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)**

Comments of the United States of America
on Responses of Mexico
to the Questions Posed by the Panel

September 26, 2014

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 Zone
FAD	Fish Aggregating Device
FCO or Form 370	NOAA Fisheries Certificate of Origin
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
MT	Metric Ton
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration

PIROP	Pacific Islands Regional Observer Program
PBR	Potential Biological Removal
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
TRP	Take Reduction Plan
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
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 – 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
Korea – Various Measures on Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Thailand – Cigarettes (Philippines) (AB)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
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 – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Shrimp (Article 21.5 – Malaysia) (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Shrimp (Article 21.5 – Malaysia) (Panel)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001
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 – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF EXHIBITS

Exhibit Number	Description
231	Karin A. Forney, SFSC, *Estimates of Cetacean Mortality and Injury in Two U.S. Pacific Longline Fisheries, 1994-2002* (2004)
232	Council Regulation (EC) No. 520/2007, laying down technical measures for the conservation of certain stocks of highly migratory species and repealing Regulation (EC) No. 973/2001 (May 7, 2007)
233	NOAA Description of the Swordfish Large Mesh Drift Gillnet Fishery
234	High Seas Driftnet Fishing Moratorium Protection Act; Identification and Certification Procedures To Address Illegal, Unreported, and Unregulated Fishing Activities and Bycatch of Protected Living Marine Resources, 76 Fed. Reg. 2011 (January 12, 2011)
235	High Seas Driftnet Fishing Moratorium Protection Act; Identification and Certification Procedures To Address Shark Conservation, 78 Fed. Reg. 3338 (January 16, 2013)
236	Identification and Certification of Nations, 50 C.F.R. 300 subpart N
237	WTO Committee on Trade and Environment, Report of the Meeting Held on 13 November 2012, WT/CTE/M/54 (March 15, 2013)
238	Intentionally Omitted
239	WCPFC, Tuna Fishery Yearbook 2012

COMMENTS ON RESPONSES TO THE PANEL'S QUESTIONS

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?

1. 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, as evidenced by the Appellate Body's analysis *in this very dispute*.[1]

2. Mexico thus errs when it argues that one of the most important factors of the even-handed analysis is "whether the discrimination can be reconciled with, or is rationally related to the relevant policy objective of the measure."[2] Mexico cannot cite to even one paragraph of any of the Appellate Body reports in *US – Tuna II (Mexico)*, *US – Clove Cigarettes*, or *US – COOL* for support, nor can it provide any explanation as to why the Appellate Body has taken a position so different from Mexico's approach.[3]

3. Moreover, Mexico is also wrong that "a lack of even-handedness can result where the measure in question exhibits an ambiguity that creates the potential for its abuse and misapplication."[4] There is nothing in the text, which refers to "treatment no less favorable," that refers to "ambiguity," let alone "abuse" or "misapplication." Mexico simply is seeking to import into the text words that are not there, and this is something the Appellate Body has explicitly stated cannot be done – "as we have said more than once, words must not be read into the Agreement that are not there."[5] Indeed, this is another instance in which Mexico seeks to have the Panel take on the role of the regulator and decide *de novo* whether the Panel would have preferred a particular, different regulatory approach. But that is not the role of a panel, and Mexico errs legally in urging this approach.

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

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[1] U.S. Response to Question 5(a), paras. 20-29; U.S. Second Written 21.5 submission, paras. 79-85; U.S. First Written 21.5 Submission, paras. 182-184.

[2] Mexico's Response to Question 5(a), para. 4 (internal quotes omitted).

[3] In any event, the United States has fully explained why the requirements of the amended measure is rationally related to its objective regarding the protection of dolphins. *See* U.S. Second Written 21.5 Submission, paras. 212-218.

[4] Mexico's Response to Question 5(a), para. 4.

[5] *US – Line Pipe (AB)*, para. 250 (citing various reports).

4. As the United States has explained, the United States used the term "calibrated" in the original proceeding to mean something akin to the term "narrowly tailored."[6] That is to say, the United States 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. While the United States does not consider the terms "calibrated" and "even-handed" to be synonymous, both inquiries examine whether there is a legitimate basis for regulatory distinctions. As such, if a panel were to find that a particular regulatory distinction was "even-handed," it is difficult to conceive that the panel would also not consider the regulatory distinction to be "calibrated."[7]

5. Mexico limits the term "calibrated" for purses of this dispute to "the comparison of the magnitude of dolphin mortalities and serious injuries in different fisheries."[8] Mexico then dismisses the relevance of the concept, as so limited, to this dispute, arguing that there is "no room for calibration" in light of Mexico's view as to what is required for implementation.

6. First, Mexico argues that "[o]ne of the most important factors" of the second step of the Article 2.1 analysis "is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure,"[9] and that "the concept of 'calibration' is totally inconsistent" with the objective of the amended measure.[10]

7. But Mexico's approach is incompatible with the Appellate Body's analysis in this dispute where the Appellate Body examined whether the original measure was "calibrated" in the context of the even-handedness analysis. Finding that the measure was not calibrated, the Appellate Body concluded that "*[i]t follows* from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction," *i.e.*, the measure is not "even-handed."[11] Nowhere does the Appellate Body require an analysis of the objective of the measure and

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[6] U.S. Response to Question 5(b), para. 32.

[7] U.S. Response to Question 5(b), para. 33.

[8] Mexico's Response to Question 5(b), para. 10.

[9] Mexico's Response to Question 5(c), para. 14.

[10] Mexico's Response to Question 5(b), para. 9.

[11] *US – Tuna II (Mexico) (AB)*, para. 297 ("In the light of the above, we conclude that the United States has not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean. *It follows* from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. We note, in particular, that the US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP. In these circumstances, we are not persuaded that the United States has demonstrated that the measure is *even-handed* in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.") (emphasis added).

nowhere does the Appellate Body mention that a "calibrated" measure would also fail the "even-handed" test. Indeed, Mexico appears to take the position that the section of the Appellate Body's report entitled "Whether the Measure Is Calibrated" is entirely meaningless.[12] Of course, Mexico is not correct, and its arguments in this regard should be rejected.[13]

8. Second, Mexico argues that it is not appropriate for the United States to vary the requirements of the amended measure at all based on differences in dolphin mortality and serious injury across fisheries. In Mexico's view, "[i]t is beyond question that the *same* conditions and requirements need to be applied to the tuna caught in all fisheries. *There is no room for calibration* . . ."[14] Under Mexico's approach, anything else would constitute a breach of Article 2.1.[15] Again, Mexico's argument is in error.

9. The United States considers it clear that the covered agreements do not prohibit the United States from "calibrating" the requirements of the dolphin safe labeling regime based on the relevant facts and circumstances – to wit, the relative harm suffered by dolphins in different fisheries. Of course, Mexico's argument also runs entirely counter to the object and purpose of the TBT Agreement itself, which recognizes that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*,'" as the United States has noted.[16] Mexico's continued insistence that it, as the trading partner, sets the appropriate level, not the United States, is simply wrong. Not surprisingly, where the Appellate Body did address differences in observer coverage across fisheries, the Appellate Body merely recognized that requiring observers "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury."[17]

10. Mexico is forced to continue to ignore these points.[18] Mexico's arguments in this regard should be rejected.

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[12] *US – Tuna II (Mexico) (AB)*, paras. 282-297.

[13] *US – Shrimp (Article 21.5 – Malaysia) (Panel)*, para. 5.5 ("In other words, although we are entitled to analyse fully the consistency with a covered agreement of measures taken to comply, our examination is not done from a completely fresh start. Rather, it has to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body.") (internal quotes omitted); *US – Shrimp (Article 21.5 – Malaysia) (AB),* para. 107 ("The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. … The Panel had, *necessarily*, to consider our views on this subject…") (emphasis added).

[14] Mexico's Response to Question 5(b), para. 10 (emphasis added).

[15] Mexico's Response to Question 5(b), para. 10 (emphasis added).

[16] *US – Tuna II (Mexico) (AB)*, para. 316 (quoting the sixth preambular recital) (emphasis added); *US – COOL (AB)*, para. 373 (quoting same).

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

[18] The United States addresses Mexico's equally invalid arguments regarding potential biological removal in commenting on Mexico's response to Question 11, *infra*.

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?

11. The United States has addressed the reason why Mexico's approach is in error, and inconsistent with recent Appellate Body reports, including the Appellate Body report in this dispute. The United States notes, in particular, that Mexico cannot explain why the Panel should adopt an approach that differs so substantially from the one adopted by the Appellate Body in this dispute.[19]

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.

12. Mexico's insistence on artificially grafting the Article XX analysis into the Article 2.1 one is improper.[20] The Article 2.1 analysis is a distinct analysis, one developed from the text of the TBT Agreement itself, not from the GATT 1994, as Mexico wrongly argues. Indeed, the Appellate Body has *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. The Appellate Body, in fact, has suggested just the opposite, *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.[21]

13. Mexico's argument is simply incompatible with the Appellate Body's analysis, not only in *US – Tuna II (Mexico)*, but in *EC – Seal Products* as well, and, as such, in error.

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[19] *See* U.S. Response to Question 5(c), paras. 34-37; *see also* U.S. Second Written 21.5 Submission, paras. 83-85.

[20] *See* U.S. Response to Question 6, paras. 38-41.

[21] *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.").

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

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?

14. Mexico has confirmed that all of its large purse seine vessels set on dolphins in the ETP, and that these large purse seine vessels represent 95 percent of the Mexican tuna fleet capacity in the ETP.[22] As such, Mexico does not claim that the amended measure discriminates against tuna product produced by Mexican large purse seine vessels not setting on dolphins in the ETP *vis-à-vis* tuna product produced by other Members' large purse seine vessels not setting on dolphins outside the ETP. However, even if Mexico did make such a claim, that claim would fail for the reasons explained previously.[23]

15. As to its actual discrimination claims, Mexico confirms once again that "Mexico is not complaining about the imposition of observer and tracking/verification requirements in the ETP and, by implication, on the Mexican fleet."[24] Mexico, of course, has made an international commitment that its large purse seine vessels in the ETP will carry observers and that the harvested tuna will be subject to record-keeping and verification requirements of the Agreement on the International Dolphin Conservation Program (AIDCP), regardless of where, and in what form, that tuna is ultimately sold. As such, the fact that the amended measure requires Mexico to certify that an observer was actually on board a vessel that has produced tuna for the U.S. tuna product market (consistent with its international obligations), does not impact whether the observer will be on board that vessel, and whether that observer will issue an observer certificate as to the fishing practices of that vessel during that trip.

16. Mexico instead complains of the "free pass" that the amended measure gives the vessels of other Members, none of whom have made an international legal commitment, as Mexico has, to apply AIDCP-equivalent tracking and observer requirements. The United States has fully addressed Mexico's various unfounded arguments in this regard elsewhere, including Mexico's assertion that any difference in tracking and observer requirements "contributes to the fact that *most* tuna products from the United States and other countries are eligible for the dolphin-safe label."[25] As discussed previously, Mexico has submitted *zero* evidence that these requirements

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[22] Mexico's Response to Question 57, para. 147; *see also id.* para. 146 ("Mexico is not aware that any Mexican tuna products manufacturers have exported any products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure.").

[23] U.S. Response to Question 7, paras. 46-54.

[24] Mexico's Response to Question 7(a), para. 17.

[25] Mexico's Response to Question 7(a), para. 21 (emphasis in original).

have any nexus whatsoever with any detrimental impact Mexico claims to suffer from, either discussed in paragraphs 233-235 of the Appellate Body report or otherwise.[26]

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?

17. Mexico has confirmed that all of its large purse seine vessels set on dolphins in the ETP, and that these large purse seine vessels represent 95 percent of the Mexican tuna fleet capacity in the ETP.[27] As such, Mexico does not claim that the amended measure discriminates against tuna product produced by Mexican large purse seine vessels not setting on dolphins in the ETP vis-à-vis tuna product produced by other Members' small purse seine vessels not setting on dolphins inside and outside the ETP. However, even if Mexico did make such a claim, such a claim would fail for the reasons explained previously.[28]

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"?

18. This issue is directly addressed by the Appellate Body in *EC – Seal Products* where the Appellate Body re-affirmed the longstanding principle that "the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of

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[26] *See* U.S. Second Written 21.5 Submission, paras. 101-104, 118-124.

[27] Mexico's Response to Question 57, para. 147; *see also id.* para. 146 ("Mexico is not aware that any Mexican tuna products manufacturers have exported any products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure.").

[28] *See* U.S. Response to Question 7, paras. 46-54. Of course, the United States disagrees with Mexico's assertion that the amended measure "has the effect of singling out Mexican tuna product for denial of the dolphin-safe label…" Mexico's Response to Question 7(b), para. 25. As the United States discussed, the eligibility conditions are the same for everyone – the amended measure *is neutral* as to nationality. *See, e.g.*, U.S. First Written 21.5 Submission, paras. 332-333. There is no evidence to suggest that this particular eligibility requirement singles out Mexico. As the original panel found, at the time of the enactment of the Dolphin Protection Consumer Information Act (DPCIA), most U.S. vessels, as well as other large vessels in the ETP, set on dolphins to catch tuna. *US – Tuna II (Mexico) (Panel)*, paras. 7.307, 7.315, 7.320. The fact that, over the past 20 years, vessels flagged to some Members have adopted methods of fishing that are less harmful to dolphins (while others have not) does not mean the U.S. measure singles out those industries that have elected not to adopt to the new requirements.

inconsistency under the GATT 1994."[29] As such, the United States is obligated to justify under the subparagraphs of Article XX only those requirements that are found to cause the inconsistency with the particular GATT 1994 provision. The United States need not prove that any other aspect of the challenged measure is so justified.[30]

19. Mexico's response does not clarify its position on this issue. At one point, Mexico expressly acknowledges the Appellate Body's statement 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."[31] However, Mexico goes on to also argue that the "'discrimination or detrimental impact' itself is relevant to the 'necessity' analysis under Article XX(b)."[32]

20. In this, Mexico errs. Mexico attempts to insert into the ordinary meaning of "necessary" in context and in light of the object and purpose of the GATT 1994 an additional requirement that "the discrimination or detrimental impact giving rise to the relevant" breach must be "weighed and balanced" against "the contribution of the challenged measure to the achievement of its objective." However, Mexico can point to no ordinary meaning of the term "necessary" that would add this additional layer of interpretation or that involves "weighing and balancing" "trade restrictiveness" and "contribution to an objective."[33] The Appellate Body has also never found that there is to be a "balance" between these two concepts, but rather has clarified that the concept of "necessary" involves a spectrum and that there may be instances in which a measure would need to be closer to one pole of that spectrum than another.[34] Indeed, Mexico asserts that "trade restrictiveness" equates to "discrimination or detrimental impact," but can point to no basis for that assertion.

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[29] *EC – Seal Products (AB)*, para. 5.185 ("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. Similarly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that the analysis of the Article XX(d) defence in that case should focus on the 'difference in the regulation of imports of like domestic products' giving rise to the finding of less favourable treatment under Article III:4. Thus 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.").

[30] *See* U.S. Second Written 21.5 Submission, para. 148 (citing *EC – Seal Products (AB)*, para. 5.185 (quoting *US – Gasoline (AB)*, at 13-14; *Thailand – Cigarettes (Philippines) (AB)*, para. 177); *EC – Seal Products (AB)*, paras. 5.188-190 (upholding the panel's findings because the panel "made clear" that it analyzed only "the components of the measure embodying the 'ban' and the 'exceptions,'" which had been found to cause the GATT 1994 inconsistency)).

[31] Mexico's Response to Question 8, para. 30.

[32] Mexico's Response to Question 8, para. 29 (emphasis in original and added).

[33] Mexico's Response to Question 8, para. 27.

[34] *See, e.g.*, *Korea – Various Measures on Beef (AB)*, paras. 162-163.

21. Moreover, while Mexico argues that the *entire* amended measure is GATT-inconsistent,[35] it only criticizes three particular aspects of the amended measure (eligibility condition regarding setting on dolphins, record-keeping/verification, and observers). Mexico surmises that these three aspects are so "integrated together" that it is "only the combined operation" of these three different aspects "that leads to the relevant GATT violations under Articles I:1 and III:4."[36]

22. But Mexico's long-standing approach to this very dispute contradicts such an assertion. In its first two submissions, Mexico claimed that the amended measure was inconsistent with the GATT 1994 only because it denied *access* to the dolphin safe label for tuna product containing tuna produced by Mexico's preferred fishing method, setting on dolphins.[37] Mexico makes no mention of the other two aspects of the measure at all. Indeed, Mexico claimed, *for the entirety of the original proceeding*, that the original measure was inconsistent with the GATT 1994 *only* because it denied access to the label for Mexican tuna product produced by setting on dolphins.[38] Mexico cannot explain this fundamental inconsistency in its own argument.

23. For the above reasons, the focus for purposes of the analysis under Article XX is on the regulatory distinctions between tuna product containing tuna caught by setting on dolphins and tuna product containing tuna caught by other fishing methods, in light of how Mexico has framed (and attempted to prove) its GATT 1994 claims. The portions of Mexico's Article XX response that address the record-keeping/verification and observer requirements are simply irrelevant to that analysis.[39]

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[35] Mexico's Response to Question 9, para. 36 ("The Amended Tuna Measure in its totality (i.e., as a whole) is inconsistent with Articles I:1 and III:4 of the GATT 1994.").

[36] Mexico's Response to Question 8, para. 32.

[37] *See* U.S. Second Written 21.5 Submission, paras. 131, 139 (quoting Mexico's first and second written submissions); *see, e.g.*, Mexico's Second Written 21.5 Submission, para. 203 ("In the original proceedings, the Appellate Body found that *the lack of access* to the advantage of the dolphin-safe label for tuna products containing tuna caught by *setting on dolphins* had a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market.") (emphasis added); Mexico's First Written 21.5 Submission, para. 329 ("[I]n the original proceedings, the Appellate Body found that *access* to the 'dolphin-safe' label constitutes an 'advantage' on the US market, *lack of access to the 'dolphin-safe' label has a detrimental impact* on the competitive opportunities in the US market.") (emphasis added)

[38] *See US – Tuna II (Mexico) (Panel)*, para. 7.255 ("In its rebuttal submission, Mexico also clarifies that its discrimination claims 'are not dependent on demonstrating that the treatment of ETP and non-ETP fisheries is different' and that 'the factual basis of Mexico's discrimination claims is that the *prohibition* against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like product from the United States and other countries.'") (quoting Mexico's Second Written Submission in Original Proceeding, para. 150) (emphasis in original); *see also id.* para. 7.280 ("As we understand it, therefore, Mexico does not challenge any differences in treatment arising from different regulatory categories for tuna caught in different fishing zones. Rather, Mexico's discrimination claim is based on the requirement of 'no setting on dolphins' that conditions access to the US dolphin-safe label, wherever the fish is caught, and its implications in practice for Mexican tuna products.") (citing Mexico's Response to Original Panel Question No. 145, para. 124).

[39] *See* U.S. Second Written 21.5 Submission, paras. 146-149.

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

24. Mexico, in its first two submissions, relied exclusively on paragraphs 233-235 of the Appellate Body report in alleging that the amended measure is inconsistent with Article I:1[40] and Article III:4[41] under the theory that the amended measure denies "access" to the label to Mexican tuna product containing tuna caught by setting on dolphins while tuna product containing tuna caught by other means continues to have "access" to the label.

25. Now, in response to the Panel's questions, Mexico fundamentally alters the way it is arguing its two GATT 1994 claims, alleging now that its claim in not limited to "access" to the label, but are based on the alleged differing requirements for tracking and observers imposed in the ETP.[42] Yet Mexico does not make a like adjustment to the evidence it provides to prove its claims. Mexico continues to rely exclusively on the Appellate Body's detrimental impact analysis in paragraphs 233-235, which only addresses whether the denial of access to the label for tuna product containing tuna caught by setting on dolphins results in a detrimental impact on

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[40] U.S. Second Written 21.5 Submission, para. 131 (citing Mexico's Second Written 21.5 Submission, para. 203 ("In the original proceedings, the Appellate Body found that *the lack of access* to the advantage of the dolphin-safe label for tuna products containing tuna caught by *setting on dolphins* had a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 233, 235); Mexico's First Written 21.5 Submission, n.313 ("In the original proceedings, the Panel agreed with Mexico that *access* to the "dolphin-safe" label constitutes an "advantage" on the US market. This finding was not appealed. The Appellate Body found that the factual findings by the Panel clearly establish that *the lack of access* to the "dolphin-safe" label of tuna products containing tuna caught by *setting on dolphins* has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 233-35); *see also id.* para. 313 ("The advantage granted by the Amended Tuna Measure is the authorization to use "dolphin-safe" labelling in the United States on tuna products.").

[41] U.S. Second Written 21.5 Submission, para. 139 (citing Mexico's Second Written 21.5 Submission, paras. 220-221 (citing *US – Tuna II (Mexico)*, paras. 235, 284, and stating, "[a]s a consequence, for the same reasons stated by the Appellate Body in the original proceedings, most Mexican tuna products that contain tuna caught by *setting on dolphins* in the ETP continue *to be ineligible* for a dolphin-safe label in the U.S. market, while most tuna products from the United States and other countries that contain tuna caught by other fishing methods outside the ETP continue to be eligible for a dolphin-safe label. Consequently, the regulatory difference imposed under the Amended Tuna Measure continues to have *the same detrimental impact* on competitive opportunities for imported Mexican tuna products *vis-à-vis* domestic tuna products (as well as tuna products originating in other countries) in the U.S. market.") (emphasis added); Mexico's First Written 21.5 Submission, para. 329 ("[I]n the original proceedings, the Appellate Body found that access to the 'dolphin-safe' label constitutes an 'advantage' on the US market, *lack of access to the 'dolphin-safe' label has a detrimental impact* on the competitive opportunities in the US market . . . Moreover, the Panel and Appellate Body found that most tuna caught by Mexican vessels, *being caught in the ETP by setting on dolphins*, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 234-35).

[42] Mexico's Response to Question 9, para. 35.

Mexican tuna product *vis-à-vis* like tuna product produced by other Members and sold in the U.S. market.

26. Mexico submits *no* evidence that the tracking and observer requirements create a detrimental impact on its tuna product sold in the U.S. market. Indeed, as the United States has explained, Mexico submits no evidence that either the *presence* of an AIDCP-approved observer on board large purse seine vessels, or the *provision* to the United States of the already created AIDCP-mandated observer certificate (or proof thereof), *has any impact at all* on Mexican tuna product sold in the United States.[43] Likewise, Mexico puts forward *zero* evidence that the fact that Mexico's industry must abide by the tracking requirements of the AIDCP, and then provide the associated Tuna Tracking Form (TTF) number along with Form 370s, *has any impact at all* on Mexican tuna product sold in the United States.

27. As the Appellate Body has stated, "the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is *whether such regulatory differences distort the conditions of competition* to the detriment of imported products."[44]

28. Mexico attempts to patch over this fault by asserting, for the first time, that "*only* the combined operation" of these three aspects of the amended measure constitutes a breach of the GATT 1994. But, as explained above, Mexico provides no reason as to why this would be so. Further, Mexico puts forward *zero* evidence that the fact that its competitors operating outside the ETP do not have to comply with AIDCP-equivalent requirements means that these competitors have more opportunity than Mexican producers to defraud U.S. consumers (and, in fact, do defraud U.S. consumers) by illegally marketing non-dolphin safe tuna product as dolphin safe.[45] Nor has Mexico put forward any evidence that even if one could find any illegal marketing, this unfortunate occurrence would be happening at a higher rate than for tuna product containing ETP tuna.[46] Rather, Mexico simply asserts it. However, mere assertion is not sufficient for a complaining party to make out its *prima facie* case.

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[43] *See also* U.S. Oral 21.5 Statement, paras. 23-24 (noting that, for example, Mexico makes no claim that compliance with these AIDCP-mandated requirements reduce sales of Mexican tuna product in the United States compared to the product from other Members, nor does Mexico claim such requirements depress the sale price compared to such other products).

[44] *EC – Seal Products (AB)*, para. 5.109 (quoting *Thailand – Cigarettes (Philippines) (AB)*, para. 128) (emphasis added); *see also EC – Seal Products (AB)*, para. 5.116 ("Article III:4 permits regulatory distinctions to be drawn between products, provided that such distinctions do not modify the conditions of competition between imported and like domestic products.").

[45] *See also* U.S. Oral 21.5 Statement, paras. 25-26; U.S. Second Written 21.5 Submission, paras. 96-104, 119-124.

[46] *See also* U.S. Oral 21.5 Statement, para. 27 (noting that Mexico's argument turns reality upside down).

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?

29. Consistent with its response to the preceding questions, Mexico continues its overhaul of its GATT 1994 claims by now alleging that the requirements related to record-keeping/verification and observer coverage are "conditions" to the granting of the advantage of the U.S. dolphin-safe label for purposes of the Article I:1 of the GATT 1994, despite never having done so before.

30. Mexico's claim remains fundamentally flawed.

31. Like its failure to prove a detrimental impact with regard to these two other aspects of the amended measure,[47] Mexico fails to explain what the "advantage" the amended measure provides the tuna product of other Members, but not to Mexican tuna product for purposes of these two aspects. In the original formulation of its Article I:1 claim, Mexico alleged that the "advantage" was *access* to the "dolphin-safe" label.[48] However, the Mexican industry *complies* with the record-keeping/verification and observer requirements. As such, Mexico fails to explain how the imposition of these requirements denies Mexican tuna product the "access" to the label.[49]

32. Furthermore, the same requirements apply to the tuna product of all Members. It does not matter which Member produces the tuna product – the same requirements apply, including ineligibility for the label for product if it is produced by setting on dolphins. In this regard, the United States recalls that a prior panel under the GATT 1947 rejected a similar claim by Mexico under Article I of the GATT 1994. The reasoning of that panel, involving the same parties, remains persuasive here.

33. Mexico's Article I:1 claim fails.

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[47] *See* U.S. Comments on Mexico's Response to Question 9, *supra*.

[48] *See* Mexico's First Written 21.5 Submission, n.313 ("In the original proceedings, the Panel agreed with Mexico that *access* to the "dolphin-safe" label constitutes an "advantage" on the US market. This finding was not appealed. The Appellate Body found that the factual findings by the Panel clearly establish that *the lack of access* to the "dolphin-safe" label of tuna products containing tuna caught by *setting on dolphins* has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.") (emphasis added); *see also id.* para. 313 ("The advantage granted by the Amended Tuna Measure is the authorization to use "dolphin-safe" labelling in the United States on tuna products."); Mexico's Second Written 21.5 Submission, para. 203 ("In the original proceedings, the Appellate Body found that *the lack of access* to the advantage of the dolphin-safe label for tuna products containing tuna caught by setting on dolphins had a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market.") (emphasis added).

[49] *EC – Seal Products (AB)*, para. 5.88; *see also id.* para. 5.93 ("[W]e consider that Article I:1 prohibits Members from conditioning the extension of an 'advantage,' within the meaning of Article I:1, on criteria that have a detrimental impact on the competitive opportunities for like imported products from any Member.").

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?

34. As the United States explained in response to this question, where undertaking a comparison of dolphin mortality and serious injury across fisheries, 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, based on the available current, fishery-by-fishery data.[50] By doing so, a meaningful comparison can be conducted of the harm caused by large purse seine vessels setting on dolphins in the ETP, on the one hand, and the harms caused by other vessels (purse seine, longline, etc.) not setting on dolphins in other fisheries, on the other hand (although such a comparison will not take into account the significant unobserved harms that occur in sets on dolphins in the ETP). The United States further noted that 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.[51] And in any event, the focus in this dispute is on the labeling of each specific tuna product, not on average or percentage numbers.

35. Mexico disagrees. Mexico argues that the Panel should not conduct a comparison of dolphin harm at all – tuna produced from *all* fisheries where any dolphin has been harmed must be treated alike.[52] In Mexico's view, the "magnitude" of the harm is irrelevant.[53] Alternatively, Mexico argues that the Panel could conduct a comparison of dolphin harm in the context of population figures if such figures were known, which they are not.[54] However, this alternative comparison could only be done for purposes of determining whether the eligibility condition related to setting on dolphins is even-handed. Under no circumstances could the Panel conduct a comparison of dolphin harm in analyzing whether the tracking and observer requirements are

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[50] U.S. Response to Question 11, para. 61. As the also noted, dolphin mortality constitutes only part of the analysis, serious injury and unobserved 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 as well. *Id.* para. 60.

[51] U.S. Response to Question 11, para. 62 (citing *Kobe II Bycatch Workshop Background Paper: Marine Mammals* (2010) (Exh. MEX-39) ("Kobe II Report")).

[52] *See* Mexico's Response to Question 11, para. 56 (tracking and observers); *id.* para. 58 (setting on dolphins).

[53] *See, e.g.*, Mexico's Response to Question 11, para. 59 ("Thus, it appears that the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist.").

[54] Mexico's Response to Question 11, paras. 65-66 ("[T]his benchmark has no application in the Panel's analysis under Article 2.1.").

even-handed. The only analysis should be to "simply determine whether any dolphin is killed or seriously injured in the fishery."[55]

36. Mexico's recent overhaul of its arguments coincides with the fact that Mexico has based its entire case on summary statements about the risks to dolphins as a general matter, and cannot rely on current, fishery-by-fishery RFMO data to prove its claims.[56]

a. Mexico Fails To Prove that the Eligibility Condition Related to Setting on Dolphins Is Not Even-Handed Pursuant to Either Benchmark Mexico Raises

37. As the Panel will recall, in its first and second written submissions, Mexico contended that denying eligibility to the label of tuna product produced by setting on dolphins while allowing tuna product produced by other means to be potentially eligible is not "even-handed" because these other "qualified" fishing methods "have adverse effects on dolphins that are equal to or greater" than setting on dolphins in an AIDCP-consistent manner does.[57] The United States disproved this factual assertion of Mexico's based on current, fishery-by-fishery RFMO data.[58] Mexico has failed to rebut this evidence.[59]

38. In this latest iteration of its argument, Mexico is forced to *completely abandon* this key factual assertion, and now tries to prove that this eligibility condition is not even-handed based on two entirely different approaches.[60]

39. First, Mexico contends that the Panel should find this eligibility condition not even-handed without resorting to a comparison of harm to dolphins in different fisheries. In Mexico's view:

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[55] Mexico's Response to Question 11, para. 56.

[56] *See, e.g.*, Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

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

[58] U.S. First Written 21.5 Submission, sec. II.C; U.S. Second Written 21.5 Submission, sec. II.A-D.

[59] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 23-24; Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

[60] The United States would further note that neither of Mexico's arguments account for unobserved harms, such as calf-cow separation, muscular damage, immune system failures, etc., despite the fact that Mexico did not contest that setting on dolphins causes such harms in the original proceeding. *US – Tuna II (Mexico) (AB)*, n.513 (quoting the original panel as stating that, "setting on dolphins may result in observed and unobserved harmful effects on dolphins," and noting that "[i]n response to questioning at the oral hearing, Mexico indicated that *it did not contest this finding by the Panel*") (emphasis added); *id.* para. 287 ("The United States has presented extensive evidence and arguments, and the Panel has made *uncontested* findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins.") (emphasis added); *id.* para. 330 ("We note, in this regard, the Panel's finding, *undisputed* by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins, even under the restrictions contained in the AIDCP rules.") (emphasis added).

> [I]t appears that it is not a question of the relative number of dolphins that are killed or seriously injured in a manner that cannot be observed. It is simply a question of whether or not such adverse effects merely exist in relation to these specific fishing methods.[61]

40. In other words, Mexico argues that, as all fisheries cause some harm to dolphins, the amended measure must treat all fishing methods equally, notwithstanding that *the magnitude* of harm is so much greater in the large purse seine fishery in the ETP than in other fisheries. But, of course, this is wrong. The United States can take into account that setting on dolphins is a "particularly harmful" fishing method to dolphins in designing and applying a *dolphin safe* label.

41. Mexico's new approach is merely a repackaged old idea. Mexico's central goal throughout this entire dispute appears to be to force the United States either to accept that setting on dolphins is safe for dolphins or to end the program entirely. As Mexico stated in its first submission, "all tuna fishing methods should be either disqualified or qualified."[62] But the Appellate Body has *already rejected* Mexico's view that the denial of the dolphin safe label to tuna product produced by setting on dolphins, alone, proves the measure inconsistent with Article 2.1. Mexico's unsupportable approach should be rejected here as well.

42. Second, Mexico argues that, in the alternative, the Panel should use an "objective, scientifically-established benchmark" to conduct the even-handedness analysis and suggests that a comparison based on fishery-specific potential biological removal (PBR) levels is one such benchmark. Relying on decade old data, Mexico claims that total mortality in the ETP is below the PBR, and therefore "there is no scientific basis to disqualify Mexico's fishing method."[63] As such, Mexico's reliance on a PBR analysis appears to be just another repackaged "appeal" of the Dispute Settlement Body (DSB) recommendations and rulings.[64] However, Mexico concedes

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[61] Mexico's Response to Question 11, para. 58.

[62] Mexico's First Written 21.5 Submission, para. 263.

[63] Mexico's Response to Question 11, para. 63. The United States would further note that PBR does not take into account unobserved harms. As such, PBR would not be an appropriate benchmark to measure the full impact of the ETP large purse seine fishery, which causes significant unobserved harms due to the millions of dolphin that are chased and captured every year.

[64] Of course, the United States has been clear that the U.S. position is not framed in terms of dolphin population figures. *See US – Tuna II (Mexico) (Panel)*, para. 7.735 ("[W]e are not persuaded that the objective of protecting dolphins through the US dolphin-safe provisions is to be understood exclusively, or even primarily, in terms of dolphin population recovery. Rather, both US objectives are defined in terms of 'adverse effect' of fishing practices on dolphins. . . . This suggests to us that the US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent on dolphin populations being depleted.").

Moreover, the United States would note that Mexico's PBR approach appears to be an argument that the covered agreements require the United States to adopt an entirely different type of measure than the one it applies currently. That is, what Mexico appears to be arguing for is a measure that denies eligibility to the label for all tuna produced from a fishery whose dolphin mortality exceeds the PBR, *regardless of the actual fishing practices of the harvesting vessel*. But under the amended measure, no fishery is *per se* disqualified. Indeed, even for the large

that the data does not exist to make such a comparison on a fishery-by-fishery basis and, as such, this "benchmark has no application in the Panel's analysis under Article 2.1."[65]

43. Given that Mexico does not pursue any specific comparison based on PBRs, and that Mexico has abandoned its "equal to or greater" approach, Mexico appears to rely exclusively on its erroneous "zero tolerance" benchmark to prove that the eligibility condition regarding setting on dolphins is not even-handed.

44. Finally, the United States notes that Mexico makes no claim whatsoever with regard to the eligibility condition relating to dolphin mortality and serious injury despite the fact that it was this condition that the Appellate Body originally found not to be even-handed.

b. Mexico Fails to Prove that the Record-Keeping, Verification, and Observer Requirements Are Not Even-Handed Pursuant to a "Zero Tolerance Benchmark" Theory

45. Mexico claims that it would not be appropriate for the Panel to assess the even-handedness of any difference in tracking and observer requirements based on a comparison of harms to dolphins across fisheries. In Mexico's view, "a comparison of the magnitude of dolphin mortalities and serious injuries in different fisheries is not relevant to" its Article 2.1 claim in this regard.[66] Mexico simply asserts that "[i]t is beyond question" that the amended measure must require AIDCP-equivalent tracking and observer requirements for "tuna caught in *all* fisheries" because *all* fisheries cause some harm to dolphins.[67]

46. Mexico's argument must fail. Mandating tracking and observer requirements irrespective of the magnitude of harm runs counter to why requirements are imposed as well as the fundamental principles underlying the TBT Agreement.

47. First, Mexico's approach runs counter to the reason why the AIDCP parties agreed to impose tracking and observer requirements on their large purse seine vessels in the ETP in the first place. As discussed previously in response to Questions 7 and 30, the AIDCP parties' decision to impose these requirements because the large purse seine vessels in the ETP fishery has caused more dolphin deaths than vessels in any other fishery in the world.[68] And this harm (both observed and unobserved) continues at an unparalleled rate whereby ETP purse seine

purse seine vessel fishery of the ETP, those vessels that do not set on dolphins (*e.g.*, Ecuadorian vessels) may produce dolphin safe tuna for the U.S. tuna product market.

[65] Mexico's Response to Question 11, para. 66.

[66] Mexico's Response to Question 11, para. 52.

[67] Mexico's Response to Question 11, para. 52 (emphasis added).

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

vessels chase and capture *millions* of dolphins, killing *thousands*.[69] For this same reason, Mexico's approach runs counter to the amended measure's requirement that Mexico provide proof of the already created AIDCP observer certificate, which is also inextricably linked to the harm caused by these large purse seine vessels in the ETP.[70] Not surprisingly, Mexico's approach runs counter to why any Member would create an observer program that focuses on marine mortality in the first place. Such programs are created because of *the magnitude* of the problem in that fishery. Indeed, the Appellate Body recognized just that dynamic in its analysis when it acknowledged that requiring observers "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury."[71]

48. In sum, Mexico urges the Panel to adopt an approach whereby, for example, the United States must require purse seine vessels producing tuna for the U.S. tuna product market in the Atlantic, Indian, and western and central Pacific oceans to carry AIDCP-equivalent observers on board to observe harm to dolphins *irrespective* of the fact that *these* purse seine vessels interact with cetaceans in less than one percent of sets,[72] whereas large ETP purse seine vessels interact with dolphins in forty to fifty percent of sets (with millions being chased and captured).[73] Mexico's "zero tolerance" benchmark approach is simply wrong.

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?

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[69] 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* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

[70] U.S. Response to Question 30, paras. 166-170. Such an approach also runs counter to any observer certifications that may be required pursuant to determinations of "significant and regular" association or mortality under sections 216.91(a)(2)(i) and (a)(4)(iii).

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

[72] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127); *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). Longline sets in both the Pacific and Atlantic oceans record a similarly small percentage of interaction per set. *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127). 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.

[73] *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)).

49. Mexico claims that "it is reasonable to infer that the same adverse effects on dolphins" that occurs in non-tuna fisheries will occur in tuna fisheries.[74] Mexico cites to no evidence why this would be so.

50. First, and as discussed previously, harm to dolphins resulting from fishing for fish other than tuna, and harm to all other marine mammals, turtles, birds, sharks, etc. suffered in all fisheries (tuna or otherwise), is simply not relevant to whether the U.S. dolphin safe labeling requirements for tuna product is inconsistent with the covered agreements.[75]

51. Second, Mexico is wrong to assume that it is always scientifically valid to generalize bycatch information between fisheries with different target species, even where these different fisheries use the same gear type.[76] For example, for longlines, there are typically different configurations, spatial distributions, and other variables that not only influence the target species caught, but also the bycatch. Moreover, 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. As such, it simply cannot be assumed that *all* bycatch data collected in non-tuna fisheries can be used to estimate dolphin mortalities without a particular examination of all the relevant facts and circumstances occurring in the specific non-tuna fishery where the bycatch data was generated, and the specific tuna fishery that that bycatch data could be used for.

52. Of course, Mexico's position that *all* bycatch data from *non-tuna* fisheries is *per se* relevant to this dispute is particularly untenable given that Mexico disagrees that the harm to dolphins caused by large purse seine vessels not setting on dolphins inside the ETP can be used to estimate harm to dolphins being caused by purse seine vessels outside the ETP in *other tuna purse seine fisheries*.[77]

53. Finally, the United States notes Mexico's allegation that the fact that there is dolphin bycatch in non-tuna fisheries "further highlights the arbitrary nature" of the amended measure.[78] Mexico puts forward no sound reason why this is so or even connects this allegation to any one of its three claims. This unsupported statement should be disregarded.

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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[74] Mexico's Response to Question 12, para. 76.

[75] U.S. Response to Question 12, para. 63.

[76] U.S. Response to Question 12, n.84.

[77] *See* Mexico's Response to Question 19, para. 92.

[78] Mexico's Response to Question 12, para. 77.

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?

54. The parties largely agree in their responses to this question. In particular, it is *uncontested* that regional observer programs operating in different parts of the world differ substantially from the AIDCP observer program. Indeed, Mexico makes this point repeatedly, contending in response to this question (and elsewhere) that:

> [N]o other Regional Management Fisheries Organization has adopted, or has plans to adopt, measures to protect dolphins *that are remotely comparable* to those of the AIDCP. None of them has even proposed a comprehensive program involving the use of special equipment, training, monitoring, tracking, verification, and certification of dolphin-safe status.[79]

55. Mexico further notes that these regional observer programs differ from the AIDCP program in material ways, including the background of the observer, the training of the observer, the coverage of the program, and the purpose of the observer program.[80] As to training, Mexico

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[79] Mexico's Response to Question 13, para. 78 (emphasis added); Mexico's Second Written 21.5 Submission, para. 56 ("None of those three [RFMOs] [*i.e.*, ICCAT, IOTC, and WCPFC] has adopted, or has plans to adopt, measures to protect dolphins that are *remotely comparable* to those of the AIDCP. None of them has even proposed a comprehensive program involving use of special equipment, training, monitoring, tracking, verification, and certification.") (emphasis added); *see also* Mexico's Response to Question 38, para. 111 ("[T]he only reliable method of oversight is to have an independent observer onboard a vessel with the appropriate training and the mandate to monitor for harm to dolphins. The only fisheries where there are such independent observers are the ETP and the U.S. domestic fisheries recently designated by the United States."); Mexico's Response to Question 45, para. 135 ("[I]n the absence of trained independent observers with responsibility and authority for monitoring fishing practices and dolphin bycatch, there is no reliable method to investigate what happened onboard a vessel fishing on the high seas or in foreign waters, outside U.S. jurisdiction."); Mexico's First Written 21.5 Submission, para. 110.

[80] Mexico's Response to Question 13, para. 79 ("In particular, none of those organizations has established programs featuring the use of trained independent observers who are marine biologists onboard every large tuna fishing vessel fishing for tuna in their fishery regions. The goal for observer coverage in the IOTC is five percent. In the ICCAT, observers from a regional program are required for vessels fishing for bigeye and yellowfin tuna two months a year in a limited region to enforce restrictions on FAD fishing, while observers are required for bluefin tuna fishing in varying degrees, again only to enforce limitations on the quantity of tuna caught. Observer coverage in the WCPFC is higher in fisheries located below 20 degrees north, but the goal is only five percent in the region above that line. Observers are not trained to monitor harm to dolphins (they are instead monitoring how much tuna is caught), and in many instances observer reports are not even shared by the national and regional observer organizations with the WCPFC."); *see also* Mexico's Response to Question 5(a), para. 79 ("In particular, [no RFMO] has established programs featuring the use of trained independent observers who are marine biologists onboard every large tuna fishing vessel fishing for tuna in their fishery regions. The goal for observer coverage in the IOTC is five percent. In the ICCAT, observers from a regional program are required for vessels fishing for bigeye and yellowfin tuna two months a year in a limited region to enforce restrictions on FAD fishing, while

correctly points out that observers in these regional programs "are not trained to monitor harm to dolphins (they are instead monitoring how much tuna is caught), and in many instances observer reports are not even shared by the national and regional observer organizations with the WCPFC."[81] In this regard, Mexico explicitly agrees with the United States that the skills required of an observer "are complex," and that "many existing observer programs give little attention to marine mammal interactions."[82]

56. Again, the AIDCP observer program is *fundamentally* different from all other programs because the fishing method of large purse seine vessels in the ETP, and the harm caused to dolphins by that fishing method, is so much different than what occurs *in any other fishery*, inside or outside the ETP. The evidence on this point is clear – only large purse seine vessels in the ETP chase and capture dolphins by the millions in pursuit of tuna. There is *zero* evidence that other purse seine vessels *chase* dolphins at all,[83] for 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 such that to capture dolphins is to capture tuna.[84]

57. And nothing in the covered agreements requires the United States to treat different fisheries, and the observer programs for those fisheries, as if they are all equal when the evidence indicates that they are not.

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?

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observers are required for bluefin tuna fishing in varying degrees, again only to enforce limitations on the quantity of tuna caught. Observer coverage in the WCPFC is higher in fisheries located below 20 degrees north, but the goal is only five percent in the region above that line. Observers are not trained to monitor harm to dolphins (they are instead monitoring how much tuna is caught), and in many instances observer reports are not even shared by the national and regional observer organizations with the WCPFC.").

[81] Mexico's Response to Question 13, para. 79.

[82] Mexico's Response to Question 13, para. 80 (quoting *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997, 40,999 (2013 Final Rule) (Exh. MEX-7)).

[83] *See* Tables 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).

[84] Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-29).

58. Mexico appears to take the position that the number of dolphin sets conducted in a year is not a key variable in determining annual dolphin mortality in the ETP.[85] As the United States has explained, that is clearly incorrect. As noted in both Graph 1 (at paragraph 80) and Table 2 of Exhibit US-127, there is a close nexus between the number of dolphin sets conducted by large ETP purse seine vessels in a year and annual dolphin mortality in the ETP, 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.

59. Notably, Mexico cannot explain why annual mortality varies year to year in the ETP. Indeed, Mexico has put forward no (or almost no) evidence with regard to the dolphin mortality and serious injury caused by large purse seine vessels in the ETP despite the fact that Mexico's central factual allegation in this proceeding is that *all* other methods of fishing "have adverse effects on dolphins that are equal to or greater" than setting on dolphins in the ETP.[86]

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

60. The United States notes that Mexico does not present any evidence that other fishing methods cause the kind of unobserved harms caused by setting on dolphins, such as calf-cow separation, heart and other muscular damage, immune system failures, etc., that occur regardless of whether dolphins are directly killed or seriously injured. The primary harms Mexico discusses are direct harms that could be (and, in the specific instances that Mexico discusses, were) observed by observers or vessel captains.

61. The real distinguishing features of unobserved harms in the ETP are that they are both unobserved and unobservable (except when they are detected in research studies and frequent, to the point where they likely occur in every dolphin set.) Mexico does not address the magnitude of these types of harms caused by the chasing and capturing of millions of ETP dolphins by large purse seine vessels every year, despite the fact that Mexico has not contested that such harms do, in fact, occur.[87] Moreover, in discussing the potential for unobserved harms, such as calf-cow separation, in fisheries outside the ETP, Mexico fails to distinguish between the rare and incidental nature of cases that may occur in other fisheries and the frequent and directed nature

[85] *See* Mexico's Response to Question 14, para. 84.

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

[87] *US – Tuna II (Mexico) (AB)*, n.513 (quoting the original panel as stating that, "setting on dolphins may result in observed and unobserved harmful effects on dolphins," and noting that "[i]n response to questioning at the oral hearing, Mexico indicated that *it did not contest this finding by the Panel*") (emphasis added); *id.* para. 287 ("The United States has presented extensive evidence and arguments, and the Panel has made *uncontested* findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins.") (emphasis added); *id.* para. 330 ("We note, in this regard, the Panel's finding, *undisputed* by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins, even under the restrictions contained in the AIDCP rules.") (emphasis added).

of cases that occur, in each of the 10,000 dolphin sets and affecting the millions of dolphins chased and captured annually, in the ETP.

62. What Mexico does do is survey its own evidence regarding dolphin mortality. As discussed below and elsewhere, the United States has fully responded to all the evidence put forward by Mexico. In contrast, Mexico has not responded to the current, current, fishery-by-fishery evidence on dolphin mortality and serious injury that the United States has submitted.[88]

63. Mexico's evidence is largely irrelevant to the tuna sold on the U.S. tuna product market, and it certainly does not support Mexico's assertion that harm to dolphins "equal to or greater" than the harm occurring in the ETP large purse seine fishery is occurring in any other fishery relevant to this dispute.[89]

64. As noted, the United States has responded to all of the evidence Mexico presented in previous submissions:

- Kobe II Bycatch Workshop Report. The Kobe II Report states that associations between tuna and dolphins have been observed outside the ETP, and that "bycatch can occur" due to longline fishing (including targeting tuna) and gillnet fishing.[90] The United States has already pointed out that: 1) the report itself shows that the association of tuna and dolphins is quantitatively and qualitatively different outside the ETP than it is inside it;[91] 2) almost none of the tuna produced for the U.S. tuna product market was caught using gillnets;[92] 3) evidence that marine mammal bycatch can occur due to longline fishing does not contradict the specific, fishery-by-fishery evidence that the United States has presented showing that the incidence of marine mammal bycatch in longline fisheries is a mere fraction of the bycatch that continues to occur in the ETP, even with the AIDCP

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[88] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 23-24; Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

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

[90] *See* Mexico's Response to Question 15, para. 90 (citing Kobe II Bycatch Workshop Background paper, at 1-2 (Exh. MEX-39).

[91] U.S. Response to Question 20, para. 126.

[92] U.S. First Written 21.5 Submission, paras. 126-28, 152 (showing that gillnet fishing produces none of the U.S.-caught tuna product on the U.S. market and accounts for approximately 0.26 percent of vessel records associated with imported tuna and tuna products in the years 2005-2013); William Jacobson Witness Statement (Exh. US-4).

safeguards;[93] and 4) evidence that fishing in general can harm marine mammals also does not contradict the specific evidence the United States has presented.[94]

- 1996 NMFS Annotated Bibliography. Mexico cites this report for the propositions that i) "tuna do associate with dolphins" outside the ETP and ii) data on marine mammal bycatch outside the ETP is problematic.[95] As the United States has pointed out, this report actually confirms that "[t]here are no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP."[96] Furthermore, the report was published in 1996 and, therefore, cannot consider the current, fishery-by-fishery data that the United States has presented in this dispute.[97]

- Young and Iudicello Report. As the United States has explained, although this report was published in 2007, many of the studies on which it relies, including the one underlying the passage cited by Mexico about the Philippine purse seiners, are at least two decades old.[98] Thus, the report and the studies that it summarizes do not contradict the recent, fishery-specific evidence that the United States has presented concerning the WCPFC purse seine fishery.[99] Furthermore, the Irish driftnet fishery that Mexico mentions was shut down in 2002 by an EU regulation that made it illegal to use gillnets to fish for tuna, among other fish.[100]

- Yousuf Report on Indian Gillnetters. As the United States noted in its first written submission, not all of the mortalities reported by the study can be attributed to tuna fishing, as, of the three ports covered by the study, only one included fisheries that target tuna and, even there, tuna was only one of four target

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[93] U.S. Second Written 21.5 Submission, para. 23 (bullets 3 and 4).

[94] U.S. Response to Question 21, para. 143, n.246 ("[The Kobe II report] 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.").

[95] *See* Mexico's Response to Question 15, para. 90.

[96] U.S. Response to Question 22, para. 151 (quoting Donahue & Edwards, 1996, at 42 (Exh. MEX-40)).

[97] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127) and the sources cited therein (summarizing the evidence on the record regarding "observable" harm on a fishery-by-fishery basis).

[98] *See* U.S. Second Written 21.5 Submission, para. 38 (noting that the study underlying the statement about the Philippine fishery in the Young and Iudicello report is 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 relied on data from over 20 years ago).

[99] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

[100] *See* U.S. First Written 21.5 Submission, para. 155 (citing Council Regulation (EC) No. 1239/98 of 8 June 1998 Amending Regulation (EC) No 894/97 Laying Down Certain Technical Measures for the Conservation of Fishery Resources (US-72)).

fish.[101] And in any case, as mentioned above, almost none of the tuna contained in the tuna product sold on the U.S. market was caught using gillnets (none of the U.S.-caught tuna product on the U.S. market and approximately 0.26 percent of vessel records associated with imported tuna and tuna products in the years 2005-2013).[102] Additionally, almost no tuna product sold on the U.S. market contains tuna caught by Indian vessels.[103]

- Moazzam Report on Pakistani Gillnetters. The United States has already explained that almost none of the tuna product in the U.S. market was caught using gillnets and essentially none of it was produced by Pakistan or caught by Pakistani vessels.[104] Furthermore (and this applies to the Yousuf study as well) many of the world's gillnet fisheries "are small to medium scale fisheries in developing countries, particularly Southeast Asia" that are not integrated into the global tuna market.[105]

- Hamer *et al.* Report on Depredation. As the United States explained, this report is not specific as to the target fish or to the type of depredating marine mammal. Furthermore, the type of interaction on which the study focuses is depredation (cetaceans eating target catch off the line or deterring fish that might otherwise be caught), not injury to or mortality of dolphins or other marine mammals.[106] The study acknowledges that the literature on depredation focuses on the impact on the fishery (reduction of catch) and not on harm to marine mammals and that only a fraction of depredations result in dolphin mortality or serious injury.[107] Thus the study provides no specific evidence of the harm caused to tuna by longline fisheries and little evidence of harm to dolphins from longline fishing generally.

- False Killer Whale TRP FAQ. As the United States has explained, the fact that the United States has established Take Reduction Plans (TRPs) for the Atlantic and Hawaii Longline Fisheries does not support Mexico's argument that harms to

[101] U.S. First Written 21.5 Submission, para. 155 (citing K.S.S.M. Yousuf *et al.*, "Observations on Incidental Catch Of Cetaceans in Three Landing Centres Along The Indian Coast," 2 *Marine Biodiversity Records* 1, 2-3 (2009) (Exh. MEX-50)).

[102] U.S. First Written 21.5 Submission, paras. 126-28, 152.

[103] U.S. Second Written 21.5 Submission, paras. 34-35 and n.74 (showing that, of the 284,541 vessel records associated with the Form 370s submitted to NOAA from 2002-2013, 340 (0.12%) were from India).

[104] *See* U.S. First Written 21.5 Submission, paras. 126-28; U.S. Second Written 21.5 Submission, paras. 34-35 and n.75 (showing that, of the 284,541 vessel records associated with the Form 370s submitted to NOAA from 2002-2013, 2 (0.00%) were from Pakistan).

[105] U.S. First Written 21.5 Submission, para. 153 (citing FAO, "Tuna Driftnet Fishing" (Exhibit MEX-49)).

[106] U.S. First Written 21.5 Submission, para. 137 (citing Hamer *et al.* 2012, at 346 (Exh. MEX-55)).

[107] U.S. First Written 21.5 Submission, para. 137 (citing Hamer *et al.* 2012, at 346 (Exh. MEX-55); William Jacobson Witness Statement Appendix 1 (Exh. US-4)).

dolphins in fisheries outside the ETP are at least as great as harms to dolphins due to the ETP purse seine fishery.[108] The MMPA directs NOAA to develop TRPs based on the level of mortality in a fishery relative to the PBR level of each affected dolphin species. The observed and unobserved harms in terms of mortality and serious injury for the Hawaii and Atlantic fisheries are far below those occurring every year in the ETP.[109] The 298 figure that Mexico mentions is an estimate and covers serious injuries as well as mortalities, which mortality data from the ETP does not. Actual dolphin mortalities in the Atlantic longline fishery are low, including in 2012.[110] (In 2012, there were an estimated 20 dolphin mortalities in the entire fishery.[111]) Furthermore, even including injuries, the level of observed dolphin *harms* in the Atlantic is far below the level of observed dolphin *mortalities* in the ETP: In 2012, there were 22.22 dolphin mortalities *and injuries* per 1,000 observed sets in the Atlantic longline fishery, compared to 94.26 dolphin *mortalities* per 1,000 dolphin sets in the ETP.[112]

- Sea Turtle Restoration Project. Mexico cites this study for the estimate that 18,000 marine mammals are "killed annually by longline fishing in the Pacific Ocean."[113] First, as the United States has explained, the statistic is misleading, as it is based on extrapolating bycatch data from the Hawaii longline fishery from 1994 to 2002, which included marine mammals that were released alive.[114] Second, the authors of the report assume that marine mammal bycatch rates in all longline fisheries throughout the Pacific Ocean are the same, whereas, in fact, marine mammals are not dispersed uniformly and do not interact with longline gear consistently across the ocean.[115] Third, raw figures from Pacific Ocean longline vessels is not comparable to data on the ETP, as the Pacific Ocean contains many different longline fisheries that involve 3,500-5,000 vessels each year, compared to approximately 80-90 large purse seine vessels authorized to set

[108] U.S. First Written Submission, para. 138.

[109] *See* U.S. First Written Submission, paras. 139-140.

[110] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

[111] *See* 2013 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species, at 42, 44-46, Tables 4.3, 4.7 (2014) (Exh. US-166).

[112] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127); NOAA Fisheries, 2013 Stock Assessment and Fishery Evaluation (SAFE) Report for Atlantic Highly Migratory Species, at 46 (2014) (Exh. US-166).

[113] Mexico's Response to Question 15, para. 90.

[114] U.S. First Written 21.5 Submission, para. 143; Sea Turtle Restoration Project, "Pillaging the Pacific," at 27-28 (November 16, 2004) (Exhibit MEX-64). In fact, according to the underlying source, 91 percent of the animals caught were released alive. *See id.* at 28 (citing K. Forney, SFSC, *Estimates of Cetacean Mortality and Injury in the Hawai'i-based Longline Fishery, 1994-2002*," at 1 (2002)); Karin A. Forney, SFSC, *Estimates of Cetacean Mortality and Injury in Two U.S. Pacific Longline Fisheries, 1994-2002*, at 13 (2004) (Exh. US-231).

[115] U.S. First Written 21.5 Submission, para. 143.

on dolphins in the ETP.[116] Therefore, a per set comparison is more appropriate. For example, dolphin mortality in the Hawaii longline fishery was 0.33 dolphins per 1,000 observed sets from 2009-2013, compared to 96.96 dolphins per 1,000 dolphin sets large purse seine vessels in the ETP.[117]

- Oak Foundation Report. As the United States has explained, the data in this report is anecdotal, in that it is not based on a scientific study that reported the number of dolphin interactions in terms of any metric that would allow a reader to understand the mortality figures in terms of the size of the fishery.[118] Additionally, the data is over two decades old, and up-to-date data concerning the bycatch of Taiwan's longline fleet shows that observed cetacean mortalities range from zero to two animals per year from 2004 to 2012.[119] Based on these observer reports, a 2011 report on Taiwan's longline fisheries concluded that "cetacean bycatch was rare."[120]

- Baird & Gogone Report. The purpose of this report is not to convey information on dolphin mortality in the Hawaii longline fishery, and it conveys no such information.[121] As Mexico points out, the report states that observers have seen false killer whales with damaged dorsal fins that may be the result of interactions with longlines. However, the report does not suggest that these interactions were unobserved or are not accounted for in the recent data that the United States presented on this fishery.[122]

- UK Food and Rural Affairs Committee Report. This report deals concerns an Irish trawl fishery. As the United States has explained, hardly any of the tuna

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[116] U.S. First Written 21.5 Submission, para. 144 (citing Secretariat of the Pacific Community (SPC), Oceanic Fisheries Program, "Longline" (accessed May 25, 2014) (Exh. US-64); IATTC, Active Purse Seine Regional Vessel Registrar (Exh. US-19); IATTC, "Dolphin Mortality Limits for 2012-2014" (Exh. US-22).

[117] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

[118] U.S. Second Written 21.5 Submission, para. 23; M. Donoghue, R. Reeves & G. Stone, eds., *Report Of The Workshop On Interactions Between Cetaceans And Longline Fisheries*, at 3 (May 2003) (Exh. MEX-65).

[119] *See* U.S. Second Written 21.5 Submission, para. 23 (third bullet) (citing WCPFC, Chinese Taipei: Annual Report, at 6, 5th Reg. Sess. Sci. Comm. (2009) (Exh. US-92); WCPFC, Chinese Taipei: Annual Report, at 5, 6th Reg. Sess. Sci. Comm. (2010) (Exh. US-93); WCPFC, Chinese Taipei: Annual Report, at 5, 7th Reg. Sess. Sci. Comm. (2011) (Exh. US-94); WCPFC, Chinese Taipei: Annual Report, at 5, 8th Reg. Sess. Sci. Comm. (2012) (Exh. US-95); WCPFC, Chinese Taipei: Annual Report, at 5, 9th Reg. Sess. Sci. Comm. (2013) (Exh. US-96).

[120] *See* U.S. Second Written 21.5 Submission, para. 23 (third bullet) (citing Hsiang-Wen Huang, "Bycatch of High Sea Longline Fisheries and Measures Taken by Taiwan: Actions and Challenges," 35 *Mar. Pol'y* 712, 715 (2011) (Exh. US-91)).

[121] *See* Robin W. Baird & Antoinette M. Gorgone, "False Killer Whale Dorsal Fin Disfigurements as a Possible indicator of Long-Line Fishery Interactions in Hawaiian Waters," 59 Pacific Science 596 (2005) (Exh. MEX-66).

[122] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

product in the U.S. market contains tuna caught by trawling.[123] (One reason for this is that trawlers' slow speed makes them ill-suited for tuna fishing.[124]) Thus this report is not relevant to the tuna sold on the U.S. tuna product market and does not contradict the evidence the United States has presented concerning relevant fisheries and gear types.

- Whale and Dolphin Conservation Society Report. This report concerned 11 pelagic trawl fisheries for horse mackerel, hake, tuna, and sea bass. It does not present the data on the tuna fishery in particular.[125] Furthermore, as discussed above, trawl fishing is not relevant to the U.S. tuna product market.

- NRDC Report. As the United States has pointed out, one figure that Mexico quotes from this report concerns Taiwan's distant-water driftnet fleet, which operated north of Australian waters in a fishery that was shut down in 1986.[126] The other piece of evidence Mexico cites concerns Taiwan's "nearshore fisheries." The figures Mexico presents were based on surveys conducted between 1993 and 1995 and on one interview in 2000."[127] The report's authors acknowledge that the estimates are "highly provisional," and it is not clear that the fisheries referred to are even tuna fisheries.[128] Thus this evidence does not contradict the evidence the United States has presented convening Taiwan's tuna fisheries today.[129]

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[123] U.S. First Written Submission, para. 157 (explaining that trawl fishing produces none of the U.S.-caught tuna products in the U.S. market and accounts for a maximum of 0.26 percent of vessel records for imported tuna and tuna products (a maximum of 0.26 percent because trawl fishing is so rare that it is not listed as an option on the Form 370, and 0.26 percent of Form 370 vessel records designate "other gear")).

[124] U.S. First Written Submission, para. 157.

[125] Mexico's Response to Question 15.

[126] U.S. Second Written 21.5 Submission, para. 39 (second bullet) (citing Natural Resources Defense Council (NRDC), "Net Loss: The Killing of Marine Mammals in Foreign Fisheries" (January 2014), at 29 (Exh. MEX-103); (citing M.B. Hardwood and E.D. Hembree, "Incidental Catch of Small Cetaceans in the Offshore Gillnet Fishery in Northern Australian Waters: 1981-1985," at 363-67, *Report of the International Whaling Commission* 37 (1987); Young & Iudicello 2007, at 26 (Exh. MEX-18); Simon P. Northridge, *Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review* § 2.3.2, FAO Fisheries Technical Paper No. 320 (1991) (Exh. US-90); Hsiang-Wen Huang, "Bycatch of High Sea Longline Fisheries and Measures Taken by Taiwan: Actions and Challenges," 35 *Mar. Pol'y* 712, 713 (2011) (Exh. US-91).

[127] *See* U.S. Second Written 21.5 Submission, para. 39 (fourth bullet) (quoting NRDC 2014, at 29 (Exh. MEX-103), citing W.F. Perrin *et al.*, *Report of the Second Workshop on the Biology and Conservation of Small Cetaceans and Dugongs of South-East Asia*, at 33, CMS Technical Series Publication No. 9 (2002) (Exh. US-97).

[128] *See* Perrin *et al.* 2002, at 32-33 (Exh. US-97).

[129] *See* U.S. Second Written 21.5 Submission, para. 39 (third bullet) and the sources cited therein.

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?

65. While Mexico concedes that "[t]here are relatively few mortalities" from large ETP purse seine vessels when not setting on dolphins compared to when setting on dolphins, even that concession greatly understates the difference. As indicated in Table 1 of the U.S. response to Question 19, 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, *a difference of 416 percent*.

66. Mexico then claims that the 2.7 annual mortality figure cannot be used to inform our evaluation of harms to dolphins in accidental purse-seine sets outside the ETP, but provides no sound reason why this is so. In particular, Mexico provides no reason why it considers that FAD fishing or conducting unassociated sets is so much more dangerous to dolphins outside the ETP than it is inside the ETP. As the United States has shown, harms to dolphins resulting from intentional sets are far greater than those in accidental sets in which dolphins are rarely injured or killed, as these interactions are purely incidental.

67. Instead, Mexico argues that "(i) purse seine vessels outside the ETP set nets on dolphins."[130] But Mexico puts forward no evidence as to how many intentional dolphins sets occur outside the ETP. The fact that defendants set on dolphins in the *Freitas* case, does not alone, mean that tuna fishing vessels are routinely setting on dolphins outside the ETP. Indeed, if there was widespread setting on dolphins outside the ETP the available dolphin mortality numbers would presumably show *much higher* dolphin mortalities on a per set basis than is occurring in the ETP (owing to the special equipment and requirements imposed by the AIDCP for the protection of dolphins, such as the mandatory "backdown" procedure, etc.).

68. But that is just the *opposite* of what the data shows. For example, in 2010, the first year of expanded observer coverage in the WCPFC purse seine fishery, there were an estimated 2.64 dolphin mortalities per 1,000 sets in the western and central Pacific Ocean, compared to 105.0 dolphins per 1,000 dolphin sets in the ETP.[131] This low amount of dolphin mortality in purse seine fisheries outside the ETP is confirmed by the available data from purse seine fisheries in the Atlantic and Indian oceans.[132] And, of course, in the years since, both the IOTC and WCPFC have joined the lead of different Members, including the EU and the United States,[133] in

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[130] Mexico's Response to Question 19, para. 92.

[131] *See* U.S. Response to Question 19, para. 116 (citing 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)).

[132] *See* U.S. Response to Question 19, paras. 117-118 (citing Amande *et al.* 2012 (Exh. US-131); Amande *et al.* 2011 (Exh. US-134)).

[133] *See* Council Regulation (EC) No. 520/2007, laying down technical measures for the conservation of certain stocks of highly migratory species and repealing Regulation (EC) No. 973/2001, art. 29 (May 7, 2007) (Exh US-232) ("The encircling with purse seines of any school or group of marine mammals shall be prohibited."); 16

prohibiting the intentional setting on dolphins, so it is likely that the isolated, opportunistic set on dolphins are occurring at even less frequency than they did in the past, if they occur at all.

69. Mexico also argues that dolphins outside the ETP "may be caught and drowned in nets even when the fishers are actually setting on FADs."[134] That is true, and the United States has never argued anything different. Indeed, uncontested IATTC/AIDCP data shows that, on average, 2.7 dolphins die every year through accidental interaction with large ETP purse seine vessels that are not intentionally setting on dolphins.[135] However, there is a fundamental difference between this level of incidental harm and the harms caused by intentionally setting on dolphins. Incidental harms do occur in fisheries outside the ETP, but as the evidence on the record shows, these are minor compared with the harms of setting on millions of dolphins intentionally in the ETP.

70. Based on overly generalized, historical data, Mexico simply maintains that purse seine vessels cause "substantial dolphin mortalities," and "[a]bsent evidence to the contrary, it would be unreasonable to assume that such mortalities have ceased."[136] But that is the entire point of the evidence that the United States has put on the record in this proceeding. That evidence, *undisputed by Mexico*, shows just the opposite of what Mexico alleges. Not setting on dolphins is much safer to dolphins than setting on them, a point that the United States considers beyond dispute.[137]

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 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?

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).

[134] Mexico's Response to Question 19, para. 92.

[135] U.S. Response to Question 19, Table 1.

[136] Mexico's Response to Question 19, para. 92.

[137] *See, e.g.*, Tables Summarizing Fishery-by-Fishery Evidence on the Record (Exh. US-127).

71. 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,[138] and a panel errs if it assumes any part of the complainant's burden of proof.[139]

72. It is clear from Mexico's submissions that Mexico makes no claim related to the "regular and significant mortality or serious injury of dolphins" determination provided for in Section 216.91(a)(4)(iii). Indeed, as discussed with regard to Question 11, Mexico insists that any evidence of harms to dolphins is entirely irrelevant to Mexico's claims as they relate to the eligibility condition regarding setting on dolphins and the requirements related to tracking and observers.[140] In Mexico's view, "the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist."[141]

73. As discussed previously, NOAA has authority under section 216.91(a)(4)(iii) to make "regular and significant mortality or serious injury of dolphins" determination with regard to "other fisheries." That is, all fisheries other than the large purse seine vessel fishery in the ETP (section 216.91(a)(1)), non-ETP purse seine fisheries (section 216.91(a)(2)), and large-scale high seas driftnet fisheries (section 216.91(a)(3)). Mexico agrees with the United States that the determination is made on the basis of evidence in a particular fishery,[142] and a "fishery" is defined by location, gear type (or fishing method), and target species.[143]

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[138] *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)*, p. 16.

[139] *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").

[140] *See* Mexico's Response to Question 11, para. 56 (tracking and observers); *id.* para. 58 (setting on dolphins).

[141] Mexico's Response to Question 11, para. 59.

[142] *See* Mexico's Response to Question 21, para. 93 ("The U.S. Commerce Department has not made any determination whatsoever regarding whether *any other fishery* outside the ETP has regular and significant dolphin mortality and serious injury.") (emphasis added); *see also* Mexico's Response to Question 52, para. 140 ("[A] fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life. Accordingly, it is possible that a fishery outside the ETP could be designated as causing regular and significant mortalities or serious injury while other fisheries using the same gear and types of vessels would not.").

[143] *See* Mexico's Response to Question 52, paras. 139-140 ("[A] fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life.") (quoting the FAO Fisheries Glossary (Exh. MEX-132) as stating that a "fishery" is "a unit determined by an authority or other entity that is engaged in raising and/or harvesting fish. Typically, the unit is defined in terms of some or all of

74. Mexico, however, argues that in light of the "substantial evidence of dolphin mortalities and serious injuries in other tuna fisheries," it is "obvious" that NOAA "should" have made such a determination, and not doing so "is itself an indication of arbitrariness."[144] Yet Mexico never even identifies what particular fishery it considers where the evidence proves a "regular and significant mortality or serious injury of dolphins" is occurring.

75. As noted previously, NOAA concluded in 2013 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 section 216.91(a)(2)(i) or 216.91(a)(4)(iii).[145] And the evidence on the record confirms NOAA's 2013 conclusion. For example, observed dolphin mortality in the longline fisheries for which there is evidence constitutes a mere fraction of the dolphins being killed by large purse seine vessels in the ETP year in and year out.[146] Not requiring observer certificates for tuna produced in these fisheries is anything but arbitrary.[147]

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?

76. As discussed previously, Section 216.91(a)(2)(i) authorizes NOAA to require an observer statement for non-ETP purse seine fisheries 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)."

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the following: people involved, species or type of fish, area of water or seabed, method of fishing, class of boats and purpose of the activities.").

[144] Mexico's Response to Question 21, para. 94.

[145] 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 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.").

[146] *See also* U.S. Response to Question 21, paras. 136-143.

[147] The United States obviously disagrees with Mexico's conclusion that "there is no interest or resources available to deal with dolphin mortalities" outside the ETP. Mexico's Response to Question 21, para. 93. The weight of the evidence in this proceeding clearly contradicts this conclusion, including the fact that NOAA regularly audits U.S. canneries, which mostly process non-ETP tuna.

77. Again, while Mexico contends that NOAA "should have made such a determination," it does not identify any particular fishery where "a regular and significant association" is occurring between dolphins and tuna "similar to the association between dolphins and tuna in the ETP." As noted previously, NOAA has already determined that it does not have any credible evidence to support such a finding, and that the evidence on the record as summarized in Table 1 of the Exhibit US-127 is entirely consistent with this conclusion.[148]

78. That fishery-by-fishery evidence confirms that the ETP is *fundamentally* different from all other oceans in that this is the only ocean where the association is of such a nature that purse seine vessels chase and capture dolphins because the bond between the dolphins is so strong "that to catch dolphins is also to catch tuna."[149] As noted in Table 1 of the Exhibit US-127, large purse seine vessels in the ETP take advantage of this association by conducting, on average, over 10,000 intentional sets on dolphins every year, chasing 6.2 million of them, 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 vessels systematically and routinely chase and capture dolphins outside the ETP to harvest tuna, thus evidencing an association exists "similar" to the ETP.

79. Like its position with regard to Section 216.91(a)(4)(iii), Mexico also fails to explain the inherent inconsistency of its position with regard to 216.91(a)(2)(i) where it argues, on the one hand, that NOAA "should" make such a determination, while arguing, on the other hand, that the magnitude of harm across fisheries is entirely irrelevant to its claims in this proceeding.

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

80. As the United States discussed, 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), and an observer is on board the particular fishing trip.[150] The United States does not understand Mexico to disagree.

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?

81. A Form 370 is not strictly required for tuna caught by U.S. flagged vessels that sell directly to U.S. canneries.[151] However, those vessels must provide the same information

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[148] The United States also notes that Mexico errs in considering that data from longline fishing is relevant to the section 216.91(a)(2)(i) determination.

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

[150] U.S. Response to Question 23, para. 153.

[151] In this regard, tuna product exported to the United States needs to be accompanied by Form 370s, regardless of the flag of the harvesting vessel.

contained in the Form 370 to the U.S. canneries, and the U.S. canneries must transmit that same information to NOAA as part of the canneries' monthly reports.[152] Not surprisingly, as a practical matter, U.S.-flagged vessels may simply use the Form 370 to provide the required information to U.S. canneries.[153] Where a vessel (U.S. or foreign) does use the Form 370, then the Atlantic Bluefin Tuna purse seine fishery falls under box 5B(2), while the others six fisheries fall under box 5B(1), as discussed previously. Where the U.S. vessel does not use the Form 370, the seven fisheries are accounted for in the same way in the parallel submission of information to the U.S. cannery.

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?

82. As the United States discussed previously, if NOAA determined that a particular fishery was "having a regulator and significant mortality or serious injury of dolphins," NOAA would need to amend the Form 370 to account for that new determination. Amending the Form 370 is a straightforward process for NOAA, and does not require a formal rulemaking process.[154]

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?

83. In its response to Question 26, Mexico argues that an "inherent conflict" exists between the United States requiring proof that an AIDCP observer was on board on the large ETP purse seine vessel and requiring an observer certificate from the observer programs that are "qualified and authorized" to provide such a certificate in the seven U.S. fisheries.[155] But no such conflict exists.

84. The United States has always taken the position that, in light of all the facts and circumstances of the AIDCP observer program (including training), it is appropriate to use the AIDCP observer certificate (or proof thereof) to attest to the dolphin safe status of the tuna when it is sold in the U.S. tuna product market. The same is true with the observer programs for the

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[152] *See* U.S. First Written 21.5 Submission, paras. 24, 37 (n.69), 52; U.S. Second Written 21.5 Submission, para. 33 n.68.

[153] *See, e.g.*, 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).

[154] *See* U.S. Response to Question 25, para. 156.

[155] Mexico's Response to Question 26, para. 104. The United States would note that Mexico is inaccurate when it states that "[t]he new requirements apply only to certain tuna fisheries in U.S. domestic waters." *Id.* para. 102. The boundaries of the California, Hawaii, and American Samoa longline fisheries extend beyond U.S. EEZs.

seven U.S. fisheries determined to be qualified and authorized to certify for purposes of the amended measure. Indeed, NOAA determined that the training for observers in these seven programs "is similar to or exceed[s] the training given by the IATTC," and "include[s] such topics as dolphin species identification, dolphin mortality recognition, data collection requirements for use in making a serious injury determination, and recognition of an intentional purse seine set."[156] The United States does not understand that Mexico disputes either point.

85. In fact, Mexico does not identify a *single* observer program in the Atlantic, Indian, or Pacific oceans (or elsewhere) that is suitable for certifying to the dolphin safe status of tuna (other than the seven U.S. fisheries designated as "qualified and authorized" and the AIDCP program).[157] As the Panel will recall, counsel for Mexico continually asserted at the panel meeting that the requirements associated with the AIDCP observer program are the "minimum" needed to attest to the dolphin safe status of tuna harvested in a particular fishery, and that other observer programs simply did not meet this "minimum" standard. Indeed, Mexico has repeatedly argued that "no other [RFMO] has adopted, or has plans to adopt, measures to protect dolphins that are *remotely comparable* to those of the AIDCP."[158] Mexico has, in fact, gone to great lengths to make this point, creating a table in paragraph 110 of its first written submission that unfavorably compares the marine mammal protections provided by four different RFMOs with the protections provided by the AIDCP.[159]

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[156] *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") ("NMFS agrees in part, but believes that observers participating in NMFS observer programs already undergo rigorous training programs, appropriate for the applicable fishery, and that training, where applicable, *is similar to or exceeds the training given by the IATTC*. NMFS training programs include such topics as dolphin species identification, dolphin mortality recognition, data collection requirements for use in making a serious injury determination, and recognition of an intentional purse seine set. After consideration of this comment, the AA adopted the final observer criteria on June 13, 2014, to be used in making qualified and authorized determinations. Satisfaction of all criteria is necessary before the AA will determine that an observer program is qualified and authorized.") (emphasis added).

[157] *See* Mexico's Response to Question 38, para. 111 ("[T]he only reliable method of oversight is to have an independent observer onboard a vessel with the appropriate training and the mandate to monitor for harm to dolphins. The only fisheries where there are such independent observers are the ETP and the U.S. domestic fisheries recently designated by the United States."); Mexico's Response to Question 45, para. 135 ("[I]n the absence of trained independent observers with responsibility and authority for monitoring fishing practices and dolphin bycatch, there is no reliable method to investigate what happened onboard a vessel fishing on the high seas or in foreign waters, outside U.S. jurisdiction.").

[158] Mexico's Response to Question 13, para. 78 (emphasis added); Mexico's Second Written 21.5 Submission, para. 56 ("None of those three [RFMOs] [*i.e.*, ICCAT, IOTC, and WCPFC] has adopted, or has plans to adopt, measures to protect dolphins that are *remotely comparable* to those of the AIDCP. None of them has even proposed a comprehensive program involving use of special equipment, training, monitoring, tracking, verification, and certification.") (emphasis added); *see also* Mexico's First Written 21.5 Submission, para. 110.

[159] *See* Mexico's First Written 21.5 Submission, para. 110 (discussing protections afforded by the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), and the Western and Central Pacific Fisheries Commission (WCPFC)).

86. As to the observer programs themselves, Mexico takes the position that the training of observers outside the ETP is inadequate in that they are not trained "to monitor harm to dolphins (they are instead monitoring how much tuna is caught)."[160] And, in any event, the coverage of these programs is not 100 percent and "in many instances observer reports are not even shared by the national and regional observer organizations with the WCPFC."[161]

87. Finally, Mexico contends that the United States erred in an previous submission by stating the United States does not have a gillnet fishery targeting tuna, noting that the California Large-mesh Drift Gillnet Fishery is a fishery that regularly harvests tuna.[162] Mexico is incorrect; the previous statement by the United States was accurate. The target species of this fishery is swordfish, and, in fact, the fishery is commonly referred to as the "Swordfish Large Mesh Drift Gillnet Fishery."[163] Like many fisheries, this fishery does not just harvest the target species, however. As indicated in the NOAA description of the fishery, thresher shark, mako shark, and opah are non-target species harvested in the fishery. NOAA has also determined that tuna, another non-target species in the fishery, is harvested at a sufficient regularity that it was appropriate to examine whether the observer program for this fishery met the "qualified and authorized" criteria.

88. The United States would further note that, according to the NOAA cannery receipts database, since 2001, no tuna product produced from U.S. canneries has contained tuna harvested in any gillnet fishery, including the California Large-mesh Drift Gillnet Fishery.[164] The California Large-mesh Drift Gillnet Fishery is a coastal fishery, contained entirely within the U.S. EEZ, and tuna harvested in that fishery would likely be sold in the fresh fish market.

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[160] Mexico's Response to Question 5(a), para. 79 ("In particular, [no RFMO] has established programs featuring the use of trained independent observers who are marine biologists onboard every large tuna fishing vessel fishing for tuna in their fishery regions. The goal for observer coverage in the IOTC is five percent. In the ICCAT, observers from a regional program are required for vessels fishing for bigeye and yellowfin tuna two months a year in a limited region to enforce restrictions on FAD fishing, while observers are required for bluefin tuna fishing in varying degrees, again only to enforce limitations on the quantity of tuna caught. Observer coverage in the WCPFC is higher in fisheries located below 20 degrees north, but the goal is only five percent in the region above that line. Observers are not trained to monitor harm to dolphins (they are instead monitoring how much tuna is caught), and in many instances observer reports are not even shared by the national and regional observer organizations with the WCPFC.").

[161] Mexico's Response to Question 5(a), para. 79; *see also* Mexico's Second Written 21.5 Submission, para. 56 ("[Neither the ICCAT, IOTC, or WCPFC] has even proposed a comprehensive program involving use of special equipment, training, monitoring, tracking, verification, and certification. In particular, none of those organizations has established programs featuring the use of trained independent observers who are marine biologists onboard every large tuna fishing vessel fishing for tuna in their fishery regions. The goals for observer coverage in both the ICCAT and IOTC are five percent, and observers have no responsibility to monitor harm to dolphins. Observer coverage in the WCPFC is higher, but observers have no responsibility to monitor harm to dolphins, and in most instances the reports are not even shared with the WCPFC."); Mexico's First Written 21.5 Submission, para. 110.

[162] Mexico's Response to Question 26, para. 105.

[163] *See* NOAA Description of the Swordfish Large Mesh Drift Gillnet Fishery (Exh. US-233).

[164] *See* William Jacobson Witness Statement, Appendix 3 (Exh. US-4).

Captains' certification

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?

89. Both Mexico and the United States agree that there is no relationship between the dolphin safe status of tuna caught and how the captain is paid.[165]

90. Mexico further contends that the collective result of the amended measure's requirements and the purchasing practice of U.S. canneries is to create an "extremely strong disincentive for a captain to self-report a dolphin set."[166] The United States, of course, disagrees. Rather, the United States considers that the amended measure discourages captains of purse seine vessels from intentionally setting on dolphins *at all*. In this regard, the amended measure contributes to the "dolphin protection objective" of the amended measure for purposes of Article XX.[167] Indeed, the Appellate Body, relying on the conclusions of the original panel, concluded that the original measure "*fully* addresses the adverse effects on dolphins resulting from setting on dolphins" both inside and outside the ETP,[168] a point that Mexico has, improperly, attempted to "appeal" in this proceeding.[169]

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?

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[165] *Compare* Mexico's Response to Question 36, para. 110 ("Whether captains are being paid based on the volume or value of the tuna that is caught by their vessels, or on a salary basis, is irrelevant."), *with* U.S. Response to Question 36, para. 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).").

[166] Mexico's Response to Question 36, para. 107.

[167] U.S. Second Written 21.5 Submission, paras. 160-163; *US – Tuna II (Mexico) (AB)*, para. 302 (noting that the dolphin protection objective is to "contribut[e] 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) (citing *US – Tuna II (Panel)*, paras. 7.401, 7.413, 7.425).

[168] *US – Tuna II (Mexico) (AB)*, para. 297 ("We note, in particular, that the US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does 'not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP.'") (quoting Panel Report, para. 7.544).

[169] *See* U.S. Second Written 21.5 Submission, paras. 161-162 (noting that Mexico has argued in this proceeding that "the actual contribution of the original Tuna Measure to the achievement of its objectives was *even lower* than that found by the original Panel").

91. The United States has fully addressed Mexico's comments in the U.S. response to this question.[170]

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?

92. While Mexico concedes that captain certifications "might be reliable for certain purposes (*e.g.*, for matters that are verifiable by post-entry audit and/or that do not involve a substantial financial conflict of interest)," Mexico argues that such certifications "are not reliable for the purpose of certifying the dolphin-safe status of the tuna caught by the captain's own fishing vessel."[171] Mexico is incorrect.

93. As the United States has explained, captain statements and logbooks are an integral part of RFMO and other international regimes, as well as the regimes of individual nations. These regimes depend on such documentation to regulate in a whole host of areas that are critical for the appropriate management of fisheries and the environment more broadly. These areas include closed area rules, fish stock management, and implementation of environmental requirements, such as the *International Convention for the Prevention of Pollution from Ships* (MARPOL).[172] Contrary to Mexico's understanding, nations and international organizations depend on this information, despite that it may be contrary to the narrow financial interest of the particular vessel to provide accurate information, such as in the case where the information from the EU vessel results in a real-time closure of a fishery, or where the vessel has disposed of contaminated bilge water in a manner that violated MARPOL.[173]

94. As to the appropriateness of using observer certificate to attest to the dolphin safe status of tuna, the United States has explained that 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 vessels – it is those vessels that are *capable of taking 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 schools of dolphins.

95. 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

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[170] *See* U.S. Response to Question 38, paras. 197-204.

[171] Mexico's Response to Question 39, para. 113.

[172] U.S. Response to Question 39, paras. 205-215.

[173] U.S. Response to Question 39, para. 213.

coordination with speedboats and helicopters, engage in tens of thousands of lengthy chases of large schools of dolphins (300-400 individuals) to catch tuna.

96. In light of this intense interaction – both in the chase by purse seine vessels, speed boats, and helicopters, and the capture in a purse seine net, of millions of dolphins each year – the AIDCP parties correctly imposed unique requirements on those vessels that are capable and permitted to engage in such a dangerous activity, including the requirement to carry a single person to observe the impact of the vessel on the hundreds of dolphins that the vessel chases each set. Thus, the requirement of the amended measure 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.

97. Consistent with its response to Question 11, Mexico argues that the need for observers is the same for all fisheries where at least some harm to dolphins occurs. The fact that the magnitude of harm is so much greater in the ETP large purse seine fishery than in other fisheries is irrelevant to whether the covered agreements requires the United States to impose observers on its vessels and the vessels of other Members fishing outside the ETP.[174] As the United States discussed above in commenting on Mexico's response to Question 11, Mexico's approach is entirely wrong, and should be rejected.

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?

98. Mexico appears to agree with the United States that no parallel market for dolphin safe certifications exist.[175]

99. In addition, Mexico again urges the Panel to consider that the global problem of illegal, unreported and unregulated (IUU) fishing is relevant to this dispute. It is not. Indeed, while Mexico's response to this question relies heavy on rhetoric, it is short on facts. Specifically, Mexico provides *zero* evidence that any tuna product sold in the U.S. market contains IUU fish.

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[174] Mexico's Response to Question 39, para. 114; Mexico's Response to Question 11, para. 52 ("[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*.") (emphasis added); *see also id.* para. 59 ("Thus, it appears that the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist").

[175] *Compare* U.S. Response to Question 42, para. 227, *with* Mexico's Response to Question 42, para. 120.

100. The fact is that the United States is a leader in addressing the global problem of IUU fishing. For example, in 2011, NOAA issued its final rule regarding the identification and certification procedures to address IUU fishing and bycatch of protected living marine resources (PLMRs), which NOAA revised in 2013 to include protections for sharks and to expand the definition of IUU fishing.[176]

101. Briefly, the U.S. IUU fishing process under these rules is that NOAA will identify those nations engaged in IUU fishing, bycatch of protected resources, and/or shark catches on the high seas in a biennial report to the U.S. Congress. In the subsequent two years, the U.S. Government will work collaboratively with identified nations on how they can best address the activities for which they were identified. At the end of the two year process, NOAA will issue positive or negative certifications based on the actions (or lack thereof) of the identified nations in the next biennial report. Nations that are not positively certified may be subject to import restrictions.

102. The United States, of course, welcomes Mexico's concern regarding in, and assistance with, the global problem of IUU. However, the United States notes that Mexico has not been a proponent of domestic IUU regimes, such as the one described above. For example, in commenting on the EU IUU regime at the WTO, Mexico took the view that "such regulations should not proliferate and should first require analysis from the point of view of a potential trade barrier," and, presumably, not as an environmental measure.[177]

103. Finally, Mexico quotes extensively to an NGO-sponsored study that claims that "[i]llegal and unreported catches represented 20-32 percent by weight of wild-caught seafood imported to

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[176] *See High Seas Driftnet Fishing Moratorium Protection Act; Identification and Certification Procedures To Address Illegal, Unreported, and Unregulated Fishing Activities and Bycatch of Protected Living Marine Resources*, 76 Fed. Reg. 2011 (Jan. 12, 2011) (Exh. US-234); *High Seas Driftnet Fishing Moratorium Protection Act; Identification and Certification Procedures To Address Shark Conservation*, 78 Fed. Reg. 3338 (Jan. 16, 2013) (Exh. US-235); *Identification and Certification of Nations*, 50 C.F.R. 300 subpart N (Exh. US-236).

[177] WTO Committee on Trade and Environment, Report of the Meeting Held on 13 November 2012, WT/CTE/M/54, paras. 1.41-1.42 (Mar. 15, 2013) (Exh. US-237). The report states:

> The representative of Mexico expressed concerns over the potential impact of the EU regulation on trade in fisheries products. In his delegation's view, Members should refrain from resorting to unilateral measures to address IUU fishing, as it was an issue that should be dealt with in the appropriate multilateral forum, such as the FAO and regional fisheries management organizations. In fact, he noted that unilateral regulations had been established without first submitting such measures to the relevant forums. Further, as this type of fishing activity was concentrated in certain regions of the world, his delegation considered that such measures should not be generalized.
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> The representative further highlighted the lack of consensus, even in the FAO, on the definition of "illegal, unreported and unregulated" fishing activities. He therefore requested whether the EU regulation considered, as IUU fishing only activities that were simultaneously illegal, unreported and unregulated or whether it covered any fishing activities which met one of these three presuppositions. His delegation was of the view that such regulations should not proliferate and should first require analysis from the point of view of a potential trade barrier. That was the reason why the issue should be brought before the TBT Committee. Further, he noted that observations made by certain Mexican stakeholders had not been taken into account in the final EU regulation.

the USA in 2011."[178] The United States respectfully disagrees. While the United States recognizes that IUU fishing is a global problem, and notes the extensive actions the United States has taken domestically and internationally to combat IUU, the United States does not agree with the statistics that are being highlighted in the study, which are based on suspect, unverifiable data.

Monitoring under United States domestic law

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.

104. The United States has fully addressed this issue in the U.S. response to Question 45.

105. As indicated in that response, the U.S. Government takes its enforcement responsibilities very seriously, and there is no basis for Mexico's opinion that "there is an apparent lack of interest by [U.S.] enforcement authorities."[179]

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?

106. As the United States discussed in response to Question 48, how the costs of observer and record keeping programs are allocated between governments and their fishing industries varies. While the U.S. observer programs are largely financed by the U.S. Government, other programs are operated differently, including the AIDCP, where 70 percent of the cost is funded by the industry and 30 percent is funded by the whole of the IATTC membership (including non-AIDCP parties such as Canada, China, etc.). Mexico does not appear to dispute a number of cost related points, including:

- Operating an AIDCP-equivalent observer program in other fisheries, such as the longline fisheries in the western and central Pacific Ocean, would cost, at a minimum, hundreds of millions of US dollars per year (not counting startup costs). Indeed, Mexico repeatedly

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[178] Mexico's Response to Question 42, para. 125.

[179] Mexico's Response to Question 45, para. 135. In this regard, the United States notes Mexico's criticism that in the *Freitas* case, "no action was taken to penalize the captain or the corporation responsible for the vessels for making false dolphin-safe declarations." *Id.* para. 134. Yet the *Freitas* case did not, and would not, have involved a false labeling claim. There was no evidence in the record of the *Freitas* case that the tuna harvested by the offending vessels entered the United States, or was ever intended to be entered into the United States.

claims that the existing regional observer programs are "not remotely comparable" in purpose, coverage, training, etc. to the AIDCP observer program.[180]

- The AIDCP observer program is unusually inexpensive, even taking account that it covers only a very few vessels (*i.e.*, there are 167 large purse seine vessels on the IATTC Vessel Registry compared to 1,310 longline vessels).[181] Indeed, New Zealand has stated that its observer program costs up to US$450 per day.[182]

- The AIDCP observer program, which is relatively inexpensive, has long run a budgetary deficit,[183] even taking into account that the 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.[184]

107. Finally, Mexico has not put forward any evidence that the elasticity of demand in the U.S. tuna product market would allow producers to pass on even some of the higher costs implicated in producing tuna product if Mexico is correct that the covered agreements require observer certificates for all tuna product marketed in the United States as dolphin safe.[185]

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

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[180] Mexico's Response to Question 13, para. 78 ("[N]o other Regional Management Fisheries Organization has adopted, or has plans to adopt, measures to protect dolphins *that are remotely comparable* to those of the AIDCP. None of them has even proposed a comprehensive program involving the use of special equipment, training, monitoring, tracking, verification, and certification of dolphin-safe status.") (emphasis added); Mexico's Mexico's Second Written 21.5 Submission, para. 56 ("None of those three [RFMOs] [*i.e.*, ICCAT, IOTC, and WCPFC] has adopted, or has plans to adopt, measures to protect dolphins that are *remotely comparable* to those of the AIDCP. None of them has even proposed a comprehensive program involving use of special equipment, training, monitoring, tracking, verification, and certification.") (emphasis added); *see also* Mexico's Response to Question 38, para. 111; Mexico's Response to Question 45, para. 135; Mexico's First Written 21.5 Submission, para. 110.

[181] *Compare* IATTC Purse Seine Vessel Registry (Exh. US-19), *with* IATTC Longline Vessel Registry (Exh. US-216).

[182] *See* New Zealand's Response to Third Party Question 2, para. 9.

[183] *See* U.S. Second Written 21.5 Submission, para. 126, n.238 (noting that 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); AIDCP Budget, Doc. MOP-29-06, 29th Mtg. of the Parties, Lima, Peru (July 8, 2014) (Exh. US-112).

[184] *See* AIDCP Budget, Doc. MOP-27-06, at 7 (Exh. US-116).

[185] *See* U.S. Response to Question 48, paras. 263-264.

dolphins) would be subject to an observer requirement while the same boats within the ETP would not?

108. Mexico concurs with the United States that the Section 216.91(a)(4)(iii) determination would be done on a fishery-by-fishery basis.[186] Mexico further concurs that a "fishery" is defined by location, gear type (or fishing method), and target species.[187] As such, it is *uncontested* in this proceeding that in the event NOAA ever required observer certificates to attest to the dolphins safe status of tuna pursuant to Section 216.91(a)(4)(iii), that determination would only affect those vessels operating in that fishery, and that other vessels operating outside that fishery would not be affected.[188]

109. Section 216.91(a)(4)(iii) authorizes NOAA to make such a determination for any non-purse seine fishery as well as the small ETP purse seine fishery, as these fisheries are not otherwise covered by covered by (a)(1) (ETP large purse seine vessels), (a)(2) (non-ETP purse seine vessels), and (a)(3) (large scale driftnet fishing).[189]

110. The United States responds elsewhere to Mexico's unfounded assertion that the covered agreements require the United States to mandate that an observer certificate attest to the dolphin

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[186] *See* Mexico's Response to Question 52, para. 140 ("[A] fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life. Accordingly, it is possible that a fishery outside the ETP could be designated as causing regular and significant mortalities or serious injury while other fisheries using the same gear and types of vessels would not."); *see also* Mexico's Response to Question 21, para. 93 ("The U.S. Commerce Department has not made any determination whatsoever regarding whether *any other fishery* outside the ETP has regular and significant dolphin mortality and serious injury.") (emphasis added).

[187] *See* Mexico's Response to Question 52, paras. 139-140 ("[A] fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life.") (quoting the FAO Fisheries Glossary (Exh. MEX-132) as stating that a "fishery" is "a unit determined by an authority or other entity that is engaged in raising and/or harvesting fish. Typically, the unit is defined in terms of some or all of the following: people involved, species or type of fish, area of water or seabed, method of fishing, class of boats and purpose of the activities.").

[188] Thus, as the United States discussed in response to this question, if NOAA made a determination under Section 216.91(a)(4)(iii) that an observer statement is necessary for 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 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. U.S. Response to Question 52, para. 274.

[189] 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 . . .").

safe status of all tuna product sold in the United States, irrespective of the harm being caused to dolphins in any particular fishery.[190]

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.**

111. Mexico disagrees with the position taken in the *amicus curiae* submission, and argues that the letter referenced in that submission, which was presumably written in the 1990s, does not provide "credible evidence" as to the current export practices of the Mexican industry. In particular, Mexico claims that the companies are no longer in business and the vessel sank over a decade ago, among other claims.[191] The United States has no reason to disagree with Mexico's statements.

112. Mexico then notes that of the 40 purse seine vessels in its fleet, 36 of them are large purse seine vessels, and the other four vessels "represent less than five percent of the capacity of the Mexican fleet fishing for tuna in the ETP."[192] All of the large purse seine vessels have been assigned Dolphin Mortality Limits (DMLs), meaning "that virtually its entire purse seine fleet fishes in the ETP by setting on dolphins."[193] Again, the United States has no reason to disagree with Mexico's statements.

113. Mexico then makes a series of statements, many of which appear to be in error either factually or legally.

114. First, Mexico claims that its vessels "cannot fish exclusively with FADs and unassociated sets in the area off the Mexican coastline and farther west, because yellowfin in that area cannot regularly be found that way."[194] Mexico provides no proof for such an allegation, and it appears to be untrue. For example, Ecuador, which produces all or virtually all of its tuna from purse

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[190] *See, e.g.*, U.S. Comment on Mexico's Response to Question 11, *supra*.

[191] Mexico's Response to Question 57, paras. 142-144.

[192] Mexico's Response to Question 57, para. 147. Mexico further notes that of those four, one vessel is actually a large purse seine vessel that has sealed some of its wells (but is still required to carry an observer). *Id.* n.125.

[193] Mexico's Response to Question 57, para. 155.

[194] Mexico's Response to Question 57, para. 150.

seine vessels that do not set on dolphins, produces significant amounts of many species of tuna, including yellowfin tuna in the ETP.[195]

115. Second, Mexico wrongly implies that it cannot become a member of the WCPFC and fish in those waters.[196] Mexico could apply for permission to fish in the WCPFC, but has chosen not to. The United States understands that two close neighbors of Mexico, Belize (longline) and El Salvador (purse seine), as well as Ecuador (purse seine), have long operated vessels in the WCPFC.[197] Rather, it appears that a key reason that Mexico has not applied for permission to fish in the WCPFC Convention Area is Mexico's strong opposition to having its vessels be subject to high seas boardings and inspections, including by the U.S. Coast Guard.[198] (IATTC Members have not agreed to allow such inspections at sea.)

116. As such, the United States disagrees that Mexico has established that "fishing not in association with dolphins is not a viable option for the Mexican fleet," as Mexico so claims here.[199] The fact that Ecuador does not set on dolphins in the ETP, and the fact that dolphin sets only constitute 40-50 percent of large purse seine vessel sets (and much less if you include small purse seine set data), proves Mexico's assertion to be untrue.

117. Further, and as discussed above with regard to Question 11 and elsewhere, the United States disagrees with Mexico that "whether or not and to what magnitude costs would be incurred by the Mexican tuna fleet to change fishing areas or methods is immaterial" to Mexico's claims.

118. In any event, it is clear that a complainant does not prove that a technical regulation provides less favorable treatment simply by establishing the complainant's industry would make less profit by complying with the respondent's measure. Again, it is a fundamental principle that

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[195] The IATTC reports that Ecuador harvested 18,167 metric tons (MT) of Yellowfin tuna in 2009, 34,764 MT in 2010, and 27,158 MT in 2011. *See* the following web site: https://www.iattc.org/Catchbygear/IATTC-Catch-by-species1.htm.

[196] Mexico's Response to Question 57, para. 151 ("The other alternative for enabling Mexican vessels to fish tuna that can be labelled as dolphin safe in accordance with the U.S. measures would be to move to the Central and Western Pacific area, which is regulated by the WCPFC. Mexico has not been accepted as a Party in the WCPFC; the current status of Mexico is "cooperating non-member.").

[197] WCPFC, Tuna Fishery Yearbook 2012 (excerpted at Exh. US-239).

[198] *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.") (emphasis added); *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.") (emphasis added). As discussed in previously, 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. U.S. Response Question to 38, para. 200.

[199] Mexico's Response to Question 57, para. 152.

"a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'"[200]

119. The fact that a complainant's industry elects not to comply with the respondent's requirements – or, indeed, *cannot* comply with the respondent's requirements – does not prove that the measure provides less favorable treatment. To accept the contrary is to accept that the respondent discriminates when it blocks imports of dangerous toys because the complainant finds it is less profitable to produce children's toys with low levels of lead. Similarly, one would need to accept that the respondent discriminates when it blocks certain vegetables from being labeled "organic," even though they contain pesticides, because the growing conditions of the complainant make it "not viable" to grow those vegetable without pesticides. In other words, this logic would have the covered agreements *prohibit* a Member from setting its own level of protection; rather, that Member's level of protection would be set by the trading partners.[201]

120. Obviously, such an approach cannot be squared with the text of any of the covered agreements, or any logic whatsoever. The fact that Mexico may consider that its "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" *does not* mean that the United States must allow such tuna product to be labeled as "dolphin safe," when, in fact, setting on dolphins is *not* safe for dolphins. The prohibition on providing less favorable treatment to like products does not require a Member to allow its trading partners to market their products in a deceptive, and fundamentally factually inaccurate, manner.

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

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[200] *US – Tuna II (Mexico) (AB)*, para. 316 (quoting the sixth preambular recital) (emphasis added); *US – COOL (AB)*, para. 373 (quoting same).

[201] *See also* U.S. First Written 21.5 Submission, para. 309.

> **"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 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?

121. As the Appellate Body has long explained:

> [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.[202]

122. Mexico correctly agrees with the United States that "the complainant bears the initial burden of establishing a *prima facie* case in respect of all elements of its claim under Article 2.1 of the TBT Agreement."[203]

123. Oddly, certain third parties take the contrary position – arguing that Mexico only has the burden of proving half of its claim, and the United States has the burden of *disproving* half of Mexico's claim. None of the proponents cite any support for a notion so contrary to *US – Wool Shirts and Blouses* other than to say that the respondent has the burden of proving its Article XX

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[202] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also 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.").

[203] Mexico's Response to Question 58, para. 157.

defense. But that point is consistent with *US – Wool Shirts and Blouses*, not contrary to it. In particular, the Appellate Body does not even remotely suggest in *US – Clove Cigarettes*, *US – COOL*, or *US – Tuna II (Mexico)* that the burden of proving a claim under Article 2.1 of the TBT Agreement differs from the burden of proof principles set out in *US – Wool Shirts and Blouses*. Indeed, the Appellate Body, in the paragraphs referenced in this question, expressly re-affirmed that the principle elucidated in *US – Wool Shirts and Blouses* applies equally to Article 2.1 claims.[204]

124. As discussed previously, Mexico has failed to establish a *prima facie* case of inconsistency with Article 2.1, requiring dismissal of the claim.[205]

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.

125. The United States has addressed Mexico's comments in the U.S. response to this question.[206]

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[204] *See 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).

[205] *See, e.g.*, U.S. Response to Question 58, paras. 287-289.

[206] U.S. Response to Question 59, paras. 290-304.