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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

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ANNEX A-1

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

- (a) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they require observer coverage for purse seine vessels in the ETP but not for vessels in other fisheries.⁹
- (b) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they impose a lesser burden on vessels outside the ETP large purse seine fishery than on vessels within it.¹⁰
- (c) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.¹¹
- (d) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.¹²
- (e) the Panel's finding that the certification requirements of the amended measure impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail," contrary to the chapeau of Article XX of the GATT 1994, because the requirements for tuna and tuna product caught outside the ETP large

provisions based

ANNEX A-2

MEXICO'

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

9.

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

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

⁵ The Panel's errors in law are contained, 7.584 -7.585 and 8.5(a), of the Panel Report.

inter alia, in paragraphs 7.545, 7.577, 7.581 -7.582,

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ARGUMENTS OF THE PARTICIPANTS

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ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES ' APPELLANT'S SUBMISSION

1. In the underlying dispute, the Appellate Body found that the U.S. dolphin safe labeling measure was inconsistent with Article 2.1 of the TBT Agreement. The United States took careful note of the concern identified by the Appellate Body and addressed it through the 2013 Final Rule. Specifically, the Appellate Body found that the original measure was inconsistent with Article 2.1

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

8. First, as explained in Section III.G.3.a, the Panel erred in its allocation of the burden of proof. The Appellate Body has been clear that nothing in its Article 2.1 analysis alters the traditional allocation of the burden of proof⁴ whereby a complainant must establish a *prima facie* case for all the elements of its claims.⁵ Here, Mexico argued that the certification requirements have a detrimental impact on Mexican tuna products due to differences in the *accuracy* of the certifications for tuna caught inside and outside the ETP large purse seine fishery.⁶ The Panel made no "definitive finding" on this issue.⁷ Instead, the Panel found a detrimental impact based on an entirely different theory, namely a difference in observer-related costs, that Mexico had never asserted or introduced evidence to support. Thus the Panel erred in making an alleged *prima facie* case for Mexico, and the Panel's finding of detrimental impact was in error.

9. Second, as explained in Section III.G.3.b, the Panel erred in finding that any difference in observer-related costs modifies the conditions of competition in the U.S. market to the detriment

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

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

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

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

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

¹³ *US - Tuna II (Article 21.5 - Mexico) (Panel)*, para. 8.2(c).

¹⁴ *US - Tuna II (Article 21.5 - Mexico) (Panel)*, para. 7.288.

¹⁵ *US - Tuna II (Article 21.5 - Mexico) (Panel)*, para. 7.382; *see also id.* para. 7.372.

¹⁶ *Japan - Agricultural Products II (AB)*, para. 129.

¹⁷ *US - Tuna II (Article 21.5 - Mexico) (Panel)*, para. 7.354 (emphasis omitted).

2. THE GATT 1994

31. In Sections IV and V of this submission, the United States explains that, for all the reasons discussed in terms of Article 2.1 of the TBT Agreement in III.G.3 and III.H.3, the Panel erred in

that tuna product produced outside the ETP large purse seine fishery without an observer onboard has a "competitive advantage "

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

43. In section VI.B.2.b, the United States explains that the Panel erred in finding that the tracking and verification requirements impose "arbitrary or unjustifiable discrimination" under the chapeau. The United States considers that the Panel's analysis and finding are in error for many of the same reasons the United States has discussed with regard to the certification requirements: (1) the Panel applied the incorrect legal analysis; (2) the Panel erred in its application of the burden of proof; (2) the Panel deexplained the United States' arguments.

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

10. Mexico argued that it was not even -handed for the amended tuna measure to completely

dolphin -safe label for tuna caught outside the ETP by fishing methods other than AIDCP

- compliant

5. This is unchanged in the amended tuna measure and, therefore, the measure continues to deny competitive opportunities to Mexican tuna products. This conclusion is based on the fact that the measure continues to deny competitive opportunities to Mexican tuna products under the first part of

D. Amended Tuna Measure Not the AIDCP

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

E. Unnecessary to Prove Mislabelling

13. For the purposes of establishing a lack of even -handedness under the second part of the legal test in Article 2.1 and arbitrary discrimination under the chapeau of Article XX, the Appellate Body made clear in *EC - Seal Products* that Mexico is only required to establish a *prima facie* case that, under the circumstances related to the design and application of the Amended Tuna Measure 's labelling conditions and requirements, tuna products containing non -dolphin -safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin -safe. The burden then shifts to the United States to sufficiently explain how such instances can be prevented in the application of the Amended Tuna Measure 's labelling conditions and requirements. Mexico has met its burden. That burden shifted to the United States, which was unable to rebut Mexico 's *prima facie* case.

III. ARTICLE 2.1 - CERTIFICATION REQUIREMENTS

A. Detrimental Impact

14. As explained above, there was no need for the Panel to make an independent finding with respect to the certification requirements because the amended tuna measure as a whole has a detrimental impact on Mexican imports. Thus, even if the United States is correct in its arguments, they have no bearing on the first part of the legal test under Article 2.1. In the context of analyzing the denial of competitive opportunities, it is not necessary to demonstrate actual trade effects. If the Appellate Body finds that the differences in costs and burdens are relevant to the

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

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

16. Mexico agrees with the United States that Mexico did not argue that the determination provisions themselves directly result in detrimental impact. There was no need for Mexico to do so. In determining whether the regulatory distinctions of the measure are even-handed, the Panel was required to assess the design, architecture, revealing 79(e)-3(d)10()-7(f)5(o)-5(r)-7(M)3(e)he aling requ

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

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

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

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

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ANNEX B-4

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEES SUBMISSION

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

2.

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

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

b. The Certification Requirements

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

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

19. First, the Panel's finding regarding the reliability of captains' certifications was not inconsistent with Article 11. Mexico is wrong in arguing that the Panel failed to understand or address its argument that the "specific circumstances" associated with dolphin safe certifications render captains' certifications inherently unreliable or any evidence related to that argument. To the contrary, the Panel simply did not agree that Mexico had proven its case. Mexico is also wrong to argue that the Panel erred by finding that Mexico had not established that captains' statements were unreliable. In fact, the Panel's finding was supported by a significant amount of evidence on the record, which Mexico fails to dispute.

21. As explained in Section VI.B.2, Mexico 's appeal of the Panel 's finding concerning the

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ANNEX C-2

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

I. ARTICLE 2.1 TBT

A. US claims

1. Certification

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

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

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

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

2. Tracking and verification

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

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

B. Mexico's claims

1. Whole measure

8. The measure and the set of regulatory distinctions complained of (viewed in the context of the measure as a whole) are conceptually the same thing. In this case Mexico complained about three regulatory distinctions: eligibility; certification; and tracking and verification. We agree with Mexico that a panel must determine whether or not the measure (that is, the set of regulatory distinctions complained of, not one of them considered in isolation) causes a detrimental impact. We also agree with Mexico

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3. Certification

11. In our experience, captain 's certifications are one pillar of the overall system. Some infringements are *reported*

ANNEX C-3

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT 'S SUBMISSION

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

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

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

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

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

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

1.9. We further observe that the WTO dispute settlement system is currently experiencing a high level of activity, which can be onerous for WTO Members engaged in multiple, parallel proceedings. In such circumstances, a Member's ability to engage effectively in all such proceedings may be impaired, especially if that Member is a developing country. Moreover, Members' capacity to