

***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 Additional Questions

October 14, 2014

TABLE OF ACRONYMS

Acronym	Full Name
AIDCP	Agreement on the International Dolphin Conservation Program
C.F.R.	Code of Federal Regulations
DPCIA	Dolphin Protection Consumer Information Act
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
ETP	Eastern Tropical Pacific Ocean
IATTC	Inter-American Tropical Tuna Commission
IDCPA	International Dolphin Conservation Program Act
MMPA	Marine Mammal Protection Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
TBT Agreement	Agreement on Technical Barriers to Trade
U.S.C.	United States Code
WIO	Western Indian Ocean
WTO	World Trade Organization

TABLE OF REPORTS

Short Title	Full Citation
<i>Canada – Aircraft (Article 21.5 – Brazil) (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000
<i>US – COOL (AB)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Tuna II (Mexico)(Panel)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF EXHIBITS

Exhibit Number	Description
240	International Dolphin Conservation Protection Act, Public Law 105-42 (Aug. 15, 1997)
241	William J. Clinton, “Statement on Signing the International Dolphin Conservation Program Act” (Aug. 15, 1997)
242	AIDCP, Guidelines for Technical Training of Observers, Doc. OBS-2-03b (Oct. 27, 2007)
243	AIDCP, Minutes of 18 th Meeting of the Parties (Oct. 26, 2007)

RESPONSES TO THE PANEL'S ADDITIONAL QUESTIONS

60. To both Parties: In its response to Panel question no. 59, the United States clarified that "the determination provided for under section 216.91(a)(4)(iii) [of the 2013 Final Rule, i.e. that a fishery is causing "regular and significant dolphin mortality or serious injury of dolphins"] 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".¹ In its comments on this response, Mexico noted that "the United States interprets the statute to authorize small purse seine vessels in the ETP to be made subject to mandatory observer requirements with a determination that they are causing regular and significant mortality (unrelated to tuna-dolphin association), while both large and small purse seine vessels outside the ETP are not subject to such a possibility".²

In light of the above, the Panel understands that (a) large and small purse seine fisheries outside the ETP can never be required to have observers on board because of "regular and significant mortality or serious injuries of dolphins". Rather, observers can only be required in such fisheries where there is "regular and significant association between dolphins and tuna similar to the ETP". Conversely, the Panel understands that non-purse seine fisheries outside the ETP, as well as small purse seine fisheries inside the ETP, can only be required to have observers in board in cases where they are causing "regular and significant mortality or serious injury of dolphins". A determination of "regular and significant association" cannot be made in respect of these fisheries.

- a. **Is the Panel's understanding correct? If so, why is the amended tuna measure structured in this way? Why, in other words, can no determination of "regular and significant mortality or serious injury" be made in respect of large and small purse seine vessels outside the ETP, and why can no determination of "regular and significant association of dolphins and tuna" be made with respect to non-purse seine fisheries outside the ETP and small purse seine fisheries inside the ETP? The Panel is aware that small purse seine vessels in the ETP are not allowed to set on dolphins under the AIDCP.**

1. As noted previously, section 216.91(a)(2)(i) requires an observer statement (in addition to a captain statement) to be provided as to the dolphin safe status of the tuna 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)" for any particular non-ETP purse seine fishery.³ Similarly, under section 216.91(a)(4)(iii), where NOAA has identified "any other fishery," i.e., those fisheries not otherwise covered by sections 216.91(a)(1)-(3), "as having a regular and significant mortality or serious injury of dolphins," NOAA may require an observer

¹ United States' responses to the Panel's questions, para. 295.

² Mexico's comments on the United States' responses to the Panel's questions, para. 198.

³ See, e.g., U.S. Response to Question 22, para. 144.

certification (in addition to the captain statement) to be provided as to the dolphin safe status of the tuna.⁴ Fisheries not covered by sections 216.91(a)(1)-(3) are non-purse seine fisheries *inside* and *outside* the ETP as well as the small purse seine vessel fishery *inside* the ETP.⁵

2. As further discussed, 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.⁶ As the criteria indicate, that decision is not based on a particular risk to dolphins in any one of these seven fisheries, but reflects NOAA’s 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.⁷

3. The two “regular and significant” determinations provided by sections 216.91(a)(2)(i) and 216.91(a)(4)(iii) are required by statute. In particular, 16 U.S.C. § 1385(d)(1) states that:

It is a violation of section 45 of title 15 for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term “dolphin safe” or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested—

(A) on the high seas by a vessel engaged in driftnet fishing;

(B) outside the eastern tropical Pacific Ocean by a vessel using purse seine nets—

(i) in a fishery in which the Secretary has determined *that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean)*, unless such product is accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that

⁴ See, e.g., U.S. Response to Question 21, para. 134.

⁵ In this regard, the United States would offer a clarification with respect to the Panel’s statement that, “non-purse seine fisheries *outside* the ETP, as well as small purse seine fisheries *inside* the ETP, can only be required to have observers in board in cases . . .,” is incorrect. All non-purse seine fisheries (except high seas large scale driftnet fisheries, which are covered under section 216.91(a)(3), and are, of course, not permitted domestically or internationally) are covered by section 216.91(a)(4), including non-purse seine fisheries inside the ETP.

⁶ *Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries*, 79 Fed. Reg. 40,718, 40,719-20 (July 14, 2014) (Exh. US-113).

⁷ See U.S. Response to Question 31, para. 175. As the United States noted in response to Question 31, the rate of dolphin mortality and serious injury is actually quite low in each of the 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. NMFS, “American Samoa Longline Annual Reports – 2006-2013” (Exh. US-164). 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. NMFS, “Hawaii Deep-Set Longline Annual Reports – 2004-2013” (Exh. US-163).

no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

...

(C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin safe under paragraph (2); or

(D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary *as having a regular and significant mortality or serious injury of dolphins*, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary. (Emphasis added)

4. These provisions were enacted into U.S. law in 1997 as part of the International Dolphin Conservation Program Act (IDCPA), which amended the Marine Mammal Protection Act (MMPA), the Dolphin Protection Consumer Information Act (DPCIA), and the Tuna Conventions Act.⁸

5. As indicated in the purposes and findings sections of the Act, a central focus of the IDCPA is on how the United States can continue to reduce the harm caused to dolphins in the ETP by large purse seine vessels that are taking advantage of the association between yellowfin tuna and dolphins.⁹ President Clinton made this precise point when signing the IDCPA into law:

The protection of dolphins in the eastern tropical Pacific Ocean, where these marine mammals swim together with schools of yellowfin tuna, has long been a high priority for the United States. Strengthening the International Dolphin Conservation Program through this legislation is a major victory for strong international efforts to protect dolphins caught during tuna fishing in this region.¹⁰

⁸ IDCPA, Public Law 105-42 (Aug. 15, 1997) (Exh. US-240).

⁹ IDCPA, sec. 2 (Exh. US-240).

¹⁰ William J. Clinton, “Statement on Signing the International Dolphin Conservation Program Act” (Aug. 15, 1997) (Exh. US-241); *see also* 16 U.S.C. § 1385(b) (“The Congress finds that – (1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world ...”); Statement of Rep. Barbara Boxer before the H. Rep., 136 Cong. Rec. H11878-02, 101st Cong. (Oct. 23, 1990) (Exh. US-99); International Dolphin Conservation Program Act, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and

6. The IDCPA pursues this objective, in part, by giving effect in U.S. law to the establishment of an International Dolphin Conservation Program under the Declaration of Panama (and the preceding La Jolla Agreement).¹¹ In particular, the IDCPA amended the moratorium on the taking and importation of marine mammals and marine mammal products to allow the importation of ETP yellowfin tuna harvested by purse seine vessels where, *inter alia*, the purse seine vessel is operating consistently with the requirements of (what would become) the Agreement on the International Dolphin Conservation Program (AIDCP).¹² The IDCPA recognizes, both for purposes of the moratorium¹³ and the dolphin safe labeling requirements,¹⁴ the importance that the signatory nations placed on having 100 percent observer coverage on those purse seine vessels that are both capable and permitted to set on dolphins.¹⁵

7. And, as explained previously, the reason the 12 signatory nations agreed to 100 percent observer coverage for large ETP purse seine vessels is the *same* reason that the amended measure requires the provision of that observer certification (or proof thereof) for tuna harvested by those same vessels.¹⁶ It is the large purse seine vessels that are capable and permitted to take advantage of the association of yellowfin tuna and dolphins in the ETP by engaging in multi-hour chases and captures of hundreds of dolphins at a time. And it is those vessels that have caused (and continue to cause) the unparalleled harm to dolphins in the ETP.¹⁷

Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess. (April 30, 1996) (Statement of Senator Barbara Boxer) (Exh. US-80).

¹¹ IDCPA, sec. 2(a) (Exh. US-240).

¹² See IDCPA, sec. 4 (Exh. US-240).

¹³ See, e.g., IDCPA, secs. 4, 6 (Exh. US-240) (amending Title III of the MMPA to mandate that the implementing regulations require observers on U.S. large purse seine vessels participating in the International Dolphin Conservation Program).

¹⁴ See IDCPA, sec. 5 (Exh. US-240) (amending subsection (d) of the DPCIA to state that tuna harvested by large purse seine vessels (*i.e.*, those vessels capable of deploying purse nets on or to encircle dolphins) be accompanied by a statement that “that there was an observer approved by the International Dolphin Conservation Program on board the vessel during the entire trip and that such observer provided the certification required under subsection (h)”).

¹⁵ See Agreement for the Conservation of Dolphins, para. 12 (1992) (Exh. US-40) (La Jolla Agreement); AIDCP, Annex II, para. 2 (Exh. MEX-30) (“Each Party shall require its vessels with a carrying capacity greater than 363 metric tons (400 short tons) and that operate in the Agreement Area, to carry an observer during each fishing trip in the Agreement Area.”).

¹⁶ U.S. Response to Question 7, paras. 49-53; see also Tables Summarizing Fishery-by-Fishery Evidence on the Record, Table 1 (Exh. US-127) (noting that ETP large purse seine vessels intentionally set on dolphins on average 10,426 times each year in the years 2009-2013).

¹⁷ See U.S. First Written 21.5 Submission, para. 79 (noting that purse seine fishing killed millions of ETP dolphins prior to the early 1990s); U.S. Response to Question 19, para. 111 (Table 1) (noting that the average annual dolphin mortalities is 2.7 when large ETP purse seine vessels do not set on dolphins compared to 1,124.3 when they do set on dolphins); *US – Tuna II (Mexico) (Panel)*, para. 7.504 (noting that “adverse impact on dolphins beyond observed mortality” “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”); *id.* para. 7.738 (stating

8. Of course, if an association similar to the one that exists in the ETP— *i.e.*, an association that is so strong and prevalent that to chase and capture dolphins is to capture tuna¹⁸ – was found to exist, then it is reasonable to assume that the local large purse seine vessels would find it economically efficient to harvest tuna by chasing dolphins (with entirely foreseeable consequences for the local dolphins). Indeed, Mexico claims that taking advantage of the association in the ETP is not only “the most reliable and efficient method” for harvesting tuna, it is the *only* “viable option for the Mexican fleet.”¹⁹

9. As such, the IDCPA appropriately provides for *the possibility* that the association in the ETP is not unique. And if such “a regular and significant association [is occurring] between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean)” elsewhere, the IDCPA provides that it would be appropriate to require an observer certification (in addition to the captain statement) as to the dolphin safe status of tuna product containing tuna harvested in that fishery.²⁰

10. Similarly, the IDCPA appropriately allows for *the possibility* that other fisheries (such as longline, hand line, etc.) may also, like the ETP large purse seine vessel fishery, be so problematic that it would be appropriate to require an observer statement to attest to the dolphin safe status of tuna product containing tuna harvested in those fisheries.²¹

11. However, in contrast to purse seine fisheries, it would seem to make little sense to connect an observer requirement to the existence of an association between tuna and dolphins similar to the one that exists in the ETP for purposes of non-purse seine fishing. That is to say, while it is undisputed in this proceeding that the unparalleled harm to dolphins caused by large purse seine vessels in the ETP is directly related to the existence of the association between yellowfin tuna and dolphins, there is *no* evidence that a similar correlation exists between that association and harm to dolphins from *other* fishing methods. The reason for this is simple – other gear types cannot take advantage of such an association. Thus, not surprisingly, there is *zero* evidence that longline fishing causes more dolphin mortality and serious injury in the part

that the AIDCP standard “fails to address unobserved adverse effects derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase”).

¹⁸ Tim Gerrodette, “The Tuna-Dolphin Issue,” in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-29); Michael L. Gosliner, “The Tuna Dolphin Controversy,” in Twiss & Reeves (eds.) *Conservation and Management of Marine Mammals* 120, 121 (1999) (Exh. US-34).

¹⁹ Mexico’s Response to Question 57, para. 149 (“Primarily, however, the vessels need to rely on the dolphin set method, because that is the most reliable and efficient method in the part of the ocean in which the Mexican fleet fishes.”); *id.*, para. 152 (“For the above reasons fishing not in association with dolphins is not a viable option for the Mexican fleet.”).

²⁰ 16 U.S.C. § 1385(d)(1)(B)(ii) (Exh. MEX-8); 50 C.F.R. § 216.91(a)(2)(i) (Exh. US-2).

²¹ 16 U.S.C. § 1385(d)(1)(D) (Exh. MEX-8); 50 C.F.R. § 216.91(a)(4)(iii) (Exh. US-2).

of the ETP where the tuna-dolphin association exists compared to longline fishing in other parts of the ETP or other parts of the world.

12. But this is not to say that dolphin mortality and serious injury caused by longline fishing (or other gear types) does not vary from fishery to fishery. Mortality and serious injury can and does vary across fisheries. As the United States has explained previously, even where different fisheries use the same gear type, such as longline, the quantity of bycatch will be determined by any number of factors, including gear configurations, spatial distributions, and the density of the species that is being caught as bycatch.²²

13. Accordingly, the amended measure appropriately allows for *the possibility* that, due to the confluence of factors, a particular fishery, other than a non-ETP purse seine fishery, may be causing “a regular and significant mortality or serious injury of dolphins” such that NOAA considers it necessary to require an observer certificate to attest to the dolphin safe status of tuna product containing tuna harvested in that particular fishery.²³

14. In sum, the amended measure authorizes NOAA to require an observer statement for *any fishery* where NOAA determines that there is a basis to do so. It is unquestioned that such a basis exists for large purse seine vessels operating in the ETP – indeed, Mexico does not challenge the observer requirements as they apply to large ETP purse seine vessels at all.²⁴

15. For purposes of this dispute, however, Mexico made no claim that any difference between the two “regular and significant” determinations is inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement) or Articles I:1 or III:4 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).²⁵ Indeed, Mexico appears to take the *opposite* position, arguing repeatedly that the Panel must not analyze the “even-handedness” of the amended measure’s observer requirements based on *any* comparison between fisheries at all.²⁶ In Mexico’s view, “[i]t is beyond question” that the amended measure must require

²² U.S. Response to Question 12, n.84.

²³ 16 U.S.C. § 1385(d)(1)(D) (Exh. MEX-8); 50 C.F.R. § 216.91(a)(4)(iii) (Exh. US-2).

²⁴ See, e.g., Mexico’s Opening Oral 21.5 Statement, para. 58 (“Mexico is not challenging the application of the tracking, verification and observer requirements to the Mexican fleet.”).

²⁵ See Mexico’s First Written 21.5 Submission, secs. IV(B)-(D); Mexico’s First Written 21.5 Submission, secs. III(B)-(D); Mexico’s Opening Oral 21.5 Statement, secs. II(B), III.

²⁶ See, e.g., Mexico’s Response to Question 11, para. 52 (“Accordingly, a comparison of the magnitude of dolphin mortalities and serious injuries in different fisheries is not relevant to, and does not affect, Mexico’s arguments regarding the lack of even-handedness in the design and application of the different labelling conditions and requirements for record-keeping, tracking and verification and for observer coverage. It is beyond question that these conditions and requirements need to be applied to the tuna caught in all fisheries. Under the Amended Tuna Measure, they are not so applied, and, for that reason, the relevant regulatory distinction is not even-handed.”); *id.*, para. 56.

AIDCP-equivalent tracking and observer requirements for “tuna caught in *all* fisheries” because *all* fisheries cause some harm to dolphins.²⁷

16. Accordingly, it is clear that Mexico has made no *prima facie* case with regard to the determinations provided for either by section 216.91(a)(2)(i) or section 216.91(a)(4)(iii). As the United States has discussed previously,²⁸ a complainant must itself prove all the elements of its *prima facie* case through the evidence and arguments that it provides to the panel,²⁹ and a panel errs if it assumes any part of the complainant’s burden of proof.³⁰

17. But even if Mexico had claimed that such determinations were inconsistent with Article 2.1 of the TBT Agreement, Article I:1 of the GATT 1994, or Article III:4 of the GATT 1994, such claim(s) would surely fail.

18. First, it is clear that there is no evidence on the record that would enable Mexico to prove any difference in the two determinations provides less favorable treatment to Mexico’s non-dolphin safe tuna product sold in the United States inconsistent with Article 2.1 of the TBT Agreement or Article III:4 of the GATT 1994, or is otherwise inconsistent with Article I:1 of the GATT 1994. Indeed, as noted above, Mexico has repeatedly argued that the covered agreements *require* the United States to impose an observer requirement for *all* tuna product sold in the United States that contain tuna harvested by a fishing method other than pole-and-line fishing.³¹

19. Second, Mexico has not even attempted to demonstrate that there is any non-ETP purse seine fishery where “a regular and significant association [is occurring] between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean)” or that there is some “other fishery” where “a regular and significant mortality or serious injury of dolphins” is occurring. As discussed previously, NOAA stated in the 2013 Final Rule that it “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.³² And the record in

²⁷ See, e.g., Mexico’s Response to Question 11, para. 52 (emphasis added); see also Mexico’s Opening Oral 21.5 Statement, para. 73 (stating same).

²⁸ See U.S. Response to Question 21, para. 135.

²⁹ 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.

³⁰ 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”).

³¹ See, e.g., Mexico’s Response to Question 11, paras. 51-52.

³² *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997, 41,000 (2013 Final Rule) (Exh. MEX-7) (“NMFS has no credible reports of any fishery in the world,

this proceeding confirms NOAA's 2013 conclusion. In particular, Exhibit US-127 makes plain that there is no current, fishery-by-fishery evidence that purse seine vessels are chasing and capturing dolphins anywhere other than the ETP,³³ nor is there any current, fishery-by-fishery evidence that there is "a regular and significant mortality or serious injury of dolphins" occurring in any "other fishery."³⁴

- b. If the Panel's understanding of the above-mentioned provisions is correct, could the fact that no determination of "regular and significant mortality or serious injury" can be made in respect of large and small purse seine vessels outside the ETP, or that no determination of "regular and significant association of dolphins and tuna" can be made with respect to non-purse seine fisheries outside the ETP and small purse seine fisheries inside the ETP result in non-dolphin safe tuna fishing?**

20. The United States refers to its response to the Panel's question in subpart (a) and previous questions regarding sections 216.91(a)(2)(i) and 216.91(a)(4)(iii).

21. As the United States has explained, if, for example, NOAA determined 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, NOAA would, pursuant to section 216.91(a)(2)(i), require tuna product containing tuna harvested in that fishery to be accompanied by an observer statement (in addition to the captain statement) that certifies to the dolphin safe status of that tuna product, *i.e.*, that "no purse seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna

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.").

³³ See, e.g., U.S. Response to Question 22, paras. 147-152 (citing to evidence on the record); Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

In this regard, the United States notes that the only new document that Mexico puts forward in its comments on U.S. responses is a study funded by the International Pole & Line Foundation, which claims that there is some association between tuna and dolphins in the western Indian Ocean. Notably, the study makes no claim that this association is similar in strength or frequency than to what occurs in the ETP. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*, at 67 (2014) (Exh. MEX-161) ("In summary, it is possible that there has been more setting on dolphins in the [western Indian Ocean (WIO)] than has been reported. This does not imply that the tuna-dolphin fishery in the WIO is of the same scale as that in the ETP. Indeed, the only comparative study of the cetaceans from the western Indian Ocean and the ETP (Ballance and Pitman, 1998) suggested that tuna-dolphin schools were seen less frequently in the WIO than in the ETP. Nevertheless it is clear that the occurrence of the tuna-dolphin association in the WIO purse seine fishing area has been consistently under-reported. The true scale of purse seine fishing on dolphin-associated schools in the WIO is therefore open to question.").

³⁴ See, e.g., U.S. Response to Question 21, paras. 136-143 (citing to evidence on the record); Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught.”³⁵

61. To the parties: At para. 71 of Mexico's first written submission, reference is made to "technical training required by the guidelines that the Parties [to the IADCP] establish". Do these guidelines exist? Could the parties please provide a copy of these guidelines to the Panel? The Panel also invites both parties to comment on these guidelines to the extent they wish to do so.

22. It would appear that Mexico was referring to the “Guidelines for Technical Training of Observers” in its first written submission.³⁶ These guidelines were agreed to at the 18th meeting of the AIDCP parties in 2007,³⁷ where, notably, Mexico questioned the necessity of the 100 percent observer coverage on large purse seine vessels.³⁸ Appendix 2 indicates that only university graduates will be recruited to be observers provided that they have “a degree in biology, marine science or a related subject” (sec. A).

23. The guidelines are brief, and apparently only serve “to highlight some essential aspects of observer training” (sec. B). That training is limited to purse seine fishing (sec. B.1), the identification of certain fish and animals, including the two most important, tunas and those dolphins associated with tuna fishing (sec. B.2), how to fill out the data forms (sec. B.3), and how “to identify, deal with, and document” instances of “interference (including bribery attempts), intimidation or obstruction by vessel crew during a trip” (sec. B.4).

³⁵ See, e.g., U.S. Response to Question 22, para. 144; 50 C.F.R. § 216.91(a)(2)(i) (Exh. US-2).

³⁶ AIDCP, Guidelines for Technical Training of Observers, Doc. OBS-2-03b (Oct. 27, 2007) (Exh. US-242).

³⁷ See AIDCP, Minutes of 18th Meeting of the Parties, Appendix 2 (Oct. 26, 2007) (Exh. US-243).

³⁸ See AIDCP, Minutes of 18th Meeting of the Parties, sec. 9 (Exh. US-243) (“Mexico asked about observer coverage in other oceans, and whether 100% coverage was necessary for the scientific study of the stocks, noting that the IATTC covered 30% of the costs of the AIDCP, since this was considered sufficient for scientific estimates. Dr. Compeán said that the level of coverage needed depended on the objective of the study, and for some purposes a lower level was sufficient, but the current 100% coverage was primarily for the monitoring required by the AIDCP and for obtaining an accurate count of dolphin mortality.”).