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)**

Executive Summary of the
Second Written Submission of
the United States of America

July 29, 2014

I. MEXICO FAILS TO ESTABLISH THAT THE AMENDED DOLPHIN SAFE LABELING MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

A. Mexico's Claim Falls Outside the Panel's Terms of Reference

1. Mexico's Article 2.1 claim falls outside the Panel's terms of reference.

2. First, Mexico argues that the Panel should focus on the amended measure "as a whole, and not elements comprising that measure." But in determining its own terms of reference, the Panel clearly can look at the specific aspects of the measure. To say that the Panel is prevented from doing so ignores past Appellate Body and panel reports that have consistently found that claims against *unchanged* elements of the original measure fall outside the compliance panel's limited terms of reference.

3. Second, Mexico argues that these three aspects of the measure have changed from the original measure, implying that the line of reports cited by the United States is inapplicable to this dispute. Mexico is mistaken. The 2013 Final Rule does not change any of the requirements *in ways that Mexico alleges prove the amended measure discriminatory*.

4. Third, Mexico argues that, even if the aspects of the amended measure that it now complains of are unchanged from the original measure, the Panel still has jurisdiction to address Mexico's claim because it has not been resolved on the merits. But that is clearly wrong. The original panel and Appellate Body did reach the merits of Mexico's Article 2.1 claim. And, in doing so, the Appellate Body rejected all three elements of Mexico's Article 2.1 claim.

5. Fourth, Mexico states that "'new claims against inseparable aspects of a measure taken to comply, which are unchanged from the original measure' are within a panel's terms of reference under Article 21.5." Mexico makes no actual argument that these aspects are "inseparable" from the measure taken to comply, and all three aspects of the measure clearly fall outside the Panel's terms of reference.

6. Finally, Mexico does not "unconditionally accept" the Appellate Body report. Such an approach deprives the United States of the opportunity to come into compliance with its obligations in accordance with the DSU.

B. The Appellate Body Has Already Rejected the Entirety of Mexico's Article 2.1 Claim

7. Mexico's Article 2.1 claim should be rejected on the basis that the Appellate Body has already considered – and rejected – the entirety of the claim.

8. First, Mexico argues that the "labelling conditions and requirements that relate to the qualification and disqualification of the fishing methods" are "different" in this proceeding than they were in the original proceeding. But of course that is wrong. The eligibility condition Mexico complains about here is the same one it complained of previously.

9. The same point holds true for the other two aspects (record-keeping/verification and observer requirements) that Mexico raises as part of its Article 2.1 claim. The AIDCP mandates certain record-keeping/verification and observer requirements for large purse seine vessels

operating inside the ETP that other vessels are not subject to. This "difference" was *uncontested* in the original proceeding and clearly fell within the Appellate Body's review of the record. What Mexico urges the Panel to do is accept its arguments without any regard to the DSB recommendations and rulings in the original proceeding. That is wrong. The Panel's analysis must 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."

C. Mexico Fails To Prove that Any of the Three Elements Is Relevant to the Article 2.1 Analysis

10. Not every regulatory distinction is relevant to the question of whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction." According to the Appellate Body: "[W]e *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries. While Mexico appears to agree with this principle, it wrongly insists that the requirements regarding record-keeping/verification and observers are relevant to the Article 2.1 analysis. The source of the parties' differing views on this issue is a disagreement over what the detrimental impact is in this dispute.

11. For the first step of its Article 2.1 analysis, Mexico relies on the Appellate Body's Article 2.1 analysis and contends that the detrimental impact is caused by the denial of "access to this label for most Mexican tuna products." However, for the second step of its Article 2.1 analysis, Mexico changes course and, relying heavily on the original panel's Article 2.2 analysis, argues that the "accuracy" of the information is the touchstone of the detrimental impact finding. The United States disagrees that the detrimental impact on the competitive opportunities can ever be different for the two steps of the Article 2.1 analysis. Such an interpretation renders the analysis meaningless. The entire point of the second step of the analysis is to determine whether the detrimental impact *determined to exist in the first step* "reflects discrimination."

12. The Appellate Body's conclusions in paragraphs 233-235 of the report show that *access* not accuracy was the touchstone of its detrimental impact analysis. Thus the record-keeping/verification and observer requirements are not relevant to this analysis, in that neither aspect accounts for the detrimental impact. Not only does Mexico's argument contradict the DSB recommendations and rulings, but Mexico puts forward *zero* evidence to prove such an assertion. Mexico's attempt to "re-imagine" the Appellate Body's detrimental impact analysis is another example of Mexico's attempted "appeal" of the DSB recommendations and rulings.

13. Mexico also errs in arguing that "further support" for the proposition that the detrimental impact exists can be found in the "unilateral application" of the amended measure. First, the DSB recommendations and rulings did not find that the detrimental impact is a factor of so-called "unilateral" application. As such, it is unclear why Mexico considers its argument relevant to the dispute. Second, the Appellate Body has already found that the objective of the original measure is *not* to "coerce" Mexico. Third, Mexico claims that the amended measure "undermines the AIDCP regime" but puts forward no evidence that the functioning of the AIDCP has been harmed. In any event, it simply cannot be the case that the United States has acted contrary to the WTO Agreement by determining for itself what level of protection is appropriate for the United States.

D. Mexico Fails To Prove that the Detrimental Impact Does Not Stem Exclusively from Legitimate Regulatory Distinctions

1. Mexico Fails To Prove that the Eligibility Conditions Are Not Even-Handed

14. In its second submission, Mexico again fails to establish that the eligibility requirements prove the amended measure inconsistent with Article 2.1. As the United States has explained, the eligibility conditions are, in fact, entirely neutral, and thus even-handed. Mexico counters that the Appellate Body determined that the eligibility conditions result in a detrimental impact on Mexican tuna products. That is true, but it does not prove that such eligibility conditions are not even-handed. Further, it is clear from the DSB recommendations and rulings that the Appellate Body did not agree that the eligibility condition regarding setting on dolphins was not even-handed, and the fact that the requirement was neutral across fisheries was key to its finding.

15. Mexico also reasserts its argument that "fishing methods used outside the ETP have adverse effects on dolphins equal to or greater than setting on dolphins in the ETP in an AIDCP-consistent manner." Mexico puts forward no new evidence to support this assertion nor does it respond to the extensive evidence that the United States put forward that proves this assertion to be unfounded.

16. More fundamentally, Mexico is wrong to argue that the United States may not draw distinctions between different fishing methods. Setting on dolphins is the only fishing method that targets dolphins. There is nothing about it that is safe for dolphins, and the measure rightly denies access to the label to tuna products containing tuna caught by this method.

2. Mexico Fails To Prove that the Record-Keeping and Verification Requirements Are Not Even-Handed

17. Mexico argues that, because the AIDCP mandates certain record-keeping and verification requirements for tuna caught by large purse seine vessels operating inside the ETP and the amended measure does not impose those same requirements on other tuna sold in the U.S. tuna product market, the amended measure is not even-handed. However, the "difference" that Mexico complained of does not stem from U.S. law at all, but from the AIDCP. Mexico argues that its "claim is made in respect of the relevant regulatory distinction in the labelling conditions and requirements of the Amended Tuna Measure, and not the AIDCP." But Mexico provides no reason as to why this is so. The actual record-keeping and verification requirements Mexico complains of are contained in the AIDCP. Thus it cannot be the case that *the amended measure* disadvantages Mexican producers in a manner that could be considered not to be even-handed.

18. Mexico has failed to submit any evidence to support its assertion that the U.S. Government and its citizens have been defrauded on an industry-wide scale by inaccurate labeling over the past two decades. Mexico denies that this aspect of its claim fails for lack of evidence based on its theory of its burden of proof. In Mexico's view, a complainant is not required to prove that this element is not even-handed. Rather, all that is required is for Mexico to assert that: "tuna products containing non-dolphin-safe tuna caught outside the ETP *could*

potentially enter the U.S. market inaccurately labeled as dolphin-safe." But the Appellate Body made clear that nothing in its Article 2.1 analysis alters the traditional notions of burden of proof.

19. Next, Mexico fails to explain how its approach is not inconsistent with the fundamental principle that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'" By contending that the United States must impose AIDCP-equivalent requirements on all its trading partners, Mexico urges this Panel to adopt an approach whereby whatever Mexico commits to in an international agreement, the United States must require of itself and all its other trading partners, irrespective of the science or any other consideration. Mexico's approach is incompatible with the sixth preambular recital and, as such, cannot establish that the amended measure is inconsistent with Article 2.1.

20. Finally, Mexico ignores the history of the AIDCP. The IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage than other Members have agreed to in other fisheries because the ETP *is different*. Nowhere else has a tuna fishery caused the harm to dolphins that large purse seine vessels have caused in the ETP. Accordingly, it is no surprise that tuna caught by large purse seine vessels in the ETP is now subject to different rules than tuna caught elsewhere. The fact that the amended measure requires the AIDCP reference number to be included on the Form 370 is not illegitimate.

3. Mexico Fails To Prove that the Requirement for an Observer Certification Is Not Even-Handed

21. Mexico again fails to establish a *prima facie* case that not imposing AIDCP-equivalent observer coverage on the rest of the world renders the amended measure discriminatory.

22. First, the specific requirements regarding the AIDCP observer program are contained in the AIDCP and related documents. Such requirements are not repeated in U.S. law.

23. Second, Mexico's approach directly contradicts the Appellate Body's findings. The Appellate Body was aware that large purse seine vessels operating in the ETP carry observers while other vessels do not. Indeed, the Appellate Body noted that the Panel did not state that imposing a general observer certification requirement "would be the *only* way for the United States to calibrate its 'dolphin safe' labeling provisions" and noted "that the measure at issue itself contemplates the possibility" of a captain's certification. Consistently, the Appellate Body did not find the aspect regarding observers and captain statements to be not even-handed. Rather, the Appellate Body recognized that the original measure "*fully* addresses the adverse effects on dolphins resulting from setting on dolphins" – both inside and *outside the ETP* – even though a captain statement was the certification required for tuna caught outside the ETP. Mexico now seeks to "appeal" this finding.

24. Third, Mexico contends that captain statements are "inherently unreliable" and that the amended measure is "designed and applied in a manner that creates the likelihood, if not the certainty, that non-conforming tuna will be improperly certified as dolphin safe." But Mexico does not establish a *prima facie* case that the amended measure is inconsistent with Article 2.1 based on mere assertions. Mexico puts forward no evidence that any tuna that is ineligible for the label is being illegally labeled as "dolphin safe."

25. Fourth, Mexico argues that this aspect of the measure is not even-handed because it is "entirely inconsistent with the objective" of the measure. The Appellate Body has never mentioned this inquiry as an element of the analysis in either this dispute or the other two TBT disputes. And the Appellate Body has made clear that analyses are different under TBT Article 2.1 and the chapeau of GATT Article XX. Therefore, this issue is not relevant to the analysis.

26. Fifth, Mexico's argument fails because it: 1) ignores why the AIDCP was agreed to in the first place; 2) ignores the level of current harms occurring due to setting on dolphins; 3) ignores the trade consequences of requiring 100 percent observer coverage; 4) ignores the fundamental principle underlying the TBT Agreement that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*'"; and 5) and requires the United States to impose "a rigid and unbending" observer requirement on all of its trading partners, regardless of whether it is needed in light of harm to dolphins in that particular fishery or feasible given the expense of the program.

II. MEXICO FAILS TO ESTABLISH THAT THE AMENDED MEASURE IS INCONSISTENT WITH ARTICLE I:1 OF THE GATT 1994

27. Mexico relies entirely on the Appellate Body's conclusion in paragraphs 233-235 of its report that the amended measure causes a detrimental impact on Mexican tuna product containing tuna caught by setting on dolphins to prove its Article I:1 claim. The Appellate Body's finding of detrimental impact, as well as the original panel's factual findings that underlie the Appellate Body's conclusion, is limited to the ineligibility for the label of tuna product containing tuna caught by setting on dolphins and the potential eligibility of tuna product containing tuna caught by other methods. Mexico *neither claims nor proves* that any other aspect of the amended measure, including the requirements related to record-keeping/verification and observer coverage, are inconsistent with Article I:1.

28. Mexico has failed to meet its burden of demonstrating that the amended measure is inconsistent with Article I:1. The "advantage" accorded by the U.S. measure is access to the dolphin safe label. Nothing prevents Mexican canneries or Mexican vessels from producing tuna product that would be eligible for the dolphin safe label. Mexico asserts that the Appellate Body has "effectively rejected the line of reasoning" on which the U.S. argument relies. We disagree. The Appellate Body did not reject the original panel's characterization of the U.S. measure but, rather, what it perceived as the original panel's assumption that regulatory distinctions not based on "national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the TBT Agreement." The original panel made no findings under Article I:1, and, therefore, the Panel should now undertake an "objective assessment of the matter."

29. Mexico asserts that "the consequences of the United States' unilateral action" in applying the amended measure "provide further support" for the detrimental impact. This argument fails. First, the DSB recommendations and rulings did not find that the "detrimental impact" is a factor of so-called "unilateral" application. Second, Mexico's characterization of the measure as "intentional[ly] exerting pressure on Mexico to change its tuna fishing practices" is incorrect. The original panel concluded that "nothing prevents Members from using the incentives created by consumer preferences to encourage or discourage particular behaviours that may have an impact on the protection of animal life or health." Third, Mexico's reliance on *US – Shrimp* is

misplaced. Fourth, the DSB recommendations and rulings state that the AIDCP label does not fulfill the objectives of the U.S. measure at the level the United States considers appropriate.

III. MEXICO FAILS TO ESTABLISH THAT THE AMENDED MEASURE IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

30. Similar to its Article I:1 claim, Mexico relies entirely on paragraphs 233-235 of the Appellate Body report to argue that the amended measure provides less favorable treatment to Mexican tuna product, inconsistently with Article III:4. The Appellate Body's findings concerning detrimental impact are limited to the ineligibility for the label of tuna caught by setting on dolphins and the eligibility of tuna caught by other methods. Mexico *neither claims nor proves* that any other aspect of the amended measure are inconsistent with Article III:4.

31. Further, for the reasons discussed above, Mexico fails to prove that the amended measure accords less favorable treatment to Mexican tuna products. Mexico relies heavily on the Appellate Body's statement in *EC – Seal Products* that, under Article III:4, a panel is not "required to examine whether the detrimental impact of a measure . . . stems exclusively from a legitimate regulatory distinction," yet the analogy to this dispute is flawed. Mexico's argument concerning the "unilateral[] design[] and appli[cation]" of the measure is not relevant and fails for reasons discussed above.

IV. THE AMENDED MEASURE IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

A. The Scope of the Analysis

32. Mexico urges the Panel to engage in an inquiry that goes well beyond the scope of the subparagraphs (b) and (g) analyses, as set out by the Appellate Body. Mexico relies exclusively on paragraphs 233-235 of the Appellate Body report when it alleges that the amended measure is inconsistent with Article I:1 and Article III:4, under the theory that the amended measure denies "access" to the label to Mexican tuna caught by setting on dolphins while tuna caught by other means continues to have "access" to the label. It *neither claims nor proves* that any other aspect of the amended measure is GATT-inconsistent. However, in its consideration of subparagraphs (b) and (g), Mexico argues that, because "there are no effective record-keeping, tracking and verification requirements or procedures in relation to tuna caught by fishing vessels outside the ETP," the amended measure does not protect animal health and life for purposes of subparagraph (b), nor "relate to" the conservation of dolphins for purposes of subparagraph (g).

33. This is improper. The Appellate Body has made clear 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." The United States need only justify 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 claims. The portions of Mexico's Article XX response that address the record-keeping/verification and observer requirements are irrelevant to this analysis.

B. The Amended Measure Satisfies the Conditions of Article XX(b)

1. The Amended Dolphin Safe Labelling Measure Has a Sufficient Nexus with an Interest Covered by Article XX(b)

34. The Appellate Body determined that the original measure had two objectives: the "consumer information objective" and the "dolphin protection objective." The amended measure has the same two objectives. The DSB recommendations and rulings demonstrate that there is "a sufficient nexus" between the amended measure's dolphin protection objective and the protection of animal life or health. The original panel found, and the Appellate Body affirmed, that the original measure "relate[d] to genuine concerns in relation to the protection of the life or health of dolphins," and was "intended to protect animal life or health or the environment."

35. Mexico ignores the DSB recommendations and rulings and pursues an unprecedented alternative legal theory, arguing that the amended measure does not pursue an objective that falls within the scope of subparagraph (b) because it *does not contribute* to that objective enough. This theory fails. Mexico's focus on the contribution of the measure improperly collapses the questions of whether the relevant objective falls within the scope of subparagraph (b), and whether the challenged measure is "necessary" to protect animal life and health. The level at which the measure contributes to its objective is not relevant to the former question. Further, Mexico's argument falls outside the scope of this analysis in that the entire argument is grounded in the aspects of the measure that Mexico neither alleges nor proves are GATT-inconsistent.

2. The Amended Dolphin Safe Labelling Measure Is "Necessary" for the Protection of Dolphin Life or Health

36. A necessity analysis involves "a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure." As to the first element, the United States explained that the protection of dolphins is an important objective. Mexico concedes this point.

37. As to the second element, the DSB recommendations and rulings established that the original measure contributed to the dolphin protection objective to a certain extent. The amended measure contributes to this same objective at an even higher level. Mexico disagrees with the findings of the original panel and Appellate Body. Indeed, Mexico appears to go as far as to contend that neither measure – the original one or the amended one – makes *any* contribution to the dolphin protection objective. In the context of an Article 21.5 proceeding, the underlying DSB recommendations and rulings are taken as a given. The Panel should reject Mexico's unfounded "appeal" of the Appellate Body report.

38. As to the trade restrictiveness of the measure, the Appellate Body in this very dispute stated that "trade-restrictiveness" "means something having a limiting effect on trade." Mexico presents three arguments as to why the U.S. measure is "trade-restrictive." None of these relate to the amended measure's trade-restrictiveness: the amended measure does not bar Mexico from selling tuna product in the United States, and, indeed, Mexican non-dolphin safe tuna product continues to be sold in the United States. The arguments regarding the other two aspects of the measure, record-keeping/verification and observers, fall outside the scope of the inquiry as to whether the amended measure qualifies under subparagraph (b), and it is difficult to understand how either aspect has any impact on exports of Mexican tuna product to the United States.

39. Mexico's first alternative measure is not a "genuine alternative." First, Mexico's description of it is so brief and vague that it deprives the United States of the opportunity to evaluate it. Second, the only difference between the amended measure and Mexico's first alternative is that tuna caught by all vessels other than large purse seine vessels operating in the ETP would be subject to AIDCP-equivalent record-keeping/verification and observer requirements. But only those aspects of the challenged measure "that give rise to the finding of inconsistency under the GATT 1994" need be justified under the subparagraphs of Article XX. Third, Mexico has not shown that its alternative is "less WTO-inconsistent" than the amended measure allegedly is. Fourth, Mexico's alternative is not less trade restrictive than the amended measure. Finally, the proposed alternative is not reasonably available. Leaving aside the start-up costs needed to establish such programs, operating the observer coverage piece of Mexico's alternative on an *annual basis* would cost *at the very least hundreds of millions of U.S. dollars, if not in excess of one billion U.S. dollars*. We would further note that given the size of these costs, it would seem likewise impossible for industry to entirely fund the costs of such programs.

40. Mexico's second proposal is for the United States to "allow alternative labeling schemes," including the AIDCP label, "coupled with a requirement to provide consumers detailed information on what the labels mean." This appears to be the same alternative Mexico put forward in the original proceeding for purposes of TBT Article 2.2. The Appellate Body noted that, under Mexico's alternative, tuna caught by setting on dolphins could be eligible for a dolphin safe label, whereas, under the U.S. measure, such tuna was ineligible. Consequently, Mexico's proposal would contribute to dolphin protection "*to a lesser degree*" than the U.S. measure. The Appellate Body's finding on Mexico's Article 2.2 claim is clearly applicable to this alternative. Mexico provides no explanation of how its second proposed alternative measure is consistent with the Appellate Body report and, in fact, it is not.

C. The Amended Measure Satisfies the Standard of Article XX(g)

41. The amended measure satisfies Article XX(g). First, in its first written submission, the United States explained that dolphins are an exhaustible natural resource. Mexico concedes that this is the case.

42. Second, as discussed above, the original panel found, and the Appellate Body affirmed, that the U.S. measure pursues the above-quoted dolphin protection objective, and, in fact, does contribute to that objective. The original panel found, and the Appellate Body affirmed, that the original measure was capable of achieving its dolphin protection objective completely within the ETP and partially outside the ETP. The amended measure goes farther in protecting dolphins by applying a certification mechanism (captain's statement) that was found "capable of achieving" the U.S. objective in the context of setting on dolphins outside the ETP to the certification that no dolphin was killed or seriously injured in catching the tuna.

43. The amended measure also imposes comparable restrictions on domestic and imported products. The amended measure imposes the *same* eligibility conditions and requirements on U.S. vessels and on foreign vessels. Mexico claims that these requirements fall outside the scope of subparagraph (g) because they do not "distribute the burden of conservation between foreign and domestic consumers in an 'even-handed' or balanced manner." But such an approach is incorrect. Under Mexico's approach and in light of its GATT 1994 Articles I:1 and III:4 claims,

subparagraph (g) would be rendered inutile. Mexico also claims that the amended measure "does not impose any real restrictions on the tuna that is harvested by the U.S. fleet outside the ETP." But the Appellate Body has already found that the original measure "fully addresses" the risks caused by the "particularly harmful" practice of setting on dolphins both inside and outside the ETP. The 2013 Final Rule expands the certification system that supported this finding to the risk of death and serious injury outside the ETP.

D. The Amended Measure Is Applied Consistently with the Article XX Chapeau

44. The amended measure is also not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. Under the chapeau, discrimination exists only where "countries in which the same conditions prevail are treated differently." Thus, there are two questions to answer: 1) whether the amended measure provides different regulatory treatment to the products originating from different countries; and 2) whether the "conditions" prevailing in those countries are "the same." Neither is the case here.

45. As the United States has explained, the eligibility condition regarding setting on dolphins is *neutral* as to nationality. This provision has no carve-out whereby the products of certain Members automatically qualify for different regulatory treatment, as was the case in the measures challenged in *Brazil – Retreaded Tyres* and *EC – Seal Products*. Whether tuna product is eligible for the dolphin safe label depends on the choices made by vessel owners, operators, and captains. As the United States noted previously, at the time the DPCIA was originally enacted, U.S.-flagged vessels (as well as many other vessels) operated in the ETP and set on dolphins. The mere 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 provides different regulatory treatment to different countries.

46. Also, the conditions prevailing in the relevant countries are not the same. Because this eligibility condition does not distinguish between Members, or even between fisheries, but between fishing methods, it would appear that the most appropriate "condition" to examine in this analysis is the different harms to dolphins caused by setting on dolphins, on the one hand, and by purse seine (other than setting on dolphins), longline, and pole-and-line fishing, on the other. That comparison is not even close. The science regarding harms to dolphins fully supports the distinction the measure draws between setting on dolphins and other fishing methods. As such, with regard to the protection and conservation of dolphins, the "conditions" prevailing in a Member whose fleet routinely sets on dolphins are *not the same* as those in a Member whose fleet employs the other methods used to produce tuna for the U.S. tuna product market.

47. Mexico also appears to make a separate argument that the alleged difference in the record-keeping/verification and observer requirements also proves that the amended measure discriminates where the conditions are the same. This argument fails. First, Mexico cannot explain why such an argument is relevant to this analysis. Mexico it does not even allege, much less prove, that the record-keeping/verification and observer coverage requirements result in a detrimental impact on Mexican tuna product, which Mexico claims is sufficient to prove the U.S. measure inconsistent with Articles I:1 and III:4. Second, these requirements *stem from the AIDCP*, not U.S. law, and as such, no *genuine relationship* exists between the amended measure and any disadvantage that Mexico perceives its tuna product industry is operating under. Third,

Mexico is wrong that the "conditions," as they relate to these requirements, are the "same." The IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage because the ETP *is different* – nowhere else in the world has tuna fishing caused the harm to dolphins that large purse seine vessels have caused in the ETP.

48. If discrimination is found, one of the "most important factors" in determining whether that discrimination is "arbitrary or unjustifiable" is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX." The denial of eligibility for the label to tuna product containing tuna caught by setting on dolphins is directly related to the dolphin protection objective. As the United States has demonstrated, setting on dolphins is a "particularly harmful" fishing method, and other fishing methods do not cause the same level of harm to dolphins that setting on dolphins does.

49. Indeed, Mexico appears not to focus at all on whether these eligibility conditions are rationally related to the dolphin protection objective. Rather, Mexico's focus appears to be more on the fact that most Mexican-caught tuna, because it is harvested by a large purse seine vessel in the ETP, is subject to AIDCP-mandated record-keeping/verification observer requirements that tuna caught outside the ETP is not subject to. In Mexico's view, this "difference" does not contribute to dolphin protection outside the ETP. First, and as discussed above, Mexico's assertion is contrary to the findings of the DSB that the original measure *did* contribute to dolphin protection outside the ETP, with respect to driftnet fishing and setting on dolphins, and to the Appellate Body's suggestion that captain's statements would provide a suitable certification. Second, to the extent that the record-keeping/verification and observer requirements are relevant to this analysis, which we dispute, we note that the fact that the AIDCP imposes unique requirements that legal regimes covering other fisheries do not replicate is indeed related to the protection and conservation of dolphins.

50. Finally, Mexico asserts that the United States has discriminated arbitrarily and unjustifiably by not working through the AIDCP to "address[] its remaining concerns about dolphins and tuna fishing." Again, Mexico is wrong on the law. As noted previously, a Member may take measures "at the levels that it considers appropriate," and nothing in covered agreements requires a Member to adhere to an international agreement, a point that Article 2.4 of the TBT Agreement confirms.

51. Mexico is also wrong on the facts. The United States *has engaged* in multilateral negotiations with Mexico through the AIDCP process. Further, the United States continued to discuss this issue with Mexico in multiple different fora, including two meetings held in Mexico City in the latter half of 2009. The United States would also note, as mentioned above, that Mexico's reliance on *US – Shrimp* is particularly misplaced. In that dispute, the U.S. measure was initially found not to be justified under Article XX in part because of the "rigid and unbending" nature of the measure. Yet Mexico now claims that the United States must impose "rigid and unbending" record-keeping/verification and observer requirements on all tuna sold as dolphin safe in the U.S. tuna product market, regardless of where or how it was caught, *in order to be justified under Article XX*. Mexico's approach turns *US – Shrimp* upside down.