

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

**(AB-2012-2 / DS381)**

**ORAL STATEMENT OF THE UNITED STATES OF AMERICA**

**March 15, 2012**

1. Good morning, Madam Chair and members of the Division. On behalf of the United States, thank you for your ongoing work on this appeal.
2. At issue in this dispute are voluntary dolphin safe labeling provisions adopted by the United States 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, and to ensure that the U.S. market is not used to encourage the use of fishing techniques that harm dolphins. Mexico considers that the TBT Agreement entitles it to continue setting on dolphins and have products containing that tuna bear the “dolphin safe” label in the United States, regardless of the fact that setting on dolphins is harmful to dolphins. As we will review today, this is simply not the case and insofar as the Panel reached the opposite conclusion, it did so based on flawed legal and factual analyses.
3. The United States will focus this morning on its appeal of the Panel’s finding that the measure at issue is a technical regulation that is inconsistent with Article 2.2 of the TBT Agreement.
  - A. The Measure At Issue Does Not Constitute A Technical Regulation**
4. As the majority noted, in deciding whether a measure is a technical regulation or standard, the key question a Panel must answer is whether the measure at issue is one with which compliance is mandatory.<sup>1</sup> After Mexico’s appellee submission, there appears to be a great deal of agreement between the parties. The United States and Mexico agree that a measure that provides for requirements for the use of a label or labels may be either a standard or a technical

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<sup>1</sup>Panel Report, para. 7.109; *see also* Panel Report (separate opinion), para. 7.149.

regulation.<sup>2</sup> The parties agree that the existence of enforcement provisions do not distinguish technical regulations from standards.<sup>3</sup> We agree that mandatory compliance does not occur merely because access to labels is denied to products that fail to meet the requirements for the use of labels.<sup>4</sup> And we agree that prohibiting false claims regarding information conveyed by labels does not make a standard a technical regulation.<sup>5</sup>

5. Therefore the question presented to the Appellate Body after Mexico’s appellee submission is narrow: if a labeling requirement sets out conditions for use of a term on a label and prohibits use of that term if those conditions are not met – what Mexico characterizes as “a single exclusive definition”<sup>6</sup> – is that measure by definition a technical regulation?

6. The United States believes the answer to this question is no. Mexico disagrees. As we will explain, Mexico’s interpretation is incorrect: it misconstrues the U.S. measure, continues the majority’s mistake of confusing “requirement” with mandatory compliance, is without basis in the text of the TBT Agreement, and is not supported by prior DSB findings.

### **1. The U.S. Dolphin Safe Labeling Provisions**

7. In light of Mexico’s appellee submission, it is useful to recall what the measure at issue actually does. First, the U.S. measure does not “restrict retailers, consumers and producers to a single choice for labelling products as dolphin safe.”<sup>7</sup> In fact, as explained to the Panel by the United States and accepted by Mexico, the official U.S. Department of Commerce dolphin safe label is almost never used. Virtually all tuna products sold in the United States bear either (a)

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<sup>2</sup>Mexico Appellee Submission, para. 47.

<sup>3</sup>Mexico Appellee Submission, paras. 65, 67.

<sup>4</sup>Mexico Appellee Submission, paras. 65, 67.

<sup>5</sup>Mexico Appellee Submission, paras. 65, 67.

<sup>6</sup>Mexico Appellee Submission, para. 69.

<sup>7</sup>Mexico Appellee Submission, para. 41.

one of several alternative dolphin safe labels designed by retailers or other private organizations, or (b) no dolphin safe label at all.<sup>8</sup>

8. Second, the U.S. measure establishes labeling requirements: certain conditions that must be met before labeling a tuna product dolphin safe.<sup>9</sup> Any dolphin safe label that meets these labeling requirements may be used.<sup>10</sup> To be clear: as the Panel found, the evidence shows setting on dolphins is harmful to dolphins and therefore it would be deceptive to claim that a tuna product is dolphin safe when the tuna was harvested by setting on dolphins and the U.S. has established a standard to reflect that fact.<sup>11</sup> As both the majority and minority found, protecting standards from deceptive use and false claims does not make the standard a technical regulation.<sup>12</sup>

9. Finally, as found by the Panel, the U.S. measure does not require a dolphin safe label for tuna products to be sold in the United States, nor does it prohibit the sale of tuna products that do not have a dolphin safe label.<sup>13</sup> Tuna products without a dolphin safe label, from Mexico and elsewhere, are currently for sale in the United States.<sup>14</sup>

## **2. “With Which Compliance Is Mandatory”**

10. It is of course true, as Mexico says, that what a document provides as labeling

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<sup>8</sup>See, e.g., United States response to Panel Question No. 11, para. 28; U.S. Second Written Submission, para. 100; United States response to Panel Question No. 131, para. 57; Mexico Second Written Submission, para. 26; see also, U.S. Appellant Submission, fn. 102.

<sup>9</sup>DPCIA, 16 U.S.C. § 1385(d)(1)-(3) (Exhibit US-5); see also Panel Report, para. 2.3.

<sup>10</sup>See Panel Report (separate opinion), paras. 7.159-.160; Mexico response to Panel Question no. 51, para. 134.

<sup>11</sup>Panel Report, paras. 7.504-.505, 7.738, 7.560-7.596.

<sup>12</sup>Panel Report, para. 7.142; Panel Report (separate opinion), paras. 7.156-.157.

<sup>13</sup>Panel Report, para. 7.118; Panel Report (separate opinion), para. 7.161; Mexico Appellee Submission, para. 40.

<sup>14</sup>Panel Report, paras. 7.353, 7.355, 7.357, 7.359.

requirements is distinct from whether compliance with that document is mandatory.<sup>15</sup> Mexico goes on to conflate these distinct concepts, however, by arguing that “[w]hat matters is not whether the ‘sale’ is regulated but whether the ‘product characteristics’ (i.e.) label are regulated.”<sup>16</sup> By conflating the two concepts, Mexico repeats the error of the majority by failing to distinguish “requirements” that must be met from “compliance” that is mandatory.

11. The proper inquiry cannot be whether product characteristics are “regulated”: standards may also “regulate” product characteristics. Indeed, the definition of a standard provides an excellent description of a product characteristic “regulation”: a document that provides rules or characteristics for products.<sup>17</sup>

12. Despite the flawed premise of focusing on whether a document establishes requirements for product characteristics, Mexico attempts to explain that documents that are technical regulations are distinct from standards in the way they establish these requirements. The U.S. measure, it argues, is a technical regulation because, in addition to establishing labeling requirements, “it is prohibited to label tuna products as dolphin-safe without complying with such requirements.”<sup>18</sup> But that, of course, is precisely what labeling requirements do, whether set out in a standard or technical regulation. It is not the case, as the majority’s interpretation would mean and Mexico specifically argues, that a standard must allow a user “to apply the label of its own choice”<sup>19</sup> even if “misleading or otherwise.”<sup>20</sup>

13. As both the majority and minority found, the proper inquiry for panels and the Appellate

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<sup>15</sup>Mexico Appellee Submission, para. 57.

<sup>16</sup>Mexico Appellee Submission, para. 58.

<sup>17</sup>See TBT Agreement, Annex 1.2.

<sup>18</sup>Mexico Appellee Submission, para. 43.

<sup>19</sup>Mexico Appellee Submission, para. 90.

<sup>20</sup>Panel Report, para. 7.144.

Body remains whether or not compliance is mandatory.<sup>21</sup> As explained by the minority and the United States in our appellant submission, the concept of mandatory compliance that respects the definitions of Annex 1.1 and 1.2 is whether or not a product can be sold or otherwise be placed on the market if it does not comply with the standard or technical regulation.<sup>22</sup>

**3. Technical Regulations Are Not “Mandatory Standards” and Do Not Operate By Exclusive Reference**

14. The majority’s and Mexico’s interpretation of requirements for labels or product characteristics amounting to mandatory compliance fails to accord with the text of Annex 1 of the TBT Agreement. Mexico therefore seeks to redefine the term “technical regulation” as set out in Annex 1.1 by recourse to a definition in the ISO/IEC Guide 2:1991, a document that the TBT Agreement explicitly says does not apply for this purpose.

15. Mexico states that the “the centre of the Panel’s determination that the U.S. labelling provisions are a technical regulation” is that the U.S. measure is a so-called “mandatory standard” because it creates “a single exclusive definition of dolphin-safe.”<sup>23</sup> This concept of “mandatory compliance” is without basis in the text of the TBT Agreement.

16. The ISO/IEC Guide definition of “mandatory standard” is inapplicable here. As Mexico acknowledges, the chapeau to Annex 1 of the TBT Agreement states that the ISO/IEC Guide is relevant where (1) the same term appears in the TBT Agreement and the ISO/IEC Guide, and (2) the TBT Agreement does not define that term.<sup>24</sup>

17. The majority’s and Mexico’s use of the ISO/IEC Guide meets neither of the criteria for

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<sup>21</sup>Panel Report, para. 7.109; Panel Report (separate opinion), para. 7.149.

<sup>22</sup>Panel Report (separate opinion), para. 7.150-.151; U.S. Appellant Submission, para. 32.

<sup>23</sup>Mexico Appellee Submission, para. 69.

<sup>24</sup>TBT Agreement, Annex 1, Chapeau, Recitals 1 and 2; Mexico Appellee Submission, para. 72.

recourse to the Guide set out in the chapeau of Annex 1 to the Agreement. First, as Mexico agrees, the term “mandatory standard” appears nowhere in the text of the TBT Agreement.<sup>25</sup>

18. Second, the TBT Agreement contains a definition of “technical regulation.” Thus, while the majority did not clearly state what term in the TBT Agreement it was seeking to define,<sup>26</sup> Mexico’s attempt to make “mandatory standard” as defined in the ISO/IEC Guide equivalent to the definition of “technical regulation” in the TBT Agreement is not permitted by the chapeau of Annex 1.<sup>27</sup>

19. In addition, even though the term “exclusive reference” in the ISO/IEC Guide definition of “mandatory standard” is not relevant to the TBT Agreement, it is clear that the U.S. measure does not even meet the Guide’s definition of “exclusive reference.” Under the Guide, “reference to standards” is the “[r]eference to one or more standards *in place of detailed provisions within a regulation.*”<sup>28</sup> The U.S. measure does not make reference to any standard; it sets out provisions that must be met in order to use a dolphin safe label.<sup>29</sup> As such, the U.S. measure does not make exclusive reference to a standard, and is not otherwise a mandatory standard under the ISO/IEC Guide.

#### **4. Mexico’s Reliance On Prior Appellate Body Reports Is Misplaced**

20. The majority and Mexico were incorrect to state that *EC – Sardines* stands for the proposition that a measure that regulates a product such that the product can still be placed on

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<sup>25</sup>Mexico Appellee Submission, para. 75; *see also* U.S. Appellant Submission, fn. 97; EU Third Participant Submission, para. 27.

<sup>26</sup>*See* Mexico Appellee Submission, fn. 314.

<sup>27</sup>Mexico Appellee Submission, para. 75.

<sup>28</sup>ISO/IEC Guide 2: 1991, para. 11.1 (“reference to standards (in regulation)”) (italics added); *see also* para. 13.1 (“exclusive reference (to standards)”).

<sup>29</sup>*See* DPCIA, 16 U.S.C. § 1385 (Exhibit US-5) and 50 C.F.R. § 216.91 (Exhibit US-6); *cf.* ASTM International Amicus Curiae Submission, paras. 73-74.

the market if it does not meet the requirements of the measure constitutes a “technical regulation”.<sup>30</sup> The majority and Mexico assume that this is because compliance with the measure was *de jure* mandatory, but since mandatory compliance with the EC regulation was not in dispute, nowhere in *EC – Sardines* does the Appellate Body indicate that this is the case.<sup>31</sup> Indeed, the United States and Mexico, as well as the minority, agree that compliance with a technical regulation can be mandatory in fact, even if not *de jure* mandatory.<sup>32</sup>

21. Furthermore, in both *EC – Asbestos* and *EC – Sardines*, the Appellate Body noted a distinction between product characteristics that are “features and qualities *intrinsic to the product itself*” and those that are “*related ‘characteristics,’* such as the means of identification.”<sup>33</sup> In this regard, the facts in *EC – Sardines* were very different from the present case where the characteristics intrinsic to the product – that is, tuna meat packaged in retail ready form, such as cans and pouches<sup>34</sup> – can be described on the label of all tuna products sold in the United States. “Dolphin safe” is not an intrinsic characteristic of a tuna product. Rather, as the majority described it, the U.S. measure only “defines the conditions under which reference may be made to certain terms, i.e. ‘Dolphins, porpoises, or marine mammals,’ on a label for tuna products.”<sup>35</sup> To put it simply, Mexican producers of tuna products can – and do – sell their tuna products in the United States; without the ability to label their preserved sardines as such, it is not clear – and cannot be assumed without findings – that Peruvian producers in fact could.

## **5. Mexico Has Not Demonstrated That Compliance With The U.S. Measure Is**

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<sup>30</sup>See Panel Report, para. 7.137; Mexico Appellee Submission, para. 81.

<sup>31</sup>See *EC – Sardines (AB)*, para. 194.

<sup>32</sup>Mexico Appellee Submission, para. 98; Panel Report (separate opinion), para. 7.173.

<sup>33</sup>*EC – Asbestos (AB)*, para. 67; *EC – Sardines (AB)*, para. 189 (quoting *EC – Asbestos (AB)*).

<sup>34</sup>Panel Report, paras. 7.229, 7.233-234.

<sup>35</sup>Panel Report, para. 7.126.



### ***De Facto* Mandatory**

22. Finally, Mexico requests that in the alternative, the Appellate Body find that compliance with the U.S. measure is *de facto* mandatory.<sup>36</sup> As noted, the United States agrees that mandatory compliance with a measure within the meaning of Annex 1.1 can be demonstrated in fact. In this dispute, however, neither sufficient Panel findings nor undisputed facts allow for such a conclusion.<sup>37</sup> In fact, the only discussion in the panel report of Mexico's *de facto* claim indicates the precise opposite.<sup>38</sup>

### **B. TBT Article 2.2**

23. With respect to TBT Article 2.2, the Panel's analysis rests on two fundamental errors. First, the Panel committed significant failures in its assessment of the evidence regarding the extent to which the U.S. measure achieves its objective. Only through its misapplication of the evidence does the Panel conclude that the U.S. measure is more trade restrictive than necessary to achieve a legitimate objective. I will return to the Panel's failure in the assessment of the evidence in a moment.

#### **1. Proposed Alternative Measure**

24. The Panel's second fundamental error with respect to its TBT Article 2.2 analysis concerns its assessment of whether the proposed alternative measure — allowing the coexistence of the labeling standard in the U.S. measure and the AIDCP dolphin safe label on the U.S. market — would constitute a less trade restrictive alternative that would fulfill the objectives of the U.S. measure at the level sought by the United States. The Panel's findings in this regard

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<sup>36</sup>Mexico Appellee Submission, para. 98.

<sup>37</sup>See Mexico Appellee Submission, para. 98.

<sup>38</sup>Panel Report (separate opinion), para. 7.176-7.186.

constitute a legal error and are flawed with respect to both objectives of the U.S. measure. With respect to preventing consumer deception, it is simply not credible to conclude – as the Panel did – that the proposed alternative measure would be “at least as apt” as the U.S. measure to contribute to the fulfilment of this objective.<sup>39</sup> In particular, that alternative measure would allow tuna products that contain tuna caught in the ETP by setting on dolphins – a technique that the Panel found is harmful to dolphins – to carry a dolphin safe label; under the U.S. measure, such products are not allowed to be labeled dolphin safe. As a consequence, the proposed alternative measure would increase consumer deception regarding whether tuna products contain tuna caught in a manner harmful to dolphins. Mexico asserts that the U.S. label somehow “deceives” consumers about AIDCP protections.<sup>40</sup> Yet, allowing tuna products that contain tuna caught by setting on dolphins to carry the AIDCP label – which is nearly identical to the official Department of Commerce label – would lead consumers to believe that such tuna is “dolphin safe” – and the evidence does not support that such tuna is dolphin safe.

25. Moreover, as the Panel found, the AIDCP label and certification only applies with respect to tuna caught inside the ETP.<sup>41</sup> Thus, the proposed alternative measure would not address the harms to dolphins outside the ETP that the Panel found led to uncertainty under the U.S. measure; again, it would only increase consumer deception about whether tuna products contain tuna caught in a manner harmful to dolphins.

26. With respect to the dolphin protection objective, there similarly is no basis to conclude – as the Panel did – that the proposed alternative measure would achieve a “level of protection

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<sup>39</sup>Panel Report, paras. 7.573, 7.577-7.578.

<sup>40</sup>Mexico Appellee Submission, para. 163.

<sup>41</sup>Panel Report, para. 7.607.

equal to that achieved under” the U.S. measure.<sup>42</sup> In particular, under the U.S. measure, tuna products that contain tuna caught by setting on dolphins may not be labeled dolphin safe; whereas under the proposed alternative measure – allowing the AIDCP label to co-exist with the U.S. measure – they could. Thus, as the Panel itself concluded, the proposed alternative measure would not discourage setting on dolphins and therefore it would not contribute to protecting dolphins from the observed and unobserved adverse effects the Panel found to result from the practice of setting on them to catch tuna.<sup>43</sup> The proposed alternative measure would also not address the issue of dolphin by-catch outside the ETP, since the AIDCP label does not apply to tuna caught outside the ETP. Thus, allowing the AIDCP label to co-exist with the U.S. measure would not address an aspect of the U.S. measure that led the Panel to conclude that the measure only partially achieved its objective. Accordingly, the proposed alternative measure would only serve to expand the scenarios under which tuna products may be labeled dolphin safe to include tuna products that contain tuna caught by setting on dolphins and therefore would detract from the ability of the United States to fulfil its object of contributing to dolphin protection.

27. Indeed, in connection with its analysis of TBT Article 2.4, the Panel concluded that the AIDCP standard would not be effective or appropriate to fulfil the U.S. objectives for the very reason that it does not “have the capacity to address U.S. concerns...beyond the ETP”<sup>44</sup> and “does not convey any information” with respect to the fact that dolphins were set upon in order

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<sup>42</sup>Panel Report, paras. 7.615, 7.618.

<sup>43</sup>Panel Report, paras. 7.607, 7.612-7.613 (noting that the effects on dolphins are “considerably reduced” by setting on them in accordance with AIDCP requirements, but that AIDCP requirements do not address unobserved effects on dolphins); see also para. 7.438 (“[C]ertain 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.”).

<sup>44</sup>Panel Report, para. 7.727.

to catch tuna in tuna products carrying the AIDCP label.<sup>45</sup> While the Panel attempts to distinguish its analysis of Article 2.4 on the basis that it was assessing the suitability of the AIDCP label alone – as opposed to in combination with the U.S. measure — its reasoning belies the fact that the AIDCP label detracts from the achievement of the U.S. objectives as compared to what is achieved by the U.S. measure.

28. Underlying the Panel’s erroneous finding that the proposed alternative measure would fulfil the objectives of the U.S. measure, is the Panel’s failure to evaluate properly the level at which the U.S. measure seeks to fulfil its objectives. This includes misunderstanding that the level reflects a balance between the risk that dolphins may be harmed in the course of tuna fishing operations on the one hand, and on the other, the costs of ensuring that consumers are not misled and contributing to dolphin protection. Balancing costs and benefits is a well-accepted regulatory approach. By failing to take into account that the level at which the United States seeks to fulfil its objective reflects the relative risks and costs of doing so, and that those risks and costs are significantly different as between the ETP and other oceans, the Panel wrongly concludes that the proposed alternative measure would fulfil the objectives of the U.S. measures at the level the United States considers appropriate.<sup>46</sup>

29. With respect both objectives, the Panel’s approach leaves the United States with two choices. Either lower the level at which it seeks to achieve its objectives, such that the United States could no longer seek to prevent deception about the harm to dolphins caused by setting on them to catch tuna or contribute to the prevention of that harm. Or, create an even more trade-

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<sup>45</sup>Panel Report, para. 7.729.

<sup>46</sup>Panel Report, para. 7.515.

restrictive measure by requiring certification based on independent observer statements that no dolphins were killed or seriously injured in all fisheries, even those for which evidence is lacking that dolphins are harmed in the course of tuna fishing operations and for which the costs of requiring certification based on independent observer statements is high. As regards the latter, Mexico itself acknowledges<sup>47</sup> that in no fishery in the world other than the ETP have nations agreed to 100% independent observer coverage for their fishing vessels.

30. Mexico’s responses to these points are unconvincing. First, in discussing the level at which a Member may pursue its objective, Mexico again relies on the sixth recital of the preamble to introduce additional tests that nowhere exist in the text of TBT Article 2.2.<sup>48</sup> Second, and equally unsupported, is Mexico’s assertion that the U.S. argument “rewrites” the objectives sought by the measures: it is Mexico, not the United States, that conflates the objectives sought with the level of fulfillment of those objectives.<sup>49</sup> As just explained, the Panel’s error lies in its analysis of the *level* of fulfillment.

31. Mexico proceeds to characterize the Panel’s analysis as an assessment of “omissions” in the U.S. measure in relation to its objectives,<sup>50</sup> or as a review of “inconsistency” in the measure.<sup>51</sup> In fact what Mexico characterizes as “omissions” and “inconsistency” merely reflects the fact that the measure does not pretend that a one size fits all approach to securing the U.S. objectives of preventing consumer deception and contributing to dolphin protection.

## **2. Extent to Which U.S. Measure Fulfils Its Objective**

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<sup>47</sup>See e.g., Mexico Oral Statement at the First Panel Meeting, para. 10; see also Panel Report, paras. 7.513-7.514.

<sup>48</sup>Mexico Appellee Submission, para. 105.

<sup>49</sup>Mexico Appellee Submission, para. 106.

<sup>50</sup>Mexico Appellee Submission, para. 152.

<sup>51</sup>Mexico Appellee Submission, paras. 153-54.

32. In addition to erroneously concluding that the proposed alternative measure would fulfil the objectives of the U.S. measures at the level the United States considers appropriate, the Panel also acted contrary to DSU Article 11 with respect to its findings and conclusions regarding the extent to which the U.S. measure fulfils its objectives. The Panel’s principal error concerns its conclusion that the risks to dolphins from tuna fishing operations inside the ETP are no greater than,<sup>52</sup> or equivalent to,<sup>53</sup> the risks to dolphins from tuna fishing operations outside the ETP.

33. Regarding the ETP, the Panel agreed that the evidence “raise[s] a presumption that genuine concern exists” that setting on dolphins to catch tuna has an adverse impact on dolphins beyond the approximately 1200 dolphin mortalities per year recorded by independent observers.<sup>54</sup> In reaching this conclusion, the Panel relied on several scientific studies and assessments presented by the United States.<sup>55</sup> These studies among other things provide that setting on dolphins separates dependent dolphin calves from their mothers, leading to death by starvation or from predation, as well as muscle damage and immune and reproductive system failures.<sup>56</sup> In addition to these studies, as pointed out in the U.S. appellant submission, other scientific studies before the Panel further document these unobserved harms.<sup>57</sup> These studies are thoroughly documented, attributed, and peer reviewed. They note uncertainties where they exist, exhibit a rigorous scientific method, and reflect decades of scientific study of the harms to dolphins from setting on them to catch tuna in the ETP.<sup>58</sup>

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<sup>52</sup> Panel Report, para. 7.562.

<sup>53</sup> Panel Report, para. 7.617.

<sup>54</sup> Panel Report, paras. 7.504, 7.499.

<sup>55</sup> Panel Report, paras. 7.495-7.499.

<sup>56</sup> Panel Report, paras. 7.496-7.499.

<sup>57</sup> U.S. Appellant Submission, paras. 108-109.

<sup>58</sup> Exhibits US-4, 11, 19, 21, 22, 26, 27, 28.

34. In contrast, regarding the three reports the Panel relied on to evaluate by-catch of dolphins outside the ETP, the Panel acknowledges that its “analysis of the existence of dolphin bycatch in fisheries outside the ETP is based on evidence contained in a limited amount of ad hoc studies” and that “information is lacking to evaluate the existence and extent of threats faced by different species of dolphins in different areas around the globe, especially outside the ETP.”<sup>59</sup>

35. Further, the Panel relies on portions of the three reports that do not support its conclusions regarding the extent of dolphin by-catch outside the ETP. For example, it relies on portions: (1) that do not pertain to tuna fishing operations,<sup>60</sup> (2) that pertain to driftnet fishing without qualification as to whether such fishing is occurring on the high seas or in an EEZ,<sup>61</sup> (3) that do not address the extent of by-catch cited,<sup>62</sup> (4) that state they are based on speculation

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<sup>59</sup>Panel Report, paras. 7.518-7.519.

<sup>60</sup> See, e.g., Panel Report, para. 7.522 n. 733 (citing MEX-5 at 26, 112) (regarding 1,700 bottlenose, 1000 spinner dolphins in WCPO); 7.522 n. 738 (citing MEX-5 at 26, 112 (regarding 1,700 bottlenose, 1000 spinner dolphins in WCPO); 7.522 n. 738 (citing MEX-5 at 18); 7.522 n. 738 (citing MEX-5, at 23) (regarding gillnetting affecting coastal species; driftnet fisheries in Bay of Bengal); 7.522 n. 738 (citing MEX-5 at AA40 regarding Sri Lankan fishing); 7.522 n. 738 (citing MEX-5 at AA-41) (regarding Sri Lankan fishing); 7.522 n. 739 (citing MEX-5 at 102) (regarding bycatch of humpback dolphins); para 7.522, n.740 (citing MEX-5 at 60-62); para. 7.523, n. 743 (citing MEX-5 at 60-62); para. 7.523, n. 743 (citing MEX-5 at 27-29).

<sup>61</sup> See, e.g., Panel Report, para. 7.522 n. 737 (citing MEX-5 at AA-16 regarding French, UK, Irish driftnet fisheries); para. 7.522 n. 738 (citing MEX-5 at 26 regarding 1,700 and 1000 dolphins as bycatch in WCPO); para. 7.522 n. 738 (citing MEX-5 at 10 regarding a driftnet off the coast of Tristan do Cunha); para. 7.522 n. 738 (citing MEX-5 at 23 regarding a terminated Taiwan driftnet fishery and driftnet fisheries further off shore in Bay of Bengal); para. 7.522 n. 738 (citing MEX-5, AA-40 regarding driftnet off coast of India); para. 7.522 n. 739 (citing MEX-5 at 102 regarding driftnets for tuna); para. 7.613 (citing Exhibit MEX-2 at 101 regarding a Japanese driftnet fishery).

<sup>62</sup> See, e.g., Panel Report, para. 7.520 n.732 (citing MEX-2, pp. 37, 98), para. 7.521 n. 734 (citing MEX-99, p. Ev 26 regarding observer studies in the 1990s), para. 7.521 n.736 (citing MEX-2, p. 37); para. 7.522 n. 737 (citing MEX-9 at 31 and 32 (regarding albacore)); para. 7.522 n. 738 (citing MEX-5 at 18); para. 7.522 n. 738 (citing MEX-5 at 23); para. 7.522 n. 738 (citing MEX-5 at AA-40 regarding catches in Indian gillnet fishery); para. 7.522 n. 738 (citing MEX-5 at 102); para. 7.522 n. 739 (citing MEX-5 at p. 9 (actually p.11)); para. 7.522 n. 740 (citing MEX-5 at AA-60).

or assumptions,<sup>63</sup> (5) that concern fishing practices that have ceased,<sup>64</sup> (6) that do not state the basis for their assertions and speculations,<sup>65</sup> or (7) that mischaracterize the information presented.<sup>66</sup>

36. The handful of instances the Panel correctly identifies of some dolphin by-catch occurring in tuna fisheries outside the ETP is not a basis to draw conclusions – as the Panel did<sup>67</sup> – about the significance or extent of dolphin mortality due to tuna fishing operations outside the ETP, much less to conclude – as the Panel also did – that the risks to dolphins inside the ETP are “not unique,<sup>68</sup> that the risks to dolphins outside the ETP are “not lower” than similar threats faced by dolphins inside the ETP,<sup>69</sup> and that the risks to at least some dolphin populations outside the ETP from tuna fishing operations are “equivalent to those currently faced by dolphin populations” inside the ETP.<sup>70</sup>

37. First, the ad hoc and anecdotal nature of the reports of dolphin by-catch and the lack of accompanying population abundance estimates preclude drawing conclusions about the

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<sup>63</sup> See, e.g., Panel Report, para. 7.521 n. 733 (citing MEX-5 at 112 regarding humpbacks killed by driftnet); para. 7.522 n. 737 (citing MEX-99 at 32); para. 7.522 n. 738 (citing MEX-5 at 23).

<sup>64</sup> See, e.g., Panel Report, para. 7.521 n.734 and n.735 (citing MEX-99, Ev. 26), para. 7.522 n.737 (citing MEX-5, p. AA-16 regarding French, UK and Irish driftnet fishery), para. 7.521 n.735 (noting that an EU ban on driftnet fishing came into effect in 2002); para. 7.522 n. 738 (citing MEX-5, p. 23 regarding now-terminated Taiwanese driftnet fishery)

<sup>65</sup> See, e.g., Panel Report, para. 7.521 n. 733 and para. 7.522 n. 738 (citing MEX-5, p. 26, 112 regarding 1,700 and 1,000 dolphins in Western and Central Pacific Ocean and ); para. 7.522 n. 737 (citing MEX-99 at p. 31 regarding observer studies in the 1990s and p. 32 regarding bycatch in albacore fishery in Celtic Bay); para. 7.522 n. 738 (citing MEX-5 at 18); para. 7.522 n. 738 (citing MEX-5 at 23); para. 7.522 n. 738 (citing MEX-5 at AA-60).

<sup>66</sup> See, e.g., Panel Report, para. 7.521 n. 735 (citing MEX-99 at Ev. 26 regarding driftnet fishing addressed by EU ban); para. 7.521 n. 735 (MEX-105 at 100); para. 7.522 n. 738 (citing MEX-5 at AA 60, 63).

<sup>67</sup> Panel Report, para. 7.531, 7.613 (characterizing that the risks to dolphins from tuna fishing operations outside the ETP as “significant”); para. 7.543 (characterizing the risks to dolphins as “regular and significant”); paras. 7.597, 7.600 (characterizing the risk to dolphins from tuna fishing operations outside the ETP as “not insignificant”).

<sup>68</sup> Panel Report, para. 7.552.

<sup>69</sup> Panel Report, para. 7.562.

<sup>70</sup> Panel Report, para. 7.617.



significance or extent of dolphin mortality outside the ETP, as the studies the Panel cites themselves note.<sup>71</sup> Second, the Panel is basing its conclusion on the wrong comparison. Specifically, the Panel is comparing instances of observed dolphin by-catch outside the ETP to observed dolphin mortalities inside the ETP. This ignores: (1) that in the ETP millions of dolphins are chased and encircled each year to catch tuna, and encircled dolphins are by definition by-catch;<sup>72</sup> and (2) harms to dolphins in the ETP include substantial unobserved dolphin mortality that is a direct result of the repeated chase and encirclement of dolphins to catch tuna.<sup>73</sup> For example, the United States provided evidence of estimated unobserved dolphin mortality of 34,000 dolphins per year.<sup>74</sup> Furthermore, the Panel’s statement that “the United States does not explain why incidental bycatch would be more likely to take place in the ETP than outside the ETP”<sup>75</sup> only highlights the Panel’s failure to consider repeated explanations by the United States about why by-catch is higher due to the regular and significant tuna-dolphin association and the wide-scale commercial exploitation of that association to catch tuna, both of which only occur in the ETP.<sup>76</sup> Contrary to what Mexico asserts, an objective assessment of these facts cannot support the conclusion that risks to dolphins inside and outside the ETP are in any way similar, much less equivalent.<sup>77</sup>

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<sup>71</sup>See Exh. MEX-5, e.g., p. 18 (noting with respect to coastal South Africa and Namibia fishery that “recent data on bycatch and population size are lacking”); id. at p. 131-32 (“Independent observer data are needed to define the composition and extent of bycatch.”).

<sup>72</sup>U.S. First Written Submission, para. 58; Exhibit MEX-5, fn. 9 (defining bycatch to include animals captured and released).

<sup>73</sup>Panel Report, para. 7.504; *see also e.g.* First Written Submission, paras. 54-58; U.S. Appellant Submission, paras. 95-99, 108.

<sup>74</sup>U.S. Answer to Panel Question 37, para. 92; U.S. Second Written Submission, para.140.

<sup>75</sup>Panel Report, para. 7.560.

<sup>76</sup>U.S. First Written Submission, paras. 52-59, 62; U.S. Second Written Submission, paras. 42-44; U.S. Response to Panel Question No. 12, para. 31; *see also* Panel Report, para. 7.520 (noting that association between tuna and dolphins does not occur outside the ETP as frequently as it does within the ETP).

<sup>77</sup>Mexico Appellee Submission, paras. 120-121; *see also* paras. 126-135.

38. The Panel’s failure to engage in an even-handed assessment of the evidence is evident throughout its analysis. Indeed, whereas the Panel accepted evidence with regard to dolphin harms outside the ETP that was based on limited samples and for which further study was needed, it dismissed U.S. evidence indicating low levels of dolphin by-catch in the Western Central Pacific Ocean for these very reasons.<sup>78</sup>

39. In this regard, the Panel appears to believe the United States bears the burden of proof of establishing that dolphin by-catch outside the ETP is not as significant as it is inside the ETP, repeatedly stating that it is “not persuaded” that there is only insignificant risk to dolphins outside the ETP.<sup>79</sup> The Panel’s placement of the burden on the United States, rather than on Mexico to establish a prima facie case, represents a failure of the Panel to make an objective assessment of the matter.

40. In response to the U.S. appeal, Mexico attempts to bolster the factual findings of the Panel with conclusions that the Panel did not reach and largely repeats the same mischaracterizations of the record relied upon by the Panel to support its conclusions.<sup>80</sup> For example:

- Despite Mexico’s assertions to the contrary, the Panel did not find that setting on dolphins is safe in the ETP due to the procedures Mexico has put in place.<sup>81</sup> Rather, the evidence demonstrates and the Panel acknowledges that setting on dolphins is harmful to dolphins.<sup>82</sup>

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<sup>78</sup>Panel Report, paras. 7.519, 7.525, 7.528-7.530.

<sup>79</sup>Panel Report, paras. 7.529, 7.555, 7.562.

<sup>80</sup>E.g., Mexico Appellee Submission, paras. 188-196 (repeating Mexico’s evidence in response to U.S. Article 11 claim that Panel erred in failing to consider the evidence put forward by the United States).

<sup>81</sup>Mexico Appellee Submission, para. 118.

<sup>82</sup>Panel Report, para. 7.418.

- While Mexico attempts to question the evidence on unobserved mortalities<sup>83</sup> to suggest that the risk to dolphins is low in the ETP, the Panel made no such finding.
- Regarding the use of driftnets in EEZs, Mexico correctly quotes the Panel report, but fails to address the fact that the source cited by the Panel does not support the Panel’s assertions regarding driftnet fishing within EEZs.<sup>84</sup> The source instead refers to the use of driftnets being “addressed by the EU” ban on driftnet fishing effective January 2002,<sup>85</sup> and does not contain evidence of problems associated with driftnets in other fisheries.<sup>86</sup> The Panel also wrongly assumes that any reference to a nationality in connection with a fishery refers to a fishery operating in a country’s EEZ. This is not the case. For example, Mexico refers to the ETP as “Mexican fishery”,<sup>87</sup> yet the ETP includes areas both within EEZs and on the high seas.<sup>88</sup>

41. These are just some examples of the factual misstatements contained in Mexico’s submission; we would of course be pleased to address these and other issues in more detail in response to questions.

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<sup>83</sup>Mexico Appellee Submission, para. 144 (“the fact that the two dolphin populations are now growing at what the United States itself asserts is the maximum possible rate of 4 to 8 percent makes it illogical to suggest that there are massive unobserved mortalities.”).

<sup>84</sup>Panel Report, para. 7.521 & n.735.

<sup>85</sup>MEX-99, Ev.26.

<sup>86</sup> U.S. First Written Submission, para. 35.

<sup>87</sup>Mexico First Written Submission, para. 165.

<sup>88</sup> U.S. First Written Submission, para. 35.