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

(DS381)

Answers of the United States of America
to the First Set of Questions from the Panel to the Parties

November 8, 2010

Table of Reports

Short Form	Full Citation
Argentina – Hides	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001
Brazil – Tyres (Panel)	Panel Report, *Brazil – Measures Affecting Imports of Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R
Canada – Dairy (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999
Canada – Wheat Exports (Panel)	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
Chile – Alcohol (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages,* WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
China – Auto Parts (AB)	Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 15 December 2008
Colombia – Ports	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted 27 April 2009
Dominican Republic – Cigarettes (AB)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001

EC – Bananas III (Article 21.5) (EC)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities*, WT/DS27/RW/EEC, circulated 12 April 1999 (unadopted)
EC – Biotech	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006
EEC – Oilseeds	GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, BISD 37S/86, adopted 25 January 1990
EEC – Parts and Components	GATT Panel Report, *European Economic Community – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
EC – Sardines (Panel)	Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS/146/R, WT/DS175/R, adopted 5 April 2002
Italian Agricultural Machinery	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery,* L/833 BISD, 7S/60, adopted 23 October, 1958
Japan – Alcohol (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Korea – Alcohol (Panel)	Panel Report, *Korea – Taxes on Alcoholic Beverages,* WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R
Korea – Alcohol (AB)	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages,* WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999

Korea – Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Mexico – Soft Drinks (Panel)	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by the Appellate Body Report, WT/DS308/AB/R
Mexico – Soft Drinks (AB)	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
Turkey – Rice Licensing	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007
US – FSC (Article 21.5) (Panel)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW
US – Gasoline (Panel)	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Section 337	GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US - Tuna Dolphin I	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 3 September. 1991, unadopted, BISD 39S/155
US – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997

TABLE OF EXHIBITS

Exhibit US-	Title
57	50 CFR 216.24
58	50 CFR 216.93
59	Table of U.S. Dolphin Safe Labeling Conditions
60	Gerrodette, T. 2009. The tuna-dolphin issue. Pages 1192-1195 in Perrin, Wursig and Thewissen (eds.) Encyclopedia of marine mammals, 2nd Edition. Elsevier: San Diego, CA
61	Gosliner, M.L. 1999. The tuna-dolphin controversy. Pages 120-155 In Twiss and Reeves (eds.) Conservation and management of marine mammals. Smithsonian Institution Press: Washington, D.C.
62	Marti L. McCracken and Karin A. Forney, Preliminary Assessment of Incidental Interactions with Marine Mammals in the Hawaii Longline Deep and Shallow Set Fisheries, PIFSC Working Paper WP-10-001, Issued 27 April 2010
63	Sources of U.S. Canned Tuna, 1988-2009
64	U.S. Tuna Cannery Receipts, 1990-2009
65	U.S. Imports of Tuna from Mexico, January - August 2010
66	2009 Report on the International Dolphin Conservation Program (2009 AIDCP Report), Document Mop-23-05 (24 September 2010)
67	Olson, R. J., and G. M. Watters. 2003. A model of the pelagic ecosystem in the eastern tropical Pacific Ocean. Bulletin of the Inter-American Tropical Tuna Commission 22:135-218
68	Kaiser, M.J. 2000. The implications of the effects of fishing on non-target species and habitats. Pages 383-392 in Kaiser and Groot, eds. Effects of fishing on non-target species and habitats. Blackwell.
69	Reilly SB, Barlow J. 1986. Rates of increase in dolphin population size. Fish Bull 84:527-533
70	Statement of Representative Barbara Boxer before the House of Representatives (October 23, 1990), Fisheries Conservation Amendments of 1990, Congressional Record, 101st Cong., p. H11890-1189

71	Statement of Senator Barbara Boxer, International Dolphin Conservation Program Act, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess (April 30, 1996)

A. GENERAL

Q1. To both parties: You have presented your arguments relating to GATT 1994 before those relating to the TBT Agreement. In light of the Appellate Body's rulings suggesting that the provisions of the agreement "that deals specifically, and in detail" (see Report of the Appellate Body in EC Bananas III, para. 204), with a question should be examined first, please clarify whether you consider that the Panel should, in this case, consider first Mexico's claims under GATT 1994, and if so, why?

1. The U.S. dolphin safe labeling provisions are not technical regulations and therefore are not subject to the provisions of the TBT Agreement cited in Mexico's panel request. Therefore, in this case, we believe it would be appropriate for the Panel to analyze Mexico's claims under the GATT 1994 in the first instance.

B. FACTUAL QUESTIONS

1. Functioning of the labelling scheme

Q3. To the United States: Please explain the functioning of the labelling scheme. In particular, please clarify what the conditions are to use the label, which authority grants the official label and whether the label is granted automatically or whether an application must be filed and by whom.

2. As an initial matter, as the complaining party, Mexico bears the burden of proof in this dispute and must present evidence and argument sufficient to establish its claims. This includes proving how the measures at issue in this dispute operate.[1] That said, in this question and others we would like to help the Panel understand how the facts in this dispute, including the operation of the U.S. dolphin safe labeling provisions, demonstrate that the U.S. dolphin safe labeling provisions are not inconsistent with Articles I:1 or III:4 of the GATT 1994, do not fall within the definition of a technical regulations and are not inconsistent with Article 2.1, 2.2 or 2.4 of the TBT Agreement.

3. The DPCIA, codified at 16 U.S.C. 1385, establishes the conditions for use of a "dolphin safe" label on tuna products. The chapeau of Section 1385(d)(1) makes it a violation of Section 45 of title 15 (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

[1] *US – Wool Shirts (AB)*, p. 14 (stating that the party who asserts a fact is responsible for providing proof thereof; the burden of proof rests upon the party who asserts the affirmative of a particular claim or defense; if that party adduces sufficient evidence to raise a presumption that what it claimed is true, then the burden shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.)

conditions laid out in Section 1385(d)(1) and further elaborated in Section 1385(d)(2). 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. The details of the conditions established under section 1385(d)(1) and (d)(2) for use of the dolphin safe label are set forth in the U.S. First Written Submission, paragraphs 15-20.

4. Section 1385 (d)(3)(C) establishes conditions in addition to (d)(1) and (d)(2) that must be met to label tuna products dolphin safe with an alternative mark, including the condition under (d)(3)(C)(i) that "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught."

5. There is no application process for the label and there is no license or other formal approval required; marketers of tuna products may use the official mark if the product meets the conditions in Section 1385(d)(1)-(2). The U.S. Department of Commerce developed an official mark for use by any marketer[2] on products that meet those conditions. Marketers may use any alternative mark if the product meets the conditions set forth in Section 1385(d)(1)-(3).

6. As stated above, there is no application process or prior approval necessary to use the official mark or any other label that connotes "dolphin safe." The United States monitors and verifies whether tuna products labeled "dolphin safe" meet the conditions in the U.S. dolphin safe labeling provisions through the collection of data on the National Oceanic and Atmospheric Administration (NOAA) Form 370, Fisheries Certificate of Origin (FCO), and through the National Marine Fisheries Service (NMFS) Tuna Tracking and Verification Program. Details regarding the NOAA Form 370 and the NMFS Tuna Tracking and Verification Program are provided in answers to Questions 7 and 4, respectively.

Q4. To the United States: Once the label is granted, what is its period of validity, and is there any procedure to verify that tuna products sold with the label are meeting the requirements set forth in the measures through out the period of validity? What happens if they do not meet the requirements? Is the penalty imposed on the retailer, the canner or exporter of the tuna?

7. As discussed in our response to Question 3, labels are not "granted"; tuna products may be labeled dolphin safe whenever the conditions to label tuna products dolphin safe, set forth in

[2] See 50 CFR 216.24(f)(12) and 216.93(f)(i), (ii), & (iii), Exhibits US-57 and US-58, which refer to "any exporter, transshipper, importer, processor, or wholesaler/distributor to possess, sell, purchase, offer for sale, transport, or ship in the United States" and "Any exporter, transshipper, importer, processor, or wholesaler/distributor of any tuna or tuna products..." Note, Exhibit US-23B contains an outdated version of 50 CFR 216.24; Exhibit US-57 contains the current version.

Section 1385(d), are met. Because the label is only to be put on tuna products meeting those conditions, and appears on those products as packaged for sale, there is no "period of validity."

8. The U.S. government collects information from domestic tuna processors, U.S. tuna vessels, and importers of tuna products, and this information is used by the NMFS Tuna Tracking and Verification Program to verify whether tuna products labeled dolphin safe meet the statutory conditions. U.S. regulations require that every import of every tuna product, regardless of whether the dolphin-safe label is intended to be used, be accompanied by a NOAA Form 370 and be submitted to Customs and Border Protection at the time of importation. A copy of the form is also to be submitted to the NMFS Tuna Tracking and Verification Program within 10 days of the shipment's entry.

9. U.S. tuna processors must submit a monthly report to the NMFS Tuna Tracking and Verification Program containing the dolphin-safe status, ocean area of capture, catcher vessel, trip dates, carrier name, unloading dates, and location of unloading of tuna for both imported and domestic receipts.[3] In the case of imported receipts, a copy of the FCO is required as well. Thus U.S. tuna processors submit all of the information found on the NOAA Form 370, plus additional information, to U.S. authorities.

10. In addition to analyzing the information submitted by importers on the NOAA Form 370 and by the U.S. tuna processors in monthly reports, the NMFS Tuna Tracking and Verification Program also conducts periodic cannery audits and "spot checks" of retail market product.[4] If product is found to be wrongfully labeled during a spot check, the product will most likely be seized as evidence. The U.S. Government may decide to forfeit, destroy, or, in the case of imports, have the product re-exported, depending on the facts and circumstances of the case. NMFS regulations hold the U.S. importer of record responsible for the submission and accuracy of the information found on the NOAA Form 370. Sanctions for offering for sale or export tuna products falsely labeled dolphin safe may be assessed against any producer, importer, exporter, distributor or seller who is subject to the jurisdiction of the United States. Sanctions are the same for tuna imported or domestically produce. Please see the U.S. response to Question 50 for more detail on the consequences for mislabeling tuna products dolphin safe.

Q5. To the United States: Does the label apply to any tuna or tuna product capable of bearing it, or is it limited to canned tuna?

11. The U.S. dolphin safe labeling provisions establish conditions under which any tuna product (as defined under the DPCIA) may be labeled dolphin safe; its application is therefore not limited to canned tuna. Any tuna product that is exported from or offered for sale in the

[3] 50 CFR 216.24(f)(2), 50 CFR 216.24(f)(3); 50 CFR 216.24(f)(4); 50 CFR 216.92; 50 CFR 216.93(d); and 50 CFR 216.93(e), Exhibits US-57 and US-58.

[4] DPCIA, 16 U.S.C. 1385(f)(6), Exhibit US-5; 50 CFR 216.93(f)(3), Exhibit US-58.

United States that meets the conditions to be labeled dolphin safe may be labeled dolphin safe. The DPCIA defines "tuna product" as "a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days."[5]

Q6. To the United States: Please clarify the relationship between the conditions for importation of yellowfin tuna caught in the Eastern Tropical Pacific (ETP) by Mexican vessels over 362.8 metric tons, including the granting of an "affirmative finding" under Sections 216.92(b) of the CFR, and the conditions for access to a "dolphin-safe " label under the measures at issue.

12. Under section 101(a)(2) of the Marine Mammal Protection Act, a nation harvesting tuna by a vessel using a purse seine net in the ETP must have an "affirmative finding" from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) in order for that tuna to be imported into the United States.[6]

13. Affirmative findings are granted to nations with large purse seine vessels active in the ETP that want to export tuna harvested in the ETP by purse seine vessels to the United States and meet statutory and regulatory criteria related to compliance with the AIDCP. An affirmative finding confirms that the nation receiving it (i) participates in the international dolphin conservation program (IDCP) established under the AIDCP, (ii) is a member of or has applied for membership in the Inter-American Tropical Tuna Commission (IATTC), (iii) is complying with all requirements of the IDCP, including adoption and enforcement of tuna tracking and verification regulations, and meets the obligations of membership in the IATTC, (iv) has a fleet-wide dolphin mortality that does not exceed the limit assigned to the vessels of the nation under the AIDCP, and (v) has provided directly or authorized the IATTC to release complete, accurate, and timely information necessary to verify information on tuna tracking forms.[7]

14. Mexico has an "affirmative finding" and therefore is allowed to export yellowfin tuna harvested by purse seine vessels in the ETP to the United States. Mexico has had such an

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[5] DPCIA, 16 U.S.S. 1385(c)(5), Exhibit US-5; *see also* 50 CFR 216.3 (stating "tuna product means any food product processed for retail sale and intended for human or animal consumption that contains an item listed in § 216.24(f)(2)(i) or (ii), but does not include perishable items with a shelf life of less than 3 days"); Exhibit US-7 (HS codes for "tuna products"); U.S. First Written Submission, para. 13 n.4.

[6] See 50 CFR 216.24(f)(6) and (8), Exhibit US-57.

[7] 50 CFR 216.24(f)(8), Exhibit US-57. Note that there is no affirmative finding process for yellowfin tuna caught by U.S. vessels delivering to a U.S. canner because the United States already regulates U.S. flag vessels requiring them to act in accordance with AIDCP procedures. See the response to Question 13 for further detail.

affirmative finding since 2000 and has an affirmative finding now.[8] Therefore, Mexico may lawfully export into the United States yellowfin tuna harvested by purse seine vessel (of any size) in the ETP, regardless of whether the tuna is labeled "dolphin safe."

15. Section 216.92(b)(1) states that a dolphin safe label may be used on yellowfin tuna products harvested in the ETP by a vessel greater than 363 metric tons only if harvested by (i) a U.S. vessel in conformance with the International Dolphin Conservation Program or (ii) a non-US vessel if the flag state has an "affirmative finding." If the harvesting nation to which the vessel belongs does not have an affirmative finding, yellowfin tuna (and products containing yellowfin tuna) may not be imported into the United States, let alone be labeled dolphin safe in the United States. Because Mexico has an affirmative finding, yellowfin tuna harvested by Mexican purse seine vessels in the ETP may be imported into the United States, and this tuna may also be labeled dolphin safe in the United States, provided the tuna meets the requirements of the DPCIA and 50 CFR 216.91 and 216.92.

Q7. To the United States: Please explain the role of NOAA Form 370, entitled "Fisheries Certificate of Origin", as contained in Exhibit MEX-63. What is this document required for? What is the relationship, if any, between the various "dolphin safe status" categories identified in the form and those contained in the measures at issue in relation to "dolphin-safe" labelling?

16. The NOAA Form 370 is required for all imports of tuna products into the United States and provides the information necessary to support any claims regarding the dolphin safe status of any tuna product sold in the United States. NOAA Form 370, by requiring U.S. Harmonized Tariff Schedule (HTS) numbers and other information about the fish (including flag State of fishing vessel, ocean area of catch, vessel name, date of fishing trip, and fishing gear), also serves a role in ensuring that tuna is imported in accordance with the affirmative finding process and other statutory requirements.[9] NOAA Form 370 is required for all tuna products imported into the United States, even for tuna products that do not bear a dolphin safe label or intend to bear a dolphin safe label.[10] The NOAA Form 370 is provided by the U.S. importer of record to the U.S.

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[8] Mexico's current affirmative finding was issued in June 2010. *See* 75 Federal Register 34106-34107 (June 16, 2010).

[9] *See* 50 CFR 216.24 (f)(2)(i)-(iii), Exhibit US-57.

[10] 50 CFR 216.24 (f)(2) states: "Imports requiring a Fisheries Certificate of Origin. Shipments of tuna, tuna products, and certain other fish products identified by the U.S. Harmonized Tariff Schedule (HTS) numbers listed in paragraphs (f)(2)(i), (f)(2)(ii) and (f)(2)(iii) of this section may not be imported into the United States unless a properly completed Fisheries Certificate of Origin (FCO), NOAA Form 370, is filed with U.S.C ustoms and Border Protection (CBP) at the time of importation." Subsections (i) and (ii) list HTS numbers for (i) "yellowfin tuna or yellowfin tuna products (other than fresh tuna) known to be imported into the United States" and (ii) "tuna or tuna products, (other than fresh tuna or yellowfin tuna identified in paragraph (f)(2)(i)) of this section, known to be imported into the United States." Therefore the regulations require NOAA Form 370 for the universe of imported

Customs and Border Protection, at the time of importation, and a copy is submitted to the NMFS Tuna Tracking and Verification Program.

17. NOAA Form 370 reflects the documentation requirements necessary to support dolphin safe claims for tuna product as set forth in the DPCIA. NOAA Form 370 identifies various scenarios under which tuna may be caught:

> (1) not harvested with a purse seine net, and not harvested in any fishery that has been identified by the Assistant Administrator as causing a regular and significant mortality or serious injury to dolphins (NOAA Form 370 Box 5 B(1));
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> (2) harvested using a purse seine net outside of the ETP (NOAA Form 370 Box 5 B(2));
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> (3) harvested by purse seine vessel outside the ETP in a fishery in which there is a regular and significant association occurring between dolphins and tuna (similar to the association in the ETP) (NOAA Form 370 Box 5 B(3));
>
> (4) harvested in the ETP by a purse seine vessel having a carrying capacity of 400 short tons (362.8mt) or less (Box 5B(4)); or
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> (5) harvested in the ETP by a purse seine vessel of more than 400 short tons (362.8mt) carrying capacity (NOAA Form 370 Box 5B(5)).[11]

18. For each of scenario described above, NOAA Form 370 refers to any necessary documentation to be submitted to support use of a dolphin safe label consistent with the conditions set out in the DPCIA. For example, the DPCIA conditions use of a dolphin safe label on tuna products that contain tuna caught in the ETP or any other fishery where there is a regular and significant association between tuna and dolphins on an observer and the captain certifying that purse seine nets were not intentionally deployed on or used to encircle dolphins during the trip and no dolphins were killed or seriously injured during the set. NOAA Form 370 reflects those conditions in Box 5B(5) and 5B(3).[12]

19. The DPCIA and implementing regulations are the source and authority for understanding the conditions on labeling tuna products dolphin safe; NOAA Form 370 merely reflects what the law and regulations provide.

"tuna products." 50 CFR 216.24 (f)(2), Exhibit US-57.

[11] NOAA Form 370, Exhibit MEX-63.

[12] Box 5(B)(5) refers to an "IDCP Member Nation Certification" because under the IDCP the captain and observer's statements are provided to the country to which the vessel belongs and an appropriate representative of that country then certifies that those were provided via an IDCP Member Nation Certification.

Q8. To the United States: In your responses to oral questions, you stated that the use of alternative dolphin-safe labels is subject to the same conditions as use of the official mark, i.e. with respect to tuna caught in the ETP, that it not have been caught by setting on dolphins. According to Section (d)(3)(C) of the DPCIA, the conditions to be fulfilled in order to use alternative dolphin safe marks and logos are the following:

(a) No dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught;

(b) The label is supported by a tracking and verification program which is comparable in effectiveness to the US domestic tracking and verification program; and

(c) The label complies with all applicable labelling, marketing and advertising laws and regulations of the Federal Trade Commission, including any guidelines for environmental labelling.

These conditions appear to be comparable to those of the Agreement on the International Dolphin Conservation Program (AIDCP), and different from a requirement of "no setting on dolphins". Please clarify, in light of these provisions, the conditions of access to the official and alternative labels under the measures at issue and explain this difference.

20. Section 1385(d) establishes the conditions under which tuna products may be labeled dolphin safe. Section 1385(d)(1)-(2) applies to all tuna products regardless of whether those tuna products are labeled with the official dolphin safe label or an alternative dolphin safe label. In addition, section 1385(d)(3)(C) sets out additional conditions for use of an alternative dolphin safe mark. Those additional conditions are the ones described in the Panel's question. Please see the U.S. answers to Questions 9 and 11 for further discussion of section 1385(d)(1)-(2) and (d)(3)(C).

Q9. To the United States: Please provide a table outlining the specific requirements for access to the official and alternative dolphin-safe label under the measures at issue, including each of the following categories, and any further subdivisions as relevant:

(a) Tuna caught in the ETP

(i) By setting on dolphins

(ii) By other methods

(b) Tuna caught outside the ETP

21. Please see Exhibit US-59 for the table referred to in this question.

22. To clarify, no tuna product may be labeled dolphin safe, regardless of whether the official mark or an alternative is used, if it contains tuna that was caught by a purse seine net intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught (1385(d)(1)-(2)). In addition, no tuna product may be labeled dolphin safe, regardless of whether the official mark or an alternative is used, if it contains tuna that was caught by a purse seine vessel in the ETP (or in any other fishery where there is a regular and significant association between tuna and dolphins), or caught by a non-purse seine vessel in a fishery where there is regular and significant dolphin morality, dolphins were killed or seriously injured in the set (1385(d)(1)(B)(i), 1385(d)(1)(C) and 1385(d)(2)). In addition, no tuna product may be labeled dolphin safe with an alternative mark if it was caught in a set in which dolphins were killed or seriously injured (1385(d)(3)(C)(i)).

Q10. To the United States: Please confirm whether tuna caught in the ETP by setting on dolphins in accordance with the requirements of the AIDCP is entitled, under the measures at issue, to use the official Department of Commerce "dolphin-safe" mark or any alternative mark referring to dolphins?

23. No tuna products caught by a purse seine net intentionally set on dolphins may be labeled with the term "dolphin safe" (either with the official mark or an alternative mark) or with any other term or symbol that claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins. This is true regardless of whether the tuna was caught in the ETP or elsewhere. Please see the U.S. answer to Question 9.

Q11. To the United States: In your written submission (paragraph 25), you argue that the use of marks that are alternatives to the official dolphin safe mark is permitted under the DPCIA. Please clarify whether the conditions for using alternative labels are the same as those applicable to the use of the official mark or, if not, how they differ and whether tuna caught in the ETP by setting on dolphins would be eligible to bear any alternative dolphin safe mark? Please explain the benefits that arise from bearing the official label compared to the alternative marks.

24. Section 1385(d)(1) and (2) establish conditions on dolphin safe labeling that apply equally to the official mark and any alternative mark. The chapeau of section 1385(d)(1) clarifies that (d)(1) applies to the use of any "label" that includes "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."[13]

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

25. Section 1385(d)(3)(C) establishes conditions in addition to (d)(1) and (d)(2) that must be met to label tuna products dolphin safe with an alternative mark, including the requirement under (d)(3)(C)(i) that "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught." Thus, for example, the DPCIA provides that to use an alternative mark on a tuna product that contains tuna caught by a vessel using purse seine nets in a fishery where there is no regular and significant association between tuna and dolphins (i.e., a fishery described in section 1385(d)(1)(B)(ii)) the following must be met: (1) purse seine nets must not have been intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught[14] and (2) dolphins must not have been killed or seriously injured in the set in which the tuna was caught.[15] To label that same tuna product with the official mark, the DPCIA provides purse seine nets must not have been intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught.[16] Please see also the U.S. answers to Questions 9 and 11.

26. In practice, however, there is little difference between the conditions that must be met to label tuna products with the official dolphin safe mark as compared to an alternative mark. Regardless of whether the official or alternative dolphin safe mark is used, dolphin safe claims on tuna products sold in the United States must be supported by a tuna tracking and verification program (for tuna processed in the United States, the program is implemented in section 216.93 of title 50 of the Code of Federal Regulations) and must comply with all applicable laws and regulations of the Federal Trade Commission (pursuant to those laws and regulations). Thus the conditions of (d)(3)(C)(ii) and (iii) in practice are also applicable to products labeled with the official mark. Regarding the condition of (d)(3)(C)(i) (i.e., no dolphins killed or seriously injured in the set), because tuna products that contain tuna harvested by large purse seine in the ETP (and other fisheries if determined by the Secretary to have a regular and significant association similar to the ETP or a regular and significant mortality or serious injury of dolphins) may only be labeled dolphin safe (either with the official mark or an alternative mark) if no dolphins were killed or seriously injured in the set (pursuant to 1385(d)(1)(B)(i) and 1385(d)(1)(C)), only in the case of a tuna product that contained tuna caught by a purse seine vessel in a fishery where there is no regular and significant association between tuna and dolphins would there be any practical difference with respect to the conditions on use of the official as compared to an alternative mark.

27. In regards to the question of whether tuna products that contain tuna caught in the ETP by setting on dolphins is eligible to bear an alternative dolphin safe mark, the answer is no. Such tuna products would not meet the condition under section 1385(d)(1)(C) and (d)(2) to be labeled dolphin safe whether with the official dolphin safe mark or an alternative mark.

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

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

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

28. The United States is not aware of any benefit to using the official label as compared to using an alternative mark. The United States is not aware of any canned tuna products in the United States that use the official mark, and the few instances we are aware of the official mark being used on tuna products sold in the United States are on tuna jerky. The fact that marketers of tuna products are not using the official dolphin safe mark suggests that there is no benefit from a commercial perspective to using the official mark over an alternative mark.

Q12. To the United States: The measures at issue envisage the possibility of additional documentary requirements for tuna caught outside the ETP in a fishery which has been determined as having regular and significant tuna-dolphin association. Please clarify:

(a) Whether any fishery other than the ETP has been determined to have such an association,

29. No fishery outside the ETP has been determined to have a regular and significant association between tuna and dolphins.[17]

(b) If no such determination has been made for any other fishery than the ETP, why? What evidence do you have that there no regular and/or significant tuna-dolphin association outside of the ETP? What is the threshold of "regular and significant"?

30. Neither the DPCIA nor its implementing regulations define "regular and significant," and because the United States is not aware of any evidence that may suggest anything approaching a regular and significant association between tuna and dolphins outside the ETP, it has not had the occasion to directly address the interpretation of "regular and significant." However, in considering whether a regular and significant association between tuna and dolphins occurs outside the ETP, the United States would consider whether the conditions present in the ETP exist in another fishery. Such an approach would be consistent with the DPCIA, which refers to "a regular and significant association . . . similar to the association between dolphins and tuna in the [ETP]." It would also ensure that the DPCIA continues to treat all fisheries the same where there is a regular and significant association, whether that fishery is the ETP or any future fishery for which it is determined there is a regular and significant association between tuna and dolphins.

31. As explained in the U.S. First Written Submission, the ETP is fundamentally different from all other oceans in that it is the only ocean where tuna and dolphins have a known regular and significant association and the only ocean where such an association is exploited as the

[17] U.S. First Written Submission, paras. 38-39; *see also* Written Submission of Non-Party Amicus Curiae, paras. 32-35.

foundation for a commercial fishery.[18] In the ETP, dolphins provide the primary visual cue for fishermen to locate large schools of yellowfin tuna. 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 seining tuna and dolphins continue to associate so tightly that to catch dolphins is also to catch tuna."[19] 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. 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.[20]

32. The evidence cited by Mexico does not establish that a regular and significant association between tuna and dolphins exists outside the ETP. As further elaborated in paragraphs 38 and 39 of the U.S. First Written Submission, while there are reports of tuna-dolphin associations outside the ETP, those reports do not support the conclusion that there are any regular and significant associations between tuna and dolphins outside the ETP. Instead, those reports indicate that (1) there have been instances in which tuna and dolphins or other marine mammals may be captured together outside the ETP and (2) there exist a number of anecdotal reports of unsustained tuna-dolphin associations outside the ETP.[21] At most, the evidence Mexico cites supports the conclusion that any tuna-dolphin associations outside the ETP, to the extent they exist at all, are rare, ephemeral and irregular. While the United States, academic institutions and other entities have explored this issue, these efforts have not resulted in any evidence to support that regular and significant tuna-dolphin associations occur outside the ETP.

33. Regional fisheries management organizations are active in monitoring all of the world's oceans with regard to bycatch issues, and the United States actively participates in or observes these RFMOs. If there were a regular and significant association between tuna and dolphins in a fishery outside the ETP, it would be known.

34. It is also important to recall that, as the party asserting that tuna and dolphins associate

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[18] U.S. First Written Submission, para. 38; *see also* Written Submission of Non-Party Amicus Curiae, paras.32-34; Gerrodette, T. 2009. The tuna-dolphin issue. Pages 1192-1195 in Perrin, Wursig and Thewissen (eds.) Encyclopedia of marine mammals, 2nd Edition. Elsevier: San Diego, CA, Exhibit US-60.

[19] National Research Council. 1992. Dolphins and the tuna industry. National Academy Press: Washington, D.C., p. 45, Exhibit MEX-2.

[20] Gosliner, M.L. 1999. The tuna-dolphin controversy, Pages 120-155, in Twiss and Reeves (eds.) Conservation and management of marine mammals. Smithsonian Institution Press: Washington, D.C., Exhibit US-61.

[21] *See, e.g.,* Donahue, M.A. and E.F. Edwards. 1996. An annotated bibliography of available literature regarding cetacean interactions with tuna purse-seine fisheries outside of the eastern tropical Pacific Ocean. NOAA Administrative, Report LJ-96-20, Exhibit US-10; Young and Iudicello. 2007. Worldwide Bycatch of Cetaceans. US Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Tech. Memo. NMFS-OPR-36), MEX-5.

outside the ETP in some way comparable to the way they do in the ETP, Mexico must put forward evidence to sufficient to establish that.[22] The United States should not need to establish that there is no regular and significant association between tuna and dolphins outside the ETP; it is Mexico that must establish that there is (assuming that is even what Mexico is asserting).[23]

(c) If there is no regular and significant tuna-dolphin association outside of the ETP, why do you have this provision?

35. While no regular and significant association has been determined to exist, this provision exists to provide the United States the flexibility necessary to ensure that, if a regular and significant association between tuna and dolphins were ever found in a purse seine fishery outside the ETP, the conditions on use of the dolphin safe label that apply with respect to the ETP for a captain's and an observer's statement that purse seine nets were not intentionally deployed on or uses to encircle dolphins during the trip and no dolphins were killed or seriously injured in the set, would apply with respect to that fishery.[24]

(d) In the event that such a determination were to be made, how would the labelling documentary requirements for tuna caught in such fishery compare to those for tuna caught in the ETP?

36. Under the DPCIA, if it were determined that there was a regular and significant association between tuna and dolphins outside the ETP, the basic conditions for use of the dolphin safe label on tuna products that contain tuna caught using purse seine nets in that fishery, would be the same as for tuna caught in the ETP by large purse seine vessels: no dolphins were intentionally set upon in the trip in which the tuna was caught and no dolphins were killed or seriously injured in the set.[25] Because no regular and significant association between tuna and dolphins has been found to exist outside the ETP, the U.S. Department of Commerce has not yet promulgated regulations setting out the details of the paper work necessary to support dolphin safe claims for tuna products that contain such tuna. The Department of Commerce, would however, have the authority to promulgate such regulations and there is no reason to suggest that

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[22] *US – Wool Shirts (AB)*, p. 14 (stating that the party who asserts a fact is responsible for providing proof thereof; the burden of proof rests upon the party who asserts the affirmative of a particular claim or defense; if that party adduces sufficient evidence to raise a presumption that what it claimed is true, then the burden shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.)

[23] Mexico appears to argue that tuna and dolphins associate outside the ETP in some way that is comparable to the ETP but does not directly state that that association is "regular and significant."

[24] *Compare* DPCIA 16 U.S.C. 1385(d)(1)(B)(ii) *with* DPCIA 16 U.S.C. 1385(d)(2), Exhibit US-5.

[25] *Compare* DPCIA 16 U.S.C. 1385(d)(1)(B)(ii) *with* DPCIA 16 U.S.C. 1385(d)(2), Exhibit US-5. It should be noted however that under section 1385(d)(2), vessels under 363 metric tons are not subject to the conditions that an observer's and captain's statement be submitted.

such regulations would differ significantly from those contained in section 216.91 and 216.92.

Q13. To the United States: Please clarify why Section 216.92 distinguishes between tuna products containing tuna harvested in vessels bearing a US or foreign flag, and why the "dolphin-safe" requirements under this Section differ in respect of yellowfin tuna only with respect to imported tuna and not to US domestic tuna.

37. Section 216.92(b) differentiates between yellowfin tuna (covered by (b)(1)) and non-yellowfin tuna (covered by (b)(2)) because an affirmative finding is only required with respect to the importation of yellowfin and not other kinds of tuna. Therefore, (b)(1) indicates that for yellowfin tuna harvested in the ETP by a non-U.S. purse seine vessel an affirmative finding is required.[26] To receive an affirmative finding, the country must be a party to the AIDCP or have applied to become a party and have a tuna tracking and verification program comparable to that of the United States.[27] Section 216.92(b)(2)(i) for non-yellowfin tuna includes as a condition for labeling tuna products dolphin safe is that the tuna be harvested by a vessel of a country that is party to the AIDCP or has applied to become a party and is adhering to the AIDCP tuna tracking program.[28] The Fisheries Certification of Origin (FCO) and certification requirements of (b)(2)(ii) and (iii) apply equally to yellowfin tuna under 50 CFR 216.24(f)(6) and (8) (regulations setting out affirmative finding for yellowfin tuna).[29]

38. Section 216.92(a) applies to tuna harvested by large U.S. purse seine vessels in the ETP and not processed outside the United States, i.e. domestic product that does not contain imported tuna.[30] Section 216.92(b) applies to imported tuna products that contain either tuna caught by U.S. vessels or vessels of other countries.[31] The provisions of section 216.92(a) and (b) differ for several reasons.

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[26] An affirmative finding is required pursuant to Section 101(a)(2)(B) of the MMPA, 16 U.S.C. 1371(a)(2)(B), 50 CFR 216.24(f)(6) and (8). Section 216.92 refers to this requirement but should not be understood itself to establish a requirement for an affirmative finding to import yellowfin tuna into the United States, which is set out elsewhere in U.S. law. Under the MMPA, only yellowfin tuna require an affirmative finding for importation because yellowfin are the primary species of tuna harvested in association with schools of dolphin in the ETP.

[27] 50 CFR 216.24, Exhibit US-57. 50 CFR 216.24(f)(a) establishes the conditions for an affirmative finding: (i) participates in the IDCP established under the AIDCP, (ii) is a member of the IATTC (or candidate members of the IATTC), (iii) meets the obligations of the IDCP and membership in the IATTC, and (iv) has a fleet-wide dolphin mortality that does not exceed the limit assigned to the vessels of the nation under the AIDCP.

[28] 50 CFR 216.92(b)(2)(i), Exhibit US-6.

[29] 50 CFR 216.24(f), Exhibit US-57.

[30] 50 CFR 216.92(a), Exhibit US-6.

[31] 50 CFR 216.92(b), Exhibit US-6.

39. First, there is no affirmative finding process for yellowfin tuna caught by U.S. vessels delivering to a U.S. canner. The United States has jurisdiction to require and does require U.S. flag vessels to adhere to the AIDCP and its tuna tracking program.[32] The affirmative finding process involves determining whether other countries also require this of their vessels.[33]

40. Second, section 216.92 conditions dolphin safe claims for tuna products (yellowfin and non-yellowfin) that contain tuna caught by U.S. vessels, on U.S. vessels submitting tuna tracking forms to the U.S. government and on the conditions in section 216.91 (which reiterate the conditions set out in the DPCIA) being met. For imported tuna products, neither vessels nor AIDCP-approved observers submit tuna tracking forms to the U.S. government but, if acting in accordance with the AIDCP and its tuna tracking program, the AIDCP-approved observer would submit those original forms to the country where the fish is landed. A copy of the forms is then provided to the country to whom the vessel belongs by either the national authority of the party under whose jurisdiction the tuna is to be processed or by the AIDCP Secretariat. Thus, for imported tuna products, the U.S. government relies on a completed FCO (Fisheries Certificate of Origin) that, if the tuna was caught in the ETP and is claimed to be dolphin safe, would include a certification by a government representative of an appropriate AIDCP party that the conditions set out in section 216.91 were met (which that government would know based on the tuna tracking forms or observer records to which the party has access).[34] In the case of an imported tuna product that contains tuna harvested by a U.S. vessel, a FCO is still required, although the U.S. government would already have received the tuna tracking form directly from the either the U.S. vessel's AIDCP approved observer, the national authority of the Party under whose jurisdiction the tuna is to be processed, or the AIDCP Secretariat.

41. Third, when a U.S. vessel or foreign vessel delivers tuna to a U.S. canner, the canner is then responsible for submitting to the U.S. government on a monthly basis detailed trip and catch information that would substantiate dolphin safe claims among other information. Under 216.93(d)(1), a NMFS representative can meet the vessel at the U.S. canner (the only U.S. canner capable of receiving raw whole tuna from a fishing vessel is located in American Samoa) and obtain the tuna tracking forms from the observer on board the vessel and access other "areas and records" of the vessel.[35]

42. In summation, by one channel or the other, the U.S. government applies the same

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[32] 50 CFR 216.93(c)(5), Exhibit US-58.

[33] Obtaining an affirmative finding requires verification that the country is a party to the AIDCP in good standing and adhering to all the requirements of the AIDCP and its tuna tracking procedures, including requiring that its vessels submit tuna tracking forms. 50 CFR 216.24(f)(8), Exhibit US-57.

[34] 50 CFR 216.24(f)(3) and (4), Exhibit US-57.

[35] 50 CFR 216.93(d), Exhibit US-58.

standard to determine whether tuna product is "dolphin safe" under U.S. law, whether harvested by U.S. or foreign vessel and whether a domestic product or imported.

Q15. To both parties: In paragraph 91 of its first written submission, Mexico notes that the United States applies different standards to its own commercial fisheries than those it applies to the Mexican fleet in the ETP and that, despite the observed bycatch mortalities of dolphins and other marine mammals in these fisheries.

(a) Can Mexico specify what it understands to be the United States' own fisheries, whether it sees the ETP as part or not of these fisheries, and how the standards applied by the United States would differ for its own fisheries?

(b) What is the view of the United States?

43. It is not clear which fisheries Mexico is considering "U.S. fisheries" in paragraphs 93-97 of its First Written Submission. With the exception of waters under national jurisdiction (e.g., exclusive economic zones), fisheries do not belong to one country or another but are shared among countries usually under the auspices of a regional fisheries management agreement. Further, a fishery is typically defined by the type of fish that is being caught in a particular part of the ocean and also commonly by the type of fishing practice used, e.g., the ETP purse-seine tuna fishery. In paragraphs 93-97 of its submission, it is not clear whether, in referring to "U.S. fisheries," Mexico is referring to a particular location (e.g., the U.S. EEZs or oceans where U.S. vessels fish), a particular type of fish (e.g. tuna) or a particular fishing method (e.g., using purse-seine nets and fish aggregating devices). To the extent Mexico is talking about a non-tuna fishery, we fail to see how that would relate in any way to the issues in this dispute which concern the conditions under which tuna products may be labeled dolphin safe.

44. We also disagree with Mexico's characterization of the ETP as a Mexican fishery. The ETP is not a Mexican fishery, but is a geographic region that encompasses a fishery where Mexican vessels fish for tuna along with vessels from many other countries. The Active Purse Seine Vessel Register, which lists all purse seine vessels authorized to fish for tuna in the ETP, includes vessels from Bolivia, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Spain, the United States, Vanuatu, and Venezuela.[36] And depending on how Mexico is defining a fishery, this list could be even longer; for example, if Mexico is using the term fishery to describe the type of fish targeted (e.g. tuna) rather than the type of fish targeted using a particular method (e.g. tuna caught using purse seine nets). Further, the origin of tuna is not determined by where it was caught but the flag of the vessel that caught it.[37] Tuna

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

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

caught in the ETP could be of Mexican origin or of an origin of any country that has vessels fishing for tuna in the ETP.

45. Further, it is not clear what Mexico means by the United States is "apply[ing] different standards" to "U.S. fisheries" as compared to "the Mexican fleet in the ETP."[38] The U.S. dolphin safe labeling provisions do not apply "standards" or rules to fisheries. The U.S. dolphin safe labeling provisions apply to tuna products and specify the conditions under which tuna products may be labeled dolphin safe. To the extent Mexico is talking about other provisions of U.S. law or regulations that may govern the conduct of U.S. vessels in the ETP or any other ocean where U.S. vessels fish, those measures are not within the Panel's terms of reference and in any event irrelevant to the treatment the U.S. dolphin safe labeling provisions afford imported and domestic tuna products. In addition, while the United States has jurisdiction over U.S. vessels and its EEZs, it does not have authority to, and does not, impose "standards" on high-seas fisheries that regulate the conduct of non-U.S. vessels. Instead, under customary international law as reflected in the United Nations Convention on the Law of the Sea, high-seas fisheries are a shared resource,[39] and high-seas fisheries for tuna are managed through regional fisheries management organizations. Through these organizations members agree upon ways to manage those fisheries and implement those agreements by imposing requirements on their respective vessels through domestic regulations or other domestic administrative procedures.

46. To the extent Mexico is relying on Exhibit Mex-38 as a listing of "U.S. fisheries," Mexico misunderstands the listing of fisheries in that exhibit. The fisheries listed there are commercial marine fisheries where U.S. vessels fish, whether for tuna or any other type of fish, and includes both U.S. EEZs and high-seas where U.S. vessels fish for tuna. It is not accurate to characterize this list as a list of exclusively "U.S. fisheries." Like the ETP, the fisheries included in this list are fisheries that U.S. vessels along with vessels from many other countries fish, including Mexico.[40]

47. Mexico also misrepresents the information contained in Exhibit Mex-38. Regarding the mid-Atlantic gillnet fishery, that is a monkfish and not a tuna fishery.[41] We fail to see how any

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[38] Mexico First Written Submission, para. 91.

[39] See Art. 116, Right to fish on the high seas, United Nations Convention on the Law of the Sea.

[40] Countries participating in the Western Central Pacific Fishery Commission (the RFMO for the Western Central Pacific Ocean), International Commission for the Conservation of Atlantic Tunas (the RFMO for the Atlantic tuna fishery), and the Northwest Atlantic Fisheries Organization (the RFMO for fishery resources of the Northwest Atlantic except salmon, tunas/marlins, whales, and sedentary species) can be found on the following websites and include for example the United States and Mexico (participating non-member in WCPFC and contracting party in ICCAT). <http://wcpfc.int/>, <http://www.iccat.int/en/contracting.htm>, <http://www.nafo.int/about/frames/about.html>.

[41] Mexico First Written Submission, para. 93; Exhibit Mex-38 at 58891.

issues concerning the harvesting of monkfish relate in any way to the issues in this dispute which concern the conditions under which tuna products may be labeled dolphin safe. Regarding the Hawaii long line tuna fishery, these fish are caught to be sold as fresh fish, not a tuna product that would receive a dolphin safe label. Further, while Mexico correctly indicates that the Hawaii deep-set longline fishery is a "Category 1" fishery under the Marine Mammal Protection Act (MMPA), it is only a "Category 1" fishery with respect to interactions with false killer whales (HI pelagic stock), and not regarding the other marine mammals Mexico cites in paragraph 93 of its first written submission.[42] For four of the species listed by Mexico in paragraph 93 of its first written submission- Blaineville's beaked whale, Bryde's whale, spinner dolphin, and sperm whale there was not a single observed instance of death or serious injury to an animal in the Hawaii deep-set longline fishery from 2004-2008.[43] The total number of observed marine mammal interactions[44] with the Hawaii longline fishery 2004-2008, excluding the interactions with false killer whales (HI pelagic stock), was 35, or 6 interactions per year. As drafted, however, paragraph 93 suggests that for all species listed, the fishery is exceeding 50 percent of the PBR threshold.[45] That is not accurate.

48. If the situation in the Hawaii deep-set long line fishery is compared to the purse seine tuna fishery that sets on dolphins in the ETP the following observation could be made. The average number of observed marine mammal interactions in the Hawaii deep-set long line fishery is less than 20 individuals per year from 2004-2008. Mexico's purse seine fleet *alone* likely exceeded that number of marine mammal interactions each year *during the first set its fleet makes on dolphins*.

49. In terms of the fisheries Mexico chose to cite in paragraph 93, it is curious that Mexico chose not to focus on the purse seine tuna fishery in the Western Central Pacific Ocean, where almost all U.S. purse seine vessels fish for tuna. Reports on that fishery reveal that marine mammal take is relatively small. Based on reporting from independent observers on U.S. vessels fishing for tuna in the Western Central Pacific Ocean (WCPO), of the 1500 sets observed in 2008, there were 5 interactions with false killer whales and one interaction with a short-finned

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[42] The United States is taking strong and responsible action to address the take of false killer whales in the Hawaii longline fishery. Specifically, NOAA has convened a take reduction team for false killer whales, which published its draft take reduction plan on July 19, 2010. The goal of this plan is to reduce, within 5 years, mortality and serious injury incidental to commercial fishing to insignificant levels approaching a zero rate.

[43] The data cited in this paragraph is a summary of observer data provided in Marti L. McCracken and Karin A. Forney, *Preliminary Assessment of Incidental Interactions with Marine Mammals in the Hawaii Longline Deep and Shallow Set Fisheries*, PIFSC Working Paper WP-10-001, Issued 27 April 2010, Exhibit US-62.

[44] In this instance, an interaction is defined as an event where a marine mammal is restrained in some manner by the fishing gear, typically this involves being hooked or entangled in the gear. McCracken and Forney, PIFSC Working Paper WP-10-001 Issued 27 April 2010, at page 2, Exhibit US-62.

[45] McCracken and Forney, PIFSC Working Paper WP-10-001, Issued 27 April 2010, Exhibit US-62.

pilot whale observed; there were no observed interactions with other marine mammals.[46]

50. Regarding Mexico's comments on observer coverage in fisheries outside the ETP purse seine tuna fishery, it should be emphasized that the U.S. dolphin safe labeling provisions are not what require 100 percent observer coverage on large purse seine tuna vessels in the ETP. The AIDCP – an intergovernmental agreement to which Mexico is a party – requires that. And it requires that because, unlike any other fishery in the word, in the ETP purse seine tuna fishery a marine mammal is intentionally exploited on a wide-scale commercial basis to catch the targeted species, and the parties to the AIDCP agreed that100 percent observer coverage would be required for that fishery in order to ensure that agreed upon dolphin mortality limits are met.

Q16. To the United States: You have referred to the "Dolores" brand. Are tuna products from the Dolores brand eligible for the label and labelled as dolphin safe?

51. Yes, Dolores brand tuna products are eligible to be labeled dolphin safe, provided they do not contain tuna that was caught by setting on dolphins and no dolphins were killed or seriously injured in the set in which the tuna was caught. However, no Dolores brand tuna products are sold in the United States with a dolphin safe label, and the Fisheries Certificates of Origin (FCO or NOAA Form 370s) submitted for Dolores brand tuna products imported into the United States indicate that the products are not certified as dolphin safe and contained no marks or labels indicating otherwise.

Q17. To the United States: Can you confirm whether Ecuador and other countries fishing in the ETP have been able to sell tuna that has been processed and contained in tuna products labelled as dolphin safe?

52. Yes, tuna products containing tuna caught by Ecuadorian vessels and vessels from other countries fishing in the ETP have been sold in the United States and labeled dolphin safe. For example, in 2009 imports of tuna in airtight containers from Ecuador totaled 12.9 million kilos valued at $76.4 million dollars,[47] all of which was dolphin safe.[48] For comparison with additional years, tuna products in airtight containers from Ecuador totaled 20.0 million kilos valued at $94.0 million dollars in 2006 (all dolphin safe except for 11 importations); 16.2 million kilos valued at $89.1 million dollars in 2007 (all of which was dolphin safe); and 14.2 million kilos valued at

[46] Communication from Dr. Charles Karnella, International Fisheries Administrator, NOAA Fisheries Pacific Islands Regional Office, to Brad Wiley, Foreign Affairs Specialist, NOAA Fisheries Office of International Affairs on October 29, 2010.

[47] Imports of Tuna from Ecuador, Exhibit US-1C.

[48] NMFS, Tuna Tracking and Verification Program Databases.

$101.9 million dollars in 2008 (all dolphin safe except for one importation).[49]

Q18. To the United States: What was the impact of introducing the labelling scheme on the US fishing fleet? What was the impact of introducing the labelling scheme on non-US fishing fleet? What was the impact of the introduction of the labelling scheme on the share of the tuna market in the US of tuna caught by US vessels / non-US vessels?

53. For both the U.S. fishing fleet and non-U.S. fishing fleets, the impact of introducing the U.S. dolphin safe labeling scheme was the same: tuna caught by setting on dolphins could not be used in tuna products labeled dolphin safe. U.S. vessels gradually discontinued setting on dolphins to catch tuna, and abandoned the practice entirely in 1994. Some of these vessels reflagged and continued to set on dolphins to catch tuna, while others began using other techniques to catch tuna either in the ETP or in other oceans, mainly the Western Central Pacific Ocean. Non-U.S. vessels also either continued to set on dolphins to catch tuna or began using other techniques to catch tuna either in the ETP or in other oceans. Mexican vessels remained in the ETP and continued to set on dolphins to catch tuna.

54. Regarding the dolphin safe labeling provisions' impact on the U.S. market share of imported and domestic tuna products, while the United States can provide data on the volume/value of imported tuna products relative to domestic tuna products since 1990 (the year the U.S. dolphin safe labeling provisions were enacted), it does not have evidence that the relative market share of imported and domestic tuna products is attributable to the U.S. dolphin safe labeling provisions. There are a number of factors that could affect the relative share of imported and domestic tuna products in the U.S. market other than the U.S. dolphin safe labeling provisions; it would be for Mexico to establish what if any impact the U.S. dolphin safe labeling provisions have on the relative share of imported and domestic tuna products in the U.S. market. That said, imports' share of the U.S. market for canned tuna (including in pouches and jars) has steadily increased since the U.S. dolphin safe labeling provisions were enacted. Imports of all tuna products relative to domestic tuna products also increased since the U.S. dolphin safe labeling provisions were enacted. Exhibits US-63 and US-64 show the relative share of imported and domestic tuna products in the U.S. market from 1990 through 2009.

Q19. To both parties: Please provide any studies conducted prior the enactment of the measures analyzing the expected economic impact of such enactment on the US fishing fleet.

55. The United States is not aware of any studies conducted prior to the enactment of the DPCIA analyzing the expected economic impact on the U.S. fishing fleet. Prior to adoption of the DPCIA implementing regulations, the National Marine Fisheries Service conducted a

[49] Imports of Tuna from Ecuador, Exhibit US-1C; NMFS, Tuna Tracking and Verification Program Databases.

"regulatory impact analysis and review" pursuant to rulemaking procedures established at the time. Under those procedures, a regulatory impact analysis and review was to include a description of the potential costs and benefits of a proposed regulatory action.[50] Because the DPCIA implementing regulations were adopted over 19 years ago, the regulatory impact analysis and review of the DPCIA implementing regulations are no longer readily available.

2. Mexican exports of tuna to the United States

Q21. To the United States: How much tuna is currently imported to the United States from Mexico? How much of this tuna would require the conditions to be labelled "dolphin safe"? How much is in fact labelled as "dolphin safe"?

56. In 2009, imports of tuna and tuna products from Mexico totaled $13 million.[51] From January through August 2010, imports of tuna and tuna products from Mexico in 2010 totaled more than $9 million.[52] Of the $13 million of Mexican exports to the United States in 2009, $7.5 million were tuna in cans, pouches and other air-tight containers; from January through August 2010, this figure was $6.2 million dollars.

57. As we stated in our first written submission, about one third of Mexico's purse seine fishing fleet in the ETP is made up of vessels under 363 metric tons and therefore tuna harvested by these vessels already meet the conditions to be labeled dolphin safe. Furthermore, at the first substantive meeting of the parties, Mexico stated that approximately 20 percent of the tuna caught by the Mexican fleet was harvested in unassociated sets or means other than setting on dolphins.

Q22. To the United States: In your written submission, you assert that until 2002, the tuna caught by certain Mexican vessels under 363 metric tons of carrying capacity was contained in products that were sold to US canners as dolphin safe (paragraph 91). Please explain why this is no longer the case. What change occurred since 2002 for Mexican tuna not to be labelled as dolphin safe today?

58. The United States does not know why this is no longer the case.

59. During the panel meeting, Mexico suggested that the tuna products containing tuna caught by Mexican vessels under 363 metric tons and sold in the United States with a dolphin safe label were tuna products that entered the United States during a three week period in 2002.

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[50] Executive Order 12291 (February 17, 1981). Executive Order 12291 was rescinded and replaced with Executive Order 12866 in 1993.

[51] U.S. Imports of Tuna 2009, Exhibit US-1G.

[52] U.S. Imports of Tuna Jan-Aug 2010, Exhibit US-65.

Mexico asserted that during that period the conditions for tuna products containing tuna caught in the ETP using purse seine nets to be labeled dolphin safe under the U.S. provisions was that no dolphins were killed or seriously injured in the set in which the tuna was caught. However, Mexico's suggestion is incorrect. The period that Mexico refers to was in fact the period between the U.S. Department of Commerce's final finding on December 31, 2002, and the stay[53] of application of that standard on January 23, 2003. The tuna products containing tuna caught by Mexican vessels that was sold in the United States with a dolphin safe label under those conditions entered in the first 3 weeks of January 2003. Thus this temporary change in the U.S. dolphin safe labeling conditions would not have affected tuna that was sold to U.S. canners as dolphin safe in 2002 and earlier, as referred to in our first written submission.

Q23. To Mexico: From the information provided by the United States, it would seem that Mexico is able to sell some tuna in the United States, including tuna that is eligible for the dolphin safe label. In particular, the United States contends that:

(a) Some Mexican vessels fish for tuna in the ETP using a technique that does not involve setting on dolphins;

(b) One third of the Mexican fleet registered to fish for tuna in the ETP is composed of vessels under 363 metric tons of carrying capacity which are considered unable to set on dolphins (US first written submission, paragraphs 44-45 and 68-69);

(c) Imports of tuna and tuna products from Mexico totalled US$ 13 millions for the year 2009 (US first written submission, paragraph 90).

Please clarify whether you agree with these statements, and whether this suggests that Mexican tuna has in fact had access to the US market.

60. The United States wishes to clarify how it arrived at the figure that one-third of Mexico's fleet comprises vessels less than 363 metric tons and therefore does not set on dolphins to catch tuna. This figure represents the number of Mexican purse seine vessels registered to fish for tuna in the ETP that are under 363 metric tons, divided by the total number of Mexican purse seine vessels registered to fish for tuna in the ETP. Alternatively, if calculated by carrying capacity, vessels under 363 metric tons comprise 9.2 percent of total carrying capacity of Mexican purse seine vessels registered to fish for tuna in the ETP.[54] In addition to the Mexican purse seine vessels under 363 metric tons that fish for tuna in the ETP exclusively using techniques other

[53] The U.S. Department of Commerce stayed the implementation of the new standard, pending resolution of a motion for preliminary injunction before a U.S. district court. See the public notice at http://swr.nmfs.noaa.gov/tuna/012903.pdf.

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

than setting on dolphins, Mexican purse seine vessels 363 metric tons and above also sometimes use techniques other than setting on dolphins to catch tuna. In fact, during the first Panel meeting, Mexico acknowledged that 20 percent of the total Mexican tuna catch in the ETP was caught using techniques other than setting on dolphins. Exhibit Mex-65A (figure A-2a and A-2b) also indicate that Mexican vessels are using techniques other than setting on dolphins to catch tuna just off the coast of Mexico.

3. The AIDCP - Impact of setting on dolphins in the ETP

Q26. To both parties: Do you consider that the application of the AIDCP, in particular the "Procedures for AIDCP Dolphin Safe Certification System" and the "AIDCP dolphin-safe certification", is capable of achieving the objectives set forth in Article II of the AIDCP, namely the progressive reduction of incidental dolphin mortalities and the elimination of dolphin mortality in the AIDCP "agreement area"?

61. While implementation of the AIDCP has made an important contribution to reducing observed dolphin mortality as a result of setting on dolphins to catch tuna, the AIDCP expressly contemplates that dolphins will be killed and seriously injured when set upon to catch tuna. For this reason, the AIDCP establishes a limit on the number of dolphins that may be killed or seriously injured in a given year. That limit is 5000 dolphins per year. Because the AIDCP recognizes the harm to dolphins from the purse seine fishery from setting on dolphins to catch tuna, the goals of the AIDCP include "[t]o progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery in the Agreement Area,"[55] and "[w]ith the goal of *eliminating dolphin mortality* in this fishery, to seek ecologically sound means of capturing large yellowfin tunas *not in association with dolphins*."[56]

62. The continued implementation of the AIDCP's dolphin conservation program is necessary to continue to monitor and manage the mortality of dolphins in the purse seine fishery for yellowfin tuna in the ETP, and in this context is also important as the primary and direct mechanism used by the AIDCP parties, including the United States, to understand the ongoing effects of the fishery on the dolphin populations, the compliance of the fishing fleets with the provisions of the AIDCP, and any efforts that may be taken to develop alternatives to fishing in association with dolphins.

63. The AIDCP Dolphin-Safe Certification System contemplates that the AIDCP labeling scheme would be based upon the existing administrative infrastructure of the AIDCP, including the AIDCP On-Board Observer Program and the AIDCP Tuna Tracking System. The AIDCP

[55] AIDCP, Article II.1 (italics added), Exhibit Mex-11.

[56] AIDCP, Article II.2, Exhibit Mex-11.

Dolphin-Safe Certification system did not substantively modify or revise those foundational elements of the AIDCP and thus have not affected the AIDCP's programmatic functioning with regard to monitoring or managing dolphin mortalities in the ETP. Thus, the AIDCP dolphin safe certification does not add to what AIDCP already had achieved or could achieve in terms of reducing dolphin mortality and, specifically, accomplishing the objective of the AIDCP in Article II.

Q27. To the United States: Are the objectives of the US DPCIA comparable to the objectives of the AIDCP? If not, how do they differ?

64. The AIDCP and the DPCIA share a similar objective in that they both seek to contribute to protecting dolphins in the ETP, although they seek to do so to a different extent and in a different way. The AIDCP is an intergovernmental agreement to manage the operations and performance of the purse seine tuna fishery in the ETP with the specific objective of reducing dolphin mortalities that result from setting on dolphins to catch tuna in that fishery.[57] The AIDCP also includes as an objective the goal of seeking to eliminate dolphin mortality by seeking ecologically sound means to capture large yellowfin tuna not in association with dolphins.[58] The AIDCP starts from the perspective that dolphin mortality and serious injury is a predictable and expected consequence of setting on dolphins to catch tuna, but that dolphin mortality and serious injury can be reduced through adherence to dolphin morality limits and the application of techniques to reduce dolphin mortality and serious injury when dolphins are set upon to catch tuna.

65. The DPCIA sets out conditions under which tuna products may be labeled dolphin safe and has as its objectives ensuring that consumers are not misled or deceived about whether the product contains 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 set on dolphins.

66. The AIDCP and DPCIA objectives aimed at protecting dolphins are complementary. While the AIDCP seeks to reduce observed dolphin mortality by establishing dolphin mortality limits and application of techniques to reduce dolphin mortality and serious injury when dolphins are set upon to catch tuna, the DPCIA seeks to protect dolphins by ensuring the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna. As the practice of setting on dolphins to catch tuna decreases, the consequent effect on dolphins of that fishing practice (both observed mortalities and serious injuries as well as the other adverse effects reviewed in response to Question 34 and the U.S. First Written Submission) decreases and the protection afforded dolphins increases.

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[57] *See, e.g.,* AIDCP, Article II, para. 1 (Exhibit Mex-11).

[58] AIDCP, Article II, para. 2 (Exhibit Mex-11).

67. The AIDCP does not include ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and therefore in this way the objectives of the AIDCP and the DPCIA are not the same.

Q28. To Mexico: Please elaborate on the sources that support your assertion in paragraph 29 of your first written submission that "using certain procedures recommended or required by the Inter-American Tropical Tuna Commission (IATTC) and AIDCP, it has been possible to virtually eliminate dolphin mortalities".

68. The United States offers two brief comments regarding Mexico's assertion that dolphin mortalities in the ETP purse-seine fishery have virtually been eliminated. First, while the United States agrees that dolphin mortalities have been significantly reduced since the procedures set out in the La Jolla agreement and the AIDCP were implemented, dolphins continue to be killed and seriously injured when they are set upon to catch tuna. In 2009, 1,239 dolphins were observed killed or seriously inured when set upon to catch tuna in the ETP.[59] While relative to the 5 million dolphins that were killed before the La Jolla and AIDCP procedures were put in place,[60] Mexico may be considering 1,239 dolphin deaths as "virtually" none, but with 1,239 dolphin deaths in 2009 it is not accurate to say that dolphin mortality in the purse seine tuna fishery in the ETP has been virtually eliminated.

69. Second, focusing on the reported mortality fails to account for the numerous dolphin deaths that go unreported each year for a variety of reasons. The U.S. answer to Question 34 below provides additional evidence in support of the U.S. position that during the intentional chasing and encircling of millions of ETP dolphins annually, the purse-seine fishery for yellowfin tuna adversely affects dolphin populations and is the most probable explanation as to why they remain so today with no clear signs of recovery.

Q31. To Mexico: The United States has argued that data on bycatch of other species presented by Mexico is inflated, insofar as the tables actually reflect the number of captures, which is a broader concept that includes catches of non-targeted fish, bycatches and releases of animals alive (US first written submission, paragraph 64). In light of this argument, please clarify the meaning of the term "bycatch" as used in the tables presented in your first written submission.

70. As discussed in paragraph 64 of the U.S. First Written Submission, the bycatch tables included in Mexico's First Written Submission, paragraph 35 and 36, are misleading and incomplete. First, for many species but not all shown, these tables show numbers of individuals

[59] 2009 Report on the International Dolphin Conservation Program (2009 AIDCP Report), Document Mop-23-05 (24 September 2010), Exhibit US-66.

[60] U.S. First Written Submission, para. 46.

captured incidental to purse-seine fishing operations in the ETP. Notably, the figures for dolphins include only numbers of animals reported killed, not the total number captured in dolphin sets. This is a clear inconsistency. For the tables cited by Mexico to be complete, the number of dolphins captured in dolphin sets should not be 837, but instead be approximately 3,600,000 (based on 9,000 dolphin sets/yr with an average of 400 dolphins encircled per dolphin set).[61] This figure is over 3 times greater than the total of all other individuals captured in floating object sets, as reported in Mexico's first written submission.

71. Second, as discussed in paragraph 65 of the U.S. First Written Submission, the assertion made by Mexico that from an ecosystem perspective one triggerfish equals one wahoo equals one dolphin is unfounded and invalid. Depending on the trophic position a species occupies in the ecosystem, its reproductive capacity, and other factors, the removal of different species can be expected to have different impacts on the ecosystem. For example, replacement time is greater for larger long-lived species (e.g., marine mammals) than for small taxa (e.g., triggerfish) whose populations turn over quickly; these differences have clear implications for the potential of different species to become depleted and impact ecosystem function.

72. Third, these tables do not include the number of individuals or biomass of large yellowfin tuna captured (and removed) from the ETP ecosystem as a result of the purse-seine fishery on dolphins. Bycatch in ETP purse-seine fisheries (all set types) represents only two percent of the total estimated fishery removals, by weight.[62] Removals of targeted yellowfin tuna, a top predator, may well have the greatest ecosystem impact.

73. Finally, the tables cited by Mexico do not support the claim that catching tuna in association with dolphins is the most environmentally safe purse-seine fishing method because the vast majority of removals that result are of large yellowfin tuna and dolphins, both of which are top predators. Fishing in association with floating objects has a less focused impact than sets on dolphins because a broader range of species and trophic levels, particularly shorter-lived and lower trophic level species, are removed. As a result, "while bycatches of non-target species are perceived as 'wasteful,' fishing across all trophic levels may help to maintain ecosystem stability, whereas biasing catches towards single species may lead to greater shifts in populations of predators and their prey."[63]

Q33. To the United States: In your response to oral questions you argued that the

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[61] IATTC, Effectiveness of Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds, p p.4, table 2, Exhibit US-29.

[62] Olson, R. J., and G. M. Watters. 2003. A model of the pelagic ecosystem in the eastern tropical Pacific Ocean. Bulletin of the Inter-American Tropical Tuna Commission 22:135-218, Exhibit US-67.

[63] Kaiser, M.J. 2000. The implications of the effects of fishing on non-target species and habitats. Pages 383-392 in Kaiser and Groot, eds. Effects of fishing on non-target species and habitats. Blackwell. p. 388, Exhibit US-68.

AIDCP definition of dolphin safe cannot be characterized as "relevant international standard" insofar as Annex 1.1 of the TBT Agreement defines the term standard as "document (...) that provides for common and repeated use (...) " observing that the AIDCP definition serves only for a specific use. The AIDCP definition of dolphin safe is embodied in the AIDCP resolution on system for Tracking and Verifying Tuna which puts in place a system of Tuna Tracking Forms to distinguish dolphin safe tuna from non dolphin safe tuna that are used during tuna fishing operations for each set. It is also used for the purposes on the AIDCP resolution on Procedures for AIDCP Dolphin Safe Tuna Certification and AIDCP Dolphin Safe Tuna Certificates and the AIDCP Dolphin Safe Tuna Label have to be issued in accordance with this definition. Please comment on the relevance of these uses on your position that this definition is not a "relevant international standard".

74. The definition of dolphin safe in the AIDCP tuna tracking and verification resolution and cross-referenced in the AIDCP dolphin safe certification resolution is not a standard. First, the definition does not provide for common and repeated use rules, guidelines or characteristics for products or related process and production methods (or an aspect covered by the second sentence in the definition of a standard such as labeling requirements). Second, the definition was not approved by a recognized body within the meaning of Annex 1 of the TBT Agreement. The Panel's question asks about the first issue, which is addressed below.

75. Annex 1 of the TBT Agreement defines a standard as a "document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products ...." Thus, one element necessary for a measure to constitute a standard is that it provide rules, guidelines etc. for "common and repeated" use. The ordinary meaning of the word "common" is "shared...of general application,"[64] while the ordinary meaning of the word "repeated" is "frequent."[65] Thus, "common" addresses the shared or general nature of the measure, while "repeated" addresses the frequency the measure is to be used. A rule, guideline etc. that is for common and repeated use would not be one that was drafted for the specific purpose of defining a term in an international agreement.

76. The definition of dolphin safe in the AIDCP tuna tracking and verification resolution sets out a definition for purposes of that resolution and, by virtue of the cross-reference in the AIDCP dolphin safe certification resolution, for purposes of the AIDCP dolphin safe certification resolution. Neither resolution purports to establish a definition of "dolphin safe" outside the context of the AIDCP resolutions. Instead, the resolutions set out a definition for a particular purpose: understanding and implementing the AIDCP resolutions and, in particular, what those resolutions mean by "dolphin safe."

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[64] *New Shorter Oxford English Dictionary* (1993), p. 453.

[65] *New Shorter Oxford English Dictionary* (1993), p. 2548.

77. Under Mexico's logic, any definition in an intergovernmental resolution or agreement pertaining to product characteristics, labelling requirements etc. could be construed to be a rule, guideline etc. for common and repeated use. Coupled with Mexico's argument that an international agreement (or the parties to it) constitutes a "body," this would not only vastly expand the scope of the term standard in the TBT Agreement, but have serious implications with respect to Members' rights and obligations under any intergovernmental resolution or agreement. For example, a Member may have agreed to a particular definition of a term for purposes of a particular intergovernmental agreement and may have agreed that no party had an obligation to implement that definition for purposes of its own domestic law. However, under Mexico's logic,[66] that Member would have an obligation to apply that definition not only for purposes of that intergovernmental agreement but with respect to any technical regulation or standard it might adopt. Indeed, that is what Mexico is arguing in this dispute: that the United States has an obligation to adopt the definition of "dolphin safe" cross-referenced in the AIDCP dolphin safe certification resolution when that resolution expressly states that parties to that resolution are not required to use the procedures set out in that resolution "especially in the event that they may be inconsistent with the national laws of a Party."[67] What Members of an intergovernmental agreement or resolution intend in defining specific terms is not the creation of standards for use by outside individuals or organizations, but rather the establishment of terms with special meanings for use solely within the scope of that agreement or resolution.

Q34. To the United States: Please provide evidence in support of your claim that the setting on dolphins causes unobserved mortality and injury even if the procedures recommended or required by the IATTC and AIDCP are implemented.

78. As an initial note, the IATTC does not address (or does not currently address) dolphin bycatch and mortality in the fishery. These issues are instead addressed under the AIDCP.

79. While it is expected ETP dolphin populations should be recovering at 4-8% per year given reported mortality in the fishery, results from the most recent assessment model indicate population growth rates for northeastern offshore spotted dolphins and eastern spinner dolphins are very likely (83% probability) less than 3% per year. The median population growth rates for

[66] Mexico's logic also includes that "an international standards exists if such document meets the definition of 'standard' provided in Annex 1.2 of the TBT [Agreement]." Mexico First Written Submission, para. 232. As elaborated in the response to Question 59, a standard is not "international" simply by virtue of the fact that it meets the definition of a standard in Annex 1 of the TBT Agreement. To be an "international standard", a standard must be adopted by a body whose membership is open to at least all WTO Members, based on consensus and made publicly available.

[67] AIDCP Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification, Exhibit Mex-56; *see also* Mexico First Written Submission, para. 235.

these two dolphin stocks were estimated to be 1.7% and 1.4% per year, respectively.[68] Further, given the scientific uncertainty inherent in the abundance estimates, it is possible that these dolphin populations are actually decreasing. Thus there must be some amount of unobserved mortality would account for the lack of recovery of these dolphin populations.

80. Direct observation indicates that currently reported mortality is underestimated by at least 14% per year based on the abandonment of dependent dolphin calves when their mothers are killed in the fishery (even with full compliance with the AIDCP). Research has shown that 75 to 95% of lactating females killed in purse seine nets are not accompanied by their nursing, dependent calves.[69] A vast majority of these abandoned nursing calves will die from starvation if they are not first killed by a shark or other predator. This means that virtually all dependent calves of mothers killed in the fishery go unaccounted for in reported kill numbers.

81. Further, even when mothers survive chase and encirclement, dependent calves are likely to be separated from their mothers by significant distances (kilometers) and die as a result of starvation or predation. Research indicates physiological constraints prevent very young dolphins from swimming at the high sustained speeds needed to keep up with their mothers during chase and encirclement.[70]

82. Examination of dolphins killed in the fishery and assessment of dolphins captured during a controlled chase-recapture experiment yielded important evidence about the unobserved injuries chase and encirclement causes in dolphins:

> "[T]here is some evidence for potential stress-related injury or unobserved mortality of dolphins involved in purse seine fishing operations, based on the combined documentation of: (a) moderately elevated stress hormones (catecholomines) and enzymes indicative of muscle damage observed in live fishery-involved dolphins; (b) evidence of past (healed) muscle and heart damage in dolphins killed during fishing operations; and (c) fatal heart damage in virtually all fishery-killed dolphins, which most

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[68] 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.

[69] 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.; 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. .

[70] 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.

probably was related to elevated catecholomines."[71]

83. Further, recent research "clearly illustrates that the purse-seine fishery has the capacity to affect dolphins beyond the direct mortality observed as bycatches." In particular,

> "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 behavior (Chivers & Scott 2002, Mesnick et al. 2002, Santurtún & Galindo 2002).[72]

84. As noted in the U.S. First Written Submission, 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 or juvenile dolphins when released.[73]

85. Additionally, there are several ways in which dolphin serious injury and mortality in the ETP purse-seine fishery could go unobserved or unreported. First, there is certainly human error that occurs when an observer simply does not see all of the animals killed or injured in a set or when injuries occur but do not result in immediate impairment/death and are not immediately apparent upon visual inspection by the observer. Injuries and deaths that are not immediately apparent to the observer are currently estimated at a minimum level and are based on direct observations, as in the response to Question 36. It should be emphasized that this estimate is a bare minimum unobserved mortality. Given that estimated population growth rates are much lower than a recovering population would exhibit, the actual unobserved mortality is certainly greater, and potentially much greater – on the order of tens of thousands of animals per year. As explained further in the U.S. response to Question 37, the magnitude of the difference between the estimated population growth rate and that of a recovering dolphin population equates to approximately 34,000 missing dolphins each year.

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[71] Reilly et al. 2005. Report of the scientific research program under the International Dolphin Conservation Program Act. NOAA-TM-NMFS-SWFSC-372, p.76. Exhibit US-19.

[72] 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.

[73] U.S. First Written Submission, paragraph 56.

Q35. To the United States: Please provide scientific evidence that dolphins are not recovering in the ETP and on the causal relationship between the absence of recovery and the setting on dolphins.

86. Please see the U.S. answer to Questions 34 and 36 regarding evidence that dolphin populations in the ETP are not recovering as well as paragraphs 47-49 of the U.S. First Written Submission.

87. Regarding the causal relationship between the absence of recovery and the setting on dolphins, estimated population growth rates are the primary indicator we have to assess the success of AIDCP conservation and management measures in reducing dolphin mortalities to levels approaching zero and enabling the recovery of dolphin stocks that became depleted as a result of the fishery. A comprehensive research program evaluated the impacts of the purse-seine fishery on dolphins, as well as the potential for other processes to impact the recovery of depleted ETP dolphin populations, including ecosystem change to a new state in which dolphin abundance is reduced relative to historic levels. On these points, the final report of this comprehensive research program concludes:

> (1) Physical and biological data do not support the supposition that such a large-scale environmental change has occurred in the ETP in such a way that it would no longer support the same numbers of these dolphins as it did before.
>
> (2) Regarding fishery effects beyond reported bycatch, "For some effects, such as cow-calf separation, we have estimates of the minimum size of the effect. For others, such as stress effects and unreported mortality, we have indications that effects may exist but do not have any quantitative estimates of their size. It is probable that all of these effects are operating to some degree, and it is plausible that in sum they could account for the observed lack of growth of the dolphin populations. If the sum of the fishery effects were a few dolphins per set or a few dolphins per 1000 dolphins chased, it would be sufficient to account for the lack of recovery."[74]

88. Thus, because we know fishery effects exist at some level beyond reported mortality (a minimum of 14% based on cow-calf separation alone; please see the U.S. response to Question 34) and the environmental change hypothesis is not supported, we conclude the most likely reason ETP dolphin populations are not recovering at 4% per year or greater is due to unobserved and/or unreported mortalities in the fishery.

Q36. To the United States: Please comment on the significance of approximately

[74] Reilly et al. 2005. Report of the scientific research program under the International Dolphin Conservation Program Act. NOAA-TM-NMFS-SWFSC-372, p.33. Exhibit US-19.

1000 dolphins being killed or seriously injured each year (using as point of reference the 2008 IATTC Annual Report you mentioned in paragraph 53 of your first written submission) year on the recovery of stocks, in light in particular of the goal of the La Jolla agreement, as described by Mexico in its oral statement, of reducing dolphin deaths to less than 5000 per year (see paragraph 12 of Mexico's oral statement). Is a bycatch of 1000 dolphins per year significant, in terms of population recovery or conservation?

89. Given the relative size of ETP dolphin populations, the death of 1,000 dolphins annually is not believed to be significant from a population recovery perspective. In other words, if only 1,000 dolphins were killed each year in the purse-seine fishery for yellowfin tuna we would expect ETP dolphin populations to be increasing (recovering) between 4% and 8% per year. In fact, as elaborated in response to Question 37, estimated population growth rates for ETP dolphins are much lower, less than 2% per year. We know, for example, that as a bare minimum estimate the separation of mothers and dependent calves is alone responsible for at a 14% per year increase in fishery mortality of dolphins beyond the reported numbers.[75] We also know dolphin deaths and serious injuries may go unreported for a variety of other reasons. In addition, we have indications, though no precise estimates, that the process of chasing for prolonged periods and multiple times per year individual ETP dolphins results in spontaneous abortions, increased predation as a result of exhaustion, and stress effects that negatively impact reproduction.[76] Recent research using aerial photography also indicates that fishing pressure has a negative effect on dolphin reproduction.[77] Please also see the U.S. response to Question 34.

Q37. To both parties: Please clarify what parameters are used to determine whether dolphin populations are depleted or recovering, and how the impact of mortality or injury arising from setting on dolphins is assessed in this context.

90. The terms "depleted" and "recovering" are not mutually exclusive; a population could be both depleted and recovering. A depleted population, as defined by the U.S. Marine Mammal Protection Act, is less than 60% of its historic abundance. In the context of ETP dolphins, historic abundance means dolphin abundance prior to inception of the practice of setting on dolphins to catch tuna.

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[75] 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.

[76] Reilly et al. 2005. Report of the scientific research program under the International Dolphin Conservation Program Act. NOAA-TM-NMFS-SWFSC-372, p.33. Exhibit US-19.

[77] Cramer, K.L., W. Perryman and T. Gerrodette. 2008. Declines in reproductive output in two dolphin populations depleted by the yellowfin tuna purse-seine fishery. Mar. Ecol. Prog. Ser. 369. Exhibit US-26.

91. ETP dolphin populations would be considered recovering if their estimated population growth rates were at least 4% per year, as the maximum annual population growth rate for dolphins is estimated to be 8%.[78] An annual population growth rate of 4% per year is expected in this case given that ETP dolphins are depleted to between 20% and 30% of their pre-fishery abundance levels[79], and assuming that the reported dolphin mortality in the fishery (approximately 1,200 per year) is the full extent of the fishery impact on dolphins. If the fishery has an adverse impact on dolphins beyond the reported mortality, and we have evidence this is the case, we would expect an annual population growth rate less than 4%. In fact, this is indeed what we see.

92. Estimation of population growth rates is complicated and is best done using assessment models.[80] Because of the uncertainty surrounding and variability in point estimates of abundance it is not possible to infer population growth rates by looking at perceived trends in these point estimates over time. Results from the most recent assessment model indicate population growth rates for northeastern offshore spotted dolphins and eastern spinner dolphins are very likely (83% probability) less than 3% per year; the median population growth rates for these two dolphin stocks were estimated to be 1.7% and 1.4% per year, respectively.[81] The differences between the observed growth rates and the expected rate of at least 4% per year are 2.3% and 2.6% per year for northeastern offshore spotted and eastern spinner dolphins, respectively.[82] Given the most recent population estimates, and considering approximately 1,200 dolphins are reported killed in the fishery each year, these percentages correspond to about 14,000 missing northeastern offshore spotted dolphins and 20,000 missing eastern spinner dolphins per year, for a total estimate of 34,000 missing dolphins each year.[83]

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[78] Reilly SB, Barlow J. 1986. Rates of increase in dolphin population size. Fish Bull 84:527-533, Exhibit US-69.

[79] Because they are not thought to be near the carrying capacity of the ecosystem where food limitation and other constraints might inhibit growth rates, their populations should be growing at or near the maximum population growth rates for dolphins (4-8% per year).

[80] 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.13, Exhibit US-20.

[81] 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.

[82] For assessment models used, see 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. Exhibit US-21.

[83] This same calculation using previous abundance estimates (resulting in 32,000 missing dolphins per year) is published in Appendix 7 of Reilly et al. 2005. Report of the scientific research program under the International Dolphin Conservation Program Act. NOAA-TM-NMFS-SWFSC-372, p.77-78. Exhibit US-19. The calculation is explained in greater depth and accompanied by tables showing missing dolphins by stock.

Q39. To the United States: In paragraph 117 of your first written submission you claim that in 1994 the United States' vessels abandoned the practice of setting on dolphins in the ETP. Please indicate:

(i) whether the United States' vessels are still fishing in the ETP using different techniques;

93. U.S. vessels do fish in the ETP using techniques other than intentionally setting on dolphins with purse seine nets. Other fishing techniques/gear types used in the ETP by U.S. flagged commercial vessels to target tuna are: pole & line fishing; troll fishing, which is the predominant gear used by U.S. vessels that catch albacore tuna; and longline fishing.

94. Two U.S. full-time purse seine vessels are currently registered to fish in the ETP for 2010, and these vessels use techniques other than setting on dolphins to catch tuna. (For a vessel to catch tuna in the ETP by setting on dolphins, the country to which the vessel is flagged must have sought and obtained an AIDCP "dolphin mortality limit" (DML) for any of its vessels that intend to set on dolphins to catch tuna. No U.S. tuna purse seiner has ever obtained an AIDCP DML.[84])

(ii) whether United States' vessels still set on dolphins outside the ETP;

95. No U.S. vessels set on dolphins to catch tuna outside the ETP. There is no regular or signification association between tuna and dolphins outside the ETP that could be commercially exploited to catch tuna.

(iii) what species of tuna the United States' fleet catches in and outside the ETP.

96. In the ETP, U.S. vessels catch albacore, skipjack, yellowfin, bigeye, and bluefin tuna.[85] Outside the ETP, U.S. vessels catch albacore, skipjack, yellowfin, bigeye and bluefin tuna.

4. Consumer preferences

Q40. To both parties: You both seem to acknowledge that consumers in the US market have a preference for tuna labelled dolphin safe. Please clarify the exact nature of consumer preferences in relation specifically to tuna caught in association with dolphins:

(a) Do you consider that the consumers' preference is determined by the fishing

[84] Only one US purse seine vessel sought a DML, but the vessel subsequently reflagged.

[85] National Marine Fisheries Service, Cannery Receipts database, Long Beach, CA.

method and that the label accurately reflects such method?

97. Consumers generally have a preference for tuna products that contain tuna that was caught in a manner that does not adversely affect dolphins. Products labeled dolphin safe assure consumers that the tuna products they purchase do not contain tuna that was caught in a manner that adversely affects dolphins.

98. 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. The amicus curiae submission filed in this dispute also highlights this sentiment.[86]

99. A few weeks prior to Congressional passage of the DPCIA, Representative Barbara Boxer (the sponsor of H.R. 2926, of four bills which formed the basis for what ultimately became the DPCIA) included the following in her remarks before the House of Representatives regarding the pending legislation:

> Mr. Speaker, our dolphin protection efforts today will support and supplement the tuna industry's effort to eliminate the practice of killing dolphin in pursuit of catching tuna. Someday soon, and I hope it is very soon, we will move to end the discredited practice of purse seining on dolphin.
>
> It is also important to state for the record how we arrived at this point today. Without years of effort from a large number of dedicated, nonprofit organizations, including the Dolphin Coalition, Greenpeace, Humane Society of the United States, Defenders of Wildlife, Earth Island Institute, and the Center for Marine Conservation, tuna-associated dolphin mortality would still be the tuna industry's sad and ugly secret. Without the letters and phone calls of countless consumers and schoolchildren from across the United States, we would not have gained 183 cosponsors of the Dolphin Protection Consumer Information Act, and the tuna industry would no doubt have continued to ignore this senseless slaughter of one of the world's most beautiful and intelligent creatures. Without the efforts of many of my colleagues, first and foremost Senator Joe Biden, the author of the Senate dolphin bill, the gentleman from Massachusetts [Mr. Studds], the gentleman from Minnesota [Mr. Sikorski], the gentleman from New Jersey [Mr. Saxton], the gentlewoman from Rhode Island [Ms. Schneider], the gentleman from Pennsylvania [Mr. Walgren], as well as Senator John Kerry of Massachusetts, this legislation would have faced a more difficult and probably an impossible road.

[86] Written Submission of Non-Party Amici Curiae Human Society International and American University, paras. 18-20, 25, 62-64.

> Without the skill of the staffs of the Committee on Merchant Marine and Fisheries, the Committee on Energy and Commerce, the Senate Commerce Committee, we could not have gotten this compromise crafted in time. Without the dedicated and skillful staff work of the House Fisheries and Wildlife Conservation Subcommittee, Jim Guthrie of Senator Biden's staff, and particularly my own staffer, Josh Kardon, this legislation might never have seen the light of day. And, again, without the hard work and leadership of Senator Biden, who tirelessly championed the legislation in the Senate, and without the gentleman from Massachusetts [Mr. Studds], who gave this bill his unyielding support, dolphin-safe tuna we can depend on would still be just a hope.
>
> Mr. Speaker, on behalf of the dolphins and consumers everywhere, as well as for myself, I thank all of these good people for their concern and courage.
>
> Mr. Speaker, in closing I want to thank the committee for working with us in a bipartisan fashion, for not ignoring the millions of Americans who know that the way we treat all living creatures is a very telling measure of our society.[87]

In response to 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, Congress enacted the DPCIA.

100. In 1996, Congress considered amendments to the DPCIA. Senator Boxer 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

[87] Statement of Representative Barbara Boxer before the House of Representatives (October 23, 1990), Fisheries Conservation Amendments of 1990, Congressional Record, 101st Cong., p. H11890-1189 (emphasis added), Exhibit US-70.

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.

***

I urge the members of this subcommittee to watch the videos on the practice of encircling dolphins. There is no scientific evidence proving it is not harmful. No one can tell me that the stress of relentless high speed chasing, and the encircling and netting is a dolphin safe practice. It isn't. It would be misleading to call it dolphin safe. It would be consumer fraud. You can't tell me that the American people, and the millions of school children who pressed for an end to the harassment and injury and death of dolphins, will stand by and let us call that dolphin safe.[88]

101. It has been over 20 years since enactment of the DPCIA, and the U.S. dolphin safe labeling provisions continue to assure consumers that when a dolphin safe label appears on tuna products sold in the United States, the product does not contain tuna caught in a manner that adversely affects dolphins.

(b) Are consumer preferences identical in all segments of the market, that is, do canners processors for example, display the same preferences as final consumers? Do retailers (shops owner) display the same preferences as final consumers? Do consumers of different kinds of tuna in the different price segments of the tuna market display the same preferences with regard to "dolphin safety"?

102. Consumers generally have a preference for tuna products that do not contain tuna that was caught in a manner that adversely affects dolphins. Retailers of tuna products share this preference, as evidenced by the fact that major U.S. grocers sell only dolphin safe tuna products.

103. As noted in the U.S. First Written Submission, all three of the major U.S. tuna companies have policies that they will not purchase or sell tuna or tuna products that are not caught by setting on dolphins.[89]

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[88] *See* Statement of Senator Barbara Boxer , International Dolphin Conservation Program Act, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess (April 30, 1996), Exhibit US-71.

[89] U.S. First Written Submission, para. 92; Exhibits US-32, US-36, US-37.

Q41. To both parties: Please explain what the understanding of the "term dolphin safe" is for US consumers at each consumption stage (canners, retailers and final consumers) and how the dolphin safe label may influence each category of consumers.

104. All three of the major U.S. tuna companies have policies addressing "dolphin safe" tuna. These policies all indicate that the company will not purchase or sell tuna or tuna products that are not caught by setting on dolphins.[90] U.S. tuna companies sell both domestic and imported tuna products.

105. All major U.S. grocery retailers of tuna products sell only dolphin safe tuna products. Exhibit US-39 includes a statement by a U.S. importer of canned tuna products from Mexico. The statement clearly evidences that importer's understanding that dolphin safe in the United States means tuna products that were not caught by setting on dolphins.[91] (It also indicates that at least in 1996 there were tuna canneries in Mexico that processed tuna that was not caught by setting on dolphins and eligible to be included in tuna products labeled dolphin safe in the United States.)

106. As reviewed in response to Question 40, it 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 that lead to the enactment of the DPCIA. Today, there continues to be an expectation that when the term "dolphin safe" appears on tuna products it means dolphins were not harmed when the tuna was caught. Further, for those U.S. consumers who want to know precisely what dolphin safe means under U.S. law, information explaining that is readily available. For example, the DPCIA and its implementing regulations are publicly available from a variety of sources and the U.S. government has established a "dolphin safe" website where the National Marine Fisheries Service (NMFS) explains what "dolphin safe" means when it appears on tuna products sold in the United States.[92]

107. It should be stressed that the objective of the U.S. 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 along with protecting dolphins by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna. Allowing the term "dolphin safe" to appear on tuna products that were caught by setting dolphins – a manner of catching tuna that adversely affects dolphins – would mislead consumers to believe that the tuna product did not contain tuna that was caught in a manner harmful to

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[90] Exhibits US-32, US-36, US-37.

[91] Statement of Mr. Fransisco Valdez, Exhibit US-39.

[92] *See* <http://dolphinsafe.gov/faq.htm>.

dolphins.

Q42. To the United States: Please comment on the results of the national poll presented by Mexico as Exhibit MEX - 64, suggesting that 48% of the public believes that "dolphin safe" means that no dolphins were injured or killed in the course of capturing tuna (which is the AIDCP standard) whereas only 12% believe that it means that dolphins were not encircled and released in the capture of tuna (Mexico's oral statement, paragraph 49). Could you please provide additional material concerning consumers' perception of the label?

108. Mexico cites the result of the poll it had conducted (Exhibit Mex-64) as evidence that U.S. consumers do not believe that dolphin safe means dolphins were not set upon to catch tuna and instead means no dolphins were killed or injured. The poll does not support this conclusion. First, the relevant questions in the poll (T.2 and T.3) posed mutually exclusive choices about what the term "dolphin safe" does mean or could mean. Specifically, the choices for responses in questions T.2 and T.3 were separated by the word "or." The poll did not allow responders to indicate that they believed "dolphin safe" means no dolphins were killed or injured *or* encircled. Second, the poll framed the questions in a way that was misleading. By asking whether "dolphin safe" means dolphins were not encircled and released *or* no dolphins were killed or injured, the questions suggest that dolphins are not injured by being encircled to catch tuna. But, as reviewed in the response to Question 34 and the U.S. First Written Submission and oral statements,[93] encircling dolphins to catch tuna adversely affects dolphins even when they are not killed or seriously injured in the nets. Third, the fact that 48 percent of individuals responded that dolphin safe means no dolphins were injured in the course of capturing tuna[94] may actually support the conclusion those individuals believe that dolphin safe means that dolphins were not set upon to catch tuna, since setting on dolphins to catch tuna adversely affects dolphins.

109. In any event, the poll Mexico cites misses the point. The objectives of the U.S. dolphin safe labeling provisions is to ensure consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and to protect dolphins by ensuring the U.S. market is not used to encourage the practice of setting dolphins to catch tuna. These objectives are achieved regardless of whether consumers believe that dolphin safe means specifically that no dolphins were set upon to catch the tuna or simply that dolphins were not adversely affected when the tuna was caught.

110. For additional information on consumer perceptions of the label, please see the U.S. responses to Questions 40 and 41.

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[93] U.S. First Written Submission, paras. 52-59; U.S. Opening Statement at the First Meeting with the Panel, para. 7.

[94] Exhibit Mex-64.

Q44. To the United States: Please explain whether and how the evolution of US measures on dolphin-safe tuna has influenced the consumers' understanding of the notion of dolphin safe tuna.

111. The U.S. dolphin safe labeling provisions condition the labeling of tuna products as dolphin safe on purse seine nets not having been intentionally deployed on or used to encircle dolphins to catch the tuna. There has been no evolution of U.S. dolphin safe labeling provisions in that regard. The U.S. Congress amended the DPCIA in 1997 to include the condition that no dolphins were killed or seriously injured in the sets in which tuna were caught. This change was made in response to a request by the U.S. Executive Branch to amend the DPCIA to reflect the changes contemplated in Annex I of the Panama Declaration, which provided that "the term 'dolphin safe' may not be used 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."[95] At that time Congress also amended the DPCIA to permit tuna products caught by setting on dolphins in the ETP to be labeled dolphin safe conditional upon the Secretary of Commerce making a finding that setting on dolphins to catch tuna was not having a significant adverse impact on depleted dolphin populations. However, there was no such finding that conformed with the requirements of the statute, so this condition did not change. The U.S. dolphin safe measures have always sought to ensure that the dolphin safe label accurately conveyed that the tuna product so labeled did not contain tuna caught in a manner that was harmful to dolphins.

112. Furthermore, the U.S. dolphin safe labeling provisions measures do not influence consumer understanding of the term dolphin safe; rather, they reflect consumers' expectations that tuna products labeled dolphin safe do not contain tuna caught in a manner that is harmful to dolphins. Please see the U.S. answers to Questions 40 and 41.

C. CLAIMS UNDER THE TBT AGREEMENT

1. Order of analysis of TBT claims

Q45. To both parties: You have addressed your TBT claims in a different order. Could you clarify the order of analysis that should be followed?

113. The United States first addressed whether the U.S. safe labeling provisions fall within the definition of a technical regulation in Annex 1 of the TBT Agreement and then addressed the TBT claims in the order in which the provisions appear in the TBT Agreement. The United States believes the Panel could, if after addressing the threshold question of whether the U.S. dolphin safe labeling provisions are technical regulations and concluding that they were, either follow that approach or the approach in Mexico's first written submission, which addressed its claims under Articles 2.2 and 2.4 of the TBT Agreement followed by its claims under Article 2.1

[95] Panama Declaration, Exhibit Mex-20.

of the TBT Agreement.

2. Definition of a "technical regulation"

Q46. To both parties: In your view, for a document to constitute a technical regulation under Annex 1.1 of the TBT Agreement, should the document as a whole be mandatory or only the product characteristics and their related processes and production methods as laid down in the document?

114. In order for a document to constitute a technical regulation, compliance with the product characteristic (or other aspects of a technical regulation covered by the second sentence of the definition of a technical regulation) set out in that document must be mandatory. Thus, for example, if a law sets out in one section product characteristics with which compliance is mandatory and in another section sets out product characteristics with which compliance is not mandatory, the portion of the law that sets out product characteristics with which compliance is mandatory would be a technical regulation, while the portion setting out product characteristics with which compliance is not mandatory would not be a technical regulation.

115. Considering a "document" to include subcomponents of a larger document and that compliance with the subcomponent setting out the product characteristics etc. is what matters, ensures that a measure that sets out product characteristics etc. with which compliance is mandatory does not fall outside the definition of a technical regulation simply because it may be subcomponent of a law that also includes non-mandatory elements.

Q48. To both parties: Considering that the definitions of both a "technical regulation" and a "standard" in Annex 1.1 and 1.2 of the TBT Agreement include "labelling requirements", please comment on the possible differences in meaning of this term in these two provisions. In particular, please comment on whether the object and purpose of the TBT Agreement may shed some light on establishing such distinctions.

116. The term "labelling requirement" should be construed to have the same meaning in both the definition of a technical regulation and the definition of a standard. First, ISO/IEC Guide 2:1991 defines the term "requirement" as a "provision that conveys criteria to be fulfilled."[96] Annex 1 of the TBT Agreement provides that terms used in the TBT Agreement shall have the same meaning as the terms defined in ISO/IEC Guide 2:1991, except for those terms specifically defined in Annex 1 of the TBT Agreement. Thus, the ISO/IEC Guide's definition of the term "requirement" applies to the term "requirement" as it appears both in the definition of technical regulation and the definition of standard.

[96] ISO/IEC Guide 2:1991, para. 7.5.

117. Second, the context in which the term "labeling requirement" appears supports ascribing the same meaning to the term in both definitions. In particular, the term "labelling requirement" appears in a section of the TBT Agreement (Annex 1) that sets out precise definitions of particular terms used in the TBT Agreement. Further, the definitions of the terms "standard" and "technical regulations" immediately proceed/follow each other. Had the drafters of the TBT Agreement intended the term "labelling requirement" to mean something different in these two definitions, Annex 1 would have been the appropriate place to set that out, yet they did not do so. In addition, the explanatory note to the definition of the term standard states: "For purposes of this Agreement standards are defined as voluntary and technical regulations as mandatory documents." This suggests that the key difference in meaning as between the terms technical regulation and standard with which drafters of the TBT Agreement were concerned was whether compliance was mandatory or voluntary, and that the drafters did not intend for the product characteristics, labelling requirements etc. referred to in both definitions to have different meanings.

118. In addition, the fourth preambular clause of the TBT Agreement states Members' desire to ensure that "technical regulations and standards, including . . . labelling requirements . . . do not create unnecessary obstacles to international trade." This further indicates that the drafters considered the term "labelling requirements" to have the same meaning whether it was the subject of a technical regulation or standard.

Q49. To the United States: Reference has been made to the US notification of the DPCIA to the TBT Committee under Article 2.9 of the TBT Agreement. Please clarify the status and legal value of such notification and the reasons for which it was notified as a technical regulation.

119. The United States notified regulations implementing the DPCIA in error. The erroneous notification[97] was made on January 10, 2000, and withdrawn[98] on March 21, 2001. In a meeting of the Committee on Technical Barriers to Trade, the U.S. representative explained that the notification had been made in error since compliance with the labeling provisions was voluntary.[99]

3. The alleged mandatory nature of the dolphin safe labelling provisions

Q50. To the United States: What are the legal consequences of not complying with the legal requirements of the United States' safe dolphin labelling provisions? In particular, what are the legal consequences of using a label suggesting that dolphins

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[97] Notification, G/TBT/Notif.00/5 (10 January 2000).

[98] Notification, G/TBT/Notif.00/5/Corr.2 (21 March 2001).

[99] Minutes of the Meeting Held on 17-19 May 2000, G/TBT/M/19 (27 June 2000), para. 7.

were not harmed during tuna harvesting operations when the product carrying such label does not comply with the dolphin safe labelling provisions?

120. Falsely or incorrectly labeling tuna product as dolphin-safe, whether it involves domestic or imported product, can be prosecuted under multiple federal statutes depending on the facts and circumstances of the case. The National Marine Fisheries Service (NMFS), an agency of the U.S. Department of Commerce, conducts a significant amount of outreach to educate tuna processors, marketers, and retailers on the conditions for labeling tuna products dolphin safe, including though its website, presentations at trade shows, press releases, and seminars via the Internet. Although rare to date, when an enforcement action must be taken related to false or incorrect dolphin safe labeling, the facts (e.g. false or incorrect supporting documents) often allow the United States to use general false statement or smuggling prohibitions (see 18 U.S.C. §1001(a)(2) and 18 U.S.C. §545), as a basis for prosecution. The United States may also use other federal labeling standards (see Food, Drug and Cosmetic Act, 21 U.S.C. §331), to support the prosecutions. NMFS or the U.S. Department of Justice may also prosecute violators directly under the Dolphin Protection Consumer Information Act or its implementing regulations (see, e.g., 50 CFR 216.92(b)).

121. The DPCIA provides that it is a violation of the Federal Trade Commission Act (FTCA) to import, sell etc. any tuna product labeled dolphin safe unless the conditions set out in the DPCIA are met. Thus, importing, selling etc. tuna products labeled dolphin safe that do not meet the conditions to be labeled dolphin safe would constitute a violation of the FTCA.

Q51. To both parties: Please clarify whether label designations, different from the United States' official dolphin safe label, suggesting that dolphins were not harmed during the tuna harvesting operations are allowed under the United States' laws and regulations? Would a label based on "meeting the protection standard of AIDCP" or "no juvenile tuna caught" be permitted in the US? If so, why is Mexico not using such a label?

122. The U.S. dolphin safe labeling provisions condition including the term "dolphin safe" (whether as part of the official dolphin safe label or any alternative label) or any other term or symbol that falsely claims or suggests that the tuna products do not contain tuna that was caught in a manner that adversely affects dolphins on tuna products unless the conditions in the U.S. provisions are met.[100]

123. With respect to a tuna product that contains tuna caught by setting on dolphins, the words "meeting the protection standard of AIDCP" or "no juvenile tuna caught" could only be included on the product label if those words did not falsely claim or suggest that the tuna product did not contain tuna that was caught in a manner that adversely affects dolphins. The United States has

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

not made a determination regarding whether including such words on tuna products that were caught by setting on dolphins would falsely claim or suggest that the tuna products do not contain tuna that was caught in a manner that adversely affects dolphins, and as far as the United States is aware, no marketer of tuna products has attempted to sell tuna products in the United States with those words included on the product label.

124. Dolores brand tuna products in Mexico have been labeled with the term "amigo del delfin" (i.e. friend of the dolphin) and "protegemos al delfin" (i.e., we protect dolphins). Dolores products when sold in the United States have not been labeled with any dolphin safe claims.

Q52. To both parties: Please express your views on whether a labelling scheme should be considered mandatory if failure to comply with it would result in preventing the products in question from accessing the market?

125. A product labeling scheme is mandatory if it requires products to be labeled in a certain way (e.g., to contain certain information on a label) to be sold, imported, distributed or otherwise marketed. Thus, a labeling scheme would be mandatory if the labeling scheme – or some other government action – prohibited products from being sold, imported, distributed or otherwise marketed that were not labeled in that way. A labeling scheme that does not require products to be labeled in a certain way to be sold, imported, distributed or otherwise marketed is a voluntary labeling scheme.

126. This view is based on the definition of the term "technical regulation" read in its context, in particular juxtaposed against the definition of the term "standard," keeping in mind that neither definition should be read in a way that would render all or part of it *inutile*.[101] Both the definition of a technical regulation and the definition of a standard refer to "labelling requirements." A labeling requirement is a technical regulation if compliance with it is mandatory; a labeling requirement is a standard if compliance with it is not mandatory. Thus, the question of whether a measure constitutes a "labeling requirement" and whether compliance with that measure is mandatory are separate inquiries and meaning must be given to each term.[102] An interpretation of the definition of the term technical regulation that gives meaning to both is that a labeling requirement sets out the conditions under which a product may be labeled in a certain way and be considered to conform to that labeling requirement,[103] while the phrase "with which compliance is mandatory" means the product must be labeled in accordance with that labeling

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

[102] In this regard, we also note that the definition of a standard refers to "rules." That term must also be giving meaning apart from what it means for compliance to be mandatory since the definition of a standard only covers measures with which compliance is not mandatory. TBT Agreement, Annex 1, para. 2.

[103] *See* ISO/IEC Guide 2:1991, para. 7.5 ("provision that conveys criteria to be fulfilled"); *New Shorter Oxford English Dictionary,* p. 2557 ("a condition which must be complied with").

requirement in order to be sold, imported, distributed or otherwise marketed.

127. Mexico's argument that the U.S. dolphin safe labeling provisions have prevented Mexican tuna products from accessing the U.S. market is not based on the U.S. dolphin labeling provisions or any other measure or other government action that limits opportunity for Mexican tuna products to be imported, sold, distributed or otherwise marketed in the United States. It is based on retailer and consumer preferences for tuna products that were not caught in a manner that adversely affects dolphins.

Q56. To Mexico: Please comment on the United States' suggestion, in paragraph 135 of its first written submission, that admitting that the definition of a "technical regulation" in Annex 1.1 of the TBT Agreement covers both de jure and de facto mandatory product characteristics, would result in rendering the definition of a "standard" in the second paragraph of that instrument "inutile".

128. The United States would like to clarify the point it was making in paragraph 135 of the U.S. First Written Submission. The United States was not addressing whether there existed "*de facto*" mandatory product characteristics. Instead, paragraph 135 made the point that, if a labeling requirement was mandatory simply because it established conditions under which a product may be labeled in a certain way, that would render the definition of a standard *inutile* in the context of a labeling requirement. The reason for this is that the definition of standard also includes the term labeling requirement but provides that a standard is a measure with which compliance is not mandatory; the definition of a labeling requirement is the conditions under which a product may be labeled in a certain way. Thus, if a labeling requirement were considered mandatory simply because it sets out conditions under which a product may be labeled, there would be no labeling requirement with which compliance could be considered not mandatory.

Q57. To both parties: What would make a de facto mandatory provision a technical regulation? What kind of governmental activity would be needed to make a de jure non mandatory labelling provision de facto mandatory?

129. For a labeling requirement to fall within the definition of a technical regulation under Annex 1 of the TBT Agreement, compliance with the labeling requirement must be mandatory, that is the product must be labeled in a particular way for the product to be sold, imported, distributed, or otherwise marketed. Compliance with a labeling requirement may be made mandatory by the same measure that sets out the labeling requirement, or by another measure or other government action that makes compliance with the labeling requirement mandatory.

130. In this dispute, Mexico's argument is that the U.S. dolphin safe labeling provisions are "*de facto*" mandatory because major distribution channels for tuna products will only purchase and sell tuna products that are labeled dolphin safe. Mexico's argument should be rejected. First, the fact that some distribution channels in the United States do purchase and sell tuna

products that are not labeled dolphin safe demonstrates that the U.S. dolphin safe labeling provisions are not mandatory. Second, whether compliance with a labeling requirement is mandatory depends on whether some government action makes compliance mandatory.[104] Consumer or retailer preferences alone cannot determine whether a labeling requirement is mandatory within the meaning of Annex 1 of the TBT Agreement. In considering a similar issue in *Korea – Beef*, the Appellate Body made the point that where it is the decision of private actors rather than the governmental measure that results in the segregation of imported and domestic like products, this would not be a breach of Article III:4 of the GATT 1994. The Appellate Body stated:

> We are not holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.[105]

131. The panel in *Argentina – Hides* similarly found in the context of a claim regarding Article XI:1 of the GATT that "[i]t is well-established in GATT/WTO jurisprudence that only governmental measures fall within the ambit of Article XI:1" and that it did not follow from "the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade restrictive."[106]

4. "Likeness" and "no less favourable treatment" under Article 2.1 of the TBT Agreement

Q58. To both parties: Both parties suggest that the analysis under Article 2.1 of the TBT Agreement is similar to the analysis under Article I:1 and Article III:4 of GATT. Please elaborate on:

(a) Whether an analysis of "likeness" and "less favourable treatment" under Article 2.1 of the TBT Agreement should be assumed to have exactly the same

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[104] In this regard, we agree with Australia that "there must be some factor in the measure itself or the governmental actions surrounding the measure which mean for the relevant industry that a measure which appears to be voluntary on its face is effectively made 'binding or compulsory.'" Australia Oral Statement, para. 4; Australia Third Party Submission, para. 27.

[105] *Korea – Beef (AB)*, para. 149.

[106] *Argentina – Hides*, paras. 11.118-119.

contours as the same analysis under Article III:4 of GATT 1994? If so, does this imply that all interpretations developed by panels and the Appellate Body in the context of Article III:4 of GATT 1994 are entirely transposable to Article 2.1? If so, why?

(b) Whether and how your arguments presented under Article I:1 of GATT 1994, which is based on different wording than the terms of Article 2.1 of the TBT Agreement, should be applied to the claims under Article 2.1.

132. We would first like to note that the U.S. dolphin safe labeling provisions are not technical regulations and therefore are not subject to Article 2.1 of the TBT Agreement. Notwithstanding its inapplicability to the present dispute, an analysis of the "likeness" and "less favourable treatment" under Article 2.1 of the TBT Agreement should not be exactly same as under Article III:4 of the GATT 1994 as there are important textual and contextual differences between the two. One such difference is that Article 2.1 states, in relevant part, that "Members shall require that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin." Thus, Article 2.1 applies "in respect" of a technical regulation.

133. As the Panel notes, the language in Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement differ regarding the treatment afforded imports from one Member as compared to the treatment afforded imports of another Member. Article 2.1 of the TBT Agreement refers to not affording "less favourable treatment" to imported products as compared to like products originating in other countries, whereas Article I:1 of the GATT 1994 states that any "advantage" or "privilege" granted to products originating in one country "shall be accorded immediately and unconditionally" to like products originating in other countries. These textual differences should be taken into account when interpreting Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement respectively. With respect to the U.S. arguments in connection with Mexico's claim under Article 2.1 of the TBT Agreement, we note that Mexico did not present any evidence or argument in support of that claim that differed from the evidence and argument it presented in connection with its claims under Article I:1 or Article III:4 of the GATT 1994. The United States has demonstrated in its response to Mexico's claims under Articles I:1 and III:4 of the GATT 1994 that those claims are without merit. And, since Mexico has not presented any different evidence or arguments in connection with its claim under Article 2.1 of the TBT Agreement, that claim fails as well.

5. Existence of an "international standard" under Article 2.4 of the TBT Agreement

Q59. To both parties: Since the TBT Agreement provides no definition of "international standard", please explain what, in your view, an international standard is for the purposes of Article 2.4 of the TBT Agreement.

134. For purposes of Article 2.4 of the TBT Agreement, an "international standard" is a standard (as that term is defined in Annex 1 of the TBT Agreement) that is (i) adopted by a body whose membership is open to the relevant bodies of at least all Members, (ii) based on consensus and (iii) made available to the public.

135. The United States bases this view on the text of the TBT Agreement. The chapeau of Annex 1 of the TBT Agreement states that terms used in the agreement "have the same meaning as given" in "the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities."[107] The ISO/IEC Guide defines "international standard" as a standard that "is adopted by an international standardizing/standards organization and made available to the public."[108] The ISO/IEC Guide in turn defines an "international standardizing organization" as a standardizing organization "whose membership is open to the relevant national body from every country"[109] and "organization" as a "body."[110] Further, Annex 1 of the TBT Agreement provides in paragraph 4 that an "international body" is a "body...whose membership is open to the relevant bodies of at least all Members"[111] and in paragraph 2 (explanatory note) that "[s]tandards prepared by the international standardization community are based on consensus."[112] Thus, an international standard is a standard that is (i) adopted by a body whose membership is open to the relevant bodies of at least all Members, (ii) based on consensus and (iii) made available to the public.

136. This interpretation of the term "international standards" is consistent with work of Members since conclusion of the Uruguay Round. For example, in 2000, Members adopted the *Decision of the Committee [on Technical Barriers to Trade] on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the [TBT] Agreement*.[113] The Committee decision sets out principles and procedures that standardizing bodies should observed when developing international standards, guides and recommendations. The importance of implementing these principles was most recently affirmed by Members at the conclusion of the Fifth Triennial Review of the TBT Agreement in November

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[107] TBT Agreement, Annex 1.

[108] ISO/IEC Guide 2: 1991, para. 3.2.1.

[109] ISO/IEC Guide 2: 1991, para. 4.3.2.

[110] ISO/IEC Guide 2: 1991, para. 4.2.

[111] TBT Agreement, Annex 1.

[112] TBT Agreement, Annex 1 (para. 2, explanatory note).

[113] *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement*, G/TBT/1/Rev.9, pp. 37-39.

2009.[114] Among the principles set out in the decision are "transparency," "openness" and "impartiality and consensus." These principles reflect Members' shared views *inter alia* that standards should be promptly published upon adoption,[115] international standardizing bodies "should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members"[116] and that the international standards should be based on "decision-making through consensus."[117]

Q61. To both parties: What are, in your view, the characteristics that a body must fulfil in order to produce "international standards" within the meaning of Article 2.4 of the TBT Agreement?

137. As elaborated in the U.S. response to Question 59, an international standard is a standard that is (i) adopted by a body whose membership is open to the relevant bodies of at least all Members, (ii) based on consensus and (iii) made available to the public. Thus, in order for a standard developed by a body to be "international" that body must (i) permit at least all Members to be members of that body, (ii) have developed the standard based on consensus, and (iii) made the standard publicly available. In this regard, it should be noted that, while only those bodies whose membership is open to at least all Members may be considered "international," it is theoretically possible for an international body to develop a standard that was not based on consensus and not made publicly available. Therefore, determining whether a particular standard is "international" involves determining not only whether the body that developed it is "international" but also whether the standard was adopted by consensus and made publicly available.

Q62. To both parties: Should the fact that the definition of a "standard" in Annex 1.2 of the TBT Agreement uses the term "recognized body" instead of the term "standardizing body", which is defined by ISO/IEC Guide 2: 1991, have any bearing on the Panel's interpretation of such definition and the applicability of Article 2.4 of the TBT Agreement?

138. The definition of a standard refers to a document approved by a "recognized body." Neither the TBT Agreement nor the ISO/IEC Guide 2:1991 contain a definition of the words

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[114] *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4*, G/TBT/26, 13 November 2009, para. 25.

[115] *Id.* para. 4(e).

[116] *Id.* para. 6.

[117] *Id.* para. 9(d).

"recognized body."[118] The ISO/IEC Guide, however, does include a definition of the term "standardizing body." That definition provides that a "standardizing body" is a "body that has *recognized* activities in standardization."[119] Thus, a reasonable interpretation of "recognized" in the context of a standard would be that the body has recognized activities in standardization.

139. In its third party submission, Canada disagrees with this interpretation and argues that whether a body is "recognized" within the meaning of Annex 1 should be determined based on whether the body applies the six principles set out in the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations.[120] The Committee Decision, however, sets out principles and procedures that standardizing bodies should observe when developing international standards. Thus, the Committee Decision would seem to support the position that a "recognized" body means a body that has recognized activities in standards development. Canada does, however, raise an interesting suggestion that a body may not be "recognized" simply because it develops standards or has recognized activities in standardization, but because it develops standards or engages in standardization activities in accordance with certain recognized principles, for example, those in the Committee Decision.

140. Under either interpretation, however, the AIDCP resolutions were not adopted by a "recognized body." Neither the AIDCP nor the parties to it constitute a "body" within the meaning of Annex 1 of the TBT Agreement and neither the AIDCP or the parties to it have recognized activities in standardization, or under Canada's interpretation, develop standards in accordance with the TBT Committee Decision principles, since only parties to the AIDCP participate in activities related to the AIDCP and only certain Members may be parties to the AIDCP.[121]

> **Q63. To both parties: May the definition of "international body" contained in Annex 1.4 of the TBT Agreement, under which an international body is a "[b]ody or system whose membership is open to the relevant bodies of at least all Members" be interpreted as meaning that such body or system should be open to all those WTO Members who bear an interest, in relation to the subject matter of the regulation in question or to all WTO Members?**

141. Annex 1 of the TBT Agreement states that an "international body or system" is a "body or system whose membership is open to the relevant bodies of at least all Members." Nothing in

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

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

[120] Canada Oral Statement, para. 28.

[121] *See* U.S. First Written Submission, paras. 184-185.

this text supports reading the reference to "at least all Members" as meaning a subset of Members, for example, those that have interest in some or all of the work of that body or system.[122] In fact, the context in which the definition of "international body or system" appears supports the opposite conclusion. In particular, the definition of a "regional body or system" is "body or system whose membership is open to the relevant bodies of only some of the Members." Thus, a body whose membership is open to only some Members, for example those that have an interest in the work of the body, would be a regional body; it would not be an international body.

142. In addition, one element of the definition of an "international standard" is that it is developed by an international body. Thus, if an international body included bodies whose membership was only open to a subset of Members, it would mean that bodies that are not open to all Members may develop "international standards." That would have two important implications. First, pursuant to Article 2.4 of the TBT Agreement, Members would have an obligation to use such "international standards" as the basis for their technical regulations (unless ineffective or inappropriate to meet a legitimate objective). Second, it would also, pursuant to Article 2.5 of the TBT Agreement, give any Member that based a technical regulation on such an "international standard" a presumption that the technical regulation was not an unnecessary obstacle to trade. In other words, defining an international body to include bodies whose membership is open to only a subset of Members, would result in that subset of Members determining for other Members the "international standards" that must be the basis of their technical regulations.

143. Conversely, defining an international body whose membership is open to all Members ensures that all Members have the opportunity to participate in the development of any "international standard" that by virtue of Article 2.4 of the TBT Agreement they have an obligation to use as the basis for their technical regulations (unless ineffective or inappropriate to fulfil the legitimate objective pursued). It also ensures that Members do not benefit from a presumption that their technical regulations are no more trade restrictive than necessary when based on standards that were developed by bodies that permitted only a subset of Members to participate.

144. Further, Members use international standards as the basis for their technical regulations when they are relevant to and effective and appropriate in fulfilling the objective pursued. When standards are developed by bodies that are not open to at least all Members, the likelihood that those bodies will develop standards that are relevant to and effective and appropriate in fulfilling the objectives pursued by Members who were not permitted to participate in their development is greatly reduced along with the likelihood that those standards will be used as the basis for

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

Members' technical regulations. It would therefore undermine the contribution international standards are capable of making in promoting the harmonization of Members' technical regulations and facilitating international trade to interpret the term "international body" in a way that would have the term "international standards" include standards developed by bodies whose membership is not open to all Members. Members' interest in harmonizing technical regulations and using international standards as a means to facilitate trade is reflected, for example, in Article 2.6 of the TBT Agreement which instructs Members to participate in internationals standards development "with a view to harmonizing technical regulations on wide a basis as possible" and the preamble to the TBT Agreement which recognizes international standards can facilitate international trade.[123]

6. Existence of a legitimate objective

Q64. To both parties: The United States asserts that the DPCIA was enacted to fulfil two legitimate objectives: (i) ensure that consumers are not mislead or deceived about whether the product contains tuna that was caught un a manner that adversely affects dolphins and (ii) contribute to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to set on dolphins (US written submission, paragraph 28) whilst Mexico identifies the objective of the US measures as preserving dolphin stocks in the course of tuna fishing operations in the ETP. Please respond to each other's assertion and clarify how the "legitimate objectives" relevant to the measures at issue should be ascertained, including in relation to the US Congress findings referred to in DPCIA, 16 U.S.C. 1385(b)?

145. The United States is clearly concerned with the issue of ecosystem protection and seeks to address this through various means both domestically and internationally. But it is not for Mexico to choose for the United States which objectives the United States should pursue. In interpreting Article 2.2 and the preambular text of the TBT agreement, the panel in EC-Sardines noted that "it is up to the Member[] to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[124] Mexico's efforts to reframe the objective of the U.S. measures should be rejected.

146. The findings made by Congress in enacting the DPCIA demonstrate that Congress specifically contemplated both the objectives of (i) ensuring that consumers are not mislead or deceived about whether the product contains tuna that was caught un a manner that adversely affects dolphins and (ii) contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to set on dolphins. Those findings state that "dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern

[123] TBT Agreement, preamble and Article 2.6.

[124] *EC – Sardines*, para. 7.120.

tropical Pacific Ocean" and that "consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins." In addition, the name of the statute – the Dolphin Protection Consumer Information Act – reflects these objectives.

147. In addition to reviewing the findings made by Congress, the objective of the U.S. measure can be discerned from the architecture, structure and design of the measure.[125] The DPCIA was enacted to address two issues: (1) consumers' interest in having accurate information about whether tuna products contain tuna that was caught in a manner harmful to dolphins and (2) a desire to contribute to the protection of dolphins. The U.S. dolphin safe labeling provisions fulfil these objectives. First, they ensure that when a dolphin safe label appears on tuna products in the United States it accurately conveys to consumers that the product does not contain tuna that was caught in a manner that adversely affects dolphins. Because setting on dolphins adversely affects dolphins, tuna products that contain tuna caught in that manner cannot be labeled dolphin safe. Second, to the extent customers choose not to purchase tuna products that are not labeled dolphin safe, the U.S. provisions help ensure that the U.S. market is not used to encourage fishing fleets to set on dolphins, and in turn contribute to dolphin protection.

148. Mexico's efforts to reframe the objective of the U.S. measures should be rejected. Mexico seems to argue that the U.S. objective of dolphin protection is not legitimate because it is in conflict with an objective that the United States should have, namely, reducing bycatch of other marine species. The United States is clearly concerned with the issue of ecosystem protection and seeks to address this through various means both domestically and internationally. But it is not for Mexico to choose for the United States which objectives the United States should pursue. In interpreting Article 2.2 and the preambular text of the TBT agreement, the panel in *EC-Sardines* noted that "it is up to the Member[] to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[126]

149. Mexico's characterization of the objective of the U.S. dolphin safe labeling provisions is too narrow. It ignores that the U.S. provisions also have as their objective ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.

Q65. To the United States: In relation to your stated objectives of dolphin and consumer protection objectives, please clarify how these should be expressed.

(a) Concerning your dolphin protection objectives, does your measure aim at achieving a specific number or rate of dolphin mortality? If so, what number or rate

[125] *Japan – Alcohol (AB)*, p. 29.

[126] *EC – Sardines*, para. 7.120.

would that be? Or should that objective be better expressed in terms of conservation of dolphin populations?

150. The objectives of the U.S. dolphin safe labelling provisions are to (i) ensure that consumers are not misled or deceived about whether the product contains tuna that was caught in a manner that adversely affects dolphins and (ii) contribute to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to set on dolphins. With respect to the latter objective, the protection of dolphins includes protecting dolphins from the adverse affects of setting on them to catch tuna. As explained in the U.S. oral statements and first written submission, setting on dolphins to catch tuna results not only in observed dolphin mortalities but adversely affects dolphins in other ways.[127] These include separation of dependent calves from their mothers, reduced reproductive success due to stress induced fetal mortality, acute cardiac and muscle damage.[128] The best available scientific evidence shows that the adverse effects resulting from setting on dolphins to catch tuna is the most probable reason that dolphin populations remain depleted and are showing no clear signs of recovering.[129]

151. The objective of the U.S. dolphin safe labeling provision that aims at protecting dolphins includes protecting dolphins from all of these adverse effects. It does not aim to achieve a specific number or rate of dolphin mortality, but rather generally to reduce the adverse effects of setting on dolphins to catch tuna by ensuring that the U.S. market is not used to encourage setting on dolphins to catch tuna. Seeking to protect dolphins from these adverse effects might also be considered as seeking to conserve dolphin populations. The Appellate Body in *United States – Shrimp* considered a measure aimed to protect sea turtles from the adverse affects of certain fishing techniques as a measure that was related to the conservation of exhaustible natural resources.[130]

(b) How does your consumer protection objective relate to or differ from your dolphin protection objective?

152. The objective of the U.S. dolphin safe labeling provisions of ensuring that consumers are not misled or deceived about whether the product contains tuna that was caught in a manner that adversely affects dolphins centers, as the Panel notes, on protecting consumers. In particular, the U.S. provisions seek to ensure that consumers are not misled as to whether tuna products contain

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[127] U.S. First Written Submission, paras. 46-59; U.S. Opening Statement at the First Panel Meeting, para. 7; U.S. Closing Statement at the First Panel Meeting, paras. 3-4.

[128] U.S. First Written Submission, paras. 52-59; U.S. Opening Statement at the First Panel Meeting, para. 7; U.S. Closing Statement at the First Panel Meeting, paras. 3-4.

[129] U.S. First Written Submission, paras. 46-51; U.S. Opening Statement at the First Panel Meeting, para. 7; U.S. Closing Statement at the First Panel Meeting, paras. 3-4.

[130] *US – Shrimp (AB)*, paras. 132-142.

tuna that was caught in a manner that adversely affects dolphins. The U.S. provisions do this by conditioning claims that a tuna product is "dolphin safe" on the tuna products not containing tuna that was caught in a manner that adversely affects dolphins. The U.S. provisions thus ensure that consumers may rely on "dolphin safe" claims on tuna products as accurately conveying that they do not contain tuna that was caught in a manner harmful to dolphins. This protects consumers from false or misleading information and allows them to exercise their choice not to buy tuna products that contain tuna that was caught in a manner that adversely affects dolphins. To the extent consumers exercise this choice, this contributes to the protection of dolphins by ensuring that the U.S. market is not used to encourage methods to catch tuna that adversely affect dolphins.

7. Existence of less-trade restrictive alternative measures under Article 2.2

Q66. To both parties: What are the scientific, environmental, financial or other type of criteria that served as the basis for the establishment of the dolphin mortality limits (DMLs) under the AIDCP?

153. The mechanism established under the AIDCP to set individual vessel dolphin mortality limits (DMLs) was based on the mechanism established in the 1992 La Jolla Agreement. Under the La Jolla Agreement, and subsequently the AIDCP, individual vessel DMLs are allocated each year and determined by dividing the total the allowed dolphin mortality limit for the given year by the number of vessels determined to be eligible to set on dolphins to catch tuna that year. Setting and allocating DMLs was considered at the time by the participating governments as one of the most effective methods for managing the dolphin mortality anticipated within the fishery from setting on dolphins to catch tuna. This was a policy decision recognizing that, even without establishing such limits, setting on dolphins to catch tuna would continue and that even if procedures to reduce dolphin mortality were implemented under the La Jolla and AIDCP, as long as dolphins were set upon to catch tuna, it could be expected that some would die or be seriously injured in the sets.

154. The initial reference points for considering where to establish the limit on allowable dolphin mortalities for each year, and thus serve as a baseline for administering annual DMLs, was based on the best available scientific data at the time of the adoption of the La Jolla Agreement in 1992, specifically the abundance estimates for the dolphin populations of the ETP and the recruitment rate for those dolphins. At that time the participating governments negotiating the La Jolla Agreement agreed that incidental mortality rates should not exceed a conservative estimate of the annual recruitment rate for dolphins. In other words, incidental mortality rates should not jeopardize the recovery of dolphin stocks. Therefore, the DMLs were established to allocate a mortality level for the dolphin stocks of the ETP based on this threshold, but also on the decreasing targets for total dolphin mortality in the fishery established in the introductory section of the La Jolla Agreement for reducing dolphin mortalities from an allowed level of 19,500 dolphins in 1993 to less than 5,000 by 1999. It should be noted that even though the governments intended for incidental mortality rates to not jeopardize recovery of ETP

dolphin stocks, assessment models to date do not support that these stocks are recovering at or near expected rates of at least 4% annually,[131] indicating some other fishery effect beyond reported dolphin mortalities is impeding recovery, which as noted the best available scientific evidence suggests is attributable to the practice of setting dolphins to catch tuna and the many adverse affects beyond immediate mortality or serious injury in the nets.[132]

Q69. To both parties: Would the Appellate Body's and other panels' interpretations of the term "necessary" used in paragraphs a, b and d of Article XX of GATT be relevant in interpreting the same term in Article 2.2 of the TBT Agreement? Would any other aspects of past interpretations of Article XX by panels and the Appellate Body be of any relevance in interpreting the terms of Article 2.2 of the TBT Agreement? Please explain.

155. As an initial matter, we would note that the issue raised in the Panel's question is not presented in this dispute since the measures at issue are not technical regulations. Regarding whether the Appellate Body and other panel's interpretations of the word "necessary" in Article XX of the 1994 would be relevant to interpreting Article 2.2 of the TBT Agreement, the word "necessary" in Article 2.2 of the TBT Agreement appears in a very different context than the word "necessary" in Article XX of the GATT 1994. In Article XX, the question is whether it is necessary for a Member to breach its GATT 1994 obligations to protect human, animal or plant life or health or public morals or to secure compliance with laws or regulations that are themselves not inconsistent with the GATT 1994. In these cases, it is the responding party that has the burden of establishing that the measure is "necessary" to protect human health, secure compliance etc. In Article 2.2 of the TBT Agreement, the question is whether an otherwise WTO-consistent measure restricts trade more than is necessary to fulfill the measure's objective, and unlike under Article XX, it is the complaining party that has the burden of establishing that the measure is "more trade-restrictive than necessary."

156. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that the terms of a treaty must be interpreted based on their ordinary meaning in their context in light of the object and purpose of the treaty. And, Article 32 of the VCLT provides that recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. In light of the very different contexts in which the

[131] Wade, P. R., G. M. Watters, T. Gerrodette, and S. B. Reilly. 2007. Depletion 1 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.10, Exhibit US-21.

[132] 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, Exhibit US-21.; Gerrodette, T., and J. Forcada. 2005. Non-recovery of two spotted and spinner dolphin populations in the eastern tropical Pacific Ocean. Mar. Ecol. Prog. Ser. 291: 1-21. p. 17. Exhibit US-22.; 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. 24. Exhibit US-4.

word "necessary" appears in Article XX of the GATT 1994 as compared to Article 2.2 of the TBT Agreement, as well as the different circumstances of its conclusion (as elaborated below), it would not be appropriate to simply apply the legal approach the Appellate Body has taken in interpreting the word "necessary" for purposes of Article XX of the GATT 1994 to interpreting the word "necessary" in Article 2.2. of the TBT Agreement.

157. Instead, the Panel should interpret Article 2.2 in accordance with Articles 31 and 32 of the VCLT. In the first instance, the Panel should interpret Article 2.2 based on the ordinary meaning of its terms in their context in light of the object and purpose of the TBT Agreement, and look to supplementary means of interpretation to confirm that interpretation. Paragraphs 164-169 of the U.S. First Written Submission applies such an approach, highlighting, for example, that Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) provides relevant context for Article 2.2 of the TBT Agreement since the two provisions contain very similar language and that a letter from the Director-General of the GATT to the Chief U.S. Negotiator confirms the interpretation of Article 2.2 of the TBT Agreement based on Article 31 of the VCLT.[133]

D. CLAIMS UNDER GATT 1994

1. Article III:4

Q72. To the United States: What legal weight do you ascribe to the various factual and legal findings of the US - Tuna (Mexico) GATT 1947 panel that you refer to in your first written submission?

158. The panel report in *United States -Tuna Dolphin I* has the same legal relevance as any other report, adopted or not, which is that it may be relied upon to extent viewed as persuasive. When considering the legal status of prior reports, the Appellate Body in *Japan - Alcohol* agreed that unadopted reports had no legal status in the GATT/WTO system, but noted that panels could find useful guidance from the reasoning used in such reports, to the extent relevant.[134] The panel's factual and legal findings in *Tuna Dolphin I* are very relevant to the current dispute, particularly in the context of Mexico's claim under Article I:1 of the GATT 1994. The panel in that dispute devoted considerable effort to considering whether the U.S. dolphin safe labeling provisions were inconsistent with Article I:1. Though the DPCIA was amended in 1997, the condition that tuna products may not be labeled dolphin safe if they contain tuna caught by setting on dolphins is the same as it was when the statue was enacted in 1990. The legal and factual conclusions of the panel were well reasoned and sound, and nothing in the intervening time has changed to support a different conclusion.

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[133] U.S. First Written Submission, paras. 164-169.

[134] *Japan - Alcohol (AB)*, pages 14-15.

Q73. To the United States: Do you accept that the measures at issue constitute "laws, regulations or requirements" within the meaning of Article III:4?

159. Mexico cites the DPCIA statute (United States Code, Title 16, Section 1385), the DPCIA regulations (Code of Federal Regulations, Title 50, Sections 216.91 and 216.92), and the ruling in *Earth Island Institute v. Hogarth* (494 F.3d 757 (9th Cir. 2007)) in its panel request as measures inconsistent with the GATT 1994 and TBT provisions at issue in this dispute. Mexico has the burden of proving that these measures are "laws, regulations or requirements" specifically within the meaning of GATT 1994 Article III:4. We do note, however, that the term "regulations" as used in Article III:4 has a different meaning than that term has in the TBT Agreement.

Q74. To both parties: Please clarify what domestic and imported products are to be compared, in the context of the "like products" analysis and in the context of the analysis of "less favourable treatment" under Article III:4. Is it US and Mexican tuna in general, or Mexican tuna caught in the ETP by setting on dolphins and US tuna caught otherwise or US dolphin safe tuna and Mexican dolphin safe tuna?

160. The "like products" analysis under Article III:4 should compare U.S. tuna products in general and imported tuna products in general.

Q75. To the United States: In paragraph 101 of your first written submission, you argue that the US dolphin safe labelling provisions do not afford "less favourable treatment" because they do not discriminate based on origin. Do you consider that only measures that are not origin-neutral are capable of affording "less favourable treatment" within the meaning of Article III:4 of GATT 1994?

161. Article III:4 of the GATT 1994 requires Members to afford no less favorable treatment to imported products as compared to like domestic products. To determine whether a measure affords less favorable treatment to imported products as compared to like domestic products it must be determined whether the treatment the measure affords imported products is different than the treatment it affords like domestic products, and if so whether the different treatment afforded imported products is less favorable than afforded like domestic products.[135] A measure

[135] This approach is consistent with prior panel and Appellate Body reports. In prior disputes where the panel or Appellate Body has found a measure to breach Article III:4, it has found that the measure afforded different treatment to imported and like domestic products and that this different treatment was less favorable treatment. *See Brazil – Tyres (Panel)* (import ban); *Mexico – Soft Drinks* (tax on use of non-cane sweeteners that was found in fact to be a tax on imported sweeteners); *Canada – Autos (Panel)* (domestic content requirement); *Canada – Wheat Exports (Panel)* (measures on the receipt of foreign grain and mixing and transport of domestic grain); *China – Auto Parts (AB)* (additional administrative procedures for users of imports); *EC – Bananas III* (Article 21.5) (EC) (license allocations based on origin); *India – Autos* (domestic content requirement); *Korea – Beef (AB)* (retail system required different marketing channels for product based on origin); *Turkey – Rice Licensing* (domestic purchase requirement); *US – FSC (Art. 21.5) (Panel)* (domestic value requirement); *US – Gasoline (Panel)* (different

may either on its face afford different treatment to imported products as compared to like domestic products, or it may do so in fact. A measure that on its face or in fact affords different treatment to imported products would not be "origin-neutral." If such different treatment constituted less favorable treatment, then the measure would be inconsistent with Article III:4.

162. The meaning of "less favourable treatment" in Article III:4 cannot be interpreted in isolation from that which is, or is not, being afforded less favorable treatment, namely imported products as compared to like domestic products. Thus, in order to show that a measure affords less favorable treatment within the meaning of Article III:4 of the GATT 1994 it must be shown that the measure (either on its face or in fact) affords imported products less favorable treatment as compared to like domestic products. This cannot be shown by simply showing that some imported products are afforded different treatment than some like domestic products. It must be shown that the different treatment is based on origin and that the different treatment is less favorable.

163. In this regard, it is important to recall the immediate context of Article III:4 of the GATT 1994, specifically Article III:1 of the GATT 1994. Article III:1 of the GATT 1994 states that internal laws, regulations and requirements affecting the internal sale of products "should not be applied to imported or domestic products so as to afford protection to domestic production." The Appellate Body has explained that Article III:1 sets out a general principle that "'informs the rest of Article III and acts 'as a guide to understanding and interpreting the specific obligations contained' in the other paragraphs of Article III, including paragraph 4"[136] and "[t]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures."[137] In the context of Article III:4, this general principle supports that Article III:4 should not be interpreted to prohibit measures that may result in some detrimental effect on imported products as compared to some like domestic products. Instead, what Article III:4 prohibits is measures that afford less favorable treatment to imported products as compared to like domestic products based on origin. Measures that do not treat products differently based on origin, and for which the effects resulting from the measure are not a result of the origin of the product, are not measures that afford protection to domestic production.

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compliance standards for imported and domestic products); *EEC – Parts and Components* (requirements to limit the use of imports); *EEC – Oilseeds* (domestic content subsidy); *Italian Agricultural Machinery* (domestic purchase subsidy); *US – Section 337* (additional enforcement regime for infringing imports). On the other hand, no national treatment violation was found in *Dominican Republic – Cigarettes (AB)*, *Japan – Film* and *EC – Biotech,* disputes where no difference in treatment between imported and like domestic products was found.

[136] *EC – Asbestos (AB)*, para. 93 (quoting *Japan – Alcohol (AB)*).

[137] *EC – Asbestos (AB)*, para. 97 (quoting *Japan – Alcohol (AB)*).

164. Thus, for example, in *EC – Biotech*, in considering Argentina's claim that imported biotech products could not be marketed while corresponding domestic non-biotech products could be marketed, the panel found:

> Even if it were the case that, as a result of the measures challenged by Argentina, the relevant imported biotech products cannot be marketed, while corresponding domestic non-biotech products can be marketed, in accordance with the aforementioned statements by the Appellate Body this would not be sufficient, in and of itself, to raise a presumption that the European Communities accorded less favourable treatment to the group of like *imported* products than to the group of like *domestic* products. We note that Argentina does not assert that domestic biotech products have not been less favourably treated in the same way as imported biotech products, or that the like domestic non-biotech varieties have been more favourably treated than the like imported non-biotech varieties. In other words, Argentina is not alleging that the treatment of products has differed depending on their origin. In these circumstances, it is not self-evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin of these products rather than, for instance, a perceived difference between biotech products and non-biotech products in terms of their safety, etc. In our view, Argentina has not adduced argument and evidence sufficient to raise a presumption that the alleged less favourable treatment is explained by the foreign origin of the relevant biotech products.
>
> In the light of the above, we find that Argentina has not established that, as a result of the alleged suspension of consideration of, or the failure to consider, the relevant eight applications, the European Communities has accorded "less favourable treatment" to imported products than to domestic products.[138]

165. In *Dominican Republic – Cigarettes*, the Appellate Body examined a claim that a bond requirement that on its face applied equally to imported and like domestic products in fact afforded different and less favorable treatment on imported products. In that dispute the complaining party asserted that although the total amount of the bond (RD$5 million) was the same for imported as it was for like domestic products, the per unit cost of the bond requirement was higher on imports because imports comprised a smaller share of the market. The Appellate Body rejected this claim because the reason for the higher per unit cost was not based on origin, but rather other factors, namely imports' versus like domestic products' relative market share.[139]

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[138] *EC – Biotech*, paras. 7.2514-7.2515.

[139] *Dominican Republic – Cigarettes (AB),* para. 96; *see also id.* para. 87 (setting out bond amount of $RD5 million). Mexico cites *Dominican Republic – Cigarettes* for the proposition that the "central question" in an Article III:4 dispute is "whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products. Mexico First Written Submission, para. 163. *Dominican Republic – Cigarettes*, however, does not stand for the proposition that a measure should be evaluated for consistency with Article III:4

Q76. To the United States: In your oral statement, you suggested that the Appellate Body's rulings in Korea - Beef, in which it considered whether the measures at issue "altered the conditions of competition for imported products", do not provide useful guidance for this case (see paragraph 10 of your oral statement). Please clarify what you consider to be the proper legal test for a determination of "less favourable treatment" under GATT Article III:4 and whether you consider that the relevant legal test is somehow different in the event of an origin-neutral measure.

166. To clarify, the U.S. position is not that it would be inappropriate to apply the legal approach taken in *Korea – Beef* to determine whether a measure affords less favorable treatment within the meaning of Article III:4. Instead, the U.S. position is that before the Panel looks at whether the treatment afforded imported products as compared to like domestic products modifies the conditions of competition to the detriment of imported products, the Panel must determine what treatment is being afforded imported products as compared to like domestic products, and if there is no different treatment being afforded imported products as compared to like domestic products, there is no basis to proceed to examine whether any different treatment afforded imported products as compared to like domestic products modifies the conditions of competition to the detriment of imported products. In *Korea – Beef*, the Appellate Body first found that the measures at issue afforded different treatment to imported and like domestic products, and then considered whether that different treatment constituted less favorable treatment by analyzing whether that different treatment modified the conditions of competition to the detriment of imported products.[140]

based solely on whether it modifies the conditions of competition. In *Dominican Republic – Cigarettes*, at the outset of considering whether the bond requirement at issue afforded less favorable treatment to imported products as compared to like domestic products, the Appellate Body stated that determining whether a measure affords less favorable treatment to imported products as compared to like domestic products requires examining whether the measure modifies the conditions of competition to the detriment of imported products (citing *Korea – Beef*). However, before addressing the question of whether the measure modified the conditions of competition, the Appellate Body looked to see if the measure afforded any different treatment to imported as compared to like domestic products. The Appellate Body found that on the face of the measure the treatment was the same and, after looking further into various facts cited by the complaining party, reached the same conclusion: the measure did afford different treatment based on origin. One of the facts the Appellate Body dismissed was that the per-unit cost of the bond was higher on imports than like domestic products, and in doing so cited the passage from *Korea – Beef* that " imported products are treated less favourably than like products if a measure modifies the conditions of competition in the relevant market to the detriment of imported products." However, it does not appear that the Appellate Body delved into to the effect the measure had on the conditions of competition; instead the Appellate Body noted that the reason for per unit costs being different was based on relative market share, not origin, and therefore the measure could not be considered to afford less favorable treatment. *Dominican Republic – Cigarettes (AB)*, paras. 91-96.

[140] *See e.g., Korea – Beef (AB)*, paras. 143-144.

167. If a measure is "origin-neutral" (i.e., does not afford different treatment to imported products as compared to like domestic products based on origin either in law or in fact), it cannot be found to modify the conditions of competition to the detriment of imported products because that measure would be affording the same treatment to imported products as it affords like domestic products, and the conditions under which imported products compete would be the same.

168. If the Panel were to reach the question of whether the U.S. dolphin safe labeling provisions modify the conditions of competition, it would need to examine whether the provisions alter the conditions under which imported and domestic products compete in the U.S. market to the detriment of imported products. This would entail, for example, examining whether the U.S. provisions allow domestic and imported products the same opportunities to compete in the U.S. market.

> **Q77. To the United States: In your oral statement, you note that the measures at issue are not "using the manner in which tuna is caught as a means to distinguish between imported and domestic products and to single out imports" (see paragraph 19 of your oral statement). Please clarify whether you consider that, in order for a violation to exist, imported products must somehow be specifically "targeted" by the measure, or whether the assessment of "less favourable treatment" should rest primarily on an examination of the impact of the measure.**

169. A measure falling within the scope of Article III:4 would be inconsistent with that article if it affords less favorable treatment to imported products as compared to like domestic products. A measure could afford different treatment to imported products as compared to like domestic products either on its face or in fact. If the allegation is that the measure is origin neutral on its face but in fact affords less favorable treatment to imported products as compared to like domestic products, a panel would need to examine whether the measure uses what appear to be origin neutral criteria to in fact afford different and less favorable treatment to imported products. A panel might do that by examining whether what appears to be an origin neutral criteria in fact singles out imports.

170. For example, in *Mexico – Soft Drinks*, the panel found that at the time the measure was adopted almost all imports comprised non-cane sugar sweeteners, whereas almost all like domestic products comprised cane sugar and, thus, in applying a 20 percent tax on the use of non-cane sugar sweeteners that it did not impose on the use of cane sugar, Mexico was in practice singling out imported sweeteners for higher taxation.[141] Similar facts supported the panels' and Appellate Body's findings in the Chile and Korea alcohol disputes that the measures in those disputes although origin-neutral on their face in fact used what appeared to be origin-neutral criteria (alcohol content and type of alcohol) to afford different treatment to imported and

[141] *Mexico – Soft Drinks (Panel)*, para. 8.119.

like domestic products (in those cases different rates of taxation). Specifically, in *Chile – Alcohol*, the facts demonstrated that most imported products were subject to the higher tax rate, whereas most domestic products were subject to the lower tax rate.[142] Similarly, in *Korea – Alcohol*, the facts demonstrated that the measure operated "in such a way that the lower tax brackets covered almost exclusively domestic production, whereas the higher tax brackets embrace almost exclusively imported products."[143] In other words, the measures allegedly origin-neutral criteria for determining which rate of taxation applied in fact singled out imports for higher taxation.

171. In *Mexico – Soft Drinks* and the Chile and Korea alcohol disputes, the "impact of the measure" was examined to the extent that such impact was a result of the measure itself. So for example, the impact or effect of taxing non-cane sugar sweeteners was that almost 100 percent of imported sweeteners were subject to the 20 percent tax. With respect to whether the "impact of a measure," should be considered, it should to the extent such impact is a result of the measure

172. If it is established that a measure affords different treatment to imported as compared to like domestic products (whether in law or fact), the next step is to evaluate whether that different treatment is less favorable by examining whether it modifies the conditions of competition to the detriment of imported products. In doing so, a panel needs to examine whether the measure itself requires a particular result. For example, in examining whether the different treatment afforded imported and like domestic products, the Appellate Body in *Korea – Beef* concluded that because the Korean measure itself imposed on retailers the "necessity of making a choice" between selling domestic and imported beef, it limited the marketing opportunities for imported beef, and thereby modified the conditions of competition to the detriment of this product.[144] The Appellate Body made the point that where it is the decision of private actors rather than the governmental measure that results in the segregation of imported and domestic like products, this would not be a breach of Article III:4 of the GATT 1994. The Appellate Body stated:

> We are not holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the governmental

[142] *Chile – Alcohol (AB)*, paras. 50, 53, 67 (75 percent of domestic products in lowest fiscal category whereas 95 of imported products are in the highest fiscal category).

[143] *Korea – Alcohol (AB)*, para. 150; *Korea – Alcohol (Panel)*, para. 10.101.

[144] *Korea – Beef (AB)*, para. 146.

> intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.[145]

173. Thus, in this dispute, the choices of retailers and consumers not to purchase tuna products that are not dolphin safe is not an "impact of the measure" with which Article III:4 is concerned. Rather, it would need to be an impact called for by the measure itself, and there is nothing in the U.S. dolphin safe labeling provisions that limit the importation, sale, distribution or other marketing of tuna products that are not dolphin safe or are not labeled dolphin safe. The limited demand for non-dolphin safe tuna products is a result of retailer and consumer preferences for dolphin safe tuna, not the U.S. dolphin safe labeling provisions.

Q79. To the United States: In paragraph 108 of your first written submission, you argue that one third of Mexican vessels are eligible under the US provisions to use the dolphin-safe label. What legal consequences do you attach to this fact? Do you consider that the fact that some Mexican tuna may be eligible for the label implies that Mexican tuna and tuna products are not afforded "less favourable treatment" within the meaning of GATT Article III:4? Do you consider that, in order for "less favourable treatment" to exist, all relevant imported products of the Member concerned must face "less favourable treatment"?

174. The fact that one-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and therefore tuna caught by these vessels is eligible to be labeled dolphin safe under the U.S. provisions, is evidence that U.S. provisions do not use origin to distinguish between tuna products that are eligible to be labeled dolphin safe. Whether a measure that is origin-neutral on its face in fact affords less favorable treatment to imported products as compared to like domestics will depend on the particular facts of each case. Thus, in a particular case, establishing a claim of less favorable treatment may require evidence that almost all or even all imported products (that are "like" domestic products) are singled out for less favorable treatment. In *Mexico – Soft Drinks* and *Chile – Alcohol* the facts that demonstrated that were that "almost 100 per cent"[146] or 95 percent of imported products were subject to the higher tax rate.[147]

2. Article I:1

Q82. To the United States: You have referred to the findings of the GATT 1947 panel on US Tuna (Mexico) with respect to GATT Article I.1. Please clarify, in

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[145] *Korea – Beef (AB)*, para. 149.

[146] *Mexico – Soft Drinks (Panel)*, para. 8.120;

[147] *Chile – Alcohol (AB)*, paras. 53, 67.

light of these findings, whether you consider that the US dolphin-safe provisions confer an "advantage" or "privilege" within the meaning of Article I:1.

175. As noted in paragraph 123 of the U.S. first written submission, the advantage at issue in this dispute is the opportunity to label tuna dolphin safe if certain conditions are met, in particular that dolphins were not set upon to catch the tuna and no dolphins were killed or seriously injured in the set.

176. In analyzing the questions of whether the U.S. provisions confer an "advantage" within the meaning of Article I:1, the panel in *United States – Tuna Dolphin I* stated that "[a]ny advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the 'dolphin safe' label."[148] We agree with this assessment, but note that the language of the panel report was unclear about whether that possible advantage, which depends on free choice by consumers, was granted by the dolphin safe labeling provisions themselves or by market forces and consumer choice. We understand the panel to be stating the former, and therefore we do not depart from what the panel in *United States – Tuna Dolphin I* found.

Q83. To the United States: You argue, in paragraph 121 of your first written submission, that the US dolphin safe provisions are not in violation of Article I:1 of GATT 1994, inter alia because they are origin neutral. Do you consider that no violation of Article I:1 can occur, where conditions unrelated to origin are imposed on the granting of the advantage at issue, even if these conditions result in a detrimental effect on the conditions of competition between imported products of different origins?

177. First, a measure that is origin neutral – both in law and in fact – cannot be found to alter the conditions of competition to the detriment of imported products. Since, if a measure is origin neutral it subjects imported and like domestic products to the same conditions and would not establish any different conditions under which imported and like domestic products would compete.

178. Second, although the Appellate Body has indicated that examining whether a measure affords less favorable treatment to imported products as compared to like domestic products within the meaning of Article III:4 of the GATT 1994 involves an examination of whether the measure alters the conditions of competition to the detriment of imported products, we are not aware that it has not extended that analysis to Article I:1 of the GATT 1994. Under Article I:1 of the GATT 1994, the Panel would need to examine whether the U.S. dolphin safe labeling provisions fail to afford an advantage to imported products that it accords to like domestic products.

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[148] GATT Panel Report, *United States – Tuna Dolphin 1*, paras 5.42-5.43.

Q84. To the United States: You argue, in paragraph 123 of your first written submission, that "no Member has the right to unconditionally label its products dolphin-safe" under US law. Please clarify, in light of this statement, whether you consider that a violation of GATT Article I:1 could only exist where an advantage is granted unconditionally to some Members but is not granted to other Members?

179. For a measure to breach Article I:1 of the GATT 1994, it must: (1) concern a measure falling within the scope of Article I:1 (e.g., a customs duty or other charge on importation or a matter referred to in paragraphs 2 or 4 of Article III:4); and (2) fail to accord an advantage, favor, privilege or immunity that it accords to imported products originating in any country immediately and unconditionally to imported products originating in all countries. Thus, a breach of Article I:1 of the GATT 1994 exists where a Member (with respect to a measure that falls within the scope of Article 1:1) grants an advantage unconditionally to some Members but not to other Members. A breach would also exist where that Member grants an advantage immediately to some Members but not to others.

180. With respect to paragraph 123 of the U.S. First Written Submission, the United States points out that the advantage provided under the U.S. provisions is not the "right to designate tuna products as dolphin safe" as Mexico suggests;[149] rather, it is the opportunity to label tuna products dolphin safe if the conditions on use of the dolphin safe label are met. The United States affords this opportunity to label tuna products dolphin safe equally to imports originating in all Members.

181. However, even if Mexico's perspective as the advantage at issue in this dispute were correct, and the advantage at issue were the opportunity or eligibility to label tuna products dolphin safe, the U.S. provisions would be consistent with Article I:1 of the GATT 1994.

182. As made clear by the *Canada – Autos* panel, and reiterated by the *Colombia – Ports* panel, the obligation under Article I:1 to grant an advantage "immediately and unconditionally" does not preclude Members from subjecting the conferral of an advantage to conditions. As the panel in *Canada – Autos* stated: "[T]here is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded 'unconditionally' to the like product of other Members."[150] Thus, the U.S. dolphin safe labeling provisions cannot be found to fail to afford an advantage "unconditionally" simply by virtue of the fact that they subject use of the dolphin safe label to certain conditions being met.

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

[150] *Canada – Autos (Panel)*, para. 10.24; *Colombia – Ports (Panel)*, para. 7.361.

The relevant question is whether the U.S. dolphin safe labeling provisions subject imported products to any conditions on use of the dolphin safe label that they do not also impose on like domestic products. The answer is no. The U.S. dolphin safe labeling provisions afford the opportunity to label tuna products dolphin safe equally to imports originating in all Members that meet the conditions under the U.S. provisions to be labeled dolphin safe.

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