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

(DS381)

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

January 19, 2011

Table of Reports

Short Form	Full Citation
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
Chile – Alcohol (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages,* WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
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 – 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
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
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R, adopted 23 October 2002
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
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

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77	IATTC 2009 Annual Report (Set Type)
78	Inter-American Tropical Tuna Commission, Data Report – No. 8, Statistics of the Eastern Pacific Ocean Tuna Fishery, 1979-1992 (1994) ("IATTC Data Report")
79A	MSC Website (North Pacific albacore certifications)
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85	U.S. imports of tuna and tuna products 1980-2009 and partial year 2010
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87	WCPFC, Record of Fishing Vessels
88	WCPFC, 2009 Year Book

A. FACTUAL ISSUES

85. To the United States: In the table explaining the functioning of the labelling scheme (Exhibit US-59), you have identified within the ETP areas of "regular and significant mortality or serious injury to dolphins" and distinguished this from areas where there is no such mortality or serious injury.

(a) Please clarify how this distinction is made between areas of regular and significant mortality or serious injury to dolphins and areas of no such regular and significant mortality or serious injury within the same fishery.

1. The table in Exhibit US-59 should not be read to indicate that the United States has made a determination that some areas within a single fishery have a regular and significant dolphin mortality while other areas do not (e.g., that some parts of a non-purse seine tuna fishery in the ETP have significant dolphin mortality while other parts do not) . The United States has not made a determination that any non-purse seine tuna fishery has regular and significant dolphin mortality. Rather, the table describes the scenarios under which tuna might be caught and the corresponding conditions under which tuna products containing tuna caught under those scenarios may be labeled dolphin safe under the DPCIA. One such scenario is tuna caught by non-purse seine vessels in a fishery where there is regular and significant dolphin mortality. The DPCIA provides that tuna products containing tuna caught under this scenario may be labeled dolphin safe if a captain and observer certify that no dolphins were killed or seriously injured. For tuna caught by non-purse seine vessels in a fishery where there is no regular and significant dolphin morality, the DPCIA does not set out any corresponding conditions under which tuna products containing tuna caught under such a scenario be labeled dolphin safe.

2. Further, a fishery is typically defined by location, gear type (or fishing method) and target species, for example, the ETP purse-seine tuna fishery or the ETP longline tuna fishery. Thus, while it is theoretically possible that a determination might be made that there is regular and significant dolphin mortality in a tuna fishery across all gear types in a particular ocean, a determination that there was regular and significant dolphin mortality in a tuna fishery would most likely be made with respect to a particular gear type that is associated with a regular and significant dolphin mortality in a particular ocean. Whether such a determination might be made with respect to only one area of that ocean, the basis for making such a determination would depend on the facts of the particular situation, for example, whether the regular and significant dolphin mortality at issue only occurred in that area or also occurred in other areas.

(b) Is there any area within the ETP where there is no regular and significant mortality?

3. Tuna and dolphins associate throughout the ETP and setting on dolphins to catch tuna occurs throughout the ETP. Accordingly, observed and unobserved dolphin mortality occurs throughout the ETP. As reviewed in previous submissions, dolphin mortality is a regular and

expected consequence of setting on dolphins to catch tuna[1] and the best available science suggests that the most probably reason dolphin populations remain depleted and show no clear signs of recovery is the practice of setting on them to catch tuna.[2]

87. To the United States: Please comment on Mexico's observation, in relation to the testimony of the President of Seafood Emporium Inc cited in Exhibit US-39, that, at the time of the testimony, Mexican tuna products were still subject to a US embargo and therefore that Mexican importer could not have been importing tuna products into to the United States.

4. Mexico's observation is incorrect. The embargo to which Mexico refers only applied to yellowfin tuna.[3] Import data from 1996 and 1997 show that in 1996 U.S. imports of skipjack tuna from Mexico totaled nearly 2 million kilos or $1.7 million and in 1997 U.S. imports of canned tuna (tuna in airtight containers) from Mexico totaled over 2.2 million kilos or $3.8 million.[4] There were also U.S. imports from Mexico of other types of tuna in 1996 and 1997, however, of those types only skipjack would be used in canned tuna products.

89. To both parties: Please clarify the composition of tuna fishing in the ETP. Specifically, please explain:

(a) Which fleets are currently fishing for tuna in the ETP and what fishing methods they use?

5. The following table sets out the fishing methods used by the purse seine fleets that currently fish for tuna in the ETP.

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[1] U.S. Second Written Submission, para. 42; 139-140; U.S. Answers to the First Set of Questions from the Panel (Questions 34), paras. 79-85.

[2] U.S. Answers to the First Set of Questions from the Panel (Questions 35-36), paras. 85-89; U.S. First Written Submission, paras. 48-50; U.S. Oral Statement at the Second Panel Meeting, paras. 10-12..

[3] As noted in the U.S. First Written Submission, the United States lifted the embargo on imports of yellowfin tuna and tuna products from Mexico in 2000. U.S. First Written Submission, para. 34.

[4] U.S. Imports of Skipjack Tuna from Mexico 1996-1997, Exhibit US-76.

Purse Seine Vessels That Fish for Tuna in the ETP – 2010[5]	
Country	**Methods**
Bolivia	Unassociated sets[6]
Colombia	Unassociated sets, sets on dolphins[7]
Ecuador	Unassociated sets
El Salvador	Unassociated sets, sets on dolphins
Guatemala	Unassociated sets, sets on dolphins
Honduras	Unassociated sets, sets on dolphins
Mexico	Unassociated sets, sets on dolphins
Nicaragua	Unassociated sets, sets on dolphins
Panama	Unassociated sets, sets on dolphins
Peru	Unassociated sets
Spain	Unassociated sets
United States	Unassociated sets
Vanuatu	Unassociated sets
Venezuela	Unassociated sets, sets on dolphins

The following table sets out the fishing methods used by the non-purse seine fleets that currently fish for tuna in the ETP:

[5] The countries listed in column 1 of this table represent all countries that have purse seine vessels registered to fish for tuna in the ETP. IATTC Active Purse Seine Vessel Register, Exhibit US-15. The fishing method used by the vessels from the listed countries is based on whether the country received an AIDCP dolphin mortality limit. Exhibit US-50. Please note that Exhibit US-50 is misnamed "IATTC 2010 DML Allocation." The correct name is "AIDCP 2010 DML Allocation." IATTC secretariat circulated the document to AIDCP parties but the allocation are pursuant to the AIDCP.

[6] Unassociated sets refers to purse seine sets not in association with dolphins, either on free swimming schools of tuna or on floating objects such as fish aggregating devices (FADs). Of unassociated sets, roughly half comprise sets on floating objects (most of which are FADs) and half comprise sets on free swimming schools. IATTC 2009 Annual Report, pp.41-43, Exhibit US-77.

[7] Sets on dolphins refers to intentional chase and encirclement and setting of purse seine nets on dolphins.

Non-Purse Seine Vessels That Fish for Tuna in the ETP – 2010[8]	
Country	**Methods**
Belize	Longline
Bolivia	Longline
Canada	Troll
China	Longline
Chinese Taipei	Longline
Cook Islands	Longline, Troll
Costa Rica	Longline
Ecuador	Longline, Pole and Line
El Salvador	Longline
France	Longline
Guatemala	Longline
Honduras	Longline
Japan	Longline, Pole and Line
Kiribati	Pole and Line
Korea	Longline
Mexico	Gillnet, Longline, Pole and Line
Nicaragua	Longline
Panama	Gillnet, Longline
Peru	Longline
Portugal	Longline
Spain	Longline,

[8] Source: IATTC Regional Vessel Register, Exhibit US-16. The countries listed in column 1of this table represent all countries that have non-purse seine vessels registered to fish for tuna in the ETP.

United States	Gillnet, Pole and Line, Longline, Recreational, Troll[9]
Vanuatu	Longline, Pole and Line
Venezuela	Longline

(b) Which fleets were fishing in the ETP at the time of enactment of the US measures and what fishing methods they were using?

6. The following table lists the countries that had vessels that fished for tuna in the ETP in 1990. The United States did not collect data on the fishing methods used by fleets other than the United States in the ETP in 1990. An IATTC report lists countries that had vessels that fished for tuna in the ETP in 1990, some by vessel type.[10] This information is provided in the table below.

Vessels that Fished for Tuna in the ETP – 1990[11]	
Country	**Vessel Type**
Colombia	Unspecified (Purse Seine and/or Other)[12]
Costa Rica	Unspecified (Purse Seine and/or Other)
Ecuador	Purse Seine, Baitboat,[13] Other[14]

[9] The IATTC Regional Vessel Register also lists "harpoon" as a technique used by U.S. vessels; however, harpoon is not used to catch tuna in the ETP. The IATTC manages tuna and other species caught by tuna fishing vessels and harpoon is used to catch billfishes such as swordfish.

[10] Inter-American Tropical Tuna Commission, Data Report – No. 8, *Statistics of the Eastern Pacific Ocean Tuna Fishery, 1979-1992* (1994) ("IATTC Data Report"), pp. 39, 42, Exhibit US-78.

[11] Source: IATTC Data Report, p. 39, 42, Exhibit US-78.

[12] The IATTC Data Report specifies vessel type for Ecuador, Mexico, the United States, Venezuela and "Other" countries. It lists Colombia, Costa Rica, Honduras, Panama, Peru, Spain and Vanuatu as comprising these "other" countries. Vessel type indicated for "other" countries is purse seine and other. IATTC Data Report, p. 39, 42, Exhibit US-78.

[13] A baitboat is a vessel that would fish for tuna using hooks and bait; a baitboat may use *inter alia* pole and line and troll to catch tuna.

[14] The IATTC report describes "other" as "miscellaneous gear types, e.g., jig boat." IATTC Data Report, p. 5, Exhibit US-78.

Honduras	Unspecified (Purse Seine and/or Other)
Mexico	Purse Seine, Baitboat
Panama	Unspecified (Purse Seine and/or Other)
Peru	Unspecified (Purse Seine and/or Other)
Spain	Unspecified (Purse Seine and/or Other)
United States	Purse Seine, Baitboat, Other
Vanuatu	Unspecified (Purse Seine and/or Other)
Venezuela	Purse Seine

7. In 1990, U.S. purse seine vessels used the following methods to catch tuna in the ETP: sets on dolphins and unassociated sets (i.e. sets on floating objects and free swimming schools). In 1990, U.S. non-purse seine vessels used similar methods to those used today to catch tuna in the ETP. The United States did not collect data on fishing methods used by non-U.S. vessels in 1990 but, based on NMFS staff knowledge, the following countries had purse seine vessels that fished for tuna in the ETP by setting on dolphins in 1990: Colombia, Ecuador, Mexico, Panama, Vanuatu and Venezuela and possibly Honduras and Spain, in addition to the United States. Other techniques likely used by foreign vessels to catch tuna in the ETP in 1990 are: unassociated purse seine sets, pole and line, troll, longline, and gillnet.

90. To both parties: Please explain the fishing techniques used by the different fleets catching the tuna used in the imported and domestic tuna products found on the US market during the years 1980-1990 and what are the methods used today to catch imported and US tuna sold on the US market.

8. For the years 1980 to 1990, the following techniques were used by U.S. vessels to catch tuna for products sold on the U.S. market: purse seine sets on dolphins, unassociated purse seine sets (sets on floating objects and free swimming schools), pole and line, handline, gillnet, longline and troll.

9. As noted in the response to Question 89, the United States did not collect data on fishing techniques used by foreign vessels in 1990 or earlier. The following is an estimate of fishing techniques used by foreign vessels to catch tuna for products sold in the United States for the years 1980 to1990, based on the IATTC report cited in response to Question 89 and personal knowledge of NMFS staff: purse seine sets on dolphins, unassociated purse seine sets, pole and line, troll, longline, and gillnet.

10. The techniques currently used by U.S. and foreign vessels to catch tuna for products sold on the U.S. market include: purse seine sets on dolphins, unassociated purse seine sets (sets on

floating objects such as FADs and free swimming schools), longline, troll, pole and line, gillnet, harpoon and handline.[15] See also U.S. response to Question 89.

91. To both parties: Please provide data on the proportion of US, Mexican and other vessels fishing in and outside the ETP at the time of the enactment of the measure and proportion today.

11. In 1990, the U.S. tuna fleet comprised 46 purse seine vessels and 6 non-purse seine vessels in the ETP,[16] 43 purse seine vessels[17] and hundreds of non-purse seine[18] in the Western Pacific Ocean (WPO) and 5 purse seine vessels[19] and hundreds of non-purse seine vessels[20] in the Atlantic Ocean. Thus, 49 percent of the U.S. purse seine tuna fleet was inside the ETP and 51 percent of the U.S. purse seine fleet was outside the ETP at the time the U.S. dolphin safe labeling provisions were enacted. In addition, a large portion of U.S. non-purse seine vessels were outside the ETP at the time the U.S. provisions were enacted.

12. In 1990, the Mexican tuna fleet comprised 52 purse seine vessels and 11 non-purse seine vessels in the ETP[21] and some number of non-purse seine vessels in the Caribbean, probably dozens to a hundred. The United States does not have data on the number of Mexican vessels outside the ETP in 1990. Regarding, countries other than the United States and Mexico, the composition of the tuna fleets of those countries in the ETP in 1990 are set out in Exhibit US-54. The United States does not have data on tuna fleets of other countries outside the ETP in 1990.

13. In 2010, the U.S. tuna fleet comprised 2 purse seine vessels and approximately 1680 non-purse seine vessels in the ETP,[22] 36 purse seine vessels and 472 non-purse seine vessels in the

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[15] NMFS TTVP databases.

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

[17] NMFS, U.S. Tuna Cannery Fleet Database. Seven of the purse seine vessels that fished for tuna in 1990 fished both in the ETP and the WPO.

[18] This is an estimate of the portion of non-purse seine vessels that fished for tuna in 1990 based on the number of non-purse seine commercial fishing vessels registered in the states of Hawaii in 1990.

[19] NMFS, Northeast Regional Office, Permits Office.

[20] This is an estimate of the portion of non-purse seine vessels that fished for tuna in 1990 based on the number of non-purse seine commercial fishing vessels registered in the U.S. states along the Caribbean and East Coast in 1990.

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

[22] IATTC Regional Vessel Register, Exhibit US-16. The IATTC Regional Vessel Register lists 1900 non-purse seine U.S. vessels however 20 of these vessels fished for swordfish and shark and do not normally fish for tuna. In addition, 199 of the vessels listed for the United States are recreational, which have been subtracted for this

WPO,[23] and 5 purse seine vessels[24] and hundreds of non-purse seine vessels in the Atlantic Ocean.[25] Thus, 7 percent of the U.S. purse seine tuna fleet was in the ETP in 2010 and 93 percent of the U.S. purse seine fleet was outside the ETP in 2010. Based on non-purse seine vessels in the ETP and WPO, 78 percent of the U.S. non-purse seine tuna fleet was in the ETP in 2010 and 22 percent of the U.S. non-purse seine fleet was outside the ETP in 2010.

14. In 2010, the Mexican fleet comprised 69 purse seine vessels and 158 non-purse seine vessels in the ETP,[26] and some number of non-purse seine vessels in the Caribbean, probably dozens to a hundred.

15. Regarding countries other than Mexico and the United States, the number of purse seine and non-purse seine vessels of those countries in the ETP in 2010 are set out in Exhibit US-16, which lists the vessels of each country that are registered to fish for tuna in the ETP along with gear/vessel type. The Western and Central Pacific Fisheries Commission ("WCPFC") tracks the number of purse seine and non-purse seine vessels of other countries that fish for tuna in the WPO and can be found on the WCPFC website.[27] The United States does not have data on number of foreign vessels in the Atlantic ocean that may fish for tuna.

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calculation.

[23] NMFS, U.S. Tuna Cannery Fleet Database; *see also* WCPFC Record of Fishing Vessels, pp. 401-428, *available at* <http://www.wcpfc.int/system/files/documents/public-document-submissions/RFV%20PDF%20Export.pdf>, Exhibit US-87. The species covered by the WCPFC includes tuna in addition to marlin and swordfish and the Record of Fishing Vessels covers vessels that may exclusively fish for marlin or swordfish. Many of the same troll and longline U.S. vessels appear on both the IATTC Regional Vessel Register and the WCPFC Record of Fishing Vessels.

[24] NMFS, Atlantic Highly Migratory Species Division. Although 5 U.S. vessels are authorized by permit to purse seine fish for tuna in the Atlantic Ocean, in 2010 none did.

[25] This is an estimate of the portion of non-purse seine vessels that fished for tuna in 2010 based on the number of non-purse seine commercial fishing vessels in the U.S. states along the Caribbean and East Coast in 2010.

[26] IATTC Regional Vessel Register, Exhibit US-16. Twelve of the 69 Mexican purse seine vessels registered to fish for tuna in the ETP are listed as inactive or sunk. Exhibit US-16; *see also* Active Purse Seine Vessel Register, Exhibit US-15.

[27] S*ee* WCPFC Record of Fishing Vessels, *available at* <http://www.wcpfc.int/system/files/documents/public-document-submissions/RFV%20PDF%20Export.pdf>. Several of the same vessels that fish for tuna in the WPO are also registered to fish for tuna in the ETP. The methods used by vessels in the WPO to catch tuna include: gillnet, handline, long line, pole and line, troll and purse seine. WCPFC 2009 Yearbook, Exhibit US-88; NMFS TTVP databases.

92. To the United States: Please clarify:

(a) what proportion of the US fleet [that] the US vessels that used to set on dolphins in the ETP represented, at the time of enactment of the measures;

16. All large U.S. purse seine vessels that fished for tuna in the ETP in 1990 except two set on dolphins to catch tuna.[28] Accordingly, 96 of the U.S. large purse seine tuna fleet set on dolphins to catch tuna in the ETP when the U.S. provisions were enacted. None of the small U.S. purse seine vessels that fished for tuna in the ETP in 1990 set on dolphins to catch tuna, since such vessels on account of their size were not capable of doing so.

(b) what proportion of US vessels currently fish in the ETP and what fishing methods they use.

17. As noted in the U.S. response to Question 91, in 2010, 7 percent of the U.S. purse seine tuna fleet is in the ETP and 78 percent of the U.S. non-purse seine tuna fleet is in the ETP. As listed in the U.S. response to Question 89, the fishing methods used by U.S. vessels in the ETP in 2010 are: unassociated purse seine sets (i.e. sets on FADs and free swimming schools), gillnet, handline, harpoon, longline, recreational and troll.

95. To the United States: Please clarify what proportion of the tuna products sold on the US market is eligible for the dolphin-safe label and how much of that tuna does in fact bear the label.

18. Most tuna products sold in the United States are eligible to be labeled dolphin safe. Regarding domestic tuna products sold in the United States, U.S. producers of tuna products use only dolphin safe tuna in their tuna products and therefore all domestic tuna is eligible to be labeled dolphin safe. Regarding imported tuna products sold in the United States, while some tuna products are sold in the United States that are not eligible to be labeled dolphin safe, the vast majority of U.S. imports of tuna products are eligible to be labeled dolphin safe. For example, in 2009, of the approximately 10,000 entries of canned tuna products in 2009, all but 137 entries (or less than 1.4% of entries) were eligible to be labeled dolphin safe.[29] By volume, these 137 entries accounted for 1.5% of total U.S. imports of canned tuna products in 2009 such that 98.5% of total U.S. imports (by volume) of canned tuna products were eligible to be labeled dolphin safe in 2009.[30]

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[28] The United States did not collect data on the portion of the U.S. fleet that set on dolphins to catch tuna in 1990; the U.S. response to this question is based on knowledge of NMFS staff involved in the ETP tuna fishery in 1990.

[29] NMFS, TTVP databases (dolphin safe entries), Exhibit US-51.

[30] NMFS, TTVP databases.

19. Regarding what proportion of tuna products sold in the United States are labeled dolphin safe, the United States does not have data on this. However, it is our understanding that most – although not all – tuna products that are eligible to be labeled dolphin safe are labeled dolphin safe. Tuna Tracking and Verification Program spot checks have on occasion found tuna products that are eligible to be labeled dolphin safe but that are not labeled dolphin safe.[31] Exhibit US-73 (photos of Great Value Tuna) contains two such examples.[32] NMFS recently verified that the tuna contained in the pouches of Great Value Tuna in the photographs in Exhibit US-73 is dolphin safe.

96. To the United States: Please explain whether any environmental labels other than dolphin-safe are used on tuna products sold in the United States.

20. The Marine Stewardship Council (MSC) is a private non-profit organization that certifies fisheries according to MSC sustainability standards and authorizes use of an MSC label on seafood products that contain seafood harvested from a fishery that MSC has certified as meeting its sustainability standards. MSC has certified certain pole and line and troll albacore tuna fisheries in the North and South Pacific Ocean.[33] Tuna products bearing the MSC label are sold in the United States.[34] In the past, imported tuna products from Mexico sold in the United States under the "Tuny" brand included on the label a graphic showing ocean waves inside a circle.[35] The United States is are not aware of any other labels used on tuna products sold in the United States that might fall in the category of "environmental" labels.

97. To both parties: Please provide data on imports of tuna and tuna products to the United States since 1980 and the market shares of domestic and foreign tuna and tuna products in the US market since 1980.

21. U.S. imports of tuna and tuna products 1980-2009 and partial year 2010 are set out in Exhibit US-85. Market share of domestic and imported canned tuna (tuna in airtight containers) is set out in Exhibit US-86. It should be noted that significant amounts of domestic canned tuna contained imported tuna. For example, in 2009 two-thirds of domestic canned tuna was sourced

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[31] U.S. First Written Submission, para. 94.

[32] Photos of Great Value Tuna, Exhibit US-73.

[33] MSC Website (North Pacific albacore certification), Exhibit US-79A; Marine Stewardship Council (MSC) Website (South Pacific albacore certification), US-79B.

[34] *See e.g.* American Tuna Website, Exhibit US-80.

[35] 2007 is the most recent year in which tuna products under the Tuny brand were imported into the United States. NMFS Tuna Tracking and Verification Program Databases. It is not clear whether products labeled in this manner were intended to convey an environmental message.

from foreign vessels.[36] This means that 84 percent of the U.S. market for canned tuna in 2009 was accounted for by a combination of imported canned tuna and domestic canned tuna that contains imported tuna.[37] The portion of the U.S. market for canned tuna for the years 1980-2010 accounted for by a combination of imported canned tuna and domestic canned tuna that contains imported tuna is set out in Exhibit US-86.

98. To both parties: Please provide information regarding the fishing techniques used by the fleets of Thailand, the Philippines, Ecuador, Indonesia, Vietnam and China since 1980.

22. The United States only maintains data on fishing techniques used by vessels of other countries to catch tuna when such tuna is exported to the United States or contained in tuna products exported to the United States, and such data only exists for 2000 to the present. The following table shows the fishing techniques used to catch tuna used in tuna products exported to the United States by vessels flagged to Thailand, the Philippines, Ecuador, Vietnam and China since 2000.

Fishing Techniques for Tuna Used by Vessels 2000 to 2010	
Country	**Technique[38]**
Thailand	gillnet, longline, pole and line, purse seine, troll
Philippines	gillnet, handline, longline, pole and line
Ecuador	purse seine sets on dolphins, unassociated purse seine sets, longline, pole and line
Indonesia	gillnet, longline, pole and line, purse seine
Vietnam	gillnet, longline, pole and line, purse seine, troll
China	longline, pole and line, purse

99. To both parties: The United States, in its oral statement, states that it has

[36] NMFS, U.S. Tuna Cannery Receipts, Exhibit US-55; *see also* U.S. Second Written Submission, para. 22; U.S. Opening Statement at the First Panel Meeting, para. 15.

[37] U.S. Second Written Submission, para. 22.

[38] TTVP databases.

provided evidence that setting on dolphins has significant adverse effects on individual dolphins, citing the example of dolphins chased by speedboats and helicopters. Please clarify whether chasing with speedboats and helicopters is currently allowed in the framework of the AIDCP.

23. Chase and encirclement with speedboats and helicopters is currently allowed under the AIDCP. Speedboats are necessary to chase and encircle dolphins (and the tuna that swim below them) with purse seine nets. Speedboats are used to herd the dolphins so they may be encircled with the purse seine nets. Helicopters assist in the process, both to spot where dolphins and tuna are located and how many tuna there are and to help herd the dolphins.

102. To the United States: In your oral statement, you state that Mexican tuna products that are not labelled dolphin safe are sold in speciality grocery stores and on the Internet and that tuna products originating in other countries that are not labelled as dolphin safe are sold in major distribution channels such as Walmart's Great Value Tuna which is a product of Thailand.

(a) Does this mean that you agree with Mexico's contention that Mexican tuna products are not sold in major distribution channels?

24. We are not aware of any major U.S. grocery retailers that sell tuna products that contain tuna that was caught by setting on dolphins. Although up until 2002 Mexican tuna caught using methods other than setting on dolphins by small purse seine vessels in the ETP was contained in tuna products sold in the United States, and these products may have been sold in major U.S. grocery retailers as dolphin safe, there have been no imports of similar Mexican tuna products containing tuna caught by such vessels since that time.

(b) In Exhibit US-73, you presented a receipt for the purchase of a tuna product of the brand Great Value in Walmart. This product is not labelled "dolphin safe". Please clarify whether, as you understand it, this product meets the requirements in order to be labelled "dolphin-safe". Are you aware whether this tuna is made from tuna caught by Mexican vessels and processed by a cannery in Thailand or whether it is made of tuna caught by other vessels?

25. NMFS has verified that the pouches of Great Value Tuna shown in Exhibit US-73 meet the conditions under the U.S. dolphin safe labeling provisions to be labeled dolphin safe. The tuna contained in these pouches was not sourced from vessels flagged to Mexico. Regardless of the source of the tuna in Great Value Tuna, the fact that the largest U.S. food distributor sells a product not labeled "dolphin-safe"belies Mexico's assertion that the label is necessary to be sold in major distribution channels.

107. To the United States: Please comment on Exhibit MEX-103. In this context, please clarify the meaning of the terms "federal requirements" in this document.

Does this designation mean that the products at issue fulfil the requirements to be labelled dolphin-safe, or to be sold in the United States, or something else?

26. Exhibit MEX-103 is a page from the U.S. Department of Commerce, National Oceanic and Atmospheric Agency's website. This page lists the brands of tuna products for which the National Marine Fisheries Service (NMFS) has conducted spot audits to confirm that tuna products sold under those brands in the United States comply with U.S. law. The brands listed in bold represent sampled tuna products for which one or more spot checks verified that those sampled tuna products were labeled dolphin safe in accordance with U.S. dolphin safe labeling provisions. The brands not listed in bold represent sampled tuna products for which one or more spot checks verified that those sampled tuna products, although not labeled dolphin safe, were sold in accordance with "federal requirements." "Federal requirements" means that the product met requirements under U.S. law to be sold in the United States. These requirements include: (1) the marketer of the tuna product responded to the NMFS request for documentation as required by 50 CFR 216.93 (f); (2) the NOAA Form 370 was supplied to U.S. Customs and Border Protection and to NMFS as required by 50 CFR 216.24 (f)(2) and (f)(3); and (3) the product was not subject to the U.S. yellowfin tuna and driftnet embargoes as stated in 50 CFR 216.24 (f)(6).

27. Mexico suggests the Exhibit MEX-103 represents a list of tuna product brands that the United States has determined are "dolphin safe" and not "dolphin safe."[39] This is a mischaracterization of the list. The list, as explained above, is a list of brands of tuna products for which NMFS has conducted spot checks to verify whether dolphin safe claims on labels meet the conditions set out in the U.S. dolphin safe labeling provisions. Brand names not listed in bold represent tuna products sold under those brand names that were not labeled dolphin safe; however, simply because those tuna products were not labeled dolphin safe does not mean that the products were not in fact dolphin safe. In fact, the following brands of tuna products not listed in bold were verified as dolphin safe even though they were not labeled dolphin safe: California Girl, Caderia, Iberia, Old Fisherman, Ottogi, Pamplona, Sardimar, and Sam's Choice (a Walmart brand).

28. Mexico also suggests that because tuna products sold under the Great Value brand are listed in bold that this is evidence that all Great Value Tuna products are sold with a dolphin safe label.[40] This is untrue. Exhibit US-73 shows photos of two pouches of Great Value Tuna that are not labeled dolphin safe. Further, although Great Value Tuna products in *cans* are sold with a dolphin safe label, Great Value Tuna products sold in *pouches* are not sold with a dolphin safe label.[41]

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[39] Mexico Opening Statement at the Second Panel Meeting, para. 27-28.

[40] Mexico Opening Statement at the Second Panel Meeting, para. 28.

[41] *See* Photos of Great Value Tuna, Exhibit US-73; Walmart Website (Great Value Tuna), Exhibit US-81 (displaying Great Value Tuna in pouches and making no dolphin safe claims).

29. Mexico further suggests that the tuna product of Mexico with a dolphin safe label (Ocean's Best) shown in Exhibit US-72 could not have been sold in the United States because it is not among the brands listed in Exhibit MEX-103. This is incorrect. Exhibit MEX-103 does not list all brands of tuna products sold in the United States; it is a list of brands of tuna products for which the NMFS has conducted spot checks to confirm that sampled tuna products comply with U.S. law. NMFS data shows that approximately 20,000 kilograms of Ocean's Best tuna products were imported for commercial sale in 2002.[42]

108. To the United States: Is there intentional setting on dolphins outside the ETP?

30. As reviewed in previous U.S. submissions, the nature of purse-seine tuna fisheries is fundamentally different inside and outside the ETP.[43] In the ETP, millions of dolphins are intentionally chased and encircled with purse seine nets to catch tuna on account of the regular and significant tuna-dolphin association that exists there.[44] Although in other oceans it may be possible to intentionally set a purse seine net on dolphins outside the ETP, if this occurs, it does not involve the intentional chase and encirclement of dolphins as a means to catch tuna.[45]

31. In its oral statement at the second Panel meeting, Mexico cites to a proposed resolution introduced by Australia that seeks to prohibit intentional sets on cetaceans in the Western Central Pacific Ocean (WCPO).[46] It should not be inferred from that proposal that any intentional sets on cetaceans in the WCPO is in any way comparable to the sets on dolphins in the ETP. Rather, it reflects that there are concerns about intentional sets on cetaceans in the WCPO and that such sets should be prohibited. The United States supported Australia's proposal, and did so because, as reviewed in previous U.S. submissions and contrary to Mexico's assertions,[47] the United States is concerned about and takes actions to protect marine mammals not just in the ETP but

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[42] NMFS Tuna Tracking and Verification Databases.

[43] *See, e.g.,* U.S. Second Written Submission, paras. 42-44, 48-49, 146; U.S. Answers to the First Set of Questions from the Panel (Question 12), paras. 31-32, 48-49; U.S. First Written Submission, paras. 38-39; U.S. Opening Statement at the Second Panel Meeting, paras. 7, 14-17.

[44] U.S. First Written Submission, para. 58; U.S. Second Written Submission, para. 49.

[45] Importantly, the number of dolphins involved would be small and on a fundamentally different scale than in the ETP and the harm inflicted on dolphins in such an intentional set is different than the harm inflicted on dolphins from repeated high-speed chase and encirclement that occurs in the ETP. U.S. Second Written Submission, paras. 48-49; U.S. Answers to the First Set of Questions from the Panel (Question 12), para. 31, (Question 34), para. 80-85; U.S. Opening Statement at the Second Panel Meeting, paras. 7, 14-17; U.S. First Written Submission, paras. 54-59.

[46] Exhibit Mex-105.

[47] *See, e.g.,* U.S. First Written Submission, paras. 73-75; U.S. Second Written Submission, paras. 55-58; U.S. Answers to the First Set of Questions from the Panel (Question15), para. 47 n.42, 49.

also in other oceans.

111. To the United States: Please clarify the relevance of your arguments relating to the justification of the measure in terms of dolphin protection, such as the arguments related to the effects of setting on dolphins and the absence of recovery, for the Panel's consideration of Mexico's claims under Articles III:4 and I:1 of the GATT 1994 and 2.1 of the TBT Agreement.

32. The U.S. dolphin safe labeling provisions treat imported and domestic products the same; the distinctions drawn by the provisions are not based on origin. Any different treatment (in the sense of Article III:4) or advantage (in the sense of Article I:1) accorded by the U.S. provisions is based on whether the tuna products contain tuna caught in a manner harmful to dolphins. The facts showing the harm to dolphins caused by setting on dolphins demonstrate why the U.S. measures draw a distinction between setting on dolphins and other methods of catching tuna. The evidence presented by the United States clearly shows that setting on dolphins causes significant harm to dolphins, and the purse seine tuna fishery in the ETP is the most likely reason that the populations remain depleted. These facts show that the conditions under which tuna products may be labeled dolphin safe are based on whether the tuna was caught in a manner harmful to dolphins and are not based on origin.

33. In addition, the facts regarding the harm caused to dolphins by setting on dolphins to catch tuna help to show a clear relationship between the objectives of the measure, which are to reduce the harm to dolphins and ensure consumers are not misled by dolphin safe claims, and conditions under which tuna products can be labeled dolphin safe under the U.S. provisions. As elaborated in the U.S. response to Question 147 below, the general principle under Article III is that measures shall not be applied so as to afford protection to domestic production. The clear relationship between the objective of the U.S. measure and the conditions under which tuna products may be labeled dolphin safe supports the conclusion that the U.S. measures do not use fishing technique as a means to afford protection to U.S. tuna products. Instead, the U.S. dolphin safe labeling provisions help to prevent the serious harm to dolphins, including in populations that remain depleted, caused by setting on dolphins to catch tuna.

112. To the United States: In paragraph 119 of its first written submission Mexico has explained that "[T]he processing of tuna into canned or pouched tuna is considered under US law to be a substantial transformation that changes the country of origin of the fish to the country where the processing takes place. The NAFTA "tariff shift" rules of origin are consistent with this principle. Accordingly, the country in which the processing occurs is the country of origin of a tuna product." Do you agree with this explanation of the relevant US rules of origin?

34. In general, the country in which the tuna is processed (for example, live, fresh or chilled tuna processed into canned or pouched tuna products) is the country of origin for that product

under U.S. law.[48]

113. To the United States: Mexico has asserted that: "[I]n the United States, the court decision Koru North America v. United States, established that the origin of fish caught on the high seas is determined by the flag of the catching vessel. Do you agree with this explanation of the relevant US rules of origin?

35. Koru North America v. United States, 701 F. Supp. 229 (Ct. Int'l Tr. 1988), confirms the principles in U.S. law that, on the high seas, the country of origin of fish is determined by the flag of the catching vessel.

B. CLAIMS UNDER THE TBT AGREEMENT

[Judicial economy and order of analysis]

115. To both parties: Please clarify the relationship between Article 2.1 and Article 2.2 of the TBT Agreement. In this context, please clarify:

(a) Whether a measure found to be inconsistent with Article 2.1 of the TBT Agreement can be "justified" under Article 2.2 of the same Agreement?

36. The obligations under TBT Articles 2.1 and 2.2 are separate, and a measure's consistency with each of these provisions needs to be examined on its own terms. A measure that is found inconsistent with Article 2.1 of the TBT Agreement does not necessarily breach Article 2.2 of the TBT Agreement.

37. In some instances, the same facts that inform a less favorable treatment analysis under Article 2.1 may also inform a trade restrictiveness analysis under Article 2.2; however, even in these instances, the analysis would not be the same under each provision. Under Article 2.1, the complaining party bears the burden of demonstrating that a measure accords less favorable treatment to imported products than like domestic products. Under Article 2.2, the complaining party bears the burden of demonstrating that a measure restricts trade more than is necessary to fulfill its legitimate objective. If under Article 2.2 a measure is found to fulfill a legitimate objective, the complaining party must put forward a reasonably available alternative that fulfills this objective at the level that Member considers appropriate and is significantly less trade restrictive.[49] Thus, a violation of Article 2.1 will not necessarily result in a violation of TBT

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[48] Rules of origin for fish and fish products are codified in the U.S. tariff schedule. *See, e.g.,* Harmonized Tariff Schedule of the United States (2010), General Note 12(b) and 12(n)(v) for North American Free Trade Agreement rule of origin for fish, Exhibit US-56.

[49] U.S. First Written Submission, para. 162-169; U.S. Second Written Submission, para. 121; U.S. Answers to the First Set of Questions from the Panel (Question 69), paras. 155-157; U.S. Response to Question 134, *infra*.

Article 2.2 if, for example, the complaining party does not suggest a reasonably available alternative that meets the required criteria.

(b) Whether an analysis under Article 2.2 is appropriate only if the measures in question are not inconsistent with Article 2.1?

38. An analysis under Article 2.2 is not contingent on a finding that a measure is inconsistent with Article 2.1. The analysis under Article 2.2 is different and separate from the analysis under Article 2.1. Of course, a panel can always decide whether to exercise judicial economy on one or more claims in light of findings with respect to another claim.

(c) Whether the relationship between Articles 2.1 and 2.2 of the TBT Agreement imposes a particular sequence of analysis between these two provisions in this case?

39. Because the obligations under Articles 2.1 and 2.2 of the TBT Agreement are separate and not consequential (i.e., a breach of one provision is not merely consequential to a breach of the other), there is no particular sequence of analysis as between the two provisions that should be followed.

[Definition of "technical regulation"]

116. To the United States: Please confirm whether you consider that the DPCIA dolphin safe labelling requirements constitute "labelling requirements" within the meaning of the second sentence of Annex 1.1.

40. Mexico has the burden to establish each element of its claim, including that the U.S. dolphin safe labeling provisions constitute labeling requirements. However, the United States is not contesting that the U.S. dolphin safe labeling provisions constitute labeling requirements. However, because compliance with the U.S. dolphin safe labeling provisions are not mandatory they do not fall within the definition of a technical regulation set out in paragraph 1 of Annex 1 but instead are labeling requirements that would fall within the definition of a standard set out in paragraph 2 of Annex 1, in particular the second sentence of that paragraph.

117. To both parties: Please clarify the meaning of the terms "their related processes and production methods" in Annex 1.1 of the TBT Agreement? In this context, please address the meaning of the word "related" and the role of the determiner "their" in the first sentence of this provision. Do the measures at issue lay down "related process or production methods" within the meaning of this provision?

41. The first sentence of the definition of a technical regulation reads: "A document that lays down product characteristics or their related processes and production methods..." The words "their" and "related" refer to the term "product characteristics" and indicates that the processes

and production methods addressed by the first sentence of the definition of a technical regulation are those that relate to product characteristics. Process or production methods unrelated to product characteristics are not covered by the first sentence of the definition of a technical regulation. The U.S. dolphin safe labeling provisions do not lay down product characteristics nor do they lay down processes or production methods related to product characteristics. They set out labeling requirements. Further, whether tuna is caught by setting on dolphins or by other means, does not affect the product characteristics of tuna products.

118. To both parties: What significance should the Panel ascribe to the fact that the words "their" and "related" were not included in the second sentence of the definition of a "technical regulation" in Annex 1.1 of the TBT Agreement? Should the term "process and production method" in the second sentence of Annex 1.1 be understood as referring to a process and production method that is related to the characteristics of a product?

42. As the Panel observes, the second sentence does not include the words "their related" but instead refers to terminology, symbols, packaging, marking and labeling requirements "as they apply to a product, process or production method." The second sentence does not include any indication that the terminology, symbols, packaging, marking and labeling requirements addressed in the second sentence are limited to those that concern product characteristics and therefore appears to address terminology, symbols, packaging, marking and labeling requirements regardless of whether they concern product characteristics. The difference presumably is due to the different nature of terminology, symbols, packaging, marking and labeling requirements and a willingness to apply the definition to a broader range in that context.

119. To both parties: Please clarify the meaning of the terms "as they apply to a product, process or production method" in the second sentence of paragraph 1 of Annex 1 of the TBT Agreement, and their relevance to the present dispute. In this context, please address the meaning of the terms "as they apply". To the extent that the measures at issue constitute "labelling requirements" within the meaning of this second sentence, what do they "apply to"?

43. The phrase "they apply to a product, processes or production method" clarifies that the second sentence covers terminology, symbols, packaging, marking and labeling requirements as they apply to a product, process or production method. The words "as they apply to" may be understood as meaning terminology, symbols, packaging, marking and labeling requirements that refer to, concern or relate to a product, process or production method. [50] In this dispute, the U.S.

[50] The *New Shorter Oxford English Dictionary* contains a number of definitions of "apply" but the most applicable to the context in which the word applies in Annex 1.1 is "8 *v.i.* Have a practical bearing, have relevance; refer; be operative." *New Shorter Oxford English Dictionary* (2003), p. 100. The Merriam-Webster Dictionary (on line version) similarly includes several definitions but the most applicable in this context is "to have relevance or a valid connection". Merriam-Webster Dictionary (online) *available at*

dolphin safe labeling provisions concern both a product – tuna products – and a production method – the manner in which tuna is caught.

121. To both parties: Please define what is the relevant market for the purpose of examining whether the US measures are mandatory. In particular, specify whether the Panel should look at the market of tuna products in general or at the market of dolphin-safe tuna products.

44. The Panel should look at the market of tuna products in general. Mexico's claims concern tuna products in general not only dolphin-safe tuna products.

122. To both parties: Does the term "mandatory" in Annex 1.1 of the TBT Agreement imply that compliance is mandatory in order to place the product on the market, or may it also mean that compliance is mandatory in order to place the product on the market under a certain designation, or something else?

45. As reviewed in previous U.S. submissions, the term "mandatory" in Annex I.1 of the TBT Agreement implies that compliance is mandatory in order to place the product on the market.[51] To the extent "under a certain designation" means label the product with certain information, the phrase "with which compliance is mandatory" in Annex I.1 does not cover measures that require a product to meet certain conditions in order to be labeled in a particular way. A measure that requires a product to meet certain conditions in order to be labeled in a particular way is a labeling requirement but there would need to be an inquiry into whether compliance with that labeling requirement is mandatory.

123. To the United States: In paragraphs 102 and 105 of your second written submission you suggest that the fact that in EC - Sardines the Appellate Body was not addressing labelling requirements, and therefore did not address the question of what it means for compliance with a labelling requirement to be mandatory, is a relevant difference between that case and the present dispute. Please clarify whether you consider that the term "mandatory" has a different meaning in relation to "labelling requirements", as compared to other types of measures covered under paragraph 1 of Annex 1 of the TBT Agreement. In responding to this question, please address the relevance of the Appellate Body's reference, in EC - Sardines, to the panel's observation that it "fail[ed] to see the basis on which a distinction can be drawn between a requirement to ´name´ and a requirement to ´label´ a product for the purpose of the TBT Agreement".

<http://www.merriam-webster.com/dictionary/apply>.

[51] U.S. Second Written Submission, paras. 88-95; U.S. Answers to the First Set of Questions from the Panel (Question 52), paras. 125-127.

46. Whether concerning a document that lays down product characteristics or sets out labeling requirements, the phrase "with which compliance is mandatory" means that the product must meet certain conditions in order to be sold, imported, distributed, or otherwise marketed. In the case of product characteristics those conditions are that the product must possess certain characteristics in order to be sold, imported, distributed, or otherwise marketed. In the case of labeling requirements those conditions are that the product be labeled in a certain way to be sold, imported, distributed, or otherwise marketed. Thus, the phrase has the same meaning in both contexts.

47. An interpretive issue arises with labeling requirements, however, that does not arise with respect to documents that lay down product characteristics: how to apply the concept that a product must meet certain conditions in order to be marketed etc. to a labeling requirement in a way that ensures that the phrase "with which compliance is mandatory" in the definition of a technical regulation as well as the term "labeling requirement" and the phrase "with which compliance is not mandatory" in the definition of a standard, continue to have effect? As reviewed in previous U.S. submissions, applying this concept to mean that a labeling requirement is mandatory if it sets out conditions under which a product may be labeled in a certain way would give the same meaning to the term "labeling requirement" as the phrase "with which compliance is mandatory."[52] This would make the phrase "with which compliance is mandatory" in the definition of a technical regulation redundant in the context of a labeling requirement and render the term "labeling requirement" and "with which compliance is not mandatory" in the definition of a standard without effect.

48. With respect to the panel's observation in *EC – Sardines* that it " fail[ed] to see the basis on which a distinction can be drawn between a requirement to ´name´ and a requirement to ´label´ a product for the purpose of the TBT Agreement,"although the Appellate Body included this quote in its summary of the panel's findings, it did not address this particular issue in its report. In fact, the Appellate Body explicitly stated: "We do not find it necessary, in this case, to decide whether the definition of a 'technical regulation' in the *TBT Agreement* makes a distinction between 'naming' and 'labelling.'"[53] The Appellate Body concluded, as did the panel, that the measure at issue concerned a product characteristic, namely that preserved sardines be prepared exclusively from fish of the species *Sardina pichardus*.[54]

125. To the United States: You suggest in paragraphs 108 and 109 of your second written submission that a labelling requirement that on its face is not mandatory may in fact be mandatory if some form of government action makes it compulsory

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[52] U.S. Second Written Submission, para. 92; U.S. Answers to the First Set of Questions from the Panel (Question 52), para. 126.

[53] *EC – Sardines (AB)*, para. 190.

[54] *EC – Sardines (AB)*, para. 190; *EC – Sardines (Panel)*, para. 7.39.

or obligatory for the products in question to be labelled in a certain way in order to be marketed. Please clarify whether you consider that Annex 1.1 may cover de facto mandatory labelling requirements. If so, please provide examples of governmental action that would make a de jure voluntary standard mandatory.

49. The United States does not seek to establish that a measure that is on its face not mandatory is in fact mandatory. Rather, in paragraphs 108-109 the United States argues that in order to support its claim, Mexico would need to identify some form of government action that makes compliance with the U.S. provisions mandatory. The United States does not know of any particular examples of such a situation.

128. To the United States: How do you reconcile your argument that the DPCIA provisions establish a voluntary labelling scheme with the fact that they prohibit the use of any alternative label that makes any reference to dolphins or other sea mammals? In addressing this question, please comment on the relevance of the Appellate Body's determination in EC - Asbestos that a technical regulation may prescribe product characteristics in either a positive or a negative form. Does the removal of the discretion to use alternative labels give a mandatory nature to the provisions?

50. The decision as to whether to label the product with the term "dolphin safe" 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" remains a voluntary decision of the seller. There is no requirement to indicate that tuna products are dolphin safe or not dolphin safe. However, if a seller chooses to label a product as "dolphin safe" 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," then that choice must meet the conditions for use of the label.[55] This is no different from any other requirement designed to protect against false or misleading labeling. For example, if a seller of a product wants to label the product as "prevents heart attacks," a Member may choose to determine under what conditions that claim or any similar claim (such as "keeps your heart healthy") may appear on the label. There is no obligation to include that claim on the label (the seller is free to market the product with no health claim at all on the label), and so the labeling requirement would be voluntary. The fact that the Member sets requirements for alternative forms of the claim does not render the label mandatory. Please see paragraphs 97-100 of the U.S. Second Written Submission for further discussion of this issue.

51. With regards to the Appellate Body's assessment in *EC – Asbestos*, as explained in previous U.S. submissions, that assessment concerned product characteristics and did not address

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

what it means for compliance with a labeling requirement to be mandatory.[56] Even so, a labeling requirement may be set out in the affirmative (e.g., products must be produced in a certain way to be labeled in a certain way) or in the negative (e.g., products must *not* be produced in a certain way to be labeled in a certain way). However, regardless of whether the labeling requirement is set out in the affirmative or negative, it must still be determined whether compliance with the labeling requirement is mandatory.[57]

> **129. To both parties: Please clarify the relevance of the fact that the measure prohibits the use of any labels referring to dolphins in the context of assessing whether the measures at issue are "mandatory" within the meaning of Annex 1, paragraph 1. Please clarify in this context whether, in your view, the fact that the conditions of access to the label are enforceable under US law makes compliance with it mandatory. Please provide an example of what would be a government enforceable labelling requirement that would not be mandatory.**

52. With respect to the Panel's first question, the U.S. provisions do not prohibit the use of labels referring to dolphins.[58] The U.S. dolphin safe labeling provisions set out the conditions under which tuna products may be labeled with any indication that they contain tuna caught in a manner that is safe for dolphins, or said another way, that is not harmful to dolphins, as explained in the U.S. response to Question 128.[59] The relevance of this fact is discussed in the U.S. response to Question 128.

53. With respect to the Panel's second question, the mere fact that a labeling requirement is enforceable does not make compliance with a labeling requirement mandatory within the meaning of paragraph 1 of Annex 1 of the TBT Agreement. While in some cases the *absence* of enforcement provisions may be indicative of whether compliance with the requirement is mandatory, enforcement provisions may merely help ensure that products labeled in a certain

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[56] U.S. Second Written Submission, para. 105; U.S. First Written Submission, paras. 131-133.

[57] U.S. Second Written Submission, para. 106.

[58] The DPCIA provides that if a tuna product bears the official dolphin safe label that the product shall not bear any other label or mark that refers to dolphins. 16 U.S.C. 1385(d)(3)(B), Exhibit US-5. In other words, a condition of labeling tuna products with the official dolphin safe label is that the product not bear any other label or mark that refers to dolphins. This is different, however, than prohibiting the use of labels referring to dolphins. To the contrary, the DPCIA expressly allows producers to label their products with the official dolphin safe label (which refers to dolphins) or with any alternative label (which may also refer to dolphins) in accordance with the conditions set out in the DPCIA. 16 U.S.C. 1385(d)(1)(3), Exhibit US-5. See also the U.S. response to Question 131 below. It is also helpful to understand that the official dolphin safe label is not simply any label that uses the terms "dolphin safe." It is a specific label designed by the U.S. Department of Commerce. A copy of this label is shown in Exhibit US-58.

[59] *See also* DPCIA, 16 U.S.C. 1385(d), Exhibit US-5; U.S. First Written Submission, paras. 129-134; U.S. Second Written Submission, paras. 96-101.

way meet the conditions to be labeled that way.[60] In other words, enforcement provisions may simply reinforce that the measure sets out labeling *requirements*. The presence of enforcement provisions alone do not answer the question as to whether compliance with the labeling requirement is mandatory within the meaning of Annex 1 of the TBT Agreement.

54. Further, it would not be uncommon for voluntary labeling requirements to include enforcement provisions. For example, many Members have laws preventing deceptive practices. Those laws do not require products to be labeled in a particular way but do provide that if a product is labeled in a particular way the labeling must not be false or deceptive and include enforcement provisions. For example, the EU permits nutritional claims on product labels, such as "low-fat" and "sugar-free,"on food products. However, the EU provides that such claims may only be used if certain conditions are met.[61] "Low-fat" may only appear on a label if the product contains no more than 3 grams of fat per 100 grams and "sugar-free" may only appear on a label if the product contains no more than 5 grams of sugar per 100 grams.[62] The EU directive setting out these labeling requirements provides that EU member States may prohibit use of health claims that they believe are inconsistent with the EU directive, pending an EU Commission decision on the matter,[63] and may require manufacturers to submit a sample label containing the health claims the manufacturer is making.[64] It also requires Commission approval of certain health claims before they may be included on a label, and approval is based on whether the health claim meets the conditions set out for that health claim in the EU directive.[65]

55. Mexico, for example, allows manufacturers to voluntarily include certain information on pre-packaged food labels (which Mexico refers to "optional information requirements") but provides that if such information is included it must meet certain conditions.[66] Mexico permits inclusion of a "complementary nutritional information" provided certain conditions are met. For example, the amount of a particular nutrient may only be included on a label if it comprise over 5% of the "nutritional value reference."[67] Mexico also permits inclusion of quality and

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[60] U.S. Second Written Submission, para. 101; *see also* U.S. Second Written Submission, paras. 88-100.

[61] Regulation (EC) No. 1924/2006 of the European Parliament and of the Council 20 December 2006 on nutrition and health claims made on foods, 2006 OJ (L404) 9-25, Exhibit US-82.

[62] Regulation (EC) No. 1924/2006, Article 13 and Annex I Exhibit US-82.

[63] Regulation (EC) No. 1924/2006, Article 23, Exhibit US-82

[64] Regulation (EC) No. 1924/2006, Article 25, Exhibit US-82.

[65] Regulation (EC) No. 1924/2006, Articles 15-17, Exhibit US-82.

[66] Mexican Official Norm NOM-051-SCFI-1994, General Labeling Specifications for Pre-Packed Foods and Non-Alcoholic Beverages, Article 4.3, Exhibits US-83A and 83B.

[67] NOM-051, Article 4.3.1.1.

environmental claims, but provides that such claims may not be false or misleading for consumers.[68] Mexico provides that these provisions shall be enforced by the competent authorities.[69] Mexico's consumer protection law also provides that information or advertising regarding goods, products or services must be truthful and free of texts or descriptions that could be misleading or deceptive and that violations of this provision are subject to monetary penalties.[70]

56. The U.S. dolphin safe labeling provisions are another example of a measure that sets out voluntary labeling requirements and includes enforcement provisions.

131. To the United States: Could you please provide examples of other labelling schemes that are generally considered as voluntary, and that restrict the use of alternative labels in a way that is similar to the restrictions to the use of alternative labels set out by the DPCIA provisions?

57. Please see the U.S. response to Questions 128 and 129. In addition, it should be clarified that the U.S. dolphin safe labeling provisions do not prohibit the use of alternative labels. Tuna products may be labeled dolphin safe or with any other indication that the product does not contain tuna caught in a manner harmful to dolphins, provided the conditions in the DPCIA are met. For products meeting those conditions, producers may indicate on their products that they do not contain tuna caught in a manner harmful to dolphins by using either the official dolphin safe label or any term or symbol of their choosing to indicate that.[71] In fact, most tuna product that are sold in the United States with an indication that they do not contain tuna caught in a manner harmful to dolphins do not use the official dolphin safe label to indicate that but instead use their own labels.[72]

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[68] NOM-51, Article 4.4, Exhibit US-83.

[69] NOM-51, Article 8, Exhibit US-83.

[70] Federal Consumer Protection Law (*Ley Federal de Protección al Consumidor*), *Dario Official*, 19 July 2010, Article 32 and 127, Exhibit US-84.

[71] DPCIA, 16 U.S.C. 1385(d)(1) and (d)(3), Exhibit US-5; U.S. First Written Submission, para. 25; U.S. Answers to the First Set of Questions from the Panel (Questions 3 and 11), paras. 5-6, 28; U.S. Second Written Submission, para. 100. In particular the DPCIA states, that "[t]he Secretary of Commerce shall develop an official mark that *may* be used to label tuna products as dolphin safe in accordance with this Act" and that "[i]t is a violation of section 45 of title 15 to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the [official mark] *unless*" certain conditions are met. This language confirms that tuna products may either be labeled with the official dolphin safe label or an alternative label, provided the conditions in the DPCIA for indicating that the tuna product does not contain tuna caught in a manner harmful to dolphins are met.

[72] U.S. Second Written Submission, para. 100; U.S. Answers to the First Set of Questions from the Panel (Question 11), para. 28

132. To the United States: Is the "dolphin safe" official logo a registered trademark in the United States? Does trademark protection provide guarantees against deceptive practices comparable to those provided in the measures at issue?

58. The United States government does not own a trademark registration for the term "dolphin safe." There are prohibitions against the registration or use of trademarks that are misleading or deceptive.[73] However, these prohibitions arise only if a party utilized or sought to register a trademark that included or was comprised of deceptive matter. If a party used a deceptive term that was not part of a trademark, the legal prohibitions against deceptive uses of trademarks would not provide a basis for preventing the party's use of the deceptive term.

[Article 2.2]

134. To the United States: Please comment on Mexico's contention that the fact that a footnote similar to footnote 3 of the SPS Agreement was not included in Article 2.2 of the TBT Agreement must be given some meaning when interpreting the latter.

59. As elaborated in previous U.S. submissions, Article 5.6 and footnote 3 of the SPS Agreement provide relevant context for interpreting Article 2.2 of the TBT Agreement.[74] Given the textual similarities between Article 5.6 of the SPS Agreement and Article 2.2 of the TBT Agreement, as well as the similarities between the TBT and SPS Agreements themselves, it makes sense to interpret Article 2.2 of the TBT Agreement similarly to Article 5.6 of the SPS Agreement. Footnote 3 explains that a measure is not more trade-restrictive than required unless there is another reasonably available alternative measure that achieves the Member's appropriate level of protection and is significantly less trade-restrictive.

60. In some situations, the absence of particular language in one provision as compared to another may indicate that the two provisions should be interpreted differently. However, this is not the situation with respect to Article 2.2 of the TBT Agreement. First, the text of Article 2.2 supports interpreting that article to require, that in order for a measure to be found more trade-restrictive than necessary to fulfill a legitimate objective, an alternative measure must be reasonably available that fulfills the Member's legitimate objective.[75]

61. Second, the TBT Agreement itself indicates that its focus is not on insignificant trade effects. For example, Article 1.6 of the TBT Agreement provides that references to technical

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[73] *See, e.g.,* 15 U.S.C. 1052(a).

[74] U.S. Second Written Submission, paras. 121; U.S. First Written Submission, para. 167; U.S. Answers to the First Set of Questions from the Panel (Question 69), para. 157.

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

regulations, standards, and conformity assessment procedures shall be construed to include any amendments thereto "except amendments of ... an *insignificant* nature." Articles 2.9 and 5.6 of the TBT Agreement require Members to notify to the WTO technical regulations and conformity assessment procedures that have a "*significant* effect on trade."[76] Thus, in the context of the TBT Agreement, Article 2.2 should be read as concerning measures that have a significant effect on trade. According, a reasonably available alternative measure that would fulfill the measure's objective must be significantly less trade-restrictive in order to establish a breach of Article 2.2 of the TBT Agreement. The context provided by Article 5.6 further confirms that Article 2.2 should be interpreted as concerning measures that are significantly more trade-restrictive than necessary, and conversely that any reasonably available alternative measure must be significantly less trade restrictive.

62. Third, a letter from the Director General of the GATT at the time the TBT Agreement was concluded confirms that Article 2.2 should be interpreted similarly to Article 5.6 of the TBT Agreement. That letter states that "it was clear from our consultations at expert level that participants [in the negotiations of the TBT Agreement] felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative."[77]

135. To both parties: If the Panel determined that an analysis of the significance of the trade-restrictiveness of a technical regulation and the available alternatives is appropriate when applying Article 2.2 of the TBT Agreement, what should be considered significantly trade-restrictive or significantly less restrictive to trade in light of the facts of this case?

63. A measure that is significantly trade-restrictive is a measure that meaningfully restricts trade or has more than a minimal or *de minimis* trade-restrictive effect.[78] Thus, a measure that is significantly less trade-restrictive is a measure that restricts trade less than the challenged measure in some meaningful way or in a manner that is more than minimal or *de minimis*. The idea is that a measure should not be found inconsistent with Article 2.2 of the TBT Agreement simply because it is more trade-restrictive than another measure by some *de minimis* amount. The Panel does not need to reach the question of what would be significantly less trade-restrictive in the context of this dispute, however, since none of the alternative measures Mexico

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

[77] Letter from Peter D. Sutherland, Exhibit US-41; *see also* U.S. First Written Submission, para. 168; U.S. Second Written Submission, para. 121.

[78] *See New Shorter Oxford English Dictionary* (2003), p. 2860 (defining "significant" as "having or conveying a meaning...important, notable, consequential"); *id.*, p. 1379 (defining "insignificant" as "meaningless..trivial, trifling ... small in size").

has put forward would fulfil the objectives of the U.S. dolphin safe labeling provisions.[79]

138. To the United States: Please comment on Mexico's argument that the United States incorrectly relies on Article 5.6 and Footnote 3 of the SPS Agreement and includes in the definition of "necessary" in Article 2.2 of the TBT Agreement two concepts that are not in the text of the provision: (i) the concept that the measure must fulfil a legitimate objective "at the level that the Member imposing the measure has determined appropriate"; and (ii) the qualifying term "significantly" in the phrase "not more trade restrictive".

64. Article 2.2 of the TBT Agreement explicitly recognizes a Member's right to adopt technical regulations to fulfil legitimate objectives such as human health or safety, animal or plant life or health and the environment, provided such measures are no more trade-restrictive than necessary to fulfil a legitimate objective. The preamble to the TBT Agreement states that no Member should be prevented from taking measures *inter alia* to protect human, animal or plant life or health or the environment or to prevent deceptive practices "at the level it considers appropriate." An interpretation of Article 2.2 that takes into account this language from the preamble, which is relevant context within the meaning of Article 31 of the VCLT, is that it permits a Member to adopt technical regulations not only to fulfil legitimate objectives but at the level the Member considers appropriate. Thus, establishing a breach of Article 2.2 requires establishing that there is a reasonably available alternative measure that fulfils the measure's objectives at the level the Member considers appropriate. As the panel in *EC – Sardines* stated, "it is up to the Member[] to decide which policy objectives [it] wish[es] to purse and the levels at which [it] wish[es] to pursue them."[80]

65. With respect to the issue of "significantly" not more trade restrictive, please see the U.S. response to Question 134.[81]

[Article 2.4]

139. To the United States: Do you agree with Mexico's claim in paragraph 187 of its response to question 59 from the Panel, that the concept of "international standard" in Article 2.4 "should be applied flexibly"? Please provide the reasons supporting your position.

66. It is not clear what Mexico means in asserting that the term "international standard" in Article 2.4 of the TBT Agreement should be interpreted "flexibly." To the extent that means that

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[79] U.S. Second Written Submission, paras.154-162; U.S. First Written Submission, paras. 170-171.

[80] *EC – Sardines (Panel)*, para. 7.120.

[81] *See also* U.S. Second Written Submission, para. 121; U.S. First Written Submission, para. 167.

the term should be interpreted in a manner that departs from the text of the TBT Agreement, the United States does not agree with Mexico's assertion. As reviewed in previous U.S. submissions, the meaning of the term "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.[82] The United States bases this interpretation on the text of the TBT Agreement, in particular the definition of the term "international body" together with the ISO/IEC Guide 2:1991 definition of an "international standard" and the language in paragraph 2 of Annex 1 of the TBT Agreement: "Standard prepared by the international standardization community are based on consensus."[83]

67. To support this assertion that the term "international standard" should be interpreted flexibly Mexico states:

> [I]t is well accepted that the Institute for Electrical and Electronics Engineers [IEEE] and SAE International are engaged in setting international standards, yet those organizations have as members individuals and not governments. It is not clear that the TBT Agreement was intended to exclude the standards of those organizations from being treated as "international standards" even though those entities are not open to WTO "members" as such.

While the United States agrees that bodies such as IEEE and SAE may develop international standards, the United States reaches this conclusion based on the meaning of the term "international standards" derived from the text of the TBT Agreement. In particular, the TBT Agreement defines an international body as a body whose membership is open to the relevant bodies of at least all Members, and the ISO/IEC Guide 2 defines "international standardizing organization" as a "standardizing organization whose membership is open to the relevant national body from every country." Nothing in these definitions indicate that membership in an international body, including an international standardizing body, is limited to governments.[84] A

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[82] U.S. Answers to the First Set of Questions from the Panel (Question 59), paras. 134-135; U.S. Second Written Submission, paras. 176-177.

[83] U.S. Answers to the First Set of Questions from the Panel (Question 59), para. 135.

[84] As explained in the U.S. Second Written Submission, Mexico appears to equate the term "national body" in the definition of an "international standardizing organization" in ISO/IEC Guide 2:1991 with the term "government body." *See* U.S. Second Written Submission, para. 178 n.239; Mexico Answers to the First Set of Questions from the Panel (Question 59), paras. 186-187. However, the ISO/IEC Guide 2 defines "national standards body" as a "standards body recognized at the national level, that is eligible to be the national member of the corresponding international or regional standards organization." *See* ISO/IEC Guide 2:1991, paras. 4.4.1, 4.4.3. Either a government or non-government body could be recognized as the national member of a standards organization and, in fact, in the United States, the American National Standards Institute (ANSI) is the recognized national standards body for example with respect to participation in ISO and IEC. ANSI is a non-governmental organization. *See* About ANSI Overview, Exhibit US-74.

body such as SAE that allows individuals as well as bodies[85] of at least all WTO Members to be members would fall within the definition of a body whose membership is open to the relevant bodies of at least all WTO Members.

68. There is also an important policy reason for not interpreting the term "international standard" "flexibly" as Mexico suggests or in a way that departs from the text of the TBT Agreement. Under Article 2.4 of the TBT Agreement, Members have an obligation to base their technical regulations on relevant international standards, unless ineffective or inappropriate to fulfil a legitimate objective. Accordingly, it is important for Members to know which standards are "international" and therefore standards on which they have an obligation to base their technical regulations. If the term international standard is given a "flexible" meaning that departs from the text of the TBT Agreement, it is not clear how Members could be expected to know which standards are international and in turn how to comply with their obligation under Article 2.4 of the TBT Agreement.

141. To both parties: In your view, what meaning should be given to the terms "recognized activities in standardization"? When interpreting the term "recognized" in this expression, should the Panel take into account, inter alia, the fact that the United States is a member of the IATTC and a signatory party to the AIDCP?

69. The term "recognized activities in standardization" appears in the definition of a "standardizing body" in ISO/IEC Guide 2:1991. The ISO/IEC Guide informs the meaning of the term "recognized body" in the definition of a standard in Annex 1 of the TBT Agreement. In particular, it suggests that a body is "recognized" within the meaning of Annex 1 of the TBT Agreement if it has "recognized activities in standardization."[86] Determining whether a body has "recognized activities in standardization" would require assessing whether it engages in activities that are recognized as involving the development of standards.[87] This assessment would focus on whether the body develops standards as that term is defined in the TBT Agreement. In this regard, the United States does not read the term "recognized" in either the ISO/IEC Guide or the TBT Agreement to mean a form of formal recognition or acknowledgment by all or a subset of WTO Members but rather interprets the word "recognized" to refer to a body that engages in activities that involved the development of "standards" as that term is defined in the TBT

[85] ISO/IEC Guide 2:1991 defines a "body" as a "legal or administrative entity that has specific tasks and composition", for example a company, organization or authority. ISO/IEC Guide 2:1991, para. 4.1; *see also* ISO/IEC Guide 2:1991, para. 4.5 (defining "authority" as "body that has legal powers and rights").

[86] U.S. Second Written Submission, para. 173; U.S. First Written Submission, para. 184.

[87] ISO/IEC Guide 2:1991 defines "standardization" but in light of the definition of "standard" in the TBT Agreement and the fact that it differs from the definition of that term in the ISO/Guide it does not appear appropriate to rely on the ISO/IEC Guide's definition of "standardization"; rather in the context of the TBT Agreement "standardization" maybe understood to mean the activity of developing standards.

Agreement.

70. In this dispute, Mexico has not established that the AIDCP is a body that has recognized activities in standardization. The AIDCP is an intergovernmental agreement, not a body. Further, the AIDCP resolutions were adopted by the parties to the AIDCP and not a "body" as that term is defined for purposes of the TBT Agreement. While the IATTC is a body, neither the AIDCP nor the AIDCP resolutions were adopted by the IATTC. The fact that the United States is a signatory to the AIDCP and a member of IATTC does not change these facts.

71. It should also be emphasized that decisions regarding implementation of the international dolphin conservation program established under the AIDCP are taken by the parties to the AIDCP, not the IATTC. While meetings of the parties to the AIDCP typically take place in conjunction with IATTC meetings and the IATTC is to provide Secretariat support for the AIDCP, decisions regarding implementation of the international dolphin conservation program including any resolutions thereunder remain decisions of the parties to the AIDCP. The IATTC has no legal authority to undertake activities or make decisions regarding the international dolphin conservation program established by the AIDCP. Further, the 1949 IATTC Convention and its successor agreement the Antigua Convention, which establish the IATTC, and the AIDCP are distinct legal instruments, each with their own objectives and obligations.

142. To both parties: Acting as member of the IATTC and within the context of this organization, has the United States ever objected the appropriateness or effectiveness of the AIDCP regime to protect the dolphin populations in the ETP? Within the same context, has the United States ever expressed concerns about the consumer-deceiving potential of the AIDCP "dolphin-safe" designation?

72. The United States has been and continues to be a strong supporter of the AIDCP, whether at meetings of the parties to the AIDCP, IATTC meetings or in other contexts. The United States supports the AIDCP because it recognizes that setting on dolphins to catch tuna occurs and that the conservation measures called for under the AIDCP are an effective means to reduce observed dolphin mortalities when dolphins are set upon to catch tuna. In the context of the AIDCP, the United States has periodically proposed or supported efforts to strengthen implementation of the AIDCP. The strong U.S. support for the AIDCP, however, should not be understood to mean that the United States supports the practice of setting on dolphins to catch tuna or that the United States believes the measures called for under the AIDCP are sufficient to protect dolphins from the harms associated with setting on dolphins to catch tuna.

73. Regarding whether the United States has ever expressed concerns about other countries' use of the AIDCP dolphin safe designation for their markets in the IATTC or AIDCP party meetings, the United States has not.

143. To the United States: In paragraph 54 of your second oral statement you refer to the AIDCP "dolphin safe" regime as "the so-called AIDCP standard".

Would you consider the fishing methods and dolphin mortality limits (DML) prescribed by the AIDCP to be a "standard", notwithstanding your position that it should not be considered to be a "relevant international standard" within the meaning of Article 2.4?

74. To avoid any potential confusion, the United States used the term "so-called AIDCP standard" as short-hand to refer to the fact that Mexico calls the AIDCP definition of dolphin safe a standard when it is not in fact a standard; this reference should not be read as suggesting that the AIDCP definition of dolphin safe is a standard within the meaning of Annex 1 of the TBT Agreement.

75. The fishing methods and dolphin mortality limits prescribed by the AIDCP do not constitute standards within the meaning of Annex 1 of the TBT Agreement.[88] Neither the fishing methods nor the dolphin mortality limits called for under the AIDCP constitute product characteristics or terminology, symbols, packaging, marking or labeling requirements as the apply to a product, process or production method. Further, the AIDCP was not adopted by a "recognized body." The AIDCP was adopted by governments that became party to the AIDCP, which is not a "body" as that term is defined for purposes of the TBT Agreement.[89]

C. CLAIMS UNDER THE GATT 1994

146. To the United States: In your oral statement you argue that a measure that affords the same treatment to imported and like domestic products does not discriminate against imported products and cannot violate Article I:1 or Article III:4 of the GATT 1994. Please clarify what is meant by "the same treatment" in that context?

76. Part of the analysis under Article III:4 of whether measure accords less favorable treatment to imported products as compared to like domestic products is a determination of what treatment the measures accords. It is not possible for a measure that accords (on its face and in fact) the *same* treatment to imported and like domestic products to accord *less* favorable

[88] The definition of a standard in Annex 1 of the TBT Agreement provides that a standard is a document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production methods." TBT Agreement, Annex 1, paragraph 2; *see also* U.S. Second Written Submission, para. 169; U.S. First Written Submission, paras. 179.

[89] The definition of a"recognized body" including in relation to the AIDCP is discussed in U.S. Response to Question 141, U.S. Second Written Submission, para. 173 and U.S. First Written Submission, paras. 180, 184.

treatment to imported products.[90] Conversely, it is possible for a measure that accords different treatment to imported and like domestic product to accord such less favorable treatment and thus it must be examined whether the different treatment accorded imported products is less favorable than the treatment accorded like domestic products.

77. Similarly, part of the analysis under Article I:1 of the GATT 1994 of whether a measure fails to accord an advantage to imported products of some Members that it accords to imported products of other Members is a determination of what advantage the measure accords. It is not possible for a measure that accords (on its face and in fact) the same advantage to imported products of all Members to fail to accord an advantage to imported products from some Members as compared to others.

78. For example, in *Dominican Republic – Cigarettes*, the Appellate Body found the measure at issue accorded the same treatment to imported and like domestic products. In that dispute, the same treatment was the imposition of a bond requirement of equal value (RD$5 million) with respect to both imported and like domestic products.[91] The Appellate Body found that the measure did not accord less favorable to treatment to imported products and was therefore not inconsistent with Article III:4 of the GATT 1994. In *Korea – Beef*, the Appellate Body found that the measures at issue accorded 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.[92] In that dispute, the different treatment was that domestic beef was allowed to be sold in certain stores while imported beef either had to be sold exclusively in specialty stores or, in the case of large grocers, stocked in display cases separate from domestic

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[90] While the question of whether a measure accords imported and domestic products the same treatment is often not a simple one, particularly in a dispute where a measure is origin-neutral on its face but uses seemingly origin-neutral criteria to in fact accord imported products less favorable treatment than like domestic products. But, in such circumstances it still must be determined if the measure is according imported and domestic products the same treatment or whether it is according imported products less favorable treatment. A variety of evidence may show that and such evidence may differ from case to case. The United States has pointed out the type of evidence that has been used in other disputes to show that a facially origin-neutral measure in fact accords imported products less favorable treatment than like domestic products as well as factors that the Appellate Body has noted would be relevant in rebutting such evidence, for example, whether there is a clear relationship between the objective of the measure and the treatment it accords. Mexico has not put forward the type of evidence used in other disputes or any other evidence to prove *de facto* discrimination, while the United States has put forward the type of evidence specifically noted by the Appellate Body as relevant to rebutting allegations that a seemingly origin-neutral criteria is in fact being used to accord less favorable treatment. See U.S. response to Question 150, *infra*.

[91] *Dominican Republic – Cigarettes (AB)*, para. 96; *see also* U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 165 & n.139.

[92] *Korea – Beef (AB)*, paras. 143-144. The panel in *Mexico – Soft Drinks* similarly examined whether the measure accorded different treatment to imported sweeteners and after finding that, although on its face the measure at issue did not accord imported and like domestic sweeteners different treatment (in that dispute, different tax treatment), it did so in fact. *Mexico – Soft Drinks (Panel)*, para. 8.119-8.121.

beef. The panel found that this different treatment constituted less favorable treatment inconsistent with Article III:4 of the GATT 1994.[93]

79. In this dispute, the U.S. dolphin safe labeling provisions treat imported and domestic products the same; the distinctions drawn by the provisions are not based on origin. The same conditions for tuna products to be eligible for a dolphin safe label apply to domestic products as apply to imported tuna products, including Mexican tuna products. In other words, the U.S. provisions treat imported and domestic tuna products the same. Any different treatment the U.S. provisions accord is to tuna products that contain tuna caught in a manner harmful to dolphins and tuna products that do not contain tuna caught in a manner harmful to dolphins.

147. To the United States: During the second substantive meeting, Mexico observed that the US arguments concerning any objectives that the United States may have are irrelevant to the claims Mexico is making under Articles I and III of the GATT and Article 2.1 of the TBT Agreement, and are only relevant to its claims under Article 2.2 of the TBT Agreement. Please comment.

80. The United States disagrees with Mexico's assertion. As the Appellate Body has stated, the general principle set forth in Article III:1 informs the rest of the Article III and is a "'guide to understanding and interpreting the specific obligations contained' in the other paragraphs of Article III, including paragraph 4."[94] The general principal under Article III is that measures shall not be applied so as to afford protection to domestic production.[95] In that regard, the United States has reiterated in its arguments under Article III that the objectives of the dolphin safe labeling provisions are dolphin protection and ensuring consumers are not misled or deceived about whether dolphins were harmed when the tuna was caught. It has explained that there is a clear relationship between these objectives and conditions under which U.S. measures allow tuna products to be labeled dolphin safe. This clear relationship, among other evidence,[96] counters

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[93] *Korea – Beef (AB)*, paras. 143-144.

[94] *EC – Asbestos (AB)*, para. 93 (quoting *Japan – Alcohol (AB)*, p. 112-13).

[95] GATT, Article III:1; *see also EC – Asbestos (AB)*, para. 97 (quoting *Japan – Alcohol (AB)*, p. 109-10)*; Korea – Beef (AB)*, para. 93.

[96] This evidence includes importantly that eligibility to label tuna products dolphin safe is not based on the product's origin. It is based on whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins. Mexico has not offered evidence to establish that conditioning eligibility to label tuna products dolphin safe on whether they contain tuna caught in a manner that adversely affects dolphins is a proxy to accord less favorable treatment to imported products. As reviewed in the U.S. response to Question 148 and previous U.S. submissions, Article III:4 does not prohibit measures that draw distinctions among like products that may result in some like products (including some imported products) facing less desirable treatment than others if the distinctions drawn are not based on origin (*see, e.g.,* U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 163), and while a complaining party may put forward evidence that a seemingly origin-neutral criteria is in fact a proxy for origin, Mexico has not done so in this dispute.

Mexico's assertion that the U.S. measures use fishing technique as a means to discriminate against Mexican tuna. In contrast, in *Chile – Alcohol* there was no such relationship between the stated criteria on which products were subject to a higher tax rate (alcohol content) and the stated objectives of the Chilean tax measure, and the Appellate Body consider this as a factor in concluding that the Chilean tax measures were applied so as to afford protection to domestic product.[97]

81. The clear relationship between the objectives of the U.S. measures is also relevant to Mexico's claims under Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement. In both cases, the clear relationship between the objective of the U.S. measure and the conditions under which tuna products may be labeled dolphin safe is evidence supporting the conclusion that the U.S. measures do not use fishing technique as a means to discriminate against Mexican tuna products.

82. Thus, the objective of a measure and whether there is a clear relationship between that objective and the treatment the measure accords is relevant when analyzing a claim that a measure discriminates against imported products, in particular when the claim is that a measure uses a seemingly origin-neutral criterion to in fact discriminate against imported products.

83. In this regard, it is important to emphasize that the U.S. argument is not that a determination of whether a measure accords less favorable treatment to imported products should turn on the objective of the measure. The objective of a measure discerned from its architecture, structure and design[98] is one piece of evidence among others. In this dispute, not only are the objectives of the U.S. measure aimed at ensuring consumers are not misled and protecting dolphins, and not protectionism, but more importantly the U.S. measures are structured and designed to fulfill their objectives of ensuring consumers are not mislead and protecting dolphins. In particular, the U.S. measures set out conditions for labeling tuna dolphin safe that ensure that tuna products labeled dolphin safe do not contain tuna caught by setting on dolphins (a fishing technique that is harmful to dolphins) and that contribute to dolphin protection by ensuring the U.S. market is not used to encourage a fishing technique that is harmful to dolphins. Further, the facts on record in this dispute do not support Mexico's contention that, although the measures are on their face origin-neutral and do not have protectionism as their objective, they in fact accord less favorable treatment to imported products.

148. To both parties: In *EC - Asbestos*, the Appellate Body observed that:

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

[98] The objective of a measure should be discerned from the architecture, structure and design of a measure, not the subjective intent of legislators, as reviewed in previous U.S. submissions. *Japan – Alcoholic Beverages (AB)*, p. 26-27 (establishing the difference between an analysis of subjective intent and of the objective intent as manifested in the measure itself); *see also Chile – Alcoholic Beverages (AB)*, paras. 59-63.

"a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products".

In light of this determination, and especially the reference to the "groups" of imported and domestic like products, please clarify:

(a) whether, in your view, an assessment of "less favourable treatment" should be based on an examination of the treatment afforded under the measures to the entire group of domestic like products as compared to the treatment afforded to the entire group of like imported products;

84. Whether a measure accords imported products less favourable treatment than like domestic products is not based on an examination of the treatment accorded *some* imported products as compared to the treatment accorded *some* or all domestic products. It is based on an examination of what treatment the measure accords and whether it accords imported products less favorable treatment than like domestic products.

85. Thus, the U.S. argument is not that the Panel's Article III:4 analysis should be based on a comparison of the treatment accorded some imported products (e.g., those that do not contain tuna caught by setting on dolphins) versus the treatment accorded some domestic products (e.g., those that do not contain tuna caught by setting on dolphins).[99] It is that the determination of whether the U.S. provisions accord imported products less favorable treatment must be based on the treatment the U.S. provisions accord imported as compared to domestic tuna products. Because the treatment the U.S. provisions accord tuna products is not based on origin – but rather on whether the tuna products contain tuna caught in a manner harmful to dolphins – the U.S. provisions accord the same treatment to imported and domestic tuna products: whether domestic or imported, tuna products are subject to the same conditions on use of a dolphin safe label.

86. The language quoted above from the Appellate Body report in *EC – Asbestos* supports the U.S. position on this issue. This language appears in the Appellate Body's discussion of the term "like product" as it appears in Article III:4 of the GATT. In particular, the Appellate Body explains that, although it is interpreting the term "like product" in a way that gives the provision a relatively broad product scope, establishing a claim under Article III:4 still requires establishing "that a measure accords to the group of 'like' *imported* products 'less favorable treatment' than it accords to the group of 'like' *domestic* products."[100] With respect to the latter, the Appellate Body observes that a "Member may draw distinctions between products which have been found

[99] We would note, however, that such a comparison would support the U.S. position that the U.S. dolphin safe labeling provisions do not use origin as a basis for the treatment they accord tuna products.

[100] *EC – Asbestos (AB)*, para. 100.

to be 'like', without for this reason alone, according to the group of 'like' *imported* products 'less favorable treatment' than that accorded to the group of 'like' *domestic* products."[101]

87. In stating this, the Appellate Body is explaining that, although it is giving a relatively broad reading to the term 'like product' in Article III:4, a measure may draw distinctions between like products (i.e., provide different treatment to some like products as compared to others) without that alone giving rise to a breach of Article III:4. The references to the "group of 'like' *imported* products" and "group of 'like' *domestic* products" support the view that the types of distinctions with which Article III:4 is concerned are those that distinguish between products based on whether they are domestic or imported, or said another way, based on origin. In other words, a measure that accords different treatment to some imported products as compared to some like domestic products based, for example, on whether the products contain tuna caught in a manner harmful to dolphins, is not a measure that accords different treatment to "the group of 'like' *imported* products" than the "group of 'like" *domestic* products." It is a measure that accords different treatment to the group of tuna products that contain tuna caught in a manner harmful to dolphins as compared to the group of tuna products that contain tuna caught in a manner that is not harmful to dolphins. Consistent with the Appellate Body's report in *EC – Asbestos*, distinctions based on criteria other than origin are not distinctions that accord less favorable treatment to the group of imported products as compared to the group of like domestic products.

(b) whether this implies that all products within the imported products group must be treated less favourably in order for the "less favourable treatment" to exist; and

88. The language quoted above from the Appellate Body report in *EC – Asbestos* does not imply that all products within the group of imported products must be treated less favorably to find that a measure accords less favorable treatment to imported products.[102] As explained above, the quote in *EC – Asbestos* stands for a different proposition.

89. It is also important to reiterate that the U.S. dolphin safe labeling requirements do not accord different treatment based on origin to domestic products versus imported products, and

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[101] *EC – Asbestos (AB)*, para. 100.

[102] Mexico misreads the U.S. position on this issue, asserting that "the United States argues that Mexico must demonstrate that almost all imports receive the less favorable treatment." Mexico Oral Statement at the Second Panel Meeting, para. 44. The United States points out that in other disputes that concerned a *de facto* claim where a facially neutral measure was found in fact to accord imported products less favorable treatment, evidence showed that almost all imported products were subject for example to the higher tax. The United States also points out that such evidence does not exist in this dispute. The United States, however, does not argue that this is the only type of evidence that might establish a *de facto* claim. However, in this dispute, Mexico has not put forward any evidence to establish that the U.S. dolphin safe labeling provisions use fishing technique or location to in fact accord less favorable treatment to imported tuna products. *See infra* U.S. response to Question 150.

therefore cannot be said to accord less favorable treatment to any foreign tuna products. The same conditions for tuna products to be eligible for the dolphin safe label apply to domestic products as apply to imported tuna products, including Mexican tuna products. The dolphin safe labeling provisions distinguish between different products based on whether the tuna was caught in a manner harmful to dolphins and not because one set of products happens to be imported.[103] As the United States has noted, the findings in *EC – Biotech* and *Dominican Republic – Cigarettes* support that a measure accords less favorable treatment to imported products than to like domestic products when any less favorable treatment it accords is based on the foreign origin of the imported products.[104]

90. To the extent that some products falling within the group of like products were to receive different treatment than other products falling within the group of like products, it would be reasonable to consider what portion of products receiving that different treatment were imported in evaluating whether the basis for the different treatment was in fact a proxy for origin. Where all or almost all domestic products fall in the group of like products that receive one kind of treatment, and all or almost all imported products fall in the group of like products that receive another, less favorable treatment, one may question whether the basis for the less favorable treatment is a proxy for origin.

91. However, the fact that some imported products may fall within the group of like products that are subject to different treatment that may be less favorable alone is not evidence that a measure accords less favorable treatment to *imported* products as compared to like *domestic* products, particularly where there is evidence that the basis for the different treatment is not in fact origin. If the basis for the different treatment is not origin, but for example the fact that some like products pose risks to life or health or the environment, then the measure is according imported and like domestic products the same treatment and it cannot be said to accord less favorable treatment to *imported* products as compared to like *domestic* products. This is consistent with the Appellate Body's finding in *EC – Asbestos* that Members may draw distinctions between like products and, if the basis for such distinctions is not based on origin, then the measure is not drawing distinctions between imported and domestic products. It is drawing distinctions between like products based on criteria other than origin, and Article III:4 does not prohibit such distinctions.

(c) how the comparison should be conducted in the present dispute (for. ex. comparing the treatment afforded to tuna eligible for the label and not eligible? comparing the treatment afforded to all US products and all Mexican products under the measures? something else?).

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[103] U.S. Opening Statement at the Second Panel Meeting, para 25.

[104] *See* U.S. Opening Statement at the Second Panel Meeting, para 27 (citing *EC – Biotech*, paras. 7.2514-7.2515 and *Dominican Republic – Cigarettes*, para. 96).

92. The relevant comparison is between the treatment accorded U.S. tuna products and imported tuna products generally. As stated, the U.S. dolphin safe labeling provisions accord imported and domestic tuna products the same treatment.

> **149. To the United States: You have referred to the treatment afforded to "imported products" under the measures in the context of your arguments concerning "less favourable treatment". In light of your position that the "like products" at issue are US and Mexican tuna products, please clarify whether you consider that the existence of less favourable treatment must be assessed with reference to imported tuna products in general, rather than to Mexican tuna products? If so, please explain why this should be the case. Please clarify also how the relative situation of imports of different sources may be accounted for under this assumption.**

93. The United States would like to clarify its position as stated in this question. As stated in the U.S. response to the first set of questions from the Panel: "The 'like products' analysis under Article III:4 should compare U.S. tuna products in general and imported tuna products in general."[105]

94. The United States considers that the existence of less favourable treatment must be assessed with reference to imported tuna products in general versus domestic tuna products in general because Article III:4 prescribes no less favorable treatment of imported products as compared to like domestic products. Article I:1 of the GATT 1994 — not Article III:4 — addresses circumstances in which a measure is according less favorable treatment to imports from some Members as compared to others.

95. As noted in the U.S. response to Question 148(b) above and in previous U.S. submissions, evidence that all or almost all imported products are subject to one kind of treatment and all or almost all domestic products are subject to another kind of treatment may suggest (although is not conclusive evidence in its own right) that a measure accords different treatment based on origin – that is, based on the fact that the product is imported versus domestic. In making such an evaluation it makes sense to compare products that are imported against products that are domestic and evaluate what percentage of imported products as compared to what percentage of domestic products are subject to one kind of treatment versus the other. It would not make sense to limit this comparison to only a portion of products that are imported.

96. Whether a measure that is origin-neutral on its face in fact accords less favorable treatment to imported products as compared to like domestic products depends on the particular facts of each case. Thus, in a particular case, establishing a claim of less favorable treatment may

[105] U.S. Response to the First Set of Questions from the Panel (Question 74) para. 160.

involve 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 demonstrated that "almost 100 per cent"and 95 percent of imported products respectively were subject to the higher tax rate.[106] In these situations, and given the absence of any countervailing evidence or explanation submitted by the complaining parties, this evidence supported the conclusion that the measures were according different tax treatment based on origin.

97. The United States has put forward extensive evidence in this dispute showing that the U.S. provisions do not in fact use fishing technique or location as a proxy for origin. The fact that tuna product imports from other nations – in fact the vast majority of all tuna imports – are eligible to receive the dolphin safe label is one piece of evidence that U.S. provisions do not use origin to distinguish between tuna products that are eligible to be labeled dolphin safe.

98. Even if the Panel were to look solely at Mexican tuna products as compared to domestic tuna products, it would not be the case that Mexican tuna products would be shown to be accorded less favorable treatment. As we stated in our second written submission[107]:

> One-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and therefore tuna products that contain tuna caught by these vessels are eligible to be labeled dolphin safe.[108] The remaining two-thirds of Mexico's purse seine fleet also opportunistically uses techniques other than setting on dolphins to catch tuna.[109] In fact during the first meeting with the Panel, Mexico acknowledged that 20 percent of its fleet's catch is caught by techniques other than setting on dolphins.[110] Tuna caught by those vessels using those techniques are also eligible to use the dolphin safe label.

Further, an even greater portion of Mexico's catch could be caught using techniques other than setting on dolphins as Mexican vessels that set on dolphins are capable, and in fact do, use techniques to catch tuna other than setting on dolphins. In other words, it is not the case that some percentage of Mexican tuna may not be used in tuna products labeled dolphin safe; all Mexican tuna could be used in tuna products labeled dolphin safe if Mexico's fleet chose to catch it in a dolphin-safe manner.

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

[107] U.S. Second Written Submission, para.

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

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

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

99. With so much of the Mexican tuna catch currently eligible to be used in tuna products labeled dolphin safe, and so many situations in which the technique of setting on dolphins is not used by Mexican vessels to catch tuna or in which other techniques could be used by Mexican vessels to catch tuna, the evidence simply does not support the conclusion that the fishing method used is a proxy for singling out Mexican tuna products, let alone imported tuna products more generally.

100. Further, there is evidence that there is a clear relationship between the objective of the U.S. provisions and the conditions under which tuna products may be labeled dolphin safe as well as evidence that the U.S. provisions are structured and designed to fulfil their objectives. Together this evidence rebuts the contention put forward by Mexico that the percentage of Mexico's catch that is caught by setting on dolphins, and that may not be used in tuna products labeled dolphin safe, is evidence that the U.S. provisions use fishing technique to in fact discriminate against Mexican tuna.

150. To the United States: You have referred, in your written submissions and in your oral statement, to the regulatory distinctions in the measures being used as "proxies", or imports being "singled out" as a basis for determining whether "less favourable treatment exists. Please clarify whether the existence of a protectionist intent, or an intent to "single out" imports is, in your view, necessary for the establishment of de facto "less favourable treatment" under Article III:4.

101. The United States does not argue that the Panel should examine whether there is protectionist intent behind a measure to determine whether it accords less favorable treatment within the meaning of Article III:4, although as reviewed in the U.S. response to Question 147 and below, whether there is a clear relationship between the objective of a measure and the treatment it accords may be relevant in evaluating whether any different treatment the measure provides is based on origin.

102. Instead of focusing on whether there is evidence of protectionist intent, an examination of whether a measure accords less favorable treatment should start with the text of the measure itself and an analysis of the treatment the measure accords. As stated in the U.S. response to Question 146 above and elaborated in previous U.S. submissions, the U.S. dolphin safe labeling provisions accord the same treatment to imported and domestic tuna products.

103. The evidence put forth by Mexico does not support its assertion that the U.S. dolphin safe labeling provisions, although origin neutral on their face, in fact accord imported products less favorable treatment than domestic tuna products. In fact, the only facts that Mexico has submitted in support of its claim are that the U.S. provisions prohibit tuna products that contain tuna caught by setting on dolphins from being labeled dolphin safe and that Mexican vessels set

on dolphins to catch tuna while U.S. vessels do not.[111] These facts are the sole basis for Mexico's contention that the U.S. provisions accord less favorable treatment to imported tuna products.

104. These facts, however, are insufficient to establish that the U.S. provisions in fact accord imported tuna products less favorable treatment than domestic tuna products, particularly in light of the evidence submitted by the United States that eligibility to label tuna products dolphin safe is not based on origin but on the fact that setting on dolphins to catch tuna is harmful to dolphins and allowing tuna products to be labeled dolphin safe that contain tuna caught in a manner harmful to dolphins would be misleading and deceptive for consumers and would not contribute to dolphin protection. The facts on which Mexico relies only show that tuna products that contain Mexican tuna caught by setting on dolphins do not meet the conditions to be labeled dolphin safe, just as the tuna products that contain tuna caught by the vessel of any nation by setting on dolphins do not meet the conditions to be labeled dolphin safe. Mexico has not provided any evidence that any different treatment that the U.S. provisions accord (e.g., as between products that contain tuna caught by setting on dolphins and those that do not) is based on origin. As such, it has not established the U.S. provisions accord imported tuna products any different treatment than domestic tuna products, much less treatment that is less favorable.

105. Furthermore, the evidence that the United States presents in support of its position that the U.S. provisions do not in fact provide different treatment to imported products, and that the treatment of imports is no less favorable than the treatment of domestic products, demonstrates that:

- setting on dolphins to catch tuna is harmful to dolphins;
- the ETP is the only ocean in the world where tuna and dolphins associate in a regular and significant way and where that association is exploited on a wide-scale commercial basis to catch tuna;
- the ocean in which the tuna is caught is not synonymous with origin,
- other countries, including the United States, fish for tuna in the ETP,
- the U.S. fleet set on dolphins to catch tuna at the time the statute was enacted, and
- Mexico can and does catch tuna by techniques other than setting on dolphins.[112]

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[111] Mexico First Written Submission, para. 165; Mexico Oral Statement at the First Panel Meeting, para. 34. Mexico does not elaborate on these facts in any of its subsequent submissions.

[112] U.S. First Written Submission, paras. 46-59, 37-39, 114, 113, 44; U.S. Second Written Submission, paras. 2-3, 146, 32, 81, 28-31, 24.

106. In addition, the United States has explained how the structure of the statute shows a clear relationship with its stated objectives and does not support the conclusion that the dolphin safe labeling conditions are applied in a manner so as to afford protection.[113] The application, structure and design of the U.S. dolphin safe labeling provisions support the conclusion that the measures protect dolphins and ensure consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner harmful to dolphins. Looking at the objective of a measure, however, is different than looking at the intent, protectionist or otherwise, of those who created the measure. The facts put forth by the United States do not pertain to the intent of legislators, regulators, or judges in creating the dolphin safe labeling provisions; they pertain to the objective of the measure discerned from its architecture, structure and design and the basis on which the U.S. provisions condition use of a dolphin safe label.

151. To the United States: You suggest that it is necessary to establish that a different treatment "based on origin" exists for a finding of "less favourable treatment" to be made. Are you suggesting that a single measure or requirement applied in the same manner to domestic and imported products cannot "modify the conditions of competition to the detriment of imported products"? Assume, for the sake of argument, a measure requiring all tuna to be caught using pole & line fishing as a pre-condition to bear the dolphin safe label, where all or the majority of domestic tuna products are made of tuna caught by pole and line fishing and all or the majority of imported tuna products are made of tuna caught using other fishing methods. Would such a measure afford "less favourable treatment" in your view?

107. A measure that on its face or in fact accords different treatment to imported products based on origin would not be "origin-neutral." If such different treatment constituted less favorable treatment on the basis of origin, then the measure would be inconsistent with Article III:4. The hypothetical posed here could give rise to a concern that the measure at issue uses fishing method as a proxy for origin. But this would not end the inquiry. As noted in the U.S. response to Question 146 and 148(b), the critical issue to consider in assessing less favorable treatment is what treatment the measure accords like products and whether that treatment is different and less favorable based on the product's origin. If the facts showed, for example, that all other methods of fishing other than pole & line fishing caused harm to dolphins, and the objective of the statute was dolphin protection, this would be evidence that the measure was not using fishing techniques as a proxy for origin, or in other words, was not using fishing technique to in fact accord less favorable treatment to imported products.

152. To both parties: In a situation where a measure leads in fact to most imports being subjected to a less desirable treatment while most domestic like products receive a preferred treatment, independently of any intention to afford less favourable treatment to imported products, is there, in your view, less favourable

[113] U.S. Second Written Submission, paras. 33-36.

treatment of the imported products within the meaning of Article III:4?

108. In a situation where a measure leads in fact to most imports being subjected to less desirable treatment while most domestic like products receive a preferred treatment, as described in this question, it is not necessarily the case that the measure in question accords less favorable treatment to imported products within the meaning of Article III:4. This is because the question of whether a measure accords less favorable treatment depends on the treatment the measure accords. As the Appellate Body stated in *Dominican Republic – Cigarettes*: "[T]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product."[114] Thus, in the situation described in the Panel's question, it must be asked on what basis are imported products being subject to less desirable treatment? Are imported products being subject to less desirable treatment based on their foreign origin or because of some other origin-neutral criteria?

109. Take for example the scenario where a measure limits the amount of chemical X that may be used in the production of toys to no more than 0.1 percent. As a result of this measure, most imported toys may no longer be sold in the relevant Member's market, since they are produced using greater amounts of chemical X than the measure allows; whereas most domestic toys may continue to be sold in the Member's market, since domestic producers stopped using chemical X in their toys prior to the ban's adoption. In one variation of this scenario (variation A), there is no safety, environmental or other concern associated with chemical X. In this variation, the fact that most imported products may no longer be sold may be evidence that the measure is using the amount of chemical X that may be used in toys as a proxy to in fact accord less favorable treatment to imported products, particularly given that the Member has not provided evidence that there is any relationship between the objective of the measure (e.g., regarding safety or the environment) and the basis on which it distinguishes between which toys may be sold and which may not. In other words, there appears to be no basis other than origin for distinguishing between toys that may be sold.

110. In another variation of this scenario (variation B), there is scientific evidence that toys containing chemical X are harmful to children and in particular evidence that toys containing more than 0.1 percent of chemical X subject children to harmful exposure to toxins. In this variation, the fact that most imported toys may no longer be sold would not be evidence that the measure is using the amount of chemical X that may be used in toys as a proxy to in fact accord less favorable treatment to imported products. Instead, the evidence would show a clear relationship between the objective of the measures (protecting children) and the ban on toys containing more than 0.1 percent of chemical X. It would also show that the basis for distinguishing between toys that may be sold and those that may not is whether the toys contain an amount of a chemical that subjects children to harmful exposure to toxins. Article III:4 does

[114] *Dominican Republic – Cigarettes (AB)*, para. 96.

not prohibit a Member from distinguishing between products on this basis, even where the effect of doing so may be that most imported products may not be sold in the Member's market. In fact, as reviewed in the U.S. response to Question 148, this is precisely what the Appellate Body was suggesting in *EC – Asbestos* when it stated that Members may draw distinctions between like products without that alone according less favorable treatment to imported products

111. In this regard, it is also telling that the Appellate Body made this statement in *EC – Asbestos* in the context of its like product discussion. Mexico has asserted that the scenario described above in variation B would be addressed through the like product analysis; specifically that, if there were health concerns with chemical X, toys containing chemical X would not be found "like" toys that do not contain chemical X. While the toxicity of a particular input might be a factor in determining whether two products are "like" it is not necessarily the case that a product that contains, for example 0.01 percent more of a toxic chemical than another product, would be found not "like." Indeed, given the Appellate Body's statement in *EC – Asbestos* that it is giving the term "like product" in Article III:4 a relatively broad scope, coupled with its statement that "a Member may draw distinctions between products without, for this reason alone, according to the group of 'like' *imported* products 'less favorable treatment' than that accorded to the group of 'like' *domestic* products," suggests that there will indeed be scenarios where products are found to be "like" but where a measure distinguishes between like products. In an Article III:4 analysis the critical inquiry in a situation where a measure distinguishes between like products, is on what basis does the measure make that distinction; if it does not distinguish (in law or in fact) based on origin, it does not accord less favorable treatment to imported products and is not prohibited under Article III:4.

153. To both parties: Please clarify whether, in your view, the existence of "less favourable treatment" under Article III:4 relates in essence to the impact of the measure or to its objectives (or to something else)?

112. The existence of less favorable treatment is about the treatment the measure accords. In a dispute where the claim is that the measure on its face accords imported products less favorable treatment than like domestic products, a panel would examine whether on its face the measure accords different treatment to imported and like domestic products, and if so, whether that different treatment is less favorable (e.g., as the Appellate Body did in *Korea – Beef*). In a dispute where the claim is that the measure on its face accords the same treatment to imported and like domestic products but in fact accords imported products less favorable treatment than like domestic products, a panel would examine whether the facts of that dispute support the conclusion that what appears to be an origin-neutral basis for distinguishing between like products is in fact based on origin (e.g., as the panel did in *Mexico – Soft Drinks*).[115]

[115] As reviewed in the U.S. response to Questions 148, a fact that might support such a conclusion is where all or almost all imported products are subject to less desirable treatment on account of the distinction the measure draws between likes products but such a fact alone would not be sufficient to support a conclusion that a measure accords imported products less favorable treatment than like domestic products.

113. Mexico loses sight of that fact Article III:4 concerns the treatment a measure accords, and in particular the treatment a measure accords imported products as compared to like domestic products, and argues that the Article III:4 analysis is simply a question of the impact of the measure.[116] However, any Article III:4 analysis must include an analysis of the treatment the measure accords imported products as compared to like domestic products, a question that necessarily involves evaluating whether the treatment the measure accords is based on origin.

114. In this regard, the United States is not, as Mexico suggests, setting up a novel approach or new legal "test" for Article III:4.[117] The text of Article III:4 refers to according imported products no less favorable treatment than accorded like domestic products. It is therefore not a novel approach to ask what treatment does the measure accord imported products as compared to like domestic products in analyzing a measure under Article III:4. Because the distinction between imported and like domestic product is origin (i.e., one is domestic, one is foreign), it make sense and is consistent with the text of Article III:4 to ask whether the treatment the measure accords is based on origin. Further, the second sentence of Article III:4 states "the provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transportation and not on the nationality of the product."[118] This sentence supports the position that an Article III:4 analysis involves an analysis of whether treatment the different and less favorable treatment the measure accords is based on origin.

115. Furthermore, this approach is consistent with how panels and the Appellate Body have analyzed claims under Article III:4. As noted in U.S. response to Question 75, in prior disputes where panels and the Appellate Body have found a breach of Article III:4 they have found that the measure accorded different and less favorable treatment to imported and like domestic products (i.e., treatment based on origin); where panels and the Appellate Body have not found a breach of Article III:4, they did not find different treatment based on origin.[119]

116. Mexico appears to be concerned that the United States suggests that it makes sense to first ask the question regarding what treatment the measure accords and does it accord different treatment based on origin before examining whether any treatment the measure accords is less favorable.[120] Regardless of the order in which these questions are asked, each must be answered in order to find a breach of Article III:4. Mexico position that the only relevant question is

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[116] *See, e.g.,* Mexico Oral Statement at the Second Panel Meeting, para. 54.

[117] Mexico Oral Statement at the Second Panel Meeting, para. 30, 32.

[118] GATT, Article III:4.

[119] U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 161 n.135.

[120] Mexico Oral Statement at the Second Panel Meeting, paras. 31-32.

whether the measure accords less favorable treatment ignores that Article III:4 is not about whether the measure accords less favorable treatment generally or to some like products as compared to others; it is about whether the measure accords imported products less favorable treatment than like domestic products, a question that cannot be answered without considering whether the measure accords different and less favorable treatment based on origin.

117. This is not to suggest that the impact of a measure is completely irrelevant to an Article III:4 analysis. In particular, as elaborated below, the impact of a measure on the conditions of competition between imported and domestic products is relevant. However, whether a measure impacts the conditions of competition to the detriment of imported products cannot be answered without considering the treatment the measure accords and in particular the treatment it accords imported as compared to domestic products. Importantly, a measure that accords domestic and imported products the same treatment (both on its face and in fact) is not a measure that modifies the conditions of competition to the detriment of imported products.

118. If a measure accords imported and like domestic products different treatment, as the Appellate Body in *Korea – Beef* explained, this is not the end of the inquiry. Article III:4 does not prohibit different treatment of imported and like domestic products; it only prohibits treatment of imports that is less favorable than the treatment of like domestic products.[121] To evaluate whether such different treatment is less favorable, a panel would examine whether the such different treatment modifies the conditions of competition to the detriment of imported products. In this regard, if by "impact" the Panel's question intended to refer to the impact on trade flows, then an analysis of trade flows would not be relevant to an inquiry regarding less favorable treatment under Article III:4. The relevant impact is the impact that the measure has on the conditions of competition. Note that it is not enough for the measure to impact or modify the conditions of competition. The impact must modify those conditions to the detriment of imported products. This implies a negative impact on the conditions of competition for imported products relative to domestic products. Thus, in this dispute, it would not be not enough for Mexico to show that the absence of a dolphin safe label on Mexican tuna products affects its ability to compete in the U.S. market.[122] Mexico must show that it is the U.S. provisions that alter the conditions under which imported and domestic products compete to the detriment of imported products. However, because under the U.S. provisions the same conditions on use of a dolphin safe label apply to domestic and imported tuna products, the U.S. provisions do not modify the conditions of competition as between imported and domestic tuna products.

119. Regarding, the objectives of a measure, the U.S. position on how the objectives of a measure are relevant to the "less favorable treatment" analysis are reviewed in the U.S. response

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[121] *Korea – Beef (AB)*, paras. 143-144.

[122] We would note that Mexico has not even established this, particularly in light of evidence that consumers have a preference for dolphin safe tuna and at least one major grocery retailer sells tuna products that are not labeled dolphin safe. Photos of Great Value Tuna, Exhibit US-73; Walmart Website (Great Value Tuna), Exhibit US-81.

to Question 147.

154. To both parties: In situations where the different treatments afforded under a measure are, on their face, related to a regulatory objective pursued by the measure, rather than to the origin of the products, what is the relevance of such regulatory objectives in assessing the existence of "less favourable treatment"?

120. That the treatment a measure accords is clearly related to its stated objective is evidence in support of the argument that the measure does not accord less favorable treatment to imported products. In particular, it is evidence that the measure is not applied so as to afford protection, but rather supports a non-protectionist objective. The United States has explained how the structure of the statute shows a clear relationship with its stated objective.[123] The application, structure and design of the U.S. dolphin safe labeling provisions support the conclusion that the measures are to protect dolphins and ensure consumers are not misled or deceived about whether dolphins were harmed when the tuna was caught. Please also see the U.S. response to Question 147.

[Article I:1]

157. To the United States: Commenting on Mexico's assertion that at the time of US - Tuna (Mexico) "there was no factual basis upon which to assess the effects of the dolphin safe labelling provisions" you argue that Mexico confuses the effect of the measure - i.e., how it operates and whether it fails to accord an advantage to imports of Mexican tuna products - with the effects of the measure on trade flows and that the panel in that dispute devoted considerable effort to considering how the U.S. dolphin safe labelling provisions operated and whether they accorded an advantage to imported tuna products of other countries that they did not also accord imported tuna products of Mexico. Please clarify how the existence of the embargo on Mexican yellowfin tuna is not relevant for assessing that Mexican tuna products have in effect not been granted the same treatment than tuna products originating in other ETP and non ETP countries with respect to the access to the tuna dolphin safe label once on the US market.

121. The existence of the embargo on Mexican yellowfin tuna is not relevant to assessing the treatment the U.S. dolphin safe labeling provisions accord tuna products. The U.S. dolphin safe labeling provisions accord tuna products originating in Mexico and tuna products originating in other countries the same opportunity to label tuna products dolphin safe: tuna products that do not contain tuna caught by setting on dolphins or in a set in which dolphins were killed or seriously injured may be labeled dolphin safe. The fact the U.S. dolphin safe labeling provisions accord tuna products originating in Mexico the same opportunity to be labeled dolphin safe may

[123] U.S. Second Written Submission, paras. 33-36.

be discerned from the text of the U.S. provisions themselves coupled with other facts on record in this dispute that refute Mexico's claims that the U.S. provisions use fishing technique or the ocean where the tuna was caught to in fact accord less favorable treatment to Mexican tuna products as compared to tuna products originating in other countries. These facts include that:

- setting on dolphins to catch tuna is harmful to dolphins;
- the ETP is the only ocean in the world where tuna and dolphins associate in a regular and significant way and an associate between tuna and dolphins is exploited on a wide-scale commercial basis to catch tuna;
- countries other than Mexico fish for tuna in the ETP;
- countries other than Mexico set on dolphins to catch tuna;
- Mexico uses techniques other than setting on dolphins to catch tuna; and
- the origin of tuna is determined by the flag of the vessels that caught the tuna or the country in which it was processed.[124]

122. These facts are not affected by whether yellowfin tuna products are subject to an embargo. For example, Mexico argues the U.S. dolphin safe labeling provisions, while origin neutral on their face, in practice discriminate against Mexican tuna products as compared to imports from other countries. One factual inquiry relevant to this claim is whether the ETP is synonymous with a particular origin for tuna products. Facts relevant to this inquiry include *inter alia* in what oceans the Mexican and other fleets fish and the fishing methods those fleets use as well as on what basis the origin of tuna products is determined. The existence of a yellowfin tuna embargo would not affect this analysis. Mexican fishing fleets and fishing fleets from several other nations were fishing and continue to fish for tuna in the ETP before and after the yellowfin tuna embargo.[125] Also, Mexican fishing fleets and fishing fleets from several other nations set on dolphins to catch tuna as well as use techniques other than setting on dolphins to catch yellowfin tuna as well as other tuna in the ETP. This was true at the time the embargo was in place and is true today.[126] Thus, the existence of the embargo does not change where Mexican tuna fleets and other fleets fish. Furthermore, whether there is a yellowfin tuna embargo has no bearing on the fact that the origin of the tuna is determined by the flag of the vessel or where the

[124] U.S. First Written Submission, paras. 107-119; U.S. Second Written Submission, paras. 22-32.

[125] IATTC Active Purse Seine Vessel Register, Exhibit US-15; IATTC Regional Vessel Register, Exhibit US-16; IATTC Data Report, pp. 39, 42, Exhibit US-78.

[126] IATTC Active Purse Seine Vessel Register, Exhibit US-15; IATTC Regional Vessel Register, Exhibit US-16 IATTC Data Report, pp. 39, 42, Exhibit US-78.

tuna is processed rather than the ocean in which the tuna was caught.

123. Whether yellowfin tuna is embargoed is also not relevant to the operation of the U.S. dolphin safe labeling provisions. Both before and after the embargo was lifted the U.S. provisions prohibit the labeling of tuna products dolphin safe if they contain tuna caught by setting on dolphins. Further, it is the case that both before and after the embargo was lifted, tuna products that are not labeled dolphin safe and that are not dolphins safe may be freely sold in the United States.

124. Since Mexico catches yellowfin tuna by setting on dolphins, the effect of consumers' preference for dolphin safe tuna might be more pronounced today than it would have been had the embargo not been lifted, but any assertion by Mexico that it would be importing more yellowfin tuna to the United States in the absence of the U.S. dolphin safe labeling provisions would be speculative at best, particularly given consumers' strong preference for tuna that is not caught in manner harmful to dolphins. Furthermore, simply examining trade flows should not be the basis of determining whether a measure in fact discriminates based on origin. Mexico itself concedes as much, saying that "from the perspective of the legal and factual thresholds for Mexico's claims, the volume of trade in tuna products between Mexico and the United States is not relevant."[127] Thus, the embargo itself is not relevant in assessing whether tuna products of other countries were accorded an advantage not accorded to Mexican tuna products.

> **160. To the United States: The Panel in Canada - Autos stated "... the fact that conditions attached to such an advantage are not related to the imported product itself does not *necessarily* imply that such conditions are discriminatory with respect to the origin of imported products" (emphasis added). Please explain your assertion in your second written submission that conditions that are origin-neutral are not inconsistent with the obligation in Article I:1 in light of this ruling.**

125. The panel report in *Canada - Autos* supports the U.S. position in this case. The United States does not argue that conditions which are related to the imported product itself are never discriminatory with respect to origin. And certainly in some circumstances, conditions that are not related to the imported product itself may be discriminatory. As the panel in *Canada – Autos* went on to explain, conditions attached to an advantage have been found to be inconsistent with Article I:1 "not because they involved the application of conditions that were not related to the imported product but because they involved conditions that entailed different treatment of imported products depending upon their origin."[128]

126. In this dispute, not only are the dolphin safe labeling conditions related to the tuna

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

[128] *Canada – Autos (Panel)*, para.10.25.

products themselves, they are, more importantly, not related to the origin of the tuna product.[129] For this reason, the U.S. dolphin safe labeling do not fail to accord an advantage to Mexican tuna products that they accord tuna products originating in other countries. In other words, the U.S. provisions accord the same opportunity to be labeled dolphin safe to tuna products regardless of the country in which they originate and therefore are not inconsistent with Article I:1.

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[129] *See* U.S. Second Written Submission, paras. 13-15.