

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

(DS381)

**Comments of the United States on the Answers of Mexico
to the Second Set of Questions from the Panel to the Parties**

January 26, 2011

Table of Reports

Short Form	Full Citation
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , 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
<i>Canada – Wheat Exports (AB)</i>	Appellate Body Report, <i>Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted on 27 September 2004, para. 133.
<i>Dominican Republic – Cigarettes (AB)</i>	Appellate Body Report, <i>Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS 302/AB/R, adopted on 19 May 2005, para. 96.
<i>Mexico – Soft Drinks</i>	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, adopted 24 March 2006, as modified by the Appellate Body Report, WT/DS308/AB/R
<i>United States – Tuna Dolphin I</i>	<i>United States – Restrictions on Imports of Tuna</i> , 3 September 1991, unadopted, BISD 39S/155

TABLE OF EXHIBITS

Exhibit US-	Title
89	IATTC Resolution C-09-01, Resolution on a Multiannual Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2009-2011
90	IATTC Resolution C-10-01, Recommendation on a Multiannual Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2011-2013

A. FACTUAL ISSUES

86. To Mexico: In your responses to questions and second written submission you argued that for tuna caught outside the ETP where no regular and significant association has been established, there is no requirement of certification ensuring the absence of killing of dolphins or serious injury, as opposed to what is required for tuna caught in the ETP by purse seine fishing. The Table provided by the United States (Exhibit US-59), suggests that tuna caught by non purse seine vessels outside the ETP in an area where no regular and significant association has been established but where there is regular and significant mortality or serious injury to dolphins may be labelled dolphin-safe only if it is accompanied by a written statement executed by the captain of the vessel and an observer that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determined that such an observer statement is necessary. Please clarify how you reconcile these two descriptions. Please also explain the relevance of these distinctions to your claims.

1. In its response, Mexico asserts that it is meaningless for the U.S. dolphin safe labeling provisions to require a captain's and an observer's statement to support dolphin safe claims on tuna products that contain tuna caught in a fishery other than the ETP where there is regular and significant dolphin mortality or a regular and significant tuna-dolphin association.¹ Mexico offers three bases for its conclusion: the United States has not (a) specifically defined the term "regular and significant", (b) established a procedure under which it could evaluate whether there is regular and significant dolphin mortality or a regular and significant tuna-dolphin association, or (c) attempted comprehensive research in other fisheries.² None of these bases support Mexico's assertion.

2. First, an established definition or procedure is not needed for the United States to determine whether there is regular and significant dolphin mortality or a regular and significant tuna-dolphin association in a fishery other than the ETP. Rather, based on the circumstances of a particular fishery, the United States would evaluate the relevant evidence and determine whether that evidence was sufficient to conclude that there is "regular and significant" dolphin mortality or a "regular and significant" tuna-dolphin association in the fishery. Should the United States determine that there is regular and significant dolphin mortality or a regular and significant tuna-dolphin association in a fishery other than the ETP, dolphin safe claims on tuna products that contain tuna caught in that fishery would be subject to the provision of the relevant captain's and observer's statement.

¹ Mexico Answers to the Second Set of Questions from the Panel (Question 86), para. 1.

² Mexico Answers to the Second Set of Questions from the Panel (Question 86), para. 1.

3. Second, there are robust observer programs in fisheries outside the ETP and in particular in the Western and Central Pacific. These programs are significant and, importantly, capable of detecting whether there is any indication of regular and significant dolphin mortality or a regular and significant tuna-dolphin association in those fisheries that is any way similar to that in the ETP. Those observer programs have not reported any such indication. Further, Mexico’s assertion ignores that the AIDCP requirement for 100 percent observer coverage on large purse seine vessels in the ETP is not what led to the “discovery” that dolphins were being set upon to catch tuna in the ETP or that dolphins were regularly being killed and seriously injured as a result; rather, evidence that this was occurring and a desire to take action to reduce it is what led to the 100 percent observer requirement.³

4. In addition, in its response, Mexico cites several “facts” that allegedly support its claim under Article 2.2 of the TBT Agreement by calling “into serious question whether the stated objectives of the measure are its genuine objectives” and establishing that the U.S. provisions cannot fulfill their objectives. The “facts” Mexico cites, however, are not facts and do not support its Article 2.2 claim.

5. First, the U.S. dolphin safe labeling provisions do not apply “more lax” conditions for labeling tuna products dolphin safe that contain tuna caught outside the ETP versus inside the ETP. Documentation to support dolphin safe claims differs based on the risk that dolphins will be set upon to catch tuna or killed or seriously injured in the fishery. If it is determined that there is a regular and significant tuna-dolphin association or regular and significant dolphin mortality in a fishery, dolphin safe claims on tuna products that contain tuna caught in such a fishery would be subject to the provision of a captain’s and an observer’s statement that no dolphins were killed or seriously injured.⁴ Further, if it is determined that there is a regular and significant tuna-dolphin association in a purse seine fishery, dolphin safe claims on tuna products that contain tuna caught in such a fishery would be subject to the provision of a captain’s and an observer’s statement that purse seine nets were not intentionally set on dolphins.⁵

6. The fact that an observer’s statement is not required where there is no regular and significant tuna-dolphin association and no regular and significant dolphin mortality reflects the

³ See e.g., Mexico First Written Submission, paras. 23-26, 42 (describing the extent and nature of dolphin mortality in the ETP and that this is what led to the establishment of the International Dolphin Conservation Program); see also U.S. Second Written Submission, para. 46-47.

⁴ 16 U.S.C. 1385(d)(1)(B)(i), Exhibit US-5; see also Exhibit US-59.

⁵ 16 U.S.C. 1385(d)(1)(D), Exhibit US-5; see also Exhibit US-59. Mexico asserts that because the U.S. dolphin safe website only describes the conditions under which tuna products may be labeled dolphin safe if they contain tuna caught in the ETP, this must signal something about conditions under which tuna products that contain tuna caught inside and outside the ETP may be labeled dolphin safe. Mexico Answers to the Second Set of Questions from the Panel (Question 86), para. 3 (4th bullet). There is no basis for Mexico's supposition. The conditions under which such products may be labeled dolphin safe remain those set out in the U.S. dolphin safe labeling provisions.

low likelihood that a dolphin may be killed or seriously injured. This is consistent with the objective of the U.S. provisions of protecting dolphins by ensuring the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna (since, absent a regular and significant tuna-dolphin association, dolphins cannot be exploited as they are in the ETP to catch tuna) as well as the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner harmful to dolphins.⁶

7. Second, the official dolphin safe label and alternative dolphin safe labels do not convey different meanings. When a dolphin safe label appears on a tuna product – whether the official label or an alternative label – it conveys that the tuna product does not contain tuna that was caught in a manner that adversely affects dolphins. As reviewed in the U.S. Second Written Submission, the one scenario that Mexico identifies where a tuna product might contain tuna caught in a set in which a dolphin was killed or seriously injured and be labeled dolphin safe with the official dolphin safe label (where it could not be so labeled with an alternative label) very likely does not exist, given the very low likelihood that a dolphin may accidentally be killed under that scenario and the fact that the official dolphin safe label is rarely used on tuna products sold in the United States.⁷ Further, even if such a scenario in fact existed, it would not, as Mexico suggests,⁸ indicate that the U.S. provisions fail to fulfill their objectives. Rather, the different documentation required to support dolphin safe claims on tuna products that contain tuna caught in a fishery where there is no regular or significant tuna-dolphin association and no regular and significant dolphin mortality, reflects a balance between the risks that dolphins may be killed or seriously injured against the burden that conditioning use of a dolphin safe label on the provision of certain documentation (e.g., an observer's statement that no dolphins were killed or seriously injured) would impose.⁹ Balancing such costs and benefits is consistent with well-established regulatory practice as well as the language of the TBT Agreement, which recognizes a Member's right to adopt technical regulations *inter alia* to prevent deceptive practices and protect animal life or health *at the level the Member considers appropriate*.¹⁰

⁶ In this dispute, Mexico asserts that the objective of the U.S. provisions is "protecting dolphins." Mexico Answers to the First Set of Questions from the Panel (Question 64), paras. 214-216; Mexico Answers to the Second Set of Questions from the Panel (Question 137), para. 110. It is not clear how Mexico's arguments that the U.S. provisions apply different standards inside and outside the ETP support its arguments that the objectives of the U.S. measures are protecting dolphins rather than ensuring consumers are not misled or deceived about whether tuna products contain tuna caught in a manner harmful to dolphins and ensuring the U.S. market is not used to encourage a fishing technique that is harmful to dolphins.

⁷ U.S. Second Written Submission, paras. 143-147.

⁸ Mexico Answers to the Second Set of Questions from the Panel, para. 3 (5th bullet), 4 (2nd bullet).

⁹ U.S. Second Written Submission, paras. 149-152.

¹⁰ U.S. Second Written Submission, para. 152.

8. In this regard, Mexico appears to be arguing for an approach under which the WTO dispute settlement system would review a Member's measure to determine if it possible to design the measure to be even more "effective" at achieving the Member's objective and without regard to the costs such a design would impose, and if so, then to conclude that the measure is inconsistent with Article 2.2 of the TBT Agreement. This approach is incorrect, would be far more intrusive on a Member's domestic regulations and policy than Members ever agreed, and fails to focus on the issues on which Members did agree – for example, whether the measure is more trade-restrictive than necessary.

9. Third, there is no basis for Mexico's assertion that if the United States were applying the same "scientific standards" outside the ETP it would make similar presumptions about unobserved dolphin mortality inside and outside the ETP.¹¹ The United States does not simply "presume" there are unobserved dolphin mortalities in the ETP. Rather, as reviewed extensively in previous U.S. submissions, the conclusion that there is significant unobserved dolphin mortality in the ETP is based on substantial scientific research showing that repeated high speed chase and encirclement of dolphins has a number of adverse effects on dolphins. These adverse effects include the separation of nursing dolphin calves from their mothers (who die of starvation and predation without their mothers), cumulative organ damage, failed or impaired reproduction and increased predation by predators such as sharks that congregate outside nets to take advantage of exhausted dolphins.¹² These adverse effects result in significant unobserved dolphin mortality and are the most probable reasons that dolphin populations remain depleted in the ETP and show no clear signs of recovery.¹³ Outside the ETP, there is no tuna-dolphin association similar to the association between tuna and dolphins in the ETP that could be exploited on a commercial basis to catch tuna.¹⁴ Absent the repeated intentional chase and encirclement of millions of dolphins each year that occurs in the ETP to catch tuna, there is no basis to "presume" that there are significant unobserved dolphin mortalities outside the ETP much less unobserved dolphin mortality anywhere close to the level of unobserved dolphin mortality in the ETP.¹⁵

¹¹ Mexico Answers to the Second Set of Questions from the Panel, para. 3 (6th bullet)

¹² U.S. First Written Submission, paras. 55-56; U.S. Answers to the First Set of Questions from the Panel (Question 34), paras.78-85; Opening Statement at the Second Panel Meeting, paras. 7-8.

¹³ U.S. First Written Submission, paras. 50; U.S. Answers to the First Set of Questions from the Panel (Questions 34 and 35), paras. 78-88; U.S. Second Written Submission, para. 48.

¹⁴ U.S. Second Written Submission, paras. 42, 47-52, 56-57; U.S. Answers to the First Set of Questions from the Panel (Question 12), para. 31-34; U.S. First Written Submission, paras. 38-39; U.S. Opening Statement at the Second Panel Meeting, paras. 14-15.

¹⁵ Second Written Submission, paras 48-49; U.S. Opening Statement at the Second Panel Meeting, paras. 14-18; U.S. Answers to the Second Set of Questions from the Panel (Question 130), paras. 30-31.

88. To Mexico: Please comment on the information provided on the Earth Island Institute website and presented as an exhibit to the Amicus curiae brief, which states that more than 90% of the world's tuna canners companies (300 companies in 51 nations) adhere to the EII standard, which requires:

- (a) no intentional chasing, netting or encirclement of dolphins during an entire fishing trip;**
- (b) no use of drift gill nets to catch tuna;**
- (c) no accidental killing or serious injury to any dolphins during net sets;**
- (d) no mixing of dolphin-safe and dolphin-deadly tuna in individual boat wells (for accidental kill of dolphins), or in processing or storage facilities; and**
- (e) that each trip in the ETP by vessels 400 gross tons and above must have an independent observer on board attesting to the compliance with points (1) through (4) above.**

10. The United States disagrees with Mexico’s assertion in paragraph 5 of its response, which states that information submitted through an amicus curiae brief “cannot properly be treated as part of the record of this dispute.” Though a panel is not required to consider information submitted by amici, a panel may consider such information as it sees fit. In particular, the Chairman of this Panel invited the parties and third parties in this dispute to offer views in relation to the amicus curiae submission filed by the Humane Society International and the American University, Washington College of Law. The United States has reviewed the submission and believes that it contains a number of pieces of relevant and useful information that could assist the Panel in understanding the issues in this dispute.

11. One of the relevant pieces of information is the exhibit that includes the EII website.¹⁶ As the exhibit shows, the vast majority of the world’s tuna canneries have committed to meet EII’s criteria for dolphin safe which includes no intentional encirclement of dolphins as well as additional criteria beyond those set forth in the U.S. dolphin safe labeling provisions. Furthermore, contrary to Mexico’s assertions in its second written submission, it is not only tuna canners that are dedicated to selling tuna caught without intentional encirclement of dolphins – retailers are also committed to selling only tuna caught without intentional encirclement of dolphins.

¹⁶ Written Submission of Non-Party Amici Curiae Human Society International and American University, Exhibit 28.

12. In paragraph 8 of its response, Mexico states that there is no way to verify claims that no dolphins were killed or seriously injured during particular net sets outside the ETP without independent observers. As the United States has noted in several earlier submissions, several regional fisheries management organizations have concluded that at this time 100 percent observer coverage is not warranted outside of the ETP. Furthermore, it is the AIDCP, not the United States Government, that imposes the heightened observer requirement in the ETP, and the U.S. dolphin safe labeling provisions build upon the program already put in place by this multilateral mechanism. Finally, to the extent that there are fewer documentation requirements to substantiate dolphin safe claims outside of the ETP, this is justified by the relatively lower risk that dolphins will be killed or seriously injured when tuna is caught.¹⁷

13. In paragraph 10 of its response, Mexico apparently misunderstands the operation of 16 U.S.C. section 1385(d)(3)(C). The U.S. Tuna Tracking and Verification Program (TTVP) is used to verify dolphin safe claims for tuna that originates both inside and outside of the ETP. Though the documentation required to support dolphin safe claims on products depends on whether the tuna is caught in a fishery where there is a regular and significant tuna-dolphin association or regular and significant dolphin mortality, the TTVP used to verify dolphin safe claims is the same regardless of where the tuna is caught. Furthermore, the TTVP is used to verify dolphin safe claims for tuna labeled with the official label or any alternative dolphin safe label to the extent those criteria are included in U.S. law.

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?

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

14. Mexico states that fishing techniques used and the species of tuna caught in the ETP vary depending on the “subregion” of the ETP and that in the central and north ETP yellowfin is the target species which is caught by setting on dolphins, while in the south ETP skipjack and bigeye tuna are the target species which are caught using FADs.¹⁸ As shown in MEX-65A, however, setting on dolphins to catch yellowfin tuna occurs throughout the ETP as does sets on floating objects such as FADs to catch skipjack.¹⁹

¹⁷ See U.S. Second Written Submission, paras. 39-47.

¹⁸ Mexico Answers to the Second Set of Questions from the Panel (Question 89(a)), paras. 19-20.

¹⁹ MEX-65A, pp. 11-12.

15. Mexico's response represents that the two main fishing methods currently used in the ETP to catch tuna are purse seine and pole and line.²⁰ Mexico's response, however, omits that longline is also another primary means to catch tuna in the ETP (including by Mexican vessels) and that other methods are also used as detailed in the U.S. response to Question 89(a). Mexico's response also fails to specify the methods used by purse seine vessels including that Mexican purse seine vessels use techniques other than setting on dolphins to catch tuna. The techniques that purse seine vessels use to catch tuna in the ETP is detailed in the U.S. response to Question 89(a).

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.

16. The United States notes that Mexico's response that "almost the entirety of its vessels" has operated within the ETP gives no information about whether Mexico refers only to purse seine tuna vessels, or includes tuna vessels with other gear types and vessels fishing for other target species.

17. Mexico also notes that it does not have further information on this question. In this regard, it should be noted that it is Mexico's responsibility as the complaining party to establish the facts necessary to support its claims.

93. To Mexico: You have referred, in response to the Panel's earlier questions, to the different commercial value of different tuna species. In light of this,

(a) Please clarify which tuna species are caught in the ETP depending on the fishing method used and the price tuna reaches in the market when it is sold.

(b) Please clarify the relevance of these different commercial values to your claims, including with respect to the determination of "likeness" under Articles III:4 and I:1 of GATT 1994 and Article 2.1 of the TBT Agreement, "less favourable treatment" under Articles III:4 of GATT 1994 and 2.1 of the TBT Agreement, and the existence of a violation of Article I:1 of GATT 1994.

18. Mexico incorrectly states that small bigeye tuna and juvenile yellowfin tuna caught when setting on FADs to catch skipjack is "returned dead to the sea."²¹ IATTC members have adopted a resolution imposing a full retention requirement. Under this requirement, vessels targeting skipjack must retain catch of small bigeye and juvenile yellowfin tuna unless the tuna is not fit

²⁰ Mexico Answers to the Second Set of Questions from the Panel (Question 89(a)), para. 18.

²¹ Mexico Answers to the Second Set of Questions from the Panel (Question 93(a)), para. 29.

for human consumption.²² Whether it is “commercially viable” to process such tuna is not a basis under the IATTC resolution for returning bycatch of small bigeye and juvenile yellowfin to the sea. Further, Mexico has not substantiated its claim that it is “not commercially viable” to process small bigeye and juvenile tuna. In fact, when small big eye and juvenile yellowfin are caught in a purse-seine FAD fishery targeting skipjack they are generally used commercially in the same way as skipjack.

94. To Mexico: You have referred, in paragraph 17 of your oral statement, to the US indication that Mexican tuna products represent 1% of its imports of tuna products. What conclusions do Mexico draw from this figure? Are you suggesting that Mexico's imports should be at a higher level? If so, on what basis?

19. Mexico has provided no basis for its assertion that its imports should be at a higher level. In paragraph 33 of its response, Mexico alludes to latent demand for Mexican tuna products, but offers no evidence of such latent demand. In fact, one of its explanations for why latent demand should exist – the supposed high quality of canned yellowfin as compared to skipjack – is directly contradicted by its statement elsewhere that it “is not aware of any distinctions in consumer preferences for tuna products based on different types of tuna or price levels.”²³ As the United States has argued previously, Mexico’s assertions that it would be exporting more yellowfin tuna to the United States in the absence of the U.S. dolphin safe labeling provisions are speculative at best, particularly given consumers’ strong preference for tuna that is not caught in a manner harmful to dolphins.²⁴

20. Furthermore, as Mexico itself concedes, one cannot establish that a measure alters the conditions of competition to the detriment of imported products simply by examining trade flows.²⁵ Mexico evinces a fundamental misunderstanding of the conditions of competition analysis in its statements in paragraph 34 of its response. The mere fact that Mexico does not

²² The relevant IATTC resolution for states: “Renew, for 2010, the program to require all purse-seine vessels to first retain on board and then land all bigeye, skipjack, and yellowfin tuna caught, except fish considered unfit for human consumption for reasons other than size. A single exception shall be the final set of a trip, when there may be insufficient well space remaining to accommodate all the tuna caught in that set. At its annual meeting in 2010, the Commission shall review the results of the program, including compliance, and decide whether to continue it.” IATTC Resolution C-09-01, Resolution on a Multiannual Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2009-2011, para. 17, Exhibit US-89. IATTC members recommended renewal of this resolution for 2011 in IATTC Resolution C-10-01, Recommendation on a Multiannual Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2011-2013, para. 16, Exhibit US-90.

²³ Mexico Answers to the Second Set of Questions from the Panel, para. 32.

²⁴ See U.S. Answers to the Second Set of Questions from the Panel (Question 159), para. 124.

²⁵ Mexico Answers to the First Set of Questions from the Panel (Question 23), para. 39 (“[F]rom 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.”).

have the market share that it would like does not mean that measure has altered the conditions of competition to the detriment of imports. Rather, Mexico must demonstrate that the measure treats imported tuna products differently than domestic tuna products, and that the different treatment constitutes less favorable treatment to imported products as compared to domestic tuna products.

21. The United States has shown that the U.S. dolphin safe labeling provisions do not limit marketing opportunities for imported tuna products.²⁶ Further, the U.S. provisions do not prevent marketers of tuna products from selling tuna products that are not dolphin safe. Marketers are free to, and do, sell tuna products that are not dolphin safe.²⁷ In addition, both Mexican and U.S. purse seine vessels fished in the ETP by setting on dolphins at the time the U.S. provisions were enacted. Both Mexican and U.S. tuna products must meet the conditions in the U.S. provisions in order to be labeled dolphin safe in the U.S. market and no tuna product may be labeled dolphin safe if it was caught by setting on dolphins. Therefore, to the extent that the conditions of competition were altered by the U.S. dolphin safe labeling provisions, they were not changed to the detriment of imports. Instead, the U.S. provisions establish conditions for labeling tuna products dolphin safe that allow imported and domestic tuna products the same opportunities to compete in the U.S. market.²⁸

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.

22. In response to the Panel's request, Mexico asserts that it does not have access to relevant data. However, this data is publicly available on the National Marine Fisheries Service (NMFS) website. Using this publicly available data, the United States provided detailed information on U.S. imports of tuna and tuna products and on market share of domestic and foreign tuna products dating back to 1980.²⁹ This information shows, for example, that the market share of imported tuna products increased from 33 percent in 1990 to 52 percent in 2009 and that the combined market share of imported tuna products together with domestic tuna products that contain imported tuna increased from 68 percent in 1990 to 84 percent in 2009.³⁰ This increase in market share of imported tuna products and domestic tuna products that contain imported tuna

²⁶ U.S. Second Written Submission, para. 60.

²⁷ U.S. Second Written Submission, para. 61.

²⁸ See U.S. Second Written Submission, paras. 59-65 (explaining why the U.S. dolphin safe labeling requirements do not alter the conditions of competition to the detriment of imports).

²⁹ U.S. Imports of Tuna and Tuna Products, Exhibit US-85; U.S. Market Share of Tuna Products in Airtight Containers, Exhibit US-86.

³⁰ Market Share of Tuna in Airtight Containers (ATC), Exhibit US-86.

is not consistent with Mexico’s theory in this dispute that the U.S. provisions deny competitive opportunities (e.g. access to the U.S. market for tuna products) to imported tuna products.

99. To both parties: The United States, in its oral statement, states that it has 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. Dolphins may be chased by speedboats and trapped in nets for 45 minutes to hours before they are finally released.³¹ The United States notes that the speedboats, which Mexico states are used to “rescue and liberate” dolphins trapped in purse seine nets, would not be needed for this purpose if they had not been deployed to chase and encircle dolphins in the first place.

100. To Mexico: The United States in its oral statement states that Mexico does not refute the evidence that dolphin mortality is at least 14% greater than observed dolphin mortality due to dependent calves that are separated from their mothers. Please comment.

24. The United States has submitted three scientific studies documenting the separation of dependent dolphin calves from their mothers during high speed chase and encirclement in the ETP purse seine tuna fishery.³² These studies report *inter alia* that 75 to 95 percent of lactating females killed in purse seine nets are not accompanied by their nursing dolphin calves.³³ Without their mothers for food and protection, the vast majority of these dolphin calves will die from starvation or predation. Thus, direct observation indicates that currently reported mortality is underestimated by at least 14 percent based on the abandonment of dependent dolphin calves when their mothers are killed in purse seine nets.³⁴ Further, because dolphin calves are incapable of keeping up with their mothers during chase and encirclement, even when mothers survive chase and encirclement, dependent calves are separated from their mothers by significant

³¹ Myrick, A.C., and P.C. Perkins. 1995. Adrenocortical color darkness and correlates as indicators of continuous acute pre-mortem stress in chased and purse-seine captured male dolphins. *Pathophysiology* 2: 191-204, p. 192, Exhibit US-11.

³² These scientific studies are contained in Exhibits US-4, US-27 and US-28 and discussed in the U.S. First Written Submission, para. 55 and U.S. Answers to the First Set of Questions from the Panel (Question 34), para. 80-81.

³³ Archer *et alia* (2004), Exhibit US-27; Archer *et alia* (2001), Exhibit US-28; *see also* U.S. Answers to the First Set of Questions from the Panel (Question 34), para. 81.

³⁴ Archer *et alia* (2004), Exhibit US-27; *see also* U.S. First Written Submission, para. 55; U.S. Answers to the First Set of Questions from the Panel (Question 34), para. 81.

distances (kilometers) and similarly vulnerable to starvation and predation.³⁵ Thus, the percent by which currently reported dolphin mortality is underestimated due to mother-calf separation is almost certainly greater than 14 percent. In fact, it is likely significantly greater due to mother-calf separation even when the mothers are not observed killed in sets.

25. In its response, Mexico does not address these studies and instead simply states that “there is no such evidence.”³⁶ Mexico cannot refute these studies by simply denying that they exist. Nor does Mexico undermine the studies’ credibility by suggesting that the United States should make similar “projections” about unobserved dolphin mortality in non-ETP fisheries.³⁷ As reviewed in the U.S. comments on Mexico’s response to Question 86, in no other ocean in the world are dolphins chased and encircled on a wide scale commercial basis to catch tuna. It is the high speed chase and encirclement of dolphins that causes the separation of dependent dolphin calves from their mothers in the ETP; high speed chase and encirclement does not occur in other oceans and consequently outside the ETP dependent dolphin calves are not being separated from their mothers like they are inside the ETP and dying of starvation and predation as a result. Further, Mexico – as the party suggesting that there is significant unobserved dolphin mortalities in non-ETP fisheries – bears the burden of supporting that contention; Mexico however has not submitted any evidence that there is significant unobserved dolphin mortality in other oceans, whether due to mother-calf separation or any other factors.

26. Mexico cites the 2002 “Final Finding” of the U.S. Department of Commerce as evidence that the United States has “previously refuted the claim it is making in this dispute” about dolphin mortality being at least 14 percent greater than observed dolphin mortality.³⁸ Mexico misrepresents the conclusions of the 2002 Final Finding. First, the Final Finding does not refute that unobserved dolphin mortality is at least 14 percent greater than observed dolphin mortality due to mother-calf separation. In fact, the portion of the Final Finding that Mexico cites states that “[a]nalysis of purse seine sets suggests that some separation occurs.” It further notes that *more conclusive* mortality estimates relative to chase do not exist and that “[a]dditional mortality associated with separation is possible in instances where dolphins are chased but not encircled.” Thus, even the selective passage Mexico chose to quote supports that there is unobserved dolphin mortality based on mother-calf separation.

27. Further, although not specifically cited in the Final Finding, the final science report upon which the Final Finding is based, cites research that unobserved dolphin mortality is at least 14 percent higher than observed dolphin mortality based on lactating females *killed* in purse seine

³⁵ Noren and Edwards (2007), Exhibit US-4; *see also* U.S. First Written Submission, para. 55.

³⁶ Mexico Answers to the Second Set of Questions from the Panel (Question 100), para. 43.

³⁷ Mexico Answers to the Second Set of Questions from the Panel (Question 100), para. 43.

³⁸ Mexico Answers to the Second Set of Questions from the Panel (Question 100), para. 44.

nets and that it is likely even higher since dependent calves are unable to keep up with their mothers during high speed chase and encirclement and consequently are separated from their mothers by significant distances and subject to starvation and predation even if their mothers are not killed in the nets.³⁹ Additionally, scientific research published since the time of the 2002 Final Finding confirms these findings.⁴⁰

101. To Mexico: The United States argues that, if anything can be inferred from the absence of a 100 percent observer requirement to monitor marine mammal interactions in other fisheries, it is that in those fisheries there is not a problem, such as the one in the ETP that merits such a requirement. Is Mexico aware of any attempts to establish a dolphin conservation program similar to the AIDCP in other regional fishery management organizations?

28. The AIDCP requires 100 percent observer coverage in the ETP purse seine tuna fishery because, unlike any other fishery in the world, in that fishery marine mammals are intentionally exploited on a wide-scale commercial basis to catch the targeted species. The parties to the AIDCP agreed that 100 percent observer coverage would be required for the ETP purse seine tuna fishery in order to ensure that agreed upon dolphin mortality limits are not exceeded. The U.S. dolphin safe labeling provisions build upon this existing observer requirement.

29. As the United States has stated in earlier submissions, Mexico's assertion should be rejected that the lack of 100 percent observer coverage in fisheries outside of the ETP means that the harm to dolphins in those oceans is unknown.⁴¹ If there were reason to believe that there was a regular and significant association between tuna and dolphins in purse seine tuna fisheries outside the ETP or regular and significant dolphin mortality or serious injury in other fisheries outside of the ETP, the relevant regional fisheries management organization (RFMO) would be aware of the issue and it would be the RFMO's responsibility to address the issue. Several RFMOs collect data on marine mammal interactions, but these data do not indicate regular and significant tuna-dolphin associations or regular and significant dolphin mortality or serious injury in tuna fisheries outside of the ETP. For example, Mexico cites data on marine mammal interactions in the Western Central Pacific Ocean, yet that data show that over an eleven year

³⁹ Reilly *et alia* (2005), Report of the Scientific Research Program under the International Dolphin Conservation Agreement Act, Exhibit US-19. Reilly *et alia* (2005) was prepared in 2002 (although published in 2005) and is the "final science report" upon which the Department of Commerce's (NOAA's) "final finding" is based. The DPCIA required the Department of Commerce to issue an initial and final finding as to whether the intentional deployment on or encirclement of dolphins with purse seine nets was having a significant adverse impact on any depleted dolphin stocks in the ETP. *See* U.S. First Written Submission, para. 22; *see also* Mexico First Written Submission, paras. 78-84.

⁴⁰ Archer *et alia* (2004), Exhibit US-27; Noren and Edwards (2007), Exhibit US-4; Crammer *et alia* (2008), Exhibit US-26.

⁴¹ U.S. Second Written Submission, para. 47.

period 33,319 purse seine sets were observed and bycatch of 1315 marine mammals was reported, 46 of which were reported killed.⁴²

103. To Mexico: With respect to tuna products made in Thailand, in your second written submission you hold that "under the US rules it is sufficient to demonstrate compliance with the dolphin safe standard for tuna harvested outside the ETP". Please clarify the meaning of that statement, bearing in mind that the dolphin safe standard of not setting on dolphins applies both inside and outside the ETP?

30. Mexico's response omits several important details:

– Dolphin safe claims on tuna products that contain tuna caught outside the ETP using purse seine nets in a fishery where there is a regular and significant tuna-dolphin association are subject to a captain's and an observer's statement that purse seine nets were not intentionally set on dolphins and that no dolphins were killed or seriously injured in the set.⁴³

– Dolphin safe claims on tuna products that contain tuna caught in a fishery where there is regular and significant dolphin mortality are subject to an observer's statement that no dolphins were killed or seriously injured in the set.⁴⁴

31. By omitting these details Mexico would have the Panel believe that the U.S. dolphin safe labeling provisions treat tuna products differently based on the origin of the product or the tuna it contains. That would be incorrect. Rather, when the circumstances of a fishery are such that there is a high likelihood that dolphins will be harmed when tuna is caught (because there is regular and significant dolphin mortality in the fishery or a regular and significant tuna-dolphin association), the U.S. dolphin safe labeling provisions provide for dolphin safe claims to be supported by both a captain's and an observer's statement. Thus, if a tuna product of Thailand were to contain tuna caught outside the ETP in a fishery where there is regular and significant dolphin mortality or a regular and significant tuna-dolphin association, any dolphin safe claims on that product would need to be supported by the relevant captain's and observer's statement. Further, if a tuna product from Thailand included tuna caught by purse seine vessels in the ETP, those tuna products would have to meet the same dolphin safe labeling conditions that Mexican tuna products that contain tuna caught by purse seine vessels in the ETP would have to meet to be labeled dolphin safe.

32. Further, Mexico's response ignores the fact that for tuna products that contain tuna caught

⁴² Mexico Second Written Submission, para. 102.

⁴³ DPCIA, 16 U.S.C. 1385(d)(1)(B)(ii), Exhibit US-5.

⁴⁴ DPCIA, 16 U.S.C. 1385(d)(1)(D), Exhibit US-5.

using purse seine nets outside the ETP in a fishery where there is no regular and significant tuna-dolphin association, tuna products bearing a dolphin safe label must be accompanied by a captain’s statement that purse seine nets were not intentionally set on dolphins.⁴⁵ This captain’s statement is submitted to U.S. Customs and Border Protection at the time of importation and subsequently to NMFS along with a completed NOAA Form 370.⁴⁶ A completed NOAA Form 370 together with the captain’s statement provides the information necessary for NMFS to verify that imported tuna products meet the conditions to be labeled dolphin safe.⁴⁷ In addition, the U.S. Tuna Tracking and Verification Program routinely purchases individual samples of tuna in airtight containers produced in foreign countries and sold in the United States as part of its “spot check” audit, and documentation can be requested for a particular sample to verify the dolphin safe claim. While it is possible that a NOAA Form 370 could contain fraudulent information or that a captain’s statement could be falsified, this is equally true regardless of whether the tuna product contains tuna caught inside or outside the ETP, and sanctions exist under U.S. law to address instances of such fraud.⁴⁸

33. Moreover, the possibility that fraudulent information may appear on a NOAA Form 370 is not evidence that the U.S. dolphin safe labeling provisions are incapable of fulfilling their objectives. Nor is such evidence found in the fact that in a fishery, where there is no regular and significant dolphin mortality and no regular and significant tuna-dolphin association, no observer’s statement is required. Rather, these facts reflect that the U.S. provisions took a balanced approach that weighed the risk that tuna products labeled dolphin safe might contain tuna caught in a manner that adversely affects dolphins against the burden of ensuring that they do not, by conditioning use of a dolphin safe label on the provision of certain documentation or, as Mexico appears to suggest,⁴⁹ by conditioning use of a dolphin safe label on something in addition to documentation.⁵⁰ Where the risk is high that dolphins may be set upon to catch tuna

⁴⁵ DPCIA, 16 U.S.C. 1385(d)(1)(B)(ii), Exhibit US-5; NOAA Form 370 (box 5(B)(2)), Exhibit MEX-63.

⁴⁶ U.S. Answers to the First Set of Questions from the Panel (Questions 4 and 7), paras. 8, 16.

⁴⁷ U.S. Answers to the First Set of Questions from the Panel (Questions 4), para. 8. Mexico appears to suggest that the United States should have jurisdiction to inspect foreign canneries to verify whether they have adequate tracking systems. Mexico Answers to the Second Set of Questions from the Panel (Question 103), para. 46. The United States does not have such jurisdiction, whether the cannery is located in a country that catches tuna in the ETP or elsewhere. However, the United States uses other means to verify dolphin safe claims on tuna products as noted above. Further, the United States may make voluntary arrangements with exporting countries so that the U.S. Tuna Tracking and Verification program may inspect foreign canneries to verify that the canneries have processes and procedures to track the dolphin safe status of tuna products.

⁴⁸ U.S. Answers to the First Set of Questions from the Panel (Questions 4 and 50), paras. 10, 120-121.

⁴⁹ Mexico Answers to the Second Set of Question from the Panel (Question 103), para. 46 (referring to program to verify foreign canneries tracking systems).

⁵⁰ U.S. Second Written Submission, paras. 45, 152.

or killed or seriously injured when tuna is caught, the U.S. provisions require an observer’s statement; where the risk is low, the U.S. provisions do not.⁵¹ Designing a measure in this way is consistent with both Members’ rights under the TBT Agreement and well-established good regulatory practices.⁵²

105. To Mexico: Please comment on the US assertion in paragraph 12 of its second oral statement that even if abundance estimates for some stocks appear to be higher than in the past it is possible that dolphin populations are actually declining.

34. Mexico suggests that the United States has taken inconsistent positions on the significance of a 95 percent probability interval (also called a “confidence interval”) cited in the 2008 report on dolphin abundance⁵³ and the 2007 assessment model,⁵⁴ in particular that the United States has used the 95 percent probability interval associated with the estimates in the 2008 report to discount those estimates when estimates in the 2007 assessment model carry the same probability interval.⁵⁵ Mexico misunderstands the U.S. position. The United States has not criticized the fact that abundance estimates in the 2008 report carry a 95 percent probability interval. Instead, the United States has pointed out that the 2008 report indicates that there is a 95 probability that dolphin abundance of ETP dolphins in 2006 lies somewhere within the interval described in the report.

35. Because the interval described in the 2008 report contains abundance estimates that would represent a decrease (as well as estimates that would represent an increase) from previous estimates, no one can say with certainty whether ETP dolphin stocks are in fact increasing, let alone recovering. The prospect that ETP dolphins are declining in light of the low reported mortality figures is concerning and, along with the multitude of studies documenting unobserved dolphin mortality resulting from intentional chase and encirclement, gives credence to the fact that the fishery impacts dolphins (e.g., through calf mortality resulting from separation from their mothers) beyond mortality reported by observers. Mexico has focused on the apparent increase in the northeastern offshore stock of spotted dolphin. However, as we have noted, the significance of this apparent increased abundance must be tempered by several caveats.

⁵¹ U.S. Second Written Submission, paras. 45, 152. In addition, the cost of conditioning dolphin safe claims on tuna products that contain tuna caught by large purse seine vessels in the ETP is low, since under the AIDCP there is a 100 percent observer requirement for such vessels. In other fisheries, there is no inter-governmental agreement requiring 100 percent observer coverage for such vessels. U.S. Second Written Submission, para. 46.

⁵² U.S. Second Written Submission, paras. 45, 152.

⁵³ Gerrodette *et alia* (2008), Exhibit US-20.

⁵⁴ Wade *et alia* (2007), Exhibit US-21.

⁵⁵ Mexico Answers to the Second Set of Questions from the Panel (Question 105), para. 53; *see also* Mexico Second Written Submission, para. 58.

Specifically, the 2008 report showed a decrease in the estimated abundance of the western-southern stock of spotted dolphin. The apparent increase and decrease in abundance of these two stocks of spotted dolphin may merely represent movement of animals across the fixed stock boundary separating the two. Viewing the 2008 report in this context, the United States notes that on the whole the 2006 estimated abundance of spotted dolphins across the ETP is lower than the 2003 estimated abundance.⁵⁶

36. Further, Mexico mischaracterizes the 2008 report as having “concluded that the dolphin populations at issue are growing at ... maximum possible rates.”⁵⁷ As reviewed during the second panel meeting, the authors of the 2008 report expressly cautioned against interpreting the estimates it contains as evidence that dolphin populations are beginning to recover (i.e., growing at 4 to 8 percent), noting several important caveats including that the rates at which dolphin populations are growing should be estimated using an assessment model that can condition on realistic population dynamics.⁵⁸

37. In addition, Mexico wrongly suggests that, in agreeing to raise the annual stock-specific AIDCP dolphin mortality limits (SMLs), the United States has taken a position on whether dolphin populations are declining in the context of the AIDCP that contradicts its position in this dispute.⁵⁹ Pursuant to the AIDCP, SMLs are calculated as 0.1 percent of the minimum abundance for each dolphin stock (known as Nmin), and Nmin is estimated using a logistic model that takes into account recent abundance estimates and biological constraints of each ETP dolphin stock.⁶⁰ The purpose of the logistic model is to provide a reasonable estimate of current population size, together with an error distribution, to calculate the minimum population size (Nmin) for each stock and in turn SMLs. SMLs are calculated as 0.1 percent of Nmin for each stock. The model relies on dolphin abundance estimates from a range of years (in this case, 2006 and 2003 as well as earlier years including 1998-2000) in a simple modeling framework that accounts for realistic dolphin growth rates and other biological constraints (the logistic model).

38. Calculating Nmin and SMLs, and assessing the rate at which dolphin populations are

⁵⁶ The 2008 report incorporates abundance estimates from 2003 and 2006.

⁵⁷ Mexico Answers to the Second Set of Questions from the Panel (Question 105), para. 54 (emphasis added).

⁵⁸ U.S. Opening Statement at the Second Panel Meeting, para. 12; Gerrodette *et alia* (2008), p. 13, Exhibit US-20.

⁵⁹ Mexico Answers to the Second Set of Questions from the Panel (Question 105), paras. 55-56. While the total annual dolphin mortality limit (DML) is 5000 dolphins per year, the AIDCP provides for annual stock-specific mortality limits – i.e., the level of mortality for each dolphin stock which may not be exceeded.

⁶⁰ AIDCP, Article V(2)(calling for stock-specific mortality limits), Exhibit Mex-11; *id* at Annex III (calling for the establishment of the system for calculating per-stock, per year dolphin mortality limits); *see also* AIDCP Procedures for Implementing Stock Mortality Limits, online at <http://www.iattc.org/PDFFiles/MOP%207%20SML%20procedures%20Jun%202002.pdf>.

growing, are two different tasks. Use of abundance estimates for 2006⁶¹ for SML calculations does not imply that spotted or spinner dolphin populations are in fact growing -- as discussed the 2006 abundances could actually be lower than previous abundance estimates.⁶² It simply means that the 2006 abundance estimates are valid scientific information that should be taken into account in the Nmin and SML calculations. Any new assessment model used to estimate the rate at which dolphin populations are growing should also take these estimates into account, along with previous estimates, and this is in fact a current focus of work.⁶³ The logistic model used for Nmin estimation may be part of this model, but there are other issues to consider, such as the exchange of spotted dolphins across their nominative northeastern and western/southern stock boundaries, estimates of unreported mortality from mother-calf separation, and direct kills reported from observers just to name a few.⁶⁴

106. To Mexico: Is your assertion in paragraph 10 of your second oral statement that dolphin mortality is currently statistically insignificant based on new evidence or you are making this argument based on the evidence already submitted to the Panel?

39. The United States has stated that, given the relative size of ETP dolphin populations, the death of 1,000 dolphins annually is not believed to be significant from a population recovery perspective.⁶⁵ However, this does not mean that the number of observed and unobserved mortalities is not significant. Given that estimated population growth rates are much lower than a recovering population would exhibit, the actual unobserved mortality is certainly greater, and potentially much greater – on the order of tens of thousands of animals per year. The magnitude of the difference between the estimated population growth rate and that of a recovering dolphin population equates to approximately 34,000 missing dolphins each year.⁶⁶

40. There is clear evidence of unobserved mortality and serious injury of dolphins in the

⁶¹ 2006 is the latest year included in the 2008 report on dolphin abundance estimates. Gerrodette *et alia* (2008), Exhibit US-20.

⁶² U.S. First Written Submission, para. 49; U.S. Opening Statement at the Second Panel Meeting, para. 12.

⁶³ The most recent assessment model providing estimates of dolphin population growth rates is the Wade *et alia* (2007) report (Exhibit US-21). Opening Statement at the Second Panel Meeting, para. 11.

⁶⁴ See e.g., U.S. Opening Statement at the Second Panel Meeting, para. 12.

⁶⁵ U.S. Answers to First Set of Questions from the Panel (Question 36), para. 89.

⁶⁶ See U.S. Answers to First Set of Questions from the Panel (Question 37) paras. 91-92.

ETP,⁶⁷ attributable to the harm caused by setting on dolphins to catch tuna.⁶⁸ The information provided by Mexico in the paragraphs it cites in response to this question contain a number of factual inaccuracies, but more importantly, say nothing about the scientific evidence of significant unobserved mortality.

109. To Mexico: Pleas clarify whether (and if so, why) you interpret the statements in Exhibit MEX-58 to imply that the retailers at issue would accept to carry products meeting the requirements for AIDCP “dolphin-safe” labelling (rather than the current US dolphin-safe standard).

41. Mexico interprets statements from certain grocery retailers that they would purchase [[]] brand tuna products if they were considered “dolphin safe” under U.S. law to mean that those retailers would [[

]] However, it is not clear from the affidavit and accompanying emails in Exhibit MEX-58 (WTO-confidential), that the change that would [[

]] is a change in U.S. law as opposed to a change in [[]] brand tuna products that would allow them to meet the conditions to be labeled dolphin safe under current U.S. law (i.e., such products no longer contained tuna caught by setting on dolphins). In fact, the latter interpretation appears to be the more plausible based on U.S. consumers’ preference for tuna that is not caught in a manner harmful to dolphins⁶⁹ and the statements also contained in the affidavit [[

]]. Thus, even if U.S. law changed, there does not appear to be a basis to assume that [[

]].

Further, one of the retailers referred to in the affidavit is [[

]].

Evidence submitted by the United States shows that [[

]].⁷⁰ This

indicates that [[]] is concerned with whether the product is dolphin safe not whether it is labeled as such.

⁶⁷ U.S. Answers to First Set of Questions from the Panel (Question 34), paras. 80-81(citations omitted); *id.* at (Question 36), para. 89 (citations omitted).

⁶⁸ *See* U.S. Answers to the First Set of Questions from the Panel (Question 34), para. 78-85; *id.* at (Question 35) paras. 86-88; U.S. First Written Submission, paras. 54-59.

⁶⁹ *See e.g.* U.S. Answers to the First Set of Questions from the Panel (Questions 40-42), paras. 97-110.

⁷⁰ [[

]].

42. Mexico cites another affidavit (Exhibit MEX-101 (WTO-confidential)) stating that a U.S. retailer was able to import [] brand tuna products with a dolphin safe label during the brief period in 2003 where under U.S. law tuna products that contained tuna caught by setting on dolphins could be labeled dolphin safe. However, this retailer appears to have []

[]⁷¹ []

[] but neither affidavit indicates that this retailer would resume sales of [] brand tuna products if there was a change in the conditions under which tuna products could be labeled dolphin safe.

43. Mexico also suggests that if U.S. retailers would not accept tuna products that contain tuna caught by setting on dolphins and labeled with the AIDCP dolphin safe label, then there would be no need for the U.S. provisions to prohibit tuna products that contain tuna caught by setting on dolphins from being labeled dolphin safe. To the contrary, an objective of the U.S. dolphin safe labeling provisions is to ensure that consumers are not misled or deceived about whether tuna products contain tuna caught by setting on dolphins. If the U.S. dolphin safe labeling provisions permitted tuna products to be labeled dolphin safe that contain tuna caught by setting on dolphins, they could no longer ensure that consumers are not misled or deceived by dolphin safe claims on tuna products (e.g. by dolphin safe claims that retailers would be free to make on tuna products that contain tuna caught by setting on dolphins). Moreover, Mexico ignores the circumstances that brought about the U.S. dolphin safe labeling provisions in the first place. In the lead up to enactment of the U.S. dolphin safe labeling provisions, there were widespread consumer boycotts of tuna products.⁷² These boycotts affected tuna products regardless of whether they contained tuna caught by setting on dolphins since consumers had no assurance that tuna products did not contain tuna caught by setting on dolphins.

111. To Mexico: Do you have any indication that if the United states were to accept another standard for “dolphin safe” based on compliance with the AIDCP, the main distribution channels would buy these products?

44. Please see the U.S. comments on Mexico’s response to Question 110.

45. In addition, Mexico’s reliance on the quotation from the Consumers Union is misplaced. The quote does not stand for the proposition that the Consumers Union believes “dolphin safe” means that no dolphins were observed killed or seriously injured in the set in which tuna was caught as opposed to chased and encircled to catch the tuna. At most, the quote makes reference to ensuring that no dolphins “were harmed or killed in the process of fishing” for tuna, which could also include harms that result when dolphins are set upon to catch tuna. Further, whether or

⁷¹ Exhibit MEX-58 (WTO-confidential).

⁷² U.S. First Written Submission, para. 93; Written Submission of Non-Party Amici Curiae Human Society International and American University, paras. 19, 62-63.

not the Consumers Union or individual consumers are able to recite each of the conditions under which tuna products may be labeled dolphin safe is not relevant. Rather, the key issue is whether it would be misleading or deceptive to allow tuna products to be labeled dolphin safe that contain tuna caught in a manner that is not safe for dolphins. The answer is yes.

B. CLAIMS UNDER THE TBT AGREEMENT

[Judicial economy and order of analysis]

114. To Mexico: With reference to paragraph 16 of your second oral statement, please clarify whether, in your view, the Panel is prevented from exercising judicial economy in relation to some of Mexico's claims under the TBT Agreement, or whether it is simply desirable that the Panel addresses each and every claim made by Mexico in relation to the TBT Agreement?

46. The United States agrees with Mexico that judicial economy gives panels discretion to refrain from making findings which are not necessary to resolve a dispute.⁷³ However, the reasons Mexico cites in paragraph 67 of its response regarding why the Panel should not exercise judicial economy on any of its claims against the U.S. dolphin safe labeling provisions appear unrelated to whether exercising judicial economy on any of Mexico's claims would fail to resolve this dispute. The Panel may exercise judicial economy on any of Mexico's claims that it determines are not necessary to resolve this dispute, and factors such as whether it is the first time certain measures have been subject to dispute settlement⁷⁴ or the "importance of effective discipline of ... non-tariff measures to developing country Members" are not relevant to that determination.

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?

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

(c) Whether the relationship between Articles 2.1 and 2.2 of the TBT Agreement

⁷³ Mexico Answers to the Second Set of Questions from the Panel (Question 114), para. 68; *see also* Appellate Body Report, *Canada – Wheat*, WT/DS276/AB/R, adopted on 27 September 2004, para. 133.

⁷⁴ This dispute is not of course the first time the U.S. dolphin safe labeling provisions have been subject to dispute settlement. Mexico previously challenged the DPCIA before a GATT panel in 1991. *See United States – Restrictions on Imports of Tuna*, 3 September 1991, unadopted, BISD 39S/155.

imposes a particular sequence of analysis between these two provisions in this case?

47. The United States disagrees that the consistency of a measure with Article 2.1 of the TBT Agreement depends on the measure's relative trade-restrictive effect. As reviewed in previous U.S. submissions, whether a measure accords imported products less favorable treatment than like domestic products depends on the treatment the measure accords imported products as compared to like domestic products; the mere fact that a measure may impact imported products more than it impacts domestic products does not establish less favorable treatment.⁷⁵ Nor is the impact on trade the same as the conditions of competition. The conditions of competition may be the same for two like products, but the impact of those conditions may differ since one producer may not be as competitive in the marketplace as another producer even when facing the same conditions of competition.

[Definition of "technical regulation"]

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"?

48. Mexico states that the ordinary meaning of the word "apply" is *inter alia* "make use of as relevant or suitable (apply the rules)" and "administer (applied the remedy; applied common sense to the problem)."⁷⁶ Neither of these definitions appear suitable for the context in which the word "apply" appears in the second sentence of the definition of a technical regulation in Annex 1 of the TBT Agreement. For example, the U.S. dolphin safe labeling provisions do not "administer" or "apply" a product. Rather as stated in the U.S. response to Question 119, "as they apply to a product, process or production method" appears to refer to terminology, symbols, packaging, marking and labeling requirements that refer to, concern or are related to a product, process or production method.⁷⁷

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

⁷⁵ See, e.g., U.S. Answers to the Second Set of Questions from the Panel (Questions 146, 148, 152, 153), paras. 76, 84, 91, 108-118; U.S. Answers to the First Set of Questions from the Panel (Question 75), para. 161-165.; U.S. Second Written Submission, paras. 13-15.

⁷⁶ Mexico Answers to the Second Set of Questions from the Panel (Question 119), para. 85.

⁷⁷ U.S. Answers to the Second Set of Questions from the Panel (Question 119), para. 43.

product on the market under a certain designation, or something else?

124. To Mexico: Please clarify whether the US standards would still be mandatory, in your view, even if it provided for a range of criteria of eligibility for “dolphin-safe” labelling, while still preventing the use of any label referring to dolphins if one of these criteria at least were not fulfilled?

49. In its response to Question 124, Mexico states that “a law that permits the dolphin safe label to be used if any accredited dolphin safe standard was met ... would likely not be mandatory.”⁷⁸ Thus, Mexico appears to acknowledge that a law may prohibit a product from being labeled in a particular way if certain conditions are not met – in Mexico’s example, if an accredited dolphin safe standard is not met – without being mandatory. This is consistent with the definition of the term “labeling requirement” and the meaning of “with which compliance is mandatory” in Annex 1 of the TBT Agreement.

50. In its response to Question 122, Mexico states that one circumstance under which compliance with a labeling requirement is mandatory is where a measure allows a product to be labeled in a particular way if certain conditions are met and “prohibits use of the label in all other circumstances.”⁷⁹ It thus appears that the dividing line from Mexico’s perspective between a labeling requirement that is mandatory versus one that is voluntary is whether the labeling that the measure prohibits (unless certain conditions are met) is a particular term or description (e.g. dolphin safe) versus a particular label (e.g., the AIDCP dolphin safe label). The line Mexico draws, however, between a mandatory versus voluntary labeling requirement finds no basis in the TBT Agreement. A measure that prohibits a product from being labeled in a particular way unless certain conditions are met (whether with a particular term or with a particular label) is a labeling requirement. Whether compliance with that labeling requirement is mandatory does not turn on whether the type of labeling that is being prohibited is a particular label or a particular term. In asserting that it does, Mexico continues to conflate the meaning of the term labeling requirement and the phrase “with which compliance is mandatory.”

126. To Mexico: How do you reconcile the fact that some tuna products not bearing the label enter the market with your allegation that the measures are de facto mandatory (see for example Exhibit MEX 103, the brands not in bold)?

51. As noted in previous U.S. submissions, the fact that Walmart – which Mexico acknowledges is the largest U.S. grocery retailer⁸⁰ – sells tuna products that are not labeled dolphin safe belies Mexico’s contention that a dolphin safe label is necessary to access major

⁷⁸ Mexico Answers to the Second Set of Questions from the Panel (Question 124), para. 90.

⁷⁹ Mexico Answers to the Second Set of Questions from the Panel (Question 122), para. 89.

⁸⁰ Mexico Exhibit MEX-58 (BUSINESS CONFIDENTIAL VERSION), para. 6.

U.S. distribution channels. While a dolphin safe label may demonstrate that a product meets the conditions to be labeled dolphin safe, it is not the only way to demonstrate to a retailer that a product meets those conditions – i.e. that the tuna product does not contain tuna caught in a manner harmful to dolphins. Walmart itself did not produce Great Value Tuna but instead imported that product from a cannery in Thailand. When requested by NMFS to provide documentation substantiating the dolphin safe status of Great Value Tuna – in particular of the pouches featured in Exhibit US-73 – Walmart did so.⁸¹

127. To Mexico: In several parts of your submissions (e.g. first oral statement paragraph 46, response to question 52 from the Panel, second written submission paragraph 197) you draw an analogy between the facts of the present dispute and those of EC - Sardines. Please clarify whether this analogy should be considered in the context of your de jure mandatory arguments or under your de facto mandatory arguments, or both.

52. As explained in previous U.S. submissions, the measure at issue in *EC – Sardines* set out product characteristics; it did not concern labeling requirements as Mexico's response suggests.²⁸

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.

53. Please see U.S. comments on Mexico's response to Questions 122 and 124.

[Article 2.2]

133. To Mexico: In light of your observations in paragraph 83 of your oral statement, please clarify whether you consider that, with respect to technical regulations under the TBT Agreement, Members are not entitled to determine their own level of protection? Please comment on the relevance, in this respect, of the reference in paragraph 6 of the Preamble to the TBT Agreement, to a Member taking measures "at the level that it considers appropriate".

54. Mexico misinterprets the sixth preambular clause to the TBT Agreement, in particular the

⁸¹ U.S. Answers to the Second Set of Questions from the Panel (Question 102), para. 25.

⁸² U.S. Answers to the Second Set of Questions from the Panel (Question 123), para. 46-48; U.S. Second Written Submission, paras. 102-104.

clause beginning with “subject to the requirement...”. The clause concerns the *manner* in which measures taken to protect *inter alia* animal life or health *may be applied*, not the level at which a Member may seek to *inter alia* protect animal life or health or the environment or prevent deceptive practices. Thus, contrary to Mexico’s suggestion, the preamble does not indicate that there are limitations on a Member’s right to determine the level at which it seeks *inter alia* to protect animal life or health or the environment or prevent deceptive practices.

55. Regarding Mexico’s suggestion that limitations on a Member’s right to determine the level it considers appropriate *inter alia* to protect animal life or health or the environment or prevent deceptive practices are found in Article 2.2 of the TBT Agreement, this is also without merit. Contrary to Mexico’s suggestion,⁸³ the phrase “taking into account the risks of non-fulfillment” is not language that circumscribes Members’ right to determine the level at which it considers it appropriate *inter alia* to protect animal life or health or the environment or prevent deceptive practices. It is language that recognizes that in designing a measure that is no more trade-restrictive than necessary to fulfill a legitimate objective, a Member should take into account the risks that non-fulfillment of that objective would create.

136. To Mexico: Please comment on the United States' argument in paragraph 56 of its second oral statement, that the hypothetical situation under which a tuna product might be sold as dolphin safe that contains tuna caught in a set in which a dolphin was killed or seriously injured (i) is not evidence that the measures fail to fulfil their objective and (ii) has not been proved. In particular, please provide any evidence you might have showing that this hypothesis has materialized in the past.

56. In paragraph 105 of its response, Mexico incorrectly asserts that there is no tracking or verification program that applies with respect to tuna products that contain tuna caught outside the ETP. The same NMFS Tuna Tracking and Verification Program (TTVP) that applies to tuna products that contain tuna caught inside the ETP applies to tuna products that contain tuna caught outside the ETP. While that program reflects that the documentation required to support dolphin safe claims may differ depending on whether a product contains tuna caught inside the ETP where there is a regular and significant tuna-dolphin association and outside the ETP where there is not, the tools the NMFS has to verify dolphin safe claims on tuna products is the same regardless of the source of the tuna. See also the U.S. comments on Mexico’s response to Questions 88 and 103.

57. The evidence Mexico cites to support its assertions that there are there are tuna-dolphin

⁸³ Mexico Answers to the Second Set of Questions from the Panel (Question 133), para. 101; Mexico Opening Statement at the Second Panel Meeting, para. 83.

associations and dolphin mortalities outside the ETP⁸⁴ do not support the conclusion Mexico draws from that evidence: that any tuna-dolphin associations or dolphin mortalities outside the ETP are comparable to the tuna-dolphin association and dolphin mortality that occurs inside the ETP. As reviewed in previous U.S. submissions, while tuna and dolphins may occasionally associate in other oceans, any such associations are rare, irregular and ephemeral.⁸⁵ Further, while dolphin mortalities may occur in fisheries outside the ETP, the nature and scale of such mortalities in those fisheries are fundamentally different than they are in the ETP purse seine tuna fishery.⁸⁶ For example, in other fisheries purse seine nets are not intentionally used to encircle dolphins as a technique to catch tuna. If a purse seine net is intentionally set on a dolphin outside the ETP it would be incidental to the fishing technique (not the fishing technique as in the ETP) and would occur if a purse seine net is knowingly deployed when a dolphin is coincidentally present with the tuna. Accordingly, the likelihood that a dolphin may be killed or seriously injured in a fishery outside the ETP is low compared to inside the ETP where dolphin mortality is a regular and foreseeable consequence of a fishing method that intentionally chases and encircles millions of dolphins per year to catch tuna and where harms associated with this fishing technique result in approximately 1,200 observed dolphin mortalities⁸⁷ and tens of thousands of unobserved dolphin mortalities each year.⁸⁸

⁸⁴ Previous U.S. submissions address the evidence Mexico cites in paragraphs 106-107 of its response. See U.S. First Written Submission, paras. 38-39, U.S. Answers to the First Set of Questions from the Panel (Question 12), paras. 32 and U.S. Second Written Submission, paras. 42, 50-52 (addressing Mexico's "summary of scientific reports on tuna-dolphin associations in non-ETP fisheries"); U.S. Oral Statement at the Second Panel Meeting, para. 16 (addressing Mexico's characterization of the report regarding mortality in the WCPO and explaining there is no basis for Mexico's extrapolation of dolphin mortalities based on that report); U.S. Answers to the Second Set of Questions from the Panel (Question 108), para. 31 (addressing Mexico's contention that Australia's WCPFC proposal should be viewed as evidence that dolphins are intentionally being set upon to catch tuna); U.S. Second Written Submission, para. 50 (addressing the reports of dolphin mortality in the Philippines and the west coast of Africa). Regarding the International Commission for Conservation of Atlantic Tunas (IATTC) publication that the tuna fishery has interacted with 26 species of dolphins and whales, the United States notes that that publication lists any bycatch species that has *ever* been caught by any major tuna fishery in the Atlantic/Mediterranean and specifically states that inclusion of a species on the list does not imply that the species was caught in significant quantities or that the individuals caught necessarily died. Mexico Second Written Submission, para. 93; Exhibit MEX-97.

⁸⁵ U.S. First Written Submission, paras. 38-39; U.S. Answers to the First Set of Questions from the Panel (Question 12), paras. 31-32; U.S. Second Written Submission, paras. 42, 47-50; Opening Statement at the Second Panel Meeting, paras. 14-15; U.S. Answers to the Second Set of Questions from the Panel (Question 108), paras. 30-31.

⁸⁶ Second Written Submission, paras. 48-52; Opening Statement at the Second Panel Meeting, paras. 16-18; U.S. Answers to the Second Set of Questions from the Panel (Question 108), paras. 30-31.

⁸⁷ U.S. Answers to the First Set of Questions from the Panel (Questions 28 and 37), paras. 68, 91-92; U.S. First Written Submission, para. 53.

⁸⁸ U.S. Answers to the First Set of Questions from the Panel (Questions 34 and 37), paras. 78-85, 90-92; U.S. Second Written Submission, para. 48.

58. In paragraph 109 of its response, Mexico acknowledges that it “cannot verify” whether there are any tuna products on the U.S. market that are labeled dolphin safe and contain tuna caught in a set in which dolphins were killed or seriously injured. Therefore, Mexico’s assertion that there are tuna products on the U.S. market that are labeled dolphin safe but contain tuna caught in a set in which dolphins were killed or seriously injured is at best speculation. As reviewed in previous U.S. submissions, the U.S. dolphin safe labeling provisions prohibit use of an alternative dolphin safe label if the tuna product contains tuna caught in a set in which dolphins were killed or seriously injured and, as far as the United States is aware, the official dolphin safe label is only used on tuna jerky, a product that is not widely sold in the United States.⁸⁹

137. To Mexico: In your response to question 64 from the Panel you claim that the United States failed to establish a connection between the design and structure of its measures and their stated objective. Please explain why, in your view, the stated objectives of (i) ensuring that consumers are not misled, and (ii) discouraging the use of certain fishing techniques are not supported by the design, structure or characteristics of the United States' measures?

59. Mexico does not answer the Panel’s question. Instead, it asserts that the U.S. measures have a “third objective,” protecting dolphins, and that the U.S. dolphin safe labeling provisions do not fulfill that objective because the AIDCP addresses dolphin protection. The United States addresses this argument in paragraphs 138-142 of its Second Written Submission.

60. Mexico also asserts that by applying the U.S. dolphin safe labeling provision, the United States has “engaged in arbitrary and unjustifiable discrimination in a manner inconsistent with the ruling of the Appellate Body on similar facts in *US – Shrimp Turtle*, and has therefore acted inconsistently with Article 2.2 of the TBT Agreement.”⁹⁰ There is no basis for Mexico’s assertion. The facts of this dispute are not similar to those in *Shrimp Turtle*, nor are the legal provisions at issue the same. *Shrimp Turtle* involved an import prohibition and an Article XX defense. Article 2.2 of the TBT Agreement does not involve an analysis of whether a measure constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. Article 2.2 of the TBT Agreement involves examination of whether there is a reasonably available alternative measure that would fulfill the objective of the challenged measure that is significantly less trade-restrictive.⁹¹

⁸⁹ U.S. Answers to the First Set of Questions from the Panel (Question 11), para. 28; U.S. Second Written Submission, para. 145.

⁹⁰ Mexico Answers to the Second of Questions from the Panel (Question 137), para. 112.

⁹¹ U.S. First Written Submission, paras. 163-169; U.S. Second Written Submission, paras.120-122; U.S. Answers to the Second Set of Questions from the Panel (Question 134 and 136), paras. 59-62, 64.

[Article 2.4]

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?

61. In paragraphs 114 and 116 of its response, Mexico refers to AIDCP parties as “member nations” and the AIDCP as an “organization.” In doing so, Mexico continues to incorrectly characterize the AIDCP as a body and AIDCP parties as members of such a body. The AIDCP, however, is not a body or an organization. It is an inter-governmental agreement, and the United States and Mexico are parties to that agreement not “members” in it.

62. Mexico also mischaracterizes the U.S. support for the AIDCP and dolphin conservation activities carried out under it as U.S. recognition of those activities as “standardizing activities.” While parties to the AIDCP have agreed that fishing vessels must apply certain procedures when setting on dolphins to catch tuna and comply with other requirements, none of these procedures or requirements constitute “standards” within the meaning of Annex 1 of the TBT Agreement and therefore would not constitute “standardizing activities” in the context of the TBT Agreement.⁹²

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?

63. In paragraph 118 of its response, Mexico states that because all AIDCP decisions and resolutions are adopted by consensus,⁹³ that means that the United States has specifically agreed to all aspects of the AIDCP regime. The United States highlights, however, that agreeing to an AIDCP decision or resolution is not the same as agreeing to implement that decision or resolution in domestic law. For example, the AIDCP resolution on dolphin safe certification expressly states that it is voluntary especially where it is inconsistent with a party’s domestic law.

C. CLAIMS UNDER THE GATT 1994

[General]

⁹² U.S. Second Written Submission, para. 175.

⁹³ Mexico also refers to AIDCP “regulations” but the AIDCP parties do not adopt “regulations”.

144. To Mexico: In your responses to the Panel's questions (question 74), and in your second written submission, you state that the relevant "like products" are Mexican and US "tuna products". In your first written submission, you explained that the country in which the processing occurs is the country of origin of a tuna product. To the extent that the origin of the fish does not necessarily determine the origin of the tuna products, please clarify how, in your view, the US measures at issue affect Mexican tuna products, as distinct from Mexican tuna? Please also clarify whether you are no longer seeking findings on "tuna" as distinct from "tuna products", in respect of your claims under Article III:4 and I.1 of GATT 1994 and under Article 2.1 of the TBT Agreement.

64. It should be noted that if tuna products from other countries, including the United States, were made with tuna caught by the Mexican vessels that set on dolphins to catch the tuna, those (non-Mexican) tuna products would also be ineligible to be labeled dolphin safe. Conversely, if Mexican tuna producers chose to purchase tuna from vessels other than large purse seine vessels that set on dolphins to catch the tuna, including large purse seine vessels that used other gear types or fishing methods or small purse seine vessels that are prohibited from setting on dolphins, those (Mexican) tuna products could be eligible to use the dolphin safe label. Nothing requires the Mexican canneries to use tuna caught by Mexican vessels (indeed, Mexico is a net importer of tuna and tuna products),⁹⁴ and Mexican vessels use other methods beyond dolphin setting to catch tuna.

145. To Mexico: In paragraph 150 of your second written submission, you indicate that "the factual basis of Mexico's discrimination claims is that the prohibition against the use of the dolphin safe label on most Mexican tuna products denies competitive opportunities to those products compared to like product from the United States and other countries" and that your claims "are not dependant on demonstrating that the treatment of ETP and non-ETP fisheries is different". Please clarify, in light of this statement, whether you consider that there is discrimination under Articles III:4, I:1 of the GATT and 2.1 of the TBT Agreement due to:

- (a) the standard of "non-setting" as basis for the label (wherever applied); or**
- (b) different requirements for different areas; or**
- (c) both?**

Please clarify, in this context, the relevance to your discrimination claims of the fact that the fishing method at issue (setting on dolphins) concerns primarily one region

⁹⁴ Mexican Imports of Tuna and Tuna Products, Exhibit US-3.

(the ETP).

65. Mexico essentially argues that the U.S. dolphin safe labeling provisions discriminate against Mexican tuna products because tuna products containing tuna caught by setting on dolphins are not eligible to use the dolphin safe label and some Mexican vessels set on dolphins to catch tuna. This argument is simply without merit, particularly given that:

- the criterion of no intentional setting on dolphins applies both inside and outside of the ETP;⁹⁵
- the criterion of no intentional setting on dolphins applies to every country including the United States;⁹⁶
- the criterion of no intentional setting on dolphins applies to products using either the official label or an alternative label;⁹⁷
- setting on dolphins is not a fishing technique unique to Mexico;⁹⁸
- vessels from the United States and other countries set on dolphins to catch tuna at the time the U.S. dolphin safe labeling provisions were enacted;⁹⁹
- Mexico uses other techniques other than setting on dolphins to catch tuna;¹⁰⁰
- there is no evidence that the objectives of the U.S. dolphin safe labeling provisions is to afford protection to domestic production;¹⁰¹ and
- there is clear scientific evidence of the harm to dolphins from setting on dolphins

⁹⁵ See U.S. First Written Submission, para. 14 (explaining that 16 U.S.C. section 1385(d)(1) read together with Section 1385(d)(2) and (h)(2) and apply regardless of where the tuna was caught or the flag of the vessel that caught the tuna).

⁹⁶ *Id.*

⁹⁷ See U.S. Answers to the First Set of Questions from the Panel (Question 2), paras. 3-5 (explaining the requirements for the official and alternative mark).

⁹⁸ U.S. Second Written Submission, para. 78.

⁹⁹ U.S. Second Written Submission, para. 64; *id* at para. 78.

¹⁰⁰ U.S. Second Written Submission, para. 78.

¹⁰¹ U.S. Second Written Submission, paras. 33-36.

to catch tuna.¹⁰²

66. Mexico’s contention that the Panel should determine what the facts would be in the absence of the U.S. dolphin safe labeling provisions and compare those with what the facts are with the U.S. provisions in place as a basis for determining whether the U.S. provisions discriminate against Mexican tuna products is without merit. An evaluation of the impact of a measure alone does not determine whether a measure breaches Article III:4 of the GATT 1994. Were that the case, Article III:4 would prohibit any measure whose impact falls disproportionately on imported products including measures that draw legitimate origin-neutral distinctions between like products, for example, to protect human health (as in the example (variation B) described in the U.S. response to Question 152).¹⁰³

67. As the Appellate Body has made clear, “the 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.”¹⁰⁴ Thus, Mexico must allege more than the mere fact that the U.S. dolphin safe labeling provisions have a detrimental impact on Mexican tuna products; it must show that such detrimental effect is based on their foreign origin. And, as recounted above, the U.S. dolphin safe labeling provisions do not accord any different treatment to tuna products based on origin, much less different treatment that is less favorable. Neither do the provisions result in the failure to accord an advantage to Mexican tuna products that is accorded tuna products of other countries. In the absence of such origin-based discrimination, Mexico cannot sustain its claims under Articles I:1 and III:4 of the GATT 1994 or Article 2.1 of the TBT agreement.

68. Mexico continues to contend that in adopting the U.S. dolphin safe labeling provisions the United States acted “unilaterally” and that this is relevant to whether the U.S. measures accord less favorable treatment to imported tuna products. There is no basis for Mexico’s contention. The United States has, and continues to be, a strong supporter of the AIDCP and agrees with Mexico that it has made an important contribution to dolphin protection in the ETP. However, as explained in previous U.S. submissions, the U.S. dolphin safe labeling provisions seek to fulfill objectives other than those pursued under the AIDCP – ensuring consumers are not misled or deceived about whether tuna products contain tuna caught in a manner harmful to dolphins and ensuring that the U.S. market is not used to encourage the practice of setting on dolphins and thereby further contribute to dolphin protection. Nothing in Article III:4 or I:1 of

¹⁰² U.S. First Written Submission, paras. 35-59; U.S. Answers to First Set of Questions from the Panel (Questions 34-36), paras. 80-89.

¹⁰³ U.S. Answers to the Second Set of Questions from the Panel (Question 152), para. 110.

¹⁰⁴ Appellate Body Report, *Dominican – Republic Cigarettes*, WT/DS 302/AB/R, adopted on 19 May 2005, para. 96.

the GATT 1994 or Article 2.1 of the TBT Agreement prevents Members from seeking to fulfill such objectives. Mexico is incorrect when it asserts that the facts of this dispute and those in *United States – Shrimp Turtle* are similar, as noted in the U.S. comments on Mexico's response to Question 137.

[Article III:4]

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

"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:

(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?).

69. The United States agrees with Mexico that the relevant comparison is between the treatment accorded U.S. tuna products and imported tuna products generally. However, it is not the case that simply because Mexico does not have the market share it would like that the U.S. provisions accord less favorable treatment to imports than to domestic products. The market share of imported products before and after adoption of a measure is not sufficient to establish that the measure discriminates against imported products, particularly in a dispute such as this one where other evidence demonstrates that the measure does not accord different or less favorable treatment based on origin. Further, in this dispute, the market share of imported tuna products has steadily increased since adoption of the U.S. dolphin safe labeling provisions.¹⁰⁵ Please see also the U.S. comments on Mexico's response to Question 94 above.

70. In addition, Mexico continues to state that 96 percent of Mexican tuna products cannot be labeled dolphin safe.¹⁰⁶ Mexico has not substantiated this figure. During the first panel meeting Mexico acknowledged that 20 percent of its catch was caught using methods other than setting on dolphins, and the United States has submitted evidence that one-third of Mexico's purse seine fleet (or just under 10 percent of its fleet's carrying capacity) comprises small vessels that do not

¹⁰⁵ U.S. Answers to the Second Set of Questions from the Panel (Question 97), para. 21; Exhibit US-86.

¹⁰⁶ Mexico Answers to the Second Set of Questions from the Panel (Question 97), para. 137.

set on dolphins to catch tuna.¹⁰⁷ Mexico has not established that only four percent of Mexican tuna catch could be used in tuna products labeled dolphin safe. Further, as noted in the U.S. comments on Mexico's response to Question 144,, nothing requires Mexican processors to use exclusively Mexican tuna in Mexican tuna products. Mexico is a net importer of tuna and tuna products and Mexican processors could use tuna caught by foreign vessels that do not set on dolphins in tuna products that Mexico wishes to sell in the United States with a dolphin safe label.

155. To Mexico: Please clarify whether you consider that, as of the time of adoption of the measure and/or currently, compliance with the US standard was or is more burdensome for Mexico than for the US or other fleets? Please clarify whether this consideration is, in your view, relevant to your claims of discrimination under Articles III:4 and I.1 of GATT 1994 and Article 2.1 of the TBT Agreement?

71. This consideration is clearly relevant to an evaluation of Mexico's claims. As the United States has noted, Mexico cites no WTO panel or Appellate Body report for the idea that the Panel must only examine the facts as they existed at the time of panel establishment.¹⁰⁸ The panel in *Mexico – Soft Drinks*, for example, considered a time period of roughly five years before the measure was adopted as part its analysis under Article III:4.¹⁰⁹ There is no reason that the Panel should ignore evidence and analysis that is clearly relevant to this dispute.

72. As the United States has noted, when the U.S. dolphin safe labeling provisions were enacted, the United States had 46 U.S. purse seine vessels that fished for tuna in the ETP of which 31 were doing so full-time.¹¹⁰ Both Mexican and U.S. vessels fished in the ETP by setting on dolphins at the time. Both Mexican and U.S. tuna products needed to meet the dolphin safe labeling conditions if the producers wanted to take advantage of labeling tuna products dolphin safe in the U.S. market.¹¹¹

156. To Mexico: In your second written submission, you argue that because a very substantial majority of the tuna products that are allowed to bear the US dolphin safe label are sourced from the Western and Central Pacific, there can be no doubt that the US provisions are for non-ETP tuna. Please clarify this statement in light of

¹⁰⁷ U.S. First Written Submission, para. 45; U.S. Answers to the First Set of Questions from the Panel (Question 23), para. 60.

¹⁰⁸ See U.S. Opening Statement at the Second Panel Meeting, para. 48.

¹⁰⁹ *Mexico – Soft Drinks (Panel)*, paras. 8.119-8.20.

¹¹⁰ See U.S. Purse Seine Vessels Participating in the ETP, Exhibit US-13 (represents vessels that fish for tuna full time); IATTC, 1990 Annual Report, Exhibit US-54 (represents vessels that fish for tuna full or part time).

¹¹¹ See U.S. Second Written Submission, para. 46.

the fact that the US standard of not setting on dolphins applies to all fisheries, inside and outside the ETP, and in light of the United States' argument that the overwhelming majority of the tuna products imported to the US market are not caught by setting on dolphins.

73. The criteria for labeling tuna products as dolphin safe, regardless of where it is caught, should not be inferred from what marketers put on their websites. Rather, the criteria are those contained in the provisions at issue. It should be noted that 1) to sell tuna products with an alternative dolphin safe label, it must be the case that no dolphins were killed or seriously injured in the sets in which the tuna were caught, and that no purse seine nets were intentionally deployed or used to encircle dolphins on the trip on which the tuna was harvested, and 2) the three major U.S. brands mentioned in Mexico's response to this question all market their tuna products with alternative labels. Thus, the U.S. dolphin safe labeling provisions require that the U.S. brands mentioned ensure that no dolphins were killed or seriously injured in the set in which the tuna was caught, as well as that no purse seine nets were intentionally deployed to encircle dolphins on the trip on which the tuna was harvested, in order to label those tuna products dolphin safe. Furthermore, as explained in the U.S. comments on Mexico's answer to Question 88 above, dolphin safe claims regarding tuna caught inside and outside the ETP are supported by the U.S. tuna tracking and verification program.

74. The United States strongly objects to the assertion that there is considerable evidence that tuna outside of the ETP is caught by setting on dolphins. None of the evidence presented by Mexico supports the conclusion that tuna and dolphins associate in the ETP in a way that would make it possible to sustain a commercial fishery.¹¹² And, as explained in earlier submissions, Mexico's claims regarding dolphin mortality outside the ETP are based on anecdotal information from outdated reports that do not appear to be supported by a robust scientific method.¹¹³ Thus, to the extent that there are fewer documentation requirements to substantiate dolphin safe claims outside of the ETP, this is justified by the relative risk that dolphins will be killed or seriously injured when tuna is caught.¹¹⁴

[Article I:1]

158. To Mexico: Please comment on the panel statement in US - Tuna (Mexico), cited in the United States second written submission, that "[a]ny advantage which might possibly result from access to this label depends on the free choice by

¹¹² See U.S. First Written Submission, paras. 38-39 (explaining that Mexico's purported evidence of setting on dolphins outside of the ETP was actually early failed attempts at creating a commercial fishery, which failed because there was no sustained tuna-dolphin relationship).

¹¹³ See U.S. Second Written Submission, paras. 48-52.

¹¹⁴ See U.S. Second Written Submission, paras. 39-47.

consumers to give preference to tuna carrying the 'dolphin safe' label".

75. Contrary to Mexico's response to this question, the panel statement in *US – Tuna (Mexico)* quoted above is clearly relevant to the present dispute, regardless of the embargo. Please see our response to Question 157 of U.S. Answers to Panel's Second Set of Questions (paragraphs 121-124) for more detail.

76. As we have previously stated, the fact that Walmart, the largest U.S. food distributor, sells a product not labeled "dolphin-safe" belies Mexico's assertion that the label is necessary for tuna to be sold in major distribution channels. Please also see the U.S. comments on Mexico's response to Question 109 and Question 126.

159. To Mexico: Please comment on the following passage of the Panel report in Canada - Autos:

"In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded "unconditionally" to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded "unconditionally" to the like product of other Members."

77. Mexico is wrong when it asserts in its response to this question that the conditions attached to the dolphin safe label cannot be met by Mexican tuna products as compared to tuna products from other countries. The dolphin safe labeling conditions are origin neutral; Mexican products do not have to meet any different or additional conditions beyond what tuna products from every other country must meet in order to be labeled dolphin safe.¹¹⁵

78. In this regard, it is important to point out the previous sentence of the panel report in *Canada – Autos*:

The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord "unconditionally" to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members

¹¹⁵ Also, as explained in earlier submissions, the U.S. provisions do not condition eligibility to use a dolphin safe label on the "situation or conduct" of Mexico. See U.S. Opening Statement at the Second Panel Meeting, para. 43 (rebutting Mexico's argument that this dispute is analogous to the *Belgium Family Allowances* dispute).

without discrimination as to origin.¹¹⁶

Thus, *Canada – Autos* makes clear that conditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 when such conditions discriminate with respect to the origin of products. In this dispute, use of a dolphin safe label is conditioned on whether the tuna product contains tuna caught by setting on dolphins or in a set in which dolphins were killed or seriously injured.

79. In addition, as noted in the U.S. comments on Mexico’s response to Question 148, Mexico has not substantiated its assertion that 96 percent of Mexican tuna products cannot be labeled dolphin safe.

¹¹⁶ *Canada – Autos (Panel)*, para. 10.23 (emphasis added).