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

(AB-2012-2 / DS381)

APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

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Short Form	**Full Citation**
Panel Report	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, circulated 15 September 2011
China – Audiovisual Products (AB)	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
China – Auto Parts (AB)	Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts* WT/DS339/AB/R, WT/DS340/AB/R, WT/DS340/AB/R, adopted 12 January 2009
EC – Airbus (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Asbestos (Panel)	Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
EC – Hormones (AB)	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Sardines (Panel)	Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R, adopted 23 October 2002
US – Clove Cigarettes (Panel)	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, circulated 2 September 2011

US – Tuna Dolphin I (GATT)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, circulated 3 September 1991, unadopted, BISD 39S/155

I. Introduction and Executive Summary

1. The U.S. measure at issue in this dispute establishes conditions under which a voluntary dolphin safe label may be applied to tuna products sold in the United States. The objective of the dolphin safe labeling provisions is to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. Moreover, to the extent that consumers choose to purchase tuna products with a dolphin safe label, dolphin safe labeling provisions ensure that the U.S. market is not used to encourage the use of fishing techniques that harm dolphins.

2. Among other requirements, the U.S. dolphin safe labeling provisions state that tuna products that contain tuna that was caught by "setting on dolphins" – that is, by intentionally chasing, encircling, and deploying purse seine nets on dolphins – may not be labeled as dolphin safe. Setting on dolphins to catch tuna has well-documented adverse impacts on dolphins. Not only are dolphins killed when encircled with purse seine nets to catch tuna, but setting on dolphins also separates mothers from their dependent calves; reduces reproduction due to stress; causes acute cardiac, muscle, and cumulative organ damage; compromises immune function; and leads to increased predation. The result of chasing, encircling, and deploying purse seine nets on dolphins in the Eastern Tropical Pacific Ocean ("ETP") is that dolphin populations in the ETP have been and remain severely reduced. Today, the population level of the two main species of dolphins impacted by tuna fishing in the ETP – northeastern offshore spotted and eastern spinner dolphins – are at only 19 and 29 percent, respectively, of the levels that existed before setting on dolphins became the predominate fishing technique for tuna in the ETP.

3. Nevertheless, the use of the U.S. dolphin safe label remains a voluntary standard: producers of tuna products do not have to label their tuna products as dolphin safe in order to sell tuna products on the U.S. market, nor must tuna products that meet the criteria for being so labeled use the dolphin safe label. Nor does the label deny access to the U.S. market. As a voluntary labeling program, producers and consumers retain the option of marketing and purchasing tuna products that do not qualify for a dolphin safe label – as demonstrated by the fact that Mexican tuna products are currently for sale in the United States.

A. The Panel Erred in Finding That the U.S. Measure is a Technical Regulation

4. The TBT Agreement applies to three classes of measures. The two that are at issue in this dispute – technical regulations and standards – are defined in very similar terms. The primary distinction is that technical regulations are defined as a class of measures "with which compliance is mandatory," while standards are defined as a class of measures "with which compliance is not mandatory." In order to use a standard, an economic operator must meet the conditions for doing so. But if, in order to place its product on the market, the operator need not meet the conditions set out in the document in question, or indicate that it meets those conditions through use of label, then the measure in question is a standard. In contrast, if in order to place its product on the market, the operator must meet the conditions set out in the document or must use a label where the conditions set out in the document are met, then the document is a technical

regulation. In this dispute, while there are conditions that must be met if a producer wishes to label a tuna product "dolphin safe," there is no requirement that tuna products be dolphin safe in order to be sold in the United States, nor is there a requirement that tuna products that meet the conditions for using the label be labeled as "dolphin safe." A minority of the Panel correctly understood this distinction and decided the U.S. measure is not a technical regulation.

5. The majority of the Panel, however, erred by finding that a labeling requirement that need not be met to place tuna products on the U.S. market was, nonetheless, a technical regulation. In reaching this finding, the majority of the Panel committed a series of legal errors including (1) failing to interpret the term "with which compliance is mandatory" in accordance with its ordinary meaning in context and in light of the object and purpose of the TBT Agreement; (2) misapplying prior Appellate Body guidance on the meaning of the phrase "with which compliance is mandatory" and the use of the so-called "positive-negative distinction" as it relates to identifying product characteristics; and (3) creating and misapplying other criteria for distinguishing technical regulations from standards.

B. The Panel Erred in Finding that the U.S. Dolphin Safe Labeling Provisions are Inconsistent with Article 2.2 of the TBT Agreement

6. The United States appeals the Panel's finding that the U.S. Dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement. First, the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU in determining the extent to which the U.S. measure fulfills its legitimate objectives. Second, the Panel erred in its conclusion that the AIDCP labeling scheme is a reasonably available, less trade-restrictive alternative that would fulfill the objectives of the U.S. measure at same level as the U.S. measure. Finally, the Panel erred in concluding that Mexico had met its burden in establishing that the AIDCP labeling regime's coexistence with the U.S. measure constitutes a less trade-restrictive alternative.

C. The Panel Erred in Finding that the AIDCP Is an International Standardizing Organization and That the AIDCP Definition of "Dolphin Safe" Is a Relevant International Standards Within the Meaning of Article 2.4

7. Though the Panel found that the United States was not obligated to use the AIDCP "dolphin safe" definition because the definition would be ineffective for achieving the U.S. legitimate objectives, it erred in finding that the AIDCP definition is a relevant international standard. The finding was in error because the AIDCP is not an international standardizing body capable of preparing and adopting international standards. The AIDCP does not meet the TBT Agreement and ISO/IEC Guide 2 definitions of international standardizing body because the AIDCP is not (1) "international" since it is not open to at least all Members; (2) is not recognized as engaging in standardizing activity; and (3) is not a body.

II. Factual Background

A. Effects of Setting on Dolphins and other Fishing Techniques on Dolphins

8. The practice of setting on dolphins to catch tuna has severely depleted dolphin populations in the ETP. From 1959 to 1976, setting on dolphins in the ETP is estimated to have caused the death of at least five million dolphins, with the result that dolphin populations were drastically reduced.[1] Dolphin stocks in the ETP have not recovered and remain depleted, with northeastern spotted and eastern spinner dolphins remaining at less than 30 percent of their historic abundance (19 percent for northeastern spotted dolphins and 29 percent for eastern spinner dolphins).[2]

9. Setting on dolphins to catch tuna has a number of adverse effects on dolphins, and setting on dolphins is the most probable reason that dolphin populations continue to be depleted in the ETP. Setting on dolphins leads to observed dolphin mortality. In fact, the AIDCP establishes an annual "dolphin mortality limit" ("DML"), the number of dolphins that may be killed or seriously injured each year as a result of setting on dolphins to catch tuna (the DML for 2009 was 5000 dolphins).[3] In 2008, 1,168 dolphins were observed killed or seriously injured when set upon to catch tuna in the ETP.[4]

10. Furthermore, research indicates that indirect or delayed effects of setting on dolphins to catch tuna can result in dolphin deaths and reductions in the rate of reproduction.[5] This is the result of several adverse effects on dolphins. For example, dolphin mothers and nursing calves are often separated during the high-speed chase and encirclement. This separation is due to the high speed (14 knots) and long duration (up to 90 minutes) of the chase phase of dolphin sets. Dependent dolphin calves are incapable of keeping pace with their mothers, and as a result they are separated and die due to starvation, predation and other causes even when their mothers are released from sets alive.[6] Additional harm to dolphins from setting on dolphins includes acute cardiac and muscle damage caused by the exertion of avoiding or detangling from the nets; cumulative organ damage in released dolphins due to overheating from the chase; failed or impaired reproduction; compromised immune function; and increased predation rates by predators such as sharks, which can congregate outside the nets and take advantage of exhausted

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[1] *See* Exhibits US-18 and US-19.

[2] *See* Exhibit US-21.

[3] AIDCP, Annex II (Exhibit Mex-11).

[4] 2008 IATTC Annual Report, p. 50-51 (Exhibit US-24).

[5] *See* Exhibit US-22.

[6] *See* Exhibits US-4 and US-27.

or juvenile dolphins when released.[7]

B. Consumer Sentiment and the Market for Dolphin Safe Tuna

11. Consumer concern over dolphins being killed in association with tuna fishing in the ETP dates back several decades.[8] In the late 1980s, undercover video showing dolphins being slaughtered provoked nationwide outrage and consumer boycotts. This led the three major tuna brands to adopt dolphin safe policies beginning in 1990. Those policies, which are reflected in the U.S. dolphin safe labeling provisions in effect today, commit the companies to not purchase any tuna caught in association with dolphins.[9]

12. At the time the U.S. dolphin safe labeling provisions were enacted, there was strong consumer sentiment that setting on dolphins to catch tuna was unacceptable and that something should be done to ensure that consumers had a choice not to purchase products that contained tuna caught in association with dolphins.[10] In response, Congress enacted the Dolphin Protection Consumer Information Act ("DPCIA").[11]

13. In 1996, Congress considered amendments to the DPCIA. Senator Boxer (one of the sponsors of the original DPCIA legislation) stated at that time:

> In 1990, the American people spoke. They wanted to end the deaths of tens of thousands of dolphins every year associated with tuna fishing and called for an end to tuna caught by chasing and capturing dolphins.
>
> ***
>
> Our definition of dolphin safe became law for all the right reasons in 1990. Those reasons are still valid today:
>
> (1) For the consumers, who were opposed to the encirclement of dolphins with purse seine nets and wanted guarantees that the tuna they consume did not result in the harassment, capture and killing of dolphins;
>
> (2) For the U.S. tuna companies, who wanted a uniform definition that would not undercut their voluntary efforts to remain dolphin-safe;
>
> (3) For the dolphins, to avoid harassment, injury and deaths by encirclement; and
>
> (4) For truth in labeling.

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[7] *See* Exhibit US-19.

[8] Written Submission of Non-Party Amici Curiae Human Society International and American University, para. 62.

[9] Written Submission of Non-Party Amici Curiae Human Society International and American University, para. 63.

[10] U.S. Answers to First Set of Questions from the Panel (Question 40), para. 98.

[11] U.S. Answers to First Set of Questions from the Panel (Question 40), para. 98.

C. The U.S. Dolphin Safe Labeling Provisions

14. The U.S. provisions at issue in this dispute are (1) the DPCIA, Title 16, Section 1385 of the United States Code; (2) Section 216, parts 91 and 92, of Title 50 of the Code of Federal Regulations; and (3) the 9th Circuit Court of Appeals decision in Earth Island Institute v. Hogarth, 494 F.3d 757 (2007).[12] These provisions set forth the conditions under which tuna products may be voluntarily labeled "dolphin safe". These conditions, and the documentary requirements to certify that these conditions have been met, reflect a balance between the magnitude of the current and potential harm to dolphins in a particular ocean or fishery, the likelihood that a tuna-dolphin association could be systematically exploited in a particular fishery, and the burden on fishers and fishing nations in complying with the documentation requirements.[13]

15. The ETP is known to have a regular and significant tuna-dolphin association. Therefore, for purse seine tuna fisheries inside the ETP, Section 1385(d)(1)(C) together with Section 1385(d)(2) and (h)(2) provide that tuna caught in the ETP may only be labeled dolphin safe – with the exception noted below – if the captain of the vessel and an independent AIDCP-approved observer certify that no purse seine nets were intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught and no dolphins were killed or seriously injured in the set in which the tuna was caught.[14] The exception to this is that tuna caught in the ETP by vessels smaller than 363 metric tons carrying capacity may be labeled dolphin safe without any documentary evidence, as vessels smaller than 363 metric tons are prohibited from setting on dolphins to catch tuna.[15]

16. For non-purse seine tuna fisheries where there is a regular and significant mortality or serious injury of dolphins, tuna products may only be labeled dolphin safe if the captain of the vessel and an observer participating in a national or international program approved by the Secretary of Commerce certify that no dolphins were killed or seriously injured in the set or other gear deployments in which the tuna contained in those tuna products was caught.[16]

17. There is no other fishery in the world for which there is a known regular and significant association between tuna and dolphins.[17] However, should such an association ever be

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[12] U.S. First Written Submission, para. 13.

[13] U.S. Answers to First Set of Questions from the Panel (Question 3), para. 3.

[14] U.S. First Written Submission, para. 16.

[15] U.S. First Written Submission, para. 16.

[16] U.S. First Written Submission, para. 17.

[17] U.S. First Written Submission, para. 18.

established, the DPCIA would condition use of the dolphin safe label on the provision of the same type of documentary evidence with respect to tuna caught using purse seine nets in that fishery as it does with respect to tuna caught using purse seine nets in the ETP.[18] Because there is no regular and significant association between tuna and dolphins, the risk that dolphins may be killed or seriously injured while catching tuna is significantly lower than the risk in the ETP. Therefore, for purse seine tuna fisheries outside of the ETP, tuna products may be labeled dolphin safe if the tuna being accompanied by a signed captain's statement certifying that the vessel did not intentionally encircle dolphins during the fishing trip in which the tuna was caught.

18. Just as is the case in the ETP, for non-purse seine tuna fisheries where there is a regular and significant mortality or serious injury of dolphins, tuna products may only be labeled dolphin safe if the captain of the vessel and an observer participating in a national or international program approved by the Secretary of Commerce certify that no dolphins were killed or seriously injured in the set or other gear deployments in which the tuna contained in those tuna products was caught. Though there may be some dolphin mortality incidental to non purse seine tuna fishing outside of the ETP, there is currently no fishery outside of the ETP where there is a regular and significant mortality or serious injury of dolphins.

19. The DPCIA makes it a violation of U.S. laws regarding deceptive practices to use any label with "the term 'dolphin safe' or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins…" except under the conditions laid out in the DPCIA.[19]

D. The Panama Declaration, AIDCP, and AIDCP Labeling Scheme

20. In 1995, Mexico, the United States and 10 other countries negotiated and concluded the Panama Declaration.[20] In the Panama Declaration, signatories declared their intention to conclude a binding international agreement on dolphin conservation in the ETP, an agreement that later became the Agreement on the International Dolphin Conservation Program ("AIDCP"). The signatories also stated that they only intended to adopt such an agreement if certain changes were enacted into U.S. law. Those changes included prohibiting use of the "term 'dolphin safe' for any tuna caught in the ETP by a purse seine vessel in a set in which a dolphin mortality occurred as documented by observers by weight calculation and well location."[21]

21. The U.S. Congress amended U.S. law to reflect the changes described in Annex I of the Panama Declaration. The U.S. Congress passed the International Dolphin Conservation

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[18] U.S. First Written Submission, para. 18.

[19] U.S. Answers to First Set of Questions from the Panel (Question 3), para. 3.

[20] *See* Panama Declaration (Exhibit Mex-20).

[21] Panama Declaration, Annex I (Exhibit Mex-20).

Protection Act ("IDCPA") to lift the embargo on tuna caught in compliance with the La Jolla Agreement (which later was transformed into the AIDCP) and, through the affirmative finding process set out in the amended Marine Mammal Protection Act, provide the market access described in Annex I of the Panama Declaration.[22] The U.S. Congress also considered whether to amend the DPCIA to permit tuna products containing tuna that was caught by setting on dolphin to be labeled dolphin safe. Congress did not accept the change called for in the Panama Declaration, but set a condition that would allow such a change: a scientific finding by the Secretary of Commerce that setting on dolphins to catch tuna was not having a significant adverse impact on depleted dolphin populations. These amendments were enacted by the U.S. Congress in 1997.

22. Negotiations on the AIDCP concluded in 1998 and entered into force in February 1999. The AIDCP is an international agreement that applies to the "purse-seine tuna fishery" in the "agreement area."[23] From May 21, 1998 until May 14, 1999, the AIDCP was open for signature by (a) States with a coastline bordering the agreement area; (b) States or regional economic integration organizations ("REIO") who were members of the Inter-American Tropical Tuna Commission ("IATTC"); and (c) States and REIOs whose vessels fished for tuna in the agreement area between May 21, 1998 and May 14, 1999.[24] The AIDCP remains open to accession by any country or REIO that meets those criteria, or is invited to accede to the AIDCP on the basis of a decision by the parties.[25] The AIDCP does not establish or authorize an organization, body or legal entity to adopt decisions; this function remains with the parties to the AIDCP, and they alone can adopt the inter-governmental agreements represented in the AIDCP as "resolutions" which can either be legally binding or non-binding on the governments.

23. In 2001, the AIDCP parties adopted a resolution on "Procedures for AIDCP Dolphin Safe Certification System."[26] These procedures are non-binding: the resolution explicitly states that application of the procedures "shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of a Party."[27] This language was included at the request of the United States because its domestic law prevented it from applying the procedures

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[22] *See* International Dolphin Conservation Program Act (Exhibit Mex-21). These changes effectively eliminated the measures that were the subject of Mexico's GATT Article XI:1 claims in *US – Tuna-Dolphin I (GATT)*.

[23] *See, e.g.,* AIDCP, Art. IV (Exhibit Mex-11). The "agreement area" is defined in Annex I of the AIDCP.

[24] AIDCP, Art. XXIV (Exhibit Mex-11).

[25] AIDCP, Art. XXVI (Exhibit Mex-11). Decision making in the AIDCP requires the consensus of all parties. *See* Article XI.

[26] AIDCP Resolution to Establish Procedures for *AIDCP Dolphin Safe* Tuna Certification (Exhibit Mex-56).

[27] AIDCP Resolution to Establish Procedures for *AIDCP Dolphin Safe* Tuna Certification, para. 2.1 (Exhibit Mex-56).

set out in the resolution. For those parties that chose to apply it, the resolution established procedures that would enable tuna caught and tracked in accordance with the procedures to receive an "AIDCP dolphin-safe certification."

III. The Panel Erred in Finding That the U.S. Measure is a Technical Regulation

A. Introduction

24. The United States appeals the Panel's findings on issues of law and legal interpretations that serve as the basis for the conclusion that the U.S. measure at issue[28] is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.

25. The TBT Agreement applies to three categories of measures: technical regulations, standards, and conformity assessment procedures. Of these, technical regulations and standards are relevant to the present dispute.[29, 30] The majority and minority,[31] as well as Mexico and the United States, agree that the phrase "with which compliance is mandatory" "plays a central role in preserving the balance between the different sub-regimes coexisting within [the TBT] agreement."[32] As the majority stated, "the subject-matter of a 'technical regulation' and the subject-matter of a 'standard' are defined in very similar terms ... it is essentially their 'not

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[28] The United States notes that the majority at times refers to U.S. "measures" (plural), but it earlier confirmed that the U.S. dolphin safe provisions were to be considered "as a single measure for the purpose of our findings." (Panel Report, para. 7.26). The United States will refer to the U.S. dolphin-safe labeling provisions as a single measure.

[29] TBT Agreement, Annex 1.1 (underline added):

> *Technical regulation* – Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

[30] TBT Agreement, Annex 1.2 (underline added):

> *Standard* – Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

[31] Two of the three panel members ("the majority") found that the U.S. measure is a technical regulation; one panel member ("the minority") found that the U.S. measure is not.

[32] Panel Report, para. 7.110; Panel Report (separate opinion), para. 7.149; Mexico's Response to Panel Question No. 48, para. 130.

mandatory' or 'mandatory' character that distinguishes the two categories of instruments."[33] The issue before the Appellate Body is therefore as important as it is unique: this is the first time the Appellate Body has been called upon to determine whether compliance with a TBT measure is mandatory.[34]

26. The United States recalls that under Article 3.2 of the DSU, panels are bound to interpret provisions of the covered agreements in accordance with the customary rules of interpretation of public international law, including as reflected in Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention").[35] Under Article 31 of the Vienna Convention, the ordinary meaning of treaty terms must be ascertained in their context and in the light of the object and purpose of the treaty.[36]

27. The proper interpretation of the definition of technical regulation in Annex 1.1 must accord with the ordinary meaning of the text, in context – in particular, the context provided by the definition of "standard" in Annex 1.2 – and in light of the object and purpose of the TBT Agreement. As discussed below, the majority recognized its obligation to interpret Annex 1.1 in context and consistent with the object and purpose of the agreement, and it correctly identified the essential elements of context and object and purpose that it should have considered. Nevertheless, the majority arrived at a definition of "technical regulation" that is not in accordance with the text and is incompatible with the definition of "standard" in Annex 1.2 and the object and purpose of the agreement. In particular, the majority concluded that a labeling requirement that does not prescribe the use of the label – that is, where use of a label is voluntary – may be deemed a labeling requirement "with which compliance is mandatory."[37] This conclusion erased the distinction between labeling requirements that are standards and those that are technical regulations, despite the fact that the two categories of measures are clearly differentiated in Annex 1.

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[33] Panel Report, para. 7.107; *see also* Panel Report, para. 7.109 ("the term 'mandatory' expresses the single characteristic that defines the key conceptual distinction between ... technical regulations and standards.").

[34] In both TBT disputes considered by the Appellate Body to date, mandatory compliance with the measures at issue was accepted as fact by the parties involved and not directly considered by the panels or Appellate Body. In *EC – Asbestos*, the mandatory nature of the EC regulation was not in dispute; rather, the EC argued that its measure was not a technical regulation because a general ban on a product is not the regulation of a "product characteristic." (*EC – Asbestos (Panel)*, para. 8.23). (The Panel agreed (paras. 8.44, 8.63), but the Appellate Body reversed (para. 76)). In *EC – Sardines*, the EC did not contest that compliance with the measure at issue was mandatory (*EC – Sardines (AB)*, para. 194). Nor did the EC contest that the measure when considered as a whole was a technical regulation. (*EC – Sardines (Panel)*, paras. 4.10, 7.31). It did argue that one article of that regulation was not a technical regulation because it set out a "naming provision" rather than a "labelling requirement" and that naming provisions do not fall within the scope of the definition of a technical regulation. (*EC – Sardines (Panel)*, para. 4.12).

[35] *See China – Auto Parts (AB)*, para. 145.

[36] *See China – Audiovisual (AB)*, para. 348.

[37] Panel Report, para. 7.131.

28. As will be explained further below, it is the essence of a standard that there are set conditions required to meet the standard. But this is not the same as saying that there is a requirement that the product actually meet that standard, or that a product must indicate whether it meets the standard. In the current dispute, there are requirements that tuna products must meet in order to be labeled "dolphin safe." But there is no mandate for tuna products to be dolphin safe, and no mandate that even where a tuna products meets those labeling conditions, it must be so labeled in order to be sold in the United States. The decision is voluntary as to whether to use the label for those products that qualify for the label. The majority's findings to the contrary are legal error and should be reversed.

B. The Majority Erred by Finding the Measure at Issue is a Technical Regulation Because Compliance with the Measure is Not Mandatory within the Meaning of Annex 1.1 of the TBT Agreement

1. The Majority's Interpretation of "Mandatory" Is Indistinguishable from the Term "Requirement"

29. In order to determine the ordinary meaning of paragraph 1 of Annex 1, the majority reviewed dictionary definitions of the word "mandatory" and concluded that "mandatory" means "binding," "obligatory, compulsory, not discretionary," and "required by law or mandate; compulsory."[38] The majority then relied on this definition to inform its interpretation of the scope of Annex 1.1, but this definition of "mandatory" is not complete. The ordinary meaning to be given to the term "mandatory" must be in context.

30. As the majority noted that the measure at issue is a labeling requirement, and "labelling *requirements* may be equally prescribed by technical regulations and standards."[39] As pointed out by the minority, the use of the word "requirement" in both the definition of "technical regulation" and the definition of "standard" provides an important contextual tool that must be used when interpreting the term "mandatory" in Annex 1.1.[40] Therefore, as recognized by the majority, "a conclusion that compliance with certain labelling requirements is mandatory within the meaning of Annex 1.1 of the TBT Agreement must be based on considerations other than, or beyond, the mere fact that such document establishes criteria for the use of a certain label."[41] In other words, a labeling "requirement" sets out the conditions that a product is required to meet in order to be able to use the label.

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[38] Panel Report, paras. 7.103-7.104.

[39] Panel Report, para. 7.107 (italics original).

[40] Panel Report (separate opinion), para. 7.149.

[41] Panel Report, para. 7.117; *see also* Panel Report (separate opinion), para. 7.151.

31. The dictionary definitions of "mandatory" relied upon by the majority do not provide a distinction between "mandatory" and "required." The same terms – "comply with" by "law, regulation, custom, etc." – appear in the dictionary definition of "requirement."[42] On the basis of dictionary definitions alone, no distinction exists between "mandatory" and "required" – they are synonyms.[43]

32. Both the majority and the minority recognized that a finding "that the mere fact that a product is prohibited from using a label if it does not fulfil these standards makes compliance compulsory would leave no space for voluntary labelling schemes as standards."[44] It was only the minority, however, that interpreted Annex 1.1 in a way that gave meaning to the term "labelling requirement" in Annex 1.2. The minority interpreted "with which compliance is mandatory" to mean a requirement to use a particular label in order to market a product.[45] In other words, a labeling requirement – whether set out in a technical regulation or in a standard – must be met if a producer elects to use the label. Compliance with the labeling requirement becomes mandatory if there is also a requirement to use the label in order to place the product for sale on the market covered by the technical regulation.

33. As the minority stated, the ordinary meaning of the term "labelling requirements" are "requirements that must be fulfilled in order to be allowed to use a certain label."[46] A valid interpretation of the phrase "with which compliance is mandatory" must not sweep into the definition of mandatory all labeling requirements: a valid interpretation must allow for "labelling *requirements*" with which compliance is *not* mandatory.[47]

34. Defining mandatory compliance with a labeling requirement as an obligation to use a label where the product meets the required conditions for the label – rather than just that there are required conditions in order to be able to use the label – respects the definition of a labeling requirement that is a technical regulation (under Annex 1.1) and the definition of a labeling requirement that is a standard (under Annex 1.2). The term "labelling requirement" as it appears

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[42] New Shorter Oxford Dictionary (4th ed.), pp. 2556 - 2557: Requirement – "A thing required or needed;" "Something called for or demanded; a condition that must be complied with"; Require – "Demand … in order to comply with a law, regulation, custom, etc."

[43] Indeed, "mandatory" is defined as a something that is "required." *See* Webster's II: New College Dictionary, p. 664: (defining "mandatory" as "[r]equired by or as if by mandate.")

[44] Panel Report (separate opinion), para. 7.151; Panel Report, para. 7.117.

[45] Panel Report (separate opinion), para. 7.150.

[46] Panel Report (separate opinion), para. 7.150; *see also* Panel Report, para. 7.116; *and* definitions of "requirement" in footnote 42, above.

[47] Panel Report (separate opinion), para. 7.149 ("An interpretation that conflates the requirement that compliance with a technical regulation has to be mandatory with the term 'labelling requirements' of the second sentence or an interpretation that leaves no space to Annex 1.2 would not be reasonable.").

in both Annex 1.1 and 1.2 is preserved by maintaining that there are conditions that must be met in order to use the label.[48] At the same time, the phrases "with which compliance is mandatory" (in Annex 1.1) and "with which compliance is not mandatory" (in Annex 1.2) are given meaning by recognizing that where the conditions for the label are met, under the former phrase, producers have a mandatory obligation to use the label, while under the latter phrase, producers retain the option of not using the label.

35. The majority failed to account for that context in its analysis. The interpretation adopted by the minority does. As a result, while the minority's interpretation of "technical regulation" preserves meaning for a "labelling requirement" "with which compliance is not mandatory," the majority's interpretation fails to do so. This was legal error.

2. The Majority Incorrectly Applied Prior Appellate Body Reports and the "Positive" and "Negative" Distinction

a. The Majority Incorrectly Applied Prior Appellate Body Reports on the Meaning of Mandatory Compliance

36. In *EC – Asbestos*, the Appellate Body examined whether a measure that banned the sale of asbestos and asbestos-containing products from the market was a measure covered by the TBT Agreement (it was accepted by the parties that if it were a TBT measure, it would be a technical regulation). In that context, the Appellate Body briefly considered the meaning of the phrase "with which compliance is mandatory" in Annex 1.1. The Appellate Body stated that the word "mandatory" suggests that "[a] technical regulation must ... regulate the 'characteristics' of products in a binding or compulsory fashion" and have "the effect of imposing or prescribing one or more product characteristics."[49]

37. Both the majority and the minority agreed with the Appellate Body's description of technical regulations as regulating product characteristics in a binding or compulsory fashion, and both the majority and the minority sought to apply the guidance.[50] Nevertheless, the majority and minority still came to divergent conclusions about the meaning of "mandatory."

38. The minority's interpretation of the ordinary meaning of "mandatory" not only accounted for the presence of "requirement" in Annex 1.1 and 1.2, but more directly applied the guidance

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[48] *See* Panel Report, para. 7.107 (italics original);.

[49] *EC – Asbestos (AB)*, para. 68.

[50] Panel Report, para. 7.104; Panel Report (separate opinion), para. 7.163 ("although the decision of the Appellate Body in *EC – Asbestos* provides useful guidance in relation to several points in discussion in the present dispute, it does not offer conclusive assistance in relation to whether legally enforceable provisions setting out the conditions of use of a label to advertise compliance with a voluntary standard, or prohibiting the use of deceptive labels, turn such standard into a technical regulation.").

provided by the Appellate Body in *EC – Asbestos*. Recalling that the Appellate Body stated that a mandatory labeling requirement would have "the effect of *prescribing* or *imposing* [a] 'distinguishing mark,'"[51] the minority explained that, "[a] labelling requirement which is a technical regulation would thus impose on a product the obligation to use the label and to fulfil the related labelling requirements. If however compliance with the labelling requirement and use of the label is not mandatory, the labelling requirement has to be seen as a standard."[52] Thus, as suggested by the Appellate Body and recognized by the minority, a measure – such as the U.S. measure – that gives producers the option not to use a "distinguishing mark" does not impose that mark in a binding or compulsory fashion.

39. In contrast, the majority's interpretation of "mandatory" failed to give effect to the Appellate Body's statement that "mandatory compliance" is characterized by being "binding" or "compulsory." The majority echoed some of the language of the Appellate Body and stated that in the context of a labeling requirement, what it must "consider is not only whether the document *lays down* certain conditions for the use of a label, or *prescribes* a certain content for a given label."[53] The majority erred, however, when it continued by saying it must also consider "whether the document at issue *regulates in a binding fashion* these conditions or content."[54] In reality, this latter condition (regulating in a binding fashion) should be redundant of the first two conditions. It is not clear how a document could "lay down" or "prescribe" certain conditions for use of a label or certain content for a label if that "laying down" or "prescription" was not "binding." The conditions or content are intended to be a requirement in order to meet the labeling standard.

40. Therefore, rather than applying that Appellate Body guidance, as the minority did, the majority misread the guidance to create incorrect criteria for distinguishing technical regulations from standards. First, as discussed next, the majority misused the Appellate Body's "positive/negative distinction" for identifying product characteristics.[55] Second, the majority began an inquiry into enforceability and exclusivity as a means of distinguishing technical regulations from standards.[56] None of these criteria, discussed next, find a basis in the text of the agreement, nor do they apply Appellate Body guidance accurately.

b. The Majority Incorrectly Applied the Appellate Body's "Positive" and "Negative" Distinction

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[51] *EC – Asbestos (AB)*, para. 68 (italics original).

[52] Panel Report (separate opinion), para. 7.151.

[53] Panel Report, para. 7.117 (italics added).

[54] Panel Report, para. 7.117 (italics added).

[55] *See* Panel Report, para. 7.118.

[56] *See* Panel Report, paras. 7.141-7.144.

41. As part of its analysis of what constitutes a "mandatory" measure, the majority referred to the distinction between "positive" and "negative" prescriptions in documents.[57] The Appellate Body previously discussed the positive/negative distinction in connection with an entirely different aspect of its analysis under Annex 1, namely the identification of documents that set out product characteristics.[58] Beyond the fact that it is out of place, this additional gloss does nothing to remedy the panel's flawed interpretation of "mandatory" or otherwise provide a means to distinguish between technical regulations and standards.

42. The Appellate Body first referred to positive and negative conditions as part of its analysis of whether a document sets out "product characteristics."[59] That is a determination separate from and preliminary to deciding whether, if product characteristics are in fact laid down, compliance with those characteristics is mandatory.[60] Moreover, while whether product characteristics were laid out was a central issue in *EC – Asbestos*, that is not at issue in this dispute.[61]

43. In considering whether the document at issue in *EC – Asbestos* laid down product characteristics, the Appellate Body observed that product characteristics may be set out "in either a positive or negative form."[62] That is, product characteristics can be prescribed in a document positively (i.e., the product *must* contain certain characteristics), or negatively (i.e., the product *must not* contain certain characteristics).[63] As another panel stated, the positive/negative distinction is simply a way to express the basic observation that a technical regulation or standard necessarily "makes a distinction between those product characteristics that are included in the measure versus those that are excluded."[64]

44. The positive/negative distinction is a device to help explain that there is more than one way to set out product characteristics; it is not a useful tool for distinguishing a technical regulation from a standard. Under Annex 1.1 and 1.2, both types of measures set forth product

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[57] *See, e.g.*, Panel Report, paras. 7.118, 7.119, 7.131.

[58] *EC – Asbestos (AB)*, para. 69.

[59] *EC – Asbestos (AB)*, para. 69.

[60] Indeed, in *EC-Asbestos* it was accepted by all parties that compliance with the EC measure was mandatory. The measure operated as a general ban from the French market on products containing asbestos. *EC – Asbestos (Panel)*, para. 8.35.

[61] *EC – Asbestos (Panel)*, para. 8.23.

[62] *EC – Asbestos (AB)*, para. 69.

[63] *EC – Asbestos (AB)*, para. 69.

[64] *EC – Sardines (Panel)*, para. 7.45. Even the majority correctly described, in an earlier passage, the concept as pertaining to the determination of whether there are "certain characteristics or other features that the product *must or must not* possess." (Panel Report, para. 7.106 (italics added)).

characteristics: a technical regulation may lay down "product characteristics," and a standard may provide for "characteristics for products."[65]

45. Nevertheless, without explanation, the majority extended the positive and negative concept to labeling requirements. In so doing, the majority used an incorrect conceptual model and thereby inserted a new gloss reflecting its erroneous understanding of what constitutes a "mandatory" measure. It defined a positive labeling requirement as a measure with respect to which it is "compulsory to meet these requirements and to bear the label, *in order to sell tuna on the US market*."[66] The majority then stated that the measures at issue were negative requirements because they "impose a prohibition on the offering for sale in the United States of tuna products *bearing a label referring to dolphins and not meeting the requirements that they set out*."[67] The italicized portions of each of these sentences are without basis in prior panel or Appellate Body reports and reflect a fundamental misunderstanding of labeling requirements. As the majority acknowledged, standards – like technical regulations – can reserve access to a label to products that comply with that standard's requirements.[68] And where a standard is a measure of a Member, that standard will naturally not permit products that do not meet that standard to claim they do.

46. As a final indication of the majority's misapplication of the Appellate Body's analysis, it is notable that the majority itself was ultimately unable to decide whether the U.S. measure was in fact positive or negative, and ultimately concluded that it was both.[69]

47. In sum, it is undisputed that the measure at issue sets forth a labeling requirement and is thus a technical regulation under Annex 1.1 or a standard under Annex 1.2. Thus, there was no need to employ the positive/negative distinction. Having incorrectly employed the distinction, however, the majority went further and distorted the positive and negative categories of product characteristics the Appellate Body set out. As such, the majority's use of the distinction was error.

3. The Majority's Supplemental Efforts to Distinguish Technical Regulations from Standards Using its Definition of "Mandatory" Fail

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[65] TBT Agreement, Annex 1.1 and 1.2.

[66] Panel Report, para. 7.131 (italics added).

[67] Panel Report, para. 7.131 (italics added).

[68] Panel Report, para. 7.141.

[69] *Compare* Panel Report, paras. 7.116 ("it is undisputed that the measures at issue do not impose a positive requirement to label tuna products for sale on the US market as dolphin-safe") and 7.131, *with* para. 7.144 (stating that the U.S. measure "effectively regulate[s] the 'dolphin-safe' status of tuna products in a binding and exclusive manner and prescribe[s], *both in a positive and in a negative manner*, the requirements for 'dolphin-safe' claims to be made.").

48. After presenting its flawed interpretation of "mandatory" and proceeding to misapply the positive/negative distinction, the majority acknowledged that its analysis had a problem: applying its interpretation generated the conclusion that "any situation in which access to a label reflecting compliance with a particular standard is reserved for products that comply with the specific requirements of that standard would amount to a situation in which a mandatory technical regulation exists."[70] In other words, applying the majority's definition of mandatory compliance would make it impossible for an adjudicator to find that a labeling requirement is a standard.[71] As the majority had previously noted, such a result would be incorrect since "both technical regulations and standards laying down 'labelling requirements' would establish the conditions that a product must comply with before being able to carry a certain label."[72]

49. Rather than reconsider the flawed premise of its analysis – its erroneous interpretation of the term "mandatory" – the majority presented an additional two factors (again without analysis or explanation) that it claimed allow one to distinguish between a technical regulation and a standard, while relying on its original interpretation of "mandatory". Neither of these factors as applied by the majority allow such a distinction to be drawn.

a. Legally Enforceable

50. First, the majority observed that "the measures at issue are legally enforceable and binding under US law."[73] While it is true that violation of the measure can lead to action, the criterion of enforcement as applied by the majority cannot be relied upon to distinguish between technical regulations and standards.

51. First, enforceability as such does not distinguish technical regulations and standards. The TBT Agreement confirms that standards – including but not limited to "labelling requirements" – can be enforceable. In particular, "labelling requirements" – whether set forth in a standard or a technical regulation – may be subject to enforcement.[74] Additionally, Article 5 sets out provisions for conformity assessment procedures to be used "in cases where a positive assurance of conformity with ... standards is required." It is difficult to conceive of a situation where positive assurance of conformity with a standard would be necessary if a product could fail to meet that standard but nevertheless could be marketed as having done so. Thus, it is clear that where a producer chooses to market its product as complying with a standard, compliance with the terms of the document establishing the conditions of the standard can be obligatory.

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[70] Panel Report, para. 7.141.

[71] *See* Panel Report (separate opinion), para. 7.149.

[72] Panel Report, para. 7.116

[73] Panel Report, para. 7.142.

[74] *See* Panel Report (separate opinion), para. 7.150 ("if a certain label could be used independent of whether specific requirements are fulfilled, the label would become meaningless.").

52. The majority did not just rely on "enforcement" to distinguish compliance that is mandatory from that which is not. It instead found significance in the phrase "*legally* enforceable."[75] Employing the word "legally" (or the phrase "by the government," which the majority also uses[76]) does not help distinguish technical regulations from standards, however. One would expect that a false claims regarding compliance with the conditions of a standard would be legally enforceable, just as false claims to have met the conditions of technical regulation would be.

53. Second, while enforceability as such does not distinguish technical regulations from standards, neither did the majority's consideration of specific enforcement possibilities in relation to the U.S. measure. The majority considered three possibilities of how the enforcement of a technical regulation would distinguish that measure from a standard. One by one, the majority rejected all three of the possibilities it considered. In contrast, the minority examined the same three enforcement possibilities and found that enforcement that results in mandatory compliance, consistent with the ordinary meaning of the phrase in the context of "labelling requirement," is enforcement that restricts access to the market to products that meet the terms of the technical regulation.

54. The majority first considered whether enforcing the requirements for accessing a label – that is, restricting the use of the label to those products that meet the requirements for the use of the label – constituted compliance within the meaning of mandatory compliance.[77] The majority decided that this alone does not. As it stated more than once, denying access to a label for failure to meet the standards required to use the label is inherent in the term "labelling requirement,[78] and therefore "does not in itself make compliance with a labelling requirement 'mandatory' or 'not mandatory.'"[79]

55. The minority also considered whether mandatory compliance with a labeling requirement means that the terms of the labeling requirement must be met in order to use the label. Whereas the majority rejected that as the sole test of mandatory compliance, the minority rejected the concept as the proper basis for mandatory compliance with a labeling requirement at all. As the minority observed, labeling requirements are, by definition, "requirements that must be fulfilled in order to be allowed to use a certain label."[80] Whether compliance with that requirement is

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[75] Panel Report, para. 7.142 (italics added).

[76] Panel Report, para. 7.142.

[77] Panel Report, para. 7.133.

[78] Panel Report, paras. 7.117, 7.141.

[79] Panel Report, para. 7.116.

[80] Panel Report (separate opinion), para. 7.150.

"mandatory" or "not mandatory," inherent in the use of the term "requirement" is the idea that certain conditions must be met before a label is used. A standard is not defined as a label that may be used without meeting the requirements for its use: such a result would read "requirements" out of Annex 1.2.[81]

56. The majority then considered – and rejected – two other possibilities for what might make compliance mandatory.

57. First, the majority suggested that "specific enforcement measures" may make compliance mandatory.[82] Subsequently, however, the majority rejected that notion. The majority noted two specific enforcement measures in the U.S. measure: incorporation by reference of the U.S. law against deceptive practices, and a fine to be levied against ship captains for falsely certifying that dolphins were not set upon.[83]

58. The first specific enforcement measure is a reference to a law against deceptive practices: the U.S. Federal Trade Commission Act.[84] The majority later stated, however, that "any standard" can be protected from abuse or misleading use by "laws against deceptive practices" and that this alone is not enough to make those standards technical regulations.[85] It found that the U.S. measure requires that certain requirements be met before a label is used – but, according to the majority, so do standards.[86] It found that the measure is backed by a law against deceptive practices that applies to labeling generally in the United States – but again, so are standards.[87] Thus, if it is accepted that a specific enforcement measure can make a labeling requirement mandatory, it would still have to be a measure that goes beyond a general prohibition on using deceptive labels.[88]

59. The second specific enforcement measure identified by the majority does not apply to false use of a dolphin-safe label, but rather is a penalty for false certification by captains and observers aboard tuna fishing vessels greater than a certain size that no dolphins were set upon

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[81] *See* Panel Report (separate opinion), para. 7.150.

[82] Panel Report, para. 7.127.

[83] Panel Report, paras. 7.122, 7.125, 7.127.

[84] 15 U.S.C. 45. The Federal Trade Commission Act broadly prohibits "deceptive acts or practices in or affecting commerce."

[85] Panel Report, para. 7.142.

[86] Panel Report, para. 7.116.

[87] Panel Report, para. 7.142.

[88] This finding is also consistent with the object and purpose of the TBT Agreement, which recognizes that Members should not be prevented from taking measures necessary "for the prevention of deceptive practices." (TBT Agreement, Preamble, Sixth Recital).

during a trip in which tuna were harvested and that no dolphins were seriously injured or killed during a set in which tuna were caught. The majority is clear that this specific enforcement provision, contained in (and only in) the documents comprising the measure, is also not enough to consider compliance with the provision to which it applies to be mandatory.[89] Rather, the majority says that "compliance with the underlying *standard* that provides access to the label (i.e., the use of certain fishing methods to harvest tuna) is not obligatory."[90] In other words, even an enforcement provision that is not a general law – but rather is contained in the measure at issue and assesses a specific penalty for acts directly circumscribed by the measure – may not be sufficient to make compliance mandatory. Thus, the majority considered whether compliance enforced by a deceptive practices act or by a penalty provided for specifically in one of the documents at issue was enough for it to find that compliance is mandatory, and decided it was not.

60. The minority also considered – and also rejected – the possibility that a general enforcement measure against deceptive practices would make compliance mandatory in the meaning of Annex 1.1. The minority observed that measures against deceptive practices are compatible with the concept of a labeling requirement as a standard.[91]

61. Finally, the majority considered the only remaining possibility for enforcing mandatory compliance with a labeling requirement: requiring the use of a specific label before the product in question can be placed on the market for sale. With very little analysis, the majority also rejected this concept of enforcement.[92]

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[89] Panel Report, para. 7.127.

[90] Panel Report, para. 7.132 (italics original).

[91] Panel Report (separate opinion), para. 7.156 ("[t]he fact that operators may be legally accountable for any misleading or false declarations in the event that they choose to advertise compliance with a standard without in fact meeting its requirements does not modify the essentially voluntary nature of such standard.").

[92] Panel Report, para. 7.137. The majority's rejection of mandatory compliance with a labeling requirement as a requirement to use the label was largely based on its reading of the Appellate Body report in *EC – Sardines*. The majority's reliance on that report is incorrect. First, as noted, neither the panel nor the Appellate Body were called upon in that dispute to consider whether compliance with the document at issue was mandatory. The EC did not contest that compliance with its regulation was mandatory. (*EC – Sardines (AB)*, para. 194). Second, there was an important distinction between the product at issue in that dispute and the product at issue in this dispute. In that dispute, the product at issue was preserved sardines (*see EC – Sardines (AB)*, para. 182). As explained by the Appellate Body, "the EC Regulation provides that, to be marketed as 'preserved sardines', products must be prepared exclusively from fish of the species *Sardina pilchardus*. We are of the view that this requirement – to be prepared exclusively from fish of the species *Sardina pilchardus* – is <u>a product characteristic 'intrinsic to' preserved sardines</u>." (*EC – Sardines (AB)*, para. 190 (underline added)). Thus, unless preserved sardines met the product characteristic laid out by the EC measure, preserved sardines from Peru were prohibited from being marketed as such. This is fundamentally different from the current dispute where it is undisputed that the product at issue – tuna products – can be marketed in the United States as tuna products with or without a dolphin safe label. Unlike the EC regulation on what a preserved sardine is, the U.S. measure does not specify the product characteristics that tuna products must meet to be sold on the U.S. market. *See also* Third Party Oral Statement of

62. In contrast, the minority fully considered whether a document establishing a labeling requirement with which compliance is mandatory is a document that requires that a label be used if the good qualifying for the label is to be sold on the market.[93] As the minority recognized, this is the only interpretation consistent with the text, context, and object and purpose of the TBT Agreement.

63. As noted, labeling requirements may be either technical regulations or standards, and it would not make sense to adopt an interpretation of "labelling requirement" that does not require a producer who chooses to use the label to meet the requirements for that label. Rather, the ordinary meaning of requirement – "a condition that must be complied with" – is that whether compliance is mandatory or not, the condition for the use of the label must be met if the label is to be used. In contrast, compliance is "mandatory" if a producer must use the label on its product in order for that product to be legally sold. This is consistent with the ordinary meaning of "mandatory."[94]

64. In conclusion, the majority stated that it could distinguish a labeling requirement with which compliance is mandatory from a labeling requirement with which compliance is not mandatory on the basis that the former – and the U.S. measure in particular – is "legally enforceable." But the majority rejected all of the enforcement theories it considered, and never arrived at a concept of how mandatory compliance is enforced. The result is that the majority failed to provide an explanation of why the manner in which the U.S. measure is enforced led it to conclude that compliance is mandatory – and yet, nevertheless, the majority decided the U.S. measure is "legally enforceable" such that it is a technical regulation. To the contrary, by the majority's own findings and legal reasoning, the measure would appear <u>not</u> to be "legally enforceable" in a way that would make it a technical regulation.

b. Exclusivity

65. The second additional criterion identified by the majority was exclusivity: the majority found that a labeling requirement with which compliance would otherwise not be considered mandatory, and hence a standard, becomes a technical regulation if it is "the only standard" available to address an issue.[95] In other words, before an adjudicator finds that compliance is not mandatory, the majority would require a finding that "various competing standards may co-exist in relation to the same issue."[96] That requirement is without basis in the TBT Agreement and

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the European Union, para. 9.

[93] Panel Report (separate opinion), para. 7.150.

[94] *See* paragraph 34, above.

[95] Panel Report, paras. 7.143-7.144.

[96] Panel Report, para. 7.144.

reads out of the agreement the distinction the text draws – whether or not compliance is mandatory – in favor of an ill-defined and difficult to apply requirement of "various competing standards."

66. The majority's exclusivity test is not based on the text of the TBT Agreement. Nothing in Annex 1.1 provides that a technical regulation must be exclusive, and nothing in Annex 1.2 provides that a standard cannot be exclusive. Nor did the majority cite to any prior panel or Appellate Body reasoning that would help explain its position.[97]

67. The majority failed to explain what relation the concept of exclusivity has to the phrase "with which compliance is mandatory," or where else in Annex 1.1 this criterion appears.[98] Exclusivity has no relation to "compliance." Compliance is an obligation placed on an economic operator. Whether an operator has only one standard it must fulfill or a choice of standards it must fulfill is irrelevant. To put it in terms of a labeling requirement, as the majority noted, if a label is used, the requirements for using that label must be met regardless of whether the label is a technical regulation or standard.[99] That does not change simply because there are other labels – each with their own requirements to meet – available. If a labeling requirement sets out multiple similar labels to choose from, but an operator must still use one in order to market its product, then the operator still faces mandatory compliance with respect to that labeling requirement; if the operator has the option of not using any of the labels, then it does not face a mandatory compliance obligation.

68. Reviewing the specific labeling requirement at issue, the majority stated that the U.S. measure is "the only standard available" because, in addition to prohibiting labels that make deceptive claims about dolphin safety, the measure also prohibits deceptive labels using two similar terms: "marine mammal" and "porpoise."[100] This is legally incorrect and in conflict with the majority's own analysis. Earlier, the majority correctly found that standards, including labeling requirements, may be "protected against abusive or misleading use under general

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[97] The only basis the majority suggests for its requirement that there must be various competing standards are in ISO/IEC Guide 2 definitions. (Panel Report, fn. 314). These definitions are irrelevant, however, and should not have been used. The TBT Agreement is clear that the ISO/IEC Guide 2 is not a covered agreement that creates additional obligations (such as the requirement to maintain multiple standards on the same topic) that Members must follow. Rather, the ISO/IEC Guide 2 is a source of definition for terms that appear in the TBT Agreement that are otherwise not defined in TBT Agreement Annex 1. (TBT Agreement, Annex 1, Chapeau). The majority did not state what TBT Agreement term it was seeking to define by use of the ISO/IEC Guide 2, but it appears the majority drew upon the term "mandatory standard" in the ISO/IEC Guide 2. "Mandatory standard" does not appear in the TBT Agreement and so the ISO/IEC Guide 2 definition of "mandatory standard" is irrelevant.

[98] *See* Panel Report, paras. 7.102-7.112.

[99] Panel Report, para. 7.116.

[100] Panel Report, para. 7.144.

law."[101] It is not clear why a standard may be protected against deceptive use of the label when using one term – such as "dolphin" – but not from deceptive use of a label that includes similar or overlapping terms – like "marine mammal" (a term that includes dolphins) or "porpoise" (a term often used as synonym for dolphin). In other words, the majority strayed from its correct finding that standards may include prohibitions against deceptive use of the label by operators whose products who do not fulfill the standard's requirements, and introduced a caveat: the standards must allow similar labels to be used, even if the similar label does not meet the standard's requirements, and even if potentially deceptive.[102]

69. Even had the majority made correct legal and factual findings with regard to the measure's prohibition on deceptive use of labels, the majority failed to explain why it would draw a distinction between a measure that provides for a single standard that need not be used and a measure that provides for multiple standards that need not be used. Such a distinction is without logic. The implication of the majority's analysis is that the existence of a "marine mammal safe" label would mean the "dolphin-safe" label would be considered a standard. Dolphins are marine mammals. Setting on dolphins is an unsafe practice for dolphins and is therefore unsafe for a marine mammal. If the majority would consider a "marine mammal safe" label that makes access contingent on not setting on marine mammals, including dolphins, to be an alternative label, that would mean the requirements underlying alternative labels could therefore be the same. In that analysis, it is hard to see what the distinction in compliance obligations is: producers that set on dolphins would be prohibited from using either a "dolphin safe" or a "marine mammal" safe label.

70. If, however, labels based on "various competing standards" – which by definition must use similar terms – must have different underlying requirements, the majority seems to have arrived at a definition of standards that undermines their value and significance. If a "marine mammal safe" label would have to be available to a producer even if that producer harms marine mammals – for instance, by setting on dolphins – during the production of its product, the very purpose of labeling and standardization would be contradicted.

71. Standards comprise common rules or guidelines so that the standard conveys information.

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[101] Panel Report, para. 7.142.

[102] The majority may have made its conclusion on the basis of factual error as well. The majority stated that this prohibition applies to claims about marine mammal and porpoise safety "whether misleading or otherwise." (Panel Report, para. 7.143). The majority appears to have believed that references to "marine mammal" and "porpoise" are prohibited even if the labeling requirements are met. This is wrong on the face of the measure. Paragraph (3)(C) of the measure establishes criteria for the use of a label alternative to the official dolphin-safe label, and specifies that it is a violation of the prohibition on deceptive practices if the alternative label makes claims regarding dolphins, marine mammals, or porpoises without meeting those criteria. (*See* the Dolphin Protection Consumer Information Act, 16 USC 1385(d)(3)© (Exhibit US-5): "It is a violation of section 45 of title 15 [the U.S. deceptive practices law] to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the [official mark] unless..."). In other words, if the conditions for using a "marine mammal safe" label are met, such a label can be used.

Therefore, if a product conforms to a particular standard, the user or purchaser of the product can be confident that a product has met certain conditions. If a product conforms to a particular labeling requirement, users or purchasers of the product are assured that the product meets the conditions for bearing the label. If marketers of products were permitted to claim a product conformed to a particular standard when that product did not in fact meet the conditions for that standard, the function served by the standard would be lost. Similarly, if marketers of products were permitted to market products using "various competing standards" with similar names but setting out different underlying characteristics or labeling requirements, the value of the information conveyed by the standard would be diminished. A proper definition of a standard is not one that undermines standards by denying them clear and consistent meaning, nor would it encourage the proliferation of empty labels.[103]

c. Object and Purpose

72. The majority found that the object and purpose of the TBT Agreement is to create "'a specialized legal regime' ... intended to discipline very specific categories of measures."[104] The United States agrees. Each of the three categories of TBT measures is distinguished by a "clear threshold" that defines the measures that fall within each category.[105] Proper categorization is essential because, as the majority recognized, different obligations must be met depending on whether a measure is a technical regulation, standard, or conformity assessment procedure (or not within the purview of the TBT Agreement at all).[106] Additionally, unlike a test based on "exclusivity," whether or not a product can be marketed without a label is a clear distinction that complies with the "clear thresholds" set out in Annex 1 that must be met to consider a measure a technical regulation or standard.[107] Defining mandatory compliance as a requirement to use the label respects the clear distinctions between the three types of measures set out in the TBT Agreement, and hence the object and purpose of the agreement.

73. Moreover, the TBT Agreement recognizes the need for national standards to ensure export quality, the protection of human, animal or plant life or health, the protection of the environment, and to deter deceptive practices, while also recognizing the possibility of

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[103] Beyond the fact that equating exclusivity with mandatory compliance amounts to a rewriting of the definition of standards to include a requirement that Members adopt various competing standards, application of this criterion would raise several practical problems for Members and panels alike. In particular, it would be difficult for bodies designing measures, and for panels making findings about those measures, to determine what a technical regulation or standard is. That is because, rather than being able to make that determination on the basis of the measure being designed or reviewed, the determination will have to be made on the basis of other, arguably similar, measures.

[104] Panel Report, para. 7.110.

[105] Panel Report, para. 7.110.

[106] Panel Report, para. 7.110.

[107] *See* Panel Report, para. 7.110.

unnecessary obstacles to international trade posed by these standards.[108] The minority's interpretation accords with the differing obligations that apply to technical regulations and standards. Maintaining the correct distinction between technical regulations and standards is not only important for the sake of clarity of the TBT Agreement, it is also integral to respecting the design and purpose of the TBT Agreement. Thus, interpreting "mandatory compliance" to mean compliance that is necessary to place a product on the market provides security and predictability to Members and preserves the original architecture of the agreement.

C. Request for Findings

74. It is, as the majority stated, "undisputed that the measure[] at issue do[es] not impose a positive requirement to label tuna products for sale on the US market as dolphin safe. Neither the statutory and regulatory provisions nor the court decision challenged by Mexico contain language that impose the use of the dolphin-safe label for tuna products as a condition for these products to be marketed in the United States."[109] Moreover, it is undisputed that Mexican tuna products are, in fact, sold on the U.S. market, as are other tuna products that do not have a dolphin-safe label.[110]

75. As such, the United States requests that the Appellate Body (1) reverse the Panel's legal interpretation of the phrase "with which compliance is mandatory" in the definition of a "technical regulation" in Annex 1.1; and (2) reverse the Panel's legal conclusion that the U.S. measure is a technical regulation.

76. Reversal of the Panel's conclusion that the U.S. measure is a technical regulation would dispose of Mexico's claims under Article 2 of the TBT Agreement. Accordingly, the United States would respectfully request that the Appellate Body find that the Panel's findings with regard to Article 2 of the TBT Agreement would be moot and of no legal effect.

III. The Panel Erred in Finding that the U.S. Dolphin Safe Labeling Provisions are Inconsistent with Article 2.2 of the TBT Agreement

77. The Panel's conclusion that the U.S. measure only partially fulfills its legitimate objective is fatally flawed. While the analytical approach the Panel set forth appears to be sound, the Panel failed to properly assess the evidence before it as called for by Article 11 in its analysis of the extent to which the U.S. measure fulfills its legitimate objective. Further, the Panel's analysis of whether the proposed alternative is a reasonably available, less trade-restrictive alternative that would fulfill the objectives of the U.S. measure at same level as the U.S. measure is illogical and

[108] TBT Agreement, Preamble, Fifth and Sixth Recitals.

[109] Panel Report, para. 7.118 (original footnote and italics omitted).

[110] Panel Report, paras. 7.353, 7.355, 7.357, 7.359.

a misapplication of Article 2.2 of the TBT Agreement.

A. The Panel's Analysis

78. Article 2.2 of the TBT Agreement states in relevant part:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

79. The U.S. Dolphin Safe labeling provisions set forth criteria that must be met should marketers choose to label tuna products "dolphin safe." Mexico challenged the U.S. measure as more trade-restrictive than necessary to fulfill a legitimate objective, and claimed that the AIDCP labeling scheme is a reasonably available less trade-restrictive alternative that would achieve the objectives at the level chosen by the United States. The United States disagreed, arguing that Mexico had not met its burden in establishing that the U.S. measure was more trade restrictive than necessary to achieve its legitimate objective because it failed to establish that there exists a reasonably available less trade-restrictive alternative that would achieve the U.S. objectives at the chosen level.

80. After correctly concluding that the second sentence of Article 2.2 explains what the first sentence of the provision means,[111] the Panel went on to consider whether the U.S. dolphin safe provisions fulfill a legitimate objective.

81. The Panel agreed that the objectives of the U.S. measures were those that the United States described.[112] As the Panel found,[113] the objectives of the U.S. measure are twofold:

- 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

- contributing to the protection of dolphins, by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects

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[111] Panel Report, para. 7.387.

[112] *See* Panel Report, para. 7.395.

[113] Panel Report, para. 7.425 (concluding that "for the purposes of our analysis of Mexico's claims under Article 2.2 of the TBT Agreement, we accept the United States' representation of the objectives of the US dolphin safe provisions as described in paragraph 7.401 above.").

dolphins.

In reaching this conclusion, the Panel correctly found that "the structure and design of the US dolphin safe provisions support the view that one of their objectives is to ensure accurate information to consumers of tuna products concerning the harmful effects on dolphins resulting from fishing methods employed to catch the tuna contained in those products." The Panel also noted that "The US Congress seemed concerned in particular about the harmful effects suffered by [dolphins and other marine mammals] arising from two sources: tuna fishing operations **in the ETP**, on one hand; and driftnet fishing in the high seas worldwide, on the other hand."[114]

82. The Panel then found that the objectives of the U.S. measures were legitimate within the meaning of Article 2.2.[115] The Panel stated the following in reaching this conclusion:

> The Panel also notes that **certain fishing techniques seem to pose greater risks to dolphins than others**. It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries, especially when used without applying certain fishing gear and procedures designed to reduce dolphin bycatch. The number of dolphins killed in the ETP before the adoption of the controls established by the AIDCP , and the ensuing degradation of the dolphins stocks in this area, are illustrative of the potentially devastating consequences that tuna fishing activities may have on dolphins.[116]

83. While the Panel correctly identified the objectives of the U.S. measure, and found that the found that the objectives identified by the United States were legitimate, the United States appeals the Panel's findings on issues of law and legal interpretations that serve as the basis for the conclusion that the U.S. dolphin safe provisions are more trade-restrictive than necessary to achieve a legitimate objective, taking into account the risks that non-fulfillment would create.[117]

84. First, the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU in determining the extent to which the U.S. measure fulfills its legitimate objectives. Second, the Panel erred in its conclusion that the AIDCP labeling scheme[118] is a reasonably available, less trade-restrictive alternative that would fulfil the

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[114] Panel Report, para. 7.418 (emphasis added).

[115] Panel Report, para. 7.440.

[116] Panel Report, para. 7.438.

[117] The appeal of this issue is without prejudice to the fact that Article 2.2 does not apply to the U.S. measure as it is not a technical regulation.

[118] Neither Mexico nor the Panel are clear about what measures (in conjunction with the U.S. dolphin safe labeling provisions) constitute the less trade restrictive alternative under consideration in this analysis. In its description of the "dolphin safe" scheme established under the AIDCP, the Panel refers to the "Resolution to Adopt

objectives of the U.S. measure at same level as the U.S. measure. Finally, the Panel erred in concluding that Mexico had met its burden in establishing that the AIDCP labeling regime's coexistence with the U.S. measure constitutes a less trade-restrictive alternative.

B. The Panel Erred in Finding that the U.S. Dolphin Safe Labeling Provisions are More Trade Restrictive Than Necessary

1. The Panel Failed to Make an Objective Assessment of the Matter before It as Required by Article 11 of the DSU by in Its Assessment of the Extent to which the U.S. Measure Fulfills Its Objectives

85. In evaluating the extent to which the U.S. measure fulfills its objectives, the Panel fails to properly assess the evidence before it regarding the relative harm to dolphins inside and outside the ETP.

a. The Panel's Analysis

86. The Panel set forth how it would determine whether the U.S. measure at issue is more trade restrictive than necessary within the meaning of Article 2.2.

> "...we find that in order to determine whether a measure is more trade restrictive than necessary within the meaning of Article 2.2, we must assess the manner in which and the extent to which the measures at issue fulfil their objectives, taking into account Member's chosen level of protection, and compare this with a potential less trade restrictive alternative measure, in order to determine whether such alternative measure would similarly fulfil the objectives pursued by the technical regulation at the Member's chosen level of protection. To the extent that a measure is capable of contributing to its objective, it would be more trade-restrictive than necessary if an alternative measure that is less trade-restrictive is reasonably available, that would achieve the challenged measure's objective at the same level.[119]

The Panel did not confront directly the question of what is the level at which the United States seeks to achieve its objectives.[120] Instead, it analyzed the extent to which the U.S. measure is

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the Modified System for Tracking and Verification of Tuna" and the "Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification." These resolutions set forth definitions of "dolphin safe" and "non-dolphin-safe" tuna and the rules on receiving an "AIDCP dolphin-safe certification." Panel Report, paras. 2.40-2.41. Therefore, we assume that the AIDCP dolphin-safe labeling scheme means those resolutions.

[119] Panel Report, para. 7.465.

[120] Although the Panel uses the term "level of protection" this is a term imported from the context of the *Agreement on the Application of Sanitary and Phytosanitary Measures* and is not a term used in the TBT Agreement. As the "legitimate objectives" for purposes of Article 2.2 are not necessarily all directed at "protection" (including the U.S. objectives for the measure at issue) the term "level of protection" is not the most accurate term

capable of contributing to each of the two legitimate objectives it identified. For example, before the Panel considered the first objective identified by the Panel, it stated:

> "...While the articulation of this objective does not expressly state what the intended 'level of protection' to be achieved is, a certain level of protection is embodied in the measure itself, and this is, in our view, what must form the basis for our assessment of the proposed alternative. We must therefore first clarify what the existing US measures achieve, in terms of 'ensuring that consumers are not misled' with respect to the manner in which tuna is caught, and then compare that to what Mexico's proposed alternative would achieve in this respect."[121]

The Panel made a similar conclusion before the start of its analysis of the second objective, concluding that "we need first to ascertain the manner and extent to which these measures contribute to this objective, and then consider whether the same level of protection could be achieved by the alternative measure proposed by Mexico."[122]

87. Thus the Panel seems to conclude that the extent to which the U.S. measure achieves its objectives, in conjunction with the level of fulfillment sought for those objectives as embodied in the measure itself, evinces the level chosen by the United States.

88. The Panel proceeded to conduct an analysis of the contribution of the U.S. dolphin safe provisions to the objective of "ensuring that consumers are not misled about whether the tuna contained in tuna products was caught in a manner that adversely affects dolphins," and erroneously concluded that the U.S. measure can only "partially" meet this objective.[123] The Panel reasoned that for tuna products containing tuna caught outside of the ETP, "a consumer could be misled into thinking that the product did not involve injury or killing of a dolphin when this may in fact have been the case."[124] The Panel also found that the differences in the dolphin safe labeling conditions for tuna caught inside and outside of the ETP with respect to whether no dolphin was killed "creates ambiguity as to the meaning of the guarantee provided by the label."[125]

89. The Panel reached a similar conclusion after its analysis of the contribution of the U.S. dolphin-safe provisions to the objective of "protecting dolphins, by ensuring that the U.S. market

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and the United States does not use that term in this appeal.

[121] Panel Report, para. 7.474.

[122] Panel Report, para. 7.589.

[123] Panel Report, para. 7.563.

[124] Panel Report, para. 7.564.

[125] Panel Report, para. 7.564.

is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins." It found that the U.S. measure fulfills this objective with respect to dolphins in the ETP.[126] However, the Panel found that "[i]n other fisheries, the US measures are capable of achieving their objective only in relation to the practices of setting on dolphins and using high seas driftnets." Further, "in relation to all other fishing techniques used outside the ETP," the Panel found that the U.S. measure does not meet this objective.[127]

90. It should be noted that the Panel did agree that the U.S. measure meets its objective of ensuring consumers are not misled by whether tuna products contain tuna caught in a manner harmful to dolphins with respect to tuna caught in the ETP (whether by setting on dolphins or using another fishing technique) and outside the ETP with respect to setting on dolphins.[128] The Panel also agreed that the U.S. measure meets its objective of contributing to dolphin protection by ensuring the U.S. market is not used to encourage tuna fishing techniques (whether setting on dolphins or other techniques) that are harmful to dolphins with respect to tuna caught inside the ETP.[129] Thus the Panel concludes that the U.S. measure only partially fulfills its two objectives.[130]

91. The conclusion that the U.S. measure only partially fulfills its objectives means essentially that the level of fulfillment the Panel found to be established is lower than that which is reflected in the measures themselves, and is achieved by the measure itself. For the reasons set forth below, the Panel erred in both its analysis and its conclusion.

b. The Panel Acted Inconsistently with Article 11 of the DSU In Its Assessment of the Relative Harm to Dolphins Inside and Outside the ETP

92. The Panel failed to conduct an "objective assessment" of the facts presented in connection with Mexico's Article 2.2 claim, as called for by Article 11 of the DSU. A panel fails to follow DSU Article 11 when it fails to provide a "reasoned and adequate" explanation and

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[126] Panel Report, para. 7.599.

[127] Panel Report, para. 7.599.

[128] Panel Report, para. 7.505 (finding that "to the extent that the US dolphin safe provisions deny access to the label to products containing tuna caught by setting on dolphins, they enable the US consumer to avoid buying tuna caught in a manner involving the types of observed and unobserved adverse impact on dolphins associated with this method.").

[129] Panel Report, para. 7.596 (finding that "[t]o the extent that denying a dolphin-safe label to any tuna caught by setting on dolphins ensures that [the] unobserved impacts of setting on dolphins are not encouraged, the US dolphin-safe provisions thus contribute to the United States' objective of not encouraging fleets to catch tuna in a manner that adversely affects dolphins.").

[130] Panel Report, paras. 7.563, 7.599.

coherent reasoning for its findings.[131] Further, the Appellate Body has found that "[t]he deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts" under Article 11.[132] In this dispute, the Panel separately considered the available evidence under each of the two objectives of the U.S. measure as identified by the Panel. The Panel failed to fulfill its DSU Article 11 duty regarding its evaluation of the relative risk of dolphin mortality and serious injury inside and outside of the ETP.

93. As noted above, the Panel concluded that the U.S. measure only partially fulfills its two objectives. Specifically, the Panel concluded that the U.S. measure cannot fulfill its objectives outside of the ETP. In reaching this conclusion, the Panel made the factual finding that the risks to dolphins outside the ETP from other fishing techniques are not lower than similar risks faced by dolphins in the ETP.[133] The Panel reached a similar conclusion with respect to the second objective, stating that it is "not persuaded, based on the evidence presented to us, that at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP under AIDCP monitoring."[134] These findings are not based on an objective assessment of the facts.

I. The Panel's Findings Contradict Its Earlier Findings

94. The Panel's conclusion that the risks to dolphins from other fishing techniques is not lower than the risk from setting on dolphins contradicts the Panel's earlier finding in the context of determining the legitimacy of the U.S. measure. There, the Panel concluded that "certain

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[131] *EC – Airbus (AB)*, para. 881.

[132] *EC – Hormones (AB)*, para. 133.

[133] Panel Report, para. 7.562. The Panel characterizes its findings regarding harm to dolphins outside the ETP in several different ways including not insignificant harm, significant harm, potential for significant harm, regular and significant harm, and equivalent harm. *See, e.g.,* para. 7.529 (finding "we are not persuaded that these figures demonstrate, as the United States suggests, that there is no or only insignificant risk of dolphin mortality or injury arising from tuna fishing operations outside the ETP"); para. 7.531 (finding "Mexico has demonstrated that certain tuna fishing methods other than setting on dolphins have the potential of adversely affecting dolphins and that the use of these other techniques outside the ETP may product and had produced significant levels of dolphin bycatch during the period over which the US dolphin-safe provisions have been in force"); para. 7.543 (indicating there is"strong evidence that regular and significant mortality and serious injury of dolphins also exists outside of the ETP); para. 7.562 (stating "we are not persuaded that the threats arising from the use of fishing methods other than setting on dolphins to catch tuna outside the ETP are insignificant, as the United States suggests, be it in terms of observed mortalities or serious injury, or even at least in some cases, in terms of sustainability of the populations. Nor are we persuaded that they are demonstrated to be lower than the similar threats faced by dolphins in the ETP"); para. 7.617 (stating " we are not persuaded... that at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP.")

[134] Panel Report, para. 7.617.

fishing techniques seem to pose greater risks to dolphins than others" and that "[i]t is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries."[135] This contradiction, without further explanation from the Panel regarding how it might be reconciled, is itself a failure of the Panel to meet its duty under DSU Article 11.

ii. The Panel's Findings Are Inconsistent with the Evidence before the Panel Regarding Risks to Dolphins Inside and Outside of the ETP

95. The Panel's finding also cannot be reconciled with the evidence before it regarding the risks to dolphins within and outside the ETP. As the Appellate Body has noted:

> The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts.[136]

96. The Panel's finding that the harm to dolphins resulting from setting on tuna is equivalent to that resulting from other fishing methods is inconsistent with the evidence before the Panel that some fishing techniques – specifically setting on dolphins to catch tuna – pose greater risks to dolphins than other techniques. The United States adduced significant evidence showing that the opportunity for dolphins to be killed or seriously injured in conjunction with setting on dolphins in the ETP is significantly greater than that possibility in conjunction with other tuna fishing techniques outside of the ETP. As the United States argued before the Panel:

> "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. 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...
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> "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... 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.

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[135] Panel Report, para. 7.438.

[136] *EC – Hormones (AB)*, para. 133.

> "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..."[137]

97. In the ETP, dolphins provide the primary visual cue for fishermen to locate large schools of yellowfin tuna.[138] It is well known during the chase and encirclement phases of sets on dolphins in the ETP that the bond between dolphins and the associated tuna persists, and that during purse seine tuna fishing, tuna and dolphins continue to associate so tightly that to catch dolphins is also to catch tuna.[139] Further, it is understood that when a subset of a dolphin school being chased breaks away from the remaining dolphins they often "take" tuna with them.[140] In other words, the bond between dolphins and tuna is so strong in the ETP that even when given the choice of staying with other tuna some tuna follow dolphins.[141]

98. In the ETP, millions of dolphins are chased and encircled each year and exposed to the consequent observed and unobserved harms. In fact, the evidence suggests that the likelihood that a dolphin would be harmed in the ETP from purse seine fishing in association with dolphins is orders of magnitude greater than the risk of being harmed outside of the ETP, since only in the ETP is setting on dolphins to catch tuna practiced as the foundation for a commercial tuna fishery.

99. There was no evidence before the Panel to suggest that interactions between tuna and dolphins during the course of commercial tuna fishing operations and consequent harms outside the ETP are in any way similar to those in the ETP.[142] The Panel simply dismisses the U.S. contention in this regard[143] and fails to address the evidence put forward by the United States demonstrating that conditions in the ETP are unique both with respect to the level of tuna-dolphin association and the fishing methods used to catch tuna based on exploiting that association, and importantly what that means in terms of risks to dolphins.[144] Instead, the Panel asserts that the risks to dolphins in the ETP are not unique, citing a report put forward by Mexico that it asserts contains "multiple examples of numerous dolphins being killed annually in

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[137] U.S. Second Written Submission, paras. 42-44.

[138] U.S. Response to Panel Question no 12, para. 31.

[139] U.S. Response to Panel Question no 12, para. 31.

[140] U.S. Response to Panel Question no 12, para. 31.

[141] U.S. Response to Panel Question no 12, para. 31.

[142] *See* U.S. First Written Submission, paras. 24, 38-39; US. Second Written Submission, paras. 42, 146.

[143] Panel Report, para. 7.552.

[144] U.S. First Written Submission, paras. 52-59, 62.

other fisheries.[145] Even if the cited report stands for that proposition (which as elaborated below it does not), the fact that there might be examples of dolphin mortality outside the ETP does not change the fact that the nature of the tuna dolphin association in the ETP and the fact that it is exploited on a wide-scale commercial basis to catch tuna results in greater risk or harms to dolphins in the ETP as compared to other fisheries.

iii. The Panel's Finding Regarding Relative Harms to Dolphins Inside and Outside the ETP Contradict Its Conclusions About the Lack of Evidence in this Regard

100. The Panel also failed to reconcile what it acknowledged is minimal evidence regarding harms to dolphins outside the ETP with its finding that there is equivalent risk to dolphins inside and outside of the ETP.

101. The Panel recognized that the quantity and quality of evidence of the risks faced by dolphin populations outside of the ETP is not as comprehensive as that of evidence available about dolphin mortalities resulting from tuna fishing activities inside the ETP.[146] Indeed, the Panel acknowledged that its "analysis of the existence of dolphin bycatch during tuna fishing operations *outside* the ETP is based on the evidence contained in a limited amount of *ad hoc* studies."[147] However, the Panel found that though allowing the use of the AIDCP label would not reduce the unobserved effects of setting on dolphins to catch tuna, the U.S. measure does not address "significant dolphin mortality" that arises outside of the ETP from other fishing techniques and therefore permitting the AIDCP label would not lead to a lower level of fulfillment of its objective.[148] Here, the Panel leaps from what it acknowledges to be the minimal evidence that there may be some harm to dolphins outside of the ETP to concluding that "significant dolphin mortality" occurs. This logical jump is not supported by the evidence that was before the Panel. The Panel itself acknowledges that "information is lacking to evaluate the existence and extent of the threats faced by different species of dolphins in different areas around the globe, especially outside the ETP"[149]

102. The Panel repeatedly asserts that the lack of information about dolphin mortalities on account of tuna fisheries outside the ETP should not be a basis for assuming no problem exists.[150] Equally however, it should not be a basis for assuming a problem does exist. The Panel,

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[145] Panel Report, para 7.552,

[146] See Panel Report, paras. 7.518-7.519.

[147] Panel Report, para. 7.519 (emphasis in original).

[148] Panel Report, paras. 7.612-7.613.

[149] Panel Report, paras. 7.518.

[150] E.g., Panel Report, para. 7.524.

however, does just that in concluding that, despite minimal observers and limited information on harms to dolphins outside the ETP arising from tuna fishing operations, such harms must exist, are significant, and comparable to harms to dolphins in the ETP arising from tuna fishing operations there.

iv. The Evidence Cited By the Panel Regarding Harms to Dolphins from Tuna Fishing Operations Outside the ETP Do Not Support the Panel's Conclusion

103. The evidence the Panel relied on to support its conclusion that dolphin bycatch and mortalities in tuna fisheries outside of the ETP are significant largely did not in fact support this finding. In particular, in the Panel's analysis of the harm from tuna fishing practices other than setting on dolphins outside the ETP,[151] the Panel erroneously referred to evidence that does not pertain to tuna fishing.[152] The fact that these sources do not refer to tuna fishing operations is critical as the Panel was seeking to support its conclusion that harm to dolphins *from tuna fishing operations* outside the ETP are significant and that the risks to dolphins inside the ETP are not greater than outside the ETP. Sources that refer to harms to dolphins from fishing operations other than tuna fishing operations cannot be relied upon to support that conclusion.

104. In addition, many if not most of the sources the Panel cites[153] as evincing harm to dolphins outside the ETP refer to a fishing technique – driftnet fishing – that disqualifies tuna products caught on the high seas from being labeled dolphin safe under the U.S. measure.[154] However, as the Panel found, the U.S. measures prohibit tuna products from being labeled

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[151] See Panel Report, paras. 7.520-7.523.

[152] Panel Report, paras. 7.520-7.523. For example, at paragraph 7.522 the Panel states that "a study commissioned by the NOAA of the US Department of Commerce refers to the case of 1,700 bottlenose dolphins and 1,000 spinner dolphins being caught in one year in the western central Pacific by gillnet, driftnets and purse-seine fisheries, including coastal gillnets fishing for tuna." The Panel quotes this study in footnote 738. However, the source cited (Exhibit MEX-5)does not support the conclusion that bottlenose and spinner dolphins are being caught in a tuna fishery. In particular, while the source indicates that bottlenose and spinner dolphins are incidentally caught in gillnet, driftnet and purse-seine fisheries in the Western Central Pacific and that gillnets and driftnets are used to catch mackerels and tuna, it does not indicate that the dolphins reportedly caught in gillnets or driftnets were caught while fishing for tuna. Additionally, the last two sentences of the first paragraph of footnote 738 generally refer to a Taiwanese driftnet fishery and cetaceans respectively but do not indicate that dolphins are being killed as a result of tuna fishing techniques.

Further, the last sentence of the third paragraph, the last sentence of the fifth paragraph, and the first (and only) sentence of the seventh paragraph of footnote 738 are similarly misleading. These sentences do not support the conclusion that dolphin mortalities are arising from tuna fishing activities, or that the level of dolphin mortality in a tuna fishery outside the ETP is anywhere near the mortality and serious injury in the ETP. They only indicate that dolphins may have or have been caught but do not indicate that the dolphins caught were caught while fishing for tuna.

[153] *See* Panel Report, paras. 7.520-7.523.

[154] Panel Report, paras. 7.520-7.523.

dolphin safe if they contain tuna caught on the high seas by driftnet fishing. Therefore, the possibility that dolphins may be harmed in driftnet fishing does not support the conclusion that there is significant harm to dolphins outside the ETP that is unaddressed under the U.S. labeling provisions. Furthermore, the data cited by the Panel regarding driftnet fisheries references fisheries that were operating 15-20 years ago, and since then several of those fisheries have ceased to exist. For example, the European Union outlawed the use of driftnets to catch tuna as of 2002, which ended the French, UK, and Irish fisheries.

105. If the Panel's references to non-tuna fisheries and driftnet fisheries are removed, the sources supporting the Panel's conclusion that harm to dolphins outside the ETP from tuna fishing operations is significant (or not insignificant) is reduced to two sources. The first source refers to a study of a pair-trawl fishery for tuna conducted in Ireland in 1988 and 1999, which recorded bycatch of 180 cetaceans (including dolphins)[155], and reference to dolphin bycatch in palagic fisheries including for tuna. The second source refers to a statement in a 1994 report that in the Philippines, scientists estimate that 2000 dolphins were killed in purse seine tuna fishing operations each year.[156]

106. The paucity of evidence provided by these sources stand in contrast to the substantial evidence the United States put before the Panel as noted above substantiating the unique characteristics of the ETP (in particular the unique tuna-dolphin association and wide scale commercial chase and encirclement of dolphins to catch tuna) and how those increase the risk to dolphins from tuna fishing operations in the ETP. It also is contradicted by the data cited by the Panel that pertains to observed dolphin mortalities over an eleven year period in the Western Central Pacific.[157] Specifically, the Panel acknowledges that the data indicate that over an eleven year period 33,319 tuna sets were observed and bycatch of only 1314 marine mammals was reported, 46 of which were reported killed. Yet, the Panel dismisses the value of this evidence by stating that the authors of the report summarizing the data do not consider the figures to be a sufficient basis for overall estimates for the fishery and that more detailed analysis is required.[158] The Panel offers no explanation as to why this data supporting a finding that dolphin bycatch in the Western Central Pacific is significantly lower than dolphin bycatch in the ETP should be dismissed because further study is warranted, when studies based on anecdotal reports that similarly note the need for further study are used as the basis for the Panel's conclusion that harm to dolphins outside the ETP from tuna fishing operations is significant and greater than in the ETP.

107. Further, it is undisputed that the observer coverage outside of the ETP (and thus in areas

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[155] Exhibit Mex-99 at p. 13, 31.

[156] Exhibit Mex-5 at pp. 26, 112, 131.

[157] Panel Report, paras. 7.526-7.527.

[158] Panel Report, paras. 7.528-7.529.

where fishing techniques other than setting on dolphins are more prevalent) is not as comprehensive.[159] However this due primarily to the fact that there is not an indication a commercial exploitation of a tuna dolphin-relationship, or an indication of regular and significant dolphin mortality or serious injury in those fisheries.

v. The Panel's Findings About Dolphin Mortality in the ETP Are Not Consistent with the Facts Before the Panel

108. The Panel also acted inconsistently with DSU Article 11 when it failed to consider in its analysis of the risk of mortality or serious injury of dolphins in the ETP important evidence introduced by the United States. The Panel makes cursorily summarized the U.S. arguments regarding unobserved dolphin mortality, the numbers of dolphins encircled, mother-calf separation, and stress of chase.[160] However, the Panel failed to fully consider two studies submitted reporting the unobserved impact on dolphins from being chased and encircled to catch tuna in the ETP, published in 2005 and 2007.[161] For example, the 2007 report states:

> "[The research] clearly illustrates that the purse-seine fishery has the capacity to affect dolphins beyond the direct mortality observed as bycatches. Chase and encirclement by purse-seine vessels and their speedboats may (1) cause changes in tissue chemistry that are associated with stress (Dizon et al. 2002, Southern et al. 2002, St. Aubin 2002), (2) elevate body temperatures and physically damage organ systems (Cowan & Curry 2002, Pabst et al. 2002, St. Aubin 2002), (3) increase bioenergetic demands (Weihs 2004, Edwards 2006) and (4) influence swimming and schooling dynamics and behaviour (Chivers & Scott 2002, Mesnick et al. 2002, Santurtún & Galindo 2002)."[162]

Further, the 2005 report states:

> "The annual number of dolphins chased, captured and released during fishing operations is high (Archer et alia 2002). Individual NE offshore spotted dolphins interact with the fisher between 2 and 50 times a year, depending on size of the school (Perkins & Edwards 1999). It is likely that this rate of interaction has negative effects on survival and/or reproduction through stress (Curry 199, Appendix 7 in Reilly et al. 2005), increased predation (Perryman & Foster 1980), and separation of mothers and calves (Archer et al. 2001)."[163]

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[159] Panel Report, para. 7.524.

[160] Panel Report, paras. 7.495-7.499.

[161] See Exhibits US-21 and US-22.

[162] Exhibit US-21(Wade 2007), p. 11; U.S. Response to Panel Question no. 34, para 83.

[163] Exhibit US-22 (Gerrodette 2005), p. 17, U.S. First Written Submission, para. 54.

109. The Panel cited studies that it claimed "question these conclusions."[164] However, the studies cited did not in fact do so. In fact, the studies cited in the Panel Report at paragraphs 7.500-7.502 largely pre-date the studies cited in paragraphs 7.497-7.499. For example, one of the studies cited in paragraphs 7.500-7.502 pre-dates any of the reports cited in paragraphs 7.497-7.499. In addition, the report cited in paragraph 7.500 (Exhibit MEX-67) as questioning the conclusions about cow-calf separation is dated 2002, when the study on cow-calf separation cited in paragraphs 7.497 was published in 2007. In fact, the report cited in paragraph 7.500 (Exhibit MEX-67) addresses the conclusions in Exhibit US-21 but does not address the other studies cited in paragraphs 7.497-7.499 (Exhibits US-4 and US-11). Further, Exhibit US-21 cited in paragraph 7.500 is not questioning the conclusions of the studies cited in paragraphs 7.497-7.499; in fact, it is one of the studies cited in paragraphs 7.497-7.499 and the passage from the study quoted in paragraph 7.500 does not imply that there are not unobserved harms to dolphins when they are set upon to catch tuna. Furthermore, this report should be viewed in its proper context, as a compilation of untested alternate theories to explain the findings of Exhibit US-21 rather than a peer-reviewed scientific report that is deserving of the same weight and consideration.

110. These erroneous factual findings are the foundation for the Panel's conclusion that there is uncertainty regarding the extent to which setting on dolphins adversely impacts dolphins beyond observed mortality.[165]

vi. The Panel's Findings Regarding Depleted Dolphin Stocks Are Not Supported by the Facts

111. In its analysis of "adverse effects of fishing activities on dolphins in and outside of the ETP," the Panel looked at the relative risks to dolphins from tuna fisheries and the depleted status of dolphin populations.[166] In its attempt to show that the risks to dolphin populations in the ETP are not unique, the Panel states that dolphin populations near Ghana and Togo are "severely depleted"[167] However, there is no indication in the source cited that the dolphin stocks off the coast of Ghana and Togo are depleted because of tuna fishing activities. Nor is there indication in the source cited in the last sentence of paragraph 7.554 and in footnote 795 that Irrawaddy dolphins stocks in parts of Thailand and the Philippines are seriously depleted on account of tuna fishing activities, as the Panel implies.[168]

112. In its discussion of the growth rates of dolphin populations in the ETP, the Panel states

[164] Panel Report, para. 7.500.

[165] Panel Report, para. 7.504.

[166] Panel Report, para. 7.547.

[167] Panel Report, paras. 7.553.

[168] Panel Report, paras. 7.554.

that "most of the studies submitted by the parties also suggest that the dolphin populations identified by the United States as depleted are recovering..."[169]. The footnote to that sentence (footnote 802) cites Exhibit US-4, p. 1, and Exhibit US-19, p. 32. However, neither of those citations support the proposition. The only reference in Exhibit US-4, p. 1 to recovery is in the following passage: "dolphin stocks are *not* recovering at expected rates." (Emphasis added). The only reference to recovery in Exhibit US-19, p. 32 is in the following passage: "neither population is recovering at a rate consistent with these levels of depletion and reported kills." This evidence is important to the proper assessment of the magnitude of the concern for dolphin populations in the ETP.

113. The Panel also neglected to consider the substantial evidence adduced by the United States that the dolphin populations in the ETP are depleted, and that the most likely reason that dolphin populations were not recovering at their expected recovery rates is due to the continuance of the tuna purse seine fishing operations in the ETP, even under the AIDCP guidelines. The United States cited the following passages from studies in support of its assertions that setting on dolphins to catch tuna adversely affects dolphins beyond observed dolphin mortalities and that it is the most probable reason why depleted dolphin populations show no clear signs of recovery:

> These stocks have not recovered and remain depleted, with northeastern spotted and eastern spinner dolphins remaining at less than 30 percent of their historic abundance (19 percent for northeastern spotted dolphins and 29 percent for eastern spinner dolphins).[170] In addition, the most recent abundance estimates for these stocks indicate these stocks are still substantially below optimum sustainable population.[171]
>
> For example, dolphin mothers and nursing calves are often separated during the high-speed chase and encirclement. This separation is due to the high speed (14 knots) and long duration (up to 90 minutes) of the chase phase of dolphin sets. Dependent dolphin calves are incapable of keeping pace with their mothers, and as a result they are separated (several nautical miles or more, if assuming only a 30 minute chase at 14 knots) and die as a result of starvation, predation and other causes even when their mothers are

[169] Panel Report, para. 7.557.

[170] Wade, P. R., G. M. Watters, T. Gerrodette, and S. B. Reilly. 2007. Depletion of spotted and spinner dolphins in the eastern tropical Pacific: modeling hypotheses for their lack of recovery. Marine Ecology Progress Series 343:1-14. p.7. Exhibit US-21.

[171] Gerrodette, T., G. Watters, W. Perryman, and L. Ballance. 2008. Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003. NOAA Tech. Memo. NMFS-SWFSC-422. p.18, Table 3. Exhibit US-20.

released from sets alive.[172] Scientists have examined mothers killed without dependent calves in ETP purse-seine sets for the periods 1973-1990 and 1996-2000. Studies estimate that because of mother-calf separation, the number of orphaned calves that die as a result of predation and starvation following a chase is approximately 14 percent higher than dolphin calve mortality observed and attributed to that fishery.[173] Therefore, annual observed dolphin mortality should be increased by at least 14 percent to capture this unobserved impact. Inclusion of the death of dependent calves after their mothers are chased and separated from them, even if released alive, would increase the mortality of spotted dolphins by 10 to 15 percent and spinner dolphins by 6 to 10 percent in the sets examined in this study.[174] Assuming these sets are representative of overall fishing activity and the demographics of dolphin schools in the ETP this increased mortality is applicable to all dolphin sets in the ETP.

vii. Conclusion

114. In the context of this dispute, the absence of evidence before the Panel supporting the notion that harm to dolphins from tuna fishing operations outside the ETP is significant and not demonstrated to be lower than harms to dolphins from tuna fishing operations inside the ETP, means that Mexico has not met its burden of establishing its contention that the U.S. measure fails to meet its objectives.[175] Yet, the Panel concludes that Mexico demonstrated that tuna fishing techniques other than setting on dolphins "[have] produced significant levels of dolphin bycatch"[176] and that threats arising from the use of fishing methods other than setting on dolphins to catch tuna outside the ETP are not "demonstrated to be lower than the similar threats faced by dolphins in the ETP"[177] The Panel also concludes that "significant dolphin mortality also arises outside the ETP from the use of other techniques than setting on dolphins, and that some of the

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[172] Noren, S.R., and E.F. Edwards. 2007. Physiological and behavioral development in Delphinid calves: implications for calf separation and mortality due to tuna purse-seine sets. Marine Mammal Science 23: 15-29. p. 21. Exhibit US-4

[173] Archer, F., T. Gerrodette, S. Chivers, and A. Jackson. 2004. Annual estimates of missing calves in the pantropical spotted dolphin bycatch of the eastern tropical Pacific tuna purse-seine fishery. Fishery Bulletin 102:233-244. Exhibit US-27.

[174] Archer, F., Gerrodette, T., Dizon, A., Abella, K. and Southern, S. 2001. Unobserved kill of nursing dolphin calves in a tuna purse-seine fishery. Marine Mammal Science 17(3): 540-554 (hereinafter "Archer 2001"). Exhibit US-28.

[175] See Panel Report, para. 7.530 (finding that with respect to the equatorial purse seine fishery in the WCPO "the authors' conclusion that further study would be required in order to draw overall conclusions for the fishery confirms that the information available in this respect is incomplete and that this issue warrants further analysis.").

[176] Panel Report, para. 7.531.

[177] Panel Report, para. 7.562.

affected dolphin populations may be at risk as a result"[178] By drawing these conclusions despite the lack of supporting evidence, and in the face of substantial contrary evidence demonstrating the significantly greater harm posed to dolphins from tuna fishing operations inside the ETP, the Panel acted inconsistently with DSU Article 11.

c. Panel Erred in Failing to Take Into Account that Article 2.2 Does Not Require Members to Fulfill Their Objectives Without Regard to Cost and Benefits

115. The Panel ostensibly allows that the U.S. be able to determine the an appropriate level of protection to achieve in relation to its objectives.[179] However, the Panel consistently implies that the U.S. is required to fulfill its objectives to the same level inside and outside of the ETP, regardless of the costs.[180] An approach that weighs costs and benefits is consistent with well-established approaches to policymaking. 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, and prioritize actions base on the results of that assessment. Nothing in the TBT Agreement indicates that Members are precluded from doing so, or that the WTO should stand in the shoes of Members to make these kinds of determinations.[181] Nothing in the TBT Agreement requires a Member to see to fulfill its legitimate objectives to the maximum extent possible, nor at any particular level,[182] nor restricts its right to address particular priorities first rather than adopt a uniform approach regardless of differences in risk.

116. The United States explained to the Panel that the measure reflects the fact that the lower likelihood that a dolphin may be killed or seriously injured in a fishery outside the ETP must be balanced against the additional burden that conditioning use of a dolphin safe label on a certification based on an independent observer's statement would impose. These costs would

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[178] Panel Report, para. 7.613.

[179] Panel Report, para. 7.622.

[180] See Panel Report, para. 7.560, 7.561.

[181] U.S. Second Written Submission, para 152.

[182] *US – Cloves (Panel)*, para. 7.323 (citing U.S. first written submission in that dispute at para. 245).

include the cost of carrying an observer on board all tuna fishing trips. The imposition of such a condition would have significant monetary and infrastructure implications for most nations whose vessels fish for tuna outside the ETP and export to the United States.

117. Indeed, the fact that the measure focuses on conditions inside the ETP is consistent with the concerns that originally prompted the measure's adoption, concerns the Panel found were indicative of the objectives of the measure. The Panel noted that "The U.S. Congress seemed concerned in particular about the harmful effects suffered by [dolphins and other marine mammals] arising from two sources: tuna fishing operations **in the ETP**, on one hand; and driftnet fishing in the high seas worldwide, on the other hand."[183] Thus, the fact that the measure focuses on risks to dolphins in the ETP is fully consistent with the measure's objective and the level of fulfilment of that objective sought by the United States.

118. The Panel erred when it concluded that the fact that the measures focus on addressing the practice of setting on dolphins in the ETP, and less so on fishing techniques outside the ETP, permits the conclusion that the level of fulfilment the United States sought was equal to the lowest common denominator — that for fisheries outside the ETP. In so doing, the Panel puts the United States in an impossible position with regard to a fishery where the risk of dolphins interacting with fishing gear, much less being killed, is not as significant as in the ETP. Under the Panel's reasoning, the United States would either need to give up on fulfilling its legitimate objective (i.e., by allowing tuna caught by setting on dolphins on its market) or create an even more trade restrictive measure — conditioning the labeling of tuna products as dolphin safe on an observer's statement that no dolphins were killed or seriously injured in all fisheries, regardless of the fact that the risks avoided by such action are outweighed by the costs.[184]

C. The Panel Erred in finding that the "Coexistence" of the U.S. Measure and the AIDCP Labeling Scheme Is a Less Trade-Restrictive Alternative

1. Description of the Alternative

119. Mexico asserted that "[a] less trade restrictive way of fulfilling the objectives [of the US. measures] would be to create dolphin safe standards rather than a technical regulation whereby the AIDCP standard could be recognized and a label complying with the AIDCP standard used. At the same time, the different U.S. standard could be recognized and a label complying with that standard used."[185] The Panel adopted Mexico's formulation of this alternative, stating that "what Mexico suggests is that the US dolphin safe label and the AIDCP label should be allowed to coexist on the US market in order to provide fuller information to US consumers. In practical

[183] Panel Report, para. 7.418 (emphasis added).

[184] U.S. Second Written Submission, para 150.

[185] Mexico Second Written Submission, para. 210.

terms, this would entail that tuna caught in the ETP by setting on dolphins could be labelled as complying with the AIDCP requirements for dolphin safe labelling, and sold in the US market, as long as it was harvested in accordance with the AIDCP."

2. The Panel Erred in Finding that the Alternative Would Fulfill the Objectives at the Level Chosen by the United States

120. The Panel made the following erroneous finding in the context of its analysis of whether the alternative measure provides a reasonably available[186] less trade restrictive means of achieving the first objective of the measure at the same level of fulfillment:

> 7.573 Thus, under both, the US measures and the AIDCP regime, consumers of tuna products would bear a certain level of uncertainty whether dolphins were adversely affected during the catching of the tuna contained in those products....[W]e consider that the extent to which consumers would be misled as to the implications of the manner in which the tuna was caught would not be greater if the AIDCP label were allowed to co-exist with the US dolphin-safe provisions, than it currently is under the existing measures.

The Panel makes a similar finding regarding the second objective:

> "...we conclude that, when conducted under "controlled" circumstances, e.g. in accordance with the requirements of the AIDCP, the adverse effects of setting on dolphins in the form of observed dolphin mortality or serious injury may be considerably reduced. In addition, compliance with the AIDCP dolphin-safe labelling requirements includes a requirement that no dolphin has been killed or seriously injured in sets in which the tuna was caught. Therefore, allowing compliance with the AIDCP labelling requirements to be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US

[186] The United States notes that the proper interpretation of Article 2.2 of the TBT Agreement is confirmed by a December 15, 1993 letter from the Director-General of the GATT to the Chief U.S. Negotiator concerning the application of Article 2.2 of the TBT Agreement. That letter explains that while "it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement] . . . it was clear from our consultations at expert level that participants 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." (Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993) (Exhibit US-41)). This letter provides supplemental means of interpretation within the meaning of Article 32 of the Vienna Convention, in particular as circumstances of the TBT Agreement's conclusion, that confirms the meaning derived from the ordinary meaning, in context, and in light of the object and purpose of the TBT Agreement. Thus, to establish that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary, Mexico must establish that there is a reasonably available alternative measure that fulfils the provisions' objectives that is significantly less trade-restrictive.

dolphin-safe provisions do and would involve no reduction in the level of protection in this respect."[187]

As described below, the Panel erred in making both of these conclusions.

a. The AIDCP Labeling Scheme Does Not Discourage Setting on Dolphins

121. As part of its assessment of the ability of the alternative to meet the U.S. objectives, the Panel spends a considerable amount of time describing why it thinks the risk to dolphins from tuna fishing is significant outside of the ETP, and on the differences in the dolphin safe labeling conditions inside and outside of the ETP. However, allowing the AIDCP label on the U.S. market would not address any of the alleged risks to dolphins outside of the ETP identified by the Panel, since by its terms it only applies to tuna caught inside the ETP. It is not designed to provide certifications that no dolphins were observed killed or seriously injured for tuna caught outside the ETP. Indeed, the observer requirement originates from the AIDCP, where parties agreed to require their fleets operating in the ETP to have an observer on board 100 percent of tuna fishing trips by vessels that are capable of using fishing methods that include setting on dolphins. The AIDCP contains no commitments for observer coverage or other procedures to protect dolphins in fishing operations outside the ETP.[188] A tuna product labeled with the AIDCP dolphin safe label would therefore mean that the tuna product contains tuna caught *in the ETP* in accordance with AIDCP requirements (e.g., procedures to reduce dolphin mortality when being set upon) and that no dolphins were observed killed or seriously injured when the tuna was caught.

122. Further, the AIDCP "dolphin safe" label allows 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. As the Panel noted, it is undisputed that setting on dolphins is harmful to dolphins.[189] The AIDCP contemplates that even when its procedures are applied some dolphins will nonetheless be killed or seriously injured when they are set upon to catch tuna. Whereas the Panel found the U.S. measure fulfill its objectives with respect to tuna caught by setting on dolphins, the AIDCP "dolphin safe" label would frustrate those objectives.

b. The AIDCP Labeling Scheme Provides No Additional Information Beyond the U.S. Dolphin Safe Label

123. The Panel concluded that the U.S. measure does not allow U.S. consumers to know the

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[187] Panel Report, para. 7.612.

[188] U.S. Second Written Submission, para. 46; Exhibits Mex-11 and Mex-56.

[189] Panel Report, para. 7.438.

benefits of the AIDCP[190] and that "the coexistence of the US and the AIDCP dolphin safe labels, would permit US consumers to be fully informed of all aspects of dolphin safe fishing methods."[191] In the context of its analysis under the objective relating to dolphin protection, the Panel notes that different conditions for US and AIDCP label could be made clear to consumers.[192] However, the Panel failed to account for the fact that the U.S. measure already requires that tuna bearing the dolphin safe label adhere to the AIDCP if the tuna was caught in the ETP, along with ensuring the tuna was not caught by setting on dolphins. The AIDCP "dolphin safe" label therefore could not add any further information. Rather, it would give the impression that tuna caught in the ETP bearing the label were not caught in a manner that adversely affects dolphins, when in reality they were caught by setting on dolphins.

c. The Addition of the AIDCP Label Would Be Confusing for Consumers

124. The Panel states that the U.S. dolphin safe label would not have to be discontinued in order for the AIDCP label to be introduced into the market, but it provides no explanation for how both labels could be made available without creating consumer confusion. The U.S. official dolphin safe mark and the AIDCP mark are identical, save for "AIDCP" or "US Department of Commerce" written in small letters at the top of the symbol.[193] Even assuming that a consumer could discern the difference between dolphin safe under the U.S. measures and the AIDCP labeling scheme, it is difficult to see how consumers would be able to appreciate the difference in what each signifies so as to make an informed choice about the tuna they buy. The Panel fails to explain how this could be avoided.

125. One might argue that a truly informed consumer would be able to choose between the level of fulfilment afforded by the AIDCP labeling scheme and the U.S. measures vis a vis discouraging fishing techniques that adversely affect dolphins, in particular the setting on dolphins with purse seine nets. However the Panel itself acknowledges that more labels do not necessarily mean better consumer information.[194] Further, the first objective of the measure is to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. The very fact that a tuna product with the AIDCP label would be allowed on the shelf next to another product labeled in accordance with the U.S. dolphin safe measure might lead one to conclude that they provided the same level

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[190] Panel Report, para. 7.506.

[191] Panel Report, para. 7.575.

[192] Panel Report, para. 7.618.

[193] *See* Exhibit Mex-121, Exhibit Mex-107

[194] See Panel Report, para. 7.539 (stating Panel's argument that to the extent the official label and the alternative label have different documentation requirements under the U.S. measure, this would lead to further confusion for consumers).

of protection to dolphins. This is simply not the case.

3. The Panel Acted Inconsistently with Article 11 of the DSU Regarding the Existence of a Less Trade Restrictive "Alternative Measure"

126. Despite Mexico's failure to prove that their proposed alternative is less trade restrictive, the Panel concludes exactly this. The Panel's cursory analysis is limited to the following paragraph:

> 7.568 We first note that the US dolphin safe provisions do not formally restrict the importation or sale of tuna or tuna products that are not labelled dolphin safe. However, as noted above, the parties agree that the US public has a preference for tuna products that are dolphin safe, and access to the label is therefore a valuable advantage on the US market. To the extent that the proposed alternative would provide access to the label, and thus to this advantage, to a greater range of tuna products, including imported tuna products, it would be less-trade restrictive than the existing US measures, in that it would allow greater competitive opportunities on the US market to those products.

127. The Panel's conclusion that the alternative is less trade restrictive is unsupported by the evidence that was before it.

128. First, though consumers prefer tuna that is dolphin safe, Mexico did not offer any evidence indicating that consumers prefer the tuna that meets the AIDCP definition of dolphin safe to the same degree as tuna that meets the definition set forth by the U.S. measure. On the contrary, the United States produced ample evidence to show that regardless of whether the tuna carries a dolphin safe label, retailers will sell and consumers will purchase tuna that comport with the US dolphin safe definition.[195] The Panel failed to consider this evidence, and thus failed to provide an objective assessment of the facts, as required by Article 11.

129. Second, the Panel misinterprets the significance of evidence that U.S. consumers prefer tuna that is dolphin safe. The evidence provided by Mexico[196] indicated that consumers are less inclined to purchase tuna that does not meet the U.S. conditions to be labeled dolphin safe.[197] This evidence suggests that consumers prefer tuna that is *in fact* dolphin safe, as currently defined by the U.S. measure, not merely tuna *labeled* dolphin safe. In fact, the evidence before the Panel indicated that some marketers of tuna products have chosen not to label their tuna

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[195] *See* U.S. Second Written Submission, para. 113, 165; U.S. Response to Panel Question no 102, paras. 24-25.

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

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

products as dolphin safe.[198] For example, Walmart's Great Value tuna products are sold both with and without dolphin-safe labels.[199] Retailers committed to carrying dolphin safe tuna (who are able to verify that the tuna product meets the US dolphin safe conditions) still carry such unlabeled dolphin safe tuna products, and consumers still purchase them. This further confirms that it is what the U.S. measure signifies that is relevant to retailers and many consumers, and not mere access to a dolphin-safe label. Therefore, any advantage that stems from use of the dolphin safe label comes from the fact that the tuna meets the criteria to qualify for the label.

130. The Panel also erred in evaluating the evidence in connection with its finding that consumers cannot distinguish between tuna caught in a manner that adversely affects dolphins and other tuna.[200] In particular, the Panel points to an opinion poll offered by Mexico as "the only piece of evidence presented in these proceedings to ascertain what US consumers in fact understand the terms 'dolphin-safe'."[201] The Panel goes on to conclude that "in light of this poll, that it is not clear that US consumers understand the term 'dolphin-safe' to mean the same as what the US dolphin-safe provisions define it to mean" and that "to the extent that there are discrepancies between the meaning of this term under the measure and consumer perceptions, this may create confusion and undermine the ability of the measure to effectively ensure that consumers are not misled." As a threshold matter, the Panel was simply wrong in stating that this poll was "the only piece of evidence" presented with regard to U.S. consumers' understanding of dolphin-safe labeling. For example, the United States introduced evidence that, at the time the U.S. provisions were adopted, there was strong consumer sentiment that setting on dolphins to catch tuna was unacceptable and that something should be done to ensure that consumers had a choice not to purchase a product that contained tuna caught in association with dolphins.[202] The Panel failed to consider this evidence, and in so doing, failed to comply with its obligation under Article 11 to conduct an objective assessment of the facts.

131. Further, the poll conducted by Mexico does not constitute evidence as to whether allowing an AIDCP label would result in more competitive opportunities for tuna products. No evidence presented to the panel indicated that consumers or retailers are interested in purchasing tuna caught by setting on dolphins, a fishing method known to cause harm to dolphins. Yet the Panel nonetheless concluded that the alternative proposed by Mexico was less trade restrictive.

132. In conclusion, the Panel erred in finding that the alternative measure articulated by Mexico is less trade restrictive than the U.S. measure.

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[198] U.S. First Written Submission, para. 94; U.S. Response to Pane Question no. 107 paras. 26-28.

[199] U.S. Response to Panel Question no 107, para. 28.

[200] Panel Report, para. 7.542.

[201] Panel Report, para. 7.481.

[202] U.S. Response to Panel Question no. 40, para. 98-101; Amicus submission, paras. 18-20, 25, 62-64.

D. Request for Findings

133. The United States requests that the Appellate Body find that (1) the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU in determining the extent to which the U.S. measure fulfills its legitimate objectives, (2) the Panel erred in its conclusion that the AIDCP labeling scheme is a reasonably available, less trade-restrictive alternative that would fulfil the objectives of the U.S. measure at same level of protection as the U.S. measure, and (4) the Panel erred in concluding that Mexico had met its burden in establishing that the AIDCP labeling regime's coexistence with the U.S. measure constitutes a less trade-restrictive alternative.

V. The Panel Erred in Finding that the AIDCP Is an International Standardizing Organization and That the AIDCP Definition of "Dolphin Safe" Is a Relevant International Standard Within the Meaning of Article 2.4

A. Introduction

134. Under Article 2.4 of the TBT Agreement, Members have an obligation to base their technical regulations on "relevant international standards" unless the international standard "would be an ineffective or inappropriate means for the fulfillment" of the Member's legitimate objective.[203] Mexico asserted that the definition of "dolphin safe" set forth in an AIDCP resolution on "tracking and verifying tuna" and used in an AIDCP resolution on "AIDCP dolphin safe tuna certification" was a relevant international standard.[204] If correct, this would mean that all Members would have an obligation under Article 2.4 and Annex 3.F to use this definition of "dolphin safe" in their standards and technical regulations unless it would be ineffective or inappropriate.

135. The Panel examined three questions in determining whether the United States violated Article 2.4: (1) whether the AIDCP definition of "dolphin safe" is a relevant international standard; (2) if so, whether the AIDCP definition was used as a basis for the U.S. measure; and (3) if not, whether the international standard would be ineffective or inappropriate for fulfilling

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[203] TBT Agreement, Art. 2.4:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

[204] *See* Panel Report, paras. 7.630, 7.631; AIDCP Resolution to Establish a System for Tracking and Verifying Tuna, para. 1.a (Exhibit Mex-55); AIDCP Resolution to Establish Procedures for *AIDCP Dolphin Safe* Tuna Certification (Exhibit Mex-56).

the legitimate objectives of the United States.[205] The Panel found that the AIDCP definition is a relevant international standard and that the U.S. measure was not based on that standard.[206] The Panel ultimately found, however, that the AIDCP definition would not be effective or appropriate at meeting the U.S. objectives, in particular the U.S. objectives of providing information about and discouraging a fishing method that results in adverse effects to dolphins.[207] Therefore, the Panel concluded that the United States was not required to base its dolphin-safe measures on the AIDCP definition, and thus the United States did not violate its obligations under Article 2.4.

136. Despite correctly finding that the United States did not have an obligation to base its measure on the AIDCP definition of "dolphin safe," the Panel was incorrect to find that the AIDCP definition is a relevant international standard. The TBT Agreement does not define the term "international standard." This term, however, is defined in ISO/IEC Guide 2 as a "[s]tandard that is adopted by an international standardizing/standards organization and made available to the public."[208] Moreover, the TBT Agreement defines "standard" as "a document approved by a recognized body," and specifies that an "international body" is a "body ... whose membership is open to the relevant bodies of at least all Members."[209] The Panel stated that in order to find that the AIDCP definition of "dolphin safe" meets the definition of an international standard, the Panel would have to find that (1) the AIDCP definition is a standard, (2) the AIDCP is an international standardizing organization, and (3) the AIDCP standard was made available to the public.[210] The Panel's conclusion that the AIDCP meets the second of these criteria and is an international standardizing organization was in error.

137. After reviewing a series of ISO/IEC and TBT Agreement definitions, the Panel determined that an international standardizing/standards organization is "*a legal or administrative entity* based on the membership of other bodies or individuals that has an established constitution and its own administration, *has recognized activities in standardization*, and whose *membership is open to the relevant national body of every country*."[211] The AIDCP meets none of these criteria. The Panel's conclusion that the AIDCP is an international standardizing/standards organization is flawed because: (1) the AIDCP is not "international" within the meaning of the TBT Agreement because its membership was not and is not open to all WTO Members; (2) the AIDCP does not have recognized activities in standardization; and (3) the parties to the AIDCP are parties to an international agreement, not a body or organization.

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[205] Panel Report, para. 7.627.

[206] Panel Report, paras. 7.707, 7.716.

[207] Panel Report, paras. 7.738, 7.740.

[208] ISO/IEC Guide 2 (1991), para. 3.2.1.

[209] TBT Agreement, Annex 1.2, 1.4.

[210] Panel Report, para. 7.659.

[211] Panel Report, para. 7.678 (italics added).

B. The AIDCP Is Not International within the Meaning of the TBT Agreement

138. As the Panel noted[212], the TBT Agreement states that an "international body" must be "open to the relevant bodies of at least all Members."[213] The ISO/IEC definition of "international standardizing organization" confirms that to be considered "international," a standardizing body must be open to all countries.[214] The Panel also understood that to be considered an international standardizing organization, participation in the AIDCP would have to be available to every country.[215] However, the Panel's conclusion that the AIDCP was "open to the relevant bodies of at least all Members" was based on an incorrect understanding of what is required for an organization to be "open". In fact, the AIDCP was not open when the dolphin safe definition was developed, and the AIDCP is not open today.

139. In order for a standardizing organization to be considered open to all Members, such that a standard it develops may be considered an international standard, that organization must be open to all Members during the period during which the standard in question was developed and it must remain open thereafter. This is made clear by the text of Annex 1 of the TBT Agreement and confirmed by ISO/IEC Guide 2, which respectively define "international body" and "international standardizing organization" in the present tense as a body that *is* open to at least all Members or every country. Moreover, as stated by Members through the TBT Committee Decision on Principles for the Development of International Standards, openness to all Members is "openness without discrimination with respect to the participation at the policy development level and at every stage of standards development."[216] Members specified that this includes openness from the beginning of the development of the standard – the "proposal and acceptance of new work items" – through the end – the "dissemination of the adopted standard."[217]

140. The Panel found that the AIDCP was and is open to the relevant body of every country.[218]

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[212] Panel Report, para. 7.679.

[213] TBT Agreement, Annex 1.4: "*International body or system* – Body or system whose membership is open to the relevant bodies of at least all Members."

[214] ISO/IEC Guide 2 (1991), p. 12 (italics original): "international standardizing organization: Standardizing *organization* whose membership is open to the relevant national *body* from every country."

[215] Panel Report, paras. 7.680, 7.687.

[216] Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2.2 and Annex 3 of the Agreement, G/TBT/1/Rev.9, p. 38.

[217] Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2.2 and Annex 3 of the Agreement, G/TBT/1/Rev.9, p. 38.

[218] Panel Report, para. 7.693.

While it found that four categories of countries were eligible to sign or accede to the AIDCP[219], it found only two of those categories provided the level of openness it considered required by the TBT Agreement. First, the Panel found that the AIDCP was open to all Members because, from May 21, 1998 to May 14, 1999, the AIDCP was open to signature to any Member who fished in the ETP and there were no restrictions on who could fish in the ETP during that period.[220] Second, the Panel also found that the AIDCP remains open to Members if they are invited to sign the agreement by the current parties.[221] Yet neither eligibility requirement allowed or allow all Members to participate in the AIDCP.

141. First, the Panel's reliance on the qualifications for signing the AIDCP in 1998 and 1999 was in error. As the Panel found, the period for signature of the AIDCP ended on May 14, 1999.[222] The AIDCP definitions at issue, however, were not adopted until June 15, 2001.[223] Therefore, even if the requirements for eligibility to sign the agreement allowed the AIDCP to be considered open to all Members during the signature period, the closing of the signature period before the development of the definition at issue concluded precludes a finding that the AIDCP was open through signature for purposes of the definition at issue.

142. Moreover, even had the period for signature of the AIDCP been the same as the period during which the resolution was developed, the AIDCP was not open to signature by at least all Members. The Panel found that any country could sign the AIDCP because, while eligibility was limited to States whose vessels fished for tuna in the agreement area, "there were no limitations to or prohibitions of fishing in the agreement area."[224] This does not qualify the AIDCP as being open to all Members since other Members who may have an interest in the AIDCP's activities other than fishing (such as consumer or conservation interests) were ineligible to become parties to the AIDCP.

143. Second, even if the AIDCP had been open to all Members in the past, including during the time that the definition at issue was developed and adopted, it is not open now. As the Panel found, accession to the AIDCP is open to a WTO Member if that Member is "invited to accede

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[219] Panel Report, para. 7.690. The Panel found the following qualifications for signing the AIDCP or acceding to the agreement: "(a) the Parties to the 1949 Convention (i.e. the United States and Costa Rica); (b) States not Party to the 1949 Convention with a coastline bordering the Convention Area; (c) States whose vessels fish for fish stocks covered by the Convention, following consultation with the Parties; or (d) States that are otherwise invited to join on the basis of a decision by the Parties."

[220] Panel Report, para. 7.691.

[221] Panel Report, para. 7.691.

[222] Panel Report, para. 7.691.

[223] Panel Report, para. 7.681.

[224] Panel Report, para. 7.691.

to the Agreement on the basis of a decision by the Parties."[225] A body in which Members may participate by invitation only is not a body that is "open." The fact that AIDCP parties may, if there is consensus to do so, invite countries to accede to the AIDCP does not alter the fact that becoming a party to the AIDCP is not an option available to at least all Members; it is an option available only to those Members invited.[226] As such, not all Members have the ability to participate in review or revision of the definitions at issue.

144. The reason that the TBT Agreement specifies that an international body must be open to all Members during the development of standards and after is that, under the TBT Agreement, all Members undertake rights and obligations for their measures related to the standards developed by international standardizing organizations. The TBT Agreement, "[r]ecogniz[es] the important contribution that international standards ... can make ... by improving efficiency of production and facilitating the conduct of international trade."[227] As such, it imposes particular rights and obligations with respect to TBT measures that are related to international standards. Under Article 2.4 and Annex 3.F (through Article 4.1), Members have an obligation to use a relevant international standard as the basis for their technical regulations or standards. Pursuant to Article 2.5, any Member that bases a technical regulation on a relevant international standard benefits from a presumption that the technical regulation is not an unnecessary obstacle to trade. In other words, international standardizing organizations have the power to affect the obligations and privileges for Members; all Members must therefore be able to participate in their work.

145. If the term "international body" were to be interpreted to include bodies whose membership was only open to a subset of Members during the development of a standard, "international standards" could be developed by bodies that are not open to all Members. Despite the inability of some Members to participate in the development of that international standard, however, where relevant, *all* Members would have an obligation to base their technical regulations and standards on that international standard. Furthermore, any Member basing a technical regulation on the international standard would benefit from a presumption that its technical regulation was not an unnecessary obstacle to trade. Defining an international body to include bodies whose membership is open to only a subset of Members would therefore 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.

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[225] Panel Report, para. 7.689 (*quoting Agreement on the International Dolphin Conservation Program* (as amended), Art. XXVI (Exhibit Mex-11)).

[226] Decision making, including the decision to invite States or REIOs to accede, must occur by consensus. *See* AIDCP, Art. IX (Exhibit Mex-11).

[227] TBT Agreement, Preamble, Third Recital.

146. Furthermore, if the term "international body" were to be interpreted to include bodies that are now closed to some Members, review and revision of "international standards" could occur without the ability of all Members to participate. Since Members have an ongoing obligation to base their technical regulations and standards on relevant international standards, those international standards must be amenable to review and revision by all Members. As Members clarified in the TBT Committee Decision on Principles for the Development of International Standards, international standards should be "impartial," and "impartiality" in the development of international standards requires that "[a]ll relevant bodies of WTO Members" are "provided with meaningful opportunities to contribute to the elaboration of an international standard" including "revision of the international standard."[228] Moreover, Article 12.5, which imposes an obligation on Members to help facilitate the "participation of relevant bodies in all Members" in the work of "international standardizing bodies" is stated in the present tense and is an ongoing obligation.[229]

147. Finally, the TBT Agreement specifically recognizes that some transnational standardizing bodies are not "international bodies." Annex 1.5 specifies that a "regional body" is a body not open to at least all Members.[230] The importance of openness to all Members is thus reinforced by Annex 1.5: if the body is not open to at least all Members, it cannot set "international standards."

148. The ability of at least all Members to have participated in the creation of a standard and the continuing ability of all Members to participate now in a standard's review and revision is therefore a fundamental factor as to whether a standardizing body is an "international body." The Panel's finding that the AIDCP was and is open was based on an incorrect understanding of "openness" and should therefore be reversed.

C. The AIDCP Is Not Recognized as Engaging in Standardization

149. In order to determine that the AIDCP definition at issue is an international standard, the Panel also examined whether the definition was approved by an "international standardizing/standards organization." As discussed, the AIDCP is not "international" as contemplated by the TBT Agreement. Nor is the AIDCP a "standardizing body."

150. The Panel correctly found that a "standardizing body" is a "body that has recognized

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[228] Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2.2 and Annex 3 of the Agreement, G/TBT/1/Rev.9, pp. 38-39.

[229] TBT Agreement, Article 12.5 (underline added): "Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members."

[230] TBT Agreement, Annex 1.5.

activities in standardization,"[231] but erred in its interpretation of this concept. According to the Panel, recognition of standardizing activities can occur in two ways: either (1) by participation by a country in a body's standardization activities, or (2) by acknowledgment of the "existence, legality and validity" of the body's standards.[232] The first avenue identified by the Panel, however, is not consistent with the definition of "standardizing body" on which it relied. While the second is a possible means of establishing that recognition exists, with respect to the AIDCP, the Panel committed legal error and failed to provide relevant evidence to support its conclusion that such acknowledgment exists.

151. With respect to the Panel's first concept of recognition, by equating participation in the setting of a standard to recognition of standardizing activities, the Panel effectively read the term "recognized" out of the definition. If it were simply assumed that the act of creating a standard was also an act of recognition by the creators, there would be no need to specify that standardization activity need be recognized: the existence of a standard would in itself establish that recognition occurred. Thus, the Panel's first criterion for how standardizing activity is recognized failed to give meaning to an important element of the definition of "standardizing body." The Panel's assumption on this basis that the AIDCP's standardizing activities were recognized by the parties who negotiated and signed the agreement was therefore in error.[233]

152. The Panel's second concept of how recognition of standardizing activity occurs – through acknowledgment of a body's standards – is correct, if applied properly.[234] For instance, the TBT Agreement uses recognition in the sense of acceptance and use. Article 6 of the TBT Agreement is entitled "Recognition of Conformity Assessment by Central Government Bodies."[235] The core obligation of the article, set out in paragraph 1, is "acceptance" of other Members' conformity assessment procedures.[236] In that same sense, recognition of standardizing activities would occur through acceptance and use of the resulting standards.

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[231] Panel Report, para. 7.679.

[232] Panel Report, para. 7.686.

[233] *See* Panel Report, para 7.686.

[234] The interpretation must accord with the way standardization activity actually occurs. Standardization is a tool by which market participants establish provisions to overcome inefficiencies in the market such as information deficits. As such, the existence, legality, and validity of standardization activity is not typically recognized in some formal way, nor is the recognition of a standard typically done by a government. Instead, recognition of standardization activity usually occurs when the resulting standards are used by market participants. For example, a manufacturer of pipes recognizes standardizing activity by using a standard on pipe sizes in the manufacture of its pipes. The converse is also true: it would not make sense to consider a standard as unrecognized simply because a government does not recognize the standard if the standard is being widely used.

[235] TBT Agreement, Art. 6.

[236] TBT Agreement, Art. 6.1: "Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted."

153. The Panel, however, did not explain how, in the context of the AIDCP, acknowledgment of the existence, legality, and validity of the AIDCP definition in fact occurred. It asserted that "it appears" that the parties to the AIDCP have recognized the dolphin-safe definition, but it cited no facts and provided no findings in support of this assertion. For example, it does not indicate to what extent, or even if, the AIDCP definition of dolphin-safe or its related label is used. The only finding the Panel made was about recognition of a single resulting standard and even here this was only the supposed recognition by the United States. This finding was in error.

154. As an initial matter, the Panel erred in taking the approach that recognition of a single standard equated to recognition of a body's "standardizing activities." The plural "activities" would appear to mean that the body has been involved in the development of more than one standard. If recognition of a single standard were sufficient to make a body a "standardizing body" then it would be impossible for Members to know at the time they were working on a standard whether that standard would be an international standard (if the body meets the definition of "international body") that would trigger the obligations under the TBT Agreement. Under the Panel's approach, only after the standard were developed and published could Members "recognize" that standard, so only after development could one know if the body were a standardizing body. The better approach is to give meaning to "standardizing activities" as being more than a single standard, such that the body's standardizing activities would have been recognized before the development of the standard at issue. Then all Members would be on notice that the standard being developed would trigger the TBT Agreement obligations.

155. The Panel erroneously applied the facts to its incorrect approach, and therefore failed to make a proper finding that its approach had been satisfied. The Panel appears to have found that the United States acknowledged the existence, legality, and validity of the AIDCP dolphin-safe definition on the basis of a statement from a U.S. federal court decision concerning the Panama Declaration, in which the court referred to the Panama Declaration as containing a "less protective standard" than the existing U.S. standard.[237] Beyond the Panel's dubious reliance on a single sentence from a single court opinion to establish the position of the United States regarding recognition, the Panel's findings with regard to the court decision are irrelevant to the correct interpretation of "recognized activities in standardization."

156. As an initial matter, the quote the Panel takes from the court opinion is irrelevant as evidence that the Panel's approach had been met. The quote from the court refers to the Panama Declaration (done in 1995), not the AIDCP resolutions or the AIDCP "dolphin safe" definition (adopted 2001). The Panama Declaration was a declaration by the signatories that they intended to conclude an international agreement on dolphin conservation in the ETP. That agreement became the AIDCP. U.S. views concerning a declaration that pre-dated the existence of the "body" in question do not constitute evidence of recognition of that non-existent body's activities. Moreover, the dolphin-safe definition guidelines set out by the Panama Declaration

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[237] Panel Report, para. 7.686.

were not guidelines for the AIDCP, but rather were intended to guide revision to the U.S. definition of dolphin-safe by the U.S. Congress.[238] Thus, the court's findings with regard to the Panama Declaration are irrelevant for determining whether the United States acknowledged the later AIDCP dolphin-safe definition.

157. Moreover, the quote relied upon by the Panel states that the U.S. Congress "*rejected* the Panama Declaration" "standard."[239] One Member's rejection of a standard says nothing about a Member's views regarding whether a body engages in standardizing activities. First, the Panel appears to attach significance to the fact that the court used the term "standard" in association with the Panama Declaration, but as noted above, were the existence of a standard sufficient to establish recognition, this would appear to render redundant and inutile the concept of recognition in the definition relied upon by the Panel. As the Panel stated, recognition of a resulting standards is comprised of more than just recognition of existence; it also requires recognition of the standards' legality and validity.[240]

158. Second, as is clear from the evidence relied on by the Panel, the U.S. Congress did not accept the Panama's Declaration "standard" with regard to a dolphin-safe definition as legal or valid for purposes of U.S. law.[241] In fact, the AIDCP resolution on "Procedures for AIDCP Dolphin Safe Certification System" explicitly states that application of the procedures: "shall be voluntary for each Party, especially in the event that they may be inconsistent with the national

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[238] *See* Panama Declaration (Exhibit Mex-20), Annex I, Chapeau ("Envisioned changes in United States law").

[239] Panel Report, para. 7.686 (italics added).

[240] Panel Report, para. 7.686.

[241] Panel Report, para. 7686. The court's full paragraph from which the Panel pulled its quotation makes the point clear. *See Earth Island Institute v. Evans* (Exhibit Mex-29), p. 3 (internal citations omitted):

> In response to the Panama Declaration, Congress enacted the International Dolphin Conservation Program Act ("IDCPA") in 1997. The IDCPA implemented a number of the goals of the Panama Declaration relating to embargoes and access to the United States market. The Act did not, however, embrace the Panama Declaration's call for an immediate weakening of the "dolphin-safe" standard. Congress remained concerned that even if no dolphins were observed to have been killed or seriously injured during a set – and notwithstanding the overall low reported mortality in recent years – that the stress suffered by dolphins from repeated year-round chase and encirclement practices would impede their ability to recover. Accordingly, Congress rejected the Panama Declaration on this point and instead adopted a compromise which provided that any change from the existing standard to the less protective standard called for by the Panama Declaration would turn on the scientific question of "whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the [ETP]." Congress further directed that certain scientific research be undertaken relevant to answering this question.

laws of a Party."[242] This language was included at the request of the United States because the definition of dolphin safe in the resolution was inconsistent with U.S. law and the United States was therefore not in a position to recognize or apply it.

159. Finally, even if the United States had acknowledged the standard resulting from the AIDCP resolution, the Panel does not explain why acknowledgment by one Member (especially if that Member ultimately rejected the standard) amounts to "recognition" of a standardizing body's activities. If acknowledgment by just one Member suffices to establish that a body's standardizing activities are "recognized", Members would be unable to dispute the existence, legality, and validity of a standard that may be acknowledged by another Member.

160. In sum, the Panel relied upon criteria in support of its determination that the AIDCP has "recognized activities in standardization" that are flawed and contrary to the text, as well as factual findings that do not support the Panel's flawed criteria. As such, the Panel's finding that the AIDCP engages in recognized activities in standardization such that it may be considered a standardizing body or organization should be rejected.

D. The Parties to the AIDCP Are Not an Organization

161. The final aspect of whether the AIDCP definition was adopted by an "international standards/standardizing organization" considered by the Panel was whether the parties to the AIDCP constitute an organization.[243] The Panel correctly noted that the term "organization" is not defined in the TBT Agreement, and using the ISO/IEC Guide, concluded that an organization is a "legal or administrative entity, "based on the membership of other bodies," that has "an established constitution and its own administration."[244] It then correctly concluded that the parties to the AIDCP do not meet this definition, but then proceeded to analyze an entirely different organization in order to reverse course and assert that the parties to the AIDCP nonetheless may be deemed to constitute an "organization." This reasoning was in error, as was the factual basis on which the finding was made.

162. As the Panel observed, "[t]he AIDCP is an international agreement concluded among States," and "does not as such have an established constitution or its own administration."[245] The United States agrees and believes that this should have been the end of the Panel's inquiry.

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[242] AIDCP Resolution to Establish Procedures for *AIDCP Dolphin Safe* Tuna Certification, para. 2.1 (Exhibit Mex-56).

[243] The inquiry cannot be into whether the AIDCP itself is an organization, because, as the Panel noted, the AIDCP is an international agreement, not an entity. (Panel Report, para. 7.682).

[244] Panel Report, para. 7.680.

[245] Panel Report, para. 7.682.

163. Yet, having established that the parties to the AIDCP do not meet the definition of "organization," the Panel then proceeded to rely on the characteristics of a separate organization – the Inter-American Tropical Tuna Commission – in order to reach the opposite conclusion.[246] This was error. The Panel's task was to determine whether the parties to the AIDCP are an organization. It determined they are not. The fact that a separate organization – the IATTC – has an institutional structure absent from the AIDCP cannot alter this conclusion, nor were the alleged "institutional links" between the two sufficient to attribute to the parties to the AIDCP the institutional structure maintained by a separate entity. Therefore, the Panel's examination of the IATTC was irrelevant.

164. The Panel also committed a separate error by failing to make an objective assessment of the facts, as called for under Article 11 of the DSU, concerning the specific links it found between the AIDCP and the IATTC. In support of its determination, the Panel asserted that there are "institutional links" between the AIDCP and IATTC sufficient to rely on the structure of the IATTC to deem the AIDCP an "organization". This is incorrect. The supposed "institutional links" on which the Panel relied consisted of the fact that (1) most (but not all) parties to the AIDCP are members of the IATTC, (2) the AIDCP is open for signature to members of the IATTC, and (3) AIDCP meetings are "preferably" to take place in conjunction with the IATTC meeting.[247] The Panel ignored the many key attributes that distinguish the two entities – including that the AIDCP is an international agreement separate and distinct from the IATTC; that the IATTC did not adopt the AIDCP or the AIDCP resolutions (and that IATTC decisions are not adopted by the AIDCP parties); that decisions regarding implementation of the International Dolphin Conservation Program established under the AIDCP are taken by the parties to the AIDCP, not members of the IATTC; that the IATTC has no legal authority to make decisions regarding the International Dolphin Conservation Program established by the AIDCP; and that the 1949 IATTC Convention and the Antigua Convention, which establish the IATTC, are distinct legal instruments from the AIDCP. Particularly remarkable is the fact that the Panel relied upon the overlap in membership between the AIDCP and IATTC to support its conclusion, when the parties to the AIDCP are in fact *not* the same as the members of the IATTC.[248] All of these are uncontested facts and support a reversal of the Panel's finding that "institutional links" between the IATTC and the AIDCP are sufficient to consider the attributes off the IATTC as

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[246] Panel Report, paras. 7.678, 7.679.

[247] Panel Report, para. 7.684.

[248] Panel Report, para. 7.684. The Panel found that "all States (but Honduras)" that are parties to the AIDCP are members of the IATTC. It omitted the EU, which was a party to the AIDCP but not a member of the IATTC. The Panel should have also, but did not, make findings about how the members of the IATTC correlate with the parties to the AIDCP. France, Japan, and Korea are members of the IATTC but are not parties to the AIDCP. Additionally, Bolivia and Colombia apply the AIDCP provisionally, but Colombia is an IATTC member while Bolivia is not. *Compare* Parties to the AIDCP (Exhibit US-30) and Members of the IATTC (Exhibit US-31).

attributes of the parties to the AIDCP.[249]

165. In sum, the Panel should have ended its analysis upon reaching its initial conclusion that the parties to the AIDCP do not meet the definition of an organization; it erred by relying on alleged "institutional links" to look beyond the parties to the AIDCP and impute to those entities the elements of a different organization. The Panel committed a separate and additional error by the factual flaws in its analysis of the relationship between the AIDCP and the IATTC.

E. Request for Findings

166. The United States requests that the Appellate Body find that (1) the AIDCP is not a body, (2) the AIDCP is not a body that has recognized activities in standardization, and (3) the AIDCP is not a standardizing body that is international. The United States also requests that the Appellate Body find that the Panel failed to make an objective assessment of the facts regarding the "institutional links" it found between the AIDCP and the IATTC, and thereby failed its duty under Article 11 of the DSU.

167. A finding that the AIDCP fails to meet any one of those criteria would mean the AIDCP is not an international standardizing body capable of developing and adopting international standards. Additionally, even if the Panel's legal conclusions were correct, a finding that it failed to objectively assess the "institutional links" between the AIDCP and the IATTC would also lead to the conclusion that the Panel had erred in finding that the AIDCP was a "body" or "organization" capable of developing and adopting international standards. As such, the United States also requests that the Appellate Body find that the AIDCP dolphin-safe definition and certification using that definition is not a relevant international standard within the meaning of Article 2.4 of the TBT Agreement.

VI. Conclusion

167. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body reverse the Panel's finding that the U.S. measure is a technical regulation within the meaning of Annex 1.1. Should the Appellate Body not reverse the Panel's finding that the U.S. measure is a technical regulation, the United States respectfully requests that the Appellate Body reverse the Panel's finding with respect to Mexico's claims under Article 2.2, and reverse the Panel's finding that the AIDCP dolphin-safe definition and certification is a relevant international standard within the meaning of Article 2.4.

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[249] *See* Panel Report, para. 7.658; United States response to Panel question No. 141, paras. 70-71; Mexico comments on the United States response to Panel questions, p. 15 (not addressing the facts presented by the United States in its response to Panel question No. 141).