

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
