mexico's Notice of Appeal fails to identify an alleged error in the issues of law covered in the Panel Reports or legal interpretation developed by the Panels.⁸⁶⁷ For the United States, this means that Mexico "has failed to justify its appeal as being within the scope of Article 17.6 of the DSU".⁸⁶⁸ At the hearing, the United States added that an appellant cannot cure a defect in the notice of appeal by including something additional in its appellant submission.

6.300. In response, at the hearing, Mexico acknowledged that the notice of appeal serves to provide adequate notice to the appellee of the nature of the appeal and allegations of error, which in turn enables the appellee to exercise fully its right of defence. At the same time, Mexico highlighted that the Appellate Body has stated that an appellee will have a better understanding of the nature of the appeal and the allegations of errors when a detailed written submission is filed on the same day. Given that Mexico's Notice of Appeal and appellant's submission were filed on the same day, Mexico argued that the references to the relevant Panels' findings and legal interpretation could be clearly inferred from a review of both documents. In any event, Mexico contended that the perceived failures of its Notice of Appeal had not prevented the United States from understanding the nature of Mexico's appeal on this matter, nor had the failures impeded the United States' ability to exercise its right of defence.

⁸⁶¹ Panel Reports, para. 7.34.

⁸⁶² Panel Reports, para. 7.31.

⁸⁶³ Panel Reports, para. 7.32.

⁸⁶⁴ Mexico's Notice of Appeal, para. 11.

⁸⁶⁵ United States' appellee's submission, paras. 381-384.

⁸⁶⁶ United States' appellee's submission, para. 385.

⁸⁶⁷ United States' appellee's submission, para. 387.

⁸⁶⁸ United States' appellee's submission, para. 389.

6.301. Rule 20(2)(d) of the Working Procedures⁸⁶⁹ provides:

(2) A Notice of Appeal shall include the following information:

...

(d) a brief statement of the nature of the appeal, including:

(i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;

(ii) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and

(iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

6.302. The Appellate Body has referred to the notices of appeal and other appeal as the "documents that define the scope of the appeal".⁸⁷⁰ In challenging the sufficiency of Mexico's Notice of Appeal, apart from noting certain formal defects, the United States expressed concern "[m]ore fundamentally" with the failure of Mexico's Notice of Appeal to identify "an alleged error in the issues of law covered in the Panel Reports or legal interpretation developed by the Panels" within the meaning of Rule 20(2)(d)(i) of the Working Procedures and Article 17.6 of the DSU.⁸⁷¹

6.303. Article 17.6 of the DSU states that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". Rule 20(2)(d)(i) of the Working Procedures is rooted in the language of Article 17.6 of the DSU by requiring a notice of appeal to include a "brief statement of the nature of the appeal, including identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel". Thus, Rule 20(2)(d)(i) reinforces the role of the notice of appeal as a document that defines the scope of the appeal⁸⁷², within the boundaries delineated by Article 17.6 of the DSU. A fundamental consideration in determining whether a notice of appeal is sufficient, therefore, is whether the allegation of error identified in the notice of appeal is one that implicates "issues of law covered in the panel report and legal interpretations developed by the panel" as required by Article 17.6 of the DSU.

6.304. In the present dispute, Mexico has identified a decision made by the Panels regarding the conduct of their proceedings. In its Notice of Appeal, Mexico challenges "the findings and conclusion of the Panels that they had the authority to conduct a partially open meeting of the parties without the consent of both Parties".⁸⁷³ As described above, as early as the organizational meetings with the Panels, Mexico objected to the public observation of the Panels' substantive meeting with the parties, either fully or partially, without the consent of both parties. The Notice of Appeal again identifies the same issue, that is, whether the Panels had the authority to conduct a meeting with the parties that was partially open to public observation without the consent of both parties. Mexico's Notice of Appeal, read in the context of the relevant procedural background leading to the Panels' findings, set out in paragraphs 6.292-6.295 above, appears to identify the issue of law as whether the Panels had the authority to conduct a meeting with the parties that was partially open to public observation without the consent of both parties. Hence, the allegation of error identified in paragraph 11 of Mexico's Notice of Appeal appears to be one that implicates an "issue[] of law covered in the panel report" as required by Article 17.6 of the DSU.

6.305. Moreover, in assessing whether Mexico's Notice of Appeal sufficiently identifies, pursuant to Rule 20(2)(d)(i) of the Working Procedures, "the alleged errors in the issues of law covered in the

⁸⁶⁹ Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010 (Working Procedures).

⁸⁷⁰ Working Procedures for Appellate Review, Communication from the Appellate Body, WT/AB/WP/W/11, 27 July 2010, p. 5.

⁸⁷¹ United States' appellee's submission, para. 387.

⁸⁷² Working Procedures for Appellate Review, Communication from the Appellate Body, WT/AB/WP/W/11, 27 July 2010, p. 5.

⁸⁷³ Mexico's Notice of Appeal, para. 11.

panel report and legal interpretations developed by the panel", we recall that the Appellate Body has stated that the notice of appeal is not expected to contain the reasons why the appellant regards a panel's findings or interpretations as erroneous. Rather, the legal arguments in support of the allegations of error are to be set out and developed in the appellant's submission.⁸⁷⁴ We do not consider that Mexico's Notice of Appeal was required to go beyond identifying the alleged erroneous findings of the Panels and "contain the reasons why [Mexico] regards those findings or interpretations as erroneous".⁸⁷⁵ In our view, such reasons were to be provided in Mexico's appellant's submission.

6.306. Furthermore, while we agree with the United States that a deficient notice of appeal cannot be cured by including a new or additional issue in the appellant's submission⁸⁷⁶, we consider that the appellant's submission may be consulted in order to confirm the meaning of the words used in the notice of appeal.⁸⁷⁷ In its appellant's submission, Mexico points out the aspects of the Panels' reasoning with which it takes issue and explains why it considers the Panels' reasoning to be erroneous.⁸⁷⁸ For example, Mexico challenges the Panels' statement that "[i]f a WTO adjudicator has the power to accede to a request to fully open a hearing or meeting with the parties, then *a fortiori* it must in principle also have the power to go less far, including by opening only parts of a meeting with the parties."⁸⁷⁹ Mexico contends that the Panels' statement is "incorrect" because, in all prior disputes to which the Panels referred in support of this statement, there was an agreement of both disputing parties to open the meeting.⁸⁸⁰ As we see it, these statements in Mexico's appellant's submission confirm the Panels' decision with which Mexico takes issue in paragraph 11 of its Notice of Appeal and provide the legal arguments in support of Mexico's claim of error.

6.307. We also take note of the United States' argument that Mexico has failed to justify its appeal as being within the scope of Article 17.6 of the DSU because, "[r]ather than relating to the matter referred to the Panels by the DSB, Mexico's appeal relates to the procedures adopted by the Panels to conduct their proceedings."⁸⁸¹ We do not agree. In our view, the manner in which a panel adopts procedures and conducts its proceedings when it addresses the matter referred to it by the DSB may give rise to issues of law and legal interpretation, which would be subject to the scope of appellate review within the meaning of Article 17.6.⁸⁸²

6.308. In addition to the United States' fundamental concern that Mexico's Notice of Appeal fails to comply with Article 17.6 of the DSU and Rule 20(2)(d)(i) of the Working Procedures, the United States argues that Mexico's Notice of Appeal fails to comply with the formal requirements set out in Rule 20(2)(d)(ii) and (iii) of the Working Procedures. The United States contends that Mexico's Notice of Appeal fails to refer to any legal provision of any covered agreement that the Panels are

⁸⁷⁴ Appellate Body Reports, *US – Shrimp*, para. 95; *Indonesia – Iron or Steel Products*, para. 5.6. It is noted that the statements by the Appellate Body in *US – Shrimp* concern an earlier version of the Working Procedures for Appellate Review. In those Working Procedures, Rule 20(2)(d) provided that a notice of appeal shall include "a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel". (Appellate Body Report, *US – Shrimp*, para. 95 (quoting Working Procedures for Appellate Review, WT/AB/WP/2, 28 February 1997))

⁸⁷⁵ Appellate Body Report, *US – Shrimp*, para. 95. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.6.

⁸⁷⁶ This is especially so because Rule 23bis of the Working Procedures provides the avenue through which an appellant can amend its notice of appeal. Indeed, the Appellate Body has, in the past, considered certain claims to fall outside the scope of the appeal where the appellant identified the claim of error in the appellant's submission but not in the notice of appeal, as required by Rule 20(2)(d) of the Working Procedures. (See e.g. Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, paras. 72-75; *Japan – Apples*, paras. 126-128)

⁸⁷⁷ In this regard, we consider the statements by the Appellate Body regarding the sufficiency of a panel request under Article 6.2 to be relevant, *mutatis mutandis*, to the discussion of the sufficiency of a notice of appeal. In *US – Carbon Steel*, the Appellate Body found that a defect in the panel request cannot be cured by including a claim in a panel submission. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings may be consulted in order to confirm the meaning of the words used in the panel request. (Appellate Body Report, *US – Carbon Steel*, para. 127)

⁸⁷⁸ Mexico's appellant's submission, paras. 341 and 344 (quoting Panel Reports, paras. 7.16 and 7.20).

⁸⁷⁹ Mexico's appellant's submission, para. 341 (quoting Panel Reports, para. 7.16).

⁸⁸⁰ Mexico's appellant's submission, para. 342.

⁸⁸¹ United States' appellee's submission, para. 389.

⁸⁸² For example, in *US – Shrimp*, the Appellate Body considered a challenge of "the [p]anel's procedural finding that [it] lacked discretion to accept materials received from non-governmental sources" to be properly raised in the notice of appeal. (See Appellate Body Report, *US – Shrimp*, paras. 94 and 96)

alleged to have erred in interpreting or applying. The United States adds that Mexico's Notice of Appeal fails to indicate any paragraph of the Panel Reports containing the alleged errors.⁸⁸³

6.309. A notice of appeal must provide a brief statement of the nature of the appeal.⁸⁸⁴ Pursuant to Rule 20(2)(d)(ii) and (iii) of the Working Procedures, this brief statement should include a list of the legal provisions of the covered agreements that the panel is alleged to have erred in interpreting or applying and an indicative list of the paragraphs of the panel report containing the alleged errors. These two requirements facilitate the "identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel" as required by Rule 20(2)(d)(i) of the Working Procedures, read together with Article 17.6 of the DSU.

6.310. Mexico's Notice of Appeal does not include "an indicative list of the paragraphs" of the Panel Reports containing the alleged errors, as required by Rule 20(2)(d)(iii). Nor does Mexico's Notice of Appeal refer to "a list of the legal provision(s) of the covered agreements" that the Panels are alleged to have erred in interpreting or applying, as required by Rule 20(2)(d)(ii). The Appellate Body has, in the past, considered such omissions to constitute "formal defects in the Notice of Appeal".⁸⁸⁵

6.311. Nonetheless, as the Appellate Body highlighted in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, Rule 20(2)(d) does not stipulate what consequences flow from a failure to meet its formal requirements.⁸⁸⁶ In assessing the potential consequences of a failure of a notice of appeal to meet the formal requirements of Rule 20(2)(d)(ii) and (iii), the Appellate Body has focused on due process considerations.⁸⁸⁷ To this end, the Appellate Body has taken into account the balance "that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the notice of appeal of the findings under appeal, so that they may exercise their right of defence effectively". Thus, the prospect of dismissal of an appeal because a notice of appeal fails to meet the formal requirements of Rule 20(d)(ii) and (iii) should be weighed against the possible denial of a party's right to appeal under Article 17.6 of the DSU. To the extent that an appellee "was placed on notice of the issues raised" in the notice of appeal, the Appellate Body has found that formal defects in the notice of appeal would not necessarily "give rise to procedural detriment of the kind that would warrant the dismissal" of the appeal.⁸⁸⁸

6.312. In the present dispute, while the United States points to these formal defects in Mexico's Notice of Appeal, the United States has not asserted that, owing to such formal defects, it did not receive sufficient notice of Mexico's appeal regarding the Panels' decision to conduct a partially opening meeting with the parties. Thus, despite Mexico's failure to comply with the requirements in Rule 20(2)(d)(ii) and (iii), we consider that these formal defects do not, by themselves, warrant the dismissal of Mexico's appeal.

6.313. Based on the foregoing, we find that paragraph 11 of Mexico's Notice of Appeal sufficiently identifies an alleged error in the issues of law covered in the Panel Reports, as required by Rule 20(2)(d)(i) of the Working Procedures and Article 17.6 of the DSU. In particular, Mexico's Notice of Appeal identifies, as an issue of law, the question whether the Panels had the authority to conduct a meeting with the parties that was partially open to public observation without the consent of both parties. We also find that the formal defects in Mexico's Notice of Appeal, owing to Mexico's failure to comply with the requirements in Rule 20(2)(d)(ii) and (iii) of the Working Procedures, do

⁸⁸³ United States' appellee's submission, para. 385.

⁸⁸⁴ Rule 20(2)(d) of the Working Procedures.

⁸⁸⁵ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 283. See also *ibid.*, para. 279.

⁸⁸⁶ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 280.

⁸⁸⁷ Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 62; *US – Offset Act (Byrd Amendment)*, para. 206. In this regard, the Appellate Body has also cautioned Members against drafting their notices of appeal or other appeal at a level of vagueness and imprecision that would make it "considerably difficult for the appellee, the third participants, and the Appellate Body to understand easily the full scope of [an appellant's] claim". Understanding the full scope of an appellant's claim should not require such effort. Drafting the notice of appeal or notice of other appeal with greater precision reduces the risk of procedural objections and possible dismissal of a claim because it does not comply with the requirements of Rule 20 or 23 of the Working Procedures. (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 686)

⁸⁸⁸ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 283.

not, by themselves, warrant the dismissal of Mexico's appeal. We therefore find that Mexico's claim that the Panels erred in finding that they had the authority to conduct a partially open meeting without the consent of both parties is properly within the scope of this appeal.

6.3.3 Whether the Appellate Body should rule on this issue

6.314. Having found that Mexico's allegation of error, as identified in paragraph 11 of Mexico's Notice of Appeal, is properly within the scope of this appeal, we take note of the suggestion by the United States that, "it would be appropriate for the Appellate Body to exercise judicial economy" with respect to this claim of error. In the United States' view, this is because Mexico's appeal of the Panels' decision to conduct the partially open panel meeting does not concern "issues of law covered in the panel report" or "legal interpretations developed by the panel".⁸⁸⁹

6.315. As a preliminary matter, we recall our finding above that paragraph 11 of Mexico's Notice of Appeal sufficiently identifies, as an issue of law, the question whether the Panels had the authority to conduct a meeting with the parties that was partially open to public observation without the consent of both parties.⁸⁹⁰ We therefore disagree with the United States that Mexico's appeal does not concern "issues of law covered in the panel report".

6.316. This, however, does not necessarily mean that a finding on this aspect of Mexico's appeal is required. The following provisions of the DSU are relevant in this regard. Article 17.12 provides that "[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding."⁸⁹¹ Article 3.2 states that:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

6.317. Article 3.4 provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

6.318. In the past, the Appellate Body has understood these overarching aims of the WTO dispute settlement mechanism to mean that, while the Appellate Body is required to address each issue on appeal, it has the discretion not to rule on an issue when doing so is not necessary to resolve the dispute⁸⁹², but the Appellate Body may rule on such an issue in light of the specific circumstances of a given dispute.⁸⁹³

6.319. Turning to the specific circumstances of these proceedings, we note the following competing considerations that are relevant to our decision on whether ruling on Mexico's claim of error is necessary. First, the issue raised by Mexico's appeal does not directly relate to the "matter [at] issue

⁸⁸⁹ United States' appellee's submission, para. 390.

⁸⁹⁰ See para. 6.313 above.

⁸⁹¹ Article 17.6 limits an appeal to "issues of law covered in the panel report and legal interpretations developed by the panel".

⁸⁹² Appellate Body Report, *US – Upland Cotton*, paras. 510-511. On many of the occasions where the Appellate Body found that ruling on an issue would be unnecessary to resolve a dispute, this finding was made after the Appellate Body had already found an error or inconsistency under a related substantive claim. (See e.g. Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.89; *US – Zeroing (Japan)*, para. 140; *US – Gambling*, para. 156; *EC – Selected Customs Matters*, para. 243) However, these examples are not exhaustive in identifying the circumstances in which it would be appropriate for the Appellate Body to find that ruling on an issue would be unnecessary to resolve a dispute. (See e.g. Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, para. 5.252; *US – Upland Cotton*, paras. 510-511; *US – Steel Safeguards*, paras. 483-484)

⁸⁹³ Appellate Body Report, *China – HP-SSST (EU)*, paras. 5.310 and 5.317. See also Appellate Body Report, *US – Upland Cotton*, para. 510.

in the dispute"⁸⁹⁴, that is, whether the 2016 Tuna Measure is consistent with the TBT Agreement and the GATT 1994.⁸⁹⁵ At the same time, we recognize that the manner in which a panel adopts procedures and conducts its proceedings when it addresses the matter referred to it by the DSB may give rise to issues of law and legal interpretation, which would be subject to the scope of appellate review within the meaning of Article 17.6 of the DSU.⁸⁹⁶ Second, Mexico considers that the Panels were not authorized to partially open their meeting with the parties to public observation without the consent of Mexico. Hence, in its appellant's submission, Mexico requests us to find that the "Panels erred ... in directing that the hearing be partially opened to the public when Mexico did not agree to the opening" in this case.⁸⁹⁷ However, Mexico's arguments on appeal do not elaborate on the manner in which the Panels' decision is inconsistent with the DSU.⁸⁹⁸ Third, in addition to Mexico's request above for a finding of error, Mexico requests "that the Appellate Body clarify that, *in the future*, panels should not open a hearing even partially without the agreement of all disputing parties".⁸⁹⁹ Mexico suggested that, by ruling on this issue, the Appellate Body would be providing clarification on a concern that impacts not only panels but also arbitrators under Article 22.6 of the DSU.⁹⁰⁰ The fact that Mexico's request concerns the proceedings of other panels and arbitrators casts doubt on whether ruling on this issue is necessary to resolve the present dispute.

6.320. In light of the specific circumstances of these proceedings as set out above, we find it unnecessary to rule on whether the Panels erred in finding that they had the authority to conduct a partially open meeting of the parties without the consent of both parties. Our finding should not be construed as an endorsement of the Panels' decision to conduct a partially open meeting of the parties without the consent of both parties.⁹⁰¹

7 FINDINGS AND CONCLUSIONS

7.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions:

7.1 Whether the Panels erred in their findings under Article 2.1 of the TBT Agreement

7.2. Under Article 2.1 of the TBT Agreement, in order to determine whether the detrimental impact stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinize whether the technical regulation at issue is even-handed in light of the particular circumstances of the case. In the present dispute, an examination of whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement entails an assessment of whether the regulatory distinctions of the measure are calibrated to the risks to dolphins arising from different fishing methods in different areas of the ocean. Such assessment involves: (i) an assessment of the overall relative risks of harm to dolphins arising from the use of different fishing methods in different ocean areas; and (ii) an assessment as to whether the differences in the dolphin-safe labelling conditions under the measure are appropriately tailored to, or commensurate with, those respective risks. If conducted properly, this calibration analysis would encompass consideration of the rational relationship between the regulatory distinctions drawn by the 2016 Tuna Measure and its objectives. Thus, there is no need to separately assess the rational relationship between the regulatory distinctions drawn by the measure and its objectives. Furthermore, while risks of inaccurate labelling are relevant to the calibration analysis, this does not mean that the applicable legal standard requires the Panels to

⁸⁹⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340. See also Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.28; *India – Patents (US)*, para. 87; *Brazil – Retreaded Tyres*, para. 257; *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Lead and Bismuth II*, paras. 71 and 73; *Argentina – Footwear (EC)*, para. 145; *Australia – Salmon*, para. 223; *Japan – Agricultural Products II*, para. 111.

⁸⁹⁵ United States' panel request; Mexico's panel request.

⁸⁹⁶ See para. 6.307 above.

⁸⁹⁷ Mexico's appellant's submission, para. 353.

⁸⁹⁸ In this regard, we take note of the United States' assertion that "the DSU does not impose any conditions on either opening the hearing or closing the hearing to the public." (United States' appellee's submission, para. 396)

⁸⁹⁹ Mexico's appellant's submission, para. 352. (emphasis added)

⁹⁰⁰ Mexico's response to questioning at the hearing.

⁹⁰¹ Paragraph 2 of Appendix 3 to the DSU states that "[t]he panel shall meet in closed session" and that "[t]he parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it." Article 12.1 of the DSU states that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."

determine whether the 2016 Tuna Measure is calibrated, *inter alia*, to the risk of inaccurate dolphin-safe information being passed to consumers.

7.3. In conducting the calibration analysis, it is necessary to examine the risks to dolphins across all relevant ocean areas in which different fishing methods are practised. This does not mean that, under Article 2.1 of the TBT Agreement, a measure that seeks to protect dolphins must make all relevant regulatory distinctions on the basis of both fishing method and ocean area. Rather, the nature of the calibration analysis to be conducted is informed by the nature of the regulatory distinctions made under the measure itself, and it is the regulatory distinctions causing the detrimental impact on imported products that must be calibrated to different risks to dolphins. The relevant regulatory distinctions that need to be examined for the purpose of calibration in this dispute include the distinction between setting on dolphins and other fishing methods (in the context of the eligibility criteria) and the distinction between the ETP large purse seine fishery and all other fisheries (in the context of the certification and the tracking and verification requirements).

7.4. For these reasons, we do not consider that Mexico has established that the Panels, in considering that they were required to examine whether the 2016 Tuna Measure was calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean, failed to include an inquiry into the nexus between the relevant regulatory distinctions and the objectives of the measure. We also disagree with Mexico that the Panels erred by comparing the risk profiles of different fishing methods in applying the calibration analysis to the eligibility criteria. In our view, in the specific context of the 2016 Tuna Measure, in order to assess whether the detrimental impact on Mexican tuna products stems exclusively from a legitimate regulatory distinction, the Panels were required to assess whether the regulatory distinctions causing that detrimental impact are calibrated to different risks to dolphins, in terms of the overall relative risks to dolphins, taking into account the objectives of the measure.

7.5. In conducting their examination of the risk profiles of different fishing methods as used in different ocean areas, the Panels reviewed all relevant evidence of risks to dolphins as provided to them by the parties, including all evidence pertaining to individual fisheries. Additionally, the Panels appropriately took into account all relevant types of harm to dolphins in assessing the risk profiles of different fishing methods and fisheries. Moreover, the Panels did not err in relying on per set data as the primary measurement of the risks to dolphins, despite three additional measurements proposed by Mexico. First, because the relevant risks to be assessed for the purpose of calibration are the risks of individual dolphins being harmed or killed in the fishing process, the Panels were correct not to rely on PBR evidence to assess the risks to dolphins. Second, given the comparative nature of the calibration analysis, the Panels did not err by relying primarily on a per set methodology, instead of a comparison of absolute levels of harm. Finally, Mexico did not substantiate its assertion that tuna fishing in ocean areas with less reliable regulatory systems is more likely to lead to harm to dolphins, and therefore the Panels did not err by excluding evidence pertaining to regulatory oversight from their assessment of the overall relative risks to dolphins from the use of different fishing methods as used in different areas of the ocean. We therefore find no error in the Panels' assessment of the risks to dolphins arising from the use of different fishing methods in different ocean areas or in their conclusions regarding the risk profiles of relevant fishing methods on the basis of that assessment.

7.6. Regarding whether the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different ocean areas, we have addressed Mexico's challenges to the Panels' assessment of the following aspects of the 2016 Tuna Measure: (i) the eligibility criteria; (ii) the certification requirements; (iii) the tracking and verification requirements; and (iv) the 2016 Tuna Measure as a whole.

7.7. With respect to the eligibility criteria, we have found that the Panels did not err in finding, in paragraph 7.539 of their Reports, that "setting on dolphins is significantly more dangerous to dolphins than are other fishing methods." This finding implies that the distinction in the eligibility criteria between setting on dolphins, on the one hand, and other fishing methods, on the other hand, is, as the Panels found in paragraph 7.540 of their Reports, "appropriately calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean". Accordingly, we find that Mexico has not demonstrated that the Panels erred in reaching the intermediate finding, in paragraph 7.547 of their Reports, that the eligibility criteria embodied in the 2016 Tuna Measure are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

7.8. With respect to the certification requirements, we have found that the Panels adopted the correct approach in comparing the risk profiles of individual fisheries, because the certification requirements make a distinction on the basis of both fishing method and ocean area. Having found no legal error in the Panels' assessment of risk profiles, we consider that the Panels did not err in finding that the ETP large purse seine fishery has a special risk profile that distinguishes it from other fisheries. We have also addressed and rejected all of Mexico's arguments challenging the Panels' assessment of the certification requirements, including the allegation that the Panels did not take into account the risks of inaccuracy in their calibration analysis. For all of these reasons, we find that Mexico has not demonstrated that the Panels erred in arriving at the intermediate finding, in paragraph 7.611 of their Reports, that the different certification requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

7.9. As with the certification requirements, we have found that with respect to the tracking and verification requirements, the Panels adopted the correct approach in comparing the risk profiles of individual fisheries, because these requirements make a distinction on the basis of both fishing method and ocean area. Having found no legal error in the Panels' assessment of risk profiles, we consider that the Panels did not err in finding that it is both the technical and legal possibilities of setting on dolphins and the fact that dolphin sets occur in a consistent and systematic manner in the ETP large purse seine fishery that give this fishery its special risk profile. Moreover, we have rejected Mexico's claims that (i) the Panels erred in their evaluation of the tracking and verification requirements, including the allegation that the Panels did not take into account the risks of inaccuracy; and (ii) the Panels failed to make an objective assessment of the facts of the case as required under Article 11 of the DSU. Consequently, we find that Mexico has not demonstrated that the Panels erred in arriving at the intermediate finding, in paragraph 7.676 of their Reports, that:

[A]lthough there remain differences between the NOAA and AIDCP regimes with respect to tracking and verification, the Panels are of the view that such differences have been considerably narrowed in the 2016 Tuna Measure and the Panels find that the remaining differences are calibrated to the differences in the risk profile of the ETP large purse seine fishery compared to other fisheries.

7.10. We further consider that the Panels' analyses of each of the elements of the 2016 Tuna Measure, as well as their examination of the measure as a whole, were properly informed by the interlinkages between these elements and the fact that they operate together to regulate access to the dolphin-safe label. Furthermore, we recall that Mexico's appeal in this regard is consequential upon its challenge of the Panels' assessment of the eligibility criteria, certification requirements, and tracking and verification requirements. Having reviewed and rejected Mexico's arguments against the Panels' assessment of each of these elements of the 2016 Tuna Measure, we find that Mexico has not demonstrated that the Panels erred in their assessment of the 2016 Tuna Measure, as a whole, or in finding, in paragraph 7.717 of their Reports, that the 2016 Tuna Measure, as a whole, is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

7.11. Based on our analyses and findings above, we uphold the Panels' conclusion, in paragraphs 7.717, 8.2, and 8.6 of the Panel Reports, that the 2016 Tuna Measure accords to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries and therefore is consistent with Article 2.1 of the TBT Agreement.

7.2 Whether the Panels erred in their findings under Article XX of the GATT 1994

7.12. One of the most important factors in the assessment of arbitrary or unjustifiable discrimination under the *chapeau* of Article XX of the GATT 1994 is the question of 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. As indicated above, the Appellate Body's guidance in the first compliance proceedings indicates that the calibration analysis is the tool in the circumstances of this dispute to assess whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement. If done properly, the calibration analysis would encompass consideration of the rational relationship between the regulatory distinction of the 2016 Tuna Measure and its objectives. As also indicated, it was appropriate for the Panels, in the circumstances of these compliance proceedings, to rely on their calibration analysis under Article 2.1 in their assessment of whether the 2016 Tuna Measure is applied in a manner that

constitutes arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX. This is because, where the differences between Article 2.1 and Article XX are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for the purpose of conducting an analysis under the other.

7.13. We also indicated above that the Panels did not err in finding that the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Therefore, given that consideration of the rational relationship between the regulatory distinctions and the objectives of the 2016 Tuna Measure was encompassed in this analysis, we find that the Panels did not err in relying on the reasoning developed under Article 2.1 of the TBT Agreement in assessing the conformity of the 2016 Tuna Measure with the *chapeau* of Article XX of the GATT 1994. We also reject Mexico's contention that, due to the Panels' reliance on per set evidence, rather than PBR evidence, in assessing the risks to dolphins, their calibration analysis cannot be relied on for assessing whether the 2016 Tuna Measure is rationally related to the conservation of exhaustible natural resources.

7.14. For the foregoing reasons, we uphold the Panels' finding, in paragraphs 7.740, 8.3, and 8.7 of the Panel Reports, that the 2016 Tuna Measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination and is therefore justified under Article XX of the GATT 1994.

7.3 The Panels' decision to hold a partially open meeting

7.15. We find that Mexico's claim that the Panels erred in finding that they had the authority to conduct a partially open meeting without the consent of both parties is properly within the scope of this appeal. However, in light of the specific circumstances of these proceedings, we find it unnecessary to rule on whether the Panels erred in finding that they had the authority to conduct a partially open meeting of the parties without the consent of both parties. Our finding should not be construed as an endorsement of the Panels' decision to conduct a partially open meeting of the parties without the consent of both parties.

7.4 Recommendation

7.16. The Panels in these compliance proceedings found that the United States has implemented the recommendations and rulings of the DSB in *US – Tuna II (Mexico)* and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*. Accordingly, the Panels concluded that no recommendation under Article 19.1 of the DSU is necessary. Having upheld the Panels' findings under Article 2.1 of the TBT Agreement and Article XX of the GATT 1994, there is no basis for us to make a recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 1st day of November 2018 by:

Ujal Singh Bhatia
Presiding Member

Thomas R. Graham
Member

Hong Zhao
Member
