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

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

Responses of
the United States of America
to the Panel's Questions and
Comments on the Third Parties' Responses
to the Panel's Questions

September 17, 2014

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TABLE OF ACRONYMS

Acronym	Full Name
AIDCP	Agreement on the International Dolphin Conservation Program
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
C.F.R.	Code of Federal Regulations
DML	Dolphin Mortality Limit
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
EPO	Eastern Pacific Ocean
ETP	Eastern Tropical Pacific Ocean
EEZ	Exclusive Economic Zones
FAD	Fish Aggregating Device
FCO or Form 370	NOAA Fisheries Certificate of Origin
HMS	Highly Migratory Species
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IDCP	International Dolphin Conservation Program
IOTC	Indian Ocean Tuna Commission
NMFS	National Marine Fisheries Service

NOAA	National Oceanic and Atmospheric Administration
NOVA	Notice of Violation and Assessment
PIROP	Pacific Islands Regional Observer Program
RFMO	Regional Fishery Management Organization
SPC	Secretariat of the Pacific Community
SPS	Sanitary and Phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TTF	Tuna Tracking Form
U.S.C.	United States Code
WCPFC	Western and Central Pacific Fisheries Commission
WCPFC Convention	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean
WCPO	Western and Central Pacific Ocean
WTO	World Trade Organization

TABLE OF REPORTS

Short title	Full Citation
Canada – Aircraft (Article 21.5 – Brazil) (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – COOL (AB)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005

US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Tuna II (Mexico)(AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US – Tuna II (Mexico)(Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
US – Upland Cotton (Article 21.5 – Brazil)(AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton– Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
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US – Zeroing (Article 21.5 – EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

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120	50 C.F.R. § 216.3
121	Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica (2003)
122	AIDCP, Resolution A-14-01, Amendment to Annex I of the Agreement (2014)
123	IATTC, Data Regarding Location of Dolphin Sets (2004-2013)
124	WCPFC, Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, *Summary Report of the Tenth Regular Session* (2013)
125	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2000)
126	WCPFC, Convention Area Map
127	Table Summarizing Fishery-by-Fishery Evidence on the Record
128	Republic of Ecuador, IDCP Dolphin Safe Certification
129	*Taking and Importing of Marine Mammals, "Dolphin Safe" Tuna Labeling*, 56 Fed. Reg. 47,418 (Sept. 19, 1991)
130	*International Fisheries; Pacific Tuna Fisheries; Revisions to Regulations for Vessels Authorized to Fish for Tuna and Tuna-like Species in the Eastern Tropical Pacific Ocean and to Requirements for the Submission of Fisheries Certificates of Origin*, 75 Fed. Reg. 1607 (Jan. 13, 2009)
131	Monin J. Amande *et al.*, "Precision in Bycatch Estimates: The Case of Tuna Purse Seine Fisheries in the Indian Ocean," *ICES J. Mar. Sci.* (2012)
132	Evgeny V. Romanov, "Bycatch in the Tuna Purse Seine Fisheries of the Western Indian Ocean," 100 *Fisheries Bulletin* 90 (2002)
133	Monin J. Amande *et al.*, "Bycatch of the European Purse Seine Tuna Fishery in the Atlantic Ocean for the 2003-2007 Period," 23 *Aquat. Living Resour.* 353 (2010)

134	Monin J. Amande *et al.*, "Bycatch and Discards of the European Purse Seine Tuna Fishery in the Atlantic Ocean: Estimation and Characteristics for 2008 and 2009," 66 *ICCAT Collect. Vol. Sci. Papers* 2113 (2011)
135	IOTC, Resolution 11/04 on a Regional Observer Scheme (2011)
136	WCPFC, CMM 2007-01 Conservation and Management Measure for the Regional Observer Programme, (Dec. 2007)
137	IOTC, *Summary of Regional Observer Programme During 2012* (Mar. 2013)
138	IOTC, Resolution 12/05 Establishing a Programme for Transhipment by Large-Scale Fishing Vessels (2012)
139	WCPFC, CMM 2008-01, Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean (Dec. 2008)
140	IATTC, Res. C-11-08, Resolution on Scientific Observers for Longline Vessels (July 2011)
141	IATTC, *Longline Observer Form and Field Manual* (July 2014)
142	16 U.S.C. § 1371
143	18 U.S.C. § 3571
144	18 U.S.C. § 3559
145	16 U.S.C. § 3372
146	16 U.S.C. § 3373
147	16 U.S.C. § 1857
148	16 U.S.C. § 1860
149	16 U.S.C. § 1375
150	Constitution of the United States
151	*Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945)
152	WCPFC, CMM 2009-06, Conservation and Management Measure on the Regulation of Transhipment (2009)
153	IATTC, Res. C-08-02, Resolution on Establishing a Program for Transshipments by Large-Scale Fishing Vessels (2008)

154	ICCAT, Rec. 12-06, Recommendation by ICCAT on a Programme for Transshipment (2012)
155	CCSBT, Resolution on Establishing a Program for Transshipment by Large-Scale Fishing Vessels, Adopted at the 15th Annual Mtg., Oct. 14-17, 2002
156	NOAA, "Pacific Transshipment Declaration Form"
157	"WCPFC Transshipment Declaration"
158	WCPFC, Form FC-2, Observer "at Sea" Transshipment Report
159	WCPFC Scientific Committee, *Fifth Regular Session Summary Report* (2009)
160	National Research Council, *Dolphins and the Tuna Industry* (1992)
161	Adam Langley, Peter Williams & John Hampton, *The Western and Central Pacific Tuna Fishery: 2006 Overview and Status of Stocks* (2008) (Orig. Exh. MEX-98)
162	WCPFC Paper Prepared by Australia, "Proposed Conservation and Management Measure Mitigating Fishing Impacts on Cetaceans" (2010) (Orig. Exh. MEX-105)
163	NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013"
164	NMFS, "American Samoa Longline Annual Reports – 2006-2013"
165	IATTC, *Executive Report on the Functioning of the AIDCP in 2010* (2011)
166	NOAA Fisheries, *2013 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species* (2014)
167	Kimberly S. Dietrich et al., "Building Scientific Observer Capacity in Africa – Lessons Learned" (2013)
168	NMFS, *National Observer Program FY 2012 Annual Report* (2013)
169	Captain's Statements Received by NMFS, 2012-2014
170	WCPFC, CMM 2006-08, WCPFC Boarding and Inspection Procedures (2006)
171	IOTC, Resolution 13/03 on the Recording of Catch and Effort Data by Fishing Vessels in the IOTC Area of Competence (2013)
172	WCPFC, CMM 2013-05, Conservation and Management Measure on Daily Catch and Effort Reporting (2013)

173	ICCAT, Rec. 10-04, Recommendation by ICCAT Amending the Recommendation to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean (2010)
174	WCPFC, Scientific Data to be Provided to the Commission
175	NMFS, "Western Pacific Longline Fishing Log"
176	NMFS, "2014 Atlantic Highly Migratory Species Logbook - Set Form"
177	Australia, "Australian Pelagic Longline Daily Fishing Log"
178	Australia, "Purse Seine Daily Fishing Log"
179	China, "Chinese Tuna Fisheries Logbook" (2013)
180	Japan, "Reporting Form of Incidentally Encircled Whale Sharks or Whales"
181	Korea, "Bycatch Purse Seine & Longline"
182	Notice of Violation and Assessment (NOVA), *In re: F/V Yu Jye Fa*, NOAA Case No. SW030314A (2003)
183	Notice of Proposed Forfeiture, *In re: F/V Yu Jye Fa*, NOAA Case No. SW030314A (2004)
184	NOAA, "$5M Settlement Boosts Marine Conservation Plans in the Pacific," July 7, 2010
185	NOVA, FF/V Albacora S.A., Case No. PI1000828 (2010)
186	Settlement Agreement, FF/V Albacora S.A., Case No. PI1000828 (2010)
187	16 U.S.C. § 1861
188	16 U.S.C. § 1821
189	Cannery Slides on Tuna Trace Systems **(Contains BCI)**
190	Company Traceability Procedure **(Contains BCI)**
191	Cannery Reference Reports for NMFS Periodic Audit **(Contains BCI)**
192	Cannery Traceability Flowchart **(Contains BCI)**
193	50 C.F.R. § 300.223
194	NOVA, *In re: F/V* Isabella, Case No. PI1100830 (2011)

195	ICCAT, Rec. 10-04, Recommendation by ICCAT Amending the Recommendation to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean" (2010)
196	ICCAT, Recommendation 11-10 by ICCAT on Information Collection and Harmonization of Data on Bycatch and Discards in ICCAT Fisheries (2012)
197	IATTC, *Tunas and Billfishes in the Eastern Pacific Ocean in 2013*, at 14 (2014)
198	European Commission, Fisheries Policy (Sept. 8, 2014)
199	Council Regulation (EC) No. 1224/2009, Establishing a Community Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy (Nov. 20, 2009)
200	European Commission Implementing Regulation (EU) No. 404/2011 (Apr. 30, 2011)
201	*See* Australia Fisheries Management Authority (AFMA), "Managing Our Fisheries: Fisheries Catch and Effort Logbooks" (accessed September 9, 2014)
202	Australia, Fisheries Management Act of 1991, Law No. 162 (as amended up to Act No. 103, 2013)
203	International Convention for the Prevention of Pollution from Ships (MARPOL) (1973)
204	33 C.F.R. § 151.25
205	U.S. Dep't of Justice Envt'l Crimes Section, "September 2010 Monthly Bulletin" (2010)
206	16 U.S.C. § 2435
207	50 C.F.R. § 300.107
208	50 C.F.R. § 300.17
209	Commission for the Conservation of the Antarctic Marine Living Resources (CCAMLR), Conservation Measure 32-02 (2012)
210	AIDCP Training-Dolphins
211	AIDCP Training-Captain Requirements
212	AIDCP Training-Resolutions
213	AIDCP Training-Observers

214	2014 Tuna Purse Seine Operator Workshop Outline (2014)
215	2014 ETP Operator Permit Holders Distribution Amongst the U.S. Purse Seine Fleet **(Contains BCI)**
216	IATTC Longline Vessel Registry (accessed Sept. 16, 2014)
217	Cannery Captain Statement (Aug. 21, 2014) **(Contains BCI)**
218	Plea Agreement, *United States v. Sandoval*, No. 2004CR02293-L (S.D. Cal. 2005)
219	NOVA, Di Mare Holdings, Inc., Case No. SW030434A (2005)
220	NOVA, Express Trading Int'l, Case No. SW060153 (2008)
221	NOVA, Otogi America, Case No. SW0704600 (2009)
222	NMFS, "TTVP Verification Components," Mar. 20, 2014
223	NMFS, "TTVP Cities Where Retail Spot Check Audits of Tuna Products Have Occurred in the USA & Puerto Rico" (accessed August 31, 2014)
224	NMFS, "TTVP Brands Sampled," Mar. 27, 2014
225	NMFS, Dolphin Safe Investigative Referral, Di Mare Holdings (Jan. 27, 2003)
226	NMFS, Offense Investigation Report (OIR), Di Mare Holdings (Dec. 8, 2003)
227	OIR, *United States v. Sandoval* (Feb. 4, 2005)
228	Order, *United States v. Sandoval* (Jan. 18, 2005)
229	NOVA, PAFCO Importing Company, Inc., Case No. SW0704605 (2009)
230	WCPFC, Scientific Committee, *2010 Overview and Status of Stocks* (2012)

RESPONSES TO THE PANEL'S QUESTIONS TO THE PARTIES

Preliminary issues and procedural matters

1. *To the United States*: Please respond to Mexico's arguments at paras. 52 and 58 of Mexico's first written submission.

1. With respect to paragraph 52, the United States agrees that regulatory agencies, such as the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), cannot implement statutes by acting contrary to clear statutory text. The 2013 Final Rule's amendments to the regulations certainly implement the Dolphin Protection Consumer Information Act (DPCIA), and these new requirements have no less effect than those requirements already reviewed by the original panel. The statute, of course, remains in effect, just as it was during the original proceeding, and the United States has never suggested the contrary.

2. Furthermore, the statute has not been modified and therefore is not a "measure taken to comply." Indeed, the DSB recommendations and rulings in this dispute did not find that the statute was inconsistent with the TBT Agreement. Mexico therefore errs if its statements in paragraph 52 are an attempt to claim that the statute is inconsistent with the covered agreements.[1] Such a claim would be outside the terms of reference of an Article 21.5 panel. The first prong of Article 21.5 ("existence" of a measure taken to comply) is inapplicable because there are no DSB recommendations and rulings with respect to the statute. The second prong ("consistency" of a measure taken to comply) is also inapplicable because the statute is not a measure taken to comply.

3. With respect to paragraph 58, the United States has already stated that the regulations, as amended by the 2013 Final Rule, are in effect, and have the force of U.S. law.[2] The United States does not understand Mexico to disagree – indeed, Mexico appears to concede the point.[3] The suggestion raised, but not ultimately pursued, by Mexico – that the 2013 Final Rule could somehow be an illegal act – is simply not true. As the 2013 Final Rule states, Congress has granted NOAA broad regulatory authority to implement the DPCIA, and the change in requirements contained in the 2013 Final Rule falls squarely within that broad authority.[4]

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[1] The United States obviously disagrees with Mexico's allegation that the statutory requirements are "discriminatory." *See, e.g.*, U.S. First Written 21.5 Submission, paras. 224-239, 277-90, 295-301; U.S. Second Written 21.5 Submission, paras. 86-94, 132-38, 139-43. The United States notes that the DSB recommendations and rulings contain no findings that any requirement contained in the statute is WTO-inconsistent.

[2] U.S. First Written 21.5 Submission, para. 18 ("The 2013 Final Rule took effect on July 13, 2013, and was mandatory as of that date.").

[3] Mexico's First Written 21.5 Submission, para. 58 (conceding that "the regulations are officially in effect").

[4] *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997, 40,997 (2013 Final Rule) (Exh. MEX-7) (noting NOAA's "broad authority to issue regulations to implement the DPCIA"). The United States would further note that Mexico has made no claim in this proceeding that the U.S. measure does not "exist" for purposes of Article 21.5 of the Dispute Settlement Understanding (DSU).

The Amended Tuna Measure

2. ***To both Parties*: Please consider the attached table (*Table 1/Rev.1*). In your opinion, does this table accurately reflect the current labelling requirements as provided for under the amended tuna measure?**

4. The United States refers the Panel to the U.S. response to Question 59.

3. ***To the United States*: How does the United States define the "ETP" for the purpose of its legislation and regulation? Does it adopt the definition in Annex I of the AIDCP?**

5. Since 1990, U.S. law has defined the term "eastern tropical Pacific Ocean" as "the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America."[5]

6. The Inter-American Tropical Tuna Commission (IATTC) was created in 1949 and at the time of formation did not specifically define the ETP, instead merely referring to the "eastern pacific ocean." The IATTC Convention Area was defined in the Antigua Convention as: "the area of the Pacific Ocean bounded by the coastline of North, Central, and South America and by the following lines: i. the 50°N parallel from the coast of North America to its intersection with the 150°W meridian; ii. the 150°W meridian to its intersection with the 50°S parallel; and iii. the 50°S parallel to its intersection with the coast of South America."[6]

7. The La Jolla and Panama agreements, the precursors to the Agreement on the International Dolphin Conservation Program (AIDCP), did not define the covered body of water. In 1999, the AIDCP parties defined the "Agreement Area" as: "the area of the Pacific Ocean bounded by the coastline of North, Central, and South America and by the following lines: a. The 40°N parallel from the coast of North America to its intersection with the 150°W meridian; b. The 150°W meridian to its intersection with the 40°S parallel; c. And the 40°S parallel to its intersection with the coast of South America."[7] In 2014, the AIDCP parties extended the AIDCP Agreement Area to the "50°N parallel" and "50°S parallel" "to harmonize" the AIDCP Agreement Area and IATTC Convention Area.[8]

8. The 1990 definition remains in effect for purposes of U.S. law.

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[5] 16 U.S.C. § 1385(c)(2) (Exh. MEX-5); *see also* 50 C.F.R. § 216.3 (Exh. US-120).

[6] *See* Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, art. III (2003) (Exh. US-121) ("Antigua Convention").

[7] AIDCP, Annex I (Exh. MEX-30).

[8] AIDCP, Resolution A-14-01, Amendment to Annex I of the Agreement (2014) (Exh. US-122).

9. As discussed at the Panel meeting, the United States does not consider that the difference in the U.S. and AIDCP definitions has any substantive effect on this dispute. IATTC data confirms that the association between yellowfin tuna and dolphins occurs in an area that is much smaller than either definition of the ETP.[9] As evidenced by the location of dolphin sets in the years 2004-2013, the association occurs predominately east of the 130° west longitude. Although the association can, on occasion, extend outwards towards the 140° west longitude, depending on environmental factors such as currents and water temperatures, Mexico has stated that its vessel do not operate west of the 130° west longitude.[10] In addition, dolphin sets do not appear to occur north of the 30° north parallel nor south of 20° south parallel.

10. In any event, Mexican large purse seine vessels only have authority to operate in the AIDCP Agreement Area, and, when doing so, must adhere to AIDCP requirements, such as payment of vessel assessment, adherence to the dolphin mortality limit (DML), and the presence of an observer. Thus, if a Mexican large purse seine vessel did cross the 130° west longitude, that vessel would be fishing in an area of overlapping jurisdictions between the WCPFC Convention Area and the AIDCP Agreement Area/IATTC Convention Area.[11] While Mexican purse seine vessels are authorized to fish in this overlap area, they remain subject to the AIDCP requirements.[12] And, again, Mexico has explained that its vessels do not, in fact, fish in the overlap area between 130° and 150° west longitude.[13] Mexican vessels are not authorized to fish in the Western and Central Pacific Fisheries Commission (WCPFC) Convention Area outside the area of overlap.

11. Given that the differences in definitions have no substantive impact on this dispute, the United States will continue to refer to simply "the ETP" in this submission as the parties have done throughout this and the original proceeding.

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[9] *See* IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-123).

[10] WCPFC, Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, *Summary Report of the Tenth Regular Session*, at 8, 12-13 (2013) (Exh. US-124) ("WCPFC, 2013 Summary Report") (quoting Mexico's statement that "it has no vessels operating in the WCPF Convention Area (including the overlap area)," which is between 130° and 150° W longitude).

[11] The WCPFC Convention Area and the AIDCP Agreement Area overlap south of 4° between 130° and 150° W longitude. *See* WCPFC, 2013 Summary Report, at 11 (Exh. US-124); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 3 (2000) (Exh. US-125) ("WCPFC Convention"); WCPFC, Convention Area Map (Exh. US-126).

[12] *See* WCPFC, 2013 Summary Report, at 11 (Exh. US-124).

[13] *See* WCPFC, 2013 Summary Report, at 8, 12-13 (Exh. US-124) (summarizing Mexico's statement at a 2013 WCPFC meeting, which Mexico attended as a Cooperating Non-Member, explaining that Mexico "does not fish in the WCPFC because its domestic legal constraints prevent it from obtaining funds to pay its assessed financial contribution" and because "domestic legal interpretations regarding the high seas" make it "difficult" for Mexico to "agree [to] high seas boarding and inspection procedures, which is a prerequisite for fishing in the WCPFC).

4. *To the United States*: Could the United States develop its argument in para. 17 of its oral statement, that the requirements relating to record-keeping, verification and observer coverage for large purse seine vessels in the ETP are "clearly "separable" from the 2013 Final Rule"?

12. In *US – Zeroing (Article 21.5 – EC)*, the Appellate Body faced the issue of whether the compliance panel erred in finding that the EU could not properly raise a claim in an Article 21.5 proceeding against an alleged unchanged arithmetical error by the U.S. Department of Commerce that the EU could have challenged in the original proceeding, but did not.[14] The Appellate Body considered the "critical question" to be "whether the alleged arithmetical error was an integral part *of the measure taken to comply*."[15] The Appellate Body thus considered "whether the nature and the effects of the alleged arithmetical error are such that the alleged error is *separable* from or incorporated into the re-determination."[16] Ultimately, the Appellate Body declined to make a finding as to "whether the United States failed to comply with the recommendations and rulings of the DSB by failing to correct such an alleged error" given "the lack of factual findings by the Panel and of undisputed evidence in the Panel record."[17]

13. It is uncontested by Mexico that all aspects of the amended measure implicated by its Article 2.1 claim are unchanged from the original measure. Furthermore, as the United States has discussed, each aspect is "clearly separable" from the U.S. measure taken to comply with the DSB recommendations and rulings in this dispute.

14. First, Mexico's claim as it pertains to the setting-on-dolphins eligibility condition is "separable" from the 2013 Final Rule. Indeed, the 2013 Final Rule does not alter the eligibility requirement regarding setting on dolphins at all. Rather, the 2013 Final Rule expands the eligibility requirement regarding whether a dolphin was killed or seriously injured to tuna caught outside the ETP. And the reason for the particular scope of the 2013 Final Rule is that it responds to the DSB recommendations and rulings, which were limited to finding the eligibility condition regarding dolphin mortality and serious injury to be not even-handed.[18]

15. Second, Mexico's claim as it pertains to AIDCP-mandated record-keeping and verification requirements for tuna harvested by large purse seine vessels operating inside the ETP is "separable" from the 2013 Final Rule. As should be clear, the 2013 Final Rule makes no adjustment to the requirements applicable to large purse seine vessels operating in the ETP. What the 2013 Final Rule did change is that the regulations now require tuna vessels and other

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[14] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 422.

[15] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 434 (emphasis added).

[16] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 438 (emphasis added).

[17] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 439.

[18] *US – Tuna II (Mexico) (AB)*, paras. 233-235.

entities holding both non-dolphin safe and dolphin safe tuna to segregate the two groups of tuna. Such a requirement is not integral to the AIDCP-mandated record-keeping and verification requirements but, rather, is integral to the expansion of the other eligibility requirement to tuna harvested by vessels other than large purse seine vessels inside the ETP, as it is now possible that a vessel would, on the same trip, catch tuna with different dolphin-safe status.[19]

16. Third, Mexico's claim as it pertains to the AIDCP-mandated observer coverage for large purse seine vessels operating inside the ETP is "separable" from the 2013 Final Rule. The 2013 Final Rule does not alter observer coverage either inside or outside the ETP. Of course, altering the former would not be possible as the observer coverage is set by an international agreement that the United States cannot override. As to the latter, the 2013 Final Rule merely forecasts that the United States may in the future request observer certifications from outside the ETP for purposes of dolphin safe labeling requirements, but only if the participating observers are "qualified and authorized" by the applicable observer authority to make such certifications for the dolphin safe labeling regime. The 2013 Final Rule makes no such determination, nor affects observer coverage or the certifications required for dolphin safe status.[20]

17. Again, the fact that the 2013 Final Rule makes no change to observer coverage or to the certifications that observers make should come as no surprise – nothing in the DSB recommendations and rulings requires the United States to condition the eligibility for the label of tuna product containing non-ETP caught tuna on whether an observer was on board the harvesting vessel and whether the observer has certified as to the eligibility conditions regarding intentional encirclement or death or serious injury. Where the Appellate Body does mention observers, it does so in a manner that explicitly declines to find that the United States can only come into compliance with Article 2.1 by imposing an observer certification requirement on all tuna product containing non-ETP caught tuna that is otherwise eligible for the label.[21] For these

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[19] 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exh. MEX-7) ("NMFS believes using a separate well to store non-dolphin-safe tuna would not be inefficient, and would not require changes on most fishing vessels. By designating a particular well on a fishing trip as containing non-dolphin safe tuna, a captain would aid fishery inspectors in verifying the location of non-dolphin-safe tuna on board a vessel, and would also facilitate tuna canneries and the NMFS Tuna Tracking and Verification Program to track, verify, and audit performance. The monitoring and tracking of tuna that is not dolphin safe in separate wells is supported by the language of the DPCIA that requires the DPCIA implementing regulations to include, among other things, '[t]he designation of well location, procedures for sealing holds, procedures for monitoring and certifying both above and below deck . . . .' (16 U.S.C. 1385(f)(3)).").

[20] As it turns out, NOAA was able to make a finding that observers serving in observer programs for seven U.S. fisheries are "qualified and authorized." *Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries*, 79 Fed. Reg. 40,718 (July 14, 2014) (Exh. US-113) ("Qualified and Authorized Notice"). As discussed below, the Qualified and Authorized Notice does not affect the observer coverage in any of the seven U.S. fisheries.

[21] *US – Tuna II (Mexico) (AB)*, para. 296 ("In addition, we note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the only way for the United States to calibrate its 'dolphin-safe' labelling provisions to the risks that the Panel found were posed by fishing

reasons, this aspect of Mexico's Article 2.1 claim is not properly within the terms of reference of the Panel.

18. This conclusion is consistent with the approach Mexico chose in framing its own argument. In the original proceeding, Mexico intentionally limited its Article 2.1 claim (as well as its Articles I:1 and III:4 claims) to the theory that the original measure discriminated against Mexican tuna product by denying eligibility for the label to tuna product containing tuna caught by setting on dolphins, while tuna product containing tuna caught by other fishing methods remained potentially eligible.[22] As a consequence, the Panel correctly made findings consistent with the scope of Mexico's argument.[23] While the Appellate Body addressed in its Article 2.1 analysis the eligibility condition regarding mortality and serious injury, which Mexico had raised as part of its Article 2.2 claim, the DSB recommendations and rulings overall reflected the scope of the parties' arguments in the original proceeding. And the 2013 Final Rule – the U.S. measure taken to comply – directly addresses those recommendations and rulings.

19. Now, Mexico seeks to shift the basis for its argument and in doing so greatly expand the scope of the dispute in this compliance proceeding. But Mexico's approach ignores the DSB recommendations and rulings, which found the original measure inconsistent with Article 2.1 based only on the eligibility condition regarding whether a dolphin had been killed or seriously injured. Mexico's approach also fails to reflect the content of the 2013 Final Rule, which directly addresses the DSB recommendations and rulings. Of course, Mexico's Article 2.1 claim is "separable" from the 2013 Final Rule – it completely *ignores* it. It is Mexico that has created this situation through the way it has approached its argument in the original and compliance proceedings, and it is Mexico that now asks for an unfair "second chance" to make its case.[24] Mexico's request should be rejected.

Claims under Article 2.1 of the TBT Agreement and the GATT 1994

5. ***To both Parties*:**

a. What factors should the panel take into account in assessing whether the amended tuna measure is "even-handed"? Does the "even-handedness" test require the Panel to engage in a quantitative cost-benefit analysis?

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techniques other than setting on dolphins. We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.").

[22] *See US – Tuna II (Mexico) (Panel)*, para. 7.255 (quoting Mexico's Second Written Submission in Original Proceeding, para. 150); *see also id.*, para. 7.280 (citing Mexico's Response to Original Panel Question No. 145, para. 124).

[23] *See US – Tuna II (Mexico) (Panel)*, paras. 7.373-7.378.

[24] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210.

20. The precise question the Panel should assess is whether Mexico has proven that the regulatory distinction "that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries" is "even-handed" or not.[25] Mexico has failed to do so.

21. As discussed previously, a regulatory distinction will not be found to be even-handed if it disadvantages one group in favor of another without any basis for doing so.[26] This was the analysis in this very dispute. The Appellate Body faulted the original measure for not applying the eligibility condition regarding whether a dolphin was killed or seriously injured to all fisheries, in light of the original panel's findings that the risks to dolphins from other fishing techniques are not "insignificant" and that those risks may "under some circumstances rise to the same level as the risks from setting on dolphins."[27] Moreover, and as the United States has explained in our first submission, the Appellate Body's "even-handedness" analysis in *US – Tuna II (Mexico)* is consistent with the analyses the Appellate Body conducted in *US – COOL*, *US – Clove Cigarettes*, and *US – Upland Cotton (Article 21.5 – Brazil)*, reports which the Appellate Body relied on in developing the even-handedness analysis for purposes of Article 2.1.[28]

22. As the United States has discussed, the two eligibility conditions, which apply to all fisheries, are "even-handed." Indeed, in the original proceeding, the Appellate Body refused to find that the eligibility condition regarding setting on dolphins – which has always applied to all fisheries – was not even-handed.[29]

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[25] *US – Tuna II (Mexico) (AB)*, para. 286; *see also id.*, para. 298 ("In the light of uncontested facts and factual findings made by the Panel, we consider that Mexico has established a *prima facie* case that the US 'dolphin-safe' labelling provisions modify the conditions of competition in the US market to the detriment of Mexican tuna products and are not even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean. We consider further that the United States has not met its burden of rebutting this *prima facie* case.").

[26] *See* U.S. Second Written 21.5 submission, paras. 79-85; U.S. First Written 21.5 Submission, paras. 182-184. *US – Tuna II (Mexico) (AB)*, paras. 289-292, 297 (determining that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the challenged measure prohibited tuna product from being labeled "dolphin safe" if it contained tuna caught inside the ETP where a dolphin was killed or seriously injured, but allowed tuna product to be so labeled if it contained tuna caught outside the ETP where a dolphin was killed or seriously injured).

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

[28] *See* U.S. First Written 21.5 Submission, para. 184.

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

23. As a general matter, Article 2.1 does not call for a panel or the WTO to take the place of a Member and decide what would have been the "best" course of action the Member should have taken. Rather, the question is whether the complainant has proven that any detrimental impact flows from other than a legitimate regulatory distinction such that the challenged technical regulation could be said to be "applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination."[30]

24. The particular set of facts that a Member is required to establish in order to prove that a technical regulation is not even-handed will depend on the particular facts and circumstances. However, in this dispute, Mexico has failed to support its three-pronged attack on the amended measure.

25. In particular, Mexico has failed to prove that setting on dolphins – which is the central issue that binds all three of Mexico's Article 2.1 arguments together – is so similar to other fishing methods (such as purse seine sets on FADs, longlining, or pole and line fishing) that setting on dolphins must be treated in the same manner as these other methods. Indeed, as explained previously, setting on dolphins is inherently dangerous to dolphins, and therefore the amended measure's regulatory distinctions are legitimate. Moreover, Mexico has failed to prove its central factual contention that *all* other methods of fishing "have adverse effects on dolphins that are equal to or greater" than setting on dolphins.[31] In fact, it is well established that the harm (both "observable" and "unobservable," as counsel for Mexico phrased it) caused by setting on dolphins in the ETP is greater than that the harm produced by other fishing methods, both inside and outside the ETP.[32]

26. Finally, the very different historical harms caused by setting on dolphins in the ETP, *vis-à-vis* other fishing methods in the ETP or elsewhere, are relevant, as they are the basis on which the AIDCP parties agreed to impose different record-keeping and verification requirements on their large purse seine vessels in the first place.[33] The fact that chasing and capturing millions of dolphins every year in the ETP is an extremely harmful fishing method for dolphins – even taking account the AIDCP-mandated requirements – simply confirms the strong basis the AIDCP

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[30] *US – Tuna II (Mexico) (AB)*, para. 213 ("Although the sixth recital does not explicitly set out a substantive obligation, we consider it nonetheless sheds light on the meaning and ambit of the 'treatment no less favourable' requirement in Article 2.1, by making clear, in particular, that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.").

[31] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 13, 248, 263, 306; Mexico's Second Written 21.5 Submission, para. 140.

[32] *See* U.S. First Written 21.5 Submission, paras. 75, 79-101, 110-167; U.S. Second Written 21.5 Submission, paras 14-17, 23-27; *see also* Table Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127) (summarizing the evidence on the record regarding "observable" harm on a fishery-by-fishery basis).

[33] *See* U.S. Second Written 21.5 Submission, paras. 106, 126, 210.

parties had for imposing the unique requirements regarding record-keeping/verification and observers on the precise vessels causing this harm.

27. However, this is not to say that all factors are relevant to the even-handedness analysis.[34] For example, the United States does not consider that Mexico must put forward a sound "quantitative cost-benefit analysis" to establish a *prima facie* case that any one of the three regulatory distinctions is not "even-handed." Certainly, the Appellate Body did not find the fact that Mexico had failed to put forward such an analysis to be determinative of whether Mexico had satisfied its *prima facie* case in the original proceeding.

28. Moreover, Mexico is wrong to argue that "whether the discrimination can be reconciled with, or is rationally related to" the relevant policy objective is relevant to the even-handed analysis. Mexico claims that such an inquiry is appropriate "[g]iven the parallel language employed in Article 2.1 and the chapeau to Article XX."[35] But, as the United States has explained, that is surely wrong.[36] The texts of the two provisions are entirely different,[37] and the Appellate Body *reversed* the *EC – Seal Products* panel's analysis under Article XX of the GATT 1994 for considering the two analyses to be the same.[38] Notably, Mexico cannot explain why the Appellate Body failed to conduct such an inquiry *in this very dispute*.

29. The United States respectfully requests the Panel to disregard Mexico's proposed approach to the analysis of "even-handedness," which deviates significantly from the analysis contained in the DSB recommendations and rulings *in this dispute*.

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[34] *See US – Tuna II (Mexico) (AB)*, para. 286 ("In particular, it would appear that in answering the question of whether the measure gives accurate information to consumers, *all* distinctions drawn by the measure are potentially relevant. By contrast, in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries.") (emphasis in original).

[35] Mexico's Second Written 21.5 Submission, para. 132.

[36] U.S. Second Written 21.5 Submission, paras. 83-85.

[37] *EC – Seal Products (AB)*, para. 5.311 ("[T]here are significant differences between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994. First, the legal standards applicable under the two provisions differ. Under Article 2.1 of the TBT Agreement, a panel has to examine whether the detrimental impact that a measure has on imported products stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. 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.").

[38] *EC – Seal Products (AB)*, para. 5.313 ("Given these differences between the inquiries under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, *we find that the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement*, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.") (emphasis added).

b. Are the terms "calibrated" and "even-handed" synonymous?

30. The United States does not consider the two terms to be synonymous.

31. In the original proceeding, the United States used the term "calibrated" as part of our argument as to why the original measure was consistent with Article 2.2. Because the Appellate Body incorporated some of the U.S. arguments concerning the Article 2.2 claim into its Article 2.1 analysis, the Appellate Body incorporated the term "calibrated" into that analysis.

32. In the original proceeding, the United States used the term to mean something akin to the term "narrowly tailored." That is to say, the measure tailored the eligibility requirements for the label to the conditions prevailing in the relevant fishery, based in particular on the fact that there was a great amount of harm to dolphins inside the ETP and substantially less harm outside the ETP. The United States considers this to be a somewhat different concept from "even-handedness," which the United States understands involves an inquiry into whether there is a legitimate basis for regulatory distinctions.[39]

33. In any event, if a panel were to find that a particular regulatory distinction was "even-handed," it would seem difficult to conceive of a situation where that panel would also not consider the regulatory distinction to be "calibrated," as both inquiries focus on the basis for the regulatory distinction, if any.

c. In light of the Appellate Body's rulings in *EC – Seal Products*, what (if any) is the relationship between "even-handedness" in TBT Article 2.1 and "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994?

34. The Appellate Body has explained that the important relationship is between "even-handedness" as used in the Article 2.1 context, on the one hand, and the concept of "arbitrary or unjustifiable discrimination" as referenced *in the sixth preambular recital of the TBT Agreement*, on the other.

35. In *US – Clove Cigarettes*, the Appellate Body noted that the sixth preambular recital's reference to "arbitrary or unjustifiable discrimination" "suggest[s] that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the *TBT Agreement*."[40] As such, "the context and object and purpose of the TBT Agreement weigh

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[39] *See* U.S. Response to Question 5(a).

[40] *US – Clove Cigarettes (AB)*, para. 95; *see also id.*, para. 173 ("We consider that the sixth recital of the preamble of the TBT Agreement provides relevant context regarding 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, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable

in favour of reading the 'treatment no less favourable' requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions."[41] Subsequent statements by the Appellate Body in *US – Tuna II (Mexico)* and *US – COOL* are consistent with this principle.[42]

36. And while the Appellate Body has clarified that the "balance" set out *within* the TBT Agreement "is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX," the Appellate Body has notably refused to find that the analysis under the second step of Article 2.1 merely incorporates the analysis developed under the chapeau of Article XX, as Mexico would have the Panel believe. Indeed, the Appellate Body has suggested just the opposite is the case, *reversing* the *EC – Seal Products* panel's analysis under the chapeau of Article XX of the GATT 1994 for considering the two analyses to be the same.[43] Not surprisingly, Mexico is unable to cite *even one paragraph* of the three TBT disputes for the proposition that the "most important factor" in an even-handedness analysis is "whether the discrimination can be reconciled with, or is rationally related to" the relevant policy objective.[44]

37. In sum, the United States does not consider that the Appellate Body has every considered that the phrase "arbitrary or unjustifiable discrimination" as used in the chapeau of Article XX provides relevant context for the interpretation of Article 2.1, and Mexico errs by entirely relying

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discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the TBT Agreement.").

[41] *US – Clove Cigarettes (AB)*, para. 175; *see also id.*, para. 182 ("Accordingly, where the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported *vis à vis* the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.").

[42] *See, e.g.*, *US – Tuna II (Mexico) (AB)*, para. 213 ("Although the sixth recital does not explicitly set out a substantive obligation, we consider it nonetheless sheds light on the meaning and ambit of the 'treatment no less favourable' requirement in Article 2.1, by making clear, in particular, that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination."); *id.*, para. 219 ("As explained above, we consider that the preamble of the *TBT Agreement* informs the meaning of Article 2.1."); *US – COOL (AB)*, para. 271.

[43] *EC – Seal Products (AB)*, para. 5.313 ("Given these differences between the inquiries under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, *we find that the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement*, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.") (emphasis added).

[44] Mexico's Second Written 21.5 Submission, para. 132.

on Article XX disputes in an attempt to prove the regulatory distinctions contained in the amended measure not to be even-handed.[45]

6. ***To both Parties*: New Zealand at para. 6 of its oral statement posits that "Specifically in this dispute, the even-handedness assessment would involve consideration of the United States' rationale for distinguishing between tuna products containing tuna caught by setting on dolphins in the Eastern Tropical Pacific and tuna harvested by other methods in other areas of the ocean. New Zealand submits that the Panel should consider whether this rationale is consistent with the overall objective of the amended dolphin-safety measure. For instance, does the distinction assist or hinder the dolphin-safety objective? Is eligibility for the label tailored to the different levels of dolphin-safety risks arising from the different fishing methods? In other words, is the rationale for the distinction consistent with the measure's overall objective?" Please comment on this statement.**

38. It is not clear what precise position New Zealand is taking in this excerpted quote, and New Zealand has declined to elaborate in its response to the Panel's question.

39. To the extent New Zealand takes the position that the regulatory distinction at issue must be legitimate, then such an approach would be consistent with the Appellate Body's approach, as the United States has explained.

40. However, to the extent that New Zealand is taking the same position that Mexico has taken – that the Article 2.1 analysis incorporates the Article XX chapeau analysis – such an approach would be in error. As discussed in response to Question 5(c), the United States notes that neither Mexico, nor any of the few third parties that agrees with Mexico, is able to cite *even one paragraph* from any one of the three relevant Appellate Body reports for support of this proposition. Moreover, none of these parties is able to explain how this position is consistent with the Appellate Body's *reversal* of the *EC – Seal Products* panel's GATT Article XX chapeau analysis for considering the two analyses to be the same.[46] Other third parties – such as Japan and the EU – point out flaws in Mexico's approach.

41. For the reasons explained above in response to Question 5(a) and (c), the United States does not consider this to be the appropriate analysis for an Article 2.1 claim. The United States

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[45] *See* U.S. Second Written 21.5 Submission, paras. 83-85.

[46] *EC – Seal Products (AB)*, para. 5.313 ("Given these differences between the inquiries under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, *we find that the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement*, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.") (emphasis added).

further notes that it has fully addressed why the amended measure is applied consistently with the chapeau of Article XX.[47]

7. ***To both Parties*: Mexico has made broad claims of discrimination and argued specific instances of discrimination.**

42. The United States would note that Mexico has limited its Article I:1 and III:4 claims to the argument that the amended measure is GATT-inconsistent because it denies eligibility to the label for tuna product containing tuna caught by setting on dolphins while tuna product containing tuna caught by other fishing methods is potentially eligible for the label.[48] Moreover, in its Article 2.1 claim, where Mexico has argued that record-keeping/verification and observer requirements do prove the amended measure discriminatory, that claim is outside the Panel's terms of reference, as the United States has explained.

a. **Do the parties believe that there is discrimination in the situation reflected in Sections 216.91(a)(1), 216.92(a), and 216.92(b), and as described in Section B(5) of form 370 on the one hand and Section 216.91(a)(2)(iii)(B) on the other hand, i.e. because large purse seine vessels not setting on dolphins in the ETP are required to have observers whereas the large purse seine vessel not setting on dolphins outside the ETP are not subject to such a requirement?**

b. **Do the parties believe that there is discrimination in the situation reflected in Sections 216.91(a)(1), 216.92(a), and 216.92(b) and as described in Section B(5) of form 370 on the one hand and Sections 216.91(a)(4) and 216.91(a)(2)(iii)(B) on the other hand, i.e. because large purse seine vessels not setting on dolphins in the ETP are required to have observers whereas small purse seine vessel inside and outside of the ETP are not subject to such a requirement?**

43. The United States will respond to both subparts of the question together.

44. As a threshold matter, Mexico has not asserted, much less proved, that Mexican large purse seine vessels *do not* set on dolphins in the ETP. As such, the factual situation in Question 7 is not presented in this dispute and would therefore not be relevant to the Panel's examination

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[47] *See* U.S. First Written 21.5 Submission, paras. 330-342; U.S. Second Written 21.5 Submission, paras. 212-218.

[48] *See* U.S. Second Written 21.5 Written Submission, para. 131 (noting that Mexico's Article I:1 claim is so limited, citing Mexico's Second Written 21.5 Submission, para. 203; Mexico's First Written 21.5 Submission, n.313, para. 316), para. 139 (noting that Mexico's Article III:4 claim is so limited, citing Mexico's Second Written 21.5 Submission, paras. 220-221; Mexico's First Written 21.5 Submission, para. 329).

of whether Mexico has established, "based on evidence and legal argument," a *prima facie* case of inconsistency on any one of its affirmative claims of discrimination.[49]

45. It is not precisely clear what the Panel means when it refers to "discrimination" in Question 7. However, Question 7 appears to depend on facts that would undermine the DSB recommendations and rulings, if they were on the record (which they are not). In particular, Question 7 appears to question the analysis contained in the DSB recommendations and rulings as to less favorable treatment.

46. In order to establish a *prima facie* case of less favorable treatment, the complainant must at the very least establish a *prima facie* case that the challenged measure "modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country."[50] To establish this element, Mexico relies entirely on the Appellate Body's detrimental impact determination in paragraphs 233-235 of its report.[51] Yet Mexico's reliance is in error. In making this determination, the Appellate Body affirmed the original panel's finding 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."[52] So the DSB recommendations and rulings were based on the fact that Mexican vessels set on dolphins in the ETP. There was no finding that any Mexican large purse seine vessel in the ETP caught tuna without setting on dolphins. Indeed, Mexico has not asserted that *even one* of its large purse seine vessels operating in the ETP *does not* set on dolphins.[53] Consequently, there is no factual support for a scenario envisioning tuna caught by Mexican large purse seine vessels in the ETP without setting on dolphins.

47. Even aside from the fact that Mexico could not prove that its fleet's composition and fishing methods have changed such that the facts underpinning the Appellate Body's detrimental impact analysis are no longer accurate, Mexico could not prove that the observer requirements of the amended measure result in a detrimental impact. That is to say, the hypothetical situation

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[49] *US – Gambling (AB)*, para. 140 (quoting *US – Wool Shirts and Blouses (AB)*, at 16).

[50] *US – Tuna II (Mexico) (AB)*, para. 215; *see also EC – Seal Products (AB)*, paras. 5.93-5.95, 5.108-5.109.

[51] *See, e.g.*, Mexico's Second Written 21.5 Submission, para. 135 (TBT Article 2.1); *id.*, para. 203 (GATT Article I:1); *id.*, paras. 220-221 (GATT Article III:4).

[52] *US – Tuna II (Mexico) (AB)*, para. 234.

[53] *US – Tuna II (Mexico) (AB)*, para. 234 (quoting *US – Tuna II (Mexico) (Panel)*, paras. 7.310, 7.314, 7.317); *see also US – Tuna II (Mexico) (AB)*, para. 191 ("Rather, Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship *with the products imported from the complaining Member* to be considered like products within the meaning of that provision.") (emphasis added); *id.* para. 190 ("Therefore, for the purposes of the less favourable treatment analysis, treatment accorded to products *imported from the complaining Member* is to be compared with that accorded to like domestic products and like products of any other origin.") (emphasis added).

presented by the question presumes that Mexico would need to prove that the observer requirements modify the conditions of competition in the U.S. market to the detriment of the group of Mexican tuna products containing tuna caught by large purse seine vessels in the ETP *vis-à-vis* the group of like tuna products produced by other Members, inside or outside the ETP. But Mexico submits *zero* evidence that either the *presence* of an AIDCP-approved observer on board its large purse seine vessels, or the *provision* to the United States of the already-created AIDCP-mandated observer certificate (or proof thereof)[54] *has any impact at all* on Mexican tuna product sold in the United States produced by the *actual* Mexican large purse seine fleet that sets on dolphins, much less the *hypothetical* Mexican large purse seine fleet that does not set on dolphins.[55] As such, the United States considers it highly unlikely that Mexico could ever prove such a detrimental impact exists.

48. Furthermore, Mexico has also not proven that any such detrimental impact would "reflect discrimination" in that the regulatory distinctions involving the observer requirements are not legitimate for purposes of the Article 2.1 claim. And, of course, there *is* a legitimate basis for why the amended measure requires the provision of the already created AIDCP-mandated observer certificate (or proof thereof) for tuna harvested by large purse seine vessels operating in the ETP but not for tuna harvested by small purse seine vessels in the ETP and other vessels, including all other purse seine vessels outside the ETP.

49. Whether a particular large purse seine vessel operating in the ETP actually sets on dolphins during a particular trip or not, that vessel is *capable and permitted* to engage in the multi-hour chase and the capturing of hundreds of dolphins in a single set that is typical of an ETP dolphin set.[56] That is to say, it is the large purse seine vessels operating in the ETP that are powerful enough to take advantage of the unique association of yellowfin tuna and dolphins in the ETP on any particular trip, and such vessels that are, in fact, permitted under the AIDCP (and U.S. law for U.S.-flagged vessels) to take advantage of that unique association to harvest tuna.[57] The same cannot be said of small purse seine vessels operating in the ETP, which are not permitted to chase and capture dolphins.[58] Similarly, purse seine vessels (of any size) operating

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[54] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128) (showing what the observer certification condition entails for large purse seine vessels in the ETP).

[55] *See also* U.S. Opening 21.5 Statement, paras. 23-24.

[56] *See* U.S. First Written 21.5 Submission, paras. 73, 81-83.

[57] *Taking and Importing of Marine Mammals, "Dolphin Safe" Tuna Labeling*, 56 Fed. Reg. 47,418 (Sept. 19, 1991) (Exh. US-129) ("1991 Final Rule") ("[NOAA] has determined that purse seine vessels of 400 short tons (362.5 metric tons) carrying capacity or greater are, for purposes of the MMPA and its implementing regulations, the only type of purse seine vessels that are capable of deploying their nets on or to encircles dolphins."); *see also International Fisheries; Pacific Tuna Fisheries; Revisions to Regulations for Vessels Authorized to Fish for Tuna and Tuna-like Species in the Eastern Tropical Pacific Ocean and to Requirements for the Submission of Fisheries Certificates of Origin*, 75 Fed. Reg. 1607, 1609 (Jan. 13, 2009) ("2009 Final Rule") (Exh. US-130).

[58] The AIDCP prohibits small purse seine vessels from setting on dolphins at all, obviating the need for the 100 percent observer coverage in the ETP. AIDCP, Annex VIII(6) (Exh. MEX-30). Indeed, there is no evidence on

elsewhere are not capable of exploiting the tuna-dolphin association, as the association does not exist outside a particular area within the ETP[59] and, in any event, are, in many cases, not permitted to intentionally set on even a single dolphin, much less the 300-400 dolphins that are set upon in a typical ETP dolphin set.[60]

50. Thus, the requirement to provide the already created AIDCP-mandated observer certificate (or proof thereof) is inextricably linked to the fact that large purse seine vessels are capable of – and permitted to – intentionally chase and capture dolphins in pursuit of tuna. Of course, what these large ETP purse seine vessels are doing is entirely unique in the world. There is *zero* evidence that other purse seine vessels *chase* dolphins at all.[61] Indeed, the evidence indicates that it only in the ETP that the "tuna-dolphin bond is so strong that the tuna stay with the dolphins" during the chase and encirclement process such that to capture dolphins is to capture tuna.[62]

51. This unique bond, and the ability of large purse seine vessels to take advantage of it, means that the fishing practice of these large purse seine vessels is dangerous to dolphins – it is simply undeniable that large ETP purse seine vessels chase and capture *millions* of dolphins, killing *thousands*.[63] Indeed, a subset of the IATTC membership agreed to the different requirements for large purse seine vessels operating in the ETP (including observer requirements) in reaction to the *undisputed* fact that *this* fishery has caused more dolphin deaths than any other fishery in the world.[64]

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the record that small purse seine vessels are even capable of doing so. *See* 1991 Final Rule, 56 Fed. Reg. 47,418 (Exh. US-129).

[59] *See* IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-123); *see also* U.S. Response to Question 20.

[60] *See* WCPFC Resolution 2011-03 (Exh. US-11) (prohibiting setting on cetaceans in the western and central Pacific Ocean); IOTC Resolution 13/04 (Exh. US-12) (prohibiting the setting on cetaceans in the Indian Ocean); 16 U.S.C. § 1372(a)(1)-(2) (Exh. US-37) (prohibiting U.S. vessels from setting on all marine mammals anywhere in the world, subject to limited exceptions).

[61] *See* Table Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127) (noting that in the ETP, large purse seine vessels have chased 31,300,659 dolphins (capturing 18,581,597) in the years 2009-2013, while there is *no evidence* of any such chases outside the ETP).

[62] Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-29). Indeed, the bond between dolphins and tuna is so strong in the ETP that even when given the choice of staying with other tuna, some tuna follow dolphins. Michael L. Gosliner, "The Tuna Dolphin Controversy," in Twiss & Reeves (eds.) *Conservation and Management of Marine Mammals* 120, 121 (1999) (Exh. US-34).

[63] U.S. First Written 21.5 Submission, paras. 89-92, 97, 166; U.S. Second Written 21.5 Submission, paras. 12, 21, 93, 106, 126; *see also* Exh. US-127 (summarizing evidence on the record).

[64] U.S Second Written 21.5 Submission, para. 16 (citing Gerrodette, "The Tuna Dolphin Issue," at 1192 (Exh. US-29)).

52. And while millions upon millions of dolphins are no longer being killed in the ETP by large purse seine vessels, the level of harm (both "observable" and "unobservable") to dolphins caused by large purse seine vessels in the ETP is without equal, either inside or outside the ETP, *even taking account the unique AIDCP requirements in place*.[65] Indeed, observed *interactions*, which covers many more situations than an intentional set, occur *in less than one percent* of all observed sets in the western and central Pacific Ocean, while intentional sets in the ETP by large purse seine vessels (which have 100 percent interaction) constitute between 40-50 percent of sets by large purse seine vessels.[66] And in the ETP, each intentional set on dolphins involves the capture, on average of 300-400 dolphins, while accidental sets, both by small purse seine vessels inside the ETP and all purse seine sets outside the ETP, will likely only capture a few individual dolphins in the rare circumstance when dolphins are captured.[67]

53. The basis for the provision of an observer certificate (or proof thereof) for tuna harvested by large purse seine vessel in the ETP is clear – indeed, the United States does not understand Mexico to even contest this point. But what Mexico cannot explain is what the basis is to require an observer certificate in other fisheries (both inside and outside the ETP) in light of the fact that the level of harm to dolphins is so different in these fisheries from the harm caused by large purse seine vessels in the ETP.

54. Of course, the Appellate Body acknowledged that observer requirements differ between the ETP and outside the ETP, and recognized that requiring observers "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury."[68] But that is clearly not the case for purse seine tuna fishing by not setting on dolphins, which cause a mere fraction of the mortality that setting on dolphins does in the ETP. Indeed, large purse seine vessels in the ETP cause, on average, 2.7 dolphin deaths per year when not setting on dolphins, and 1,124.3 deaths per year when setting on dolphins.[69]

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[65] See U.S. First Written 21.5 Submission, paras. 89-91, 110-149.

[66] *See* U.S. First Written 21.5 Submission, para. 92 (citing 2009 IATTC Annual Report, at 54, Table 5 (Exh. US-35); IATTC, EPO Dataset 2009-2013 (Exh. US-26)).

[67] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26) (showing that, on average, 3,716,319 dolphins were captured each year in 2009-2013 in an average of 10,423 dolphin sets per year, making for an average of 357 dolphins encircled per set); WCPFC, *Summary Information on Whale Shark and Cetacean Interactions in the Tropical Purse Seine Fishery*, at 6, Paper prepared by SPC-OFP, 8th Reg. Sess., Tumon, Guam, Mar. 26-30, 2012 (Jan. 18, 2012) (Exh. US-58) ("WCPFC Cetacean Interactions Paper") (showing that, in the WCPFC purse seine fishery in 2010, there were 37 sets with a dolphin encounter and a total of 144 dolphins encountered, making for an average of 3.9 dolphins encountered per dolphin interaction).

[68] *US – Tuna II (Mexico) (AB)*, n.612.

[69] *See* U.S. Response to Question 19, Table 1 (citing IATTC, EPO Dataset 2009-2013 (Exh. US-26); IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2008* (2010) (Exh. US-43) ("2008 IATTC Annual Report")).

55. The data from other purse seine fisheries is consistent with the ETP data. In the western and central Pacific Ocean tuna purse seine fishery, dolphin mortality in 2010 was an estimated 2.64 dolphins per 1,000 sets compared to 100.4 dolphins per 1,000 dolphin sets in the ETP in that same year.[70] In the Indian Ocean, a study covering European purse seine vessels found that marine mammal interactions occurred in less than one percent of the observed 3,052 sets, and in all instances, the animal was released alive.[71] None of the sets were intentional dolphin sets – indeed, no instance of dolphin interaction was specifically mentioned, and most of the observed interactions with marine mammals likely involved whales.[72] A study of the tropical Atlantic purse seine fishery off the African coast from 2003-2007, found that, in the 598 observed sets of European purse seine vessels, only two "catch events" of marine mammals were reported: both involved baleen whales and both were released alive.[73] An update to that study covering 2008-2009 found that, of the observed 791 sets, *no* interactions with marine mammal, including dolphins, were recorded.[74]

56. This is all to say that the evidence confirms that chasing and capturing huge schools of dolphins (as occurs exclusively in the ETP) is much more dangerous to dolphins than *not* setting on dolphins (either in the ETP or elsewhere). As such, it is legitimate for the United States to require provision of the already created AIDCP-mandated observer certificate (or proof thereof) for tuna product to be marketed as "dolphin safe" where that product contains tuna harvested by

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[70] *See* WCPFC Cetacean Interactions Paper, at 4-6 (Exh. US-58); IATTC, EPO Dataset 2009-2013 (Exh. US-26); *see also* U.S. Second Written 21.5 Submission, para. 23 (citing both). The data from non-purse seine fisheries is similar. In the Hawaii longline fishery, which is about half as large as the ETP purse seine fishery in terms of registered vessels, estimated average annual dolphin mortality from 2006-2010 was 40.4 dolphins per year, 3.8 percent of average annual dolphin mortality in the ETP during the same period (1,060.4 dolphins) and 0.8 percent of what was allowed under the AIDCP (5,000 dolphins). U.S. First Written 21.5 Submission, para. 145 (citing "U.S. National Bycatch Report First Edition Update," Table 8.3 (2012) (Exh. US-67); "U.S. National Bycatch Report First Edition Update," Table 8.4 (2012) (Exh. US-68)); *see also* U.S. Second Written 21.5 Submission, para. 23.

[71] *See* Monin J. Amande *et al.*, "Precision in Bycatch Estimates: The Case of Tuna Purse Seine Fisheries in the Indian Ocean," *ICES J. Mar. Sci.*, at 6 (2012) (Exh. US-131). The study covered tuna purse seiners during 115 trips (4,020 sea days and 3,052 sets) between 2003 and 2009. *Id.* at 2. The covered sets were about half sets on free-swimming tuna schools and half sets on floating objects. *Id.* at 2-3.

[72] *See* Amande *et al.* 2012, at 2 (Exh. US-131). An earlier study of tuna seiners in the Western Indian Ocean (WIO) supports the findings of this study, concluding that: "In offshore regions of the WIO tuna-dolphin associations are rare, purse seining for them is not practiced, and there is no dolphin bycatch problem." *See* Evgeny V. Romanov, "Bycatch in the Tuna Purse Seine Fisheries of the Western Indian Ocean," 100 *Fisheries Bulletin* 90, at 91 (2002) (Exh. US-132).

[73] Monin J. Amande *et al.*, "Bycatch of the European Purse Seine Tuna Fishery in the Atlantic Ocean for the 2003-2007 Period," 23 *Aquat. Living Resour.* 353, 358 (2010) (Exh. US-133).

[74] Monin J. Amande *et al.*, "Bycatch and Discards of the European Purse Seine Tuna Fishery in the Atlantic Ocean: Estimation and Characteristics for 2008 and 2009," 66 *ICCAT Collect. Vol. Sci. Papers* 2113, 2114, 2117-2118 (2011) (Exh. US-134). The observed sets were two thirds unassociated sets and one third floating object sets. *Id.* at 2116.

vessels *that are both capable and permitted* to chase and capture huge schools of dolphins to harvest tuna while not requiring the provision of an observer certificate for other vessels that fish for tuna in an entirely different manner.

8. *To both Parties*: Under Article XX(b), what must be "necessary to protect human, animal or plant life or health": the challenged measure considered in its entirety (i.e. as a whole), or only the discrimination or detrimental impact giving rise to the relevant GATT violation? Similarly, under Article XX(g), is it the measure as a whole or only the discrimination or detrimental impact that must "relate to the conservation of exhaustible natural resources"?

57. The text of Article XX explicitly refers to "measures" that are "necessary" or "relating to" the objective covered by an Article XX subparagraph and not to any "inconsistency" with the GATT 1994 that the measure was found to cause.[75]

58. In *US – Gasoline*, the Appellate Body clarified that "the 'measures' to be analyzed under Article XX are the same provisions infringing Article III:4."[76] Accordingly, "provisions not themselves found inconsistent with Article III:4" did *not* form part of the "measure" that had to be justified under Article XX.[77] Similarly, the Appellate Body in *EC – Seal Products*, found that "the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994."[78]

59. Here, therefore, what must be "necessary to protect human, animal or plant life or health," under Article XX(b), or must "relate to the conservation of exhaustible natural resources," under Article XX(g), is the aspect of the challenged measure that is found to give rise to any inconsistency with Articles I:1 or III:4 of the GATT 1994.

9. *To Mexico*: Do Mexico's Article I and III GATT 1994 claims relate to both the disqualification of tuna caught by setting on dolphins from accessing the dolphin

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[75] *See, e.g., EC – Seal Products (AB)*, para. 5.185 ("We begin by noting that the general exceptions of Article XX apply to 'measures' that are to be analysed under the subparagraphs and chapeau, not to any inconsistency with the GATT 1994 that might arise from such measures. In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994.") (citing *US – Gasoline (AB)*, pp. 13-14).

[76] *US – Gasoline (AB)*, pp. 13-14.

[77] *US – Gasoline (AB)*, p. 14. Applying this principle to the facts of the dispute, the Appellate Body found that as no part of the Gasoline Rule "other than the baseline establishment rules" was found to be inconsistent with Article III:4, and, "accordingly, there was no need at all to examine whether the whole of the Gasoline Rule or any of its other rules, was saved or justified by Article XX(g)." *Id.*, p. 13.

[78] *EC – Seal Products*, para. 5.185. In that dispute, the permissive and prohibitive aspects of the EU Seal Regime had found to be inconsistent with the GATT 1994 and, consequently, these aspects were analyzed under Article XX(a). *See EC – Seal Products*, para. 5.193.

safe label and the different tracking and observer requirements imposed in the ETP, or only the former?

10. ***To Mexico*: Is it Mexico's position that the different tracking, verification, and observer requirements imposed on tuna caught by large purse seine vessels in the ETP are "conditions" within the meaning of Article I:1 of the GATT 1994?**

11. ***To both Parties*: In assessing the risks posed to dolphins outside of the ETP by fishing methods other than setting on dolphins, should the concerned party simply compare the raw number of dolphins killed in different fisheries, or should it also take into account the number of dolphins killed as a percentage of the known species population in the particular fishery?**

60. As the original panel found, and the Appellate Body affirmed, the dolphin protection objective of the U.S. dolphin safe labeling measure is broad – 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."[79] As such, while the United States considers dolphin mortality to be part of the analysis, it is not the whole analysis. Serious injury and "unobservable" harms, such as cow-calf separation, muscular damage, and immune and reproductive systems failures, which can occur in the absence of direct mortalities, are an important part of the analysis.[80]

61. As to the dolphin mortality part of the analysis, it is most appropriate to make the assessment in terms of the raw dolphin mortality figures presented in the context of the size of fishery (in terms of vessels) or on a per set basis. The United States has endeavored to present the available current, fishery-by-fishery data in this manner. By doing so, the United States has presented meaningful comparisons of the harm caused by large purse seine vessels setting on dolphins in the ETP versus the harms caused by these same vessels not setting on dolphins, as well the harms caused by other vessels (purse seine, longline, etc.) not setting on dolphins in other fisheries.[81]

62. It is not possible to create meaningful comparisons by taking into account the number of dolphins killed as a percentage of the known species population in the particular fishery as the data on so many dolphin populations is simply not known. As the Kobe II Report, on which Mexico heavily relies, notes, tuna regional fishery management organizations (RFMOs) "lack marine mammal population and bycatch data and, as a result, have not determined whether there

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[79] *US – Tuna II (Mexico) (AB)*, para. 242 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.401).

[80] *US – Tuna II (Mexico) (Panel)*, para. 7.486 (noting that the "adverse effects" targeted by the U.S. measure relate to the "observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations").

[81] *See* U.S. First Written 21.5 Submission, paras. 91-92, 132-133, 144-145; U.S. Second Written 21.5 Submission, paras. 23, 39; U.S. Response to Questions 6, 19, and 22.

is a need to adopt bycatch reduction measures for these species."[82] The one exception is the IATTC, but even there, those dolphin population estimates "are largely limited to species that frequently associate with tunas and have historically been set on by tuna purse-seine vessels."[83]

12. *To both Parties*: What is the relevance, if any, of evidence showing dolphin mortality in non-tuna fisheries (e.g. swordfish fisheries)? How does this compare to dolphin mortality in tuna fisheries?

63. Mexico challenged the U.S. requirements regarding the eligibility of tuna product for the "dolphin safe" label. As such, evidence concerning dolphin mortality, serious injury, or unobserved harms in the harvest of any fish other than tuna, including swordfish, is *not* relevant to this dispute. Similarly, evidence as to the harms caused by fishing to marine mammals other than dolphins, or to other species caught as bycatch, such as whale sharks or birds, is not relevant to this dispute.[84]

13. *To both Parties*: The Panel notes that there are organizations (e.g. the Indian Ocean Tuna Commission (IOTC) and the Western and Central Pacific Fisheries Commission (WCPFC)) whose observer programs require a report on by-catch, which could therefore provide records of dolphin mortality.

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[82] *Kobe II Bycatch Workshop Background Paper: Marine Mammals*, sec. 1 (2010) (Exh. MEX-39) ("Kobe II Report") ("One notable exception is the work of the IATTC in conjunction with the AIDCP. The IATTC and AIDCP have extensive information on marine mammal populations, distributions and bycatch rates in IATTC purse seine fisheries and have adopted effective measures for reducing dolphin bycatch. In contrast, the remaining tuna RFMOs lack marine mammal population and bycatch data and, as a result, have not determined whether there is a need to adopt bycatch reduction measures for these species."); *id.*, sec. 1 ("With the exception of the EPO, accurate abundance and bycatch estimates for marine mammals are lacking in areas where marine mammal distribution overlaps tuna fisheries, making quantitative analysis of bycatch extremely difficult.").

[83] Kobe II Report, sec. 2.2 (Exh. MEX-39) ("The IATTC has access to the most comprehensive abundance estimates for offshore dolphin stocks, though those estimates are largely limited to species that frequently associate with tunas and have historically been set on by tuna purse-seine vessels."); *id.*, sec. 2.4 ("Several RFMOs employ observers to record bycatch, but overall observer effort across all tuna fisheries is low relative to the total fishing effort in most RFMOs. In the case of some longline fisheries, it is lacking altogether. As a result, of the five tuna RFMOs, only IATTC has developed and considered marine mammal bycatch estimates and, even then, only for a few species of offshore dolphins in the EPO.").

[84] Even if such comparisons were relevant for this dispute, the United States would note that it is not always scientifically valid to generalize bycatch information between fisheries with different target species. Even where these different fisheries use the same gear type, such as longline, there are typically different configurations, spatial distributions, and other variables that not only influence the target species caught, but also the bycatch. There are also many other factors that impact the amount of bycatch produced in a particular fishery, not the least of which is the density of the species that is being caught as bycatch.

a. Please comment on whether information from these organizations should be taken into account for the purpose of granting tuna catch access to the dolphin safe label?

b. Could the United States, if possible, provide the Panel with a template of an observer's report under the WCPFC program?

64. As is the case with other RFMOs, the IOTC and the WCPFC do not operate observer programs for the entirety of their respective convention areas. Rather, members operate individual observer programs that cover certain vessels (*e.g.*, shallow-set longline, deep-set longline, or purse seine vessels of particular nationalities) operating in a particular region of the convention area (*e.g.*, the eastern tropical Atlantic). The structure of these programs differ markedly from the AIDCP program, as they were established for different purposes: the IOTC and WCPFC programs were created to collect data on catch of target species and related scientific information,[85] while the AIDCP program was established to address unprecedented dolphin mortality.[86]

65. Furthermore, the individual regional observer programs in the Indian Ocean and the western and central Pacific Ocean can vary widely from one another (both in terms of coverage and substantive requirements), although they must satisfy certain minimum standards set forth by the applicable RFMO. In light of this diversity, the United States does not understand that there is one observer form that must be used either in an IOTC or a WCPFC regional observer program. (Indeed, the WCPFC does not appear even to publish a template for regional observer programs.) The United States understands that 12 different members of the IOTC have provided lists of accredited national observers, and that 24 members of the WCPFC operate regional observer programs in the convention area.[87]

66. Of course, the fact that regional observer programs operating in any particular ocean area differ substantially from the AIDCP observer program is *uncontested* in this proceeding. For example, Mexico has argued that the dolphin interaction and mortality data produced by the

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[85] *See, e.g.*, IOTC, Resolution 11/04 on a Regional Observer Scheme, para. 1 (2011) (Exh. US-135) (stating: "The objective of the IOTC observer scheme shall be to collect *verified catch data* and *other scientific data related to the fisheries for tuna and tuna-like species* in the IOTC area of competence") (emphasis added); WCPFC, CMM 2007-01, Conservation and Management Measure for the Regional Observer Programme, at para. 6 (Dec. 2007) (Exh. US-136) (stating: "The objectives of the Commission ROP shall be to collect *verified catch data*, other scientific data, and additional information related to the fishery . . . and to monitor the implementation of the conservation and management measures adopted by the Commission") (emphasis added).

[86] *See* La Jolla Agreement (1992) (Exh. US-40); AIDCP, art. II (Exh. MEX-30).

[87] IOTC members that have provided a list of accredited observers to the IOTC include: Australia, China, Comoros, the EU, Japan, Kenya, Korea, Madagascar, the Maldives, Mozambique, and the Seychelles. WCPFC members that have regional observer programs for the WCPFC include: Australia, China, Chinese Taipei, Cook Islands, Fiji, Japan, Kiribati, Korea, Marshall Islands, New Zealand, Palau, Philippines, Papua New Guinea, Solomon Islands, Tonga, and the United States.

regional observer programs in the western and central Pacific Ocean cannot be used to compare dolphin harms between that ocean and the ETP in light of the significant differences in scope and coverage between those regional observer programs and the AIDCP program.[88] While the United States disagrees with Mexico's conclusion in this regard, the United States considers Mexico's characterization of those regional observer statements as differing substantially from the AIDCP observer statements in their structure and purpose to be correct.

67. The United States discusses the observer programs operating in the Indian Ocean, the western and central Pacific Ocean, and the eastern tropical Pacific Ocean below.

Indian Ocean

68. The United States is not a member of the IOTC, and does not have a detailed knowledge of any particular regional observer program operating in the Indian Ocean.

69. However, the United States understands that regional observer programs in the Indian Ocean are required to have five percent coverage for all vessels over 24 meters in length.[89] Key objectives of these regional observer programs include the collection of verified catch data,[90] and the monitoring of transshipments.[91] There appears to be no explicit requirement for regional

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[88] *See* Mexico's Oral 21.5 Statement, para. 32 ("In its Second Written Submission, the United States claims that dolphin mortalities in the Western and Central Pacific are lower than in the ETP. But the report on which the United States relies presents data on only a fraction of the tuna fishing in that ocean region; it includes the area only within 20 degrees North and 20 degrees South. The observer coverage target for vessels north of 20 degrees is only five percent. The report also states that the domestic fisheries of Indonesia and the Philippines are excluded. Moreover, there is a long lag time in the reporting of accurate regional observer program data to the WCPFC. Accordingly, the United States cannot establish that dolphin mortalities in the Western and Central Pacific are lower than in the ETP.") (citing Exhs. US-58, MEX-120, MEX-121).

[89] IOTC Res. 11/04 on a Regional Observer Scheme, para. 2 (Exh. US-135) ("In order to improve the collection of scientific data, at least 5 % of the number of operations/sets for each gear type by the fleet of each CPC while fishing in the IOTC area of competence of 24 meters overall length and over, and under 24 meters if they fish outside their Exclusive Economic Zone (EEZ) shall be covered by this observer scheme. For vessels under 24 meters if they fish outside their EEZ, the above mentioned coverage should be achieved progressively by January 2013.").

[90] IOTC Res. 11/04 on a Regional Observer Scheme, para. 10 (Exh. US-135) ("Observers shall: a) Record and report fishing activities, verify positions of the vessel; b) Observe and estimate catches as far as possible with a view to identifying catch composition and monitoring discards, by-catches and size frequency; c) Record the gear type, mesh size and attachments employed by the master; d) Collect information to enable the cross-checking of entries made to the logbooks (species composition and quantities, live and processed weight and location, where available); and e) Carry out such scientific work (for example, collecting samples), as requested by the IOTC Scientific Committee.").

[91] *See* IOTC, *Summary of Regional Observer Programme During 2012*, at 3 (Mar. 2013) (Exh. US-137); IOTC, Resolution 12/05 Establishing a Programme for Transhipment by Large-Scale Fishing Vessels, para. 3 (2012) (Exh. US-138) (establishing a program to monitor transshipment at sea for those "large scale tuna longline fishing vessels" that are authorized to offload tuna and tuna-like species to carrier vessels at sea).

observers to record and report bycatch data, including interactions with dolphins. Specific data collection requirements and reporting forms for domestic observer programs are at the discretion of the IOTC member operating the regional observer program. As contemplated by the IOTC, observer statements do not appear to move with the tuna, but are retained by the observer program and provided by that observer program to the vessel flag state and IOTC after a significant delay.[92]

70. As to the IOTC document that the Panel cites, it is not clear whether that document is being used as a template in any of the regional observer programs. The United States would note that the document does not appear to require the type of information required to certify as to the dolphin safe status of the tuna under the amended measure. For example, the IOTC document appears to be structured so that the observer records the "marine mammals" caught by year and month, rather than on a per gear deployment basis. The IOTC document also does not appear to require a certification as to serious injury, only requiring marine mammals be recorded as either "dead" or "released alive." Finally, the document appears to indicate that the IOTC does not anticipate that regional observers are trained to distinguish between an incidental and intentional sets on marine mammals.

Western and Central Pacific Ocean

71. The WCPFC requires 100 percent observer coverage for purse seine vessels operating between 20°N latitude and 20°S latitude, and five percent coverage for longline vessels.[93] The United States understands that the difference in coverages relates to the fact that certain conservation and management measures that require observers to determine compliance are specific to purse seine vessels (such as the seasonal ban on fishing on FADs and the catch retention requirement), as well as to the fact that the burden and costs of an observer can differ between purse seine and longline vessels (the larger purse seine vessels can more easily accommodate an extra person, and purse seine trips are generally shorter than longline trips).

72. The functions of observers in these regional programs include collecting catch data and other scientific data, monitoring the implementation of the conservation and management measures adopted by the WCPFC, and providing any additional information related to the fishery

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[92] IOTC, Res. 11/04 on a Regional Observer Scheme, para. 11 (Exh. US-135) ("The observer shall, within 30 days of completion of each trip, provide a report to the [Contracting Parties and Cooperating Non-Contracting Parties (CPCs)] of the vessel. The CPCs shall send within 150 days at the latest each report, as far as continuous flow of report from observer placed on the longline fleet is ensured, which is recommended to be provided with 1 x 1 format to the IOTC Executive Secretary, who shall make the report available to the IOTC Scientific Committee upon request. In a case where the vessel is fishing in the EEZ of a coastal State, the report shall equally be submitted to that coastal State.").

[93] *See* WCPFC, CMM 2008-01, Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean, para. 28, (Dec. 2008) (Exh. US-139).

that may be approved by the WCPFC.[94] As is the case for the IOTC regional observer programs, there appears to be a significant lag time in the reporting of regional observer data to the RFMO.[95]

73. As to marine mammals generally, and to dolphins in particular, the training of the observers and the specificity (and quality) of the data collected will differ from regional program to regional program. As discussed in response to Question 28, NOAA has determined that the three regional observer programs it operates in the western and central Pacific Ocean do meet the applicable criteria regarding training, willingness to make certifications for purposes of the amended measure, etc., such that it was appropriate to determine that these three regional observer programs are "qualified and authorized" to make certifications for purposes of the amended measure.[96]

Eastern Tropical Pacific Ocean

IATTC

74. Like the IOTC and WCPFC, the IATTC also depends on regional observer programs administered by members of the RFMO for monitoring of fishing in the ETP. Similar to the IOTC and WCPFC, the IATTC requires five percent observer coverage by effort on all longline vessels greater than 20 meters in length.[97] The "primary role" of the observers is to "record any available biological information, the catches of targeted fish species, species composition and any interactions with non-target species such as sea turtles, seabirds and sharks."[98] The IATTC longline observer form is tailored to these fishery-specific concerns, and provide space for detailed information regarding bycatch of sea turtles (hawksbill, loggerhead, and leatherback only), sea birds, and sharks.[99]

AIDCP

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[94] *See* WCPFC, CMM 2007-01 for the Regional Observer Program, at para. 6 (Exh. US-136).

[95] *See* Mexico's Oral 21.5 Statement, para. 32 (quoting WPCFC, *Performance Assessment of RFMO Bycatch Governance: Criteria Suite Design and Results for Assessment of the WCPFC*, at 38 (Mar. 2012) (Exh. MEX-121) as stating, "[f]or purse seine trips observed by a regional observer in 2010, SPC has yet to receive 33% (581 of a total of 1751 observed trips) of data from observed trips ….").

[96] *See* Qualified and Authorized Notice, 79 Fed. Reg., at 40,719 (Exh. US-113) (listing criteria). The three western and central Pacific Ocean U.S. fisheries are: the American Samoa Pelagic Longline Fishery; the Hawaii Deep-set Longline Fishery; and the Hawaii Shallow-set Longline Fishery. As discussed previously, observer coverage in these fisheries averages approximately 20 percent.

[97] IATTC, Res. C-11-08, Resolution on Scientific Observers for Longline Vessels, at para. 1 (July 2011) (Exh. US-140).

[98] IATTC, Res. C-11-08, at para. 4 (Exh. US-140).

[99] IATTC, *Longline Observer Form and Field Manual*, at 3-5 (July 2014) (Exh. US-141).

75. In contrast to the IOTC, WCPFC, and IATTC, the central objective of the AIDCP is the protection of dolphins in the ETP purse seine fishery.[100] The observer program is likewise unique – it requires 100 percent coverage on those vessels that are capable and permitted to chase and capture dolphins. The *focus* of these observers is *on the dolphins* – in particular, the harm that these vessels are causing those dolphins that are being chased and captured.[101] Again, it is *uncontested* that other observer programs differ substantially from the AIDCP program.[102] The Kobe II Report, on which Mexico so heavily relies, confirms the difference:

> At present, most observer programs implemented by tuna RFMOs or their members are not comparable to one another nor sufficiently representative to estimate marine mammal bycatch rates throughout the relevant RFMO convention area. Perhaps more importantly, such programs are insufficient to inform our understanding of the nature of interactions in order to develop effective mitigation measures.[103]

76. And, again, the fact that the AIDCP observer program is different should come as no surprise. While *marine mammal* harm is *a* concern in many fisheries, including the tuna fisheries governed by the IOTC, WCPFC, and IATTC, *dolphin* harm is the *central* concern of the AIDCP observer program. For it is only in the ETP that tuna vessels are capable and permitted to chase and capture large schools of dolphins. *Millions* of ETP dolphins are chased and *thousands* die. No other similar fishery exists, and, not surprisingly, no similar observer program has been developed.

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[100] AIDCP, art. II (Exh. MEX-30).

[101] Kobe II Report, sec. 3.1 (Exh. MEX-39) ("[T]he IATTC and the AIDCP have implemented the most well-known and effective management measure for reducing marine mammal bycatch in EPO purse seine fisheries. For example, they established clear limits on dolphin mortality for individual vessels and the fishery as a whole. Compliance with these targets and a means to assess progress toward meeting these performance standards was possible because of both the high level (100 percent) of observer coverage in the EPO purse-seine fishery and the oversight structures adopted under the IDCP.").

[102] *See, e.g.*, Mexico's Opening 21.5 Statement, para. 32; Mexico's First Written 21.5 Submission, paras. 76-79.

[103] Kobe II Report, sec. 3.3 (Exh. MEX-39). Indeed, as to data collection, even the Kobe II Report states that the data collection for the AIDCP is incomplete as the program is only focused on those offshore dolphins that associate with yellowfin (and that are subject to chase and capture). *Id.*, sec 2.2 ("The IATTC has access to the most comprehensive abundance estimates for offshore dolphin stocks, though those estimates are largely limited to species that frequently associate with tunas and have historically been set on by tuna purse-seine vessels."); *id.* sec. 2.4 ("Several RFMOs employ observers to record bycatch, but overall observer effort across all tuna fisheries is low relative to the total fishing effort in most RFMOs. In the case of some longline fisheries, it is lacking altogether. As a result, of the five tuna RFMOs, only IATTC has developed and considered marine mammal bycatch estimates and, even then, only for a few species of offshore dolphins in the EPO.").

77. Simply put, nothing in the covered agreements requires the United States to treat different observer programs operating anywhere in the world as if they are all equal when the evidence indicates that they are not (a point that Mexico itself makes repeatedly).[104]

14. *To both Parties*: Mexico argues that dolphin mortality in the ETP has significantly decreased between 2011 and 2012. This decrease could be a consequence of the AIDCP requirements, including the fact that the treaty regime prohibits the importation of tuna that is not "dolphin safe" within the meaning of the treaty (as distinct from the meaning of "dolphin safe" under the US amended tuna measure). Do the parties agree with this? To what extent is the reduced dolphin mortality a consequence of new, more effective dolphin protection methods developed since the original proceedings?

78. AIDCP requirements regarding record-keeping/verification and observers (as well as the overall DML) have not changed since 1999.[105] As such, the decrease in mortality from 986 dolphins in 2011 to 870 dolphins in 2012 cannot be explained by any change in the AIDCP requirements.[106]

79. Instead, much, if not all, of this change in mortality can be explained by the fact that there were fewer dolphin sets in 2012 than in 2011. The number of dolphin sets conducted in a year is a key variable in determining annual dolphin mortality, although vessel operators' decisions (*e.g.*, setting on large schools of dolphins, setting on dolphins in areas with strong currents, etc.) can also play a role. In 2011, 9,604 dolphin sets occurred, and 986 dolphins were killed (976 from dolphin sets), whereas in 2012, 9,220 dolphin sets occurred, and 870 dolphins were killed (all from dolphin sets).[107] This pattern is repeated in other years. For example, in 2007, the year with the lowest dolphin mortality, only 6,844 dolphin sets occurred,[108] while in 2009 and 2010, 10,910 and 11,646 dolphin sets occurred, and approximately 300-400 more dolphins were killed.[109]

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[104] *See* Mexico's First Written 21.5 Submission, paras. 76-79; Mexico's Second Written 21.5 Submission, paras. 57-58.

[105] *See* U.S. First Written 21.5 Submission, paras. 90 (citing Agreement for the Conservation of Dolphins (1992) (La Jolla Agreement) (Exh. US-40) and 109 (citing IDCP, Scientific Advisory Board, *Updated Estimates of N_{min} and Stock Mortality Limits*, at 3, Table 2, 7th Meeting, La Jolla, CA (Oct. 30, 2009) (Exh. MEX-4)).

[106] *See* U.S. First Written 21.5 Submission, para. 91 (Table 1).

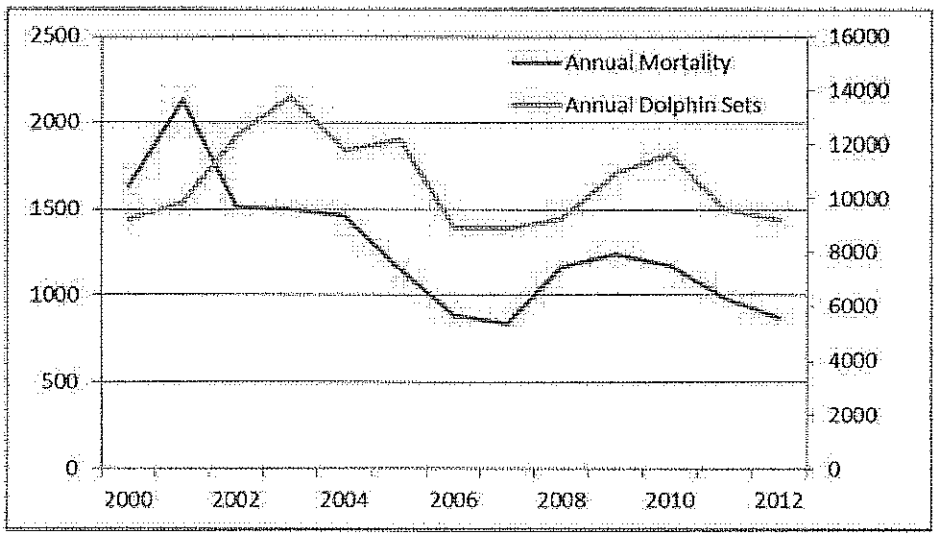
[107] IATTC, EPO Dataset 2009-2013 (May 9, 2014) (Exh. US-26).

[108] *See* U.S. First Written 21.5 Submission, para 91, Table 1; IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2009*, at 55, Table 5 (2013) (Exh. US-35) ("2009 IATTC Annual Report").

[109] IATTC, EPO Dataset 2009-2013 (May 9, 2014) (Exh. US-26).

80. The relationship between annual dolphin mortalities and the number of dolphin sets in the ETP per year is shown in Graph 1 below:

Graph 1: Annual Mortality and Annual Dolphin Sets in the ETP[110]



15. *To both Parties*: Do fishing methods other than setting on dolphins cause "unobserved" harms? Please provide evidence supporting your position.

81. As the United States has indicated in previous submissions, other fishing methods have the potential to harm marine mammals, including dolphins, and that these direct harms can have indirect (and unobserved) effects.[111] The principal example is that the death of a mother dolphin may lead to the unobserved harm of increased vulnerability for her calf. This harm could occur no matter how the mother dolphin died.

82. Such an indirect effect of a direct harm, however, is very different from the unobserved harms that occur as a result of the chase and encirclement process of setting on dolphins in the ETP.[112] These latter harms are not dependent on whether a dolphin is actually killed, but are a result of the chase and encirclement of the dolphins by large purse seine vessels in the ETP. These harms include: calf-cow separation, muscular damage, immune system failures,

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[110] Graph was generated from IATTC data, *see* IATTC, EPO Dataset 2009-2013, Tables II and III (May 9, 2014) (Exh. US-26).

[111] *See* U.S. Second Written 21.5 Submission, para. 17, n.20.

[112] *US – Tuna II (Mexico) (Panel)*, para. 7.504 (recognizing "that such effects would arise as a result of the chase in itself, and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP"); *see also* U.S. First Written 21.5 Submission, paras. 95-96 and the sources cited therein.

reproductive system failures, and other adverse health effects.[113] Moreover, the scale of the unobserved harms caused by the chase in the ETP is unprecedented. IATTC data indicates that in the years 2009-2013 large ETP purse seine vessels chased *31.3 million* dolphins, capturing *18.5 million* of them.[114]

83. The United States is not aware of any evidence, and certainly Mexico has presented none, that fishing methods other than sets on dolphins cause all the types of unobserved harms being caused by large purse seine vessels in the ETP, let alone cause such harms on a scale anywhere close to that occurring in the ETP.[115]

16. *To the United States*: What is the United States doing to address the unobserved harms to dolphins caused by fishing methods outside the ETP?

84. For purposes of the dolphin safe labeling requirements, the United States addresses the unobserved harms to dolphins caused by dolphin sets outside the ETP in the same way that it addresses the unobserved harms to dolphins caused by dolphin sets *inside* the ETP: all tuna product containing tuna caught by setting on dolphins is ineligible for the dolphin safe label.[116] As such, the Appellate Body specifically found that the original measure "*fully* addresses the adverse effects on dolphins resulting from setting on dolphins" – both *inside and outside* the ETP.[117]

85. More generally, the United States has long prohibited U.S. persons and vessels from setting on dolphins other than under the auspices of the AIDCP.[118] Specifically, it is contrary to U.S. law for any person or vessel "subject to the jurisdiction of the United States to take any marine mammal on the high seas" or in waters under U.S. jurisdiction, except under certain limited circumstances specified in the statute (of which the purse seine fishing under the auspices of the AIDCP is an example).[119]

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

[114] Exh. US-127, at Table 1 (summarizing evidence on the record); *see also* U.S. First Written 21.5 Submission, para. 73 (citing IATTC, EPO Dataset 2009-2013 (May 9, 2014) (Exh. US-26); U.S. Response to Panel's Original Question No. 31, para. 70; IATTC, *Effectiveness of Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds*, at 4, Table 2 (2003) (Exh. US-27)).

[115] *See* Mexico's Second Written 21.5 Submission, paras. 50-55; Mexico's First Written 21.5 Submission, paras. 126-151.

[116] *See* U.S. First Written 21.5 Submission, para. 30 (citing 50 C.F.R. § 216.91(a)(1) (applying to large purse seine vessels in the ETP) and section 216.91(a)(2) (applying to purse seine vessels outside the ETP).

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

[118] U.S. Second Written 21.5 Submission, para. 86 n.174.

[119] 16 U.S.C. §§ 1372(a)(1)-(2) (Exh. US-37); 16 U.S.C. § 1362(13) (Exh. US-38) (defining "take" as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill"). For example, permits for taking marine

86. Finally, the United States proposes as well as supports initiatives by RFMOs to prohibit setting on cetaceans (including dolphins) in convention areas.[120] The March 2012 WCPFC resolution requiring its members to ban setting on "a school of tuna associated with a cetacean" in the Convention Area is one example.[121] The U.S. proposal to the International Commission for the Conservation of Atlantic Tunas (ICCAT) is another example.[122] The United States considers these examples to be consistent with an emerging international trend to prohibit fishing vessels from setting on cetaceans, including dolphins.[123]

17. *To the United States*: Please explain why tuna caught by setting on dolphins is never eligible to receive the US dolphin safe label even where there is a statement by an independent observer that no dolphin was killed or injured.

87. Tuna caught by setting on dolphins is never eligible to receive the U.S. dolphin safe label because the fishing method is *inherently* dangerous to dolphins and, consequently, the tuna caught by this method can never be considered "dolphin safe."[124] The U.S. view is not only consistent with the facts on the record, but with the Appellate Body's conclusion that "setting on dolphins is *particularly* harmful to dolphins."[125] And nowhere is this more true than in the ETP where large purse seine vessels are permitted to, and capable of, taking advantage of the unique bond between yellowfin tuna and dolphins by chasing and capturing millions of dolphins every year.

88. Of course, setting on dolphins is unique in that it is the *only* fishing method that specifically *targets* dolphins. Where dolphins interact with all other fishing methods, it is generally by accident. The facts bear this out. While interactions with dolphins occur in 100

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mammals may be issued for such reasons as scientific research, public display, and survival or recovery of the species. *See* 16 U.S.C. § 1371 (Exh. US-142).

[120] *See* U.S. Second Written 21.5 Submission, paras. 31, 266, n.502; ICCAT, "Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries," Doc. No. IMM-015/I 2014 (May 20, 2014) (Exh. US-13).

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

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

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

[124] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 23, 93; U.S. First Written 21.5 Submission, paras. 81-84, 89-101.

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

percent of dolphin sets, they occurs in only a small percentage of sets of other fishing methods. For example, according to the most recent studies, interactions with *cetaceans* occur in less than one percent of purse seine sets in the western and central Pacific Ocean, the Indian Ocean, and in the Atlantic Ocean off the African coast,[126] and in similarly small percentages in longline sets in both the Pacific and Atlantic oceans.[127]

89. Moreover, large purse seine vessels in the ETP that are setting on dolphins are intentionally interacting with *huge* numbers of dolphins. Those vessels chase 6.2 million dolphins every year, capturing 3.6 million in nets.[128] In any given year, each northeastern offshore spotted dolphin is chased 10.6 times per year and captured 3.2 times; each eastern spinner dolphin is chased 5.6 times per year and captured 0.7 times; and each coastal spotted dolphin is chased 2.0 times per year.[129]

90. And as the original panel recognized,[130] these chases of ETP dolphins are harmful, causing death and serious injury, as well as unobserved harms – such as cow-calf separation, muscular damage, and immune and reproductive systems failures – *even where no death or serious injury occurs*.

91. Simply put, setting on dolphins is *not safe* for dolphins, and this is nowhere more true than with in the ETP where the unique association allows large purse seine vessels to intentionally chase and capture millions of dolphins every year. And while the AIDCP

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[126] *See* Exh. US-127 (summarizing evidence on the record); *see also* WCPFC Cetacean Interactions Paper, at 5-6 (Exh. US-58); Amande *et al.* 2012, at 6 (Exh. US-131); Amande *et al.* 2010, at 355-358 (Exh. US-133); Amande *et al.* 2011, at 2114, 2117-2118 (Exh. US-134).

[127] *See* Exh. US-127 (summarizing evidence on the record). For example, in the Hawaii-based pelagic longline fishery targeting tuna in 2012 and 2013, cetacean interactions occurred in only 1.9 percent (5 out of 263) and 3.7 percent (10 out of 273) of observed trips. NMFS Pacific Islands Regional Observer Program (PIROP), "Deep Set Annual Status Report: 2012" (2013) (Exh. US-83); NMFS PIROP, "Deep Set Annual Status Report: 2013" (2014) (Exh. US-84). Similarly, in a study of eight Spanish commercial longline vessels operating in the Atlantic in 2006-2007, cetacean bycatch occurred in only 0.16 percent of sets, and a cetacean interaction occurred in only 4.4 percent of sets. Hernandez-Milian, et al., "Results of a Short Study of Interactions of Cetaceans and Longline Fisheries in Atlantic Waters," 612 *Hydrobiologia* 251, 254 (2008) (Exh. US-85). Thus, in 95.6 percent of the sets, cetaceans, including dolphins, seemed to be unaffected by the tuna fishing activity.

[128] *See* U.S. First Written 21.5 Submission, para. 97; IATTC, *Effectiveness of Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds*, at 4, Table 2 (2003) (Exh. US-27). Chases can last up to two hours. Barbara E. Curry, *Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean*, NOAA NMFS Technical Memorandum, at 6 (1999) (Exh. US-36).

[129] *See* U.S. First Written 21.5 Submission, para. 97; Stephen B. Reilly et al., *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, at 26 (2005) (Exh. US-28).

[130] *US – Tuna II (Mexico) (Panel)*, para. 7.504 (recognizing "that such effects would arise as a result of the chase in itself, and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP"); *see also* U.S. First Written 21.5 Submission, paras. 95-96 and the sources cited therein.

requirements have greatly reduced dolphin *mortality* caused by that fishing method as employed by large purse seine vessels in the ETP, those requirements cannot eliminate the *harms* that those vessels cause each and every year. These harms "arise as a result of the chase in itself" even where no dolphin is killed or seriously injured.[131]

18. *To the United States*:

a. Regarding United States and non-United States vessels fishing inside and outside the ETP, what are the legal consequences for a captain/observer who makes a false statement/certificate about the dolphin safe status of tuna caught during the fishery?

92. There are several possible legal consequences for captains or observers (U.S. persons and non-U.S. persons), related to fishing inside or outside the ETP, although what penalties are available in any particular enforcement action would depend on the facts of that enforcement action. In general, the possible consequences are the same for U.S. and non-U.S. captains and observers and do not depend on where the fishing took place. Possible legal consequences include the following:

93. Criminal Penalties for Making a False Statement or Writing. 18 U.S.C. § 1001 establishes criminal liability for any person who "knowingly and willfully" "makes a materially false, fictitious, or fraudulent statement or representation" or "makes or uses any false writing or documents knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" to the U.S. government in any matter within its jurisdiction.[132] Violation of this provision may be punished by a fine of up to US$250,000 and/or up to 5 years imprisonment.[133] Section 1001 could potentially cover false statements on a Form 370 or a dolphin safe certification, if the captain or observer intentionally lied. Thus, both U.S. and foreign captains fishing inside and outside the ETP could potentially be liable under § 1001 for making a false certification, as could observers.

94. Criminal Penalties for Fraudulently Importing or Bringing in Merchandise. 18 U.S.C. § 545 establishes criminal liability for any person who "knowingly and willfully, with intent to defraud the United States" brings into the United States, or attempts to bring in, "any merchandise which should have been invoiced, or makes out or passes . . . through the

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[131] *US – Tuna II (Mexico) (Panel)*, para. 7.504.

[132] 18 U.S.C. § 1001(a) (Exh. US-103).

[133] 18 U.S.C. § 1001(a) (Exh. US-103) (referring to fines under "this title"); 18 U.S.C. § 3571(b)(3) (Exh. US-143) (showing the maximum fine for a felony as US$250,000); 18 U.S.C. § 3559(a) (Exh. US-144) (classifying an offense that is not specifically classified by letter grade but which provides for a penalty as "less than ten years but five or more years" as a Class D felony).

customhouse any false, forged, or fraudulent invoice, or other document or paper."[134] Penalties could include a fine of up to US$250,000 and up to 5 years imprisonment.[135] Additionally, merchandise brought into the United States in violation of this law may be forfeited to the United States.[136] Depending on the facts of the particular case, U.S. and foreign captains fishing inside or outside the ETP could be liable under this provision for falsifying dolphin safe certifications.

95. Penalties for False Labeling. Under the Lacey Act, 16 U.S.C. § 3372(d), it is unlawful for any person "to make or submit any false record, account, or label for, or any false identification of" any fish that has been or is intended to be imported, transported, sold, purchased, or received from a foreign country or transported in interstate or foreign commerce.[137] Administrative penalties of up to US$11,000 per offense may be available, as well as criminal penalties of up to US$250,000 and 5 years imprisonment for knowing violations.[138] Forfeiture of the product may also be available.[139] As all tuna product would likely be transported in interstate or foreign commerce, liability under this statute potentially could be available for observers or for U.S. and foreign captains (fishing inside or outside the ETP) who falsified dolphin safe certifications.

96. Penalties for Selling Fish Caught or Sold in Violation of Foreign Law. Under another provision of the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), it is unlawful for a person to sell, import, export, or transport "in interstate or foreign commerce" fish "taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."[140] Civil sanctions of up to US$11,000 and forfeiture of the product may be available.[141] A U.S. or foreign captain could potentially be liable under this provision for falsifying a dolphin safe certification, if doing so was against the laws of: 1) the flag state of the harvesting vessel (for a foreign vessel); 2) the port state where the product was transshipped (for U.S. or foreign captains); or 3) the country in which the cannery to which the product was sold was located (for a U.S. or foreign captain selling to a foreign cannery).

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[134] 18 U.S.C. § 545 (Exh. US-106).

[135] 18 U.S.C. § 545 (Exh. US-106) (referring to fines under "this title"); 18 U.S.C. § 3571(b)(3) (Exh. US-143) (showing the maximum fine for a felony as US$250,000); 18 U.S.C. § 3559(a) (Exh. US-144) (classifying an offense that is not specifically classified by letter grade but which provides for a penalty as "less than twenty-five years but ten years or more years" as a Class C felony).

[136] 18 U.S.C. § 545 (Exh. US-106).

[137] 16 U.S.C. § 3372(d) (Exh. US-145).

[138] 16 U.S.C. § 3373(d)(3) (Exh. US-146); 16 U.S.C. § 3374(a)(1) (Exh. US-105); 18 U.S.C. § 3571 (Exh. US-143).

[139] 16 U.S.C. § 3373(d)(3) (Exh. US-146); 16 U.S.C. § 3374(a)(1) (Exh. US-105).

[140] 16 U.S.C. § 3372 (Exh. US-145).

[141] 16 U.S.C. § 3373(a) (Exh. US-146); 16 U.S.C. § 3374(a)(1) (Exh. US-105).

97. Similarly, under the Magnuson Act, 16 U.S.C. § 1857(q) it is unlawful "for any person . . . to import, export, sell, receive acquire, or purchase in interstate or foreign commerce any fish taken, possessed, or sold in violation of any foreign law or regulation.[142] Penalties for violating the Magnuson Act may be up to US$140,000 per violation, and forfeiture of the product that was the subject of the violation is available.[143] As with the Lacey Act a U.S. or foreign captain could potentially be liable under this provision, depending on the factual circumstances of the case.

98. Administrative Penalties for Violating the Dolphin Safe Regulations. 16 U.S.C. § 1375 provides for a civil administrative penalty for "any person who violates any provision of this subchapter or of any permit or regulation issued thereunder."[144] The penalty may be up to US$11,000 per violation and up to US$20,000 and/or up to a year's imprisonment per knowing violation.[145] The dolphin safe regulations fall within the scope of this provision. Thus making a false statement or certification about the dolphin safe status of tuna on an FCO would violate 50 C.F.R. §§ 216.24(f)(2) and (4), which require that a "properly completed" and "accurate" Form 370 accompany all imported tuna product.[146] This provision covers those who produce, import, distribute, or sell tuna product and so generally applies to the manufacturers and importers. However, this potential liability provides an additional incentive for importers and manufacturers to ensure the truthfulness of captains' statements, as they may themselves be held liable if a certification turns out to be false, even if they did not know of or support the captain's lie.

99. Finally, there is an additional civil penalty established by the DPCIA for "knowingly and willfully" making a false statement on the captain's statement.[147]" The amount of the penalty may be up to US$130,000 per violation.[148] This provision covers only fishing activities inside the ETP by U.S. or foreign vessels.[149]

100. All of these penalties are subject to the same jurisdictional limitation, namely, that for a U.S. court to impose a penalty, it must have jurisdiction over the person of the defendant, as well as subject matter jurisdiction.[150] U.S. persons would, of course, qualify, as would companies

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[142] *See* 16 U.S.C. § 1857(a)(1)(Q) (Exh. US-147).

[143] 16 U.S.C. § 1858(a) (Exh. US-147; 16 U.S.C. § 1860(a) (Exh. US-148); *Civil Monetary Penalties; Adjustment for Inflation*, 77 Fed. Reg. 72,915, 72,917 (Dec. 7, 2012) (Exh. US-102).

[144] 16 U.S.C. § 1375(a)(1) (Exh. US-149).

[145] 16 U.S.C. § 1375(b) (Exh. US-149); 18 U.S.C. § 3571 (Exh. US-143).

[146] 50 C.F.R. §§ 216.24(f)(2), (f)(4) (Exh. US-2).

[147] 16 U.S.C. § 1385(e) (Exh. MEX-8) (referencing 16 U.S.C. § 1385(d)(2)(B)).

[148] 16 U.S.C. § 1385(e) (Exh. MEX-8); 77 Fed. Reg. 72,916 (Exh. US-102).

[149] The United States would like to take this opportunity to clarify with respect to paragraph 124 of the U.S. Second Written 21.5 Submission that this particular provision applies only to the ETP. *See* U.S. Second Written 21.5 Submission, para. 124.

[150] *See* Constitution of the United States, art. III (Exh. US-150); *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945) (Exh. US-151).

with a U.S. presence. Foreign persons could be subject to U.S. jurisdiction if, while they are present in the United States, the U.S. Government serves them notice of the legal action.

b. Please comment on paras. 162 – 170 of Mexico's first written submission. What instruments enable the United States to identify and respond to the risk of "tuna laundering" (Mexico's first written submission, para. 166)?

101. These paragraphs of Mexico's first written submission suggest that tuna industries that are not "vertically integrated" are vulnerable to "tuna laundering."

102. Mexico's argument ignores the interlocking international and national requirements regarding transshipments as well as the possibility that tuna could be laundered in a vertically integrated industry. And, of course, like much of Mexico's case, Mexico's argument in this regard is built entirely on speculation and innuendo rather than any actual evidence that "laundered" tuna has entered the U.S. tuna product market falsely labeled dolphin safe.

103. Transshipment is one of the activities most highly regulated by RFMOs and port states. For example, the WCPFC requires that a Transshipment Declaration be completed for every transshipment in the Convention Area.[151] These requirements include identifying information for the fishing and carrier vessels, the quantity and state (fresh or frozen) of product to be transshipped, the date and location of the transshipment, and the quantity of product already on board the receiving vessel.[152] Additionally, WCPFC members must provide detailed reports on all transshipment activities that occur in the Convention Area, including transshipments that occur in port and in members' EEZ.[153] These reports must include the total quantifies of highly migratory fish species transshipped by vessels for which the member is responsible, broken down by transshipment location, catch location, product form, and fishing gear, and the number of transshipments, broken down by transshipment and catch location and by fishing gear.[154]

104. Other RFMOs have established similar requirements for the regulation of transshipment. The IOTC requires prior notification to port state authorities of the details of a transshipment, including the fishing and carrier vessels, the tonnage of the product, the major fishing grounds of

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[151] WCPFC, CMM 2009-06, Conservation and Management Measure on the Regulation of Transhipment, art. 10 and Annex II, (2009) (Exh. US-152).

[152] WCPCF, CMM 2009-06, art. 10 and Annex I (Exh. US-152).

[153] Exh. MEX-75, at 49; WCPFC, CMM 2009-06, art. 11 (Exh. US-152). There is one exception to this requirement for fishing activities that occur entirely within archipelagic waters or territorial seas. *See id.*

[154] WCPCF, CMM 2009-06, art. 11 and Annex II (Exh. US-152); *see also* Mike A. McCoy, *A Survey of Tuna Transshipment in Pacific Island Countries: Opportunities for Increasing Benefits and Improving Monitoring*, at 49-50 (2012) (Exh. MEX-75) (noting that members were already collecting this information for transshipment activities in their ports "for fee calculations and other purposes" and that they generally use preexisting Mate's Receipt forms to provide information on the volumes transshipped in their ports).

the catch, and the date and location of the transshipment.[155] The captain of the fishing vessel must also notify the flag state at the time of transmission and complete the IOTC transshipment declaration, and the master of the carrier vessel must notify the port state and transmit the transshipment declaration.[156] As in the WCPFC, IOTC Members must submit annual reports on the details of their vessels transshipment activities.[157] The IATTC, the ICCAT, and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) have all established similar regimes.[158]

105. These RFMO requirements are additional to the laws of port states governing transshipment in port (including in national waters).[159] In the WCPFC Convention Area, the procedures for clearing arriving fishing and carrier vessels are standard across the five transshipment ports and reflect usual practices in international shipping.[160] A boarding party of representatives from relevant government offices boards the vessels, checks the vessel documents, conducts customs inspections, and collects the documents relevant to transshipment, including the well plan showing the stowage of fish, a voyage memorandum showing previous ports visited, and a sheet of general information on the vessel and the catch.[161] When the vessel has been cleared, transshipment may begin, and is subject to monitoring by the government fisheries department and, periodically, by other monitoring or enforcement agencies.[162] Government authorities collect the required documentation[163] and monitor part or all of the transshipment, which take place 12-14 hours per day for several days.[164]

106. Transshipment at sea is subject to even more stringent regulation than transshipment at port. In the WCPFC, the IOTC, and other RFMO convention areas, transshipment at sea is

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[155] *See* IOTC, Resolution 12/05, Annex I and II (Exh. US-138).

[156] IOTC, Resolution 12/05, Annex I (Exh. US-138).

[157] IOTC, Resolution 12/05, Annex I (Exh. US-138).

[158] *See* IATTC, Res. C-08-02, Resolution on Establishing a Program for Transshipments by Large-Scale Fishing Vessels, Annex I (2008) (Exh. US-153); ICCAT, Rec. 12-06, Recommendation by ICCAT on a Programme for Transshipment, Annex 3 (2012) (Exh. US-154); CCSBT, Resolution on Establishing a Program for Transshipment by Large-Scale Fishing Vessels, Adopted at the 15th Annual Mtg., Oct. 14-17, 2002, at sec. 4, Annex I (Exh. US-155).

[159] *See* McCoy 2012, at 45-50 (Exh. MEX-75).

[160] McCoy 2012, at 46 (Exh. MEX-75).

[161] McCoy 2012, at 46 (Exh. MEX-75).

[162] McCoy 2012, at 46 (Exh. MEX-75).

[163] *See, e.g.*, NOAA, "Pacific Transshipment Declaration Form" (Exh. US-156); "WCPFC Transshipment Declaration" (Bilingual) (Exh. US-157).

[164] McCoy 2012, at 47-48 (Exh. MEX-75).

prohibited for purse seine vessels.[165] For large longline vessels, transshipment at seas is allowed only for vessels authorized by the party to which the vessel is flagged.[166] Parties are responsible for reporting which vessels are authorized to make and receive transshipments and for ensuring that they are notified in advance of the details of any high seas transshipment.[167] After the transshipment, the vessels concerned must transmit transshipment declarations to the flag state of the fishing vessel and the WCPFC Commission or the IOTC Secretariat.[168] Under both regimes, transshipments at sea must also be monitored by an observer, who confirms that the quantities of transshipped fish are consistent with the Transshipment Declaration, log-sheets, and other available information.[169] The ICCAT, IATTC, and CCSBT regimes governing transshipment at sea (for longline vessels only) are similar to the WCPFC and IOTC regimes.[170]

107. In addition, Mexico's argument ignores the economic incentives of flag states and of the tuna industry to maintain accurate records of transshipped fish. Port states' fee calculations are often based on volumes of transshipped fish, giving them an incentive (even apart from complying with RFMOs) to monitor transshipments in port.[171]

108. Fishing and carrier vessels also monitor transshipped fish for economic reasons. Canneries may reject tuna on various grounds (*e.g.*, spoiling, smashed fish, or small size). Consequently, any tuna broker or carrier vessel has an incentive to track the harvest of each vessel, including during transshipment, to ensure that the cannery is not left paying for fish that they cannot use. Thus, the industry tracks transshipped tuna for private financial reasons, and the RFMO regimes take advantage of this.

109. Finally, Mexico's argument provides no basis for its assumption that a "vertically integrated" cannery would be less likely to launder tuna than one that is independently owned.

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[165] *See* Exh. MEX-75, at 13; WCPCF, CMM 2009-06, arts. 13, 25-30 (subject to certain exceptions for small vessels in the WCPFC) (Exh. US-152); IOTC, Resolution 12/05, sec. 2 (Exh. US-138).

[166] IOTC, Resolution 12/05, sec. 2 (Exh. US-138); WCPCF, CMM 2009-06, art. 34 (Exh. US-152). In the WCPFC, the flag state must have determined that it would otherwise be impractical for the vessel to operate

[167] IOTC, Resolution 12/05 (Exh. US-138) (requiring flag state notification 24 hours in advance); WCPCF, CMM 2009-06, art. 35 (Exh. US-152) (requiring that the flag state notify the WCPFC Commission 36 hours in advance).

[168] WCPCF, CMM 2009-06, art. 35 (Exh. US-152); IOTC, Resolution 12/05, sec. 4(15) (Exh. US-138).

[169] WCPCF, CMM 2009-06, arts. 13-14 (Exh. US-152); IOTC, Resolution 12/05, sec. 4(17)-(18) (Exh. US-138); *see, e.g.*, WCPFC, Form FC-2, Observer "at Sea" Transshipment Report (Exh. US-158).

[170] *See* IATTC, Resolution C-08-02, secs. 1-4 (Exh. US-153); ICCAT, Recommendation 12-06, secs. 1-5 (Exh. US-154); CCSBT, Resolution on Establishing a Program for Transshipment by Large-Scale Fishing Vessels, secs. 1-3 (Exh. US-155).

[171] McCoy 2012, at 32-36, 49 (Exh. MEX-75).

The motivation to act inconsistent with national or international requirements is not impacted by the ownership structure.

110. However, the United States has seen no evidence to suggest that such laundering – of Mexican or U.S. tuna product or the tuna product of any other Member – is occurring on a widespread basis in a way that impacts the U.S. tuna product market. Indeed, Mexico has presented *zero* evidence that such activities are occurring in the U.S. tuna product supply chain.

19. *To both parties*: Please provide data on dolphin mortality and injury in the ETP caused by fishing methods other than setting on dolphins. Could this data, if available, be extrapolated to reflect dolphin mortality and injury outside the ETP?

111. Table 1 depicts dolphin mortalities in the ETP caused by large purse seine vessels both from dolphin sets and from sets other than dolphin sets – namely, sets on free-swimming schools of tuna and sets on floating objects – over the past ten years.

Table 1. Observed Dolphin Mortalities due to ETP Large Purse Seine Vessels, by Set Type[172]

Year	Mortalities Due to Non-Dolphin Sets	Mortalities Due to Dolphin Sets	Total Mortalities	Dolphin Set Mortalities as % of Total
2003	2	1,490	1,492	99.9%
2004	8	1,461	1,469	99.4%
2005	0	1,151	1,151	100%
2006	2	884	886	99.8%
2007	1	837	838	99.9%
2008	1	1,168	1,169	99.9%
2009	2	1,237	1,239	99.8%
2010	1	1,169	1,170	99.9%
2011	10	976	986	99.0%
2012	0	870	870	100%
Average	**2.7**	**1,124.3**	**1,127**	**99.8%**

112. Thus, dolphin mortalities due to unassociated sets and sets on floating objects averaged 2.7 dolphins per year over the past decade, compared to an average of 1,124.3 dolphin mortalities per year over the same period due to sets on dolphins, constituting at least 99 percent of observed dolphin mortalities in the ETP purse seine fishery in each year.

113. To put it another way, dolphin mortalities due to dolphin sets were, on average, 416 times greater than dolphin mortalities due to other kinds of sets by large purse seine vessels. This is despite the fact that, over the past ten years, dolphin sets constituted less than half (46.6 percent)

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[172] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26); 2008 IATTC Annual Report (Exh. US-43).

of all sets by large purse seine vessels in the ETP and never accounted for more than 57 percent of all sets.[173] In fact, looking at the figures on a per set basis makes the comparison even starker. In the past 5 years, between 2009 and 2013, dolphin mortality per 1,000 dolphin sets ranged from 74.5 to 113.4 dolphins, compared to between 0 and 0.83 dolphin mortalities per 1,000 non-dolphin sets. In total, dolphin mortality per 1,000 dolphin sets between 2009 and 2013 was 97 dolphins killed for every 1,000 dolphin sets; dolphin mortality per 1,000 non-dolphin sets was 0.24 animals per 1,000 sets.[174]

114. Because the data in column one regarding mortality caused by sets of large ETP purse seine vessels on something other than dolphins is ETP purse seine data, the United States considers that this data indicates the dolphin mortality caused by small purse seine vessels in the ETP, which are not permitted to set on dolphins.[175]

115. In addition, the data in column one is consistent with data from other purse seine fisheries, where recent, systematically collected data exists. This consistency suggests that the ETP data can be extrapolated to reflect dolphin mortality and injury in purse seine fisheries outside the ETP where current, fishery-by-fishery data does not exist or is incomplete.[176]

116. For example, in 2010, the first year of expanded observer coverage in the WCPFC purse seine fishery,[177] purse seine vessels caused an estimated 110 total dolphin mortalities (*i.e.*, less than 10 percent of the dolphin mortalities in the ETP from dolphin sets in that year).[178] Controlling for the number of sets (the WCPFC purse seine fishery is much larger than the ETP), there were an estimated 2.64 dolphin mortalities per 1,000 sets in the WCPFC compared to 105.0 dolphins per 1,000 dolphin sets in the ETP.[179]

117. A study of the European purse seine tuna fishery in the Indian Ocean also showed very low dolphin bycatch. The study covered tuna purse seiners during 115 trips (4,020 sea days and 3,052 sets) between 2003 and 2009.[180] The covered sets were split fairly evenly with about half of the sets on free-swimming tuna schools and about half of the sets on floating objects; none of

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[173] IATTC, EPO Dataset 2009-2013 (Exh. US-26); IATTC, *Tunas and Billfishes*, Table A-7 (Exh. US-44).

[174] *See* Exh. US-127 (summarizing the evidence on the record).

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

[176] *See* Exh. US-127 (summarizing evidence on the record).

[177] *See* WCPFC, CMM 2008-01, para. 28, (Exh. US-139).

[178] *See* U.S. First Written 21.5 Submission; WCPFC Cetacean Interactions Paper, Table 2b (Exh. US-58).

[179] *See* WCPFC Cetacean Interactions Paper, Table 2b (Exh. US-58); IATTC, EPO Dataset 2009-2013 (Exh. US-26) (showing, for 2010, 1,169 dolphin mortalities due to 11,646 dolphin sets, for a total of 100.4 dolphins killed per 1,000 sets).

[180] Amande *et al.* 2012, at 2 (Exh. US-131).

them were dolphin sets.[181] Marine mammal interactions occurred in less than 1 percent of observed sets, and in all instances, the animal was released alive.[182] No instance of dolphin interaction was specifically mentioned, and most of the observed interactions with marine mammals likely involved whales.[183]

118. A study of the European tuna purse seine fishery in the Atlantic Ocean showed similar results. The data collected covered 27 trips (598 sets) by purse seine vessels fishing in the tropical Atlantic off the African coast.[184] The sets were unassociated and floating object sets. Only two "catch events" of marine mammals were reported: both times the animals were released alive and both interactions involved baleen whales.[185] Thus there were *no* dolphin interactions in the observed sets. An update for 2008-2009 covered 27 trips (791 sets).[186] The observed sets were two thirds unassociated sets and one third floating object sets.[187] The study found no interactions at all with marine mammals, including dolphins, on the covered trips.[188] The data from these studies directly contradicts Mexico's assertion regarding dolphin mortalities in the tuna purse seine fishery off the coast of Africa, and the United States notes that the underlying source for Mexico's claim is an unpublished report relying on a study dating from over 25 years ago.[189]

119. Data from other types of tuna fisheries relevant to the U.S. tuna product market confirm that the scale of dolphin interactions and mortalities due to setting on dolphins in the ETP by large purse seine vessels is unique. As discussed in response to Question 21, observer data from the U.S. Western Pacific longline fisheries targeting tuna indicates that the vast majority of

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[181] *See* Amande *et al.* 2012, at 2-3 (Exh. US-131).

[182] *See* Amande *et al.* 2012, at 6 (Exh. US-131).

[183] *See* Amande *et al.* 2012, at 2 (Exh. US-131). An earlier study of tuna seiners in the Western Indian Ocean (WIO) supports the findings of this study, concluding that: "In offshore regions of the WIO tuna-dolphin associations are rare, purse seining for them is not practiced, and there is no dolphin bycatch problem." *See* Romanov 2002, at 91 (Exh. US-132).

[184] Amande *et al.* 2010, at 355 (Exh. US-133).

[185] Amande *et al.* 2010, at 358 (Exh. US-133).

[186] Amande *et al.* 2011, at 2114 (Exh. US-134).

[187] Amande *et al.* 2011, at 2116 (Exh. US-134).

[188] Amande *et al.* 2011, at 2114, 2117-2118 (Exh. US-134).

[189] *See* Mexico's Opening 21.5 Statement, para. 27 (citing Young & Iudicello, "Worldwide Bycatch Of Cetaceans," NOAA Tech. Memo. NMFS-OPR-36, at 131-32 (2007) (Exh. MEX-18), which in turn cited F.G. Alverson, "Tuna Purse Seine and Gill/Drift Net Fisheries in the Oceans of the World and their Relationship to Tuna-Dolphin, Tuna-Whale, and Tuna-Whale Shark Associated Schools," Unpublished Report Submitted to the CANAINPES Seccion Especializada en Pesca de Atun Programa Atun-delfin, Camara Nacional de la Industria Pesquera, at 110 (1991)).

fishing trips occur without any dolphin interactions *at all*.[190] Further, dolphin mortalities in U.S. longline fisheries are a small fraction of dolphin mortalities due to setting on dolphins in the ETP.[191] And, as discussed further below, this data is consistent with other studies of longline fisheries. Finally, it is uncontested that pole and line fishing – which accounts for 17.6 percent of vessels records associated with U.S.-caught and processed tuna over the past decade and 14.8 percent of Form 370 vessel records associated with imported tuna and tuna product between 2005 and 2013 – is not associated with dolphin bycatch.[192]

20. *To the United States*: At para. 251 of its report, the Appellate Body found that there is evidence of tuna-dolphin association outside of the ETP, albeit less "frequent[]" than in the ETP. Has the United States put forward any evidence showing *how much* less frequently this association occurs outside the ETP? What steps has the US taken to address the issue of dolphin mortality in such cases?

120. The United States has submitted significant evidence on the "frequency" of association between tuna and dolphins inside and outside the ETP. For the ETP, the proof of this frequency is derived by examining current data regarding the number of *intentional sets by large purse seine vessels on dolphins* to catch tuna.[193] Outside the ETP, there is no current, fishery-by-fishery evidence demonstrating that purse seine vessels are routinely intentionally setting on dolphins. The only evidence on the record describes isolated incidents, such as those discussed in the *Freitas* case.[194]

121. As such, the United States relies on evidence of *interaction* between purse seine vessels and dolphins. Even though such evidence includes *accidental* interactions with dolphins, the comparison between intentional sets in the ETP and *all* interactions outside the ETP is stark. As noted in Table 2, there were, on average, 10,423 intentional sets on dolphins in the ETP per year from 2009-2013, while there have been no more than 202 observed sets with any dolphin interaction (including an accidental interaction) in fisheries outside the ETP, according to data covering 2003-2010.

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[190] *See* U.S. Response to Question 21.

[191] *See* U.S. Response to Question 21 (explaining, *inter alia*, that total estimated dolphin mortality in the Hawaii deep-set longline tuna fishery was 2.2 percent of dolphin mortality in the ETP for the years 2002-2006 and 2.6 percent of dolphin mortality in the ETP for 2006-2010 even though the Hawaii fishery has a larger number of active vessels than set on dolphins in the ETP).

[192] *See* U.S. First Written 21.5 Submission, paras. 147-149.

[193] As discussed in response to Question 3, the unique ETP tuna-dolphin association does not occur throughout the entire ETP. *See* IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-123).

[194] *See In the Matter of Matthew James Freitas, et al.*, at 45-50 (Exh. MEX-46) ("*Freitas* case").

Table 2. Frequency of Dolphin Sets in the ETP[195]

Fishery	Year	Intentional Sets on Dolphins*	Dolphins Chased*	Dolphins Encircled*	% Sets w/ Dolphin Interactions*
ETP Large Purse Seine	2009	10,910	7,106,662	4,307,169	49.05%
	2010	11,645	6,645,054	3,923,563	52.88%
	2011	9,604	6,095,530	3,428,728	44.07%
	2012	9,220	5,546,533	3,350,085	41.26%
	2013	10,736	5,906,880	3,572,052	46.57%
	Total	52,115	31,300,659	18,581,597	46.78%
	Average	10,423	6,260,132	3,716,319	46.77%

Table 3. Frequency of Sets with Dolphin Interactions in Purse Seine Fisheries Outside the ETP

Fishery	Year	Sets w/ Dolphin Interactions	Dolphins Chased*	Dolphins Interactions	% Sets w/ Dolphin Interactions*
WCPFC Purse Seine[196]	2007-2009	134*	no evidence of any	798	0.07%
	2010	37*	no evidence of any	397	0.18%
Eastern Tropical Atl. Purse Seine[197]	2003-2007	0	0	0	0%
	2008-2009	0	0	0	0%
Indian Ocean Tropical Purse Seine[198]	2003-2009	fewer than 31	no evidence of any	unknown	less than 1% for all marine mammals

* Most of these interactions are unintentional. *See* WCPFC Cetacean Interactions Paper, at 3 (Exh. US-58). However the *Freitas* case is evidence that opportunistic sets on one or a few dolphins do occasionally occur.

122. As the United States has discussed previously, the nature of the tuna-dolphin bond in the ETP is unique. In the ETP, the association between tuna and dolphins is so frequent and intense that large purse seine vessels are able to exploit the association on a widespread basis by locating herds of hundreds of dolphins, chasing them for up to two hours, and capturing the dolphins and the tuna underneath them in a purse seine net. The tuna remain with the dolphins throughout the

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[195] *See* IATTC, EPO Dataset 2009-2013 (U.S. Exh. 25); *see also* U.S. First Written 21.5 Submission, paras. 91-92; U.S. Second Written 21.5 Submission, para. 23.

[196] *See* WCPFC Cetacean Interactions Paper, Table 2a, 2b (Exh. US-58); WCPFC Scientific Committee, *Fifth Regular Session Summary Report*, at 15 (2009) (Exh. US-159); *see also* U.S. First Written 21.5 Submission, para. 132; U.S. Second Written 21.5 Submission, paras. 23, 104.

[197] *See* Amande *et al.* 2010, at 355-358 (Exh. US-133); Amande *et al.* 2011, at 2114-2118 (Exh. US-134); *see also* U.S. Response to Question 19.

[198] *See* Amande *et al.* 2012, at 2-3, and 6 (Exh. US-131); U.S. Response to Question 19.

protracted, high-speed chase and as well as the encirclement process.[199] Indeed, the association between tuna and dolphin is such that, in the ETP, "*to catch dolphins is also to catch tuna.*"[200] Again, the scope of the commercial practice – which reflects the association itself – is huge. In the years, 2009-2013, large purse seine vessels set on dolphins, on average, more than 10,000 times per year.

123. The intense bond between dolphins and tuna that occurs in part of the ETP is completely distinct from the general tendency of tuna to congregate underneath floating objects such as logs, FADs, and, in some cases, marine mammals or whale sharks. This general type of association may arise fleetingly between tuna and any number of objects (or animals) both in the ETP and outside it. While purse seine vessels may opportunistically intentionally set on dolphins when, due to this phenomenon, they find tuna in proximity to the dolphins, there is *no evidence* that tuna and dolphins associate so frequently or so strongly outside the ETP that purse seine vessels chase dolphins to harvest tuna. Indeed, there is little evidence that purse seine vessels interact with dolphins at all, even by accident.

124. The Appellate Body's statement at paragraph 251 appears to relate to this second, general type of association. There was no evidence presented in the original proceeding that dolphins in any fishery outside the ETP were being chased.[201] And Mexico has presented no further evidence in this proceeding.

125. The record in this dispute is thus entirely consistent with NOAA's conclusion in the 2013 Final Rule that there are "no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP, where dolphins are systematically and routinely chased and encircled each year in significant numbers by tuna fishing vessels."[202]

126. Mexico's evidence does not undermine this conclusion. In attempting to prove that tuna and dolphins associate outside the ETP, Mexico relies most heavily on the Kobe II Report.[203] The report contains one sentence concerning tuna-dolphin associations, which states: "the association of yellowfin tuna and dolphins has been observed and documented in other oceans,

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[199] Gerrodette 2009, at 1192 (Exh. US-29).

[200] National Research Council, *Dolphins and the Tuna Industry*, at 45 (1992) (Exh. US-160) (Orig. Exh. MEX-2) (emphasis added).

[201] *See US – Tuna II (Mexico) (AB)*, para. 251; *US – Tuna II (Mexico) (Panel)*, n. 729-731 and the sources cited therein (presenting *no* evidence that any dolphins are chased to catch tuna in any fishery outside the ETP); *see also id.* para., 7.520 (stating that there are "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP").

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

[203] *See* Mexico's First Written 21.5 Submission, para. 109 (citing Kobe II Bycatch Workshop Background Paper, at 2).

but it is not well characterized or understood and only partially documented in some regions."[204] The report also notes that, "In addition to tuna fishery interactions with dolphins, the ICCAT, the IOTC, and the IATTC have all documented purse seine fishers setting on tuna associated with large whales" and that, in these sets, the nets "either encircle or are set next to whales."[205] Thus the Kobe II Report presents no evidence that in any fishery outside the ETP dolphins are chased to catch tuna or that there is any special tuna-dolphin relationship that is widely exploited. To the contrary, the report suggests that, outside the ETP, tuna-dolphin associations are no different to tuna-whale associations: fleeting and susceptible to only opportunistic exploitation.

127. The few other pieces of evidence that Mexico cites are similar. One NMFS report stated that "tuna-dolphin associations have been sighted and deliberately set upon" outside the ETP.[206] Another report stated, that, of 33,319 sets observed in the WCPFC purse seine fishery between 1995 and 2005, "Marine mammals were caught in a very small proportion … mainly from sets targeting tuna schools associated with either whales or dolphins."[207] Finally, a third paper stated that "interactions with whale sharks and cetaceans have also been recorded in the Indian Ocean region."[208] None of these reports suggest a tuna-dolphin association similar to the one that exists in the ETP, namely one that allows dolphins to be chased and set on to catch tuna. In fact, they all suggest just the opposite – that only general, fleeting associations such as might occur between tuna and any number of floating objects occur in these other fisheries.

128. Furthermore, the evidence before the original panel demonstrated that the general type of tuna-dolphin association occurred only very infrequently in all fisheries on which evidence was presented. The evidence on which the panel relied was as follows:

- Original Exhibit MEX-2 stated that there have been "reports of association of yellowfin tuna with dolphins" outside the ETP, "but the "frequency . . . seems to be much lower in other ocean areas." For example, a few small studies found sets on dolphins to account for between 0.4 percent and 4.7 percent of sets in certain fisheries off the West Coast of Africa.[209]

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[204] Kobe II Bycatch Workshop Background Paper, at 2 (2010) (Exh. MEX-39).

[205] Kobe II Bycatch Workshop Background Paper, at 2 (2010) (Exh. MEX-39).

[206] *See* Mexico's First Written 21.5 Submission, para. 113 (citing Meghan A. Donahue & Elizabeth F. Edwards, NMFS, "An Annotated Bibliography Of Available Literature Regarding Cetacean Interactions With Tuna Purse-Seine Fisheries Outside Of The Eastern Tropical Pacific Oceans," at 2 (1996) (Exh. MEX-40) (stating that "tuna-dolphin associations have been sighted and deliberately set upon" outside the ETP)).

[207] Mexico's First Written 21.5 Submission, para. 114 (citing Secretariat of the Pacific Community, "The Western And Central Pacific Tuna Fishery: 2006 Overview And Status Of Stocks," at 59-60 (2008) (Exh. MEX-41).

[208] Mexico's First Written 21.5 Submission, para. 118 (citing Australia and Maldives, "On The Conservation Of Whale Sharks (Rhincodon Typus)," IOTC–2013–S17–PropD[E] (2013) (Exh. MEX-45)).

[209] National Research Council, *Dolphins and the Tuna Industry*, at 48 (Exh. US-169).

- Original Exhibit US-61 described the strength of the tuna-dolphin association in the ETP and how the fishing industry there learned to exploit the association.[210]

- Original Exhibit US-10 presented evidence that tuna-dolphin association outside the ETP was "rare."[211] It described a study involving 30 skippers fishing in the eastern tropical Atlantic from 1976 to 1979, in which the participants reported that from 0 to 4 percent of their sets each year were on tuna schools associated with dolphins.[212] The skippers also stated that, in general, dolphins were "poor indicators" of potential tuna catch. In another study, of purse seiners operating in the eastern tropical Atlantic between 1988 and 1991, porpoises were reported as being associated with tuna schools in "less than 0.2% of catches."[213] In a study of seiners operating in the western Indian Ocean in 1983-1984, the authors found that an association between tunas and dolphins was "very rare."[214] Another report on seiners operating in the WCPFC in 1976 reported that 4% of observed sets were sets associated with marine mammals, and that most of these involved whales. Tunas were "rarely" observed in association with porpoises.[215]

- Even original Exhibit MEX-98, on which the panel relied in finding that there were indications that setting on dolphins had occurred outside the ETP, stated that the association was infrequent. The report stated that, in the western central Pacific tuna fishery, "[m]arine mammals were caught in a very small proportion of these observed sets, mainly from sets targeting tuna schools associated with either whales or dolphins."[216] The study reported that, in three western and central Pacific Ocean fisheries between 1995 and 2005, marine mammals were caught in 0.2 percent of observed sets (WTP longline fishery), 0.3 percent of observed sets (WSP longline fishery), and 3.9 percent of observed sets (equatorial purse seine fishery).[217]

- Original Exhibit MEX-105 was Australia's proposed WCPFC resolution to require members to prohibit intentionally setting purse seine nets on cetaceans and to require reporting when a cetacean is inadvertently encircled. The resolution "not[ed] with concern" that there had been reports of "a number of instances of interactions" with

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[210] Gosliner 1999, at 120-121 (Exh. US-34).

[211] *See* Donahue & Edwards 1996, at 7 (1996) (Exh. MEX-40) (Orig. Exh. US-10).

[212] *See* Donahue & Edwards 1996, at 7-8 (Exh. MEX-40).

[213] *See* Donahue & Edwards1996, at 16 (Exh. MEX-40).

[214] *See* Donahue & Edwards 1996, at 22 (Exh. MEX-40).

[215] *See* Donahue & Edwards 1996, at 28 (Exh. MEX-40); *see also id.* at 39 (reporting similar findings for a study published in 1990).

[216] Adam Langley, Peter Williams & John Hampton, *The Western and Central Pacific Tuna Fishery: 2006 Overview and Status of Stocks*, at 59 (2008) (Orig. Exh. MEX-98) (Exh. US-161).

[217] Adam Langley *et al.* 2008, at 60 (Exh. US-161).

cetaceans.[218] (The United States notes that the resolution did not mention intentional sets particularly, and that cetaceans are mentioned generally rather than dolphins specifically.)

129. And, as shown by Table 3 above, recent studies confirm the evidence on which the original panel relied. Exhibit US-58, a 2011 WCPFC report found that, in the WCPFC purse seine fishery in 2007-2009, 2.5 percent of observed sets were sets on a "Whale (Marine mammal)."[219] That figure was 1.6 percent of sets in 2010.[220] The designation of marine mammal sets as "Whale" sets demonstrates that the majority of these were sets on whales, not dolphins. The report found that "interactions" with toothed cetaceans (dolphins) occurred in only 0.7 percent of observed sets in 2007-09 and 0.18 percent of observed sets in 2010.[221] Further, most of these interactions were likely *not* the result of an intentional set on dolphins. The report found that, in contrast to interactions with whales and whale sharks, interactions with cetaceans "appear to be mainly incidental, rather than the result of sets specifically targeting at these animals."[222] The studies of the European purse seine fisheries in the Indian and Atlantic Oceans, which were discussed in response to Question 19 above, also found *no* intentional sets on dolphins.[223]

130. Thus, the evidence on this point is clear. In part of the ETP, there is a frequent, intense bond between tuna and dolphins. Large purse seine vessels are capable and permitted to take advantage, and do take advantage, of this bond by intentionally setting on dolphins 52,115 times from 2009-2013. These sets involved the chasing of over 31 million dolphins and the capture of 18.5 million. Outside the ETP, there is evidence that tuna will congregate underneath floating objects such as logs, FADs, and, in some cases, marine mammals or whale sharks. As such, purse seine vessels will, on occasion, capture dolphins – accidentally or intentionally – in pursuit of tuna. But this happens infrequently – in much less than 1 percent of all observed sets in all of the other purse seine fisheries discussed on the record. And, of course, this type of association is not of the same type that is occurring in the ETP, as shown by the fact that there is *zero evidence* that purse seine vessels outside the ETP *chase* dolphins to harvest tuna.

Form 370

21. *To both parties*: The United States appears to recognize that there is dolphin mortality and serious injury outside the ETP. Has the United States Assistant

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[218] WCPFC Paper Prepared by Australia, "Proposed Conservation and Management Measure Mitigating Fishing Impacts on Cetaceans" (2010) (Orig. Exh. MEX-105) (Exh. US-162).

[219] WCPFC Cetacean Interactions Paper, at 4 (Exh. US-58).

[220] WCPFC Cetacean Interactions Paper, at 4 (Exh. US-58).

[221] WCPFC Cetacean Interactions Paper, at 5-6 (Exh. US-58).

[222] WCPFC Cetacean Interactions Paper, at 3 (Exh. US-58).

[223] *See* U.S. Response to Question 19 (citing Amande *et al.* 2012, at 2 (Exh. US-131); Amande *et al.* 2011, at 2114-2118 (Exh. US-134).

Administrator made any determination to this effect as provided in Section 216.91(a)(4)(iii) and as described in Section B(1) of Form 370? If not, why not? What is the meaning of "regular and significant" in the context of making this determination? Should the Assistant Administrator have made any such determination?

131. As a threshold matter, the United States notes that while the Panel has asked several questions about the "regular and significant" determinations that could be made pursuant to Sections 216.91(a)(2)(i) and 216.91(a)(4)(iii), Mexico has not claimed that the United States has acted inconsistently with the covered agreements by not so designating any particular fishery.

132. It is well established that the complaining party must itself prove all the elements of its *prima facie* case through the evidence and arguments that it provides to the panel.[224] It would thus be legal error for a panel to assume a part of the complaining party's burden of proof by making a case for the complaining party – the burden of identifying and providing the relevant evidence (including provisions of the measure) and of explaining their relevance to the alleged inconsistency with the covered agreements is for Mexico itself to sustain.[225]

133. In response to the Panel's specific question, NOAA has not made a determination pursuant to either Sections 216.91(a)(2)(i) or 216.91(a)(4)(iii). NOAA confirmed in the 2013 Final Rule that NOAA "has not made a determination that another fishery has either a regular and significant association between dolphins and tuna or regular and significant mortality or serious injury of dolphins" in light of the fact that NOAA "has no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP" that would support a positive determination under either provision.[226]

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[224] *See US – Gambling (AB)*, para. 140 ("A *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency."); *US – Wool Shirts and Blouses (AB)*, at 16.

[225] *See Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 50 (noting that "the burden of explaining the relevance of evidence, in proving claims made, naturally rests on whoever presents that evidence"); *see also US – COOL (AB)*, para. 469 (reversing the panel's Article 2.2 finding where the panel had and stating that "we agree with the United States that, by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement without examining the proposed alternative measures, the Panel erred by relieving Mexico and Canada of this part of their burden of proof").

[226] 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exh. MEX-7) ("The 'regular and significant' standard has been part of the DPCIA and its implementing regulations for many years. This rule is not intended to address or revise that standard. The DPCIA directs the Secretary to make a determination or identification of a fishery if there is a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), or if a fishery has regular and significant mortality or serious injury to dolphins. NMFS has no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP, where dolphins are systematically and routinely chased and encircled each year in significant numbers by tuna fishing vessels, or any tuna fishery that has regular and significant mortality or serious injury of dolphins. Therefore, the Secretary has not

134. With regard to Section 216.91(a)(4)(iii) specifically, that provision states that where "any other fishery" is identified "as having a regular and significant mortality or serious injury of dolphins," NOAA may require an observer certification (in addition to the captain statement) to be provided as to the dolphin safe status of the tuna. By its terms, this provision applies to fisheries not otherwise covered by section 216.91(a)(1)-(3).

135. NOAA interprets its own regulations based on its plain meaning of the relevant text. As such, the term "fishery" is defined by location, gear type (or fishing method) and target species; for example, the Hawaii deep-set longline tuna fishery.[227] Further, the United States would note that any determination would likely be done on a fishery-by-fishery basis ("[i]n any other fishery …") based on current mortality and serious injury ("*as having* a regular and significant mortality . . ."). In sum, such a determination would be based on an evaluation of whether the relevant evidence regarding the current circumstances of the particular fishery was sufficient to conclude that there is "regular and significant" dolphin mortality or serious injury.

136. The current, fishery-by-fishery evidence that the United States has submitted in this dispute is entirely consistent with the NOAA conclusion in 2013 that "no credible reports of any fishery" support a positive determination under Section 216.91(a)(4)(iii).

137. Observer data from western Pacific longline fisheries show that dolphin interactions occur in only a tiny percentage of sets and that dolphin mortality is, consequently, low relative to the size of the fishery. In the Hawaii deep-set tuna longline fishery, for example, of the 2,817 fishing trips observed since 2004, only 3.1 percent had any marine mammal interaction *at all*.[228] Similarly, in the American Samoa longline fishery, over 92 percent of all observed trips over the past decade have taken place without any marine mammal interaction.[229]

138. The set-level data is even more definitive: in both fisheries, over 99 percent of all observed sets occurred without a marine mammal interaction.[230] In the Hawaii fishery in the past decade there were 2.49 marine mammal interactions per 1,000 observed sets.[231] This number is 2.4 percent of the 105 dolphin mortalities per dolphin 1,000 sets that, on average, have occurred in the ETP over this period. In the American Samoa fishery, there were 3.42 marine mammal

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made a determination that another fishery has either a regular and significant association between dolphins and tuna or regular and significant mortality or serious injury of dolphins.").

[227] *See, e.g.*, Qualified and Authorized Notice, 79 Fed. Reg. at 40,718-19 (Exh. US-113) (listing the Hawaii deep-set longline tuna "fishery" as one of seven "fisheries").

[228] NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013" (Exh. US-163).

[229] NMFS, "American Samoa Longline Annual Reports – 2006-2013" (Exh. US-164).

[230] NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013" (Exh. US-163); NMFS, "American Samoa Longline Annual Reports – 2006-2013" (Exh. US-164).

[231] NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013" (Exh. US-163); "Mortalities per 1,000 Dolphin Sets Table" (drawn from EPO Dataset; IATTC, 2009 Annual Report).

interactions per 1,000 sets, *i.e.*, 3.2 percent of dolphin mortalities per 1,000 sets in the ETP.[232] Furthermore, these numbers actually *understate* the difference in dolphin mortality between the fisheries, as the data from the Hawaii and American Samoa fisheries covers *all* marine mammal interactions, not just dolphin mortalities.

139. Extrapolating from observer reports, estimated annual incidental mortality and serious injury of cetaceans in the Hawaii deep-set longline fishery was 25.23 animals per year for 2002-2006 and 40.4 animals per year for 2006-2010.[233] Those numbers represent 2.2 percent and 3.6 percent of the 1,124 dolphins that are, on average, killed every year in the ETP due to setting on dolphins.[234] However, the number of active vessels in the Hawaii tuna longline fleet is about a third *greater* (112 active vessels in 2012 in the Hawaii pelagic longline fishery, compared to 80-90 vessels authorized to fish by setting on dolphins in the last few years).[235] Thus the data per vessel is even starker. In 2010, the 87 vessels given DMLs in the ETP each killed, on average, 13.4 dolphins – 3,722 percent of the estimated mortalities per vessel in the Hawaii fishery (0.36 dolphins per vessel).[236]

140. This data is consistent with other studies of longline fisheries. One study of EU vessels operating in the Atlantic from 2006-2006 observed a total of 635 sets, in which only one instance of cetacean bycatch occurred.[237] Furthermore, a cetacean interaction occurred in only 28 sets (4.4 percent of the total).[238] Thus, in contrast to setting on dolphins, where 100 percent of sets involve dolphin interactions (often with hundreds of animals) over 95 percent of sets did not affect dolphins at all.

141. Similarly, in the U.S. Atlantic Pelagic Longline fishery, only 2.8 percent of observed sets over the past decade have involved any marine mammal interaction.[239] And, extrapolating from

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[232] NMFS, "American Samoa Longline Annual Reports – 2006-2013" (Exh. US-164).

[233] *See* U.S. First Written 21.5 Submission, para. 145 (citing William A. Karp, Lisa L. Desfosse, & Samantha G. Brooke (eds.), NMFS, *U.S. National Bycatch Report*, at 391, Table 4.6.C.1 and 394, Table 4.6.D.1 (2011) (Exh. US-66); "U.S. National Bycatch Report First Edition Update," Table 8.3 (Exh. US-67); "U.S. National Bycatch Report First Edition Update," Table 8.4 (Exh. US-68)).

[234] *See* Table 1, *supra*.

[235] *See* NMFS, *National Observer Program FY 2012 Annual Report*, at 32 (2013) (Exh. US-114) (abridged); AIDCP Dolphin Mortality Limits 2012-2014" (Exh. US-22).

[236] *See* IATTC, *Executive Report on the Functioning of the AIDCP in 2010*, at 1 (2011) (Exh. US-165).

[237] *See* U.S. Second Written Submission, para. 23, n.47; Hernandez-Milian, *et al.* 2008, at 254(Exh. US-85).

[238] Hernandez-Milian *et al.* 2008, at 254 (Exh. US-85).

[239] *See* NOAA Fisheries, *2013 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species*, at 41, 44-46, Table 4.7 (2014) (Exh. US-166) ("NOAA Atlantic HMS Report") (abridged) (showing that between 2003 and 2012, a total of 8,254 non-experimental sets were observed in the fishery and that an "interaction" with a marine mammal occurred in 234 sets (2.8 percent)).

all observed sets since 2003, dolphin mortalities and injuries per 1,000 sets is an estimated 18.7 dolphins,[240] which is less than a fifth of the average of 105 dolphin mortalities per 1,000 dolphin sets in the ETP over the past decade. Furthermore, the data for the Atlantic longline fishery overstates dolphin mortality compared to the ETP data because it includes injuries, whereas the data on dolphin mortality in the ETP does not.[241] There have been very few actual dolphin mortalities in the fishery since 2003.[242]

142. As discussed previously, the only other non-purse seine fishing method that produces a significant portion of tuna for the U.S. tuna product market is pole and line fishing.[243] And it is uncontested that pole and line fishing is not associated with dolphin bycatch.[244]

143. Furthermore, Mexico has presented no evidence that undermines NOAA's conclusion in 2013 regarding the status of the relevant evidence. Indeed, Mexico has avoided responding to this fishery-by-fishery data entirely.[245] Rather, Mexico has relied heavily on general summations regarding the state of marine mammal bycatch in the world generally[246] and highly dated

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[240] *See* NOAA Atlantic HMS Report, at 41, 44-46, Tables 4.3, 4.7 (2014) (Exh. US-166).

[241] *See* NOAA Atlantic HMS Report, at 44-46, Table 4.7(Exh. US-166).

[242] *See* NOAA Atlantic HMS Report, at 44-46, Table 4.7 (Exh. US-166) (showing that there were between 0 and 2 observed mortalities in the fishery between 2003 and 2012 and estimating that total mortalities for the fishery ranged between 0 and 28.1 marine mammals per year).

[243] *See* U.S. First Written 21.5 Submission, paras. 125, Table 2, and 127, Table 3.

[244] *See* U.S. First Written 21.5 Submission, paras. 147-149; Mexico's Oral 21.5 Submission, para. 61. Moreover, as discussed in response to Questions 19 and 22, the data from purse seine fisheries outside the ETP shows low levels of dolphin interaction and mortality. *See* U.S. Response to Question 19 (showing that, based on the most up-to-date evidence, dolphin mortality in the WCPFC purse seine fishery in 2010 was 110 dolphins, or 2.64 dolphins per 1,000 sets, which is 2.6 percent of dolphin mortalities per 1,000 sets in the ETP in that year and showing that data from other purse seine fisheries in the Atlantic and Indian shows similar interaction and mortality levels).

[245] *See* U.S. Second Written 21.5 Submission, para. 23 (detailing U.S. evidence that Mexico has failed to respond to).

[246] *See* Mexico's Opening 21.5 Statement, para. 16 (citing Kobe II Bycatch Workshop Background Paper, at 2 (2010) (Exh. MEX-39) (The Kobe II report states that "the bycatch of marine mammals in fisheries is a significant factor in long-term conservation and management of marine mammal stocks worldwide" and that thousands "of these animals are killed each year through entanglement with fishing gear" and that "[m]arine mammals interact with several gear types used in fisheries managed by tuna RFMOs." *See* Exh. MEX-39, at 2. It contains no specific information about dolphin mortalities in any fisheries but makes general recommendations for bycatch mitigation. The United States does not cast aspersions on the Kobe II Report, but merely observes that it does not present evidence of dolphin mortalities in tuna fisheries, and, indeed, it was not its purpose to do so); *see also* Mexico's Second Written 21.5 Submission, para. 43 (In this paragraph, Mexico cited reports on: 1) a gillnet fishery that Mexico does not even assert targets tuna and, in any case, would not be a significant source for the U.S. tuna product market; 2) a driftnet fishery that has been closed since 1986; and 3) a report on Taiwanese near-shore fishery (not necessarily a tuna fishery) that was based on surveys from the early 1990s and a single interview with a "driftnetter" in 2000. *See* U.S. Second Written 21.5 Submission, para. 39 and the sources cited therein.).

publications that make conclusions based on studies or anecdotes from decades ago.[247] In short, Mexico's cannot demonstrate that there is "regular and significant" dolphin mortality is currently happening in any particular tuna fishery (other than the ETP large purse seine fishery) for the exact same reason that Mexico has failed to prove its central factual allegation that all other fishing methods "have adverse effects on dolphins that are equal to or greater than" setting on dolphins in an AIDCP-compliant manner does – the evidence simply does not support it.

22. *To both parties*: Has the United States Assistant Administrator made any determination of tuna-dolphin association in fisheries other than the ETP as provided in Section 216.91(a)(2)(i) and as described in Section B(3) of Form 370? If not, why not? What is the meaning of "regular and significant" in the context of making this determination? Should the Assistant Administrator have made any such determination?

144. Section 216.91(a)(2)(i) requires an observer statement (in addition to the captain statement) where NOAA "has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)."

145. As discussed in response to the Question 21, NOAA has not made a determination pursuant to either Sections 216.91(a)(2)(i) or 216.91(a)(4)(iii). NOAA confirmed in the 2013 Final Rule that NOAA "has not made a determination that another fishery has either a regular and significant association between dolphins and tuna or regular and significant mortality or serious injury of dolphins" in light of the fact that NOAA "has no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP" that would support a positive determination under either provision.[248]

146. NOAA interprets its own regulations based on its plain meaning of the text. And by its terms, Section 216.91(a)(2)(i) applies to non-ETP purse seine fisheries. Moreover, any

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[247] *See* Mexico's Opening 21.5 Statement, para. 27 (citing N.M. Young & S. Iudicello, *Worldwide Bycatch of Cetaceans*, NOAA Tech. Memo NMFS-OPR-36, at 131-32 (2007) (Exh. MEX-18)) (The exhibit to which Mexico cites presents no original data but summarizes data from previous studies dating from the 1970s, 80s, and 90s. The underlying source for the sentence Mexico cites, concerning dolphin mortality off the coast of Africa, was an unpublished report from 1991. *See id.* (citing F.G. Alverson, "Tuna Purse Seine and Gill/Drift Net Fisheries in the Oceans of the World and their Relationship to Tuna-Dolphin, Tuna-Whale, and Tuna-Whale Shark Associated Schools," Unpublished Report Submitted to the CANAINPES Seccion Especializada en Pesca de Atun Programa Atun-delfin, Camara Nacional de la Industria Pesquera, at 110 (1991). Thus the source for the figure Mexico mentions is a quarter century old and was never subject to scientific review. Furthermore, modern data from European vessels fishing off the African contradicts the report. *See* U.S. Response to Question 19.); Mexico's First Written 21.5 Submission, para. 119 (citing Young & Iudicello 2007, at 112 (Exh. MEX-18)) (The underlying source, in this instance, was Dolar, M.L.L. "Incidental Bycatch of Small Cetaceans in Fisheries in Palawan, Central Visayas and Northern Mindanao in the Philippines, 15 *Rep. Int'l Whaling Comm.* 355 (1994), which is over two decades old and is directly contradicted by more recent data from the WCPFC).

[248] 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exh. MEX-7) (quoted above).

determination would likely be done on a fishery-by-fishery basis ("[i]n a fishery …") based on current data ("regular and significant association *occurs* between …"). A "fishery" is defined by location, gear type (or fishing method) and target species; for example, the eastern tropical Atlantic purse seine tuna fishery. In considering whether a regular and significant association between tuna and dolphins occurs outside the ETP that is "similar to the association between dolphins and tuna in the ETP," the United States would consider whether the conditions present in the ETP exist in another fishery.[249]

147. The current, fishery-by-fishery evidence on the record is entirely consistent with NOAA's conclusion in 2013 regarding the state of the evidence. As discussed in response to Question 20, large purse seine vessels conduct, on average, over 10,000 intentional sets on dolphins, chasing, on average, 6.2 million dolphins, and capturing, on average, 3.7 million of them. Yet there is *no evidence* that a purse seine vessel has ever *chased* a dolphin to harvest tuna, much less evidence that purse seine vessel systematically and routinely *chase and capture* dolphins outside the ETP to harvest tuna, thus evidencing an association exists "similar" to the ETP.

148. The fact of the matter is that the ETP is *fundamentally* different from all other oceans in that it is the only ocean where tuna and dolphins have a known regular and significant association and the only ocean where such an association is exploited as the foundation for a commercial fishery.[250] It is well known, for example, that during the chase and encirclement that the bond between dolphins and the associated tuna persists, and that "during seining tuna and dolphins continue to associate so tightly that to catch dolphins is also to catch tuna."[251] Further, it is understood that when a subset of a dolphin school being chased breaks away from the remaining dolphins they often "take" tuna with them. In other words, the bond between dolphins and tuna is so strong in the ETP that even when given the choice of staying with other tuna some tuna follow dolphins.[252]

149. Large purse seine vessels take advantage of this unique association to the detriment of ETP dolphins. As such, it is not surprising that the mortality figures in purse seine fisheries outside the ETP differ so much from inside the ETP, even taking into account the AIDCP-mandated requirements. Large purse seine vessels in the ETP have caused, on average, 1,127 dolphin mortalities per year over the past decade.[253] 99.8 percent of these deaths (1,124.3) have been caused by intentional sets on dolphins, which make up less than half of all sets by large

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[249] *See also* 16 U.S.C. § 1385 (d)(1)(B)(i) (Exh. MEX-8) (referring to "a regular and significant association . . . similar to the association between dolphins and tuna in the [ETP]").

[250] *See US – Tuna II (Mexico) (Panel)*, para. 7.520; Donahue & Edwards 1996, at 38 (Exh. MEX-40); Gerrodette 2009, at 1192 (Exh. US-29).

[251] National Research Council, *Dolphins and the Tuna Industry*, at 42 (Exh. US-160).

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

[253] *See* U.S. Response to Question 19, at Table 1.

purse seine vessels in the ETP.[254] Unassociated sets and floating object sets together have caused and average of 2.7 dolphin mortalities per year. And data from other purse seine fisheries tells the same story: the fact is that not setting on dolphins is simply not as dangerous to dolphins as setting on dolphins.[255]

150. Mexico puts forward no evidence that a "regular and significant association" between tuna and dolphins "similar to the association between dolphins and tuna in the ETP" occurs in any fishery outside the ETP. As discussed above in the response to Question 20, none of the sources Mexico cites suggest that, in any fishery outside the ETP, dolphins can be chased with helicopters and speedboats and set on to catch tuna or that there is a tuna-dolphin bond that can be exploited on a commercial basis.[256] To the contrary, all of the sources Mexico cites describe tuna-dolphin associations outside the ETP in the same terms as tuna-whale associations, namely very rare, fleeting, and susceptible of only opportunistic exploitation.[257]

151. Indeed, Exhibit MEX-40, an annotated bibliography summarizing the available literature on dolphin interactions with tuna purse seine fisheries outside the ETP, concludes: "There are no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP."[258] Tuna-whale associations occur more frequently than tuna-dolphin, and even these are very rare. Furthermore, "there is no evidence that [the catches of dolphins that do occur] result from directed chase and capture methods such as those used by the large vessels in the ETP."[259]

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[254] *See* U.S. Response to Question 19 (citing IATTC, EPO Dataset 2009-2013 (Exh. US-26); IATTC, *Tunas and Billfishes*, Table A-7 (Exh. US-44)).

[255] *See* U.S. Response to Question 19 (showing: 1) that dolphin mortality per 1,000 sets in the WCPFC purse seine fishery in 2010 was 2.64 dolphins – 2.6% of dolphin mortalities per 1,000 dolphin sets in the ETP; 2) that a study of the European purse seine fishery in the Indian Ocean reported zero dolphin mortalities in 3,052 observed sets; and 3) that a study of the European purse seine fishery in the Atlantic Ocean showed zero dolphin interactions in nearly 1,400 observed sets).

[256] *See* U.S. Response to Question 20; *see also* Mexico's First Written 21.5 Submission, paras. 109, 113 (citing Kobe II Bycatch Workshop Background Paper, at 2 (Exh. MEX-39) and Donahue & Edwards, 1996, at 2 (Exh. MEX-40)).

[257] *See* Kobe II Bycatch Workshop Background Paper, at 2 (Exh. MEX-39) (likening tuna-dolphin associations outside the ETP to tuna-whale associations); Donahue & Edwards, 1996, at 7, 16, 22, 28 (Exh. MEX-40) (summarizing several studies that found rare instances of sets on whales and dolphins outside the ETP); Australia and Maldives, "On The Conservation Of Whale Sharks Rhincodon Typus)" (Exh. MEX-45) (stating that "interactions with whale sharks and cetaceans" have "been recorded," although mentioning only sets on whale sharks (the focus on the resolution), several species of whales, and one species of dolphin).

[258] Donahue & Edwards, 1996, at 42 (Exh. MEX-40).

[259] Donahue & Edwards, 1996, at 42-43 (Exh. MEX-40).

152. Thus, the record in this dispute confirms NOAA's statement in the 2013 rule that there are no reports of any fishery exhibiting a tuna-dolphin association similar to the association between in the ETP.

23. *To both parties*: What is meant by the term "where applicable" in paras. B(1), B(2) and B(4) of Form 370?

153. The term "where applicable" refers to the situation where NOAA has determined that an observer program for a particular fishery to be "qualified and authorized" pursuant to section 216.91(a),[260] and an observer is on board the particular fishing trip.

24. *To both parties*: In the seven fisheries referred to in para. 128 of the United States' second written submission, to which para. in form 370, if applicable, do these fisheries fall under?

154. The Atlantic Bluefin Tuna purse seine fishery falls under box 5B(2). The other six fisheries fall under box 5B(1).

25. *To both parties*: Form 370 does not appear to have a check box for a situation where a fishing vessel fishes in an area that the Assistant Administrator has determined as having regular and significant dolphin mortality or serious injury. What is the requirement under such a circumstance in the context of filling out the form?

155. If NOAA determined that a particular fishery was "having a regulator and significant mortality or serious injury of dolphins," NOAA would need to amend section 370 to account for that new determination. At present, no such determination has been made and, as such, the form need not account for such a scenario.[261]

156. Amending Form 370 is a straightforward process for NOAA, and does not require a formal rulemaking process.[262] NOAA last changed Form 370 in 2013 to account for the changes made to the regulations by the 2013 Final Rule.

Observers

26. *To Mexico*: Could Mexico please comment on para. 128 of the United States' second written submission regarding the new requirements for qualification of observers?

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[260] *See* Qualified and Authorized Notice, 79 Fed. Reg. at 40,718 (Exh. US-113).

[261] As a general matter, NOAA has tried to keep Form 370 to one page for ease of completion by the industry and for filing and archiving by the NOAA's Tuna Tracking and Verification Program (TTVP).

[262] Under the Paperwork Reduction Act, NOAA is required to receive prior approval from the Office of Management and Budget (OMB) (an office of the Executive Office of the President) before making changes to Form 370.

27. *To the United States*: Other than in the fisheries mentioned in para. 128 of the United States' second written submission, has the United States engaged in training and qualifying observers, or assisting other countries and organizations to train and qualify observers, outside the ETP so that observers are able to certify that no dolphins were killed or seriously injured?

157. NOAA tailors the requirements of each domestic observer program to the specific needs of the fishery at issue. Where there is need to train observers as to whether dolphins have been killed or seriously injured, the United States has done so. In particular, as discussed in Question 28, NOAA has recently determined that the observer programs for all seven domestic fisheries where tuna is regularly harvested are "qualified and authorized" to issue certifications for purposes of the amended measure.[263]

158. As to foreign fisheries, the United States has provided capacity building assistance to certain foreign observer programs operating outside the ETP. The capacity building that the United States provides is tailored to the particular needs of the observer program or programs at issue. Such capacity building will often cover comprehensive training on fishing regulations, fishing methods, biological sampling, and marine animal protection, and would not necessarily address identification of dolphin mortality and serious injury.[264] The reason for this is that, although the AIDCP observer program has always focused on the harms caused to *dolphins* by large purse seine vessels, the same is not generally true of other observer programs.[265] But again, the reason that the AIDCP program is focused so squarely on harms to *dolphins*, where other programs may not be, is that the need in the ETP differs so dramatically from other fisheries.

159. Recent capacity building for non-ETP observer programs include two observer training courses NOAA gave in West Africa (one in Gabon and one in Liberia) in 2012. The Gabon course was three weeks long and focused on a variety of topics, including: 1) species identification of fish, sharks, and marine mammals; 2) data collection for target species and

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NOVA, FF/V Albacora S.A., Case No. PI1000828 (2010)[263] Qualified and Authorized Notice, 79 Fed. Reg. at 40,719-20 (Exh. US-113).

[264] *See, e.g.*, Kimberly S. Dietrich et al., "Building Scientific Observer Capacity in Africa – Lessons Learned" (2013) (Exh. US-167) (This guide suggests that building capacity should focus on comprehensive training on fishing regulations, fishing methods, biological sampling, and marine animals. *See id.* at Table 1. The report also describes the many challenges of establishing a new observer program, including lack of office supplies, lack of electricity, and lack of motivation among participants.).

[265] *See* AIDCP, art. II (Exh. MEX-30) (stating that the goals of the AIDCP are: 1) "to progressively reduce incidental dolphin mortalities"; 2) "with the goal of eliminating dolphin mortality in this fishery, to seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins"; and 3) ensuring the fishery's long-term sustainability); *id.* Annex II(4) (enumerating the duties of observers, including making available to the captain "the record of dolphin mortality of that vessel" and providing to the Director the reports required by the agreement, including dolphin mortalities and sets on dolphins without a DML or after reaching a vessels DML).

bycatch; 3) vessel information; 4) vessel sightings; 5) documenting compliance; and 6) matters relating to daily procedures and safety.[266] The Liberia course took place in two week-long periods and covered the duties of an observer, fish identification, and management actions on shrimp and groundfish operations.[267] In previous years, the United States provided observer trainings in Ghana, Senegal, and Liberia that focused on safety, sea turtles, marine mammals, seabirds, and fishing techniques.[268]

160. More generally, the United States has been an active participant and leader in the seven International Fisheries Observers & Monitoring Conferences, including at the last conference in Chile in 2013. These sessions covered a range of topics, including cost-effectiveness, data quality, use of industry monitoring to support observer programs, new technological developments (*i.e.*, VMS), and building capacity in new and emerging observer programs.

28. *To the United States*: How and why has the United States chosen the fisheries mentioned in para. 128 of the United States' second written submission? Could the United States explain what are the criteria taken into account for choosing one specific fishery over another?

161. As explained in paragraph 128 of the U.S. second submission, NOAA published the Qualified and Authorized Notice on July 14, 2014.[269] This notice does two things. First, it sets out the criteria NOAA uses to determine whether an observer program is "qualified and authorized" to issue observer statements for purposes of the dolphin-safe labeling program.[270] Second, the notice announces that, after examining the observer programs operating in the seven domestic fisheries in which tuna is regularly harvested, NOAA has determined that all seven programs meet the criteria and are therefore "qualified and authorized" to provide observer statements for purposes of the amended measure.[271]

162. The criteria are as follows:[272]

- Observers are trained and able to identify dolphins endemic to the area of the fishery;

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[266] NMFS, *National Observer Program FY 2012 Annual Report*, at 10-11 (2013) (Exh. US-168).

[267] NMFS, *2012 Annual Report*, at 11 (Exh. US-168).

[268] Deitrich *et al.* 2013, at Table 1 (Exh. US-167).

[269] *See* Qualified and Authorized Notice, 79 Fed. Reg. at 40,718 (Exh. US-113).

[270] Qualified and Authorized Notice, 79 Fed. Reg. at 40,719 (Exh. US-113).

[271] Qualified and Authorized Notice, 79 Fed. Reg. at 40,719-20 (Exh. US-113). The seven domestic fisheries are: the American Samoa Pelagic Longline Fishery; the Atlantic Bluefin Tuna Purse Seine Fishery; the Atlantic Highly Migratory Species Pelagic Longline Fishery; the California Deep-set Pelagic Longline Fishery; the California Large-mesh Drift Gillnet Fishery; the Hawaii Deep-set Longline Fishery; and the Hawaii Shallow-set Longline Fishery.

[272] Qualified and Authorized Notice, 79 Fed. Reg. at 40,719 (Exh. US-113).

- Observers, or an authorized representative participating in the observer program, as applicable, are trained and able to determine dolphin mortality and serious injury. ''Serious injury'' means any injury likely to cause mortality;

- Observers are trained and able to collect written or photographic documentation, sufficient for an authorized representative participating in the observer program, to verify or make a determination about the disposition of any dolphin, if statements certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught are to be made;

- (For purse seine fisheries only) Observers are trained and able to determine whether a purse seine net was intentionally deployed on or used to encircle dolphins;

- (For purse seine fisheries only) Observers are trained and able to collect written or photographic documentation, sufficient for an authorized representative participating in the observer program, to verify or make a determination that no purse seine net was intentionally deployed on or used to encircle dolphins during a fishing trip, if statements certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna was harvested are to be made; and

- Observers, or an authorized representative of a nation participating in the observer program based on information from the observer, as applicable, are authorized by the applicable observer authority to certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were harvested, and in the case of purse seine vessels, that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught.

29. ***To the United States*: What is the relationship between a United States determination regarding the qualification of observers and the presence of such observers on fishing boats? How does the United States determine which fishing trips (i.e. in which fishery/ies and using which fishing method(s)) will require independent observer certification?**

163. In the Qualified and Authorized Notice, NOAA has determined that observer programs in seven different domestic fisheries are "qualified and authorized" to issue observer statements for purposes of labeling tuna product "dolphin safe" under the amended measure.[273] The rule does not affect observer coverage in any fishery. As such, NOAA only considered for purposes of this notice those domestic fisheries that already had an observer program and that regularly harvested tuna. Seven U.S. fisheries fit this description. NOAA has determined that the observer programs in all seven of these fisheries are "qualified and authorized."

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[273] Qualified and Authorized Notice, 79 Fed. Reg. at 40,719-20 (Exh. US-113).

164. The United States regulates fisheries differently depending on the fisheries' particular characteristics. Whether NOAA requires an observer program to be instituted in a domestic fishery, and what coverage will be required in a particular fishery, depends on a whole host of factors. Like foreign observer programs, U.S. observer programs often do not require 100 percent coverage. For example, the Hawaii Deep-set and American Samoa Longline fisheries average 20 percent coverage,[274] even though WCPFC rules only mandate that the U.S. regional observer programs require five percent coverage for those fisheries.[275] Where there is not 100 percent coverage in a U.S. fishery, the U.S. observer program determines which particular vessels will carry observers on which particular trips. This decision is often based on a formula with the goal being that the observers are evenly spread over all participating vessels over time. The determination that a particular fishery is "qualified and authorized" to issue observer statements for purposes of the amended measure does not affect the process by which the relevant observer program determines which vessels will carry observers on which trips.

30. *To the United States*: Why does the United States regulation impose observer certification within the ETP but not outside the ETP?

165. The United States wishes to clarify that, for tuna product containing ETP tuna, the United States requires the provision of an observer certification (or proof thereof) where the tuna was caught by large purse seine vessels that are required to carry observers under the AIDCP.[276] The United States *does not* require the provision of an observer certification (or proof thereof) for tuna harvested by small purse seine vessels, longline vessels, or other vessels operating in the ETP that are not required under the AIDCP to carry observers.[277] For tuna caught by those vessels, the United States requires captain certifications attesting to the dolphin safe status of the tuna product.[278]

166. As discussed in response to Question 7, the reason that the United States requires the provision of the already created observer certification (or proof thereof) for tuna harvested by large ETP purse seine vessels is the same reason that the AIDCP requires observers on those

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[274] *See* NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013" (Exh. US-163); NMFS, "American Samoa Longline Annual Reports – 2006-2013" (Exh. US-164).

[275] *See* WCPFC, CMM 2007-01, Attachment K, Annex C(6) (requiring 5 percent observer coverage in each fishery except for certain purse seine fisheries by June 30, 2012) (Exh. US-136).

[276] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128).

[277] The two exceptions to this are the two U.S. fisheries in the ETP where tuna is regularly harvested, the California Deep-set Pelagic Longline Fishery and the California Large-mesh Drift Gillnet Fishery. As discussed previously, NOAA has determined that the observer programs for these two fisheries (as well as five other non-ETP fisheries) are qualified and authorized to issue certificates for purposes of the amended measure where an observer is on board the harvesting vessel. Where an observer is not on board, the United States requires only a captain statement to attest to the dolphin safe status of the tuna. *See* Qualified and Authorized Notice, 79 Fed. Reg. at 40,719-20 (Exh. US-113).

[278] *See, e.g.*, Captain's Statements Received by NMFS, 2012-2014 (Exh. US-169).

vessels – it is those vessels that are *capable and permitted* to take advantage of the unique association of yellowfin tuna and dolphins in the ETP by engaging in multi-hour chases and captures of huge herds of dolphins. The same cannot be said of small ETP purse seine vessels, which are not permitted to set on dolphins.[279] And all non-ETP purse seine vessels are not capable of harvesting tuna by chasing and capturing dolphins because the association on which this chase and capture depends does not exist outside the ETP.[280] In any event, many non-ETP purse seiners are not permitted to opportunistically set *on even a single dolphin*, much less chase and capture hundreds of dolphins in a single set.[281] Of course, non-purse seine vessels (*e.g.*, longliners) do not use gear that would enable them to chase and capture even one dolphin, much less a school of hundreds of dolphins.

167. Again, the situation in the large purse seine ETP fishery is fundamentally different from the situation in other fisheries, inside and outside the ETP. Large ETP purse seine vessels, in coordination with speedboats and helicopters, engage in tens of thousands of lengthy chases of large schools of dolphins (300-400 individuals) to catch tuna.[282] No evidence exists that this happens anywhere else in the world.

168. A large ETP purse seine vessel carries a crew of approximately 20 persons on any particular trip. The primary job of the crew *is to harvest tuna*. However, given the intensity and length of the interactions in a dolphin set between the dolphins, on the one hand, and the vessel, speed boats, helicopter, and purse seine net on the other, the AIDCP parties concluded that it was appropriate to require a vessel *capable and permitted* to engage in such a dangerous activity to

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[279] AIDCP, Annex VIII(6) (Exh. MEX-30) (prohibiting small purse seine vessels from setting on dolphins); *see also* 1991 Final Rule, 56 Fed. Reg. at 47,418 (Exh. US-129) (determining that only purse seine vessels of 400 short tons (362.5 metric tons) carrying capacity or greater are capable of deploying their nets on or to encircles dolphins"); 2009 Final Rule, 75 Fed. Reg. at 1609 (Exh. US-130) (declining to revisit this determination).

[280] *See* IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-123) (showing where the association exists); *see also* U.S. Responses to Questions 20 and 22.

[281] *See* WCPFC Resolution 2011-03 (Exh. US-11) (prohibiting setting on cetaceans in the western and central Pacific Ocean); IOTC Resolution 13/04 (Exh. US-12) (prohibiting the setting on cetaceans in the Indian Ocean); 16 U.S.C. §§ 1372(a)(1)-(2) (Exh. US-37) (prohibiting U.S. vessels from setting on all marine mammals anywhere in the world subject to limited exceptions).

[282] Chases usually last 20-40 minutes but can take over two hours. U.S. First Written 21.5 Submission, para. 82 (citing Curry 1999, at 6 (Exh. US-36)). At the end of a chase, speedboats have herded the dolphins into a tight group. The purse seiner then deploys the net around the dolphins, and speedboats circle the net's opening to prevent dolphins from escaping until the net is closed completely. At that point, dolphins cannot escape, other than by jumping over the net's floating corks, until the "backdown" process is initiated. Helicopters are often flown extremely close to the water's surface during the chase and encirclement so that the air turbulence from their rotors creates a windstorm beneath the aircraft which, along with the loud noise from the engines, help deter dolphins from escaping. It takes approximately 40 minutes before the vessel can begin the "backdown" procedure to release the captured dolphins, and thus dolphins could be confined for over an hour and half during a set. Curry 1999, at 6 (Exh. US-36).

carry a *single* person to observe the impact of the vessel on the dolphins that it was chasing and capturing.

169. Thus, the requirement to provide the already created AIDCP-mandated observer certificate (or proof thereof) is inextricably linked to the fact that large purse seine vessels are capable of – and permitted to – intentionally chase and capture dolphins in pursuit of tuna. What these large ETP purse seine vessels are doing is entirely unique in the world. There is *zero* evidence that other purse seine vessels *chase* and capture dolphins. Indeed, the evidence indicates that it is *only* in the ETP that the "tuna-dolphin bond is so strong that the tuna stay with the dolphins" during the chase and encirclement process so that to capture dolphins is to capture tuna.[283] Where other purse seine vessels set on dolphins, it is generally by accident, and likely involves only a small number of dolphins. The current, fishery-by-fishery data on purse seine fisheries outside the ETP reflect the uniqueness of the ETP: the interaction with and harm to dolphins caused by tuna fishing is a mere fraction of what large purse seine vessels are causing in dolphin sets in the ETP.[284] Indeed, where those *same* large ETP purse seine vessels do not intentionally chase and capture dolphins, they interact with and kill *virtually no dolphins*.[285]

170. Simply put, it is the intentional chase and capture of dolphins that is the problem, and the only vessels capable and permitted to chase and capture dolphins are large purse seine vessels operating in the ETP. Not surprisingly, the AIDCP parties mandate a unique observer program for *those vessels*. The United States, which is party to the AIDCP, agrees with the purpose of the AIDCP observer program, and uses that already created AIDCP-mandated observer certificate for purposes of the U.S. dolphin safe label.[286]

31. *To the United States*: Please provide further explanation to help the Panel better understand how the decision to require observer certification is made. In answering, please discuss also how the United States decides on the extent (geographical and numerical) of required observer coverage. Is risk to dolphins taken into account in making such a determination?

171. The United States refers to its responses to other questions, including Questions 7, 28, and 30.

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[283] Gerrodette 2009, at 1192 (Exh. US-29). Indeed, the bond between dolphins and tuna is so strong in the ETP that even when given the choice of staying with other tuna some tuna follow dolphins. Gosliner 1999, at 121 (Exh. US-34).

[284] *See* U.S. Response to Question 19; U.S. Second Written 21.5 Submission, paras. 23, 38; U.S. First Written 21.5 Submission, para. 132.

[285] *See* U.S. Response to Question 19; U.S. Second Written 21.5 Submission, para. 23; U.S. First Written 21.5 Submission, para. 133.

[286] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128).

172. Currently, the only observer certifications that the United States requires for purposes of the amended measure are the AIDCP-mandated observer certifications for large purse seine vessels operating in the ETP and the observer certifications generated in the observer programs of the seven U.S. fisheries determined to be "qualified and authorized" to issue observer statements for purposes of the amended measure.

173. First, the United States has explained in Questions 7 and 30 what the basis is for the requirement to provide an observer certification (or proof thereof) where the tuna was caught by large purse seine vessels that are required to carry observers under the AIDCP. As explained, that decision is tied closely to the harm caused to dolphins by those specific vessels operating in that specific area.

174. With regard to "the extent (geographical and numerical) of required observer coverage," the United States requires the provision of the observer certificate (or proof thereof) where the AIDCP-mandated observer certificate has already been created.

175. Second, the United States has explained in response to Question 28 that the United States now requires an observer certification for tuna product containing tuna from the seven U.S. fisheries that have observer programs that are "qualified and authorized" to issue observer statements for purposes of the amended measure.[287] As the criteria indicate, that decision is not based on a particular risk to dolphins in any one of these seven fisheries. (Indeed, we consider the rate of dolphin mortality and serious injury to be quite low in all seven fisheries. For example, in the American Samoa Pelagic Longline Fishery, for all observed trips in 2013, there were two dolphin interactions out of 1,690,962 hooks retrieved, with one dolphin released dead.[288] Similarly, in the Hawaii Deep-Set Longline fishery, for observed trips in 2013, there were 11 marine mammal interactions in 9,278,133 hooks retrieved with 4 dolphins released dead.[289]) Rather, the determination in the Qualified and Authorized Notice reflects decision to strengthen the dolphin safe labeling requirements by making use of an existing supplementary source of information regarding the dolphin safe status of tuna, where such information can be provided at little or no cost, due to the presence of a qualified and authorized observer.

176. With regard to "the extent (geographical and numerical) of required observer coverage," the United States requires the provision of the observer certificate for tuna caught in one of those seven fisheries where an observer certificate has already been created.

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[287] *See* Qualified and Authorized Notice, 79 Fed. Reg. at 40,718-20 (Exh. US-113).

[288] NMFS, "American Samoa Longline Annual Reports – 2006-2013" (Exh. US-164). The observer coverage rate for this fishery was approximately 20 percent in 2013.

[289] NMFS, "Hawaii Deep-Set Longline Annual Reports – 2004-2013" (Exh. US-163). Observer coverage averages 20 percent in this fishery.

177. The factors that the United States considered in establishing observer programs for those seven fisheries derive from the same statutory and regulatory requirements that triggered the establishment of most of the observer programs in the 47 U.S. fisheries that currently have observer programs. An observer program may be established in a U.S. fishery for a number of different reasons, including marine mammal protection, fishery conservation, sea turtle protection, and the protection of threatened or endangered species more generally.[290]

178. The level of coverage of any particular observer program and the types of information the observers collect are determined based on the characteristics of the fishery, legal requirements, and other considerations, such as funding. The seven U.S. observer programs determined by NOAA to be "qualified and authorized" have observer coverage ranging from 8 to 100 percent, although the exact coverage for any one of these fisheries in any particular year can vary depending on the availability of funds and other considerations.[291]

32. *To the United States*: In its oral answer to panel question no. 12, the United States explained that a determination that observers are qualified to make a dolphin-safe certification has no consequence to or impact on the extent of *coverage* of observers on board fishing vessels. In light of this fact, what is the purpose of making such a determination?

179. The Panel's understanding is correct. The Qualified and Authorized Notice does not affect the coverage of observers on board fishing vessels operating in one of the seven fisheries. Thus, the Hawaii Deep-set Longline Fishery averages 20 percent observer coverage. The Qualified and Authorized Notice does not impact that percentage.

180. As the United States noted in its second submission, the United States recognizes that observers are important in the collection of data, including data related to harms caused to dolphins by fishing.[292] As such, the purpose of the determination contained in the Notice is to further strengthen the dolphin safe labeling requirements by making use of a "qualified and authorized" supplementary source of information regarding the dolphin safe status of tuna where such a source of information already exists. As noted in the Notice, the observer statement would be in addition to a captain's statement, which remains required for tuna product containing tuna harvested in those seven fisheries to be labeled dolphin safe, just as it is for tuna product containing tuna harvested in other fisheries.[293]

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[290] *See generally* NMFS, *National Observer Program FY 2012 Annual Report*, at 1 (2013) (Exh. US-168).

[291] U.S. Second Written 21.5 Submission, para. 128 (citing NMFS, *National Observer Program FY 2012 Annual Report*, at 29-38 (Exh. US-114)).

[292] U.S. Second Written 21.5 Submission, para. 128.

[293] Qualified and Authorized Notice, 79 Fed. Reg. at 40,719 (Exh. US-113).

181. But to be clear, the United States *does not* consider the Qualified and Authorized Notice to constitute the U.S. measure taken to comply with the DSB recommendations and rulings in this dispute. The DSB recommendations and rulings do not require the United States to alter the observer-related requirements *in any way whatsoever*. Where the Appellate Body discussed the differing observer requirements, it confirmed, if anything, that the United States need not adjust its observer requirements to remain in compliance with its WTO obligations.[294]

33. *To the United States*: Please explain what is meant by the reference to observers being "on board" in section 216.91(a)(2)(B) of the 2013 Final Rule.

182. The United States understands the Panel to be referring to section 216.91(a)(2)(iii)(B) where that provision reads, in part ". . . and where such an observer is *on board* the vessel, . . ." The reference to "on board" means that an observer statement is required in those fisheries with an "authorized and qualified" observer program only if an observer was actually working on board the harvesting vessel when the tuna contained in the tuna product was caught. Where no observer is on board, section 216.91(a)(2)(iii)(B) does not require an observer statement for tuna caught on that trip for purposes of the amended measure.

183. As noted above, U.S. fisheries often do not have 100 percent coverage. In particular, the seven U.S. observer programs determined by NOAA to be "qualified and authorized" have observer coverage ranging from 8 to 100 percent, although the exact coverage for any one of these fisheries can vary depending on the availability of funds and other considerations.[295] Section 216.91(a)(2)(iii)(B) recognizes this reality.

34. *To the United States*: During the oral hearing, the United States explained that it only requires observer certification where such observers are already "available". Please explain what this means. Also, where is this condition indicated in the amended tuna measure?

184. "Available" describes the two situations where the United States requires observer certifications for purposes of the amended measure. First, the United States requires an observer statement (or proof of one) for tuna product containing ETP tuna where an AIDCP-mandated certificate has already been created – *i.e.*, for tuna caught by large purse seine vessels operating in the ETP. Second, the United States requires an observer statement "where applicable." As explained in response to Question 23, that term refers to the requirement that an observer statement be provided where the tuna product contains tuna caught in a fishery determined to be

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[294] *See US – Tuna II (Mexico) (AB)*, para. 296.

[295] U.S. Second Written 21.5 Submission, para. 128 (citing NMFS, *National Observer Program FY 2012 Annual Report*, at 29-38 (Exh. US-114)).

"qualified and authorized" pursuant to section 216.91(a),[296] *and* an observer was on board the vessel for the particular fishing trip where the tuna was harvested.

35. *To the United States*: the Panel is aware of the United States' Hazard Analysis and Critical Control Points (HACCP) program. As the United States already conducts spot-checks and inspections in this context, could the United States also conduct those spot-checks and inspections to determine compliance with the dolphin-safety measure?

185. As a threshold matter, the HACCP requirements the Panel refers to fall within the purview of the U.S. Food and Drug Administration (FDA), in particular FDA's regulations on *Fish and Fishery Products*, 21 C.F.R. pt. 123, and on *Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers*, 21 C.F.R. pt. 113.[297] The HACCP requirements concern issues unrelated to dolphin safety and would not contribute to compliance with the amended measure. Furthermore, FDA regulates only in areas where it has legal authority to do so. FDA does not have authority in the area of the dolphin safe labeling requirements.

186. As a separate matter, under Article 11 of the DSU, a panel is to conduct an objective assessment of the matter referred to it. That objective assessment concerns an assessment of the evidence and arguments provided to it by the parties. Accordingly, a panel needs to conduct its assessment based on the evidence on the record. In this dispute, this would mean examining the evidence and arguments that Mexico has submitted to the Panel to determine whether Mexico has established a *prima facie* case of inconsistency with respect to each of its three claims.[298]

187. In that regard, Mexico has not submitted evidence concerning the HACCP requirements, and the HACCP program is not properly before the Panel.

188. Of course, NOAA already has a robust inspection and verification regime. As noted previously, NOAA's Tuna Tracking and Verification Program (TTVP) regularly conducts "spot checks" of retail market tuna products.[299] These spot checks may be of any tuna product sold at retail, regardless of origin. In addition, TTVP regularly audits U.S. tuna canneries.[300] Tuna

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[296] *See Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries*, 79 Fed. Reg. 40,718 (July 14, 2014) ("Qualified and Authorized Notice") (Exh. US-113).

[297] These measures relate to protection of human life and health, and therefore fall outside the TBT Agreement. TBT Agreement, art. 1.5.

[298] *See* U.S. Response to Question 58 (discussing *US – Tuna II (Mexico) (AB)*, para. 216; *US – COOL (AB)*, para. 272).

[299] *See* U.S. First Written 21.5 Submission, paras. 52-53 (citing *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. § 216.93(g)(3) (Exh. US-2)).

[300] *See* U.S. First Written 21.5 Submission, paras. 52-53 (citing *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. § 216.93(g)(3) (Exh. US-2)). While NOAA has the legal authority to audit processors other than

product found to have been wrongfully labeled pursuant to either examination will likely be seized as evidence and subsequently re-exported, destroyed, or forfeited, depending on the facts of the case.[301] Furthermore, NOAA regulations hold the U.S. importer of record responsible for the submission of the Form 370 that must accompany all imported tuna products and accuracy of the information the form contains, including dolphin safe information.[302]

189. TTVP does not conduct in-person inspections of foreign canneries or other processors, but this is true for *all* foreign canneries and other processors, including *Mexican* canneries. As such, it is impossible to consider that NOAA's inspection regime regarding U.S. canneries and other processors, and the products those domestic entities produce, is not even-handed or otherwise contributes to less favorable treatment of *Mexican* tuna product. We note in this regard that Mexico itself takes the position that it does not allow its vessels to operate in the WCPFC Convention Area in part because it would subject them to high seas boardings and inspections, including by the U.S. Coast Guard.[303]

Captains' certification

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canneries, NOAA is not aware of any such processors that produce tuna product marketed as dolphin safe in the United States.

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

[302] U.S. Response to Original Panel Question No. 4. As also noted in the U.S. First Written Submission, NOAA collects information from domestic tuna processors to verify whether tuna product labeled dolphin safe meets all the relevant conditions. *US – Tuna II (Mexico) (Panel)*, para. 2.31. Whenever a U.S. cannery receives a shipment of domestic or imported tuna for processing, a NMFS representative may be present to monitor delivery and verify the dolphin safe designations. 50 C.F.R. § 216.93(d)(1) (Exh. US-2). Additionally, U.S. tuna processors are required to submit monthly reports to the TTVP for all tuna received at their processing facilities. *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. § 216.93(d) (Exh. US-2). These reports contain, for all tuna received, whether the tuna is eligible to be labeled dolphin safe under section 216.91, species, condition of the tuna products, weight, ocean area of capture, catcher vessel, gear type, trip dates, carrier name, unloading dates, location of unloading and, if the tuna products are labeled dolphin safe, the required certifications for each shipment of tuna. *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. §§ 216.93(d)(i), (d)(ii), (e) (Exh. US-2); *see* U.S. Response to Original Panel Question No. 4.

[303] *See* WCPFC, 2013 Summary Report, at 8 (Exh. US-124) ("Mexico stated it does not have any vessels in the WCPO area and that it continues to have a domestic legal constraint to accepting high seas boarding and inspection, and issues attributing budget for financial contribution, given lack of fishing presence."); *id.* at 8-9 ("Furthermore, Mexico considered that because it has no vessels operating in the WCPF Convention Area (including the overlap area) there should be no need for it to agree high seas boarding and inspection procedures, and in fact due to domestic legal interpretations regarding the high seas it would be difficult to do so." [sic]). As discussed in response to Question 38, U.S. Government authorities may carry out boarding and inspection on the high seas in the WCPFC of any vessel that engaged in or reported to have engaged in any fishery regulated pursuant to the WCPFC Convention. WCPFC, CMM 2006-08, WCPFC Boarding and Inspection Procedures, art. 5 (2006) (Exh. US-170).

36. *To both Parties*: What, if anything, is the relationship between, on the one hand, the number and/or dolphin-safe status of tuna caught, and, on the other hand, a captain's remuneration and/or other incentives?

190. There is no evidence on the record to establish that a relationship exists between the number of fish caught on a particular trip or the dolphin-safe status of such fish and the vessel captain's remuneration (and/or other incentives).

191. There are any number of ways that a captain could be compensated. For example, longline vessels tend to be smaller operations and are more likely to be owner-operated. In such cases, the captain-owner would surely be compensated based on the value of the catch.

192. In contrast, purse seine vessels, which tend to be larger and more expensive to operate, are more likely to be owned by larger companies. Those captains could be paid on a per day basis or could be paid based on the volume or value of their catch or on other considerations.[304] For example, Captain Freitas, a defendant in the *Freitas* case, was paid a per day salary, which "[was] not connected to the amount of fish the vessel catches."[305] But that is just one example, of course, and does not prove that captains that are paid on a per day basis are more likely to opportunistically set on marine mammals than captains compensated in other ways. Indeed, it seems reasonable to assume that captains of Mexican large purse seine vessels are likely to intentionally chase and capture dolphins, no matter how they are compensated.

193. Regardless of the specific payment contract, captains (and their employers, if any) certainly have an interest in maintaining their credibility with canneries. If a captain is untruthful about his catch, and a cannery discovers this, it would likely have a negative impact on the captain's income, because the cannery would no longer want to do business with that captain. Such untruthfulness, of course, could also provide an evidentiary basis for a captain to suffer civil and criminal penalties, as discussed in response to Question 18.

37. *To the United States*: Please provide more information on the log-book kept by captains. What kind of information is kept in this log-book? Does it include the number of tuna caught and the number, if any, of dolphins killed or seriously injured? And how does the captain obtain the information s/he enters into the log-book? Does the captain personally observe all tuna sets, or does s/he receive information from subordinates on-board? Could the United States provide a sample log-book entry to the Panel?

194. As discussed elsewhere, different fisheries have different characteristics and, consequently, are regulated differently. Certain information that is typically required in

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[304] The United States would note that the value of catch would likely depend on tonnage and quality, rather than on number of individual fish, as the question implies.

[305] *In the Matter of Matthew James Freitas, et al.*, at 23, para. 77 (Exh. MEX-46).

logbooks includes: set times, set positions, water temperature, gear configuration, quantity of species caught, disposition of any protected species, port of landing, and port of departure, although the specifics of what actually must be recorded will differ from fishery to fishery.

195. The IOTC, WCPFC, and ICCAT specify certain minimum information that the logbooks must contain.[306] While minimum RFMO logbook standards may require the tracking of marine mammal bycatch, including species identification, such minimum standards may not require recording whether the marine mammal was killed or seriously injured.[307] However, certain logbooks required by national programs covering fisheries in the WCPFC and IOTC areas do require determinations concerning the fate of any marine mammal bycatch (*i.e.*, released alive, released dead, or, in some cases, released injured) or provide space for recording such information.[308]

196. With respect to the captain's knowledge of the information contained in the captains' certificate, we note that, in general, the captain is directing the crew in fishing operations and has first-hand knowledge of the information that he personally enters. In the rare circumstances where the captain does not have first-hand knowledge of information entered into the logbook, it

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[306] *See* IOTC, Resolution 13/03 on the Recording of Catch and Effort Data by Fishing Vessels in the IOTC Area of Competence, arts. 3-8, 17-21 (2013) (Exh. US-171); WCPFC, CMM 2013-05, Conservation and Management Measure on Daily Catch and Effort Reporting (2013) (Exh. US-172); ICCAT, Rec. 10-04, Recommendation by ICCAT Amending the Recommendation to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean (2010) (Exh. US-173).

The IOTC requires that all vessels (except those under 24 meters in length that fish only inside an EEZ) maintain a logbook that contains: vessel information, information on dates and ports of arrival and departure, information on fishing gear, information on sets (*e.g.*, date, position, and description), catch information by weight and species, and any interactions with species of interest, including marine mammals. IOTC, Resolution 13/03, Annexes I-III (Exh. US-171). The WCPFC requires that logbooks be completed daily and contain vessel information, ports and dates of departure and arrival, details on fishing gear, details on fishing effort (time and location of sets), catch information (by species, weight, and the size of the fish), and (for purse seine vessels) set type. WCPFC, CMM 2013-05, at 2 (Exh. US-172); WCPFC, Scientific Data to be Provided to the Commission (Exh. US-174). The ICCAT logbooks are required to include vessel information, dates and ports of arrival and departure, fishing gear, fishing activity (including dates and locations and records of catches), and species identification. ICCAT, Recommendation 10-04, Annex 2 (Exh. US-173).

[307] *See, e.g.*, IOTC, Resolution 13/03, Annexes II (Exh. US-171).

[308] *See, e.g.*, NMFS, "Western Pacific Longline Fishing Log" (Exh. US-175) (requiring recording of whether the dolphin had been released uninjured, injured, or dead); NMFS, "2014 Atlantic Highly Migratory Species Logbook - Set Form," at 3 (Exh. US-176) (requiring recording whether, on a per set basis, whether a dolphin had been involved, injured, or killed); Australia, "Australian Pelagic Longline Daily Fishing Log," at 9 (Exh. US-177) (requiring recording whether the dolphin had been released alive, injured, or been killed); Australia, "Purse Seine Daily Fishing Log," at 10 (Exh. US-178) (requiring recording whether the dolphin had been released alive, injured, or been killed); *see also* China, "Chinese Tuna Fisheries Logbook" (2013) (Exh. US-179); Japan, "Reporting Form of Incidentally Encircled Whale Sharks or Whales" (Exh. US-180); Korea, "Bycatch Purse Seine & Longline" (Exh. US-181).

is nonetheless subject to the captain's review, and the captain remains subject to penalties for any false information that is reported.

38. *To both parties*: Are United States and non-United States captains subject to any kind of independent oversight? How, if at all, are captains' certifications that tuna is dolphin-safe independently verified? For example, are there any kind of "spot checks" on captains? If captains do not observe the sets themselves but receive information on dolphin-safe status from their staff, how is such information verified?

197. With respect to their dolphin safe certifications, fishing vessel captains, both U.S. and non-U.S. persons, are subject to oversight directly, by the U.S. Government, and indirectly, through the U.S. Government's oversight of tuna canneries and importers. Thus, oversight occurs in several ways, and, consequently, captains' dolphin safe certifications may potentially be verified by several mechanisms.

198. Dockside Inspections. Whenever a vessel pulls into a U.S. port – to offload catch, purchase fuel, do repairs, etc. – NMFS agents have authority to board and inspect the vessel. This may include physical inspections of the vessel holds, the captain's logbook, and any NOAA Form 370s (or comparable documents), as well as interviews with the captain and crew (separately), to monitor whether the information is consistent among these sources. A dockside inspection could reveal whether a captain's dolphin safe certification is false, for example, by disclosing a discrepancy between the captain's certification that all the tuna on the boat was dolphin safe and a logbook entry that recorded dolphin death or serious injury.[309]

199. NMFS dockside inspections occur regularly and cover U.S. and foreign vessels landing tuna for sale to U.S. canneries and at U.S. ports.[310] From May 2012 to July 2013, NMFS enforcement agents conducted 129 dockside fishing vessel inspections in American Samoa. Altogether in 2013, 385 fishing vessels were inspected in the NMFS Pacific Islands Division, which includes ports in Guam, Hawaii, and American Samoa. The officers are trained to look

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[309] For example, in the case *In re: F/V Yu Jye*, a NMFS agent performed a dockside investigation in Apra Harbor, Guam, to confirm that vessels were complying with recently issued shark fin regulations. The agent not only discovered that the vessel was not complying with the new regulations but also found a beaked whale on board that had been "imported" in violation of the Marine Mammal Protection Act (MMPA). The agent seized the shark fins and served the vessel owner and operator with a notice of violation with a total assessed penalty of $20,000. *See* Notice of Violation and Assessment (NOVA), *In re: F/V Yu Jye Fa*, NOAA Case No. SW030314A (2003) (Exh. US-182); Notice of Proposed Forfeiture, *In re: F/V Yu Jye Fa*, NOAA Case No. SW030314A (2004) (Exh. US-183).

[310] U.S. officials may be present at a U.S. cannery when it receives a shipment of tuna. 50 C.F.R. § 216.93(d) (Exh. US-2).

for anomalies in the vessel and its documents, and any inconsistencies can lead to a fuller investigation and, if appropriate, to an enforcement action.[311]

200. Inspections on the High Seas and in U.S. Waters. The United States retains oversight and flag state enforcement responsibilities over all its flagged vessels and, consequently, has broad inspection authority. Under U.S. law, U.S. Government authorities can board and inspect any "covered" fishing vessel, *i.e.*, any vessel flagged to the United States or fishing in U.S. waters.[312] These boardings and inspections are, for the most part, carried out by the U.S. Coast Guard. As with dockside inspections, high seas or in-port inspections can include verification of logbooks, cargo, and relevant licences, and can disclose anomalies that, to the trained inspector, cast doubt on or debunk a captain's claims as to the dolphin safe status of the tuna onboard.

201. Additionally, some RFMOs provide boarding authority to parties and cooperating non-members. In the WCPFC convention area, for example, U.S. Government authorities may carry out boarding and inspection on the high seas of any vessel that engaged in or is reported to have engaged in fishing in any fishery regulated pursuant to the Convention.[313] As mentioned in the U.S. first submission, boardings and inspections under this authority have led to enforcement actions against vessels for fishing offenses.[314]

202. Oversight of U.S. Canneries and Importers. As discussed in response to Question 44 above, U.S. canneries are required to produce monthly reports containing various information, including dolphin safe documentation, about the tuna they process.[315] NOAA also periodically audits canneries and conducts retail market spot-checks that track a can or pouch of tuna from the retail purchaser back to the distributor, importer, or cannery and eventually back to the harvesting vessel.[316] Any product found to have been wrongfully labeled is subject to seizure, and the cannery or importer may be subject to sanctions, including those discussed in response to

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[311] In fact, the largest case NOAA has brought originated with a dockside boarding in American Samoa. In that case, *FF/V Albacora Uno*, a NOAA agent discovered, during a boarding that, based on the captain's log, the fishing vessel had been fishing in the U.S. EEZ for two years without a valid permit. The NOVA, issued in June 2010, included 67 counts of fishing in the EEZ without a valid permit and a possible civil penalty of US$7.4 million. Ultimately, the case settled for US$5 million. *See* NOAA, "$5M Settlement Boosts Marine Conservation Plans in the Pacific," July 7, 2010 (Exh. US-184); NOVA, FF/V Albacora S.A., Case No. PI1000828 (2010) (Exh. US-185); Settlement Agreement, FF/V Albacora S.A., Case No. PI1000828 (2010) (Exh. US-186).

[312] *See* 16 U.S.C. § 1861(b)(1)(ii) (Exh. US-187); 16 U.S.C. § 1821(c)(2)(i) (Exh. US-188).

[313] WCPFC, CMM 2006-08, art. 5 (Exh. US-170).

[314] *See* U.S. First Written 21.5 Submission, para. 27; NMFS, 2012 Driftnet Report, at 8 (Exh. Mex-21).

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

[316] *US – Tuna II (Mexico) (Panel)*, para. 2.32; 50 C.F.R. § 216.93(f)(3) (Exh. US-2).

Question 18(a). Thus, U.S. canneries and importers have incentives to ensure that the captains' certifications are complete and accurate.

203. Consequently, to comply with the U.S. measure and ensure they can meet the requirements of a NMFS audit or spot-check, canneries that produce tuna product for the U.S. market require captains to submit dolphin safe certifications for the tuna that the canneries purchase,[317] and they have systems for tracking particular lots of tuna from the harvesting vessel, through processing, all the way to retail sale.[318] The cannery systems ensure that captain's statements and Form 370s are associated with particular shipments of tuna from a particular vessel trip and that these documents (along with other information) remain electronically or physically associated with the tuna, through the loining and canning processes, to sale of the tuna as tuna product.[319] Consequently, canneries can verify that all tuna labeled dolphin safe has a captain's certification associated with it and (if the tuna is sold directly to the cannery) that separation requirements have been met.

204. Cannery audits cover U.S. canneries and the tuna (both U.S. and foreign-caught) processed there, and the retail market spot checks can extend to both U.S. and foreign canneries and the tuna they process. Thus, all captains producing tuna for the U.S. tuna product market are subject to this indirect oversight by canneries that are subject to oversight by NOAA.

39. *To both Parties*: In both of its written submissions and in its oral statement to the Panel, the United States emphasizes that captain certifications are regularly relied upon by national and international regulators, and that such statements are generally accepted as being reliable. Is it international practice to accept captains' certifications to prove compliance with regulatory requirements? In other RFMOs, are captain certifications sufficient to establish compliance with relevant regulatory requirements?

205. Captain statements and logbooks are an integral part of RFMO regimes and other international regimes and agreements. A few examples of how captain statements and logbooks are used are the following:

206. Closed Area Rules. RFMOs will sometimes close off an area of a fishery to fishing. In such situations, the RFMOs, through the members, may rely on captain's logbooks to establish whether captains are complying with the closure. For example, the WCPFC established two

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[317] *See* Captain's Statements Received by NMFS, 2012-2014 (Exh. US-169); Cannery Slides on Tuna Trace Systems, at 1-2, 7 (Exh. US-189) (Contains BCI).

[318] Company Traceability Procedure (Exh. US-190) (BCI); Cannery Reference Reports for NMFS Periodic Audit (Exh. US-191) (Contains BCI); Cannery Slides on Tuna Trace Systems (Exh. US-189) (Contains BCI); Cannery Traceability Flowchart (Exh. US-192) (Contains BCI).

[319] Cannery Slides on Tuna Trace Systems, at 4-6 (Exh. US-189) (Contains BCI).

closed areas in 2008.[320] The United States implemented these closures through regulation.[321] Under these regulations, NOAA could use logbooks to confirm whether vessels that passed through the closed area had fished, in violation of the closure rule.[322]

207. Fisheries Management. Most RFMOs require members' vessels fishing in the convention area to maintain daily logbooks. The information from these logbooks is often used by the RFMO to monitor management of the fishery, including the status of target and non-target stocks, and for scientific purposes.

208. The IOTC, for example, requires all vessels (except those under 24 meters in length that fish only inside the EEZ) to keep a logbook covering, *inter alia*, information on fishing effort, fishing methods employed, catch, and bycatch.[323] The WCPFC requires that its members require their vessels to complete daily logbooks recording their fishing operations, catch, and bycatch (among other things).[324] Members must require the master of each of its vessels operating in the convention area to provide an "unaltered original or copy" of the required information within 15 days of the end of a trip. The ICCAT requires that fishing vessels for Bluefin tuna in the Eastern Atlantic or the Mediterranean keep a logbook indicating the quantity of tuna caught, the date and location of catches, all species caught, and data on catch retention and fishing gear[325] and also requires that all vessels over 24 meters in length operating in the Convention area keep a logbook that includes, *inter alia*, data on bycatch.[326]

209. Information recorded in logbooks is used for scientific purposes, including stock assessment and measuring fishing effort. For example, the IATTC relies on logbook data on the number of sets and the retained catch of vessels smaller than 363 metric tons to input into the IATTC statistical database, which is used for stock assessment purposes and to inform fishing

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[320] WCPFC, CMM No. 2008-01, at 10-11 (Exh. US-139).

[321] *See* 50 C.F.R. § 300.223 (Exh. US-193).

[322] *See* 50 C.F.R. § 300.223(a)(2) (Exh. US-193). In one enforcement action brought under the regulations implementing the WCPFC closure rule, *In re: F/V Isabella*, the captain's logbook confirmed that the vessel had fished inside the closed area. This led to an enforcement action and a civil penalty of US$110,000. NOVA, *In re: F/V* Isabella, Case No. PI1100830 (2011) (Exh. US-194).

[323] *See* IOTC, Resolution 13/03 on the Recording of Catch and Effort Data by Fishing Vessels in the IOTC Area of Competence, arts. 3-8, 17-21 (Exh. US-171).

[324] WCPFC, Conservation and Management Measure on Daily Catch and Effort Reporting, CMM 2013-05 (Exh. US-172).

[325] ICCAT, Rec. 10-04, Recommendation by ICCAT Amending the Recommendation to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean" (2010) (Exh. US-173).

[326] *See* ICCAT, Recommendation 03-13 by ICCAT Concerning the Recording of Catch by Fishing Vessels in the ICCAT Convention Area (2003) (Exh. US-195); ICCAT, Recommendation 11-10 by ICCAT on Information Collection and Harmonization of Data on Bycatch and Discards in ICCAT Fisheries (2012) (Exh. US-196).

closures.[327] Similarly, in the WCPFC, the daily logbooks that must be reported to the Commission contain information on catch, effort, and time periods, which is used to manage closures and for stock estimates.[328] Fisheries management is the purpose for which RFMOs were established and, consequently, the fact that most RFMOs rely on logbook data to manage fish stocks demonstrates that captains' statements, in the form of logbooks, are viewed as reliable.

210. The EU also relies on logbook data as the "key element" in its fisheries control system, which is part of the Common Fisheries policy for managing fishing and conserving fish stocks and is designed to ensure that only allowed quantifies of fish are caught.[329] To this end, all Community vessels over 10 meters in length are required to keep a logbook of their operations recording, *inter alia*: i) the name of each species caught and the location of catch, ii) the date of all catches, iii) the quantities of each species caught (in live weight or, where appropriate, the number of individuals), and iv) the number of fishing operations.[330] (These are only the minimum requirements and logbooks for different fisheries contain different additional information.[331]) All EU vessels must transmit logbook data regularly – at least once a day for all fishing vessels required to use electronic logbooks and within 48 hours of landing or transshipment in port for other vessels.[332] The logbook data is used to effect real-time fisheries closures, enforce overall catch limits, and monitor compliance with discard requirements.

211. Australia also relies on logbooks as the "major source of data" in assessing fish stocks and setting sustainable catch limits.[333] Under the Fisheries Management Act of 1991, the Australia Fisheries Management Authority (AFMA) determines, with respect to different fisheries, the form and content of the logbooks vessels are required to maintain.[334] For all managed fisheries, the information required includes the species, location, and quantity of fish

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[327] IATTC, *Tunas and Billfishes in the Eastern Pacific Ocean in 2013*, at 8 (2014) (Exh. US-197).

[328] *See, e.g.*, WCPFC, Scientific Data to be Provided to the Commission (2012) (Exh. US-174).

[329] *See* European Commission, Fisheries Policy (Sept. 8, 2014) (Exh. US-198).

[330] *See* Council Regulation (EC) No. 1224/2009, Establishing a Community Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy, art. 14 (Nov. 20, 2009) (Exh. US-199); European Commission Implementing Regulation (EU) No. 404/2011, Annex X (Apr. 30, 2011) (Exh. US-200).

[331] *See, e.g.*, EU Implementing Regulation No. 404/2001, Annexes VI, VII, VIII (Exh. US-200).

[332] *See* EC Regulation No. 1224/2009, art. 15 (Exh. US-199); EU Implementing Regulation No. 404/2001, arts. 32, 47. Fishing vessels 12 meters in length or more are subject to the electronic logbook requirement, except that Member States may exempt vessels under 15 meters that operate exclusively within the territorial seas of the flag Member State or never spend more than 24 hours at sea before returning to port. *See* EC Regulation No. 1224/2009, art. 15 (Exh. US-199).

[333] *See* Australia Fisheries Management Authority (AFMA), "Managing Our Fisheries: Fisheries Catch and Effort Logbooks" (accessed September 9, 2014) (Exh. US-201).

[334] *See* Australia, Fisheries Management Act of 1991, Law No. 162 (as amended up to Act No. 103, 2013), section 42(1B) (Exh. US-202).

caught, as well as any other information relevant to the particular fishery.[335] Keeping a false or misleading logbook is an offense subject to forfeiture and other penalties.[336]

212. Implementation of International Agreements. The implementation of international treaties relating to fishing often depends on captains' certifications or logbooks.

213. For example, the International Convention for the Prevention of Pollution from Ships (MARPOL) is the principal international convention covering pollution of the marine environment by ships. It requires parties to prohibit violations of the Convention and bring enforcement actions when they learn of violations and have sufficient evidence.[337] Under the U.S. regulations implementing MARPOL Annex I (on oil and oily mixtures) vessels must keep oil record books of the activities, including cleaning, disposal of residue, and discharge or disposal of contaminated bilge water.[338] Falsification of the Oil Record Book is treated as a false official statement under 18 U.S.C. § 1001, and cases of fraudulent entries in record books have been brought.[339]

214. Another international agreement that relies for implementation on captains' certifications is the Commission for the Conservation of the Antarctic Marine Living Resources (CCAMLR) – a treaty for the conservation of marine living resources in the Antarctic. The U.S. statute implementing CCAMLR makes it unlawful to engage in harvesting Antarctic marine living resources in violation of any conservation measure in force under the Convention or to violate any regulation promulgated under the implementing statute.[340] To monitor compliance, the United States uses a Catch Documentation Scheme, whereby captains have to supply fishing details to NOAA (*i.e.*, fishing dates, areas fished, estimated amount of fish caught) in order to obtain a catch documentation clearance document to land fish.[341] The CCAMLR captain's

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[335] *See* Australia, Law No. 162, section 42(1B) (Exh. US-202); *see, e.g.*, Australia, "Australian Pelagic Longline Daily Fishing Log" at 6 (Exh. US-177); Australia, "Purse Seine Daily Fishing Log," at 10 (Exh. US-178).

[336] *See* Australia, Law No. 162, sections 95, 106 (Exh. US-202).

[337] *See* International Convention for the Prevention of Pollution from Ships (MARPOL), art. 4 (1973) (Exh. US-203).

[338] *See* 33 C.F.R. § 151.25(a) (Exh. US-204).

[339] *See, e.g.*, U.S. Dep't of Justice Envt'l Crimes Section, "September 2010 Monthly Bulletin," at 5-6 (2010) (Exh. US-205) (summarizing the case of *United States v. Michael Murphy*, No. 2:10-CR-00235 (E.D. La.), involving a former vessel chief engineer who was charged under 18 U.S.C. § 1001 with making a false statement by knowingly and willfully presenting an oil record book containing false entries); *id.* at 11 (summarizing the case of *United States v. Transmar Shipping*, No. 4:10-CR-00552 (N.D. Cal. 2010), which involved illegal discharges of oil and failure to maintain an accurate logbook. The operator and several engineers were charged with making a false statement under 18 U.S.C. § 1001 and under the MARPOL statute).

[340] *See* 16 U.S.C. § 2435 (Exh. US-206).

[341] *See* 50 C.F.R. § 300.107(c) (Exh. US-207).

logbook may be used to verify compliance with a number of CCAMLR regulations, including whether the captain fished in a closed area.[342]

215. This list of examples is illustrative rather than comprehensive, as captain's statements, particularly in the form of logbooks, are used to monitor compliance with a wide range of national and international rules and for various scientific purposes. The global fishing industry is enormous but highly regulated and, consequently, relying on self-certifications is essential.

40. *To the United States*: According to the United States' own case, individuals require significant training before they can be authorized to certify that no dolphins were killed or seriously injured in a fishing set. In light of this fact, why does the United States believe that captains are qualified to make such certifications? Do captains undergo any kind of training that would enable them to certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught?

216. As a threshold matter, the United States does not consider that training would be necessary for a captain to understand when he or she "intentionally" set on dolphins. The captain should know his or her *own* intention without any formal training. The same could not be said of observers, however. Unlike captains, observers do not necessarily have extensive experience at sea, and do need formal training to be able to determine whether, based on all the relevant circumstances, it is correct to conclude that another person – the captain – has intentionally set on dolphins.

217. As to the training of purse seine captains, the AIDCP requires that, in order to be considered qualified to apply for a DML, the captain and crew of large purse seine vessels receive approved training in "dolphin release and rescue techniques."[343] Such training covers many topics, including harms to dolphins from purse seine fishing, captain requirements, AIDCP and IATTC requirements, and observers.[344] The AIDCP does not require such training for captains of small purse seine vessels.

218. The United States implements this requirement in Section 216.24(b)(2), which requires that an "operator permit" be obtained by the "[t]he person in charge of and actually controlling fishing operations . . . on a U.S. purse seine fishing vessel engaged in commercial fishing operations under a vessel permit." "Vessel permits" must be obtained by "[t]he owner or

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[342] *See* 50 C.F.R. § 300.17 (Exh. US-208); *see, e.g.*, CCAMLR, Conservation Measure 32-02 (2012) (Exh. US-209).

[343] *See* AIDCP, Annex IV (Exh. MEX-30).

[344] *See* AIDCP Training-Dolphins (Exh. US-210); AIDCP Training-Captain Requirements (Exh. US-211); AIDCP Training-Resolutions (Exh. US-212); and AIDCP Training-Observers (Exh. US-213).

managing owner of a U.S. purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that participates in commercial fishing operations in the ETP."[345] To receive such a permit, an operator "must have satisfactorily completed all required training under paragraph (c)(5) of this section."[346]

219. Section 216.24(c)(5) requires that:

> An operator must maintain proficiency sufficient to perform the procedures required herein, and must attend and satisfactorily complete a formal training session approved by the Administrator, Southwest Region, in order to obtain his or her permit. At the training session, an attendee will be instructed on the relevant provisions and regulatory requirements of the MMPA and the IDCP, *and the fishing gear and techniques that are required for reducing serious injury and mortality of dolphin incidental to purse seining for tuna.*[347]

220. NOAA holds ETP Operators Permit training based on demand. The last training session was held in 2013.[348] The training session relies on the AIDCP power point slides (referenced above), as well as a video titled "Tuna Seining and Porpoise Safety." The NOAA training covers the same topics as the AIDCP training, such as harms to dolphins from purse seine fishing (and techniques to reduce dolphin mortality and serious injury), captain requirements, AIDCP and IATTC requirements, and observers.[349] In addition, the training covers an overview of relevant U.S. law requirements.

221. Although the ETP Operators Permit is only strictly required for those operating U.S. large purse seine vessels fishing in the ETP, it is considered good business practice for U.S.

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[345] 50 C.F.R. § 216.24(b)(1) (Exh. US-9) ("Vessel permit. The owner or managing owner of a U.S. purse seine fishing vessel of greater than 400 st (362.8 mt) carrying capacity that participates in commercial fishing operations in the ETP must possess a valid vessel permit issued under paragraph (b) of this section. This permit is not transferable and must be renewed annually. If a vessel permit holder surrenders his/her permit to the Administrator, Southwest Region, the permit will not be returned and a new permit will not be issued before the end of the calendar year. Vessel permits will be valid through December 31 of each year.").

[346] Section 216.24(b)(2) further notes that, "[t]he operator's permit is valid only when the permit holder is on a vessel with a valid vessel permit. Operator permits will be valid through December 31 of each year."

[347] Section 216.24(c)(5) continues by stating that: "[o]perators who have received a written certificate of satisfactory completion of training and who possess a current or previous calendar year permit will not be required to attend additional formal training sessions unless there are substantial changes in the relevant provisions or implementing regulations of the MMPA or the IDCP, or in fishing gear and techniques. Additional training may be required for any operator who is found by the Administrator, Southwest Region, to lack proficiency in the required fishing procedures or familiarity with the relevant provisions or regulations of the MMPA or the IDCP."

[348] The next training session is scheduled for September 30, 2014, with another session in November if there is demand for one.

[349] *See* 2014 Tuna Purse Seine Operator Workshop Outline (2014) (Exh. US-214).

purse seine captains fishing outside the ETP to receive an ETP Operators Permit as well. Forty-four persons currently hold U.S. ETP operator permits, meaning that all 44 persons would have attended the training at one point. Of the 40 active, full-time U.S. tuna purse seine vessels fishing in the western and central Pacific Ocean, 32 currently have at least one person who holds an ETP Operator Permit. Despite the fact that the majority of the U.S. purse seine fleet has not fished in the ETP in the last decade, NOAA has issued ETP Operator Permits to 81 different individuals since 2005.[350]

222. The United States does not understand that the WCPFC, IOTC, or other RFMOs require training for operators of purse seine vessels of the type required by the AIDCP and section 216.24 (which, again, is only required to operate a large purse seine vessel in the ETP).

223. Similarly, the United States is not aware that the IATTC requires analogous training for captains of other types of vessels (longline, pole and line, etc.) operating inside the ETP. Likewise, the United States does not understand that the WCPFC or other RFMOs require analogous training for captains of non-purse seine vessels operating outside the ETP.

41. *To the United States*: If captains' certifications are reliable and sufficient, why does the United States require independent observers in the ETP? And why does the amended tuna measure make provision for the United States administration to require independent observer certifications in other fisheries?

224. As discussed previously, the AIDCP requires observer certificates for all tuna harvested by large purse seine vessels inside the ETP. This requirement does not depend on the ultimate disposition of the tuna, and applies whether the tuna is destined to be sold as fresh loin in Costa Rica, frozen steaks in Mexico, or tuna product in the United States. What the amended measure requires is the provision of that already created AIDCP observer certificate (or proof thereof) where the tuna product contains tuna harvested by large purse seine vessels in the ETP.[351] An observer statement is not required for tuna product containing tuna harvested in the ETP by small purse seine vessels, longline vessels, and all other vessels not required to have an AIDCP approved observer on board.[352]

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[350] 2014 ETP Operator Permit Holders Distribution Amongst the U.S. Purse Seine Fleet (Exh. US-215) (Contains BCI). Despite the fact that the U.S. purse seine fleet does not operate in the ETP, NOAA issues ETP Operator Permits every year: 34 in 2005, 33 in 2006, 24 in 2007, 22 in 2008, 33 in 2009, 43 in 2010, 44 in 2011, 50 in 2012, 51 in 2013, and 44 in 2014.

[351] *See* Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128). As discussed above, the requirement also applies to tuna product produced from the seven "qualified and authorized" U.S. fisheries (two of which are in the ETP) where an observer was on board during the trip.

[352] The United States thus requests *the provision* of the observer certificate (or proof that one exists) from only a small minority of vessels operating in the ETP. For example, while the IATTC vessel database lists 235 purse seine vessels, only 167 of them appear to be large purse seine vessels. IATTC Purse Seine Vessel Registry (Exh. US-19). This is compared to the 1,310 longline vessels listed in the IATTC vessel database. IATTC Longline

225. The other situation is where tuna is harvested from a fishery that is similar in nature to the ETP. That, of course, is the point of the "regular and significant" association and mortality determinations provided for in Sections 216.91(a)(2)(i) and 216.91(a)(4)(iii). However, as discussed in the U.S. responses to Questions 21 and 22, no current, fishery-by-fishery evidence establishes that a "regular and significant" association between tuna and dolphins "similar to the association between dolphins and tuna in the ETP" is occurring in any fishery outside the ETP. Indeed, there is *zero* evidence on the record that tuna vessels chase and encircle dolphins to catch tuna in any other fishery.[353] Likewise, the current, fishery-by-fishery mortality data does not support a finding that "any other fishery" has "a regular and significant mortality or serious injury of dolphins," such that the imposition of a mandatory observer certificate for all tuna product claiming to be produced in a "dolphin safe" manner is necessary.

226. Rather, the evidence proves that the ETP is *fundamentally* different from all other oceans in terms of the association between yellowfin tuna and dolphins, and the evidence proves that the fishing method that has been developed to take advantage of that unique association is inherently dangerous to dolphins in a way that other fishing methods such purse seine sets on FADs, longlines, and pole and line are not.

42. *To both Parties*: Is there a parallel market for dolphin-safe certifications? In other words, do dolphin-safe certifications always follow or stay with the tuna catch that they describe, or can such certifications be assigned at a later point (i.e. sometime after catch) to other batches of tuna that may not have been caught in a dolphin-safe manner?

227. No. There is no market – legal or otherwise – for dolphin-safe certifications. Dolphin-safe certifications are not alienable or transferrable. Labels are specifically associated with the particular tuna caught. The United States has no reason to believe that there is a black market for such certifications, and Mexico certainly has not put forward any proof of such a black market.

228. Again, the way the amended measure operates is that the documentation attesting to whether the tuna is dolphin safe or not stays with the tuna. As explained at the panel meeting, canneries keep careful track of the tuna for both dolphin safe and food safety purposes. To do that, canneries collect from the vessels from which they purchase tuna, various pieces of information, including dolphin safe documentation, concerning each lot of tuna purchased.[354] Canneries then use comprehensive tracking systems (most use an electronic bar code system) that allow all the information related to that particular lot of fish – the harvesting vessel, seller,

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Vessel Registry (Exh. US-216). The 1,304 longline vessels listed are at least 24 meters long and authorized to fish for tunas and tuna-like species.

[353] *See* U.S. Response to Question 22; *see also* 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exh. MEX-7).

[354] *See, e.g.*, Captain's Statements Received by NMFS, 2012-2014 (Exh. US-169); Cannery Captain Statement (Aug. 21, 2014) (Exh. US-217) (Contains BCI).

price, dolphin safe status, etc. – to be retrieved quickly in the case of a NMFS audit or FDA inspection.[355]

43. *To the United States*: How, if at all, is the United States able to verify that outside the ETP dolphin-safe and non-dolphin safe tuna has been kept separately, from the point of catch to the point of retail, as required under the amended tuna measure?

229. There are several mechanisms by which the United States could verify whether dolphin safe and non-dolphin safe tuna caught outside the ETP had been kept separate from harvest, through processing, to retail sale. These mechanisms overlap with those that could uncover other violations of the U.S. dolphin safe labeling measure (and, indeed, many different potential violations of U.S. laws and regulations governing fishing). The mechanisms most relevant to vessel captains were discussed in the response to Question 38, above, and those most relevant to importers and processors are discussed in detail in the response to Question 44, below. Consequently, the means by which failure to segregate tuna could be uncovered are only summarized here.

230. Inspections on the High Seas or in U.S. Waters. As discussed above, the United States retains enforcement responsibilities over U.S.-flagged vessels, as well as foreign vessels in U.S. ports or fishing in U.S. waters, and has the authority to board an inspect such vessels.[356] The United States also has authority for high seas boarding and inspection of foreign vessels where it is given that authority under an international agreement (as is the case in the WCPFC convention area).[357] Where the United States (usually the U.S. Coast Guard) conducts such an inspection, a captain's failure to segregate dolphin safe and non-dolphin safe tuna could be uncovered. This could occur if, for example, the officers learned from the captain's logbook, speaking to the crew, or observation that a dolphin had been killed during fishing operations, but no tuna was segregated as non-dolphin safe. In that case, all tuna on board the vessel would be ineligible for the dolphin safe label.[358]

231. Dockside Inspections. Similarly, routine inspections of shipments of tuna unloaded at U.S. ports or U.S. canneries could disclose a captain's failure to segregate dolphin safe from non-dolphin safe tuna. This could occur if the NOAA officer's inspection of the vessel logbook or the vessel itself or the officer's conversations with the crew disclosed that some tuna should have been designated non-dolphin safe and there was no separation, or if the investigation

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[355] *See* Company Traceability Procedure (Exh. US-190) (Contains BCI); Cannery Reference Reports for NMFS Periodic Audit (Exh. US-191) (BCI); Cannery Traceability Flowchart (Exh. US-192) (Contains BCI).

[356] *See* U.S. Response to Question 38 (citing 16 U.S.C. § 1861(b)(1)(ii) (Exh. US-187); 16 U.S.C. § 1821(c)(2)(i) (Exh. US-188)).

[357] WCPFC, CMM 2006-08, art. 5 (Exh. US-170).

[358] *See* U.S. First Written 21.5 Submission, para. 50; 50 C.F.R. §§ 216.93(c)(1)(i), (c)(1)(iv), (c)(2)(i), (c)(2)(ii) (Exh. US-2).

disclosed that more tuna should have been designated non-dolphin safe than was actually segregated from the dolphin safe tuna. Additionally, an officer might be able to observe tuna being offloaded to trucks, storage facilities, or carrier vessels in a way that does not maintain segregation of dolphin safe and non-dolphin safe tuna.[359]

232. Audits. As discussed further below, the NOAA TTVP periodically audits U.S. canneries and has the authority to audit importers, transshippers, processors, or distributors of tuna product as well.[360] To comply with an audit, canneries must turn over documents relevant to their systems for tracking the tuna they purchase, process, and ship to distributors (or retailers) from the harvesting vessel to the time that tuna leaves the cannery.[361] Consequently, cannery audits could disclose systematic failures to maintain adequate procedures for segregating dolphin safe and non-dolphin safe tuna. They could also disclose inadequate systems for ensuring that all tuna purchased as dolphin safe is accompanied by the required certifications and is tracked through processing.

233. Retail Market Spot Checks. In retail market spot checks, discussed further below, a NMFS official buys a retail can or pouch of tuna at random and uses the product code to trace the product back through the importer or manufacturer all the way to the harvesting vessel and vessel trip.[362] Spot checks can extend to all tuna product in the U.S. market, including foreign-processed tuna caught by foreign vessels. If the importer or the processor had inadequate systems for documenting and separating dolphin safe and non-dolphin safe tuna, it could result in anomalies that would be detected in a retail market spot check and could lead to an enforcement investigation, which could discover if a company's systems were inadequate.

234. Industry Oversight. In response to U.S. Government oversight of tuna processors (and, perhaps in response to public attention as well) the tuna canning industry imposes its own oversight on vessel captains.[363] This oversight took the form of a company-to-company dolphin safe certification that many canneries and importers required even before the 2013 Final Rule took effect.[364] Consequently, it is possible that canneries themselves could and would verify

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[359] *See* 50 C.F.R. §§ 216.93(c)(4), (d)(1) (Exh. US-2).

[360] *See* U.S. Response to Question 44; 50 C.F.R. § 216.93(f)(3) (Exh. US-2).

[361] *See* Cannery Reference Reports for NMFS Periodic Audit (2014) (Exh. US-191) (Contains BCI); Cannery Slides on Tuna Trace Systems (Exh. US-189) (Contains BCI).

[362] *See* U.S. Response to Question 44.

[363] *See* U.S. Response to Question 38.

[364] *See* Captain's Statements Received by NMFS, 2012-2014 (Exh. US-169); Cannery Captain Statement (Aug. 21, 2014) (Exh. US-217) (Contains BCI) (obtaining a Form 370 from a U.S. vessel, even though this is not officially required by the U.S. measure, although the information contained therein is required); Cannery Slides on Tuna Trace Systems, at 7 (Exh. US-189) (Contains BCI) (depicting a cannery-required captain's statement that includes the certifications required by the 2013 rule, but includes other information as well).

whether vessels have maintained the segregation required by the U.S. measure, and that they might refuse to purchase tuna from vessels that had not complied with the amended measure.[365]

Monitoring under United States domestic law

44. *To the United States*: How can the United States determine whether an importer, processor, or captain has made a false dolphin-safe declaration?

235. There are several types of oversight to which captains, importers, and processors are subject and, consequently, several ways in which the United States might determine that a person or company made a false certification. The types of oversight that affect captains – dockside boardings, high seas or in-port boardings, and indirect oversight by canneries – are discussed in response to Question 38 above. For importers and processors, discovery of a false statement could occur in the following ways.

236. Monitoring of Form 370s. Every shipment of imported tuna product must be accompanied by a NOAA Form 370 showing, *inter alia*, the quantity of the imported tuna, the harvesting vessel, and the harvesting vessel trip dates. NOAA TTVP reviews each Form 370 and may detect irregularities. For example, TTVP staff may note a missing vessel name or captain's certification, discrepancies in the purported dates on which the fish was harvested, discrepancies in the amount of tuna actually imported compared to Form 370s, or anomalies in the amount of tuna purporting to come from one ship or one trip. NOAA can then use the Form 370 to track the tuna back to the processer, the harvesting vessel, and trip on which it was caught.

237. Such reviews may disclose discrepancies, including fraud, by importers, canneries, or captains. For example, if a captain's vessel only held a certain quantity of tuna, but he had submitted (to the cannery) a Form 370 covering a larger quantity of dolphin safe tuna, that would be disclosed. The individual or company – be it the importer or the processor – who was deemed responsible for the anomaly would be liable for administrative penalties and possibly for the civil or criminal penalties discussed above in the response to Question 18(a), depending on the facts of the case.

238. Because all imports of tuna product must be accompanied by FCOs, this routine monitoring could disclose false certifications by importers, foreign canneries, or captains who sold tuna to foreign canneries. TTVP investigations from such routine monitoring have led to enforcement investigations and to cases where civil fines or criminal penalties were imposed for various mistakes on or falsifications of Form 370s.[366]

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[365] *See* Cannery Slides on Tuna Trace Systems, at 1-2 (Exh. US-189) (Contains BCI).

[366] *See, e.g.*, Plea Agreement, *United States v. Sandoval*, No. 2004CR02293-L, at 2-3 (S.D. Cal. 2005) (Exh. US-218) (in which the importer was held liable under 18 U.S.C. § 545 for importing numerous shipments of

239. Monitoring of Cannery Reports. U.S. tuna processors must submit monthly reports to the NOAA TTVP containing various pieces of information regarding the tuna they have processed, including the dolphin-safe status, the ocean area of capture, the harvesting vessels, trip dates, carrier names, unloading dates, and the location of unloading.[367] These reports cover both U.S.-caught and foreign-caught tuna.[368] NOAA TTVP reviews these monthly reports, and faults or inconsistencies in the documents can be discovered in the same way as by monitoring of Form, 370s, namely NOAA can uncover any missing or inconsistent information and initiate an investigation of the cannery. This investigation can lead to administrative, civil, or criminal penalties such as those discussed in the response to Question 18(a).

240. Cannery Audits. In addition to investigations triggered by inconsistencies in documentation, the TTVP periodically audits U.S. canneries.[369] In an audit, the TTVP requests procedural documentation related to dolphin safe certifications. Specifically, NOAA TTVP can acquire all the documents that track particular lots received by the canneries from the vessel trip on which the tuna was caught to the can code on the tuna product sold on the retail market.[370] These documents include the captain's certifications from the captains of harvesting vessels and the FCOs (for foreign-caught tuna) and can also include transhipment records, invoices, proprietary can code translation documentation, and packing lists.[371]

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non-dolphin-safe tuna into the United States with a falsified FCO, which listed a harvesting vessel that did not exist); NOVA, Di Mare Holdings, Inc., Case No. SW030434A (2005) (Exh. US-219) (in which the importer was held liable for importing tuna products without a properly completed FCO, *i.e.*, failure to list a vessel name); NOVA, Express Trading Int'l, Case No. SW060153 (2008) (Exh. US-220) (in which the importer was found liable for an administrative violation and under the Lacey Act for submitting a false record of fish product, *i.e.*, an entry form containing false HTS numbers); NOVA, Otogi America, Case No. SW0704600 (2009) (Exh. US-221) (in which the importer was found liable on 7 counts of failing to submit a Form 370 and 4 counts of importing tuna without a properly completed Form 370).

[367] 50 C.F.R. § 216.93(d), (e) (Exh. US-2).

[368] 50 C.F.R. § 216.93(d)(2), (e) (Exh. US-2).

[369] 50 C.F.R. § 216.93(f)(3) (Exh. US-2). Specifically, the TTVP audits tuna canneries in the United States and American Samoa. The most recent audit was completed on March 19, 2014, and it was determined that the audited cannery's traceability systems met the TTVP's requirements. *See* NMFS, "TTVP Verification Components," Mar. 20, 2014 (Exh. US-222).

[370] *See, e.g.*, "Reference Reports for NMFS Periodic Audit" (2014) (Exh. US-191) (Contains BCI).

[371] *See* Cannery Slides on Tuna Trace Systems (Exh. US-189) (Contains BCI); Captain's Statements Received by NMFS, 2012-2014 (Exh. US-169).

[372] *See* Company Traceability Procedure (Exh. US-190) (Contains BCI).

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[373] *See* Cannery Slides on Tuna Trace Systems (Exh. US-189) (Contains BCI).

[374] Cannery Slides on Tuna Trace Systems, at 1-2 (Exh. US-189) (Contains BCI).

[375] Cannery Slides on Tuna Trace Systems, at 6 (Exh. US-189) (Contains BCI).

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Transshippers, importers, distributors, and U.S. tuna processors are required to maintain the records necessary to comply with one of these audits, including FCOs and the required certifications, for all tuna processed in the last two years.[379]

244. Like reviews of Form 370s or cannery reports, audits can disclose discrepancies in documentation and procedural irregularities leading to inaccurate or fraudulent dolphin safe certifications. Specifically, an audit could uncover missing Form 370s or captains' statements, inadequate record keeping linking captains' certifications to canned tuna lots, or mixing of dolphin-safe and non-dolphin safe tuna, if such problems existed. If this were discovered, the cannery could be liable for civil or criminal penalties.[380]

245. Retail Market Spot Check. Finally, NOAA conducts spot checks of the retail tuna product market in the United States, which could also uncover unsupported or fraudulent dolphin safe certifications by captains, importers, or processors.

246. In retail market spot-checks, a NOAA staff member buys a can or pouch of tuna at retail and uses the product code to trace the can back to the importer or manufacturer that processed the product, who then supplies the documentation necessary to substantiate the dolphin safe label, if the product was labelled dolphin safe.[381] For U.S.-processed tuna, NOAA TTVP traces the tuna back to the manufacturer (*i.e.*, cannery or other processor) where it was processed and then obtains from the manufacturer the necessary documentation to support the dolphin safe certification, *i.e.*, the captain's statement covering the tuna contained in the purchased tuna product and the cannery's tracking documents showing that the tuna covered by the certification is the tuna in the purchased can. For foreign-processed tuna, NOAA uses the product code to trace the document to the importer and then obtains the documents to substantiate the dolphin safe label, *i.e.*, the captain's statements and the Form 370. The same internal traceability systems

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[376] *See* Cannery Slides on Tuna Trace Systems (Exh. US-189) (Contains BCI); Company Traceability Procedure (Exh. US-190) (Contains BCI); Cannery Reference Reports for NMFS Periodic Audit (Exh. US-191) (Contains BCI); Cannery Traceability Flowchart (Exh. US-192) (Contains BCI).

[377] *See* Cannery Reference Reports for NMFS Periodic Audit, at 2 (Exh. US-191) (Contains BCI); Cannery Traceability Flowchart (Exh. US-192) (Contains BCI).

[378] *See* Cannery Reference Reports for NMFS Periodic Audit (Exh. US-191) (Contains BCI); Cannery Slides on Tuna Trace Systems (Exh. US-189) (Contains BCI).

[379] 50 C.F.R. § 216.93(g)(1) (Exh. US-2).

[380] *See* U.S. Response to Question 18(a).

[381] NMFS, "TTVP Verification Components," Mar. 20, 2014 (Exh. US-222).

that enable canneries to comply with cannery audits also allow canneries to comply with the requirements of retail spot-checks.[382]

247. Retail market spot checks can cover all U.S. and foreign canneries that serve the U.S. tuna product market and, indirectly, all the vessels (both U.S. and foreign) that sell to those canneries. Altogether, NOAA TTVP has undertaken retail market spot checks of tuna products in over 100 cities in every U.S. state and Puerto Rico.[383] These spot checks have covered about 100 different brands, some more than once, most of which were labelled dolphin safe.[384] On at least one occasion, a retail market spot check of an imported can of tuna disclosed a violation of the U.S. dolphin safe labeling measure. In that case, the importer who was responsible for importing the tuna submitted a Form 370 that showed the tuna was harvested after the can was purchased and was missing an IDCP certificate. The importer subsequently said he had sent the Form 370 for the wrong shipment. The re-submitted form was consistent with other documentation, but the importer was nevertheless fined for an incomplete Form 370 based on the original form, which was associated with another importation.[385]

248. Therefore, through regular monitoring of Form 370s and cannery reports, cannery audits, and retail market spot-checks, combined with dockside, high seas, and in-port boardings and investigations, all importers/distributors, processors, and vessel captains that serve the U.S. tuna produce marker are potentially subject to oversight by NOAA. Of course, NOAA does not verify the dolphin safe certification on every can of tuna imported to the United States. However, the detailed records kept by importers and canneries, and the fact that dolphin safe certifications have been translated into and provided in many languages by vessels of different nationalities,[386] demonstrates that U.S. and foreign canneries and fishing vessels that supply tuna product for the U.S. market are conscious of and take steps to comply with the U.S. measure.

45. *To both parties*: Has there has never been any prosecution or fine imposed on an importer, processor, or captain for making a false dolphin-safe declaration in the United States (or elsewhere). If not so, please explain why.

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[382] *See, e.g.*, Cannery Slides on Tuna Trace Systems (Exh. US-189) (Contains BCI); Company Traceability Procedure (Exh. US-190) (Contains BCI); Cannery Reference Reports for NMFS Periodic Audit (Exh. US-191) (Contains BCI); Cannery Traceability Flowchart (Exh. US-192) (Contains BCI).

[383] NMFS, "TTVP Cities Where Retail Spot Check Audits of Tuna Products Have Occurred in the USA & Puerto Rico" (accessed August 31, 2014) (Exh. US-223).

[384] NMFS, "TTVP Brands Sampled," Mar. 27, 2014 (Exh. US-224).

[385] *See* NMFS, Dolphin Safe Investigative Referral, Di Mare Holdings (Jan. 27, 2003) (Exh. US-225); NMFS, Offense Investigation Report (OIR), Di Mare Holdings (Dec. 8, 2003) (Exh. US-226); NOVA, Di Mare Holdings, Inc. (Exh. US-219).

[386] *See* Captain's Statements Received by NMFS, 2012-2014 (Exh. US-169).

249. It is accurate to say that there has never been a prosecution against a captain, processor, or importer arising out of a captain's dolphin safe certification that proved to be false. However, it is not accurate to say that there have never been prosecutions or fines imposed for submitting a falsified Form 370. In fact, there have been numerous cases brought, and fines imposed, involving falsified Form 370s.

250. For example, in the 2005 case *United States v. Sandoval*, an importer was charged with importing approximately 1,500 cases of non-dolphin safe tuna into the United States with a falsified Form 370 (listing a harvesting vessel that did not exist).[387] Mr. Sandoval was charged under 18 U.S.C. § 545 (introducing goods into the United States with false documentation or knowingly bringing in merchandise contrary to law) and was ordered to pay US$41,975.00 in restitution for the tuna and was sentenced to a three-year, suspended prison sentence.[388] In 2008, another importer was charged with two counts of importing tuna without a Form 370 and two counts under the Lacey Act of submitting a false record for a fish product that was transported in foreign commerce (specifically, submitting a customs form that contained a false Harmonized Tariff Schedule (HTS) number).[389] The total assessed penalty was US$3,000, although the case settled for US$2,250. There are numerous other examples of cases charging a missing or improperly completed FCO.[390]

251. These cases demonstrate that NOAA takes its monitoring and enforcement responsibilities seriously, contrary to Mexico's implication.

252. The United States would further note that, prior to July 2013, any prosecution against a non-ETP captain, processor, or importer arising out of a captain's dolphin safe certification would have been limited to the scenario where a Form 370 falsely stated that no purse seine nets had been intentionally deployed on dolphins.[391] Yet the United States considers that compliance with this requirement is very good, and it is therefore hardly surprising that no prosecutions have resulted. Indeed, as discussed in response to Question 20, the evidence suggests that, other than in the ETP, purse seine vessels in the fisheries that produce tuna for the U.S. tuna product market do not set on dolphins to catch tuna except in a tiny fraction of cases.[392]

253. With respect to the certifications required for tuna harvested by large purse seine vessel in the ETP to be labeled dolphin safe, the United States has not identified any cases of a falsified

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[387] *See* OIR, *United States v. Sandoval*, at 11-17 (Feb. 4, 2005) (Exh. US-227).

[388] *See* Order, *United States v. Sandoval* (Jan. 18, 2005) (Exh. US-228).

[389] *See* NOVA, Express Trading Int'l (Exh. US-220).

[390] *See, e.g.*, NOVA, PAFCO Importing Company, Inc., Case No. SW0704605 (2009) (Exh. US-229).

[391] *See US – Tuna II (Mexico) (Panel)*, paras. 4.220-4.221.

[392] *See* U.S. Response to Question 20 (noting, *inter alia*, that, in the WCPFC purse seine fishery, "interactions" with toothed cetaceans (which include dolphins) occurred in only 0.7 percent of observed sets in 2007-09 and 0.18 percent of observed sets in 2010 and that most of these interactions were likely *not* the result of an intentional set on dolphins).

captain's statement. However, the United States would not necessarily be aware of any prosecutions that have occurred in other countries, including Mexico.

ETP

46. *To the United States*: How can the United States determine whether a vessel has been fishing in the ETP?

254. If the United States wanted to determine whether a foreign vessel has been fishing in the ETP, outside U.S. waters, the United States would likely contact the IATTC Director. The United States understands that the Director could determine whether a particular vessel has been fishing in the ETP by examining logbooks where those logbooks require documentation of the location of the vessel's sets. The United States understands the IATTC Director regularly relies on these logbooks and finds them reliable. In addition, the United States understands that approximately 80 percent of the ETP ports have IATTC permanent staff that monitor entry and exit of vessels and that this monitoring would be accessible to the United States upon request to the IATTC Director. Finally, observers on board large purse seine vessels monitor not only the location of the vessel the observer is on, but also take note of all other vessels the observer makes visual contact with.

255. For vessels operating in U.S. waters, the United States would have access to the relevant logbooks and any satellite tracking data available at port. Vessels operating in U.S. waters are also subject to boarding by the U.S. Coast Guard.

47. *To the United States*: If, as the United States argues, association of tuna and dolphins occurs only in a limited area of the ETP, why does the US apply its observer and tracking/verification requirements to the entire ETP?

256. As discussed in response to Question 3, IATTC data confirms that the association between yellowfin tuna and dolphins, as evidenced by the location of dolphin sets, occurs predominately east of the 130 west longitude, although it can extend outwards towards the 140 west longitude, depending on environmental factors such as currents and water temperatures. Dolphin sets do not appear to occur north of 30°N latitude or south of 20°S latitude.[393]

257. As noted previously, the AIDCP requires all large purse seine vessels to carry observers regardless of where the vessel intends to fish, and regardless of whether the vessel intends to set on dolphins. Likewise, the AIDCP requires large purse seine vessels (and the processors of tuna caught by those vessels) to adhere to AIDCP mandated record-keeping and verification requirements. The amended measure requires exporters of tuna product to the U.S. market to provide the already created observer certificate (or proof that one exists) that attests to the dolphin safe status of the tuna product to accompany the tuna product. In addition, the amended

[393] *See* IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-123).

measure requires exporters to provide the AIDCP-mandated tracking number on the Form 370 attachment.[394] As discussed, Mexico makes no claim that *the provision* of such information has any impact on its producers. Indeed, Mexico makes no claim that *the creation* of such documents burdens its producers in the least bit.

258. The United States would further note that a rule requiring the provision of an observer certificate from tuna product containing tuna harvested by large ETP purse seine vessels marketed as dolphin safe only in certain circumstances (*i.e.*, when the vessel passed through the area where the ETP tuna-dolphin association occurs) would create significant complications without any apparent benefit. That is to say, NOAA would be forced to verify whether the harvesting vessel indeed operated in a particular area of the ETP before knowing what documentation would be required of the tuna product to meet the criteria of the amended measure, which would likely have impacts on trade.

259. Moreover, it is unclear how such a hypothetical measure would help Mexico. Mexican large purse seine vessels set on dolphins, after all. And even if a Mexican large purse seine vessel stopped setting on dolphins, it would likely still have to pass through the area where the ETP tuna-dolphin bond exists as that bond appears to be particularly strong near the Mexican coast.[395]

Costs

48. *To both Parties*: Who pays the costs associated with observers and tracking and verification? Do these costs fall on governments, or is it rather the industry and, ultimately, consumers who pay?

260. The way that the costs of observer and record keeping programs are allocated between governments and the fishing industry varies across observer programs. The On-Board Observer Program established by the AIDCP is a hybrid program financed 30 percent by the IATTC membership and 70 percent by vessel assessments based on well volume.[396]

261. The U.S. observer programs, by contrast, are largely government financed. In 2012, government funding accounted for US$54.9 million of the total US$73.7 million cost of the U.S. national observer programs (74 percent), compared to US$18.8 million paid by industry.[397] Furthermore, the industry funding was for particular fisheries that the industry chose to support,

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[394] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128).

[395] *See* IATTC, Data Regarding Location of Dolphin Sets (2004-2013) (Exh. US-123).

[396] *See* IATTC, Doc. CAF-01-05, *Program and Budget for Fiscal Years 2014 and 2015*, at 1, 1st Meeting of the Comm. on Admin. & Finance, Veracruz, Mexico (June 5, 2013) (Exh. US-23); AIDCP Budget, Doc. MOP-29-06, 29th Mtg. of the Parties, Lima, Peru (July 8, 2014) (Exh. US-112).

[397] NMFS, *National Observer Program FY 2012 Annual Report*, at 5 (Exh. US-168).

primarily the Atlantic sea scallop and Alaska groundfish observer programs.[398] The industry was scheduled to begin shouldering some of the costs of the observer program for the Atlantic groundfish fishery in 2012, but NOAA's economic analysis indicated that the industry was not ready to do so.[399] The U.S. Government also pays the costs of monitoring and enforcement of the dolphin safe label, namely the costs of audits, spot-checks, enforcement investigations and proceedings, reviews of cannery reports and Form 370s, and NOAA inspections.

262. However, the industry does pay the costs of the tracking and verification required by U.S. fishing regulations such as the dolphin safe label. The industry also bears costs associated with the requirement to segregate dolphin safe and non-dolphin safe tuna, which amounts to the potential loss of carrying capacity for dolphin safe tuna should the vessel have a non-dolphin safe well (due to an incidental mortality or serious injury). And canneries bear the costs of their traceability systems and the costs of complying with periodic audits and spot checks.

263. Finally, the United States notes that the issue of whether industry or government bears the costs of an observer program is distinct from the issue of whether these costs can be passed on to consumers. If demand for tuna product in the United States is price-elastic, industry will not be able to pass on all the costs of tracking and observer programs. If demand is highly elastic, industry may not be able to pass on *any* of the costs.

264. Mexico has not produced any evidence – elasticity statistics, company records, or any relevant studies – that the U.S. tuna product market is so inelastic that the tuna industry would be able to pass on all of the potentially enormous costs of a global record-keeping and observer program similar to the AIDCP regime.[400]

49. *To the United States*: If observers are already on board vessels, are the costs of authorizing such observers to certify the dolphin-safety of tuna really that high?

265. The United States does not maintain that, where authorized and qualified observers are already on board vessels, there are any additional costs to providing the observer certifications of the dolphin safe label. Consequently, in the seven U.S. fisheries designated under the July 2013

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[398] NMFS, *National Observer Program FY 2012 Annual Report*, at 22 (Exh. US-168).

[399] NMFS, *National Observer Program FY 2012 Annual Report*, at 22, 29 (Exh. US-168).

[400] As discussed at the panel meeting, Mexico must prove any allegation as to whether the consumer would ultimately bear the cost of any regulatory burden imposed on industry. *See, e.g., US – COOL (AB)*, para. 263 (noting that the Panel found that the costs of compliance with the COOL measure "cannot be fully passed on to consumers," citing evidence that consumers are unwilling to bear such costs, as well as "direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock"); *see also* U.S. Response to Question 49 showing that, even just for the WCPFC longline fishery, establishing an observer program with 100 percent coverage where observers were trained to make the certifications required by the U.S. measure would cost hundreds of millions of dollars per year.

Rule,[401] where an observer is on board the harvesting vessel, there is no additional cost to the observer, the vessel, or the U.S. Government for the observer to provide the dolphin safe certifications. Similarly, there is no cost to providing an already created observer certificate (or proof thereof) to the United States with regard to tuna product containing tuna harvested by large ETP purse seine vessels.[402]

266. However, where observer programs qualified to make the relevant certifications do not exist, *establishing* such programs *would* be very costly.[403] Mexico is arguing, essentially, that the United States must impose this enormous barrier to entry on all Members whose industries wish to produce for the U.S. tuna product market. This assertion ignores the fact that the IATTC parties themselves chose to assume this burden in response to the enormous and unprecedented dolphin mortality that was occurring due to large purse seine vessels in the ETP. It also ignores the fact that the ETP is unique because it is the only fishery where setting on dolphins occurs on a regular commercial basis, and setting on dolphins causes a different scale of dolphin

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[401] Qualified and Authorized Notice, 79 Fed. Reg. at 40,718 (Exh. US-113).

[402] *See* Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128).

[403] *See* U.S. Second Written 21.5 Submission, para. 177 n.338 (estimating, based on the costs of the U.S. longline observer programs, that merely covering the entire WCPFC longline fleet (3,687 active vessels) could cost approximately US$654,460,935 per year, not counting the additional costs of starting the program).

Mexico criticizes the United States for using these figures rather than the costs of the AIDCP program. *See* Mexico's Opening 21.5 Statement, para. 37. However, Mexico does not dispute that the U.S. programs, in fact, cost as much as they do, nor does Mexico assert that no other countries would have to have as expensive programs (due to employment laws, for example). Mexico also faults the United States for including things other than "observer payments" in its calculation of the costs of the AIDCP program, ignoring the fact that these costs – scientific staff, field offices, and administrative staff – are part of running an observer program that maintains any kind of reliable monitoring and tracking system. *See id.*; AIDCP Budget, Doc. MOP-27-06, at 2 (Exh. US-116). Additionally, Mexico underestimates the cost of a program that has 100 percent coverage by relying only on the AIDCP budget because IATTC observers only cover at least half of the fishing days of large purse seine vessels in the ETP (57 percent in 2013). The others are covered by observers from national programs, which are not paid for out of the IDCP budget. *See* IATTC, "AIDCP Observer Program Info" (Exh. US-117); *see also* IATTC, *Quarterly Report – October-December 2012*, at 31 (2013) (Exh. US-118).

The United States agrees that observer programs will cost different amounts for different countries. But even using the low AIDCP numbers (which would likely underestimate the cost for covering longline vessels), covering the WCPFC longline fleet would cost approximately US$131,891,364 per year, not counting startup costs of establishing a program where observers are qualified to make the certifications relevant to the amended measure. *See* IATTC, "AIDCP Observer Program Info" (data received by Erika Carlsen, NOAA, from Ernesto Altamirano Nieto, IATTC) (July 14, 2014) (Exh. US-117) (estimating the cost of the AIDCP observer program at US$132 per observer per day and showing that IATTC observers covered 20,441 sea days, which was 57 percent of all days covered in the ETP large purse seine fishery in that year); WCPFC, *WCPFC Record of Fishing Vessels* (Exh. US-115) (showing 3,687 longline vessels active in the WCPFC). If costs are somewhere between the U.S. and AIDCP programs, covering even just the WCPFC fleets would certainly cost hundreds of millions of dollars per year. And this would not cover any of the approximately 2,400 purse seine and longline vessels in the IOTC (5 percent coverage under the current program), the 1,600 longline vessels in the ICCAT (currently 20 percent coverage), or vessels in any other fishery.

interactions and dolphin harms than any other fishing method used to produce tuna for the U.S. tuna product market.

50. *To the United States*: Why does the US believe that in the ETP the relevant industry is able to bear such costs for an observers but this is not the case outside the ETP?

267. The United States cannot speak directly to whether another WTO Member would be willing to bear the costs of an observer program or not. It is a fact, of course, that the AIDCP parties have made an international legal commitment to bear the costs of the AIDCP observer program. And the reason these parties have made such a commitment is because of the inherent harm that the fishing practices of their vessels were, and are, causing in the ETP. It has not been necessary for the protection of dolphins for other Members (whose vessels operate both inside and outside the ETP) to make this same commitment, and consequently they have not done so. For example, the members of IATTC, WCPFC, and IOTC have only committed to five percent observer coverage for longline vessels of a certain length or greater operating in the respective convention areas. And, as discussed, while marine mammal protection may be a factor in whether an RFMO membership decides to require a minimum observer coverage level, the protection of dolphins is the *key* goal underlying the AIDCP observer program.

268. The United States would further note that several factors suggest that the AIDCP observer program is less costly to the affected fishing industry than a comparable program in other fisheries would be. First, the costs of ETP observers are born partially (30 percent) by the governments of the IATTC members.[404] Second, the AIDCP had a cumulative deficit of US$770,913 for 2002 to 2012, and, even with a proposed 18 percent increase in vessel assessments, it is projected to still have a deficit of US$278,245 in 2018.[405] Third, the IDCP figures significantly underestimate the costs of an observer program, as national programs may provide up to 50 percent of observers on Class 6 vessels in the ETP.[406] In 2013, IATTC observers covered 57 percent of sea days observed under the IDCP, and observers from national programs covered the rest.[407] Consequently, the costs of the AIDCP program are likely unusually low relative to what it would cost other countries or RFMOs to establish similar programs, although of course costs will vary.

269. Moreover, this question addresses one of the key points in this dispute, namely that the United States did not unilaterally decide that the tuna industry in the ETP could bear the costs of

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[404] *See* U.S. First Written 21.5 Submission, para. 274 (citing to IATTC, Doc. CAF-01-05, *Program and Budget for Fiscal Years 2014 and 2015*, at 1, 1st Meeting of the Comm. on Admin. & Finance, Veracruz, Mexico (June 5, 2013) (Exh. US-23)).

[405] *See* U.S. Second Written 21.5 Submission, para. 126, n.238; AIDCP Budget, Doc. MOP-29-06, 29th Mtg. of the Parties, Lima, Peru (July 8, 2014) (Exh. US-112).

[406] *See* AIDCP Budget, Doc. MOP-27-06, at 7 (Exh. US-116).

[407] *See* IATTC, "AIDCP Observer Program Info" (Exh. US-117); *see also* IATTC, *Quarterly Report – October-December 2012*, at 31 (2013) (Exh. US-118).

the AIDCP observer program; the IATTC members did. Members of other RFMOs have not established a similar program because there is not a similar need for an AIDCP-like regime elsewhere.

270. Thus, Mexico's assumption that countries like Indonesia, the Philippines, and China could afford to establish AIDCP-like programs is doubly flawed. First, Mexico has put forward no evidence that those countries or their industries could afford to establish such programs. Second, it is incorrect that a global observer program similar to the *completely unique regime* that the AIDCP parties have decided to impose on themselves is necessary in all other fisheries that supply tuna for the U.S. tuna product market. In fisheries in which there are only a few dolphin interactions in a thousand sets, a captain is capable of noticing and documenting dolphin mortalities and serious injuries and whether he or she intentionally deployed a purse seine net on a dolphin. Thus, there is simply no need for the global industry to attempt to bear the costs of an AIDCP-style observer program, even if they could, which the United States doubts.

51. *To the United States*: Does the provision in the Implementing US regulation entitled 'Other Fisheries' (§216.91(a)(4)(iii)) apply to large purse seine vessels not setting on dolphins outside the ETP?

271. Section 216.91(a)(4) applies to fisheries "other than one described in paragraphs (a)(1) through (3)."[408] Purse seine vessels operating outside the ETP (regardless of size) are covered by Section 216.91(a)(2).[409] As such, purse seine vessels operating outside the ETP (regardless of size) are not covered by any part of Section 216.91(a)(4), including Section 216.91(a)(4)(iii).

52. *To both Parties*: Assume a situation whereby the United States made a determination under §216.91(a)(4)(iii) that there was regular and significant mortalities or serious injury to dolphins in a fishery other than the ETP. In such circumstances, would it possible that non-purse seine vessels and small purse seine vessels operating outside the ETP in the fishery for which the above determination was made (i.e. that there was regular and significant mortalities or serious injury to dolphins) would be subject to an observer requirement while the same boats within the ETP would not?

272. As a threshold matter, and as discussed in response to Question 21, a "fishery" does not simply refer to an area of the ocean (such as the ETP), but is defined by location, gear type (or fishing method), and target species. For example, the western and central Pacific Ocean is not a

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[408] 50 C.F.R. § 216.91(a)(4) (Exh. US-2) ("*Other fisheries.* By a vessel on a fishing trip that began on or after July 13, 2013 in a fishery other than one described in paragraphs (a)(1) through (3) of this section . . .").

[409] 50 C.F.R. § 216.91(a)(2) (Exh. US-2) ("*Non-ETP purse seine vessel.* Outside the ETP by a vessel using a purse seine net . . .").

fishery. Rather, the western tropical Pacific deep-set longline tuna fishery is a "fishery" within the western and central Pacific Ocean.[410]

273. In the event that NOAA made a determination under Section 216.91(a)(4)(iii) that an observer statement is necessary for a particular fishery that is "having a regular and significant mortality or serious injury of dolphins," such a determination would only affect vessels in that fishery.[411] It would not affect the requirements for tuna harvested by vessels operating outside that fishery.[412]

274. For example, let us suppose that NOAA made a determination under Section 216.91(a)(4)(iii) that an observer statement is necessary for the the western tropical Pacific deep-set longline tuna fishery based on current, fishery-specific evidence that this fishery is "having a regular and significant mortality or serious injury of dolphins." Such a determination would only affect the tuna harvested by deep-set longline vessels operating in *the the western tropical Pacific deep-set longline tuna fishery*. Tuna harvested by other longline vessels that do not operate in that fishery, such as longline vessels operating in other parts of the western and central Pacific Ocean, the Indian Ocean, the ETP, etc., would not be subject to an observer statement requirement because of this determination. The same, of course, would be true for tuna harvested by other gear types, such as shallow-set longline, purse seine, pole and line, etc., operating in western tropical Pacific Ocean, or anywhere else in the world.

53. *To the United States*: Is there any provision in US legislation that would enable the United States to require independent observers for small purse seine vessels and non-purse seine vessels inside the ETP if, for example, the United States determined that those fishing methods were causing regular and significant mortality or serious injury to dolphins?

275. As discussed in response to Question 1, Congress has granted NOAA broad regulatory authority to implement the DPCIA, a point that the 2013 Final Rule explicitly recognizes.[413]

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[410] The fishery is described as being between 15°north latitude and 10°south latitude with 10 or more hooks between floats).

[411] As discussed in Response to Questions 21 and 53, a Section 216.91(a)(4)(iii) is only made for "other fisheries," *i.e.*, those fisheries not covered by (a)(1) through (a)(3). Any determination made under Section 216.91(a)(4)(iii) for a fishery outside the ETP would, therefore, necessarily be for a non-purse seine vessel as all non-ETP purse seine vessels are already covered by (a)(2).

[412] As noted elsewhere, the distinction between "small" and "large" purse seine vessels is only important inside the ETP, given that it is only large purse seine vessels in the ETP that are capable and permitted to chase and capture dolphins. This distinction is not made in other fisheries outside of the ETP.

[413] 2013 Final Rule, 78 Fed. Reg. at 40,997 (Exh. MEX-7) ("NOAA Fisheries has broad authority to issue regulations to implement the DPCIA, including specifically the authority to establish a domestic tracking and verification program to track tuna labeled dolphin-safe (whether using the official mark or any other mark), and to

276. For purposes of the amended measure, both ETP non-purse seine vessels and ETP small purse seine vessels are considered to operate in "other fisheries" as these vessels do not operate in fisheries otherwise covered by (a)(1) (ETP large purse seine vessels), (a)(2) (non-ETP purse seine vessels), and (a)(3) (large scale driftnet fishing).[414] As such, pursuant to Section 216.91(a)(4)(i), tuna harvested by ETP non-purse seine vessels and ETP small purse seine vessels must be accompanied by a captain statement certifying that "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught."[415] This requirement is implemented in boxes (B)(1) and (B)(4) of the Form 370 for ETP non-purse seine vessels and ETP small purse seine vessels, respectively.[416] Any fishery falling within the "other fisheries" category is potentially subject to the determination under Section 216.91(a)(4)(iii) that an observer statement is necessary for that particular fishery in light of the evidence that the fishery at issue is "having a regular and significant mortality or serious injury of dolphins."

54. *To the United States*: If the United States makes a determination of regular and significant mortality under section 216.91(a)(4)(iii) or of regular and significant association under section 216.91(a)(2)(i) of the implementing regulation, what would the required observer coverage be for the areas concerning which a determination was made?

277. Determinations under the provisions referenced in the question would not be for an "area," but rather, as discussed in response to Question 52, would be for a "fishery." As noted previously, a "fishery" is defined by location, gear type (or fishing method), and target species, *e.g.*, the western tropical Pacific deep-set longline tuna fishery.

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adjust such regulations as appropriate to implement an international tracking and verification program (16 U.S.C. 1385(f)).").

[414] 50 C.F.R. § 216.91(a)(4) (Exh. US-2) ("*Other fisheries*. By a vessel on a fishing trip that began on or after July 13, 2013 in a fishery other than one described in paragraphs (a)(1) through (3) of this section . . .").

[415] 50 C.F.R. § 216.91(a)(4) (Exh. US-2) ("*Other fisheries*. By a vessel on a fishing trip that began on or after July 13, 2013 in a fishery other than one described in paragraphs (a)(1) through (3) of this section unless such product is accompanied as described in section 216.93(d), (e), or (f), as appropriate, by: (i) A written statement executed by the Captain of the vessel certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.").

[416] NOAA Form 370 (Exh. MEX-22) ("(1) Tuna not harvested with a purse seine net, and not harvested in any fishery that has been identified by the Assistant Administrator as causing a regular and significant mortality or serious injury to dolphins, with valid documentation by the captain of the vessel and, where applicable, by either a qualified and authorized observer or by an authorized representative of a nation participating in the observer program, certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. See instructions. Certification(s) attached. . . . (4) Tuna harvested in the ETP by a purse seine vessel having a carrying capacity of 400 short tons (362.8 mt) or less, with valid documentation by the captain of the vessel and, where applicable, by either a qualified and authorized observer or by an authorized representative of a nation participating in the observer program, certifying that no dolphins were killed or seriously injured in the sets in which the tuna were caught. See instructions. Certification(s) attached.").

278. Neither a determination under Section 216.91(a)(2)(i) nor under Section 216.91(a)(4)(iii) would, strictly speaking, require a certain level of observer coverage to be applied in that fishery generally. If NOAA determined pursuant to Section 216.91(a)(2)(i) that a regular and significant association is occurring between dolphins and tuna (similar to the association between dolphins and tuna in the ETP) in a particular non-ETP purse seine fishery, the consequence would be that NOAA would require an observer statement for all tuna from that fishery sold in the U.S. tuna product market. Similarly, if NOAA determined pursuant to Section 216.91(a)(4)(iii) that an observer statement is necessary for a particular fishery in light of evidence that the fishery is "having a regular and significant mortality or serious injury of dolphins," the consequence would be that NOAA would require an observer statement for all tuna from that fishery sold in the U.S. tuna product market.

55. ***To the United States*: Is the Panel correct in understanding that, if the United States makes a determination of regular and significant association under section 216.91(a)(2)(i), only purse seine vessels would be required to have an observer certificate/statement, and that vessels using other fishing methods, such as longline, would not need to have such certificate/statement?**

279. As discussed in response to Question 22, Section 216.91(a)(2)(i) requires an observer statement (in addition to the captain statement) where NOAA "has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)" in a purse seine fishery outside the ETP. Such a determination would be done on a fishery-by-fishery basis in light of current data as to whether a "regular and significant association" is occurring "between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)."

280. Thus, for example, in the event that NOAA determined that a regular and significant association is occurring in the eastern tropical Atlantic Ocean purse seine tuna fishery between dolphins and tuna (similar to the association between dolphins and tuna in the ETP), NOAA would require an observer statement for tuna product marketed in the United States containing tuna harvested in this fishery to attest to the dolphin safe status of the tuna product. That requirement would only apply to tuna *harvested by purse seine vessels in that fishery* and sold in the U.S. tuna product market. Such a determination would not require observer statements for tuna product produced in other purse seine fisheries in the Atlantic, Pacific, and Indian oceans, nor would it require an observer statement for tuna product containing tuna harvested by other types gear types, such as deep-set longline, shallow-set longline, or pole and line, in the eastern tropical Atlantic Ocean, or anywhere else in the world.

281. As the United States discussed in response to Question 22, the association between dolphins and tuna is unique, and no evidence exists that proves that a similar association exists

outside the ETP.[417] Indeed, there is *no* evidence that dolphins are *chased* and *captured* anywhere other than the ETP, a point that Exhibit US-127 makes plain. In the ETP, large ETP purse seine vessels chased 31 million dolphins in the years 2009-2013, capturing 18 million of them. *No* evidence exists on the record of *even one* example where a vessel has chased and captured dolphins in order to capture tuna. Where purse seine vessels interact with dolphins at all, it is generally by accident and likely involve only a small number of dolphins.[418] There is *no* evidence at all that an association exists between dolphin and tuna outside the ETP that is "similar" to the one that exists in ETP.

56. *To the United States*: Section 216.91(a)(2) of the implementing regulation refers to "purse seine vessels" irrespective of their size/carrying capacity. Does this mean that small purse seine vessels outside the ETP also have to certify that no nets were intentionally deployed on or used to encircle dolphins?

282. Section 216.91(a)(2) covers all non-ETP purse seine vessels, regardless of the size of the vessel. The requirements (and potential determinations) contained in Section 216.91(a)(2) thus apply to all non-ETP purse seine vessels, regardless of size. As such, tuna product containing tuna harvested by non-ETP purse seine vessels (regardless of size) must be accompanied by a captain certification that certifies that "that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested to certify that no nets were intentionally deployed on or used to encircle dolphins."[419] This requirement is implemented in box (B)(2) of the Form 370.[420]

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[417] *See* Exh. US-127 (Table 1); 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exh. MEX-7) ("NMFS has no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP, where dolphins are systematically and routinely chased and encircled each year in significant numbers by tuna fishing vessels, or any tuna fishery that has regular and significant mortality or serious injury of dolphins. Therefore, the Secretary has not made a determination that another fishery has either a regular and significant association between dolphins and tuna or regular and significant mortality or serious injury of dolphins.").

[418] *See* Exh. US-127 (Table 1); Mexico's First Written 21.5 Submission, paras. 109 (citing the *Kobe II Report*), 113 (citing a NMFS report stating that dolphins "have been sighted" in association with tuna "and deliberately set upon"), 120 (citing the *Freitas* case, which involved single animals and did not involve any chase); *see also* WCPFC Cetacean Interactions Paper, at 6 (Exh. US-58) (showing that, in the WCPFC purse seine fishery in 2010, there were 37 sets with a dolphin encounter and a total of 144 dolphins encountered, making for an average of 3.9 dolphins encountered per dolphin interaction); IATTC, EPO Dataset 2009-2013 (Exh. US-26) (showing that, on average, 3,716,319 dolphins were captured each year in 2009-2013 in an average of 10,423 dolphin sets per year, making for an average of 357 dolphins encircled per set).

[419] 50 C.F.R. § 216.91(a)(2)(ii) (Exh. US-2).

[420] *See* NOAA Form 370 (Exh. MEX-22) ("(2) Tuna harvested using a purse seine net outside the Eastern Tropical Pacific Ocean (ETP), in any fishery for which the Assistant Administrator has not determined that there is a regular and signification association occurring between dolphins and tuna, with valid documentation by the captain of the vessel, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught and, where applicable, documentation by either a qualified and authorized observer or by an authorized representative of a

283. The distinction between "small" and "large" purse seine vessels is only relevant in the ETP itself where only "large" purse seine vessels are capable and permitted to chase and capture dolphins to harvest tuna.

57. *To Mexico*: **The Panel has received evidence suggesting that several Mexican companies process and export tuna that is eligible for the US dolphin safe label, and that "several tuna companies in Mexico … are considering adopting dolphin safe policies, but are hesitant due to concern that the current US dolphin safe definition will be weakened": Exhibit 5 submitted by the Amicus Curiae. The Panel invites Mexico to comment on this evidence. In particular, the Panel would like to know how many Mexican tuna companies have adapted to the US dolphin safe measure, the process by which Mexican companies are or may be able to adapt to the US dolphin safe measure, and the costs associated with such adaptation.**

58. *To both Parties*: **At paragraph 216 of its report in the original proceedings, the Appellate Body made the following statement:**

> **In the context of Article 2.1 of the TBT Agreement, the complainant must prove its claim by showing that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1**

And at para. 272 of its report in US – COOL, the Appellate Body again states that where

> **"the complainant adduces evidence and arguments showing that the measure is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products**

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nation participating in the observer program, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip and that no dolphins were killed or seriously injured in the sets in which the tuna were caught.").

stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1".

What are the implications of this statement for the allocation of the burden of proof under Article 2.1 of the TBT Agreement? Does the complainant bear the burden of showing, at least prima facie, both that the technical regulation at issue has a detrimental impact and that such impact does not stem exclusively from a legitimate regulatory distinction? Or, alternatively, does the complainant bear the burden only of showing the existence of detrimental impact, after which showing the burden shifts to the respondent to positively demonstrate that such impact does stem exclusively from a legitimate regulatory distinction?

284. As the Appellate Body has stated now many times, the burden of proof rests on the complaining party to prove its affirmative claims.[421] This "well-established" principle applies equally to Mexico's Article 2.1 claim, as the Appellate Body has already stated in this very dispute.[422] As such, to prove its Article 2.1 claim, Mexico must put forward evidence and argument sufficient to establish a *prima facie* case on each element of its claim. Only where Mexico has done so does the burden shift to the United States as respondent.[423]

285. Accordingly, Mexico must establish a *prima facie* case with evidence and argument "that the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country."[424] To do so, Mexico must

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[421] *See, e.g., Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("[T]he burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence."); *EC – Hormones (AB)*, para. 98 ("The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."); *US – Wool Shirts and Blouses (AB)*, p. 14 ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.").

[422] *US – Tuna II (Mexico) (AB)*, para. 216 ("With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall that it is well-established 'that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.'") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).

[423] *US – Tuna II (Mexico) (AB)*, para. 216.

[424] *US – Tuna II (Mexico) (AB)*, para. 216 ("In the context of Article 2.1 of the TBT Agreement, the complainant must prove its claim by showing that the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country."); *US – COOL (AB)*, para. 272 ("With respect to the burden of proof under Article 2.1, the Appellate Body found in *US – Tuna II*

prove *both*: 1) that "the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other country"; and 2) that "the detrimental impact on imports" does not stem "exclusively from a legitimate regulatory distinction" but rather reflects "discrimination against the group of imported products."[425] It is not the case that Mexico proves its Article 2.1 claim by establishing a *prima facie* case as to the first element, but not the second, and the Appellate Body has so confirmed.[426]

286. As the Appellate Body has explained, the allocation of the burden of proof does not depend on how difficult it is for the complainant to prove its case – "the complainant must prove its claim" regardless of the "degree of difficulty" of doing so.[427] If the complainant fails to meet its burden of proof in the initial step, the panel must decide in favor of the respondent. A panel

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(Mexico) that, as with all affirmative claims, it is for the complaining party to show that the treatment accorded to imported products is less favourable than that accorded to like domestic products.").

[425] *US – Tuna II (Mexico) (AB)*, para. 215 (quoting *US – Clove Cigarettes (AB)*, paras. 180, 182); *see also US – COOL (AB)*, paras. 271-272.

[426] *US – Tuna II (Mexico) (AB)*, para. 216 ("In the context of Article 2.1 of the TBT Agreement, the complainant must prove its claim by showing that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1."); *US – COOL (AB)*, para. 272 ("Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing. If, for example, the complainant adduces evidence and arguments showing that the measure is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed, this would suggest that the measure is inconsistent with Article 2.1.").

[427] *EC – Sardines (AB)*, para. 281 ("The *degree of difficulty* in substantiating a claim or a defence may vary according to the facts of the case and the provision at issue. For example, on the one hand, it may be relatively straightforward for a complainant to show that a particular measure has a text that establishes an explicit and formal discrimination between like products and is, therefore, inconsistent with the national treatment obligation in Article III of the GATT 1994. On the other hand, it may be more difficult for a complainant to substantiate a claim of a violation of Article III of the GATT 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying that measure. *But, in both of those situations, the complainant must prove its claim.* There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.") (emphasis added).

may not relieve a party of its burden and make a *prima facie* case for one of the parties.[428] To do so constitutes reversible error.[429]

287. And, as the United States has discussed, it is clear that Mexico has failed to establish a *prima facie* case that the treatment accorded by the amended measure to Mexican tuna product is less favorable than that accorded to like U.S. tuna product or like tuna product originating in any other Member.

288. For example, and as discussed at the Panel meeting, Mexico is now attempting to fundamentally alter all three of its claims, alleging that the record-keeping/verification and observer requirements of the amended measure modify the conditions of competition in the relevant market to the detriment of the group of Mexican tuna product *vis-à-vis* the group of like U.S. tuna product and like tuna product originating in other Members.[430] But even if Mexico is allowed to so greatly expand its claims at this late stage of the proceeding (and there appears no basis to allow this), Mexico has failed to prove such a detrimental impact. Indeed, Mexico submits no evidence that either the *presence* of an AIDCP-approved observer on board its large purse seine vessels or the *provision* to the United States of the already created AIDCP-mandated observer certificate (or proof thereof)[431] *has any impact at all* on Mexican tuna product (non "dolphin safe" or otherwise) sold in the United States.[432] Similarly, Mexico puts forward *zero* evidence that the fact that Mexico's industry must abide by the record-keeping/verification rules of the AIDCP (because it fishes in the ETP with large purse seine vessels) and provide the associated TTF number along with Form 370s[433] again, *has any impact at all* on Mexican tuna product (non "dolphin safe" or otherwise) sold in the United States.[434]

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[428] *See Japan – Agricultural Products II (AB)*, para. 129 ("Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on the specific legal claims asserted by it."); *see also US – Gambling (AB)*, para. 282 ("[A] panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so.").

[429] *See US – COOL (AB)*, para. 469 ("[W]e agree with the United States that, by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement without examining the proposed alternative measures, the Panel erred by relieving Mexico and Canada of this part of their burden of proof.").

[430] *See* Mexico's Opening 21.5 Statement, paras. 11, 52, as well as statements made by Mexico at the Panel meeting; *see also* U.S. Second Written 21.5 Submission, paras. 68-78, 131, 139, 147.

[431] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128).

[432] *See also* U.S. Opening 21.5 Statement, paras. 23-24.

[433] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128).

[434] *See also* U.S. Opening 21.5 Statement, paras. 25-26 (noting that Mexico has failed to prove the detrimental impact even as (mis)framed by Mexico); U.S. Second Written 21.5 Submission, paras. 76-78 (same).

289. Moreover, Mexico has failed to prove that any detrimental impact "reflects discrimination" because it does not exclusively stem from legitimate regulatory distinctions. Indeed, as the United States has explained, not only has Mexico failed to prove its central argument that the detrimental impact "reflects discrimination" because all other fishing methods "have adverse effects on dolphins that are equal to or greater" than setting on dolphins does,[435] it has failed to prove any of its subsidiary arguments for a whole host of reasons.[436]

59. *To both Parties*: Please comment on the attached table (Table 1/Rev.2), in light of the various requests for clarifications as reflected in the earlier batches of questions from the Panel.

Overall

290. Tables such as this one often risk oversimplifying complex legal issues. As such, the United States encourages the Panel to focus its examination on the requirements of the amended measure, rather than relying heavily on this table.

291. The Panel does not provide any explanation as to the color scheme used in the table. For instance, it is not clear why some columns and rows are yellow as opposed to green or red, and it is not clear why some "X's" are red, while others are green and yellow. The United States has therefore ignored the different colors in commenting on the table.

292. As noted previously, the NOAA Form 370 does not require AIDCP Tuna Tracking Forms (TTF), but requires an IDCP Member nation certification which certifies: 1) there was an IDCP-approved observer onboard the vessel during the entire trip; (2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught; and (3) listing the numbers for the associated AIDCP TTFs, which contain the captain and observer certifications.[437]

293. As noted in response to Question 56 (and below), the distinction between "small" and "large" purse seine vessels is only relevant inside the ETP where only "large" purse seine vessels are capable and permitted to chase and capture dolphins to harvest tuna. Outside the ETP, the requirements are the same for all purse seine vessels.

Slide One (LPSV)

294. Column 1: *LPSV outside ETP with determination of regular and significant association.* Please refer to the U.S. responses to Questions 22 and 55 regarding determinations made

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[435] U.S. First Written 21.5 Submission, paras. 72-75, 79-166, 236-237; U.S. Second Written 21.5 Submission, paras. 10-27, 86-94.

[436] *See* U.S. First Written 21.5 Submission, paras. 218-223, 240-275; U.S. Second Written 21.5 Submission, paras. 95-128.

[437] *See, e.g.*, Republic of Ecuador, IDCP Dolphin Safe Certification (Exh. US-128).

pursuant to Section 216.91(a)(2)(i). As explained, NOAA would make such determinations on a fishery-by-fishery basis in light of current data as to whether a "regular and significant association" is occurring "between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)." A "fishery" is defined by location, gear type (or fishing method), and target species, *e.g.*, the eastern tropical Atlantic Ocean purse seine fishery.

295. Column 2: *LPSV outside ETP with determination of regular and significant mortality.* Please refer to the U.S. responses to Questions 21 and 22. As explained, the determination provided for under Section 216.91(a)(4)(iii) only applies to those fisheries not otherwise covered by sections 216.91(a)(1)-(3). As purse seine vessels operating outside the ETP are covered by (a)(2), this determination does not apply to purse seine fisheries outside the ETP. The column should therefore be deleted.

296. Column 3: *LPSV outside ETP with determination that observers are qualified and authorized.* Please refer to the U.S. responses to Questions 23 and 34. In particular, please note that these determinations are made on an observer program-by-observer program basis. Each observer program must satisfy the applicable criteria in order for NOAA to determine that it is "authorized and qualified" to issue certificates for purposes of the amended measure.

297. Further, the United States notes the "check" in the in the third row (certificate by observer). As the United States has explained, the United States requires an observer statement "where applicable." That is to say, the United States requires statement be provided where the tuna product contains tuna caught in a fishery determined to be "qualified and authorized" pursuant to section 216.91(a), and an observer was on board the vessel for the particular fishing trip where the tuna was harvested. The United States does not require an observer statement for tuna product containing tuna harvested from such a fishery where an observer was not on board.

Slide Two (small PSV)

298. Columns 1, 2, and 3. As noted above, no distinction is made outside the ETP between "large" and "small" purse seine vessels. As such, all comments the United States makes on the first three columns in Slide One applies equally to the first three columns in Slide Two. For columns 1 and 3, it is unclear what the Panel is referring to when it states "new question 1 in the questions slide" in column 1 and "variable coverage" in column 3. The United States has addressed the question of observer coverage, for example, in responses to Questions 29, 32, and 54.

299. Column 3: *Small PSV outside ETP with determination that observers are qualified and authorized.* As currently entitled, this column appears to indicate that the "qualified and authorized" determination is limited to only those fisheries outside the ETP. That is incorrect, if that is indeed the intent. NOAA has the authority to make that determination for fisheries inside and outside the ETP. Indeed, two of the seven observer programs NOAA has determined to be "authorized and qualified" are inside the ETP (California Deep-set Pelagic Longline Fishery and the California Large-mesh Drift Gillnet Fishery). As such, if, in the future, an observer program was established for small purse seine vessels in the ETP, NOAA has the authority to determine

that such an observer program was "qualified and authorized" if the program met the applicable criteria.

300. Missing Column. As discussed in response to Question 53, the regulations treats small ETP purse seine vessels as operating in an "other fishery." Under the regulations, all fisheries falling under Section 216.91(a)(4) are potentially subject to a determination under Section 216.91(a)(4)(iii) that a "regular and significant mortality" is occurring. The missing column could be entitled "small PSV inside the ETP with determination of regular and significant mortality." The information in that column should be identical to the information provided in the second column in Slide 3, currently entitled "Others outside ETP with determination of regular and significant mortality." The specifics of the Section 216.91(a)(4)(iii) determination is discussed in response to Questions 21 and 52.

Slide Three (other boats/methods (other than purse seine))

301. Column 1: *Others outside ETP with determination of regular and significant association.* As discussed in response to Question 22, the determination made pursuant to Section 216.91(a)(2)(i) only applies to non-ETP purse seine fisheries. As such, column one should be deleted.

302. Column 2: *Others outside ETP with determination of regular and significant mortality.* The title to this column is incorrect. The regular and significant mortality determination provided for in Section 216.91(a)(4)(iii) applies to all fisheries not otherwise covered by sections 216.91(a)(1)-(3). Accordingly, such a determination could be made for non-purse seine fisheries inside and outside the ETP. In addition, and as discussed above, the Section 216.91(a)(4)(iii) determination could also apply to small purse seine vessels operating in the ETP. The determination would be made on a fishery-by-fishery basis in light of current data.

303. Column 3: *Others outside ETP with determination that observers are qualified and authorized.* The title to this column is incorrect. As noted above, the determination that observers could be "authorized and qualified" to issue certificates for purposes of the amended measure could be made with regard to observer programs inside and outside the ETP.[438] Indeed, of the seven observer programs NOAA has determined to be "authorized and qualified," two are inside the ETP (California Deep-set Pelagic Longline Fishery and the California Large-mesh Drift Gillnet Fishery), while the remaining five are outside the ETP.[439]

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[438] *See* Qualified and Authorized Notice, 79 Fed. Reg. at 40,719-20 (Exh. US-113) (determining both ETP and non-ETP as "qualified and authorized" for purposes of the amended measure: the American Samoa Pelagic Longline Fishery; the Atlantic Bluefin Tuna Purse Seine Fishery; the Atlantic Highly Migratory Species Pelagic Longline Fishery; the California Deep-set Pelagic Longline Fishery; the California Large-mesh Drift Gillnet Fishery; the Hawaii Deep-set Longline Fishery; and the Hawaii Shallow-set Longline Fishery).

[439] *See* U.S. Response to Question 28.

304. Further, and as noted above with regard to Slide One (and, by implication, Slide Two), the Panel has a "check mark" in the third row (certificate by observer). As the United States has explained, the United States requires an observer statement "where applicable." That is to say, the United States requires a statement be provided where the tuna product contains tuna caught in a fishery determined to be "qualified and authorized" pursuant to section 216.91(a) and an observer was on board the vessel for the particular fishing trip where the tuna was harvested. The United States does not require an observer statement for tuna product containing tuna harvested from such a fishery where an observer was not on board.

COMMENTS ON THIRD PARTIES' RESPONSES TO THE PANEL'S QUESTIONS

1. ***To Third Parties*: New Zealand at para. 6 of its opening statement posits that "Specifically in this dispute, the even-handedness assessment would involve consideration of the United States' rationale for distinguishing between tuna products containing tuna caught by setting on dolphins in the Eastern Tropical Pacific and tuna harvested by other methods in other areas of the ocean. New Zealand submits that the Panel should consider whether this rationale is consistent with the overall objective of the amended dolphin-safety measure. For instance, does the distinction assist or hinder the dolphin-safety objective? Is eligibility for the label tailored to the different levels of dolphin-safety risks arising from the different fishing methods? In other words, is the rationale for the distinction consistent with the measure's overall objective?" Please comment on this statement by New Zealand.**

305. The United States has commented on the third parties' responses to this question in the U.S. response to Question 6.

2. ***To Third Parties*: Please provide examples, as applicable, of national observer programmes, or international observer programmes that you are participating in, and provide in as much detail as practicable, the cost of running or participating in such observer programmes.**

306. The responses by New Zealand and the EU illustrate: 1) the large number and diversity of observer programs operating in the RFMO areas; 2) that the costs of establishing an AIDCP-like observer program with 100 percent coverage of all vessels that catch tuna sold on the U.S. tuna product market would be enormous (at least hundreds of millions of dollars per year and likely more); and 3) that these costs would likely be born largely by the global tuna industry.

307. First, as New Zealand pointed out, RFMOs, including the WCPFC, do not operate a single observer program for their entire convention areas. Rather, 24 WCPFC members have regional observer programs, including the Kiribati program that provides observers for New Zealand's vessels.[440] These observer programs have different training programs, different record-keeping systems, and different requirements for the information observers collect.

308. Furthermore, as the United States has explained, the purpose of these observer programs is different from the purpose of the AIDCP program. The AIDCP program was established in response to the massive dolphin death that was occurring in the ETP large purse seine fishery. The program's purpose was to monitor compliance with the DML regime, which was designed

[440] *See* U.S. Response to Question 13.

to reduce dolphin mortality from the population-depleting levels of the 1950s to early 1990s.[441] By contrast, other observer programs have been established to focus on other issues. The WCPFC observer program, for example, has focused on sustainable fishing and mitigation of sea turtle and seabird bycatch.

309. Second, the examples provided by the third parties illustrate the significant costs that establishing an AIDCP-like observer program covering all vessels that produce for the U.S. tuna product market would impose on the global tuna industry. New Zealand stated that its own observer program costs up to US$450 per day.[442] Using this figure, multiplied by the estimated number of fishing days per vessels in the U.S. Pacific longline fisheries, it would cost an estimated US$449,629,650 per year to operate an observer program with 100 percent coverage of the 3,687 longline vessels in the WCPFC (assuming five percent coverage).[443] And this leaves out the additional costs associated with establishing such a program as well as the thousands of other vessels that catch tuna sold on the U.S. tuna product market.

310. Similarly, the EU stated that its observer program covering the four Spanish large purse seine vessels that fish in the ETP costs approximately US$151,234 per year to operate.[444] As the EU stated, EU observers covered 13 trips in 2012,[445] which amounted to 64 percent of the trips by EU large purse seine vessels in the ETP.[446] Thus, the EU observer program, if it were required to have 100 percent coverage would cost approximately US$235,303 per year (assuming constant length of trips, costs of observers, and administrative/staff costs). Based on this figure for four purse seine vessels, covering the 3,687 longline vessels in the WCPFC would cost approximately US$216,890,540 per year.[447] Furthermore, this figure is almost certainly an

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[441] *See* La Jolla Agreement (1992) (Exh. US-40). The United States notes that the purpose was not, as Mexico asserted at the Panel meeting, to monitor compliance with any dolphin safe labeling regime. The observer program for large purse seine vessels in the ETP was established by the La Jolla agreement of 1992 for the purpose of monitoring compliance with the DML regime that the parties established. *See id.* The AIDCP dolphin safe label was not established until 1999. The U.S. dolphin safe label was first established in 1990, but tuna caught by setting on dolphins was per se ineligible for this label from the beginning, and there has been no evidence presented that there were discussions of amending this criterion until several years later, during the Panama Declaration negotiations. *See* Mexico's First Written 21.5 Submission, para. 36.

[442] *See* New Zealand's Response to Third Party Question 2, para. 9.

[443] *See* NMFS, *National Observer Program FY 2012 Annual Report*, at 32 (Exh. US-168) (showing that 142 vessels participated in the Hawaii and American Samoa longline fisheries and that observers covered 9,790 sea days and that the combined coverage rate was 25.4 percent; extrapolating from this data, 100 percent coverage would require covering 38,498 sea days, or 271 days per vessel).

[444] *See* EU's Response to Third Party Question 2, para. 6.

[445] *See* EU's Response to Third Party Question 2, para. 5.

[446] IATTC, *Quarterly Report – October-December 2012*, at 31 (2013) (Exh. US-118).

[447] *See* U.S. Second Written 21.5 Submission, para. 177, n.338 (citing WCPFC, *WCPFC Record of Fishing Vessels*, http://www.wcpfc.int/record-fishing-vessel-database (accessed July 21, 2014) (Exh. US-115)).

underestimate, since it not only leaves out start-up costs but also does not account for the fact that longline vessels take longer trips (so that more sea days must be covered per vessel) and return to port less frequently, which tend to make longline observer programs relatively more costly, on a per vessel basis, than purse seine programs.[448]

311. The EU's response also illustrates that the cost to the ETP tuna industry of the AIDCP program is lower than the cost of a similar program generally would be. First, the EU confirmed that, as the United States noted previously, IDCP observers cover just over half of all trips by large purse seine vessels in the ETP.[449] Thus the AIDCP budget is not actually funding a 100 percent coverage observer program but, rather, a 50-60 percent coverage program, with the national observer programs funding the remainder.[450] Second, as the EU noted, all fleets with IDCP observers have "incurred deficits" due to the fact that the observers cost more than accounted for in the IDCP budget.[451] Indeed the IDCP program has had difficulty attracting qualified observers in recent years because, as the employment situation in Latin America has improved, individuals with the requisite educational qualifications are not attracted by the salary of only US$28-32 per day.[452]

312. Finally, New Zealand's response provides another example of an observer program that is largely financed by the covered fishing industry. Vessels in New Zealand's EEZ that are required to carry observers must pay the cost of the observer, namely US$450 per day.[453] Furthermore, observers are required to have their own cabin onboard a vessel, and the vessel is required to pay for the observer's "food, water and other associated needs."[454] As New Zealand's statement suggests, this is most difficult for smaller, wider-ranging longline vessels than for large purse seine vessels.[455]

3. *To Third Parties*: In your experience, if any, are captain's statement inherently reliable?

313. As the United States has discussed previously: 1) self-reporting is critical in the regulation of the global fishing industry; and 2) self-reporting, in the form of captains' statements and vessel logbooks, is generally viewed as reliable, and, in fact, is relied on by many

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[448] *See* U.S. Second Written 21.5 Submission, para. 177 n.338.

[449] See U.S. Second Written 21.5 Submission, para. 177 n.338 (citing IATTC, *Quarterly Report – October-December 2012*, at 31 (2013) (Exh. US-118); IATTC, "AIDCP Observer Program Info" (Exh. US-117)).

[450] *See* IATTC, "AIDCP Observer Program Info" (Exh. US-117).

[451] *See* EU's Response to Third Party Question 2, para. 6.

[452] *See* AIDCP Budget, Doc. MOP-27-06, at 1-3 (Exh. US-116).

[453] *See* New Zealand's Response to Third Party Question 2, para. 11.

[454] New Zealand's Response to Third Party Question 2, para. 10.

[455] *See* New Zealand's Response to Third Party Question 2, para. 8.

Members in regulating their vessels on the high seas or fishing in their national waters.[456] In its Response to Question 39, the United States presented numerous examples of how Members and RFMOs rely on logbooks to enforce various rules governing fishing, including closed area rules, fisheries management rules, and international agreements concerning fishing.[457]

314. In their responses to the Panel's questions, New Zealand and the EU confirm that captain's statements are viewed as reliable for purposes of demonstrating compliance with fishing rules. New Zealand affirms that its fishing authorities require captains' statements to certify compliance with catch documentation schemes and rules regarding fishing practices set out in RFMO measures and international agreements.[458] Similarly, the EU affirms that "the inherent reliability of the captain is one of the pillars" of the EU's system for ensuring compliance with the rules of the EU common fisheries policy.[459] The EU's answer focuses on the large purse seine fishery in the ETP, but, as the EU suggests and as United States has shown, the EU's reliance on captain's statements and logbooks extends to monitoring compliance with fishing rules in areas without AIDCP-like observer programs.[460]

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[456] *See* U.S. Second Written 21.5 Submission, para. 126, n.237.

[457] *See* U.S. Response to Question 39.

[458] *See* New Zealand's Response to Third Party Question 3, para. 14.

[459] EU's Response to to Third Party Question 3, para. 10.

[460] *See* U.S. Response to Question 39 (summarizing the EU's logbook and catch documentation requirements and describing how the information obtained from captains' logbooks is used, *inter alia*, to inform fisheries closures and monitor compliance with discard requirements).