UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

(WT/DS381)

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Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R
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Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998
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US - Tuna Dolphin I	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 3 September. 1991, unadopted, BISD 39S/155

I. Introduction

1. The U.S. dolphin safe labeling provisions establish origin-neutral conditions under which tuna products may voluntarily be labeled dolphin safe. These conditions ensure that when a dolphin safe label appears on a tuna product that it does not contain tuna that was caught in a manner harmful to dolphins.

2. It is well-documented, and virtually uncontested by Mexico, that setting on dolphins to catch tuna adversely affects dolphins. The practice of setting on dolphins to catch tuna in the Eastern Tropical Pacific Ocean ("ETP") resulted in the death of over five million dolphins before conservation measures were adopted; and although conservation measures have reduced observed dolphin mortalities as a result of that fishing practice to approximately 1200 dolphins per year, the adverse effects of setting on dolphins to catch tuna far exceeds these observed dolphin mortalities. To note only a few of these effects, setting on dolphins to catch tuna results in the death of dependant calves that die of starvation or predation after being separated from their mothers during high-speed chases, acute cardiac and muscle damage caused by the exertion of avoiding or detangling from nets, and failed or impaired reproduction. Further, dolphin populations in the ETP remain depleted and show no clear signs of recovery and the best available science suggests that the most probable reason for this is the practice of setting on dolphins to catch tuna.

3. These well-documented adverse effects lie at the core of why the U.S. provisions condition the labeling of tuna products "dolphin safe" on such products not containing tuna caught by setting on dolphins. In short, tuna caught by setting on dolphins is not safe for dolphins.

4. In this dispute, Mexico argues that the conditions under which tuna products may be labeled dolphin safe – in particular the condition that dolphins were not set upon to catch the tuna – discriminate against Mexican tuna products in breach of Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement. It also argues that these conditions are more trade-restrictive than necessary to fulfill the objective of the U.S. dolphin safe labeling provisions and impermissibly depart from relevant international standards in breach of Articles 2.2 and 2.4 of the TBT Agreement. Mexico's claims are without merit.

5. First, Mexico has not adduced evidence sufficient to demonstrate that the U.S. dolphin safe labeling provisions – which it concedes are origin-neutral on their face – afford less favorable treatment to Mexican tuna products as compared to U.S. tuna products or tuna products of any other country. Critically, Mexico has not established that the U.S. dolphin safe labeling provisions afford any different treatment to imported products based on origin much less different treatment that is less favorable or results in the failure to accord an advantage to Mexican tuna products that is accorded tuna products of other countries. In the absence of such origin-based discrimination, Mexico cannot sustain its claims under Articles I:1 and III:4 of the GATT 1994.

6. Second, the U.S. dolphin safe labeling provisions establish a voluntary labeling scheme. No one is required to label their products as to whether they are dolphin safe or not. Rather, the label is an option that those marketing tuna can choose to use or not. Because the U.S. provisions do not set out labeling requirements with which compliance is mandatory, they do not meet the definition of a technical regulation under the TBT Agreement and, therefore, are not subject to Articles 2.1, 2.2, or 2.4 of the TBT Agreement.

7. Third, even aside from the fact that the U.S. dolphin safe labeling provisions are not technical regulations, they fulfill legitimate objectives that could not be fulfilled if the provisions permitted tuna caught by setting on dolphins to be labeled dolphin safe. Those legitimate objectives are ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins and ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna. Additionally, the "relevant international standards" Mexico relies on to advance its Article 2.4 claim are not in fact relevant international standards within the meaning of Article 2.4 of the TBT Agreement. Therefore, even aside from the fact that they are not considered technical regulations, the U.S. provisions would not breach Articles 2.1, 2.2 or 2.4 of the TBT Agreement.

8. The Panel should accordingly reject Mexico's claims and find that the U.S. dolphin safe labeling provisions are not inconsistent with Articles I:1 or III:4 of the GATT 1994, and are not subject to Article 2 of the TBT. The Panel should accordingly reject Mexico's claims that the U.S. dolphin safe labeling provisions are inconsistent with Articles I:1 or III:4 of the GATT 1994 and Articles 2.1, 2.2 or 2.4 of the TBT Agreement.

II. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with the GATT 1994

A. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with Article III:4 of the GATT 1994[1]

9. In the context of this dispute, Article III:4 of the GATT 1994 requires that imported tuna products shall be accorded treatment no less favorable than that accorded to tuna products of the

[1] As noted in the U.S. response to Question 1, in the context of this dispute it would be appropriate to consider Mexico's claims under Article I:1 and III:4 of the GATT prior to examining its claims under the TBT Agreement. U.S. Answers to the First Set of Questions from the Panel (Question 1), para. 1. In its response to Question 1, Mexico also indicates that it would be appropriate for the Panel to consider its claims under Articles I:1 and III:4 of the GATT 1994 before turning to its claims under Article 2.2 and 2.4 of the TBT Agreement. Mexico Answers to the First Set of Questions from the Panel (Question 1), para. 2. Based on the order and extent to which it has detailed its claims, Mexico also appears to believe that it would be appropriate for the Panel to consider its claims under Articles I:1 and III:4 of the GATT 1994 prior to its claim under Article 2.1 of the TBT Agreement.

United States.[2] The burden is on Mexico as the complaining party to show that the U.S. dolphin safe labeling provisions accord less favorable treatment to imported tuna products than to domestic tuna products. Mexico has failed to meet this burden.

10. To establish its Article III:4 claim, Mexico must first establish that the U.S. dolphin safe labeling provisions accord different treatment to imported and domestic tuna products and that any such different treatment is based on origin. Then, if it establishes that the U.S. provisions accord any different treatment to imported and domestic tuna products, it must establish that the treatment accorded imported tuna products is less favorable than the treatment accorded domestic tuna products. Mexico may establish that the U.S. dolphin safe labeling provisions accord different treatment to imported products based on origin either by demonstrating that the U.S. provisions on their face accord such different treatment or by demonstrating that the U.S. provisions – while origin-neutral on their face – in fact accord such different treatment. As elaborated below, Mexico has not established, either in law or in fact, that U.S. dolphin safe labeling provisions accord different treatment, let alone less favorable treatment, to imported tuna products.

11. First, Mexico has failed to show that the U.S. provisions accord any different treatment to Mexican tuna products than the treatment accorded domestic products. In *Korea – Beef*, the Appellate Body first found that the measures at issue accorded different treatment to imported and like domestic products. Only after answering that threshold question did the Appellate Body then consider whether that different treatment constituted less favorable treatment by analyzing whether that different treatment modified the conditions of competition to the detriment of imported products.[3]

12. Mexico's legal analysis skips the threshold issue of different treatment and jumps immediately to the issue of whether the treatment the U.S. provisions accord alters the conditions of competition to the detriment of imported products. In fact, the U.S. dolphin safe labeling provisions accord the same treatment to Mexican products as they do to domestic products. Without more evidence on the threshold issue, Mexico prematurely identifies the second portion of the Appellate Body analysis in *Korea – Beef* as setting out the legal approach the Panel should take in analyzing Mexico's claim under Article III:4.

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[2] Mexico states that "[t]una products are the relevant like product in this dispute" and Mexico claims as elaborated in its oral statement and answers to questions appears focused on tuna products. Mexico does not appear to be advancing arguments that the U.S. provisions are inconsistent with Articles I:1 and III:4 of the GATT 1994 or Articles 2.1, 2.2 and 2.4 of the TBT Agreement with respect to tuna. Mexico Answers to the First Set of Questions from the Panel (Question 23), para. 41.

[3] *See e.g., Korea – Beef (AB)*, paras. 143-144; *see also* U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 161 n.135 (listing the many reports where panels or the Appellate Boy have found a measure to breach Article III:4 and that in each case found the measure accorded different treatment to imported and like domestic products; citing three reports where no different treatment was found and no Article III:4 breach was found).

13. Second, as elaborated in the U.S. responses to Questions 75, 76 and 77,[4] in order to establish that a measure accords less favorable treatment within the meaning of Article III:4, it must be shown that any different treatment accorded to imported products is based on origin and that any different treatment is less favorable. Simply offering evidence that some imported products are accorded different treatment than some like domestic products is insufficient to support an Article III:4 claim. As elaborated in the U.S. response to Question 75, read in the context of the general principle contained in Article III:1 of the GATT 1994 that internal measures "should not be applied to imported or domestic products so as to afford protection to domestic production," Article III:4 should not be interpreted to prohibit measures that may result in some detrimental effect on imported products as compared to some like domestic products; instead, what Article III:4 prohibits is measures that accord less favorable treatment to imported products as compared to like domestic products based on origin.[5] Measures that do not treat products differently based on origin, and for which the effects resulting from the measure are not a result of the origin of the product, are not measures that accord protection to domestic production.

14. Thus, for example, the panel in *EC – Biotech* found that because Argentina had not "adduced argument and evidence sufficient to raise a presumption that the alleged less favorable treatment is *explained by the foreign origin* of the relevant biotech products," it had not established that the EC had accorded less favorable treatment to imported products than to domestic products.[6] In *Dominican Republic – Cigarettes*, the Appellate Body found that a bond requirement that imposed higher per unit costs on imported products as compared to like domestic products was not inconsistent with Article III:4 since the reason for the higher per unit cost was not based on origin, but rather other factors (imports' versus like domestic products' relative market share).[7]

15. As explained in footnote 139 in the U.S. response to Question 75,[8] Mexico wrongly cites *Dominican Republic – Cigarettes* for the proposition that the "central question" in an Article III:4 dispute is "whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products."[9] Importantly, as the United States explained before addressing the question of whether the measure modified the conditions of competition, the Appellate Body in *Dominican Republic – Cigarettes* looked to see if the measure accorded any different treatment based on origin to imported as compared to like domestic products. The

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[4] U.S. Answers to the First Set of Questions from the Panel (Questions 75-77), paras. 161-173.

[5] U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 163.

[6] *EC – Biotech (Panel)*, paras. 7.2514-7.2515; *see also* U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 164 (discussing *EC – Biotech*).

[7] *Dominican Republic – Cigarettes (AB),* para. 96; *see also* U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 165 (discussing *Dominican Republic – Cigarettes).*

[8] U.S. Answers to the First Set of Questions from the Panel, para. 165 n.139

[9] Mexico First Written Submission, para. 163.

Appellate Body found that on the face of the measure the treatment was the same and, after looking further into various facts cited by the complaining party, reached the same conclusion: the measure did not accord different treatment based on origin.[10]

16. Mexico wrongly cites the GATT panel report in *Belgian Family Allowances* as supporting its position in this dispute. *Belgian Family Allowances* does not stand for the proposition that a Member may not condition a product's access to its market on that product meeting certain conditions. Rather as the panel in *Indonesia – Autos* clarified, *Belgian Family Allowances* stands for the proposition that if conferral of an advantage within the meaning of Article I:1 of the GATT is made conditional on any criteria then those criteria must be related to the imported product itself.[11] In *Belgian Family Allowances*, Belgium conditioned a product's eligibility for a particular tax exemption on whether or not the country from which the product originated maintained a system of family allowances that was consistent with the requirements of Belgian law. This Belgian requirement resulted in imported products from some countries being accorded the tax exemption while imports of like products from other countries were not for reasons wholly unrelated to the imported products themselves.[12]

17. The facts are different in this dispute. In contrast to the situation in *Belgian Family Allowances,* if a tuna product is ineligible to bear a dolphin safe label it is based on criteria directly related to product itself, namely it contains tuna caught by setting on dolphins or in a set in which dolphins were killed or seriously injured. Further, while *Belgian Family Allowances* did not even concern Article III:4, its approach to Article III:2 supports the view that the interpretation of Article III:4 that finds support in WTO panels and the Appellate Body reports is the one set forth above and in previous U.S. submissions to the Panel.

1. Mexico Has Failed to Establish That the Origin-Neutral Conditions Under Which Tuna Products May Be Labeled Dolphin Safe In Fact Accord Different Treatment to Imported Tuna Products

18. In this dispute, Mexico acknowledges that the U.S. dolphin safe labeling provisions do not on their face discriminate based on origin;[13] and instead asserts that the U.S. dolphin safe labeling provisions – while origin-neutral on their face – in fact discriminate against Mexican tuna products by using the manner and place in which tuna is caught to discriminate against Mexican tuna products.[14] To show that the U.S. provisions in fact discriminate against Mexican tuna products based on origin, however, Mexico must establish that what appear to be origin-

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[10] *Dominican Republic – Cigarettes (AB)*, paras. 91-96.

[11] *Indonesia – Autos (Panel)*, paras. 14.143-14.145.

[12] *Belgian– Family Allowances (GATT Panel)*, para. 3.

[13] Mexico First Written Submission, para. 164; Mexico Opening Statement at the First Panel Meeting, para. 33.

[14] *See, e.g.*, Mexico Oral Statement at the First Panel Meeting, para. 33.

neutral criteria for distinguishing among products in fact accord different and less favorable treatment to imported products. Mexico has not produced such evidence.

19. In other disputes where a party has claimed that a facially origin neutral measure in fact discriminates based on origin, the complaining party has presented substantial evidence that what may appear to be origin-neutral criteria in fact single out imports for different treatment. For example, in *Mexico – Soft Drinks*, the panel found that at the time the measure was adopted almost all imports comprised non-cane sugar sweeteners, whereas almost all like domestic products comprised cane sugar. Thus, in applying a 20 percent tax on the use of non-cane sugar sweeteners that it did not impose on the use of cane sugar, Mexico was in practice singling out imported sweeteners for higher taxation.[15]

20. Similar facts supported the panels' and Appellate Body's findings in the Chile and Korea alcohol disputes that the measures in those disputes although origin-neutral on their face in fact used what appeared to be origin-neutral criteria (alcohol content and type of alcohol) to accord different treatment to imported and like domestic products (in those cases different rates of taxation).

- Specifically, in *Chile – Alcohol*, the facts demonstrated that most imported products were subject to the higher tax rate, whereas most domestic products were subject to the lower tax rate.[16]

- Similarly, in *Korea – Alcohol*, the facts demonstrated that the measure operated "in such a way that the lower tax brackets covered almost exclusively domestic production, whereas the higher tax brackets embrace almost exclusively imported products."[17]

21. In other words, the measures allegedly origin-neutral criteria for determining which rate of taxation applied in fact singled out imports for higher taxation. In this dispute, Mexico has not adduced similar evidence to show that the U.S. dolphin safe labeling provisions – although origin neutral on their face – in fact use the manner or the place in which the tuna was caught to single out imports.[18] In fact, as reviewed below, the evidence on the record leads to the opposite conclusion.

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[15] *Mexico – Soft Drinks (Panel)*, paras. 8.148- 8.149.

[16] *See Chile – Alcohol (AB)*, paras. 66-67.

[17] *Korea – Alcohol (AB)*, para. 150.

[18] In the 1991 GATT dispute, the panel reached a similar conclusion in response to Mexico's claim under Article I:1 of the GATT 1947 that the U.S. dolphin safe labeling provisions did not discriminate based on origin. In particular, the panel found that the U.S. dolphin safe labeling provisions "applied to all countries whose vessels fished in the [ETP] and thus did not distinguish between products originating in Mexico and products originating in other countries." *US – Tuna Dolphin 1*, para. 5.43.

(a) The Overwhelming Majority of Tuna Products on the U.S. Market Are Imported and the Vast Majority of Those Products Are Not Caught By Setting on Dolphins

22. The United States imported $538 million worth of fresh and frozen tuna and $613 million worth of canned tuna (i.e., tuna in air-tight containers)[19] in 2009 for a total of nearly of $1.2 billion worth of tuna products.[20] The amount of U.S. imports of tuna products is particularly significant relative to the amount of domestic production. For example, imports of canned tuna comprised 52 percent of the U.S. market for canned tuna products.[21] The remaining 48 percent was domestically produced by U.S. tuna canners. However, two thirds of that domestically produced canned tuna was sourced from foreign vessels.[22] This means that approximately 84 percent of the U.S. market for canned tuna products is accounted for by a combination of imported tuna products and domestic tuna products that contain imported tuna. Of the $1.2 billion of U.S. imports of tuna and tuna products, the vast majority contained tuna that was caught by methods other than setting on dolphins and are eligible to be labeled dolphin safe. For example, of the over 10,000 entries of canned tuna products in 2009, all but 137 entries were dolphin safe.[23]

23. These facts are in stark contrast to the evidence presented in, for example, the *Mexico – Soft Drinks* and *Chile – Alcohol* disputes where almost all imported products comprised non-cane sugar or contained certain alcohol content and were subject to a different (and higher) tax rate than the domestic cane sugar or domestic alcoholic beverages of a lower alcohol content. The facts simply do not exist in this dispute for Mexico to credibly argue, that in conditioning use of a dolphin safe label on tuna products not containing tuna not by caught by setting on dolphins, the U.S. dolphin safe labeling provisions single out, or act as a proxy for, imported products, when the vast majority of imported tuna products satisfy the conditions to be labeled dolphin safe.

(b) Mexican Vessels Use Methods Other Than Setting on Dolphins to Catch Tuna

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[19] The term "canned tuna" is often used to refer to not only tuna in cans but tuna in any air-tight container such as pouches or jars. The import figures provided in this paragraph and in paragraph 15 of the U.S. opening statement for "canned tuna" are for tuna in any air-tight container.

[20] *See* U.S. Imports of Tuna 2009 (all countries), Exhibit US-2. Under the DPCIA, a tuna product is "any food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than three days." U.S. regulations clarify that tuna products include, for example, frozen tuna and tuna loins. DPCIA, 16 U.S.C. 1385(c)(5), Exhibit US-5; 50 CFR 216.3 (indicating that tuna product means any food product processed for retail sale and intended for human or animal consumption that contains an item listed in 50 CFR 216.24(f)(2)(i) or (ii)); 50 CFR 216.24(f)(2), Exhibit US-57; Exhibit US-7 (HS codes for "tuna products); *see also* U.S. First Written Submission, para. 13 n.4.

[21] NMFS, Sources of U.S. Canned Tuna, 1988-2009, Exhibit US-63.

[22] NMFS, U.S. Cannery Receipts, 2009, Exhibit US-55.

[23] NMFS Tuna Tracking & Verification Program Databases, Exhibit US-51.

24. While Mexico asserts that its fleet "almost exclusively" sets on dolphins to catch tuna, this is incorrect. One-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and therefore tuna products that contain tuna caught by these vessels are eligible to be labeled dolphin safe.[24] The remaining two-thirds of Mexico's purse seine fleet also opportunistically uses techniques other than setting on dolphins to catch tuna.[25] In fact during the first meeting with the Panel, Mexico acknowledged that 20 percent of its fleet's catch is caught by techniques other than setting on dolphins.[26] Tuna caught by those vessels using those techniques are also eligible to use the dolphin safe label.

25. Mexico argues that the one-third of its fleet that comprises vessels of 363 metric tons carrying capacity or less account for only five percent or less of the Mexican fleet's total catch.[27] Mexico does not substantiate this figure. The U.S. figure is based on the fact that 19 (i.e., one-third) of Mexico's 47 purse seine vessels registered to fish for tuna in the ETP have a carrying capacity of 363 metric tons or less.[28] Using carrying capacity as a proxy for catch, these vessels comprise nearly 10 percent of the total catch of the Mexican purse seine tuna fleet.[29] Regardless of the precise percentage of Mexican tuna catch accounted for by techniques other than setting on dolphins, the point remains that it is incorrect that Mexican vessels "almost exclusively set on dolphins" to catch tuna.

26. It is also incorrect for Mexico to assert that "vessels [with 363 metric tons carrying capacity or less] are not economically viable."[30] The number of vessels with 363 metric ton carrying capacity or less on the IATTC Active Purse Seine Vessel Register belies Mexico's assertion,[31] as does the fact that up until 2002 tuna caught by Mexican vessels with 363 metric tons carrying capacity or less was contained in Mexican tuna products that were sold as dolphin

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[24] U.S. First Written Submission, paras. 108. These vessels are vessels that have a carrying capacity of 363 metric tons or less and for which the AIDCP prohibits the setting on dolphins to catch tuna. *See id.* para. 45, 91.

[25] U.S. First Written Submission, paras. 68-69.

[26] U.S. Closing Statement at the First Panel Meeting, para. 7.

[27] Mexico Opening Statement at the First Panel Meeting, para. 25; Mexico Answers to the First Set of Questions from the Panel, para. 40.

[28] U.S. Answers to the First Set of Questions from the Panel (Question 23), para. 60; Active Purse Seine Vessel Register, Exhibit US-15.

[29] U.S. Opening Statement at the First Panel Meeting, para. 20; Active Purse Seine Vessel Register, Exhibit US-15.

[30] Mexico Answers to the First Set of Questions from the Panel (Question 24), para. 43. Mexico's assertion that greater reliance on tuna caught by vessels with carrying capacity 363 metric tons or less is not "environmentally sustainable" is also unsubstantiated and assumes that expanded fishing operations by these vessels would be done in contravention of fisheries management measures maintained under the auspices of the Inter-American Tropical Tuna Commission (IATTC).

[31] *See* Active Purse Seine Vessel Register, Exhibit US-15 (showing that there were 70 purse seine vessels of 363 metric ton carrying capacity or less authorized to fish for tuna in the ETP as of April 2010).

safe in the United States.[32] Moreover, as even Mexico admits, it is not only vessels with 363 metric tons carrying capacity or less that are capable of catching tuna using techniques other than setting on dolphins; Mexican vessels with carrying capacity greater than 363 metric tons also use techniques other than setting on dolphins to catch tuna.[33]

27. It is also important to emphasize that Mexican vessels have a choice of whether to set on dolphins to catch tuna or to use other techniques to catch tuna. While Mexico's large purse seine vessels have chosen to set on dolphins to catch tuna, as noted, they could also catch tuna using other techniques and do so in the ETP. For example, in 2009 Ecuador fished for tuna in the ETP using techniques other than setting on dolphins[34] and exported $76 million of canned tuna products to the United States in 2009,[35] $48 million of which contained tuna caught in the ETP.[36]

(c) U.S. Vessels Set on Dolphins to Catch Tuna at the Time the U.S. Dolphin Safe Labeling Provisions Were Enacted

28. At the time the U.S. dolphin safe labeling provisions were enacted, there were 46 U.S. purse seine vessels along with 52 Mexican vessels that fished for tuna in the ETP.[37] Most of the 46 U.S. purse seine vessels authorized to fish for tuna in the ETP that year set on dolphins to catch tuna.[38] U.S. vessels did not fully discontinue the practice until years later, in the mid-1990s.[39] Thus, at that time the U.S. dolphin safe labeling provisions were enacted, tuna products that contained tuna caught by U.S. vessels were not eligible to be labeled dolphin safe. This again points to the conclusion that the U.S. provisions do not use the manner in which tuna is caught as a proxy to single out imports as ineligible to be labeled dolphin safe.

(d) The Fact That Mexican Vessels Fish in the ETP Is Not a Basis to Argue That the U.S. Dolphin Safe Labeling Provisions Accord Different Treatment to Mexican Tuna Products

29. Mexico focuses on the fact that its fleet fishes for tuna in the ETP and therefore that any difference in the conditions for labeling tuna products dolphin safe based on whether it is caught

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[32] U.S. First Written Submission, para. 91; Photo of "Ocean's Best", Exhibit US-72 (showing a can of tuna labeled dolphin safe under the U.S. dolphin labeling provision and marked as a "Product of Mexico").

[33] Mexico Answers to the First Set of Questions from the Panel (Question 23), para. 40.

[34] U.S. Answers to the First Set of Questions from the Panel (Question 17), para. 52; NMFS, Foreign Trade and TTPV databases. In 2010, Ecuador made the choice to fish for tuna in the ETP exclusively using techniques other than setting on dolphins, and has again made this choice for 2011. U.S. Opening Statement at the First Panel Meeting, para. 32; U.S. First Written Submission, para. 40 &n.40.

[35] US Imports of Tuna 2005-2009 (Ecuador), Exhibit US-1C.

[36] NMFS, Foreign Trade and TTPV databases.

[37] U.S. Opening Statement at the First Panel Meeting, para. 20; IATTC, 1990 Annual Report, Exhibit US-54.

[38] U.S. Opening Statement at the First Panel Meeting, para. 20.

[39] U.S. First Written Submission, para. 43.

inside or outside the ETP discriminates against Mexican tuna products.[40] This argument should be rejected.

30. The United States imports significant amounts of tuna products that contain tuna caught in the ETP and are labeled dolphin safe. For example, in 2009 the United States imported $48 million worth of canned tuna products (i.e., tuna in airtight containers) from Ecuador that contained tuna caught using purse seine nets in the ETP. All of these imports were eligible to be labeled dolphin safe.[41] Three other countries also exported tuna products to the United States that contained tuna caught by purse seine vessels in the ETP. Thus, it is likewise not credible to argue that the place where tuna is caught – namely the ETP – acts as a proxy to single out imported tuna products as ineligible to be labeled dolphin safe, when tuna products that contain tuna caught in the ETP are sold as dolphin safe in the United States.

31. Further, tuna caught in the ETP cannot be equated with tuna of Mexican origin. Contrary to Mexico's assertions, the ETP is not a Mexican fishery, but is a geographic region that encompasses a fishery where Mexican vessels fish for tuna along with vessels from many other countries. The Active Purse Seine Vessel Register, which lists all purse seine vessels authorized to fish for tuna in the ETP, includes vessels from Bolivia, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Spain, the United States, Vanuatu, and Venezuela.[42] And depending on how Mexico is defining a fishery, this list could be even longer; for example, if Mexico is using the term fishery to describe the type of fish targeted (e.g. tuna) rather than the type of fish targeted using a particular method (e.g. tuna caught using purse seine nets).[43]

32. Furthermore, the origin of tuna is not determined by where it was caught but the flag of the vessel that caught it.[44] Tuna caught in the ETP could be of Mexican origin or of an origin of any country that has vessels fishing for tuna in the ETP. As noted above, there were 46 U.S. purse seine vessels, of which 31 were full-time, that fished for tuna in the ETP along with 52 Mexican purse seine vessels in the year the statute was enacted in 1990[45]. Therefore, it would be wrong to suggest that the U.S. provisions use the ocean where the tuna was caught as a means to single out Mexican imports for different or less favorable treatment than domestic tuna.

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[40] *See, e.g.,* Mexico First Written Submission, para. 164-165; Mexico Opening Statement at the First Panel Meeting, paras. 26-28.

[41] NMFS Foreign Trade & TTVP databases.

[42] Active Purse Seine Vessel Register, Exhibit US-15.

[43] *See* IATTC Regional Vessel Register, Exhibit US-16.

[44] U.S. Opening Statement at the First Panel Meeting, para. 20.

[45] IATTC, 1990 Annual Report, Exhibit US-54.

(e) There Is No Evidence that the Objectives of the U.S. Dolphin Safe Labeling Provisions Is to Afford Protection to Domestic Production

33. In addition to failing to establish that the U.S. dolphin safe labeling provisions use the conditions under which tuna products may be labeled dolphin safe as a means to single out imports for different and less favorable treatment, Mexico has also failed to establish that the U.S. provisions reflect any intent to afford protection to domestic production of tuna products. As elaborated in the U.S. response to Question 75, Article III:1 of the GATT 1994 provides relevant context for Article III:4 and sets forth that "the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures."[46] Yet, when directly asked by the Panel for any evidence that the U.S. provisions were introduced with the objective of disturbing competition between imported and non-imported tuna or affording protection to U.S. tuna products, Mexico had no evidence to offer.[47] Mexico has also indicated, in response to the Panel's question about the relevance of the panel's finding in *US - Tuna Dolphin I*, that there was no evidence at the time of *de facto* discrimination.[48]

34. Given Mexico's correct position that the starting point for ascertaining the objectives of the U.S. provisions should be the design, structure and characteristics of the provisions,[49] it is difficult to understand how the objectives of the U.S. provisions – discerned based on their design, structure and characteristics – could be different today than they were at the time they were adopted. Further, according to Mexico, the objectives of the U.S. provisions are "protecting dolphins."[50] Thus, even relying on Mexico's own arguments in this dispute, there appears to be no basis to conclude that the U.S. dolphin safe labeling provisions reflect any intent to afford protection to U.S. industry or discriminate against Mexican tuna products.

35. Even setting Mexico's arguments aside, and looking at the design, structure and characteristics of the provisions, this reveals that the U.S. dolphin safe labeling provisions do not reflect any intent to afford protection to domestic production or discriminate against Mexican tuna products. In *Chile – Alcohol* the Appellate Body considered whether there was evidence that Chile's tax measures were applied so as to afford protection to domestic production. The Appellate Body noted that Chile had identified four objectives of its tax measures, yet had failed to explain the relationship between those four objectives and the "architecture, structure and design" of the tax measures which effectively consisted of two tax rates separated by only 4 degrees of alcohol content and applied a higher tax rate to most imported products. The

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[46] *EC – Asbestos (AB)*

[47] Mexico Opening Statement at the First Panel Meeting, para. 30; Mexico Answers to the First Set of Questions from the Panel (Question 20), paras. 36-38.

[48] Mexico Answers to the First Set of Questions from the Panel (Question 71), para. 270.

[49] Mexico Answers to the First Set of Questions from the Panel (Question 64), 213.

[50] Mexico Answers to the First Set of Questions from the Panel (Question 64), para. 214.

Appellate Body concluded that the absence of a clear relationship between the stated objectives of a measure and this structure of the Chilean tax measures confirmed its conclusion, based on the architecture, structure and design of the measures, that the measures were applied so as to afford protection.[51] Similar facts do not exist in this dispute.

36. As the United States has made clear in its previous submissions to the Panel, the objectives of the U.S. dolphin safe labeling provisions are twofold: (1) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and (2) contributing to the protection of dolphins by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna. There is a clear relationship between the objectives of the U.S. dolphin safe labeling provisions and the conditions under which tuna products may be labeled dolphin safe. For example, setting on dolphins to catch tuna adversely affects dolphins, and killing and seriously injuring dolphins when they are set upon to catch tuna, also adversely affects dolphins. Thus, by prohibiting the labeling of tuna products as dolphin safe if they were caught by setting on dolphins or if dolphins were killed or seriously injured in the set, the U.S. provisions fulfill their two objectives.

2. Mexico's Argument That the U.S. Dolphin Safe Labeling Provisions Provide "Different Standards" for U.S. and Mexican Fisheries Should Be Rejected

37. Mexico argues that the U.S. dolphin safe labeling provisions "impose more liberal conditions for use of the labeling standard in all fisheries other than the ETP because, in those fisheries, no certification is required that no dolphin[s] were killed or seriously injured and independent observers are not required."[52] Mexico claims that "at least the same amount or more dolphins are being killed outside the ETP in alternative fishing operations" as inside the ETP as a result of fishing operations there.[53] Mexico further claims that fisheries outside the ETP are "U.S. fisheries" while the ETP is a Mexican fishery[54] and therefore that the different conditions that apply with respect to those fisheries supports its claim that the U.S. provisions discriminate against Mexican tuna products.[55] Mexico's arguments should be rejected.

38. The United States elaborates below three reasons why Mexico's arguments fail.

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[51] *Chile – Alcohol (AB)*, paras. 69-71.

[52] Mexico Opening Statement at the First Panel Meeting, para. 40.

[53] Mexico Opening Statement at the First Panel Meeting, paras. 9, 52-54; Mexico Answers to the First Set of Questions from the Panel (Question 14), para. 12, 16.

[54] Mexico First Written Submission, para. 91; Mexico Answers to the First Set of Questions from the Panel (Question 15), para. 20.

[55] Mexico First Written Submission, para. 91; Mexico Answers to the First Set of Questions from the Panel (Question 15), para. 20.

• First, as elaborated below, to the extent there are any differences in documentation to substantiate dolphin safe claims they are calibrated to the risk that dolphins will be killed or seriously injured when tuna is caught and are not evidence that the U.S. dolphin safe labeling provisions discriminate against Mexican tuna products.

• Second, the so-called available scientific evidence Mexico cites to support its assertion that the extent of dolphin mortality as a result of tuna fishing operations outside the ETP are the same or greater outside the ETP do not in fact support that assertion.

• Third, to the extent Mexico's claim relies on the different standards applied under the U.S. dolphin safe labeling provisions as compared to those under the Marine Mammal Protection Act, such arguments are inapposite. The issue before the Panel is whether the U.S. dolphin safe labeling provisions accord imported tuna products less favorable treatment. As elaborated below, comparing how fisheries are managed under the MMPA as compared to how tuna products may be labeled dolphin safe under the U.S. dolphin safe labeling provisions does not shed light on that issue.

(a) To the Extent There Are Any Differences in Documentation Required to Substantiate Dolphin Safe Claims They Are Calibrated to the Risk that Dolphins Will Be Killed or Seriously Injured

39. As an initial matter, Mexico's argument is not based on an "apples to apples" comparison when it asserts that different standards for labeling tuna products apply with respect to tuna caught inside and outside of the ETP. If tuna is caught anywhere in the world, including the ETP, where there is a regular and significant association between tuna and dolphins, then tuna products containing that tuna may only be labeled dolphin safe if the captain and observer certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught.[56] Thus, to the extent that risk of dolphin mortality or serious injury in tuna fishing operations outside of the ETP are comparable to the risks inside the ETP, the U.S. provisions apply the same standards for labeling tuna products with respect to tuna caught inside and outside the ETP.

40. Further, section 1385(d)(3) provides that if tuna products are labeled with an alternative dolphin safe label, those tuna products may not contain tuna that was caught in a set in which dolphins were killed or seriously injured (and this conditions applies regardless of whether the

[56] DPCIA, 16 U.S.C. 1385(d)(1)(B)(i), Exhibit US-5. In addition, if the tuna is caught outside the ETP using other methods other than purse seine nets in a fishery where there is regular and significant dolphin mortality or serious injury, section 1385(d)(1)(D) provides that tuna products labeled dolphin safe must be backed by certifications by the captain and observer that no dolphins were killed or seriously injured. DPCIA, 16 U.S.C. 1385(d)(1)(D), Exhibit US-5.

tuna was caught inside or outside the ETP).[57] Thus, even in instances where there is no regular and significant association between tuna and dolphins, with respect to use of an alternative dolphin safe label, the U.S. provisions condition use of a dolphin safe on the tuna products not containing tuna caught in a set in which dolphins are killed or seriously injured (as well as the tuna products not containing tuna caught by setting on dolphins per section 1385(d)(1)-(2)).

41. To the extent the risk of dolphin mortality or serious injury is not comparable inside and outside the ETP, Mexico is correct that in a narrow instance the U.S. dolphin safe labeling provisions require different documentation to substantiate dolphin safe claims. Specifically, tuna products that contain tuna caught in a fishery where there is no regular and significant association between tuna and dolphins and no regular and significant dolphin mortality may be labeled with the official dolphin safe label provided dolphins were not set upon to catch the tuna.[58] However, even Mexico acknowledges that where there are different circumstances in one fishery versus another fishery, measures can differ to take into account those differences.[59] In this case, there are clear differences between the ETP and a fishery where there is no regular and significant association between tuna and dolphins and no regular and significant dolphin mortality and these differences account for the different documentation required to substantiate dolphin safe claims on tuna products that contain tuna caught in such a fishery.

42. There are two main differences between the ETP and other oceans. First, in the ETP there is a regular and significant tuna-dolphin association that is commercially exploited on a wide scale commercial basis to catch tuna and for which dolphin mortality and serious injury are a regular, foreseeable and expected consequence of exploiting that association.[60] In other oceans there is no regular and significant tuna-dolphin association much less one that could be exploited in any way comparable to the ETP.[61] There is also no evidence in other oceans that dolphins are regularly and systematically killed in the course of tuna fishing operations.[62] While there are

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[57] DPCIA, 16 U.S.C. 1385(d)(3), Exhibit US-5; U.S. Answers to the First Set of Questions from the Panel (Questions 10- 11), paras. 22, 25.

[58] The difference in documentation at issue concerns whether dolphin safe claims must be backed by an observer's certification that no dolphins were killed or seriously injured. The DPCIA provides that dolphin safe claims on tuna products that contain tuna caught in the ETP by large vessels using purse seine nets must be supported by such a certification in addition to a captain's statement that purse seine nets were not intentionally deployed on or used to encircle dolphins (section 1385(d)(1)(C) and (d)(2)); dolphin safe claims on tuna products that contain tuna caught outside the ETP *in a fishery where there is no regular and significant tuna dolphin association* must be supported by a captain's statement that purse seine nets were not intentionally deployed on or used to encircle dolphins (section 1385(d)(1)(B)(ii)).

[59] Mexico Answers to the First Set of Questions from the Panel (Question 14), para. 12.

[60] U.S. First Written Submission, paras. 38-39; U.S. Answers to the First Set of Questions from the Panel (Question 12), paras. 31-34.

[61] U.S. First Written Submission, para. 38; U.S. Answers to the First Set of Questions from the Panel (Question 39), para. 95; *id.* at Question 12, para. 31.

[62] The evidence Mexico cites does not support the conclusion that there are dolphin deaths in other fisheries comparable to those that have occurred in the ETP purse seine tuna fishery. *See* U.S. First Written Submission, para.

anecdotal reports of tuna-dolphin associations outside the ETP, those reports do not support the conclusion that there are any regular and significant associations between tuna and dolphins outside the ETP; rather those reports indicate that any tuna-dolphin associations outside the ETP are rare, ephemeral and irregular.[63]

43. Second, dolphin populations in the ETP are depleted with abundance levels at less than 30 percent of the levels they were at before the practice of setting on dolphins to catch tuna began. The best available sciences suggests that the most probable reason populations remain depleted and are showing no clear signs of recovery is the practice of setting on dolphins to catch tuna. Outside the ETP, dolphin populations have not been depleted on account of their exploitation to catch tuna and do not remain depleted on account of any such exploitation.

44. Together these differences mean that outside the ETP there is a much lower likelihood that any given dolphin would interact with fishing gear and accidentally be killed or seriously injured. The United States recognizes that in the course of using other fishing methods for tuna outside of the ETP, a dolphin may be killed or seriously injured. But the death of a dolphin in this manner does not represent a systematic exploitation that implicates the health of dolphin populations in those oceans or fisheries. To the extent that unintentional deaths of dolphins in a purse seine fishery other than the ETP or in non-purse seine fishery does indicate a systematic issue, the U.S. provisions contemplate (under section 1385(d)(1)(B)(i) and 1385(d)(1)(D)) that dolphin safe claims on tuna products that contain tuna caught in such fisheries be supported by an observer's statement that no dolphins were killed or seriously injured in the set.

45. In establishing the documentation necessary to substantiate dolphin safe claims, the U.S. dolphin safe labeling provisions balance the lower risk that a dolphin may accidentally be killed or seriously injured when tuna is caught outside the ETP in a fishery where there is no regular and significant tuna-dolphin association and no regular and significant dolphin mortality against the costs that documenting dolphin safe claims would impose. Where the risk that a dolphin may be accidentally killed or seriously injured is very low, the U.S. provisions do not require an observer certification that no dolphins were killed or seriously injured. Balancing the benefits of a measure against its costs is a well-established and accepted approach in connection with the introduction of government measures and one that helps ensure that such measures do not act as unnecessary barriers to trade. [64]

62; *infra* Section II.A.2(b).

[63] U.S. First Written Submission, paras. 38-39; U.S. Answers to the First Set of Questions from the Panel (Question 12), paras. 32-34. As noted in the U.S. response to Question 12, reports of tuna-dolphin associations outside the ETP indicate that (1) there have been instances in which tuna and dolphins or other marine mammals may be captured together outside the ETP and (2) there exist a number of anecdotal reports of unsustained tuna-dolphin associations outside the ETP.

[64] For example, the OECD explicitly encourages regulators within different countries to "estimate the total expected costs and benefits of each regulatory proposal."OECD, OECD Reference Checklist for Regulatory Decision-Making, adopted 5 March 1995, *available at* <www.oecd.org/dataoecd/20/10/35220214.pdf>.

46. In terms of the cost associated with having an observer certify that no dolphins were killed or seriously injured in the set, as Mexico acknowledges, the AIDCP requires observers on 100 percent of tuna fishing trips by large purse seine vessels in the ETP to monitor dolphin mortalities and serious injuries.[65] The parties to the AIDCP – including Mexico – agreed that100 percent observer coverage would be required for that fishery in order to ensure that agreed upon dolphin mortality limits were not exceeded.[66] Thus, contrary to Mexico's assertions, it is not the U.S. dolphin safe labeling provisions that result in additional costs for large purse seine vessels that fish for tuna in the ETP and seek to have tuna they catch used in products that may be labeled dolphin safe. The U.S. provisions simply reflect information that fishing vessels would already have as a result of obligations under the AIDCP. By contrast, if the U.S. provisions were to require an observer certification that no dolphins were killed or seriously injured in the set in which tuna is caught in a fishery outside the ETP, that would impose the additional cost of maintaining 100 percent observer coverage on vessels in that fishery – a fishery where there is no regular and significant tuna-dolphin association and no regular and significant dolphin mortality and for which there is no intergovernmental agreement that such observer coverage would be warranted.[67]

47. Furthermore, Mexico's conclusion that the lack of 100 percent observer coverage in fisheries outside of the ETP means that the risk of dolphin mortality or serious injury is unknown should be rejected. The reason that the AIDCP requires the strict observer coverage for the purse seine tuna fishery in the ETP is because of the unique circumstances of that fishery where the association between tuna and dolphins is commercially exploited on a wide scale and dolphin mortality and serious injury are a regular, foreseeable and expected consequence of purse-seine fishing operations. If there were reason to believe that there was a regular and significant association between tuna and dolphins outside the ETP or regular and significant dolphin mortality in purse seine tuna fisheries outside of the ETP, the relevant regional fisheries management organization would be aware of the issue and it would be addressed. Mexico's analysis "puts the cart before the horse," and would have the United States insist upon a 100 percent observers requirement before there was an indication of a regular and significant tuna-dolphin associations or regular and significant dolphin mortality or serious injury in the fishery. Mexico assumes that it is only the lack of observer coverage that explains the low incidence of dolphin mortalities outside of the ETP. However, the fact that millions of dolphins are being chased and encircled in the ETP each year, is not a revelation that coincided with the advent of observers on purse-seine vessels; rather the observer coverage was a management measure

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[65] AIDCP, Annex II.2, Exhibit MEX-11.

[66] AIDCP, Annex II.13, Exhibit MEX-11.

[67] Conditioning the labeling of tuna products as dolphin safe on an observers statement that no dolphins were killed or seriously injured would require an observer to be on the vessel. In no fishery other than the ETP is there an international dolphin conservation agreement or any other agreement in place whereby parties agree to have observers on 100 percent of fishing trips to document whether dolphins are killed or seriously injured when tuna is caught. This of course reflects the fact that there is no regular and significant association between tuna and dolphins or regular and significant dolphin mortality outside the ETP.

implemented as a result of knowledge about the fishing practice and resulting dolphin conservation problem. Because fishers are not targeting dolphins to catch tuna (or any other fish) in any other ocean besides the ETP, it is improbable that the absence of comprehensive observer coverage outside the ETP is the reason for the low incidence of dolphin mortality outside the ETP.

(b) Dolphin Mortalities Outside the ETP Are Not Comparable to Dolphins Mortalities Injury Outside the ETP

48. Mexico's efforts to equate dolphin mortality inside the ETP with dolphin mortality outside the ETP are not credible.[68] Dolphin mortalities in the ETP are fundamentally different than dolphin mortalities that may occasionally occur in other fisheries anywhere in the world. In the ETP, the intentional exploitation of dolphins to catch tuna not only results in approximately 1200 reported dolphin mortalities per year, but in additional unobserved dolphin mortalities (e.g., due to calves that are separated from their mothers and die of starvation or predation[69]) and reduced reproductive rates that the best available science suggests are responsible for the continued depletion of dolphin populations and their failure to show any clear signs of recovery.[70] These additional dolphin mortalities and reduced reproductive rates, measured by the estimated rate of growth of dolphin populations against the expected rate of growth of dolphin populations, account for 34,000 dolphins per year.[71] This number represents the number of dolphins that would be expected to be added to dolphin populations in the ETP each year if the purse-seine tuna fishery was not having an adverse impact on dolphins beyond observed dolphin mortalities.

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[68] *See, e.g.,* Mexico Opening Statement at the First Panel Meeting, para. 9; Mexico Answers to the First Set of Questions from the Panel (Question 14), paras. 18.

[69] Other harms include acute cardiac and muscle damage cause by the exertion of avoiding or detangling from the nets, cumulative organ damage in released dolphins due to overheating from the chase, compromised immune function and increased predation by predators such as sharks, which can congregate outside the nets and take advantage of exhausted and juvenile dolphins when released. U.S. Answer to the First Set of Questions from the Panel (Question 34), paras. 82-84.

[70] U.S. First Written Submission, paras. 46-50; U.S. Answers to the First Set of Questions from the Panel (Questions 35 and 37), paras. 87-88, 91-92. In its response to Question 32, Mexico cites 1992 National Research Council (NRC) Report as evidence that the pre-fishery abundance estimates for ETP dolphins are unreliable. In fact, the most recent pre-fishery abundance estimates were published in Wade et al. 2007 (Exhibit US-21). Wade and colleagues used several different models to estimate pre-fishery abundance of ETP spinner and spotted dolphins using dolphin mortality estimates and ship-based abundance estimates for the period 1979 - 2000 (published in Gerrodette and Forcada 2005, Exhibit US-22). The results of all models were in general agreement. There is little doubt that northeastern spotted dolphins and eastern spinner dolphins are depleted relative to their pre-fishery abundances. The results of all six models indicated that northeastern offshore spotted dolphins are at less than 30 percent of pre-fishery abundance and that eastern spinner dolphins are at approximately 20 percent of their pre-fishery abundance. It should be noted that the modeling done by Wade et al. represented a significant advancement over methods that had been employed for this purpose at the time of the NRC report. While more recent abundance estimates and reported fishery kills have become available since the Wade et al. paper was published that paper still represents the best information available at this time.

[71] U.S. Answers to the First Set of Questions from the Panel (Question 37), para. 92

Therefore, by adding the observed and unobserved mortality estimates together, dolphin mortality in the ETP is orders of magnitude greater than dolphin mortality anywhere else in the world.

49. Further, the opportunity for dolphins to be killed and seriously injured in the ETP is on a fundamentally different scale than the possibility that dolphins could be killed or seriously injured in any other ocean in the world. In the ETP, dolphins are intentionally exploited on a wide scale, to catch tuna. *Millions* of dolphins are chased and encircled each year to catch tuna in the ETP. On average, each northeastern offshore spotted dolphin is chased 10.6 times per year and captured 3.2 times per year, each eastern spinner dolphin is chased 5.6 times per year and captured 0.7 times per year, and each coastal spotted dolphin is chased 2.0 times per year.[72] In the ETP, of the 26,988 of sets on tuna in 2009, for example, 10,910 (or 40 percent) involved sets on dolphins.[73] In other oceans where there have been interactions between marine mammals and purse seine fishing gear, those interactions occur infrequently when compared to the ETP. In no other ocean in the world is there this scale of routine interaction between marine mammals and the target fish species.

50. The sources Mexico cites in asserting that dolphin mortality occurs in other fisheries do not support its conclusion that at least as many dolphins are killed outside the ETP as in the ETP. The excerpts of the report Mexico cites in its opening statement as "plainly [demonstrating that] dolphins are at risk all over the world, from a variety of different fishing methods"[74] does not support that conclusion.[75] Those excerpts cited by Mexico are based on anecdotal information and from reports from a much earlier period and have not been further substantiated in the intervening time. The estimates of dolphin mortality in the Philippines was based on data from a report from 1994, while the speculation that dolphins were encircled off the coast of West Africa resulting in dolphin mortalities was based on a report from 1991.[76] There has been no substantiation of these claims in the 16 plus years since they were made. Further, the estimates and speculation in these reports do not appear to be supported by a robust scientific method.

51. The reports Mexico cites in paragraph 93 of its First Written Submission and response to Question 15 also do not support its assertions regarding dolphin mortality outside the ETP. As

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[72] U.S. First Written Submission, para. 58.

[73] Tuna and Billfishes in the Eastern Pacific Ocean in 2009, IATTC-81-05, p. 41-42, Exhibit US-75.

[74] Mexico Opening Statement at the First Panel Meeting, paras. 53-54.

[75] Mexico states that this report was commissioned and published by the United States. While Mexico is correct that NOAA commissioned and funded this report, it neither edited it nor endorsed it. The disclaimer to the report states: "Technical Memoranda are used for documentation and timely communication of preliminary results, interim reports, or special-purpose information and have not received complete review, editorial control or detailed editing. NOAA Fisheries commission outside contractors to prepare this report and is publishing it in its entirely. Views or opinions expressed in this report are those of the authors and do not necessarily represent those of NOAA Fisheries."

[76] N. Young, S. Iudicello & MRAG Americas, "Worldwide Bycatch of Cetaceans: Analysis and Action Plan," Report to the NOAA Fisheries Office of International Affairs (30 June 2007), pp. 12-13, 26-27, Exhibit MEX-5.

reviewed in the U.S. response to Question 15, evidence of dolphin mortality in a monkfish fishery would not relevant to Mexico's claims regarding the conditions under which *tuna products* may be labeled dolphin safe, and the evidence Mexico cites regarding the Hawaii deep-set long line fishery is also not relevant as tuna caught in that fishery is sold as fresh fish, not as tuna products.[77] As also noted, the average number of observed interaction between marine mammals (all marine mammals not just dolphins) and the Hawaii deep-set long-line tuna fishery is less than 20 individuals per year from 2004-2008, while Mexico's tuna purse seine fleet in the ETP likely exceeds that number of marine mammal interactions each year during the first set its fleet makes on dolphins.[78]

52. Regarding the "evidence" Mexico cites in response to Question 15, the fisheries referred to there as involving interactions with harbor porpoise are the U.S. Northeast sink gillnet, mid-Atlantic gillnet, Northeast bottom trawl and in the Canadian Bay of Fundy groundfish sink gillnet and herring weir fisheries. None of these fisheries are tuna fisheries of the kind that would supply tuna to tuna products potentially eligible for the U.S. dolphin safe label. Mexico has not explained why evidence of dolphin mortalities in non-tuna fisheries would be relevant to its claims that the conditions under which *tuna products* may be labeled dolphin safe. The additional quotation Mexico cites in its response regarding NMFS' establishment of take reduction teams concern marine mammals and fisheries generally and does provide evidence of dolphins killed or seriously injured in purse seine tuna fisheries.

(c) Comparisons Between the MMPA and the DPCIA Are Inapposite

53. In asserting that the United States applies "different standards" to "U.S. fisheries" as compared to "Mexican fisheries," Mexico relies on a comparison of provisions of the MMPA and the DPCIA.[79] In particular, Mexico argues that "the United States applies a standard for sustainability of marine mammal stocks to its own fisheries that tolerates levels of mortalities, as a percentage of PBR, equivalent to or greater than those of dolphins in the ETP."[80] These assertions are both factually incorrect and legally irrelevant to this dispute.

54. First as reviewed above, the ETP is not a Mexican fishery. It is a region where Mexico along with many other countries including the United States fish for tuna. To the extent the MMPA or DPCIA differentiate between the ETP as compared to other oceans, any such differentiation is based on the risk to marine mammals not whether the ocean is one where U.S. vessels versus vessels of other countries fish.

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[77] U.S. Answers to the First Set of Questions from the Panel (Question 15), paras. 47-48.

[78] U.S. Answers to the First Set of Questions from the Panel (Question 15), para. 48.

[79] Mexico First Written Submission, paras. 91-92; Mexico Answers to the First Set of Questions from the Panel (Questions 14 and 15), paras. 11-31; Mexico First Written Submission, paras. 91-97.

[80] Mexico responses to the Panel's questions, para. 31.

55. Second, the MMPA and the DPCIA are different measures with different purposes. The MMPA is designed to protect marine mammals generally, in part by monitoring (and if necessary for marine mammal conservation, restricting) fisheries over which the United States has jurisdiction. The objectives of the MMPA are broader than the DPCIA's objectives (for example the MMPA seeks to protect marine mammals including dolphins that may be harmed in the course of fishing operations including tuna fishing operations), and reflect a complex balance of statutory and regulatory initiatives designed to accommodate its broad purposes. The DPCIA is a labeling measure, not a general conservation statute or regime to manage fisheries. The U.S. dolphin safe labeling provisions apply to tuna products and specify the conditions under which tuna products may be labeled dolphin safe. The U.S. dolphin safe labeling provisions do not establish thresholds or standards for taking action to protect marine mammals. In any event, they are irrelevant to the treatment the U.S. dolphin safe labeling provisions accord imported and domestic tuna products.

56. Third, much of the information Mexico presents in paragraphs 20-31 of its response to Question 15 is inaccurate, and, more fundamentally, the comparisons made between the fisheries mentioned in those paragraphs and the ETP purse seine tuna fishery are illegitimate. None of the fisheries Mexico mentions in paragraphs 25 through 28 of its responses to the Panels questions is a tuna fishery. For example, one of the Gulf of Maine fisheries discussed in paragraph 25 is a sink gillnet fishery for groundfish that incidentally interacts primarily with harbor porpoise. As we have mentioned, the management of non-tuna fisheries is completely irrelevant to the dispute at hand.[81] Further, marine mammal mortality in the ETP purse seine tuna fishery and the fisheries cited by Mexico as covered by the MMPA are not comparable. All of the examples that Mexico has provided of fisheries where there is marine mammal mortality involved the incidental take of marine mammals. For example, though the accidental entanglement of harbor porpoise in gillnets results in their mortality, harbor porpoise are not intentionally encircled,[82] as are millions of dolphins when set upon to catch tuna in the tuna purse seine fishery in the ETP.

57. In addition, the 2008 GAO report Mexico cites to argue that the United States does not effectively address marine mammal mortality outside of the ETP[83] does not support that conclusion. The United States notes, for example:

- Regarding GAO report findings (which refer to stocks, not fisheries), in the Hawaii longline fishery, the only stock for which the level of mortality in a tuna fishery triggered take reduction team requirements is the false killer whale stock off the coast of Hawaii.

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[81] An important corollary to the point Mexico makes in paragraph 28 of its responses to Question 15 is that any tuna products that contain tuna caught in (non-tuna) fisheries outside the ETP can be labeled dolphin safe, is that any tuna products that contain tuna caught by Mexican vessels in these same fisheries can also be used in tuna products labeled dolphin safe under the U.S. provisions.

[82] Furthermore, harbor porpoise are neither "threatened" nor "depleted" under U.S. law, contrary to Mexico's assertion. Mexico Answers to the First Set of Questions from the Panel (Question 15), para. 26.

[83] *See* Mexico Answers to the First Set of Questions from the Panel (Question 15), para. 27.

NMFS has established a take reduction team for this stock and the Hawaii-based deep-set (tuna target) and shallow-set (swordfish target) longline fisheries.

- The United States has two longline tuna fisheries, the West Coast fishery and the East Coast fishery. Both of these fisheries serve fresh, not canned, tuna market and therefore tuna caught in these fisheries would not be contained in tuna products that would be eligible to bear a dolphin safe label (and are thus irrelevant to this inquiry). Both fisheries have take reduction teams.

- There are three Gulf of Maine fisheries referred to by Mexico in paragraph 25 of its responses to the Panel's questions – Mid-Atlantic gillnet, Northeast sink gillnet, and Northeast bottom trawl. All three of the fisheries mentioned have take reduction teams that address mortality and serious injury of marine mammals in these fisheries. (Though note, as stated above, these are not tuna fisheries.)

Where the United States has jurisdiction to monitor and manage marine mammal mortality outside of the ETP, the United States identifies fisheries where the incidental take levels of marine mammals are elevated and implements significant measures to reduce those mortalities down to the zero mortality rate goal. It should also be noted that it is because of U.S. commitments to implement the AIDCP that the MMPA applies different provisions regarding take of dolphins in the purse seine yellowfin tuna fishery in the ETP as compared to the take of marine mammals in all other fisheries where U.S. vessels fish.[84]

58. Additionally, as stated in the U.S. Answers to the Panel's First Set of Questions, the United States does not "regulate" non-U.S. vessels or high-seas fisheries such as those in the ETP through the dolphin safe labeling measures or otherwise. The United States participates in international efforts to regulate high-seas fisheries through regional fisheries management organizations. Through these organizations members agree upon ways to manage those fisheries and implement those agreements by imposing requirements on their respective vessels through domestic regulations or other domestic administrative procedures.

3. The U.S. Dolphin Safe Labeling Provisions Do Not Modify the Conditions of Competition to the Detriment of Imported Products

59. If it is established that a measure affords different treatment to imported as compared to like domestic products (whether in law or fact), Mexico would then need to show that that different treatment is less favorable by showing that it modifies the conditions of competition to the detriment of imported products. Mexico has not shown, however, that the U.S. measures have so modified the conditions of competition. For example, in examining whether the

[84] *See* Title III of the MMPA, specifically managing the yellowfin tuna fishery of the ETP, and especially section 303 of the MMPA. 16 U.S.C. 1413 (requiring among many other restrictions observers on each vessel and domestic implementation of the International Dolphin Conservation Program).

different treatment afforded imported and like domestic products, the Appellate Body in *Korea – Beef* concluded that because the Korean measure itself imposed on retailers the "necessity of making a choice" between selling domestic and imported beef, it limited the marketing opportunities for imported beef, and thereby modified the conditions of competition to the detriment of this product. The Appellate Body made the point that where it is the decision of private actors rather than the governmental measure that results in the segregation of imported and domestic like products, this would not be a breach of Article III:4 of the GATT 1994. The Appellate Body stated:

> We are not holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.[85]

60. In this dispute, the U.S. dolphin safe labeling provisions do not limit the marketing opportunities for imported tuna products. As an initial matter, approximately 84 percent of the U.S. market for canned tuna (i.e., tuna in air-tight containers) is accounted for by a combination of imported tuna products and domestic tuna products that contain imported tuna.[86] It is difficult to understand how in light of the substantial market share of imported tuna products Mexico can argue that the U.S. provision have limited marketing opportunities for imported tuna products.

61. Further, the U.S. provisions do not impose any choice on marketers of tuna products in terms of selling tuna products in the United States. Marketers are free to, and do, sell tuna products that are not dolphin safe. Mexico has not identified anything in the U.S. dolphin safe labeling provisions that limit the marketing of tuna products that are not dolphin safe or are not labeled dolphin safe. Mexico is correct that purchasers of tuna products in the United States have a preference for tuna products that are dolphin safe.[87] However, in line with *Korea – Beef*, the actions of private actors (in this case, their preference for tuna products that are dolphin safe) cannot form the basis for concluding that the U.S. dolphin safe labeling provisions modify the conditions under which imported and domestic products compete. The limited demand for non-dolphin safe tuna products is a result of retailer and consumer preferences for dolphin safe tuna products, not the U.S. dolphin safe labeling provisions.

62. Mexico offers several arguments that purport to show the dolphin safe labeling provisions modify the conditions of competition to the detriment of Mexican tuna products:

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[85] *Korea – Beef (AB)*, para. 149.

[86] *See supra* Section II.A.1(a).

[87] *See, e.g.,* Mexico First Written Submission, para. 165; U.S. Answers to the First Set of Questions from the Panel (Question 40), paras. 97.

- Mexico suggests that its proximity to the ETP gives it a competitive advantage relative to the United States and other countries in terms of fishing for tuna by setting on dolphins.[88] But other countries, including the United States, are similarly close to the ETP, including those areas of the ETP where setting on dolphins to catch tuna occurs.[89]

- Mexico states that it would have to travel outside of its "traditional fishing grounds" to catch tuna in a manner other than in association with dolphins. But evidence submitted by Mexico in its own Exhibit 65A shows that there is already a significant amount of purse seine fishing by means other than by intentionally setting on dolphins that can and does occur very close to the coast of Mexico and which is being used to catch yellowfin tuna along with other species of tuna.[90] Mexico would not have to travel long distances, change its target species, or significantly alter the duration of its trips in order to seize the opportunity to fish without setting on dolphins in its own backyard. Mexico has not substantiated its assertion that switching fishing techniques would involve "considerable financial and other costs," particularly in light of the fact that the same boats and fishing gear that is used to catch tuna by setting on dolphins can be used to catch tuna using other techniques.

- Mexico suggests that it would be costly for Mexican vessels to catch tuna using methods other than setting on dolphins, although we note that Mexico is not arguing that its fleet is incapable of doing so. The possibility that Mexico's fleet may incur some costs to switch from setting on dolphins to using other techniques to catch tuna, however, is not evidence that the U.S. provisions accord less favorable treatment to Mexican tuna products. To the extent there are costs associated with adopting alternative techniques to catch tuna those would not be unique to Mexican vessels. They would be borne by any vessel that adopted alternative techniques, including the U.S. fleet when it abandoned setting on dolphins to catch tuna after enactment of the dolphin safe labeling provisions. Furthermore, producers often must shoulder additional costs in conjunction with compliance with a government measure, and those costs may be higher for some producers than others depending on a number of factors (e.g., size, location or business model). Mexico cannot simply claim that its fishing vessels may incur some costs to adopt fishing practices to catch tuna in a manner that does not adversely affect dolphins as evidence the U.S.

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[88] *See* Mexico First Written Submission, para. 165-167.

[89] U.S. First Written Submission, para. 68; Active Purse Seine Vessel Register, Exhibit US-15.

[90] In Exhibit MEX-65A, Figure A-1a shows that, for example, that there are many sets by on unassociated schools of yellowfin tuna (indicated by the green portions in circles) that were made near the Mexican coast from 2004-2008. In several cases, the proportion of yellowfin tuna caught by this method was much greater than that caught by setting on dolphins. Thus, Mexico would not have to go far from its coast to fish for yellowfin tuna by methods other than setting on dolphins. Figure A-2a shows catches of skipjack tuna 1998-2007 and that catches of skipjack occurred near the Mexican coast. Furthermore, Exhibit MEX-65B shows that Mexico is already traveling a significant distance to do much of its purse seine tuna fishing in the ETP, and to the extent that its fleets chose to go farther South to fish for tuna by other means than in by setting on dolphins, the distance its fleet would travel South appears to be no further than the distance it already travels West to set on dolphins.

measures are consistent with Article III:4. Mexico must demonstrate that the measures treat imported tuna products differently than domestic tuna products, and that different treatment accords less favorable treatment to imported products as compared to domestic tuna products.

- Mexico states that if its vessels were to expand its fishing for yellowfin tuna in a manner other than by setting on dolphins, they would catch juvenile tuna rather than the mature tuna it currently catches. Mexico argues that catching juvenile tuna would eventually exhaust the tuna stocks and is therefore commercially unsustainable.[91] However, this argument assumes that expanded fishing operations by these vessels would be done in contravention of fisheries management measures maintained under the auspices of the multilateral IATTC. The IATTC is responsible for monitoring and maintaining the tuna stocks in the ETP, and has policies and procedures to address the scenario of overfishing that Mexico envisions might occur.

- Mexico asserts that the U.S. dolphin safe labeling provisions benefit U.S. producers because they "exclude[] Mexican brands from competing in the U.S. market" and allow U.S. canneries to "avoid having to ensure that tuna they purchase from non-ETP sources was captured without killing or seriously injuring dolphins."[92] There is no basis for Mexico's assertion. First, the U.S. provisions do not exclude Mexican brand tuna products from the U.S. market. In fact, the United States imported $13 million of tuna and tuna products in 2009, $7.5 of which was canned tuna products.[93] Second, U.S. canneries use an alternative dolphin safe label on their tuna products and are therefore subject to the condition in section 1385(d)(3) that tuna labeled dolphin safe must not contain tuna caught in a set in which dolphins were killed or seriously injured.[94] Third, as Mexico acknowledges, U.S. canneries do not own their own fishing fleet and purchase significant amounts of tuna from foreign fishing fleets.[95] Any cost associated with documenting whether dolphins were killed or seriously injured when tuna was caught would be borne by the fishing vessels from which U.S. canneries purchase tuna, not the U.S. canneries; therefore there is no benefit to U.S. canneries of avoiding having to ensure that the tuna they purchase is not caught in a set in which dolphins were killed or seriously injured.[96] Fourth, the real reason U.S. canneries supported the DPCIA was

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[91] Mexico's Responses to the Panel's questions, para. 84.

[92] Mexico Answers to the First Set of Questions from the Panel (Question 43), para. 109.

[93] U.S. Imports of Tuna, Exhibit US-1G.

[94] DPCIA, 16 U.S.C. 1385(d)(3), Exhibit US-5.

[95] Mexico Answers to the First Set of Questions from the Panel (Question 43), para. 106.

[96] Mexico wrongly attributes the existence of tuna production in American Samoa and the reduction of tuna processing in California as evidence of the U.S. tuna processing industry's support of the DPCIA as a method to shut out Mexican imports. The tuna canneries in American Samoa did not open in response to any migration of the U.S. tuna fishing fleet in the 1980s or 1990s. The first cannery opened in American Samoa in 1954, and since that time tuna production has been the territory's primary industry. Furthermore, the closure of canneries in Terminal Island,

because consumers were concerned about dolphins being harmed when tuna was caught and wanted assurances that tuna products did not contain tuna that was caught in a manner harmful to dolphins; without such assurances some consumers were boycotting the purchase of tuna products all together.

63. Mexico argues that the Panel should ignore evidence that there was no change in the relative competitive conditions at the time the legislation was enacted, and instead focus on the result of Mexico's choices made after the measures were in effect.[97] The treatment accorded to Mexican tuna products now is the same treatment accorded Mexican tuna products at the time the DPCIA was enacted in 1990. It is also the same treatment that was and is accorded to products of the United States and other countries. The question is not whether Mexico is currently taking advantage of the available competitive opportunities available, but whether the U.S. provisions changed the conditions of competition to the detriment of imported products.

64. Contrary to Mexico's assertion,[98] when the DPCIA was enacted, the United States had 46 U.S. purse seine vessels that fished for tuna in the ETP of which 31 were doing so full-time.[99] Both Mexican and U.S. vessels fished in the ETP by setting on dolphins at the time. Both Mexican and U.S. tuna products needed to meet the conditions of the DPCIA if they wanted to take advantage of labeling tuna products dolphin safe in the U.S. market. Therefore, to the extent that the conditions of competition were altered by the U.S. dolphin safe labeling provisions, they were not changed to the detriment of imports. Instead, the U.S. provisions established conditions for labeling tuna products dolphin safe that allow imported and domestic tuna products the same opportunities to compete in the U.S. market.

65. In sum, the U.S. dolphin safe labeling provisions accord no less favorable treatment to Mexican tuna or tuna products than that accorded to tuna and tuna products of the United States. Therefore, the U.S. provisions are not inconsistent with Article III:4 of the GATT 1994.

B. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with Article I:1 of the GATT 1994

66. Mexico has also failed to establish that the U.S. dolphin safe labeling provisions are inconsistent with Article I:1 of the GATT 1994. Article I:1 of the GATT 1994 requires Members to accord any advantage granted to products originating in any Member's territory immediately and unconditionally to like products originating in all other Members' territories. Analyzing whether a measure complies with this obligation thus involves among other things consideration

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CA and San Diego, CA in the early 1980's were driven by labor and port costs, not by the location of the U.S. fishing fleet.

[97] *See* Mexico Answers to the First Set of Questions from the Panel (Question 19), para. 34.

[98] Mexico Answers to the First Set of Questions from the Panel (Question 19), para. 34.

[99] See U.S. Purse Seine Vessels Participating in the ETP, Exhibit US-13 (represents vessels that fish for tuna full time); IATTC, 1990 Annual Report, Exhibit US-54 (represents vessels that fish for tuna full or part time).

of (1) whether the measure accords an advantage to products originating in any Member and (2) whether that advantage is accorded immediately and unconditionally to products originating in any other Member.[100] As elaborated below, in this dispute, Mexico both wrongly identifies the advantage at issue in this dispute and fails to establish that the U.S. dolphin safe labeling provisions accord an advantage to imported tuna products of other countries that they fail to accord to imported tuna products of Mexico.

1. The Findings of the Panel in *US – Tuna Dolphin I* Remain Relevant Today

67. As pointed out in the U.S. First Written Submission, the issue of whether the U.S. provisions fail to accord such an advantage was heard and decided two decades ago when a 1991 panel under the GATT 1947 rejected Mexico's claims that the U.S. dolphin safe labeling provisions were inconsistent with Article I:1 of the GATT 1993. In particular, the panel found:

> According to the information presented to the Panel, the harvesting of tuna by intentionally encircling dolphins with purse-seine nets was practised only in the ETP because of the particular nature of the association between dolphins and tuna observed only in that area. By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus the U.S. provisions "applied to all countries whose vessels fished in the [ETP] and thus did not distinguish between products originating in Mexico and products originating in other countries."[101]

68. Mexico states that circumstances are different now than at the time the panel in *US - Tuna Dolphin I* considered the issue because there was an embargo on imports of certain yellowfin tuna including from Mexico and therefore that panel's analysis is not relevant.[102] Mexico is incorrect. The panel in *US - Tuna Dolphin I* made clear that it was examining separately the issues of (1) "the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico imposed by the United States and the provisions of the MMPA on which it is based" [that is, the embargo] and (2) "the application to tuna and tuna products from Mexico

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[100] As stated in the U.S. response to Question 83, in examining a claim under Article I:1 of the GATT 1994 panels and the Appellate Body have not used a conditions of competition analysis like they have done in examining claims of less favorable treatment under Article III:4 of the GATT 1994. U.S. Answers to the First Set of Questions from the Panel (Question 83), para. 178.

[101] *US – Tuna Dolphin 1*, para. 5.43 (emphasis added).

[102] Mexico's Response to the Panel's Questions, paras. 34, 269-271.

of the labelling provisions of the DPCIA, as well as these provisions as such."[103] The panel's analysis of the labeling provisions was not dependent on whether the embargo existed.

69. Further, Mexico is wrong that at the time *US – Tuna Dolphin I* "there was no factual basis upon which to assess the effects of the dolphin safe labeling provisions."[104] Mexico confuses the effect of the measure – i.e., how it operates and whether it fails to accord an advantage to imports of Mexican tuna products – with the effects of the measure on trade flows. The panel in that dispute devoted considerable effort to considering how the U.S. dolphin safe labeling provisions operated and whether they accorded an advantage to imported tuna products of other countries that they did not also accord imported tuna products of Mexico. It was not relevant to the panel's analysis that the United States had already enacted certain requirements for the U.S. fleet and had embargoed certain imports of yellowfin tuna at the time the labeling provisions went into effect.[105] Instead it was how the measure operated and whether it failed to accord an advantage to imported products, not trade flows, that was relevant to the panel's finding that the U.S. dolphin safe labeling provisions were not inconsistent with Article I:1 of the GATT 1994.[106]

70. Mexico appears to believe such an approach is also appropriate in the context of this dispute noting that "from the perspective of the legal and factual thresholds for Mexico's claims, the volume of trade in tuna products between Mexico and the United States is not relevant."[107] It is difficult to understand then why the volume of Mexican imports of tuna products at the time of *US – Tuna Dolphin I* as compared to the present would render the findings of the panel in *US – Tuna Dolphin I* irrelevant to this dispute.

71. Additionally, though the DPCIA was amended in 1997, the condition that tuna products may not be labeled dolphin safe if they contain tuna caught by setting on dolphins is the same as it was when the statue was enacted in 1990. Thus, the Panel in this dispute is presented with the same question as the one in *US – Tuna Dolphin I* : whether the U.S. dolphin safe labeling provisions fail to accord an advantage to Mexican tuna products that they accord imported tuna products of other countries. The legal and factual conclusions of the panel in *US – Tuna Dolphin I* were well reasoned and sound, and nothing in the intervening time has changed to support a different conclusion.

2. Mexico Wrongly Identifies the Advantage at Issue

72. Mexico wrongly identifies the "advantage" at issue in this dispute. Mexico appears to believe that the advantage Mexican products are being denied is the right to carry the dolphin safe label. That is incorrect. No product (whether of the United States or any other Member) is

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[103] *United States – Tuna Dolphin I*, para. 5.7.

[104] Mexico Answers to the First Set of Questions from the Panel (Question 71), para. 270.

[105] Mexico Answers to the First Set of Questions from the Panel (Question 71), paras. 269-271.

[106] *US – Tuna Dolphin I,* para. 5.43.

[107] Mexico Answers to the First Set of Questions from the Panel (Question 23), para. 39.

entitled unconditionally to be labeled dolphin safe under U.S. law. Rather, as noted in paragraph 123 of the U.S. First Written Submission, the advantage at issue in this dispute is the opportunity under U.S. law to label tuna dolphin safe if certain conditions are met, in particular that dolphins were not set upon to catch the tuna and no dolphins were killed or seriously injured in the set. Further, in analyzing the questions of whether the U.S. provisions confer an "advantage" within the meaning of Article I:1, the panel in *US - Tuna Dolphin I* stated that "[a]ny advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the 'dolphin safe' label."[108]

3. Misinterprets Article I:1 of the GATT

73. Based on the arguments it advances in connection with its Article I:1 claim, Mexico appears to believe that a measure may be found inconsistent with Article I:1 of the GATT 1994 simply by virtue of the fact that imported products from some countries qualify for an advantage while others do not. This is not a correct reading of Article I:1 of the GATT 1994. As prior reports have expressed, whether conditions attached to an advantage granted by a measure are inconsistent with Article I:1 depends upon whether or not such conditions discriminate with respect to the origin of products.[109] Conditions that are origin-neutral are not inconsistent with the obligation in Article I:1 that any advantage granted to imported products originating in any Member shall immediately and unconditionally be granted to like products originating in any other Member.

74. Thus, the panel in *Canada – Autos* found:

> The word "unconditionally" in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country. The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord "unconditionally" to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.
>
> In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded "unconditionally" to the like product of all other Members. An advantage can be granted subject to conditions without necessarily

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[108] *US – Tuna Dolphin I*, paras 5.42-5.43.

[109] *Canada – Autos (Panel)*, para. 10.29.

> implying that it is not accorded "unconditionally" to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products."[110]

The *Colombia – Ports* panel reiterated the view expressed in *Canada – Autos* that conditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 when such conditions discriminate with respect to the origin of products[111].

75. The advantage granted by the U.S. dolphin safe labeling provisions is the opportunity to use the dolphin safe label if the conditions on use of the dolphin safe label, which concern the manner in which the tuna was caught, are met. Following the reasoning of the panels in *Colombia – Ports* and *Canada – Autos*, Mexico would therefore have to prove that this advantage, while conferred to tuna products of other nations, is not so conferred immediately and unconditionally to Mexican tuna products based on origin.

76. As elaborated below, Mexico has not met this burden. The U.S. dolphin safe labeling provisions are origin neutral and do not accord any advantage to products of any other Member that is not also immediately and unconditionally accorded to products of Mexico.

4. The U.S. Dolphin Safe Labeling Provisions Do Not Fail to Accord an Advantage to Mexican Tuna Products That Is Accorded to Tuna Products of Other Members

77. Mexico argues the U.S. dolphin safe labeling provisions, while origin neutral on their face, in practice discriminate against Mexican tuna products as compared to imports from other countries. Yet, Mexico has not put forth evidence sufficient to substantiate its claim. In particular, Mexico has not established that the conditions the U.S. provisions establish for labeling tuna products dolphin safe – which Mexico acknowledges are origin neutral on their face[112] – in fact act as a proxy to single out imports from some countries over others as eligible to be labeled dolphin safe. To the contrary, the information on record in this dispute demonstrates that the U.S. provisions do not fail to accord an advantage to Mexican tuna products that they accord to imported tuna products originating in other countries.

78. As reviewed in connection with Mexico's claims under Article III:4 of the GATT 1994, one-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and the remaining two-thirds of Mexico's fleet also opportunistically uses techniques other than setting on dolphins to catch tuna. As Mexico acknowledged during the first meeting with the Panel, approximately 20 percent of Mexican tuna catch is caught by

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[110] *Canada – Autos (Panel)*, paras. 10.23-10.24.

[111] *Colombia – Ports (Panel)*, para. 7.366.

[112] Mexico First Written Submission, para. 185.

techniques other than setting on dolphins. Additionally, the technique of setting on dolphins to catch tuna is not unique to the Mexican fishing fleet.[113] The fishing fleets of Colombia, El Salvador, Guatemala, Nicaragua, Panama, and Venezuela also have vessels that set on dolphins, among other techniques, to catch tuna in the ETP. Setting on dolphins was a technique used by U.S. vessels at the time the U.S. provisions were adopted. In addition, vessels of the United States and other countries that do not currently set on dolphins to catch tuna could choose to do so in the future, but like Mexican tuna products that contain tuna caught in that manner, could not be labeled dolphin safe. These facts are evidence that U.S. provisions do not use the manner in which the tuna was caught as a proxy to distinguish between tuna products that are eligible to be labeled dolphin safe and those that are not based on origin. It is the manner in which the tuna was caught not origin that determines whether tuna products containing it may be labeled dolphin safe.

79. Further, nothing prevents Mexico's fleet from expanding its use of techniques other than setting on dolphins to catch tuna, including on account of the costs as noted in Section II.A.3. For example, Ecuador's fleet made the choice in 2010 to catch tuna in the ETP exclusively using techniques other than setting on dolphins, and for years has been using those other techniques to catch tuna and exporting that tuna products to the United States that are labeled dolphin safe. As noted above,[114] Ecuador exported $76 million of canned tuna products to the United States in 2009, $48 million of which contained tuna caught in the ETP. There is no reason Mexican vessels could not make a similar choice.

80. To the extent Mexico relies on it the same arguments it made in the Article III:4 context to prove that the U.S. labeling provisions discriminate against Mexican, because they call for different documentation to substantiate dolphin safe claims on tuna products that contain tuna that was caught in a fishery where there is no regular and significant tuna-dolphin association and no regular and significant dolphin mortality as compared to tuna products that contain tuna caught in a fishery where there is such an association or regular and significant dolphin mortality, those arguments are without merit for the same reasons as discussed in Section II.A.2(a).

81. As in the case with Mexico's argument under Article III:4, Mexico's argument that the U.S. provisions discriminate against Mexican tuna products because the Mexican fleets primarily fish for tuna in the ETP should likewise be rejected in the context of Mexico's Article I:1 claim. As reviewed in Section II.A.1(d), the U.S. dolphin safe labeling provisions equally prohibit the labeling of tuna products dolphin safe if they contain tuna caught by setting on dolphins outside the ETP; the location in which the tuna was caught does not change this. It also does not change the origin of the tuna since origin is determined by the flag of the vessel that caught the tuna, or where it is processed.[115] Moreover, Mexico is wrong to suggest that the ETP is a "Mexican fishery." Mexico is not the only country to have vessels that fish for tuna in the ETP. Bolivia,

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[113] *See* Section III.A.1(d).

[114] *See* Section II.A.1(b).

[115] *See* Exhibit Mex-51; Exhibit US-54.

Colombia, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, Spain, the United States, Vanuatu and Venezuela also have purse seine vessels that fish for tuna in the ETP.[116]

82. Thus, it is not the case that conditioning use of the dolphin safe label on the fishing technique used is a proxy for according imports from some countries an advantage that is not accorded to imports from Mexico. Tuna caught by Mexican vessels can be, and is, caught using techniques other than setting on dolphins and thus tuna products containing it are eligible to be labeled dolphin safe under the U.S. provisions.[117] Conversely, tuna originating in other countries can be, and is, caught by setting on dolphins[118] and thus tuna products containing it are ineligible to be labeled dolphin safe under the U.S. provisions. This only highlights that it is the fishing technique used and whether dolphins were killed or seriously injured when the tuna was caught that determines whether tuna products may be labeled dolphin safe. The origin of the tuna product, or the tuna in that product, is not a factor, either in law or fact.

83. In this connection, it may be helpful for the panel to consider another dispute where complainants argued that a measure that was origin neutral on its face in practice discriminated against imports from certain countries as compared to others. In *Canada – Autos*, for example, the Panel found that limiting eligibility for an import duty exemption to certain importers in practice discriminated against imports originating in certain countries and therefore breached Article I:1 of the GATT 1994. In that dispute, the facts demonstrated that importers of automotive products only imported automotive products from countries where the importer's parent company or an affiliate of the importer was located.[119] Thus, limiting eligibility for the import duty exemption to only certain importers had the effect of limiting eligibility for the import duty exemption to imports from only certain countries. Importantly, in that dispute, there was nothing that exporters of automotive products whose products did not benefit from the import duty exemption could do to qualify.[120]

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[116] Active Purse Seine Vessel Register, Exhibit US-15.

[117] As of April 13, 2010, 19 of the 57 Mexican purse seine vessels listed on the IATTC Regional Vessel Register are vessel class five or smaller (less than 363 metric ton capacity), which means that they cannot make dolphin sets and that all of the tuna they harvest therefore meet the conditions under the U.S. dolphin safe labeling provisions to be labeled dolphin safe. IATTC Active Purse Seine Register, Exhibit US-15. Furthermore, at the first substantive meeting of the parties, Mexico stated that approximately 20 percent of the tuna caught by the Mexican fleet was harvested in unassociated sets or means other than setting on dolphins. *See also* Mexico Responses to the Panel's Questions, para. 43.

[118] In accordance with the AIDCP, vessel owners that choose to set on dolphins to catch tuna in the ETP must apply for and be granted a "dolphin mortality limit" or DML each year in order to fish for tuna in the ETP by setting on dolphins. In 2010, Colombia, Guatemala, Mexico, Nicaragua, Panama, El Salvador, and Venezuela requested DMLs to allocate to their fleets. IATTC 2010 DML Allocation, Exhibit US-50.

[119] *Canada – Autos (Panel)*, para. 10.43.

[120] *Canada – Autos (Panel)*, paras. 10.45-10.46.

84. In this case, unlike in *Canada – Autos*, limiting use of the dolphin safe label to tuna products that do not contain tuna that was caught by setting on dolphins or in a set in which dolphins were killed or seriously injured does not have the effect of limiting eligibility to use the dolphin safe label to imports originating in only certain countries. It is not the origin of the product, but whether that product was caught in a manner that adversely affected dolphins that determines eligibility to use the dolphin safe label. In contrast to the situation in *Canada – Autos*, Mexican fishing vessels can choose to meet the conditions that would make products containing their tuna eligible for the dolphin safe label. The fact that a significant portion of Mexico's fleet has chosen not to do so, cannot be attributed to the U.S. provisions or any failure of those provisions to accord Mexican tuna products an advantage they accord to like products originating in other countries.

85. Mexico's arguments that it would be costly for Mexican vessels to adopt alternative fishing techniques should be rejected for the same reasons as they should be under Mexico's Article III:4 claim.[121] For example, evidence submitted by Mexico in its own Exhibit 65A shows that there is already a significant amount of purse seine fishing by means other than by intentionally setting on dolphin that can and does occur very close to the coast of Mexico to catch yellowfin tuna among other species of tuna. Mexico would not have to travel long distances, change its target species, or significantly alter the duration of its trips in order to seize the opportunity to fish without setting on dolphins in its own backyard. Further, the same boats and fishing gear can be used to catch tuna using alternative techniques as are used to catch tuna by setting on dolphins.

86. In sum, the U.S. measures do not accord an advantage, favour, or privilege to tuna or tuna products originating in any other country that is not also accorded to Mexico. Therefore, the U.S. provisions are not inconsistent with Article I:1 of the GATT 1994.

III. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with the TBT Agreement

87. In addition to its claims under the GATT 1994, Mexico asserts that the U.S. dolphin safe labeling provisions are inconsistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement. As reviewed in previous U.S. submissions and elaborated below, the U.S. dolphin safe labeling provisions are not technical regulations. Therefore, they are not subject to Article 2 of the TBT Agreement – which applies to technical regulations – and cannot be found inconsistent with Article 2.1, 2.2 or 2.4 of the TBT Agreement. The sections that follow explain why the U.S. dolphin safe labeling provisions are not technical regulations and, without prejudice to that position, explain why the U.S. provisions are not inconsistent with Article 2.2 or 2.4 of the TBT Agreement.

A. The U.S. Dolphin Safe Labeling Provisions Are Not Technical Regulations

[121] *See* Section II.A.3.

88. Mexico has failed to establish that the U.S. dolphin safe labeling provisions constitute technical regulations within the meaning of Annex 1 of the TBT Agreement. In particular, Mexico has failed to establish that compliance with the U.S. dolphin safe labeling provisions is mandatory. As elaborated below and in previous U.S. submissions, a labeling requirement with which compliance is mandatory is a measure that establishes conditions under which a product may be labeled in a certain way *and* requires the product to be labeled in that way in order to be marketed. Mexico has not established that, even if the U.S. dolphin safe labeling provisions establish conditions under which tuna products may be labeled dolphin safe, tuna products must be labeled dolphin safe to be marketed and therefore has failed to establish that the U.S. provisions are technical regulations within the meaning of Annex 1 of the TBT Agreement.

1. Mexico Misinterprets the Definition of a Technical Regulation in Annex 1 of the TBT Agreement

89. Mexico argues that the U.S. dolphin safe labeling provisions are "technical regulations" within the meaning of Annex 1 of the TBT Agreement because they establish conditions under which tuna products may be labeled dolphin safe and make it unlawful to sell tuna products that are labeled dolphin safe that do not meet these conditions.[122] These facts, however, do not support the conclusion that the U.S. dolphin safe labeling provisions are "mandatory" within the meaning of Annex 1 of the TBT Agreement. At most, they establish that the U.S. dolphin safe labeling provisions are "labelling requirements."

90. The principal flaw in Mexico's interpretation of the definition of technical regulation in Annex 1 of the TBT Agreement is that it conflates the meaning of the term "labeling requirement" with the phrase "with which compliance is mandatory." In doing so, Mexico would render the phrase "with which compliance is mandatory" and the phrase "with which compliance is not mandatory" in the definition of a technical regulation and the definition of a standard, respectively, without effect. Mexico's approach is inconsistent with the fundamental rule of treaty interpretation that an interpretation of the terms of a treaty is to be preferred that gives full effect and meaning to each of its terms.[123]

91. The term "labeling requirement" appears in both the definition of a "technical regulation" and the definition of a "standard" in Annex 1 of the TBT Agreement. As Mexico agrees,[124] the term "labelling requirement" should be construed to have the same meaning in both the definition of a technical regulation and the definition of a standard.[125] The term "labeling requirement" in Annex 1 of the TBT Agreement means the criteria or conditions that a product

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[122] Mexico First Written Submission, paras. 198, 202; Mexico Opening Statement at the First Panel Meeting, 45; Mexico Answers to the First Set of Questions from the Panel (Questions 46 and 52), paras. 120, 138-139.

[123] *US - Gasoline (AB)*, p. 24; *Canada - Dairy (AB)*, para. 135.

[124] Mexico Answers to the First Set of Questions from the Panel (Question 48), paras. 128-129.

[125] U.S. Answers to the First Set of Questions from the Panel (Q48), paras. 116-118.

must meet to be labeled in a particular way.[126] This meaning is supported by the ordinary meaning of the word "requirement" which includes "a condition which must be complied with" and the definition of "requirement"[127] in the ISO/IEC Guide 2:1991 which provides that a "requirement" is a "provision that conveys criteria to be fulfilled."[128] Mexico agrees with this interpretation. Specifically, in its response to Question 48, Mexico states: "The 'requirements' in 'labeling requirements' refer to the criteria for the application of the label. Whether the label is a technical regulation or a standard, those criteria must be met before the label can be used. These 'requirements' do not make the label 'mandatory' or 'not mandatory' within the definitions of 'technical regulation' and standard.'"[129]

92. As Mexico correctly notes,[130] the key difference then between a "standard" that concerns a labeling requirement and a "technical regulation" that concerns a labeling requirement is that compliance with the latter is mandatory while compliance with the former is not.[131] Whether compliance with a labeling requirement is mandatory must turn on something more than the mere fact that the labeling requirement sets out conditions under which products may (or may not) be labeled in a certain way. Otherwise, there would be no labeling requirements for which compliance is not mandatory, and inclusion of the term "labeling requirement" in the definition of a standard would be without effect. Or conversely, the phrase "with which compliance is not mandatory" in the definition of a standard would be without effect in the context of a labeling requirement. Such an approach would not comport with the principle of treaty interpretation that

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[126] U.S. Answers to the First Set of Questions from the Panel (Question 52), para. 126; U.S. Opening Statement para. 42.

[127] *New Shorter Oxford English Dictionary* (1993), p. 2557.

[128] ISO/IEC Guide 2:1991, para. 7.5. Annex 1 of the TBT Agreement provides that terms used in the TBT Agreement shall have the same meaning as the terms defined in ISO/IEC Guide 2:1991, except for those terms specifically defined in Annex 1 of the TBT Agreement.

[129] Mexico Answers to the First Set of Questions from the Panel (Question 48), para. 131.

[130] Mexico also appears to agree with this position as it states that "[in the case of a standard] 'compliance is not mandatory' and with respect to [a technical regulation] 'compliance is mandatory.'" Mexico Answers to the First Set of Questions from the Panel (Question 48), para. 132. The decisions and recommendations of the TBT Committee since conclusion of the TBT Agreement further support this conclusion. Those decisions and recommendations Members' views Members' obligations with respect to mandatory labeling requirements are set out in Article 2 of the TBT Agreement pertaining to technical regulations and that Members' obligations with respect to voluntary labeling requirements are set out in Annex 3 of the TBT Agreement pertaining to standards. *See* U.S. First Written Submission, paras. 136-137.

[131] The ordinary meaning of the phrase "with which compliance is mandatory" means that fulfilling a request or demand is obligatory or compulsory. *New Shorter Oxford English Dictionary* (1993), pp. 461, 1683. Read in the context of a document that deals with labeling requirements, this phrase means that fulfilling the labeling requirements is obligatory or compulsory. Conversely, the ordinary meaning of the phrase "with which compliance is not mandatory" in the context of a labeling requirement is that fulfilling the labeling requirements is not obligatory or compulsory. Review of these definitions leaves open the question of what it means precisely for it to be compulsory, obligatory or mandatory that a labeling requirement be fulfilled. As reviewed above, this question is answered by reading the definitions of a standard and a technical regulation in their context in light of the TBT Agreement's object and purpose.

an interpretation of the terms of a treaty is to be preferred that gives full effect and meaning to each of its terms.

93. Instead an approach that gives full effect and meaning to the term "labeling requirement" and the phrases "with which compliance is mandatory" and "with which compliance is not mandatory" is to interpret a labeling requirement with which compliance is mandatory to refer to a measure that establishes conditions under which a product may be labeled in a certain way *and* requires the product to be labeled in that way in order to be marketed and a labeling requirement with which compliance is not mandatory to refer to a measure that establishes conditions under which a product may be labeled in a certain way but does not require the product to be labeled in that way in order to be marketed.[132]

94. Interpreting a labeling requirement with which compliance is not mandatory to mean a measure that establishes conditions under which a product may be labeled in a certain way but does not require the product to be labeled in that way in order to be marketed, is also consistent with the function standards serve. Standards are designed to convey information. If a product conforms to a particular standard, the user or purchaser of the product can rely on that product having, for example, certain characteristics, or in the case of a labeling requirement, meeting the conditions to be labeled in a particular way. If marketers of products were permitted to claim a product conformed to a particular standard when that product did not in fact have the characteristics set out in the standard, or did not meet the conditions to be labeled in a certain way, purchasers or users of that product could no longer rely on the product having certain characteristics or meeting the conditions to be labeled in that way, and the function served by the standard would be lost. Thus, it is entirely consistent with the non-mandatory nature of a standard to prohibit claims that a product meets the conditions of a standard when the product does not in fact meet those conditions.[133] Such prohibitions do not turn a standard into a technical regulation.

95. Mexico's interpretation of the definition of a technical regulation in part appears to rest on the notion that, if it did not cover measures that make it unlawful to label products unless certain conditions are met, some set of measure would escape WTO disciplines.[134] Mexico's suggestion, however, ignores the fact that the TBT Agreement includes agreed disciplines on standards. Those disciplines are similar – although not identical – to those for technical regulations.[135] A finding that compliance with a document described in the definition of a technical regulation is not mandatory would not mean that measure would fall outside the scope

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[132] This interpretation is consistent with the positions taken by Australia and Korea in their third-party statements. Australia Third-Party Oral Statement, para. 3; Korea Third-Party Oral Statement, para. 7.

[133] Japan states a similar position in its third-party statement. Japan Third-Party Oral Statement, para. 5 ("the distinctive characteristic of a 'standard' is that private persons may choose freely whether to use the standard at all, but if they use the standard, they must conform to the specifications the standard provides.").

[134] Mexico Answers to the First Set of Questions from the Panel (Questions 52, 55), paras. 147, 159.

[135] TBT Agreement, Annex 3.

of the TBT Agreement. Instead, it would mean the document is a standard and subject to the provisions in the TBT Agreement that apply with respect to standards. These provisions are binding on Members at the central level of government and are set out in Annex 3 of the TBT Agreement.[136]

2. Applying the of the Correct Interpretation of Annex 1 of the TBT Agreement, the U.S. Dolphin Safe Labeling Provisions Are Not Technical Regulations

96. Applying the correct interpretation of a technical regulation to the facts of this dispute reveals that compliance with the U.S. dolphin safe labeling provisions is not mandatory within the meaning of Annex 1 of the TBT Agreement.. While the U.S. dolphin safe labeling provisions set out conditions under which tuna products may be labeled dolphin safe (or labeled with any other term or symbol that conveys the tuna products do not contain tuna that was caught in a manner that adversely affects dolphins), they do not require tuna products to be labeled dolphin safe (or with any other term or symbol that conveys the tuna products do not contain tuna that was caught in a manner that adversely affects dolphins) to be marketed. In fact, tuna products that are not labeled dolphin safe are readily available on the U.S. market. These products include tuna products that do not meet the conditions to be labeled dolphin safe, as well as tuna products that do meet the conditions but that are not labeled dolphin safe because the marketer of those products have not indicated the dolphin safe status of the product on the product label.[137] Accordingly, the U.S. dolphin safe labeling provisions establish labeling requirements with which compliance is not mandatory.[138]

97. In its responses to Question 52, Mexico advances that one way to distinguish between a labeling requirement that is voluntary and one that is mandatory is whether the label contemplated in the labeling requirement is the only label that may be used in the market. There is no basis for Mexico's theory. First, it is not based on the text of the TBT Agreement. Nowhere in the text of the TBT Agreement is there a line drawn between mandatory and voluntary labeling

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[136] TBT Agreement, Article 4.1 and Annex 3.

[137] U.S. First Written Submission, paras. 94-95; *see also* Exhibit US-51 (showing that entries of tuna products into the United States that were not "dolphin safe"); Photo of Great Value Tuna, Exhibit US-73. The National Marine Fisheries Service's (NMFS) Tuna Tracking & Verification Program (TTVP), on a routine basis, randomly samples tuna products found in retail markets to either verify the dolphin safe claim or to verify that the product was legally imported in the United States. On November 9, 2010, TTVP personnel purchased a 181 gram pouch of chuck light tuna in water bearing the "Great Value" label at a WalMart store in Santa Ana, California. Also, on November 10, 2010, TTVP personnel purchased a 74 gram pouch of chuck light tuna in water bearing the "Great Value" label at a WalMart store in Huntington Beach, California. Both Great Value tuna pouches have neither a dolphin safe logo nor a dolphin safe claim on the packaging. The TTVP has not yet completed the process of requesting and receiving documentation from the product distributor as of this date.

[138] Korea and Australia reached the same conclusion in their third-party oral statements. Korea Third-Party Oral Statement, para. 7; Australia Third-Party Oral Statement, para. 3.

requirement based on whether the label contemplated in the labeling requirement is the only one that may be or is used in a market.

98. Second, Mexico's theory conflates the meaning of the term a "labeling requirement" with the meaning of the phrase "with which compliance is mandatory" and renders the latter without effect. It also appears to conflict with its position that the term labeling requirement means the "criteria for application of the label" and that regardless of whether a labeling requirement is a technical regulation or a standard a labeling requirement requires that "those criteria must be met before the label can be used."[139] Thus, as Mexico itself appears to acknowledge, inherent in the term "labeling requirement" is the notion that products that do not meet the conditions to be labeled in a particular way may not be labeled in that way. If it meant otherwise, establishing conditions under which products may be labeled in a certain way would have no effect.

99. In advancing this theory, Mexico appears to believe that compliance with the U.S. provisions is mandatory within the meaning of Annex 1 because tuna products that contain tuna caught by setting on dolphins may not be labeled with the AIDCP "dolphin safe" logo (or any other term or symbol that falsely claimed or suggested that the product did not contain tuna that was caught in a manner that adversely affects dolphins). However, this fact simply makes the U.S. dolphin safe labeling provisions labeling requirements: that is, they set out conditions under which tuna products may be labeled dolphin safe (whether using the AIDCP "dolphin safe" logo or any other dolphin safe logo or term or symbol that falsely conveys that the tuna product does not contain tuna that was caught in a manner that adversely affects dolphins). In this way, the U.S. provisions are no different from any other labeling requirement that establishes conditions under which a product may (or may not) be labeled in a certain way.

100. Third, it is factually incorrect to suggest, as Mexico appears to do, that the U.S. dolphin safe labeling provisions establish a label that must be used to the exclusion of other labels. Under the U.S. provisions, marketers of tuna products are free to label their products in any way they choose, provided that if they claim or suggest that the tuna product does not contain tuna that was caught in a manner that adversely affects dolphins, the conditions set out in the U.S. provisions are met, namely dolphins were not set upon to catch the tuna and no dolphins were killed or seriously injured when the tuna was caught. As explained in response to questions,[140] marketers are not required to use the official dolphin safe label if they chose to indicate on the label of their products that they do not contain tuna that was caught in a manner that adversely affects dolphin; and in fact, most marketers of tuna products do not use the official dolphin safe label.

101. Mexico also argues that "the fact [the U.S.] measures established surveillance and enforcement procedures" is an additional point supporting its position that the U.S. dolphin safe

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[139] Mexico Answer to the First Set of Questions from the Panel (Question 48), para. 131.

[140] U.S. Answers to the First Set of Questions from the Panel (Questions 3, 11), paras. 5, 28; U.S. First Written Submission, para. 25.

labeling provisions are mandatory.[141] The fact that the United States maintains provisions to ensure that when a product is labeled dolphin safe it does not contain tuna that is not dolphin safe does not mean that the U.S. dolphin safe labeling provisions are mandatory. It means that the U.S. provisions establish a labeling requirement or, to use Mexico's words, "criteria [that] must be met before the label can be used."[142] The information collected by the United States and the surveillance activities it undertakes to ensure that tuna products labeled dolphin safe are in fact dolphin safe, and any corresponding penalties when products are found to be falsely labeled, are simply mechanisms that support the underlying labeling requirement established in the U.S. dolphin safe labeling provisions. They do not change the fact that the U.S. provisions do not require tuna products to be labeled in a certain way to be marketed in the United States and therefore compliance with the labeling requirements set out in the U.S. provisions is not mandatory within the meaning of Annex 1 of the TBT Agreement.

3. The U.S. Dolphin Safe Labeling Provisions Are Not Like the Measures in *EC - Asbestos* or *EC – Sardines*

102. In an effort to support its position that the U.S. dolphin safe labeling provisions are technical regulations, Mexico relies on the reports in *EC – Asbestos* and *EC – Sardines.* Mexico's efforts are misplaced. As explained in the U.S. First Written Submission, both *EC – Asbestos* and *EC– Sardines* concerned measures that fell within the scope of the first sentence of the definition of a technical regulation; neither concerned labeling requirements.[143] In *Asbestos* the measure concerned a prohibition on products containing asbestos fibers;[144] in *Sardines* the measure concerned a requirement that sardines be composed of a certain species of fish.[145] In both disputes, the measure set out product characteristics, one in an affirmative manner (sardines must comprise a certain species of fish), the other in a negative manner (products must not contain asbestos fibers); the measures prohibited the sale of products that failed to posses those product characteristics. In neither dispute did the responding party contest that compliance with the measure was mandatory.[146] By contrast, in this dispute the measure at issue is a document that deals with a labeling requirement, and not a document that sets out product characteristics.

103. In addition, while compliance with the measures at issue in *EC – Asbestos* and *EC – Sardines* was mandatory, compliance with the U.S. dolphin safe labeling provisions is not. In particular, while under the U.S. dolphin safe labeling provisions tuna products may only be labeled dolphin safe if the conditions set out in the U.S. provisions are met, they do not prohibit the sale of tuna products that fail to meet those conditions nor do they prohibit the sale of tuna products that are not labeled dolphin safe. This was not the case in either *EC – Asbestos* or *EC*

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[141] Mexico Answer to the First Set of Questions from the Panel (Question 52), para. 143-146.

[142] Mexico Answer to the First Set of Questions from the Panel (Question 48), para. 131.

[143] U.S. First Written Submission, paras. 131; *see also id.* para. 126 n.141.

[144] Appellate Body Report, *EC – Asbestos*, para. 72.

[145] Appellate Body Report, *EC – Sardines*, para. 190, 193 ; Panel Report, *EC – Sardines*, paras. 7.26-7.35.

[146] *EC – Sardines (AB)*, para. 194; *EC – Asbestos (Panel),* para.8.18-8.27,

– *Sardines* where products that did not possess the product characteristics set out in the measure (which in the case of *EC – Asbestos* was the absence of a particular product characteristic) could not be sold in the EU.

104. In connection with *EC – Sardines*, Mexico wrongly argues that that dispute concerned a labeling requirement and that sardines could be exported to the EU if they were not composed of the specified species of fish. While the EU in that dispute argued that the measure at issue was a "naming" requirement rather than a "labeling requirement," the basis for the panel and the Appellate Body's finding that the measure constituted a technical regulation was that the measure set out product characteristics with which compliance was mandatory.[147] Further, under the measure in *EC – Sardines,* sardines could not be marketed in the EU unless they comprised a certain species of fish.[148] The fact that products that did not comprise this species of fish could nonetheless be marketed in the EU as something other than sardines is irrelevant. The fact remained that if exporters wanted to sell sardines in the EU, those sardines had to comprise a certain species of fish. This fact further distinguishes *EC – Sardines* from the present dispute since there is nothing in the U.S. dolphin safe labeling provisions that prevent marketers of tuna products from marketing them as tuna products based on whether they meet the conditions to be labeled dolphins safe.[149]

105. Mexico appears to miss the importance of the fact that the first and second sentence of a technical regulation cover different things and that labeling requirements (covered by the second sentence of the definition of a technical regulation) are not examples of product characteristics (covered by the first sentence of the definition of a technical regulation).[150] The consequence of this is that, in saying that a document may lay down product characteristics with which compliance is mandatory either by prescribing certain characteristics that products must possess (i.e. in the affirmative) or by prescribing certain characteristics that products must *not* possess (i.e., in the negative), the Appellate Body was not addressing labeling requirements; it was addressing product characteristics.[151] Thus, the Appellate Body has not addressed the question of what it means for compliance with a labeling requirement to be mandatory.

106. Mexico is wrong that, if the Panel correctly reads that labeling requirements are not examples of product characteristics, the Appellate Body's reasoning in *EC – Asbestos* (which applied to product characteristics) applies to the question of whether compliance with a labeling requirement is mandatory.[152] As explained above, a labeling requirement by definition sets out

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[147] *EC – Sardines (AB)*, para. 190, 193; *EC – Sardines (AB)*, paras. 7.26-7.35.

[148] *EC – Sardines (AB)*, para. 190; *EC – Sardines (Panel)*, paras. 7.27.

[149] The EU provides a similar analysis in its third-party oral statement. EC Third Party Oral Statement, para. 9.

[150] Mexico agrees that the United States as well as Canada in its third-party submission "have raised some valid interpretive points regarding the relationship between the two sentences of the definition of a technical regulation." Mexico Answers to the First Set of Questions from the Panel (Question 46), para. 125.

[151] *EC – Asbestos (AB)*, para. 68-69.

[152] Mexico Answers to the First Set of Questions from Panel (Questions 46, 52), para. 12, 139.

conditions that must be met for a product to be labeled in a certain way. These labeling requirements can be set out in the affirmative (e.g., products must be produced in a certain way to labeled in a certain way) or the negative (e.g., products must *not* be produced in certain way to be labeled in a certain way). However, regardless of whether a labeling requirement is set out in the affirmative or negative, it must still be determined whether compliance with that labeling requirement is mandatory. As elaborated above, a labeling requirement with which compliance is mandatory is a measure that establishes conditions under which a product may be labeled in a certain way *and* requires the product to be labeled in that way in order to be marketed, while a measure that sets out labeling requirements with which compliance is not mandatory is a measure that establishes conditions under which a product may be labeled in a certain way but does not require the product to be labeled in that way in order to be marketed.

4. Mexico's Alternative Argument that the U.S. Dolphin Safe Labeling Provisions Are *"De facto"* Mandatory Is Not Supported By the Facts

107. In the alterative, Mexico argues that even if the U.S. dolphin safe labeling provisions were not to be "considered *a priori* mandatory, [they are] *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without the dolphin safe designation."[153] Mexico's argument should be rejected.

108. For a labelling requirement to fall within the definition of a technical regulation under Annex 1 of the TBT Agreement, compliance with the labelling requirement must be mandatory. Contrary to Mexico's assertions, a labeling requirement cannot be "*de facto*" mandatory simply based on private actors' preference for products labeled in a certain way. Some form of government action must make it compulsory or obligatory that for products to be marketed they must be labeled in a certain way in order for compliance with a labeling requirement to be mandatory.[154]

109. This does not rule out the possibility that a labeling requirement that on its face is not mandatory could, in the circumstances of a particular case, in fact be mandatory. However, to establish that, some form of government action must be involved that in effect makes compliance with the labeling requirement mandatory. In considering a similar issue in *Korea – Beef*, the Appellate Body made the point that where it is the decision of private actors rather than the governmental measure that results in the segregation of imported and domestic like products, this would not be a breach of Article III:4 of the GATT 1994. The Appellate Body stated:

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[153] Mexico First Written Submission, para. 203; Mexico Answers to the First Set of Questions from the Panel (Question 57), para. 147.

[154] Australia and Guatemala reached the same conclusion . For example, in its third-party oral statement Australia stated: "In Australia's view, there must be some factor in the measure itself or the governmental actions surrounding the measure which mean for the relevant industry that a measure which appears voluntary on its face is effectively made 'binding or compulsory.'" Australia Third-Party Statement, para. 4; *see also* Guatemala Third-Party Oral Statement, para. 4.

> We are not holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.[155]

The panel in *Argentina – Hides* similarly found in the context of a claim regarding Article XI:1 of the GATT that "[i]t is well-established in GATT/WTO jurisprudence that only governmental measures fall within the ambit of Article XI:1"and that it did not follow from "the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade restrictive."[156]

110. In this dispute, Mexico's argument is that the U.S. dolphin safe labelling provisions are "*de facto*" mandatory because major distribution channels for tuna products will only purchase and sell tuna products that are labeled dolphin safe. Mexico identifies no government action that makes compliance with the U.S. dolphin safe labeling provisions mandatory, but rather argues that the actions of consumers and retailers makes the U.S. provisions in fact mandatory. As explained above, the actions of private actors alone cannot form a basis for concluding that compliance with a voluntary labeling scheme is in fact mandatory.

111. Further, Mexico's argument implicitly concedes that compliance with the U.S. dolphin safe labeling provisions is not in fact mandatory. Mexico's argument is based on the assertion that major distribution channels will only purchase and sell tuna products that are labeled dolphin safe. This means, however, that even under Mexico's own admission there are distribution channels in the United States that will purchase and sell tuna products that are not labeled dolphin safe. Indeed, the facts on record in this dispute demonstrate that. Dolores brand Mexican tuna products that contain tuna that was caught by setting on dolphins and not labeled dolphin safe is widely available in the United States and is popular in grocery stores in the United States that cater to Latino consumers and readily available over the Internet from a U.S.-based Internet grocer.[157]

112. The panel in *US – Tuna Dolphin 1* examined a similar issue finding that "the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the 'Dolphin Safe' label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any

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[155] *Korea – Beef (AB)*, para. 149.

[156] Panel Report, *Argentina – Hides*, paras. 11.118-119.

[157] U.S. First Written Submission, para. 95.

advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the 'Dolphin Safe' label."[158]

113. Moreover, the facts of this dispute do not support Mexico's assertion that major distribution channels for tuna products will only purchase and sell tuna that is labeled dolphin safe. While U.S. consumers and retailers generally have a preference for tuna that is not caught in a manner that adversely affects dolphins, some marketers of tuna products have chosen to omit the dolphin safe label on their tuna products even though those products meet the conditions to be labeled dolphin safe.[159]

114. For the forgoing reasons, Mexico has failed to establish that the U.S. dolphin safe labeling provisions are technical regulations within the meaning of Annex 1 of the TBT Agreement and accordingly has failed to establish that the U.S. dolphin safe labeling provisions are subject to Article 2 of the TBT Agreement. As a consequence, the U.S. dolphin safe labeling provisions cannot be found inconsistent with Article 2.1, 2.2 or 2.4 of the TBT Agreement, and the Panel should therefore reject Mexico's claims under those articles.

115. In Sections III.B-D below, the United States responds to Mexico's claims that the U.S. dolphin safe labeling provisions are inconsistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement. The U.S. arguments in Sections III.B-D are without prejudice to its position that the U.S. provisions are not technical regulations. Even aside from the fact that the U.S. provisions are not technical regulations, they would not breach Article 2.

B. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with Article 2.1 of the TBT Agreement

116. Article 2.1of the TBT Agreement requires Members to ensure that *in respect of technical regulations*, products from the territory of any Member are accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country. As explained above, the U.S. dolphin safe labeling measures are not technical regulations within the meaning of the TBT Agreement and therefore cannot be inconsistent with Article 2.1. However, assuming *arguendo* that Article 2.1 of the TBT Agreement applies to the U.S. measures at issue in this dispute, those measures are not inconsistent with that provision.

117. Article 2.1 of the TBT Agreement includes both a most favored nation clause and a national treatment clause. Regarding the national treatment clause, the language of Article 2.1 of the TBT Agreement is similar to the language of the national treatment provision in Article III:4 of the GATT 1994. However, an analysis of the "likeness" and "less favourable treatment" under Article 2.1 of the TBT Agreement should not be exactly same as under Article III:4 of the GATT 1994 as there are important textual and contextual differences between the two. For

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[158] *US – Tuna Dolphin I,* para. 5.42.

[159] U.S. First Written Submission, para. 94; Photo of Great Value tuna, Exhibit US-73.

example, Article 2.1 applies "in respect" of a technical regulation, while Article III:4 of the GATT 1994 has no such qualification. Despite these contextual differences, Mexico relies solely on the arguments it makes regarding the consistency of the U.S. dolphin safe labeling provisions with Article III:4 of the GATT 1994 for its arguments under TBT Article 2.1 that the U.S. provisions afford less favorable treatment to Mexican tuna products. The United States has articulated why Mexico's arguments under Article III:4 of the GATT 1994 fail, and Mexico's arguments under TBT Article 2.1 fail for the same reasons.

118. Regarding the most favored nation clause of Article 2.1 of the TBT Agreement, the United States notes that the language used in Article 2.1 is different than that which is used in Article I:1 of the GATT 1994. Specifically, Article 2.1 requires that products from any Member are "accorded treatment no less favorable than that accorded to like products" while Article I:1 requires that any "advantage, favour, privilege or immunity" granted by any Member to any product be "accorded immediately and unconditionally to the like product." These textual differences may compel a different legal analysis of the consistency of the U.S. measures with Article 2.1 of the TBT Agreement than an analysis under Article I:1 of the GATT 1994. However, given that Mexico relies solely on the arguments it makes under Article I:1 of the GATT 1994 to support its claim under TBT Article 2.1 that the U.S. dolphin safe labeling discriminate against Mexican imports as compared to import from other countries, the United States believes that any analysis will lead to the Panel to the same result: the U.S. provisions are consistent with Article 2.1 of the TBT Agreement.

C. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with Article 2.2 of the TBT Agreement

119. To establish that a breach of Article 2.2 of the TBT Agreement, a complaining party must establish that the measure at issue is "more trade-restrictive than necessary to fulfil a legitimate objective." As reviewed in the U.S. First Written Submission, interpreting Article 2.2 in accordance with customary rules of interpretation of public international law, a measure is "more trade-restrictive than necessary to fulfill a legitimate objective" if (1) there is a reasonably available alternative measure (2) that measure fulfills the objectives of the measure at the level that the Member imposing the measure has determined is appropriate and (3) is significantly less trade-restrictive.[160] As elaborated below, Mexico has not established any of these elements with respect to the U.S. dolphin safe labeling provisions. Mexico also puts forth an interpretation of Article 2.2 that is inconsistent with customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties (Vienna Convention) and accordingly should not be followed.

1. Article 2.2 of the TBT Agreement Should Be Interpreted in Accordance with Articles 31 and 32 of the Vienna Convention

[160] U.S. First Written Submission, paras. 162-169.

120. Articles 31 and 32 of Vienna Convention provide that the terms of a treaty shall be interpreted based on their ordinary meaning in their context in light of the treaty's object and purpose and that recourse may be had to certain supplementary means of interpretation to confirm the meaning of terms resulting from application of Article 31. As elaborated in the U.S. First Written Submission, based on the ordinary meaning of its terms, a measure that is more trade-restrictive than necessary is one that restricts trade more than is needed or required to fulfill the measure's legitimate objective, or stated another way, that there is another measure that could fulfill the measure's legitimate objective but that restricts trade less.[161]

121. Relevant context for Article 2.2 is Article 5.6 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). Given the textual similarities between Article 5.6 of the SPS Agreement and Article 2.2 of the TBT Agreement, as well as the similarities between the TBT and SPS Agreements themselves,[162] it makes sense to interpret Article 2.2 of the TBT Agreement similarly to Article 5.6 of the SPS Agreement. A footnote to Article 5.6 of the SPS Agreement explains that a measure is not more trade-restrictive than required unless there is another reasonably available alternative measure that achieves the Member's appropriate level of protection and is significantly less trade restrictive.[163] A letter from the Director-General of the GATT to the Chief U.S. Negotiator at the time the TBT Agreement was concluded confirms that Article 2.2 of the TBT Agreement should be interpreted similarly to Article 5.6 of the TBT Agreement, explaining that the "it was clear ... that participants [in the negotiation of the TBT Agreement] felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative."[164] The TBT Agreement indicates that its focus is not on insignificant trade effects, for example, in Article 1.6 of the TBT which provides that references to technical regulations, standards, and conformity assessment procedures shall be construed to include any amendments thereto "except amendments of ... an insignificant nature" and in Articles 2.9 and 5.6 of the TBT Agreement which require Members to notify to the WTO technical regulations and conformity assessment procedures that have "significant effect on trade."[165] Further, the preamble to the TBT Agreement states that no Member should be prevented from taking measures *inter alia* to protect human, animal or plant life or health or the environment or to prevent deceptive practices at the levels the Member considers appropriate.[166]

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[161] U.S. First Written Submission, para. 166.

[162] Article 5.6 of the SPS Agreement requires a Member to ensure that its SPS measures are "not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection" while Article 2.2 of the TBT Agreement prohibits measures that are "more trade-restrictive than necessary to fulfill a legitimate objective." The Appellate Body has also noted the similarities between the SPS and TBT Agreements (*EC – Sardines (AB)*, para. 274).

[163] SPS Agreement, Article 5.6, n.3; *see* U.S. First Written Submission, para. 167.

[164] U.S. First Written Submission, para. 168; Exhibit US-41.

[165] TBT Agreement, Articles 1.6, 2.9 and 5.6.

[166] TBT Agreement, preamble.

122. Taken together, the text of Article 2.2 in its context and in light of the object and purpose of the TBT Agreement, means that a measure is "more trade-restrictive than necessary to fulfill a legitimate objective" if there is a reasonably available alternative measure that fulfills the measure's objectives that is significantly less trade restrictive. Accordingly, to prove that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement, Mexico must establish that (1) there is a reasonably available alternative measure (2) that measure fulfills the objectives of the U.S. provisions at the level that the United States has determined is appropriate; and (3) is significantly less trade-restrictive.

123. Rather than applying an interpretation of Article 2.2 based on Articles 31 and 32 of the Vienna Convention, Mexico instead adopts an interpretation of Article 2.2 of the TBT Agreement based on prior panels' and the Appellate Body's interpretation of Article XX of the GATT 1994.[167] As discussed in the U.S. answer to Question 69, it would not be appropriate to apply the same interpretive approach panels and the Appellate Body have undertaken in connection with the word "necessary" as it appears in Article XX of the GATT 1994 in analyzing whether a measure is "more trade restrictive than necessary"within the meaning of Article 2.2 of the TBT Agreement.[168]

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[167] Mexico First Written Submission, paras. 218, 222-224; Mexico Answers to the First Set of Questions from the Panel (Question 69), para. 245.

[168] U.S. Answers to the First Set of Questions from the Panel (Question 69), paras. 155-157. Mexico quotes the Appellate Body's summary of the U.S. third-party views in *EC – Asbestos* to assert that the United States has previously indicated that it would be appropriate to interpret Article 2.2 of the TBT Agreement using the same legal approach used to interpret Article XX of the GATT 1994. Mexico Answers to the First Set of Questions from the Panel (Question 69), para. 247. The U.S. view in *EC – Asbestos*, however, was not that the same legal approach should be used to interpret Article 2.2 of the TBT Agreement as Article XX of the GATT 1994 but that some of the same facts could be used to evaluate whether a measure was more trade-restrictive than necessary to fulfill a legitimate objective under Article 2.2 of the TBT Agreement as could be used to evaluate whether a measure was necessary to protect human health under Article XX(b) of the GATT 1994:

> The facts on the record that supported the Panel's findings, made in the context of the Panel's Article XX(b) analysis, satisfy the requirements of TBT Article 2.2: Article 2.2 specifically states that protection of human health, inter alia, is a legitimate objective. The risks of non-fulfillment of this objective were assessed, in the case of asbestos, based on available scientific and technical information and intended end-uses of the product, as provided for in Article 2.2. The Panel concluded that there was an "undeniable public health risk in relation to the chrysotile contained in high-density chrysotile-cement products." Panel Report, para. 8.203. The Panel also found that there was no other measure reasonably available to France that would halt the spread of this risk. The Panel found that the only alternative measure proposed by Canada – "controlled use" – would not achieve the level of protection chosen by France for a number of reasons, including its unsuitability for "do-it-yourself" enthusiasts and undeclared workers, and was therefore neither effective nor reasonably available to achieve the public health objective sought by France. E.g., Panel Report, paras 8.214, 8.217. For this reason, France's Decree is not more trade restrictive than necessary, under TBT Article 2.2.

U.S. Third Party Submission in *EC – Asbestos*, para. 33.

124. In particular, the term "necessary" is used in Article XX of the GATT 1994 in a very different context than in TBT Article 2.2. Under Article 2.2 of the TBT Agreement, a panel is inquiring as to whether a measure fulfills a legitimate objective is "more trade restrictive than necessary" to fulfill that objective. On the other hand, under Article XX of the GATT 1994, the question is whether it is "necessary" to breach the GATT 1994 to protect human, animal or plant life or health or public morals or to secure compliance with laws or regulations. Thus, the alternatives that are being compared under Article 2.2 of the TBT Agreement are two alternatives that are WTO-consistent, while the alternatives being compared under Article XX of the GATT are an alternative that is WTO-inconsistent and another that is WTO-consistent. Further, the question under Article XX is whether the measure itself is necessary, whereas under Article 2.2 the question is whether the amount of trade-restrictiveness is necessary. And, unlike under Article XX, it is the complaining party that has the burden of establishing that the measure is "more trade-restrictive than necessary" under Article 2.2.

125. Further, there is no textual basis to apply the panel and Appellate Body's interpretive approach to Article XX of the GATT 1994 to Article 2.2 of the TBT Agreement. Under the Vienna Convention, the terms of a treaty must be interpreted based on their ordinary meaning in their context in light of the object and purpose of the treaty. The interpretation of Article 2.2 based on the Vienna Convention is outlined above, and does not support reading the word "necessary" in the phrase "more trade-restrictive than necessary to fulfil a legitimate objective" in Article 2.2 of the TBT Agreement to have the same meaning as the word "necessary" in Article XX(a), (b) or (d) of the GATT 1994.[169] In light of the different context in which the word "necessary" appears in Article 2.2 as compared to Article XX and the different circumstances surrounding conclusion of those provisions, it would not be appropriate to apply the same meaning or interpretive approach to both provisions.[170]

126. As outlined below in Sections III.C.2 through III.C.6, applying the proper interpretation of Article 2.2 of the TBT Agreement to the facts of this dispute, it is clear the U.S. dolphin safe labeling provisions are no more trade-restrictive than necessary to fulfill their legitimate objectives.[171]

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[169] Mexico argues that Article 2.2 of the TBT Agreement and Article 5.6 of the SPS Agreement "use[] different terminology and wording" and that the "Appellate Body has made it clear that the use of different terms in the texts of the WTO Agreement implies a different meaning." Mexico Answers to the First Set of Questions from the Panel (Question 69), para. 249. In this regard, while Article 2.2 of the TBT Agreement and Article 5.6 of the SPS Agreement use slightly different language (for example "not be more trade-restrictive than necessary" versus "are not more trade-restrictive than required") the language in Article 5.6 of the SPS Agreement is much more similar to the language in Article 5.6 of the SPS Agreement than Article XX of the GATT 1994.

[170] *See* U.S. Answers to the First Set of Questions from the Panel (Question 69), paras. 155-157.

[171] It should be noted that, even if the Panel were to apply Mexico's flawed interpretation of Article 2.2 of the TBT Agreement, as detailed in Section III.C.5, Mexico has not identified a reasonably available alternative measure that would fulfill the objectives of the U.S. dolphin safe labeling provisions. As a consequence, even under its Mexico's interpretation of Article 2.2, Mexico has not established what it would need to establish to prove that the U.S. dolphin safe labeling provisions breach Article 2.2 of the TBT Agreement.

2. The Objectives of the U.S. Dolphin Safe Labeling Provisions

127. The first step in an Article 2.2 analysis is identifying the objectives of the measure at issue. The objectives of the U.S. dolphin safe labeling provisions are: to (i) ensure that consumers are not misled or deceived about whether tuna products contains tuna that was caught in a manner that adversely affects dolphins and (ii) contribute to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to set on dolphins.

128. These objectives are reflected both in the name of the statute establishing the U.S. dolphin safe labeling provisions – the Dolphin Protection Consumer Information Act – as well as the finding of Congress specified in that statute. Those findings state "dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean" and that "consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins."[172] Further, as reviewed in the U.S. answer to Question 40, the DPCIA was enacted in response to strong consumer sentiment that setting on dolphins to catch tuna was unacceptable and that Congress should act to ensure that consumers had a choice not to purchase products that contained tuna caught by setting on dolphins.[173]

129. In addition, the architecture, structure and design of the U.S. dolphin safe labeling provisions also reflects these objectives. Specifically, the U.S. dolphin safe labeling provision establish conditions under which tuna products may be labeled dolphin safe based on whether those products contain tuna that was caught in a manner that adversely affects dolphins. Products that contain tuna that was caught in a set in which dolphins were killed or seriously injured or by setting on dolphins – a technique that adversely affects dolphins – may not be labeled dolphin safe. Conversely, products that contain tuna that was not caught by setting on dolphins or in a set in which dolphins were killed or seriously injured may be labeled dolphin safe if the necessary documentation to support such claims is provided. Such documentation includes a statement from the vessel's captain that purse seine nets were not intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught and, in a fishery where there is a regular and significant association between tuna and dolphins or regular and significant dolphin mortality, an observer statement that no dolphins were killed or seriously injured in the set in which the tuna was caught.[174] In addition, the U.S. provisions are designed in such a way that labeling tuna products dolphin safe or with "any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins" when the conditions for labeling products in that way are not met is a violation of the U.S. law prohibiting deceptive practices.[175]

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[172] DPCIA, 16 U.S.C. 1385(a), Exhibit US-5.

[173] U.S. Answers to the First Set of Questions from the Panel (Question 40), paras. 98-101.

[174] DPCIA, 16 U.S.C. 1385(d)(1)-(2).

[175] DPCIA, 16 U.S.C. 1385(d), Exhibit US-5.

130. The structure and design of the U.S. provisions thus reflect that the objective of the U.S. provisions is ensuring that when a dolphin safe label appears on tuna products it accurately conveys that the product does not contain tuna that was caught in a manner that adversely affects dolphins – i.e., that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.

131. The structure of the U.S. provisions also reflects the objective of ensuring that the U.S. market is not used to encourage the practice of setting on dolphins, since under the U.S. provisions, tuna products that contain tuna caught by setting on dolphins may not be labeled dolphin safe. Consumer may therefore rely on a dolphin safe label to exercise their preference for tuna products that do not contain tuna caught by setting on dolphins. The U.S. provisions contribute to protecting dolphins by enabling consumers to exercise their preference for tuna products that do not contain tuna caught by setting on dolphins and in turn discourage the practice setting on dolphins to catch tuna.

132. In its response to Question 64, Mexico appears to contest that the objectives of the U.S. provisions are ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and contributing to dolphin protection by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins, although the basis for Mexico's position is not entirely clear. First, the United States agrees that the structure, architecture and design of the U.S. dolphin safe labeling provisions as well as the findings of Congress are relevant to ascertaining the objectives of the U.S. provisions and, as elaborated above the structure, architecture and design of the U.S. dolphin safe labeling provisions and the findings of Congress expressed in the DPCIA reflect the objectives of the U.S. provisions cited by the United States in this dispute.

133. Second, contrary to Mexico's assertion the United States has not represented the objectives of the U.S. dolphin safe labeling provisions in a manner that creates a moving target.[176] From the outset of these proceedings, the United States has explained that the objectives of the U.S. provision are ensuring consumers are not misled or deceived about whether tuna products contains tuna that was caught in a manner that adversely affects dolphins and contributing to dolphin protection by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins. Indeed, Mexico cites the various instances in the U.S. First Written Submission where the objectives of the U.S. provisions are consistently stated as such.[177]

134. Moreover, as noted in the U.S. First Written Submission,[178] it is perplexing that Mexico overlooked and now appears to contest that one of the objectives of the U.S. provisions concerns information provided to consumers about whether tuna products contain tuna caught in a manner that adversely affects dolphins and ensuring that consumers are not misled or deceived by that

[176] Mexico Answers to the First Set of Questions from the Panel (Question 64), para. 207.

[177] Mexico Answers to the First Set of Questions from the Panel (Question 64), paras. 210-212.

[178] U.S. First Written Submission, para. 147 n. 158.

information. The title of the statutory provision at issue (the Dolphin Protection *Consumer Information* Act) clearly indicates that it concerns consumer information as does the language of the statute itself which sets out the conditions under which labels on tuna products may contain certain information (namely information about the dolphin safe status of tuna products). The statute also provides that is a violation of the law against deceptive practices to include the term dolphin safe or any other term or symbol suggesting the product does not contain tuna that was caught in a manner harmful to dolphins when such conditions are not met.[179]

135. Mexico's assertion that the United States has not directly argued that protecting dolphins is also an objective of the U.S. provisions is also perplexing.[180] As stated throughout these proceedings, one of the objectives of the U.S. provisions is ensuring that the U.S. market is not used to encourage the practice of setting dolphins to catch tuna and thereby contributing the protection of dolphins. In fact, Mexico quotes the many instances where the United States has reiterated this objective in its answer to Question 64. What Mexico appears to misunderstand is that the objective of the U.S. provisions is contributing to the protection of dolphins not only from the adverse effect of being killed or seriously injured in the nets when dolphins are set upon to catch tuna but from the other adverse effects of setting on dolphins to catch tuna as well.

3. U.S. Dolphin Safe Labeling Provisions Fulfill a Legitimate Objective

136. As noted, the objectives of the U.S. dolphin safe labeling provisions are to ensure that consumers are not misled or deceived about whether tuna products contains tuna that was caught in a manner that adversely affects dolphins and to contribute to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to set on dolphins. The U.S. provisions fulfill these objectives. First, the U.S. dolphin safe labeling provisions fulfil the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins by establishing conditions under which tuna products may be labeled dolphin safe that are based on whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins. Specifically, tuna products that contain tuna that was caught by setting on dolphins – a technique known to harm dolphins – or in a set in which dolphins were observed killed or seriously injured may not be labeled dolphin safe or with any other term or symbol that falsely claims or suggests that the tuna products do not contain tuna that was caught in a manner harmful to dolphins. By limiting use of the term dolphin safe and any other term or symbol that claims or suggests that the tuna products do not contain tuna that was caught in a manner that is harmful to dolphins, to those products that contain tuna that was not caught in a manner that adversely affects dolphins, the U.S. provisions ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.

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[179] DPCIA, 16 U.S.C. 1385, Exhibit US-5.

[180] Mexico Answers to the First Set of Questions from the Panel (Question 64), paras. 215.

137. Second, the U.S. dolphin safe labeling provisions fulfil the objective of protecting dolphins by ensuring that the U.S. market is not used to encourage setting on dolphins to catch tuna. The U.S. provisions accomplish this by ensuring that the dolphin safe label is not used on tuna products that contain tuna that was caught by setting on dolphins. To the extent customers choose not to purchase tuna products without the dolphin safe label, the U.S. provisions help ensure that the U.S. market is not used to encourage fishing fleets to set on dolphins. As the practice of setting on dolphins to catch tuna decreases, the associated adverse effects on dolphins decrease as well.

4. Mexico's Arguments That the U.S. Dolphin Safe Labeling Provisions Do Not Fulfill Their Objectives Should Be Rejected

138. Mexico contests that the U.S. dolphin safe labeling provisions fulfill their objectives.[181] The basis for Mexico's position appears to be twofold. First, the AIDCP fulfills the objective of protecting dolphins such that the U.S. dolphin safe labeling provisions do not provide any additional protections for dolphins.[182] Second, in a hypothetical situation where (i) a dolphin is accidentally killed in a fishery where there is no regular and significant association between tuna and dolphins and no regular or significant dolphin mortality, (ii) the dolphin was not intentionally set upon to catch the tuna, *and* (iii) the official dolphin safe label is used, a tuna product might be labeled dolphin safe that contains tuna that was caught in a set in which a dolphin was killed.[183] Both bases are without merit.

(a) The U.S. Dolphin Safe Labeling Provisions Provide Protections for Dolphins That Go Beyond the Protections Afforded Under the AIDCP

[181] In the context of its Article III:4 claims, Mexico criticized the objective of the U.S. provisions of protecting dolphins by ensuring the U.S. market is not used to encourage setting on dolphins, equating it to a desire to see Mexico change its fishing practices. Mexico Opening Statement at the First Panel Meeting, para. 18, 39. The objective of the U.S. provisions is not to compel Mexico to change its fishing practices; it is instead to ensure that the U.S. market is not used to encourage setting on dolphins to catch tuna (along with ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins). Nothing in the U.S. provisions prevents Mexico from continuing to set on dolphins to catch tuna and to sell that tuna in the United States. In fact, since enactment of the U.S. provisions, Mexico has continued to set on dolphins to catch tuna and, as the Mexican delegate stated in the first Panel meeting, Mexico intends to continue to do so in the future. Further nothing in the U.S. provisions prevents Mexico from exporting tuna products that contain tuna caught in that manner in the United States. In fact, for example, in 2009 the United States imported $7.5 million of Mexican canned tuna products that contained tuna that was caught by setting on dolphins. U.S. First Written Submission, para. 90; Exhibit US-1G. Vessels of other countries, however, including the United States and Ecuador, have stopped setting on dolphins to catch tuna since the U.S. dolphin safe labeling provision entered into force and sell tuna products in the United States that are labeled dolphin safe.

[182] Mexico First Written Submission, para. 211.

[183] Mexico Oral Statement at the First Panel Meeting, paras. 48, 54-55.

139. With respect to Mexico's contention that the AIDCP fulfils the objective of protecting dolphins and therefore that the U.S. provisions do not provide any additional protection, Mexico ignores and does not refute the significant body of scientific evidence that setting on dolphins to catch tuna adversely affects dolphins. First, setting on dolphins to catch tuna results in observed dolphin mortalities. In fact, dolphin deaths are a foreseeable and expected consequence of setting on dolphins to catch tuna, and this is why under the AIDCP each vessel that wishes to fish for tuna in this way is assigned a set number of dolphins that it may be observed killing each year.[184] In 2009, 1,239 dolphins were observed killed or seriously injured when set upon to catch tuna in the ETP.[185] Under the terms of the AIDCP, up to 5000 dolphins may be killed each year in the ETP when set upon to catch tuna.[186] It cannot be disputed that not setting on dolphins to catch tuna affords greater protection to dolphins than setting on them. At minimum, the 1,239 dolphins that died in 2009 and the up to 5000 dolphins that may die in any given year in the ETP, would be better off.[187] Indeed, the objectives of the AIDCP implicitly recognizes this by stating that the objectives of the agreement are to progressively *reduce* dolphin mortalities in the ETP tuna purse-seine fishery but that, when it comes to the *elimination* of dolphin mortalities, this is to be achieved through seeking "ecologically sound means of capturing large yellowfin tunas *not in association with dolphins*."[188]

140. Second, the observed dolphin mortalities and serious injuries are only one of the many adverse effects of setting on dolphins to catch tuna. The AIDCP is an agreement that sets out ways to reduce observed dolphin mortalities and serious injuries when dolphins are set upon to catch tuna. It does not address the many other adverse affects of setting on dolphins to catch tuna. These adverse effects include separation of dependent calves from their mothers, reduced reproductive success due to stress induced fetal mortality, acute cardiac and muscle damage, cumulative organ damage, compromised immune function and increased predation as reviewed in the First Written Submission and in response to Question 34.[189] The AIDCP currently has no mechanism to undertake a research program to assess these effects and to mitigate them. Moreover, although observed dolphin mortalities and serious injuries have remained under 5000

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[184] *See* U.S. First Written Submission, paras. 53, 81; U.S. Closing Statement at the First Panel Meeting, para. 3; U.S. Answers to the First Set of Questions from the Panel (Question 66), paras. 153-154.

[185] 2009 AIDCP Report, Exhibit US-66; *see also* First U.S. Written Submission, para. 53 (noting that in 2008 1,168 dolphins were observed killed or seriously injured when set upon to catch tuna in the ETP).

[186] U.S. First Written Submission, para. 81.

[187] In this regard, Mexico asserts that the U.S. dolphin safe labeling provisions undermine the "very purpose of the AIDCP" because the incentive for participating in the AIDCP is "to gain access to the U.S. market." Mexico Opening Statement at the First Panel Meeting, para. 21; Mexico First Written Submission, para. 211. This position is not supported by the facts as elaborated in paragraph 160 of the U.S. First Written Submission. Since the AIDCP's conclusion in 1998 and entry into force in 1999, all parties including Mexico have generally been abiding by their obligations under the AIDCP, while at the same time under the U.S. provisions tuna products containing tuna caught by setting on dolphins may not be labeled dolphin safe. U.S. First Written Submission, para. 160.

[188] AIDCP, Article II, Exhibit MEX-11.

[189] U.S. First Written Submission, para. 52-59; U.S. Answers to the First Set of Questions from the Panel (Question 34, paras. 78-85.

dolphins per year since the AIDCP's entry into force, dolphin populations remain depleted at less than 30 percent of their abundance levels before the practice of setting on dolphins began and are showing no clear signs of recovery.[190] As explained in the U.S. response to Question 37, the median population growth rates for northeastern offshore spotted dolphins and eastern spinner dolphins are estimated to be 1.7 and 1.4 percent respectively, below the expected rate of at least 4 percent. The differences between the growth rates for northeastern offshore spotted dolphins and eastern spinner dolphins estimated from assessment models and expected growth rates correspond to 34,000 dolphins per year.[191] This number represents the number of dolphins that should be added to dolphin populations in the ETP each year if the purse-seine tuna fishery was not having an adverse impact on dolphins beyond observed dolphin mortalities. As elaborated in the U.S. response to Question 35 and the U.S. First Written Submission, the most probable reasons based on the best available science that dolphin populations remain depleted and are showing no clear signs of recovery are unreported/unobserved dolphin mortalities resulting from the practice of setting on dolphins to catch tuna. [192]

141. This is not to suggest that the AIDCP has not been successful in protecting dolphins. It has. Application of procedures under the AIDCP and its predecessor the La Jolla Agreement has resulted in significant reduction of observed dolphin mortalities caused by setting on dolphins to catch tuna. However, despite application of these procedures, dolphins continue to die or be seriously injured when set upon to catch tuna and thousands more are repeatedly chased and encircled each year to catch tuna with resulting adverse affects.[193] The U.S. dolphin safe labeling provisions contribute to addressing those concerns by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna.[194] Thus, contrary to Mexico's assertions, the U.S. provisions do provide protections for dolphins that go beyond the protections afforded under the AIDCP.[195]

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[190] U.S. First Written Submission, paras. 46-50; U.S. Answers to the First Set of Questions from the Panel (Question 37), paras. 91-92.

[191] U.S. Answers to the First Set of Questions from the Panel (Question 37), para. 92.

[192] U.S. First Written Submission, para. 50; U.S. Answers to the First Set of Questions from the Panel (Question 35), paras. 87-88.

[193] Data published by the IATTC indicate there are approximately 9,000 sets made on dolphins each year and that, on average, 400 dolphins are encircled in each dolphin set. From these data we can conclude approximately 3.6 million individual dolphin-encirclement events occur each year. We also note these figure is greater than the estimated total number of dolphins in the ETP, indicating individual dolphins are being chased and encircled multiple times annually. *See* U.S. First Written Submission, para. 58.

[194] The preamble to the TBT Agreement makes clear that a Member has the right to protect *inter alia* animal life or health and the environment at levels the level it considers appropriate. Mexico therefore cannot argue that the United States is limited to protecting dolphins at the level they are protected under the AIDCP.

[195] Mexico's arguments that the U.S. dolphin safe labeling provisions undermine the AIDCP is simply not borne out by the facts of this dispute. *See* U.S. First Written Submission, para. 160. Further, it is difficult to reconcile Mexico's position with Mexico's statements about its commitment to the AIDCP, which by the way includes as one its objectives"with the goal of eliminating dolphin mortality in this fishery, *to seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins.*" AIDCP, Article II, Exhibit Mex-11 (emphasis added).

142. Furthermore, the objective of the U.S. dolphin safe labeling provisions is not only to protect dolphins from observed dolphin mortalities and serious injury (by ensuring the U.S. market is not used to encourage a practice that results in such mortality and serious injury, i.e., setting on dolphins to catch tuna) but also to protect them from other adverse effects of setting on them to catch tuna by ensuring that the U.S. market is not used to encourage setting on dolphins to catch tuna. The U.S. dolphin safe labeling provisions therefore add to the protection afforded dolphins under the AIDCP by seeking to discourage the practice of setting on dolphins. Further, Mexico's argument ignores that the U.S. dolphin safe labeling provisions in addition to contributing to dolphin protection, have as their objective ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. The AIDCP also does not fulfil this objective, as elaborated in Section III.C.5 below.

(b) The Hypothetical Situation Mexico Describes Does Not Support the Conclusion that the U.S. Dolphin Safe Labeling Provisions Fail to Fulfill Their Objectives

143. With respect to the situation Mexico describes where a tuna product might contain tuna caught in a set in which a dolphin was killed yet still be labeled dolphin safe, this does not support Mexico's contention that the U.S. dolphin safe labeling provisions fail to full their objective of ensuring consumers are not misled or deceived about whether the product contains tuna that was caught in a manner that adversely affects dolphins. As an initial matter, it is important to understand that Mexico's hypothetical situation might exist only in the limited scenario where the following three factors coincide: (1) tuna is caught in a fishery where there is no regular or significant association between tuna and dolphins and no regular or significant dolphin mortality; (2) a dolphin is accidentally killed when a purse seine net is accidentally set on a dolphin; and (3) the official dolphin safe label is used.

144. To explain, section 1385(d)(1)-(2) covers the following scenarios: (1) tuna caught using purse seine nets outside the ETP where there *is* a regular and significant association between tuna and dolphins (1385(d)(1)(B)(i)); (2) tuna caught using purse seine nets outside the ETP where there is *no* regular and significant association between tuna and dolphins (section 1385(d)(1)(B)(ii)); (3) tuna caught using purse seine nets inside the ETP (where there is regular and significant association between tuna and dolphins) (1385(d)(1)(C) and 1385(d)(2)); (4) tuna caught *not* using purse seine nets in a fishery where there is regular and significant dolphin mortality (1385(d)(1)(D)).[196] For the scenarios described in sections 1385 (d)(1)(B)(i), 1385(d)(1)(C) and 1385(d)(1)(D) tuna products that contain tuna caught in those scenarios may not be labeled dolphin safe (or with any other term or symbol that claims or suggests that the tuna was not caught in a manner that adversely affects dolphins) if dolphins were killed or seriously injured in the set.[197] Thus, the only scenario in which a tuna product could hypothetically contain

[196] DPCIA, 16 U.S.C. 1385(d)(1)-(2), Exhibit US-5; *see also* U.S. First Written Submission, paras. 14-20.

[197] DPCIA, 16 U.S.C. 1385(d)(1), Exhibit US-5.

tuna caught in a set in which a dolphin was killed or seriously injured and meet the conditions described in section 1385(d)(1) or 1385(d)(2) to be labeled dolphin safe is the scenario described in section 1385(d)(1)(B)(ii) – a fishery where there is no regular or significant association between tuna and dolphins and no regular or significant dolphin mortality. Further, because 1385(d)(1)(B)(ii) provides that tuna products may not be labeled dolphin safe if they contain tuna that was caught using purse seine nets intentionally set dolphins, the scenario under which tuna products could meet the conditions to be labeled dolphin safe under section 1385(d)(1)(B)(ii) if a dolphin is killed or seriously injured is further narrowed to those situations where purse seine nets are not set on dolphins. In addition, as elaborated in the U.S. response to questions, if a dolphin safe label other than the official dolphin safe label is used on the product,[198] section 1385(d)(3) provides that tuna products (caught under any scenario) may not be labeled dolphin safe unless "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught."[199] Thus, the only scenario in which a tuna product might hypothetically be labeled dolphin safe that contains tuna caught in a set in which a dolphin was killed is one where the tuna is caught in a fishery where there is no regular or significant association between tuna and dolphins and no regular or significant dolphin mortality, a dolphin is accidentally killed when a purse seine net is not intentionally set on a dolphin, and the official dolphin safe label is used.

145. Mexico has presented no evidence that such a hypothetical actually exists. In fact, as far the United States is aware the official dolphin safe label is not used on any canned tuna products sold in the United States and the only instance the United States is aware of the official dolphin safe label being used is on tuna jerky, a product that is not widely sold in the United States. Moreover, even for the limited amount of tuna products sold in the United States that may use the official dolphin safe label, Mexico has not shown that any such products contain tuna that was caught in a set in which dolphins were killed or seriously injured.

146. In fact, the likelihood of any such products being on the U.S. market is low. As described in the U.S. First Written Submission, answers to questions and Section II.A.2(a), in no other fishery in the world other than the ETP is there a regular and significant association between tuna and dolphins, and no other fishery in the world where a tuna-dolphin association is exploited on commercial bases to catch tuna.[200] Absent the exploitation of such an association there is a vastly lower likelihood that dolphins would interact with fishing gear and be killed in a fishery outside the ETP. Further, in order for tuna products that contain tuna caught in a fishery described in section 1385(d)(1)(B)(ii) to be labeled dolphin safe, the captain of the vessels must certify that no purse seine nets were intentionally deployed on dolphins, further reducing the likelihood that dolphins would interact with the fishing gear and be killed.

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[198] U.S. Answers to the First Set of Questions from the Panel (Questions 3, 8, 9, 10), paras. 4, 20, 22, 25.

[199] DPCIA, 16 U.S.C. 1385(d)(3).

[200] U.S. First Written Submission, paras. 38-39; U.S. Answers to the First Set of Questions from the Panel (Question 12), paras. 31-33.

147. Moreover, there is no evidence that dolphin mortality exists outside the ETP in any way comparable to inside the ETP, as reviewed in Section II.A.2(b). This further underscores that the very low likelihood that the hypothetical scenario Mexico paints of a tuna product being labeled dolphin safe that contains tuna caught in a set in which a dolphin was killed actually exists.

148. Mexico also suggests that tuna caught in a purse seine fishery where there is no significant association between tuna and dolphins and no regular and significant dolphin mortality, but where a dolphin was killed, may be used in tuna products that bear a non-official dolphin safe label because marketers may not adhere to the condition under section 1385(d)(3) that tuna products that contain tuna that was caught in a set in which a dolphin was killed or seriously injured may not be labeled dolphin safe. Mexico says this is possible because the statute does not require a captain or observers statement that no dolphins were killed or seriously injured when the tuna was caught for a fishery described in section 1385(d)(1)(B)(ii).

149. As explained in Section II.A.2(a), the different documentation to support dolphin safe claims in a fishery described in section 1385(d)(1)(B)(ii) as compared to a fishery where there is a regular and significant association between tuna and dolphins reflects the very different risk in those fisheries that a dolphin may accidentally be killed or seriously injured when tuna is caught. In light of these different risks, the statute does not require an observer's statement that no dolphins were killed or seriously injured when the tuna was caught.[201] [202] This risk that dolphins might be killed or seriously injured is balanced against the burden that conditioning use of a dolphin safe label on an observer's statement that no dolphins were killed or seriously would impose. This is in contrast to the high risk that exists in a fishery where there is a regular or significant association between tuna and dolphins or regular and significant dolphin mortality.

150. Mexico cannot argue that the balance reflected in the U.S. dolphin safe labeling provisions to minimize the burden of meeting the conditions to label tuna products dolphin safe in light of the risks involved, demonstrates that the U.S. provisions fail to fulfill their legitimate objective. To do so would put the United States in an impossible position with regards to a fishery where the risk of dolphins interacting with fishing gear, much less being killed, is very low: the United States could either condition the labeling of tuna products as dolphin safe on an observer's statement that no dolphins were killed or seriously injured, but face accusations that it had imposed conditions that were more trade-restrictive than necessary to fulfill its legitimate objective, or it could not condition the labeling of tuna products as dolphin safe on an observer's

[201] As explained in Section II.A.2(a), conditioning the labeling of tuna products as dolphin safe on an observers statement that no dolphins were killed or seriously injured would require an observer to be on the vessel. In no fishery other than the ETP is there an international dolphin conservation agreement or any other agreement in place whereby parties agree to have observers on 100 percent of fishing trips to document whether dolphins are killed or seriously injured when tuna is caught. This of course reflects the fact that there is no regular and significant association between tuna and dolphins or regular and significant dolphin mortality outside the ETP.

[202] As explained in Section II.A.2(a), captains are not in a position to certify that no dolphins were killed or seriously injured.

statement that no dolphins were killed or seriously injured, but face accusations that its measure fails to fulfill a legitimate objective.

151. Rather than demonstrating that the U.S. dolphin safe labeling provisions do not fulfill their objectives of ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, the documentation to support dolphin safe claims reflect that the U.S. provisions took a balanced approach that weighed the risk of products containing tuna caught in a manner that adversely affects dolphins against the burden of ensuring that by conditioning use of dolphin safe labeling on an observer's statement that no dolphins were killed or seriously injured.

152. As noted in Section II.A.2(a), such an approach that weighs costs and benefits is consistent with well-established approaches to the introduction of government measures. It is also consistent with the TBT Agreement. The preamble to the TBT Agreement provides that Members should not be prevented from taking measures *inter alia* to protect human, animal or plant life or health or the environment or to prevent deceptive practices *at the levels* they consider appropriate. Article 2.2 of the TBT Agreement requires that Members' technical regulations shall not be more trade-restrictive than necessary, reflecting together with the preamble to the TBT Agreement that while Members may take measures to fulfill legitimate objectives at the levels they consider appropriate, those measures must not be more trade-restrictive than necessary to fulfill those objectives at those levels. Within this framework, Members have the right to determine how best to fulfill their legitimate objectives, and at what level. In making such determinations, Members often weigh costs and benefits among other factors. Nothing in the TBT Agreement indicates that Members should not do so, or that the WTO should stand in the shoes of Members to make these kinds of determinations.

153. In a further effort to demonstrate that the U.S. dolphin safe labeling provisions fail to fulfill their objectives, Mexico cites a poll that it had conducted shortly before the first panel meeting.[203] It is difficult to understand how this poll supports Mexico's position. As elaborated in the U.S. response to Question 42, the questions posed in this poll about what dolphin safe means were misleading and suggested that setting on dolphins to catch tuna does not harm dolphins.[204] The fact that 48 percent of individuals responded that dolphin safe means no dolphins were injured in the course of capturing tuna[205] may actually support the conclusion that those individuals believe that dolphin safe means that dolphins were not set upon to catch tuna, since setting on dolphins to catch tuna harms dolphins. In any event, the objective of the U.S. dolphin safe labeling provisions is to ensure consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. Whether consumers believe that means specifically that no dolphins were set upon to catch the tuna or simply that dolphins were not adversely affected when the tuna was caught, the U.S. dolphin safe

[203] Mexico Opening Statement at the First Panel Meeting, para. 49.

[204] U.S. Answers to the First Set of Questions from the Panel (Question 42), paras. 108-109.

[205] Exhibit MEX-64.

labeling provisions fulfill that objective by conditioning use of dolphin safe labeling on tuna products not containing tuna that was caught by in manner that adversely affects dolphins.

5. Mexico Has Failed to Identify a Reasonably Available Alternative Measure That Would Fulfill the Objectives of the U.S. Dolphin Safe Labeling Provisions

154. As reviewed in the U.S. First Written Submission, to establish that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to fulfill a legitimate objective within the meaning of Article 2.2 of the TBT Agreement, Mexico must establish that there is a reasonably available alternative measure that fulfills the provisions' objectives that is significantly less trade-restrictive.[206] Mexico has failed to identify such an alternative.

155. The alternatives Mexico appears to identify are the AIDCP[207], the "AIDCP standard"[208] and the "AIDCP dolphin safe label."[209] Mexico does not explain what it means by the "AIDCP standard" or the "AIDCP dolphin safe label," but based on its arguments under its Article 2.4 claim, we presume what Mexico means is the AIDCP resolutions on tuna tracking and verification and dolphin safe certification and what might be labeled dolphin safe under the definition of dolphin safe referred to in those resolutions.[210] Neither the AIDCP nor the AIDCP resolutions are alternatives that would fulfill the objectives of the U.S. dolphin safe labeling provisions.[211]

(a) The AIDCP Is Not An Alternative That Would Fulfill the Objectives of the U.S. Dolphin Safe Labeling Provisions

156. As elaborated in Section III.C.4(a), the AIDCP is an agreement that seeks to reduce observed dolphin mortalities and serious injuries *when dolphins are set upon to catch tuna*. It does this, for example, by setting limits on the number of dolphins that may be observed killed in nets when they are set upon dolphins to catch tuna and by requiring parties to require their vessels to follow certain procedures when setting nets on dolphins to catch tuna. The agreement contemplates that even when the procedures are applied some dolphins will nonetheless be killed

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[206] U.S. First Written Submission, paras. 162-169.

[207] Mexico First Written Submission, para. 224.

[208] Mexico Oral Statement at the First Panel Meeting, para. 56.

[209] Mexico Answers to the First Set of Questions from the Panel (Question 67), para. 236.

[210] Mexico First Written Submission, paras. 229-230.

[211] We understand Mexico to argue in its first written submission that the AIDCP itself (rather than the AIDCP resolutions on tuna tracking and dolphin safe certification) are an alternative to the U.S. dolphin safe labeling provisions that would fulfill their objective of those provisions aimed at protecting dolphins, while in its opening statement, Mexico appears to argue that the AIDCP resolutions are an alternative to the U.S. dolphin safe labeling provisions that would fulfill their objective aimed at protecting dolphins. Regardless of whether Mexico is referring to the AIDCP itself or the AIDCP resolutions, it has failed to identify an alternative that would fulfill the objectives of the U.S. dolphin safe labeling provisions.

or seriously injured when they are set upon to catch tuna[212] and does not contain provisions aimed at discouraging the practice of setting on dolphins to catch tuna. As long as dolphins are set upon to catch tuna, they will suffer the adverse effects of that practice. Thus, the AIDCP is not a substitute for provisions that seek to protect dolphins by discouraging the practice of setting on them to catch tuna.

157. Rather, the U.S. dolphin safe labeling provisions complement the protections afforded under the AIDCP. Dolphins would be better off if they were not set upon to catch tuna, but if they are to be set upon, then the procedures set out in the AIDCP help minimize dolphin mortalities and serious injury. In this way, the U.S. dolphin safe labeling provisions build upon protections afforded dolphins under the AIDCP by ensuring the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna. As noted in the U.S. First Written Submission, the U.S. dolphin safe labeling provisions together with the procedures called for under the AIDCP and other provisions of U.S. law form part of a comprehensive strategy to protect dolphins.[213] Were the United States to substitute one aspect of this comprehensive strategy for another – for example forgo the dolphin safe labeling provisions in lieu of the AIDCP – this overall strategy would be compromised and U.S. efforts to protect dolphins from the full range of adverse affects of setting on them to catch tuna would be undermined. Therefore, the AIDCP is not an alternative that would fulfill the objectives of the U.S. dolphin safe labeling provisions aimed at protecting dolphins.

158. Furthermore, Mexico's suggestion that the AIDCP is an alternative measure that would fulfill the objective of the U.S. dolphin safe labeling provisions, loses sight of the fact that the objective of the U.S. provisions is protecting dolphins *by* ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna. If the U.S. dolphin safe labeling provisions did not exist, tuna products could be labeled dolphin safe without regard to whether dolphins were adversely affected when the tuna was caught, for example, tuna products caught by setting on dolphins could be labeled dolphin safe. In such a scenario, no measure would exist to ensure that the U.S. market is not used to encourage the practice of setting on dolphins.

159. In addition, Mexico's argument ignores that the U.S. dolphin safe labeling provisions also have as their objective ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. Application of the procedures called for under the AIDCP would not fulfill this objective, since those procedures are procedures to reduce dolphin mortalities when setting on dolphins to catch tuna and do not address the labeling of tuna products or dolphin safe claims on tuna products.

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[212] *See, e.g.,* U.S. First Written Submission, para. 81 (citing AIDCP "dolphin mortality limits" or DMLs); U.S. Closing Statement at the First Panel Meeting, para. 3.

[213] U.S. First Written Submission, para. 171.

(b) The AIDCP Resolutions Are Not An Alternative That Would Fulfill the Objectives of the U.S. Dolphin Safe Labeling Provisions

160. Mexico also argues that the "AIDCP standard" or "AIDCP label" would fulfill the objectives of the U.S. dolphin safe labeling provisions.[214] As noted, the United States presumes that by the "AIDCP standard" or "AIDCP label" Mexico means the AIDCP resolutions on tuna tracking and verification and dolphin safe certification and in particular the definition in the tuna tracking and verification resolution of "dolphin safe tuna." The tuna tracking and verification resolution states that the term "dolphin safe tuna"used in the resolution means "tuna captured in sets in which there is no mortality or serious injury of dolphins."[215] The dolphin safe tuna certification resolution cross-references this definition in defining the term "AIDCP dolphin safe tuna certification."[216] Use of the definition of "dolphin safe" referred to in the AIDCP resolution would not fulfill the objective of the U.S. dolphin safe labeling provisions.

161. First, that definition – if used as a basis for the conditions under which tuna products may be labeled dolphin safe – would not ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins because it would allow tuna products to be labeled dolphin safe if dolphins were set upon to catch the tuna and, as reviewed in the U.S. First Written Submission and the U.S. answer to Question 34 setting on dolphins to catch tuna adversely affects dolphins.[217] Second, these definitions – if used as a basis for the conditions under which tuna products may be labeled dolphin safe – would not contribute to the protection of dolphins by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna, since they would permit tuna products to be labeled dolphin safe that were caught by setting on dolphins.

162. Because Mexico has failed to put forward a reasonably available alternative measure that would fulfill the objective of the U.S. dolphin safe labeling provisions, much less one that restricts trade less or significantly less than the U.S. provisions, it cannot demonstrate that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. Therefore, even if the Panel were to conclude that the U.S. provisions were technical regulations, the Panel should reject Mexico's claims that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement owing to Mexico's failure to put forward a reasonably available alternative measure that would fulfill the objectives of the U.S. dolphin safe labeling provisions.

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[214] Mexico Opening Statement at the First Panel Meeting, para. 56.

[215] AIDCP Resolution to Establish A System for Tracking and Verifying Tuna, para. 1.a, Exhibit MEX-55.

[216] AIDCP Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification, para. 1, Exhibit MEX-56.

[217] U.S. First Written Submission, paras. 47-59; U.S. Answers to the First Set of Questions from the Panel (Questions 34-35), paras. 79-88.

6. Mexico Has Failed to Establish that the U.S. Dolphin Safe Labeling Provisions Restrict Trade More Than Necessary

163. The Panel should also reject Mexico's claims that U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement, because Mexico has not demonstrated that the U.S. dolphin safe labeling provisions restrict trade, much less that they restrict trade more than necessary within the meaning of Article 2.2 of the TBT Agreement.

164. Mexico argues that the U.S. dolphin safe labeling provisions restrict trade because they "deny competitive opportunities to Mexican tuna products." In the context of its Article 2.2 claim, Mexico does not explain how the U.S. provisions allegedly deny Mexican tuna products these opportunities. To the extent Mexico is basing its allegation in this regard on similar allegations made in the context of its Article III:4 of the GATT 1994 claim, as reviewed in Section II.A, the U.S. dolphin safe labeling provisions afford domestic and imported, including Mexican, tuna products the same opportunities to compete in the U.S. market and therefore, contrary to Mexico's assertion, do not "deny competitive opportunities to Mexican tuna products."

165. Further, Mexico has not substantiated its assertion that the U.S. dolphin safe labeling provisions actually have an "adverse effect" on Mexican tuna products.[218] Mexico asserts that U.S. retailers will not purchase tuna products that do not bear the dolphin safe label. However, based on the evidence Mexico has cited,[219] it is not clear that retailers will not purchase tuna that is not labeled dolphin safe or whether retailers will not purchase tuna products that do not meet the conditions to be labeled dolphin safe. In fact, it appears from the evidence Mexico cites, that the latter is the case.[220] In addition, although most tuna products that meet the conditions to be labeled dolphin safe are labeled dolphin safe, some marketers of tuna products have chosen not to label their tuna products as dolphin safe.[221]

D. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent With Article 2.4 of the TBT Agreement

166. Mexico claims that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.4 of the TBT Agreement because they are not based on relevant international standards that are not an ineffective or inappropriate in fulfilling the legitimate objectives of the U.S. provisions.[222] However, to substantiate an Article 2.4 claim, the complaining party must establish that (1) there is a relevant international standard; (2) that standard would not be an ineffective or inappropriate

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[218] Mexico First Written Submission, para. 111.

[219] Mexico First Written Submission, para. 111; Business confidential Exhibit MEX-58.

[220] Mexico First Written Submission, para. 111; Business confidential Exhibit MEX-58.

[221] U.S. First Written Submission, para. 94; Photo of Great Value Tuna, Exhibit US-73.

[222] Mexico First Written Submission, para. 228.

in fulfilling the legitimate objective of the measure; and (3) the measure at issue is not based on that standard.[223] Mexico has not established, however, that the AIDCP resolutions Mexico identifies – resolution on tuna tracking and dolphin safe certification – are relevant international standards within the meaning of Article 2.4 of the TBT Agreement or that they would not be ineffective and inappropriate to fulfill the objectives of the U.S. dolphin safe labeling provisions. The Panel should therefore reject Mexico's claims that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.4 of the TBT Agreement.

1. Definition of Dolphin Safe in the AIDCP Resolutions Is Not A Relevant International Standard

167. To establish that the AIDCP resolutions are "relevant international standards" within the meaning of Article 2.4 of the TBT Agreements, Mexico must establish that the resolutions: (1) constitute standards within the meaning of Annex 1 of the TBT Agreement; (2) are "international" as that term is used in Article 2.4 of the TBT Agreement; and (3) are relevant to the objective pursued by the measure. Mexico has not established any of these elements.

(a) The Definition of Dolphin Safe in the AIDCP Resolutions Is Not a "Standard"

168. Although Mexico asserts that the definition of "dolphin safe tuna" in the AIDCP resolutions on tuna tracking and verification and a cross-reference to that definition in the AIDCP resolution on dolphin safe certification constitute "standards,"[224] Mexico has not made any showing that these resolutions meet the definition of a standard set out in Annex 1 of the TBT Agreement. Mexico cannot establish a *prima facie* case simply on the assertion that the definition of "dolphin safe tuna" in the AIDCP tuna tracking and verification resolution is a "standard."

169. Instead, based on the text of Annex 1 of the TBT Agreement, there are three basic elements that Mexico must establish for the definition[225] of "dolphin safe tuna" in the AIDCP resolution on tuna tracking to fall within the definition of a standard: it must (1) provides rules, guidelines or characteristics for products or related process and production methods (or provide

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[223] TBT Agreement, Article 2.4.

[224] Mexico refers to the definition of dolphin safe in the tuna tracking and verification and a cross-reference to that definition in the AIDCP resolution on dolphin safe certification as "the AIDCP standard" for dolphin safe and appears to suggest that the definition of "dolphin safe" in the tuna tracking and verification resolution comes from the AIDCP. The AIDCP, however, does not define or use the term "dolphin safe."

[225] While the AIDPC resolution on tuna tracking sets out procedures to track tuna, Mexico does not appear to be arguing that the resolution's procedures to track tuna constitute the rules, labeling requirements etc. at issue but that the definition itself constitutes a standard. Likewise, with respect to the resolution on dolphin safe certification, Mexico does not appear to be arguing that the procedures for certifying tuna under the AIDCP resolution for dolphin safe certification constitute a standard, but that the cross-reference in that resolution to the definition of "dolphin safe" in the tuna tracking resolution is a "standard."

for an aspect covered under the second sentence of the definition such as a labeling requirement) (2) for common and repeated use (3) that are approved by a recognized body. Mexico has not established any of these elements.

170. First, Mexico has not established that the definition of "dolphin safe tuna" in the AIDCP resolution on tuna tracking and verification or the cross-reference to that definition in the dolphin safe certification resolution provides for rules, guidelines or characteristics for products or related process and production methods or for an aspect covered under the second sentence such as a labeling requirement. Instead, the definition of "dolphin safe" in the AIDCP resolution on tuna tracking and verification is simply that – a definition. This definition defines a term, but does not itself provide for rules, guidelines or characteristics for products or related process and production methods or, importantly for Mexico's claims, aspects covered under the second sentence of the definition of a technical regulation such as labeling requirements.

171. Second, Mexico has not established that the definition in the AIDCP resolution on tuna tracking and verification is for "common and repeated use." As elaborated in the U.S. answer to Question 33,[226] the word "common" in the definition of a standard refers to a rule, guideline or characteristic of general application and a rule, guideline, or characteristic that is for common and repeated use would not be one that was drafted for the specific purpose of defining a term in an international agreement. The definition of dolphin safe in the AIDCP tuna tracking and verification resolution sets out a definition for purposes of that resolution and, by virtue of the cross-reference in the AIDCP dolphin safe certification resolution, for purposes of the AIDCP dolphin safe certification resolution. Neither resolution purports to establish a definition of "dolphin safe" for general application outside the context of the AIDCP resolutions. Instead, the resolutions set out a definition for a specific purpose: understanding and implementing the AIDCP resolutions and, in particular, what those resolutions mean by "dolphin safe."

172. To construe the definition of "dolphin safe" in the AIDCP resolution on tuna tracking, and the cross-reference to that definition in the dolphin safe certification resolution, as standards for "common and repeated use" would – as elaborated in the U.S. answer to Question 33 – vastly expand the scope of the term standard in the TBT Agreement and have serious implications with respect to Members' rights and obligations under any intergovernmental resolution or agreement.[227] In particular, taken to its logical conclusion, adopting Mexico's position would mean that any time a Member agrees to the definition of a term for purposes of implementing an intergovernmental agreement, it has an obligation to use that definition as a basis for its technical

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[226] U.S. Answers to the First Set of Questions from the Panel, paras. 74-77 (Question 33). As explained in the U.S. answer to Question 33, the ordinary meaning of the word "common" is "shared...of general application," while the ordinary meaning of the word "repeated" is "frequent." Thus, the term "common" addresses the shared or general nature of the measure, while the term "repeated" addresses the frequency the measure is to be used. A rule, guideline etc. that is for common and repeated use would not be one that was drafted for the specific purpose of defining a term in an international agreement. U.S. Answers to the First Set of Questions from the Panel, para. 75.

[227] U.S. Answers to the First Set of Questions from the Panel (Question 33), paras. 74-77.

regulations. This would include, for example, situations – such as in this case – where the parties to that agreement or resolution agreed that no party had an obligation to implement the resolution or any definitions it contains for purposes of its own domestic law.[228] While an intergovernmental agreement might obligate parties to use a particular definition contained in the agreement for purposes of domestic law, any such obligation would be set forth in the agreement. In the absence of any such obligation, what parties to an intergovernmental agreement intend in defining the terms used in an intergovernmental agreement is to establish terms with special meanings for purposes of that agreement, not the creation of standards for use in other contexts.

173. Third, Mexico has not established that the definition of "dolphin safe tuna" in the AIDCP resolution on tuna tracking and verification or the AIDCP resolution on dolphin safe certification were approved by a recognized body within the meaning of Annex 1 of the TBT Agreement. Those resolutions were adopted by the parties to the AIDCP, and Mexico has not established that the parties to the AIDCP constitute a body as that term is defined for purposes of the TBT Agreement. ISO/IEC Guide 2 defines a body as a "legal or administrative entity that has specific tasks and composition"and, because the terms used in the TBT Agreement are to have the same meaning as given in the ISO/IEC Guide, this definition applies to the term "body" as used in definition of a standard in Annex 1 of the TBT Agreement. [229] The parties to the AIDCP are not a "legal or administrative entity that has specific tasks and composition," as defined by the ISO/IEC Guide 2. In particular, the parties to the AIDCP do not operate as a legal or administrative entity. The parties to the AIDCP are governments that act independently and on their own accord, not as a legal or administrative entity. Mexico argues that an "organization" is a body that is based on the membership of other bodies and that AIDCP is based on the membership of national governments which are bodies.[230] Mexico's argument ignores however that the AIDCP is an agreement not a body. Governments are party to the AIDCP; they are not members in it or members in any body or organization established under the AIDCP.

174. The parties to the AIDCP are also not a "recognized" body for purposes of the TBT Agreement. As elaborated in the U.S. answer to Question 62 and the U.S. First Written Submission,[231] although the term "recognized body"[232] is not defined in the TBT Agreement or ISO/IEC Guide 2, the ISO/IEC Guide does include a definition of the term "standardizing body." That definition provides that a "standardizing body" is a "body that has *recognized* activities in

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[228] The AIDCP resolution on dolphin safe certification expressly states that parties to that resolution are not required to use the procedures set out in that resolution "especially in the event that they may be inconsistent with the national laws of a Party." AIDCP Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification, Exhibit Mex-56; *see also* Mexico First Written Submission, para. 235.

[229] *See* U.S. First Written Submission, paras. 180, 184.

[230] Mexico Answers to the First Set of Questions from the Panel, paras. 190, 195 (Questions 60 and 61).

[231] U.S. Answers to the First Set of Questions from the Panel, paras. 138-140; U.S. First Written Submission, paras. 184-185.

[232] It does contain a definition of "body" which it defines as a "legal or administrative entity that has specific tasks and composition." ISO/IEC Guide 2:1991, para. 4.1.

standardization."[233] Thus, a reasonable interpretation of "recognized" in the context of a standard would be that the body has recognized activities in standardization.

175. Mexico argues that "AIDCP's main role is to establish rules and procedures - i.e., standards – governing the interaction between fishing and dolphins" and therefore has recognized activities in standardization.[234] Mexico' argument should be rejected. As stated above, the AIDCP is an agreement not a body; while an agreement may call on parties to undertake various activities, an agreement itself is not capable of carrying out activities. Thus, it is incorrect to assert as Mexico does that the AIDCP has recognized activities in standardization or in any other matter. Further, even if for the sake of argument the AIDCP could be considered a "body," Mexico has not established that such a body would have recognized activities in standardization. As noted in the U.S. First Written Submission, the objectives of the AIDCP and the activities parties take pursuant to it are fundamentally different from those of bodies such as Codex Alimentarius Commission or ASTM International that have as their core functions the development of standards.[235] The fact that the parties to AIDCP have adopted resolutions on tuna tracking and verification and dolphin safe certification, however, is not evidence that the parties to the AIDCP have recognized activities in standardization. Mexico has not established, for example, that resolutions establish rules, procedures or characteristics for products or labeling requirements nor that the adoption of the resolutions constitute "recognized" activities in standardization.

(b) The Definition of Dolphin Safe in the AIDCP Resolutions Is not "International"

176. In addition to not being "standards" within the meaning of Annex 1 of the TBT Agreement, the AIDCP resolutions are also not "international" within the meaning of Article 2.4 of the TBT Agreement. As elaborated in the U.S. First Written Submission and response to Questions 59 and Question 61, for purposes of Article 2.4 of the TBT Agreement, an "international standard" is a standard (as that term is defined in Annex 1 of the TBT Agreement) that (i) is adopted by a body whose membership is open to the relevant bodies of at least all Members, (ii) based on consensus and (iii) made available to the public.[236]

177. Mexico does not appear to contest that each of these elements must be met for a standard to qualify as international under Article 2.4 of the TBT Agreement.[237] Instead, Mexico interprets the first element – adopted by a body whose membership is open to at least all Members – as requiring that the body be open to the relevant bodies of at least all Members *who bear an*

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[233] ISO/IEC Guide 2:1991, para. 4.3.

[234] Mexico Answers to the First Set of Questions from the Panel, para. 190.

[235] U.S. First Written Submission, para. 185.

[236] U.S. First Written Submission, paras. 186-187; U.S. Answers to the First Set of Questions from the Panel, paras. 134-137 (Questions 59 and 61).

[237] Mexico Answers to the First Set of Questions from the Panel (Question 61), paras. 192-198.

interest in relation to the subject matter of the regulation.[238] There is no basis for Mexico's interpretation.

178. The requirement that membership in a body be open to at least all Members in order for a standard to qualify as international stems from the definition of "international body" in Annex 1 of the TBT Agreement.[239] That definition indicates that an international body or system is a body or system whose membership is open to at least all Members. As elaborated in the U.S. answer to Question 63, nothing in that definition supports reading the reference to "at least all Members" as meaning a subset of Members, for example, those that have interest in some or all of the work of that body or system.[240] In fact, the context in which the definition of "international body or system" appears supports the opposite conclusion. In particular, the definition of a "regional body or system" is "body or system whose membership is open to the relevant bodies of only some of the Members."[241] Thus, a body whose membership is open to only some Members, for example those that have an interest in the work of the body, would be a regional body; it would not be an international body.

179. Further context disproving Mexico's position lies in Articles 2.4 and 2.5 of the TBT Agreement. Pursuant to Article 2.4 of the TBT Agreement, Members have an obligation to use relevant international standards" as the basis for their technical regulations (unless ineffective or inappropriate to meet a legitimate objective), and pursuant to Article 2.5 of the TBT Agreement, any Member that bases a technical regulation on relevant international standards benefits from a presumption that the technical regulation is not an unnecessary obstacle to trade. As a result, if an the term "international body or system" included bodies or systems whose membership was only open to a subset of Members, "international standards" could be developed by bodies that are not open to all Members, yet where relevant all Members would have an obligation to base their technical regulations on those standards (unless ineffective or inappropriate to fulfilling the

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[238] Mexico Answers to the First Set of Questions from the Panel (Question 63), paras. 200-206.

[239] In this regard, the basis for Mexico's assertion that the term "international standard" should be "applied flexibly" is flawed. Mexico Answers to the First Set of Questions from the Panel (Question 59), paras. 186-187. The TBT Agreement defines an international body as a body whose membership is open to the relevant bodies of at least all Members. Unlike the definition of "international standardizing organization" in the ISO/IEC Guide, the definition of international body in Annex 1 of the TBT Agreement refers to "bodies" not "national bodies." TBT Agreement, Annex 1; ISO/IEC Guide 2, para. 4.4.3. Further, Mexico wrongly equates the term "national body" with "government body." The ISO/IEC Guide defines a "national standards body" as a "standards body recognized at the national level, that is eligible to be the national member of the corresponding international or regional standards organization." ISO/IEC Guide 2, para. 4.4.1. Either a government or non-government body could be recognized as the national member of a standards organization and, in fact, in the United States, the American National Standards Institute (ANSI) is the recognized national standards body for example with respect to participation in ISO and IEC. ANSI is a non-governmental organization. *See* About ANSI Overview, Exhibit US-74.

[240] In this regard, it is unclear how it would be decided, and by whom, that a given Member has an interest in the work of a particular body. If it is the Member who decides, then the body would have to ensure that its membership is open to all Members since it would not know with certainty whether any given Member has an interest in its work. If it is the body who decides, it is unclear how it would know which Members have an interest in its work.

[241] TBT Agreement, Annex 1, para. 5.

legitimate objective pursued) and any Member basing their technical regulations on those standards would benefit from a presumption the technical regulation was not an unnecessary obstacle to trade. In other words, defining an international body to include bodies whose membership is open to only a subset of Members, would result in that subset of Members determining for other Members the "international standards" that must be used as the basis of their technical regulations. It would also permit the Members that were allowed to participate in the body to adopt standards that may reflect those Members' interests (but not the interests of other Members) and, on account of the presumption provided in Article 2.5 of the TBT Agreement, help shield any technical regulations they adopt based on those standards from being challenged as unnecessary obstacles to trade under Article 2.2 of the TBT Agreement.

180. Mexico is incorrect that, as applied to the facts of this dispute, its interpretation would avoid a situation where developing countries were called upon to base their technical regulations on a standard in whose development they did not participate.[242] If the definition of dolphin safe in the AIDCP resolutions were considered an international standard, then all Members including developing country Members that did not participate in the adoption of those resolutions would have an obligation, pursuant to Article 2.4, to base their dolphin safe labeling technical regulations on the AIDCP resolutions, provided that standard was relevant, effective and appropriate in fulfilling their legitimate objective. In addition, any Member basing its technical regulations on the AIDCP resolutions would benefit from a presumption, pursuant to Article 2.5 of the TBT Agreement, that the technical regulation is not an unnecessary obstacle to trade. Thus, any developing country wishing to label products in accordance with another Member's requirements would need to ensure that the products met the conditions set out in the technical regulation and would have to overcome the presumption in Article 2.5 to establish that any such technical regulation was an unnecessary obstacle to trade.

181. Further, it is important to recall that Members use international standards as the basis for their technical regulations when they are relevant to and effective and appropriate in fulfilling the objective pursued. When standards are developed by bodies that are not open to at least all Members, the likelihood that those bodies will develop standards that are relevant to and effective and appropriate in fulfilling the objectives pursued by Members who were not permitted to participate in their development is greatly reduced along with the likelihood that those standards will be used as the basis for Members' technical regulations. It would therefore undermine the contribution international standards are capable of making in promoting the harmonization of Members' technical regulations and facilitating international trade to interpret the term "international body" in a way that would have the term "international standards" include standards developed by bodies whose membership is not open to all Members. Members' interest in harmonizing technical regulations and using international standards as a means to facilitate trade is reflected, for example, in Article 2.6 of the TBT Agreement which instructs Members to participate in internationals standards development "with a view to harmonizing

[242] Mexico Answer to the First Set of Questions from the Panel (Question 63), para. 205.

technical regulations on wide a basis as possible" and the preamble to the TBT Agreement which recognizes international standards can facilitate international trade.[243]

182. In contrast to the interpretation offered by Mexico, defining an international body as a body whose membership is open to all Members ensures that all Members have the opportunity to participate in the development of any "international standard" that by virtue of Article 2.4 of the TBT Agreement they have an obligation to use, if relevant, as the basis for their technical regulations (unless ineffective or inappropriate to fulfil the legitimate objective pursued). It also ensures that Members do not benefit from a presumption that their technical regulations are not unnecessary obstacles to trade when based on standards that were developed by bodies that permitted only a subset of Members to participate. Ensuring that international standards may only be adopted by bodies whose membership is open to at least all Members also promotes harmonization of Members' technical regulations and facilitate trade by increasing the likelihood that when an international standard is adopted it is relevant, effective and appropriate in meeting the needs of Members and therefore a standard that Members will used as the basis for their technical regulations.

183. With respect to the AIDCP resolutions, those resolutions were not adopted by a body whose membership is open to the relevant bodies of at least all Members and therefore do not qualify as "international" for purposes of Article 2.4 of the TBT Agreement.[244] In addition to not being adopted by a body as discussed in Section III.D(1)(a), the AIDCP resolutions were adopted by a limited number of countries that are party to the AIDCP, and the AIDCP limits the countries that may become parties.[245] Mexico's contention that the AIDCP is not closed to "additional members"[246] ignores that the AIDCP is not a body and does not have members. It also fails to address the fact that, even if additional countries may accede to the AIDCP, the AIDCP by its terms limits the countries that may do so.[247] The fact that AIDCP parties may invite countries to accede to the AIDCP that do not otherwise meet the requirements for accession does not alter the fact that becoming party to the AIDCP is not an option available to at least all Members.[248] Because the AIDCP resolutions were not adopted by a body whose membership is

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[243] TBT Agreement, preamble and Article 2.6.

[244] U.S. First Written Submission, paras. 186-187.

[245] U.S. First Written Submission, paras. 186-187.

[246] Mexico Answers to the First Set of Questions from the Panel (Question 63), para. 201.

[247] U.S. First Written Submission, para. 186; AIDCP, Articles XXIV and XXVI, Exhibit MEX-11.

[248] Mexico's further contends that no "additional countries" have expressed an interest in joining the AIDCP and that the U.S. dolphin safe labeling provisions are "a standard specifically designed to have an impact only on the ETP" and therefore it cannot be expected that other countries would want to become a party to the AIDCP should likewise be rejected. Mexico Answer to the First Set of Questions from the Panel (Question 63), paras. 202, 206. Whether or not any country has expressed interest in acceding to the AIDCP, the fact remains that becoming a party to the AIDCP is not an option available to at least all Members, and Mexico is incorrect that the U.S. dolphin safe labeling provisions are specifically designed to have an impact only on the ETP. The U.S. dolphin safe labeling provisions establish conditions under which any tuna product may be labeled dolphin safe; those conditions are not limited to tuna products that contain tuna caught in the ETP.

open to at least all Members, the definition of "dolphin safe" reflected in them do not constitute "international standards" within the meaning of Article 2.4 of the TBT Agreement.

(c) The Definition of Dolphin Safe in the AIDCP Resolutions Is Not Relevant

184. In addition to not being an international standard, the AIDCP resolutions are not relevant to the U.S. dolphin safe labeling provisions.[249] First, with respect to the resolution on tuna tracking, that resolution concerns the tracking of tuna and does not address the labeling of tuna or tuna products. Further, the definition of "dolphin safe" contained in that resolution is for purposes of understanding and implementing that resolution and does not apply outside that context. Second, with respect to the resolution on dolphin safe certification, that resolution does not define "dolphin safe" but instead explicitly states that the definition of "dolphin safe" in the tuna tracking resolution applies to the term "dolphin safe" as it appears in the dolphin safe certification resolution;[250] it does not reference that definition for any purpose other than understanding and implementing the dolphin safe certification resolution.[251] Third, the dolphin safe certification resolution explicitly states that no country is required to apply the resolution if doing so would be inconsistent with domestic law.[252] The dolphin safe certification resolution, therefore, recognizes that the definition of "dolphin safe" in the tuna track resolution and cross-referenced in the dolphin safe certification resolution is not relevant in all situations and in particular is not relevant in those instances where application of that definition would be inconsistent with domestic law, as would be the case with respect the U.S. dolphin safe labeling provisions.

185. The definition of "dolphin safe" in the tuna tracking resolution and cross-referenced in the dolphin safe certification resolution is also not relevant because it does not relate or pertain to the objectives of the U.S. dolphin safe labeling provisions. Specifically, the objectives of the U.S. dolphin safe labeling provisions are ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and ensuring the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna and thereby contribute to dolphin protection. The AIDCP resolutions are not relevant to fulfilling these objectives since, under their definition of "dolphin safe," tuna would be considered "dolphin safe" if it was caught by setting on dolphins.

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[249] *See* U.S. First Written Submission, paras. 188-190 (explaining the meaning of "relevant" for purposes of Article 2.4 of the TBT Agreement).

[250] AIDCP Resolution on Dolphin Safe Certification, para.1, Exhibit MEX-56.

[251] Both the resolution on tuna tracking and the resolution on dolphin safe certification contain a "definitions" section and begin that section with the following: "The terms used in this document are defined.... as follows". AIDCP Resolution on Dolphin Safe Certification, Exhibit MEX-56, para. 1; AIDCP Resolution on Tracking and Verifying Tuna, Exhibit MEX-55, para. 1. The resolutions make clear that the definitions are for purposes of the resolutions.

[252] AIDCP Resolution on Dolphin Safe Certification, para.2.1, Exhibit MEX-56.

2. The Definition of Dolphin Safe in the AIDCP Resolutions Would Be Ineffective and Inappropriate to Fulfill the Objectives of the U.S. Dolphin Safe Labeling Provisions

186. In addition to establishing that the definition of "dolphin safe" in the AIDCP resolutions constitute "relevant international standards, to establish its Article 2.4 claim, Mexico must also establish that the basing the U.S. dolphin safe labeling provisions on that definition would not be ineffective or in appropriate to fulfilling the objective of the U.S. provisions. Mexico has not done so.

187. As elaborated in Section III.C.2, the objectives of the U.S. dolphin safe labeling provisions are ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and ensuring the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna and thereby contribute to the protection of dolphins (since setting on dolphins to catch tuna adversely affects dolphins). Mexico has not put forth any evidence or argument that the definition of "dolphin safe" in the AIDCP resolutions would not be ineffective or inappropriate to fulfill the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. For this reason alone, Mexico has failed to establish a *prima facie* case under Article 2.4 of the TBT Agreement, since it has not established that the definitions of "dolphin safe" in the AIDCP resolutions would not be ineffective or inappropriate to fulfil the objective of the U.S. dolphin safe labeling provisions of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.[253]

188. With respect to the second objective of the U.S. dolphin safe labeling provisions – ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna and thereby contributing to the protection of dolphins – Mexico has also not established that the definition of dolphin safe in the AIDCP resolutions would not be ineffective or inappropriate in fulfilling that objective. First, under the definition of "dolphin safe" in the AIDCP resolutions tuna caught by setting on dolphins may be considered "dolphin safe" provided no dolphins were killed or seriously injured in the set. If the U.S. dolphin safe labeling provisions were based on that definition then tuna products that contain tuna caught by setting on dolphins could be labeled dolphin safe, and consumers would no longer know whether tuna products labeled "dolphin safe" contain tuna that was caught by setting on dolphins and their purchases of tuna products that contain tuna caught by setting on dolphins could serve to encourage a practice that adversely

[253] As noted in the U.S. First Written Submission, use of the definition of "dolphin safe" in the AIDCP resolutions would not be effective or appropriate in fulfilling the objective of ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins since it would allow tuna products to be considered dolphin safe if they contain tuna that was caught by setting on dolphins, a fishing technique that adversely affects dolphins. U.S. First Written Submission, paras. 191, 195; *see also supra* Section III.C.4.

affects dolphins. Basing the U.S. provisions on the definition of "dolphin safe" in the AIDCP resolutions would therefore not be effective or appropriate in fulfilling the objective of the U.S. provisions of contributing to dolphin protection.

189. Second, as elaborated in Section III.C.3 and 4 and the U.S. First Written Submission, the AIDCP is an agreement that seeks to protect dolphins when they are set upon to catch tuna. The objective of the U.S. dolphin safe labeling provisions aimed at protecting dolphins, however, seeks to protect dolphins in a way that goes beyond the protections afforded under the AIDCP. Specifically, the U.S. dolphin safe labeling provisions seek to ensure that the U.S. market is not use to encourage the practice setting on dolphins to catch tuna. Thus, while the AIDCP seeks to protect dolphins by establishing procedures to minimize observed dolphin mortality and serious injury when dolphins are set upon to catch tuna, the U.S. dolphin safe labeling provisions seek to protect dolphins by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins in the first instance.

190. As reviewed in the U.S. First Written Submission and answer to Question 34, dolphin mortality and serious injury observed in the nets when dolphins are set upon is only one of the many adverse effects of setting on dolphins to catch tuna.[254] By ensuring the U.S. market is not used to encourage setting on dolphins to catch tuna, the U.S. provisions seek to protect dolphins not only from observed dolphin mortality and serious injury but also from the other adverse effects of setting on dolphins to catch tuna. Because the AIDCP does not seek to address adverse effects of setting on dolphins to catch tuna beyond observed dolphin mortality and serious injury in the nets, it would not be effective or appropriate in fulfilling the objective of the U.S. measures of contributing to dolphin protection by ensuring the U.S. market is not used to encourage that practice. The same is true for the AIDCP resolutions which reflect a definition of "dolphin safe" that does not take into account the adverse affects of setting on dolphins to catch tuna beyond observed dolphin mortality and serious injury in the nets.

IV. Conclusion

191. For the reasons stated above, the panel should reject Mexico's claims that the U.S. dolphin safe labeling provisions are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

[254] U.S. First Written Submission, paras. 193-194; U.S. Answers to the First Set of Questions from the Panel (Question 34), paras.79-85.