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

(WT/DS381)

Second Written Submission of the United Mexican States

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CASES CITED IN THIS SUBMISSION

Short title	Full case title
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
Belgium – Family Allowances	GATT Panel Report, *Belgian Family Allowances (Allocations Familiales)*, adopted 7 November 1952, BISD 1S/59.
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847
EC- Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
India – Additional Import Duties	Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US-Tuna (Mexico)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 3 September 1991, unadopted, BISD 39S/155

TABLE OF ACRONYMS USED IN THIS SUBMISSION

Acronym	Full Name
AIDCP	Agreement on the International Dolphin Conservation Program
DMLs	Dolphin Mortality Limits
DPCIA	Dolphin Protection Consumer Information Act
EPO	Eastern Pacific Ocean
ETP	Eastern Tropical Pacific
FAD	Fish Aggregating Device
IATTC	Inter-American Tropical Tuna Commission

IDCP	International Dolphin Conservation Program
IDCPA	International Dolphin Conservation Program Act
IRP	International Review Panel
MMPA	Marine Mammal Protection Act

I. INTRODUCTION

1. This dispute concerns U.S. measures that unilaterally impose conditions related to fishing methods in order for tuna products to be labeled "dolphin safe" and thereby enable those products to access major distribution channels in the U.S. market. The conditions imposed by the measures conflict with and undermine a highly successful multilateral environmental agreement, the *Agreement on the International Dolphin Conservation Program* ("AIDCP"), to which both Mexico and the United States are parties and with which the Mexican fishing fleet fully complies. The AIDCP addresses concerns about dolphin mortality and injury and has been very effective in doing so. Mexican tuna products qualify for the dolphin safe label under that agreement. Notwithstanding Mexico's compliance with the international agreement, the conditions imposed by the U.S. measures prohibit the use of a dolphin safe label on imports of tuna products from Mexico while permitting the label to be used on like tuna products from other countries including the United States. As a consequence, Mexican tuna products are not able to access the major distribution channels in the U.S. market while tuna products of the United States and other countries are.

2. In addition to protecting dolphins, the AIDCP also protects tuna stocks and the overall ecosystem of the Eastern Tropical Pacific (ETP). These broader environmental objectives are undermined by the U.S. measures which are intended to extraterritorially pressure the Mexican tuna fleet to change where it fishes for tuna and/or to change its fishing method to alternative methods that are recognized to cause substantial environmental harm. In addition to their adverse environmental effects, either of these actions will threaten the economic viability of the Mexican fishing fleet, which is an important part of Mexico's economy, particularly in the light of Mexico's status as a developing country Member.

3. As its core, the protection of dolphins is what the "dolphin safe" label is all about. However, the U.S. measures are not effective in providing additional protection for dolphins in the ETP and, in fact, provide no protection for the many dolphins that are killed or seriously injured in fisheries outside the ETP where fishing methods other than setting upon dolphins are used. Moreover, by refusing to allow the use of an international dolphin safe label that is authorized by the AIDCP, the U.S. measures eliminate the commercial incentive to participate in the AIDCP, and thereby undermine and potentially threaten the viability of a very successful multilateral environmental agreement and the regime that protects dolphins in the ETP.

4. As a result of the U.S. measures, Mexican tuna that is caught in compliance with the AIDCP and is qualified as dolphin safe under that agreement is not allowed to be labeled dolphin safe in the U.S. market. U.S. consumers, however, cannot be sure that tuna that is labeled dolphin safe and sold in the United States is actually dolphin safe, because the United States does not require observers or impartial dolphin safety certifications for tuna caught outside the ETP. For non-ETP tuna, there is not even a requirement for a certification that no dolphins were killed or seriously injured during the set in which the tuna were caught.

5. The United States' concern about unobserved dolphin mortality that it uses to justify its measures is not substantiated by scientific evidence. Rather, the most recent study (2008 Department of Commerce Report) indicates that all three of the officially "depleted" dolphin

stocks in the ETP were estimated to be growing at rates considered to be near the 4-8 percent maximum possible for dolphins. This finding contradicts the United States assertion that setting upon dolphins in a manner consistent with the AIDCP is adversely affecting dolphin stocks through unobserved dolphin mortality.

6. The circumstances that created the need for the U.S. measures have been remedied by the AIDCP and no longer exist. To the extent that the U.S. arguments regarding other circumstances that necessitate the U.S. measures have any merit, the United States should have addressed those circumstances multilaterally rather than unilaterally, particularly given that there is an existing and effective multilateral institution available in the form of the Inter-American Tropical Tuna Commission ("IATTC"). Finally, there are less trade-restrictive alternative measures reasonably available to the United States that can achieve the objectives that it seeks.

7. On the basis of the argument and evidence presented by Mexico, it requests that the Panel find that the U.S. measures are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement and make such recommendations that are necessary for the United States to bring itself into conformity with these provisions.

II. MEASURES AT ISSUE

A. The Measures Must be Assessed Cumulatively

8. As elaborated upon in Mexico's response to Question 2 of the Panel, the U.S. measures must be examined cumulatively.

9. In Mexico's view the U.S. measures identified in its panel request and its First Written Submission should be analyzed as a whole. A comprehensive analysis of these measures, considering the specific facts and circumstances of this dispute, leads to the conclusions that there are violations of Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

10. The application of all the measures identified by Mexico prohibits in a discriminatory manner the use of a "dolphin safe" label on imports of tuna products from Mexico, and modifies to the detriment of Mexican imports conditions of competition in the relevant market.

B. Functioning of the U.S. Measures

1. Application Inside of the ETP

11. Approximately 95 percent of Mexico's annual tuna catch comes from large purse seine vessels that capture tuna in the ETP using the dolphin set method. Mexico has already explained in detail how the U.S. measures apply to tuna caught in the ETP.[1]

12. In simple terms, under the U.S. measures, for tuna products produced from fish caught in the ETP by large vessels with purse seine nets there must be a certification that (i) the tuna was not caught using the dolphin set method at any time during a particular fishing trip, and (ii) no dolphins have been killed or seriously injured during the set in which the tuna were caught. This certification must be verified by an independent observer who was onboard the vessel during the voyage.

13. The requirement that the tuna must not be caught using the dolphin set method automatically disqualifies Mexican tuna products from using a dolphin safe label even though such tuna is dolphin safe under the AIDCP.

2. Application Outside of the ETP

14. Mexico has explained that the dolphin safe standard that the United States applies to tuna harvested outside the ETP is that "no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip". Outside the ETP there is no requirement to certify that no dolphins were killed or seriously injured while fishing for tuna.[2]

15. In its responses to the panel's questions, the United States presented a confusing description of the standard. Accordingly, Mexico believes it is necessary to review again the U.S. measures and the practices of the U.S. producers of tuna products in complying with those measures.

16. 16 U.S.C. § 1385(d) separates tuna caught outside the ETP into the following categories:

- "*caught on the high seas by a vessel engaged in driftnet fishing*".[3] This category is not at issue in this dispute.

- caught using purse seine nets "*in a fishery in which the Secretary has determined that a regular and significant association occurs between dolphins and tuna*

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[1] *See* Mexico's First Written Submission, paragraphs 137 and 138; Opening Statement of Mexico at the First Panel Meeting, paragraphs 23-29, and Mexico's Responses to the Panel's Questions, paragraphs 11-35.

[2] Mexico's First Written Submission, paragraph 139.

[3] 16 U.S.C. § 1385(d)(1)(A). Mexico's First Written Submission, Appendix A.

(similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean)".[4] The United States has acknowledged that the Secretary of Commerce has never designated any fishery in this manner during the 20 year history of the law.[5] The United States also has never initiated a procedure to consider designating another fishery in this manner.

- caught using purse seine nets "*in any other fishery*".[6]
- caught without use of purse seine nets in a fishery "*identified by the Secretary as having a regular and significant mortality or serious injury of dolphins*".[7] The United States has also never designated any fishery in this category, or considered doing so.

17. Although not expressly mentioned in the statute, for tuna caught without using purse seine nets in a fishery not identified as having a regular and significant mortality or serious injury of dolphins (that is, all fisheries other than the ETP), no certification at all is required. Also, for vessels using purse seine nets that are smaller than 400 short tons, which under the statute the Secretary of Commerce has designated "not capable of deploying its purse seine nets on or to encircle dolphins," no certification is required.[8]

18. The above description in paragraphs 16 and 17 is consistent with the description contained in the chart submitted as Exhibit US 59. This description is also consistent with U.S. Form 370, which the United States has agreed is the mechanism through which it enforces the dolphin safe standard with respect to imports of tuna and tuna products.[9] The key point is that, in the 20 years since the law was enacted, the United States has not designated any non-ETP fishery as having a regular and significant association between tuna and dolphins, or regular and significant dolphin mortalities. Indeed, the United States has never initiated a procedure or investigation to consider designating another fishery.

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[4] 16 U.S.C. § 1385(d)(1)(B)(i). Mexico's First Written Submission, Appendix A.

[5] *See* U.S. Answers to Panel's First Set of Questions, paragraph 29 ("No fishery outside the ETP has been determined to have a regular and significant association between tuna and dolphins.").

[6] 16 U.S.C. § 1385(d)(1)(B)(ii). Mexico's First Written Submission, Appendix A.

[7] 16 U.S.C. § 1385(d)(1)(D). Mexico's First Written Submission, Appendix A.

[8] *See* Form 370. Exhibit MEX-63.

[9] U.S. Answers to Panel's First Set of Questions, paragraph 6 ("The United States monitors and verifies whether tuna products labeled "dolphin safe" meet the conditions in the U.S. dolphin safe labeling provisions through the collection of data on the National Oceanic and Atmospheric Administration (NOAA) Form 370, Fisheries Certificate of Origin (FCO), and through the National Marine Fisheries Service (NMFS) Tuna Tracking and Verification Program.").

19. Thus, with respect to fishing by vessels using purse seine nets, the only relevant category for non-ETP fisheries is the one for "any other fishery." The certification required for the "any other fishery" category is "no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip," and the certification is made only by the vessel's captain.

20. In its response to the Panel's Question 11, the United States put forth a novel interpretation of the law, asserting that the standard for alternative labels in section 1385(d)(3)(C) ("no dolphins killed or seriously injured") is being applied cumulatively with the standard for the official label in section 1385(d)(1)(B)(ii) ("no purse seine net was intentionally deployed on or used to encircle dolphins"). That assertion is contradicted by Exhibit US-59, Form 370, and the practices of the U.S. producers of tuna products.

21. In particular, neither Exhibit US-59 nor Form 370 describes a standard for tuna caught in "any other fishery" that includes the "no dolphins killed or seriously injured" requirement. The only certification requirement applicable to tuna caught outside the ETP with purse seine nets is that "no purse seine net was intentionally deployed on or used to encircle dolphins".[10]

22. Each of the three major U.S. producers of tuna products define "dolphin safe" as not setting on dolphins, with no mention of dolphins not being killed or seriously injured:

> Starkist
>
> StarKist will not purchase any tuna caught in association with dolphins. StarKist continues its practice of refusing to purchase tuna caught with gill or drift nets, which are known to be dangerous to many forms of marine life. StarKist condemns the use of these indiscriminate fishing methods that trap dolphins, whales, and other marine life along with the intended catch of fish.[11]
>
> Chicken of the Sea
>
> All tuna purchased, processed and sold by Chicken of the Sea is dolphin-safe... period! There is no flexibility in our policy. All the suppliers of our raw tuna and all suppliers of finished goods must be 100% dolphin-safe. None of the tuna we purchase is caught in association with dolphin.[12]
>
> Bumble Bee
>
> Bumble Bee Foods, LLC remains fully committed to the 100% dolphin-safe policy we implemented in April 1990. This policy guarantees the following:

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10 Exhibit MEX-63.

11 Exhibit US-32.

12 Exhibit US-37.

> - Bumble Bee will not purchase tuna from vessels that net fish associated with dolphins. Our purchasing agreements require certification of dolphin-safe fishing practices from all tuna suppliers.
>
> - Bumble Bee will not purchase tuna caught with gill or drift nets as use of these nets can sometimes entrap dolphins, other marine mammals, or birds.[13]

23. Because a very substantial majority of the tuna products that are allowed to have the dolphin safe label in the U.S. market are made from tuna sourced from the Western and Central Pacific, there can be no doubt that these descriptions of the standard are for non-ETP tuna.[14]

24. In fact, the statutory provision on alternative labels was intended to discourage the use of alternative labels entirely, by requiring that any claims that no dolphins were killed or seriously injured be backed by a tracking and verification system "comparable in effectiveness" to the one created by the United States for the ETP. Since there is no tracking and verification system regarding dolphin mortality and serious injury for non-ETP fisheries, this condition cannot be satisfied for tuna from a non-ETP fishery.

25. In this regard, the United States cites to the regulations at section 216.93 of title 50 of the Code of Federal Regulations as containing the rules for tracking and verification.[15] Those regulations provide for substantive tracking and verification procedures <u>only for tuna from the ETP</u>; for tuna from other ocean regions, the only requirement is that U.S. tuna processors report the sources of their tuna.[16] Moreover, there is no evidence that the United States has ever required exporters of tuna products from the Western Pacific – such as Thailand and the Philippines, who are the top two exporters to the United States – to demonstrate that they have tracking and verification programs for dolphin safe tuna.

26. As a practical matter, therefore, the three major U.S. brands – Starkist, Chicken of the Sea and Bumble Bee – use labels that are very similar to the official Department of Commerce label, and advertise that their labels have the exact same meaning as the official label – which is that no dolphin sets were made on the voyage during which the tuna was harvested. For its part, the United States has chosen to acquiesce in the use of "alternative" labels in this manner.

27. In any event, if the United States is correct, that would mean that the dolphin safe label for tuna caught outside the ETP has alternative meanings, depending on whether the official or

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[13] Exhibit US-36.

[14] Mexico's Responses to the Panel's Questions provided evidence that less than 1% of the tuna used by U.S. canneries is sourced from the ETP. Department of Commerce, "United States Tuna Cannery Receipts January - December 2009 and Comparison". Exhibit MEX-72. Imports of tuna products from Ecuador (which apparently are Starkist brand products) represent about 13% of total U.S. imports of tuna products. See paragraph 37 below.

[15] U.S. Answers to Panel's First Set of Questions, paragraph 26.

[16] 50 CFR § 216.93. Exhibit US-58.

an alternative label is used. The United States acknowledges the difference in paragraph 26 of its Question Responses, where it stated:

> only in the case of a tuna product that contained tuna caught by a purse seine vessel in a fishery where there is no regular and significant association between tuna and dolphins would there be any practical difference with respect to the conditions on use of the official as compared to an alternative mark.

In other words, the United States agreed that, under its interpretation, there is a difference in the standard for the official and alternative marks for tuna harvested in non-ETP fisheries that have not been designated as having a regular and significant association. Strangely, the United States uses the word "only" here, even though it already acknowledged that it has not designated any other fishery as having a regular and significant association between tuna and dolphins, or regular and significant dolphin mortalities. Thus, for all fisheries other than the ETP, the U.S. law as described by the United States provides for a different meaning for the dolphin safe label, depending on whether the official or an alternative label is used.

28. It is also noteworthy that the U.S. Question Responses includes the following assertion:

> … the U.S. government has established a "dolphin safe" website where the National Marine Fisheries Service (NMFS) explains what "dolphin safe" means when it appears on tuna products sold in the United States.[17]

29. The webpage cited by the United States, which it did not include as an exhibit, was submitted by Mexico as Exhibit MEX-79. That webpage provides the following explanation of the dolphin safe standard:

> What does dolphin-safe mean?
>
> Dolphin-safe means no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught, as defined in 16 U.S.C. §1385(h) (2).

30. The citation to 16 USC § 1385(h)(2) is to the statutory provision that establishes the standard for the ETP only. Indeed, the entire webpage cited by the United States only discusses fishing in the ETP, and it contains no information on what the dolphin safe standard means for tuna harvested outside the ETP (i.e. in any other fishery).

31. The confusion of the United States about what the dolphin safe standard means for tuna caught outside the ETP, and its failure to provide information to consumers on what the standard means for non-ETP tuna products, are relevant facts in assessing the objective of the measure and whether the measure fulfills that objective.

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[17] U.S. Answers to Panel's First Set of Questions, paragraph 106.

III. FACTS

A. The U.S. Measures Have the Effect of Excluding Mexican Tuna Products from the Major Distribution Channels

32. It is clear that the U.S. dolphin safe labeling measures have altered the conditions of competition for Mexican tuna products, and have had the effect of excluding such products from the major distribution channels in the United States.

33. As previously discussed, from 1990 to 2000, Mexican tuna was subject to a complete embargo. In 1997, the United States enacted the IDCPA to fulfill its commitments under the Panama Declaration in order to (i) allow yellowfin tuna to be imported from countries participating in the IDCP, and (ii) change its labeling definition of "dolphin safe" from a "method of capture" standard to the "non-mortality or serious injury" standard.

34. Mexico was able to export tuna and tuna products starting in April 2000, when it received an affirmative finding from the Department of Commerce.. Yet, the United States failed to fulfill the second commitment, and because the definition of dolphin safe remained the same, the difficulty to export Mexican tuna remained, even though it is not subject to an embargo.

35. The U.S. measures have created a market distinction for tuna products in the U.S. market where the dolphin safe label has an important commercial value. By virtue of the U.S. measures which prohibit the label on Mexican tuna products, those products are excluded from the major distribution channels. As a consequence, Mexican tuna has never been able to compete in the U.S. market.

36. In 2009 the total production of tuna products in the United States amounted to $757 million[18]. U.S. imports have grown from $259 million in 2000 to $613 million in tuna products in 2009. Mexico's exports have remained minimal throughout this period, and in 2009 U.S. imports from Mexico were only $7.5 million. Therefore, Mexican tuna products accounted for only 1% of the U.S. market for imported tuna products, and an even smaller percentage of the total U.S. market.[19] This clearly shows an adverse impact of the U.S. measures on Mexican tuna products.[20]

37. Mexico's share of U.S. imports is illustrated in the below chart:

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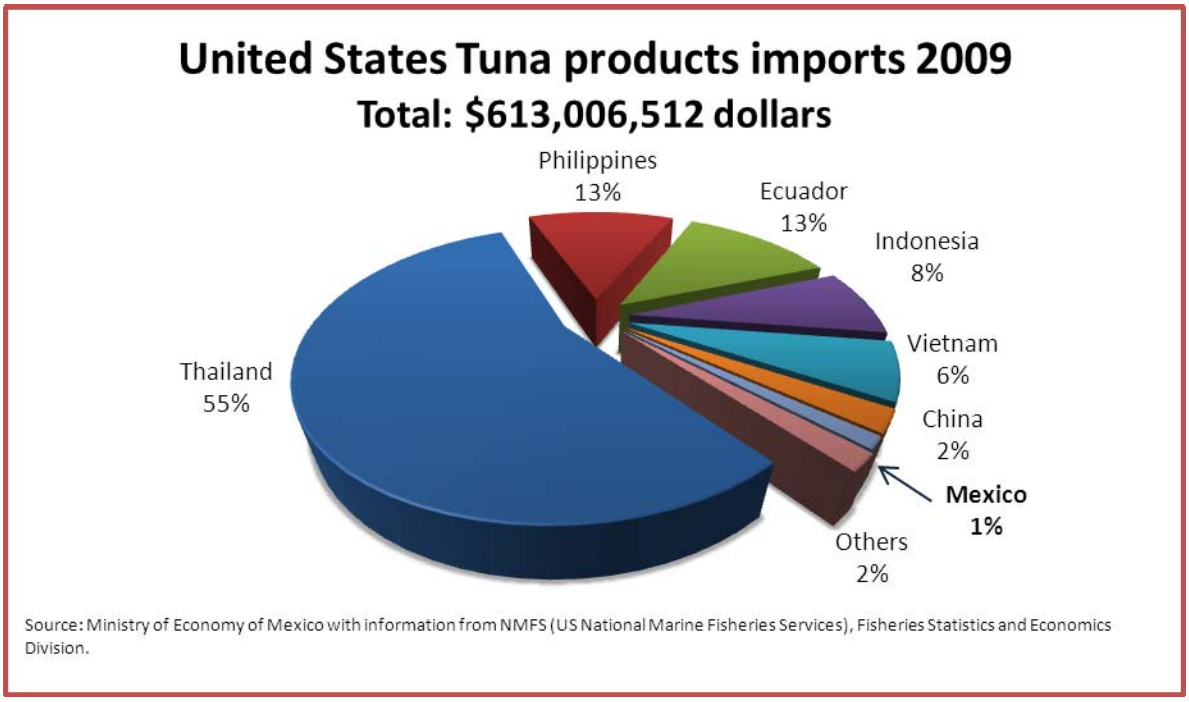
[18] NOAA, Fisheries of the United States - 2009, available at http://www.st.nmfs.noaa.gov/st1/fus/fus09/05_process2009.pdf. Exhibit MEX-87.

[19] NOAA, Fisheries of the United States, Fisheries Statistics and Economics Division, available at http://www.st.nmfs.noaa.gov/pls/webpls/trade_prdct_cntry_ind.results?qtype=IMP&qyearfrom=2000&qyearto=2010&qprod_name=TUNA+%25+ATC+%28%25&qcountry=%25&qsort=COUNTRY&qoutput=PRINTER. Exhibit MEX-88.

[20] *Ibid.*



38. Although the United States asserts that imports' share of the U.S. market of tuna products has steadily increased since the U.S. labeling provisions were enacted, in Mexico's view this assertion applies only with respect to tuna caught outside the ETP and/or using a fishing method other than the dolphin set method. For tuna caught in association with dolphins there has not been any significant growth or gains in market share.

39. The fact that the Mexican industry fishes for yellowfin tuna using the dolphin set method makes it impossible for this tuna to be dolphin safe under the U.S. measures.[21]

40. The United States asserts that Mexico has vessels under 363 metric tons and therefore tuna harvested by these vessels already meets the conditions to be labeled dolphin safe under the U.S. measures. As Mexico has stated, those vessels amount to less than 4% of the total catch of the Mexican tuna fleet and these tuna is sold in the domestic market. With respect to the vessels above 363 metric tons that sometime uses other techniques than setting on dolphins, Mexico has already explained that the tuna caught with these techniques cannot be labeled as dolphin safe given that the U.S. measures require that the dolphin set method is not used during an entire voyage. If Mexican vessels make opportunistic sets on unassociated schools or FADs, the tuna caught cannot be labeled as dolphin safe because these vessels concentrate their effort on catching mature yellowfin tuna with the dolphin set method. Therefore, it is irrelevant if some tuna is caught using other techniques, as Mexican tuna products remain restricted from having the dolphin safe label and therefore blocked from the major U.S. distribution channels.[22]

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21 *See* Confidential Exhibits MEX-86(A), MEX-86(B) and MEX-86(C).

22 *See* Confidential Exhibits MEX-86(A), MEX-86(B) and MEX-86(C).

41. The United States has suggested that Mexican producers supported the continuation of the U.S. measures, relying on Exhibit US-39, an undated letter from a purported trader in Mexican tuna products. The letter's author states that he had been importing dolphin safe Mexican tuna products into the United States, but at the time of the letter – which apparently was 1996, given that the letter is opposing the enactment of the International Dolphin Conservation Program Act – Mexican tuna products were still subject to a U.S. embargo and could not be imported into the U.S. market until the embargo was lifted in 2000. Accordingly, the individual could not have been importing any Mexican tuna products, dolphin safe or otherwise.[23]

B. Tuna Fishing and Effects on Dolphins

42. In explaining its justification for the measures at issue, the United States relies on two primary themes: first, that tuna fishing is resulting in the deaths of many thousands of dolphins more than those that are recorded by the independent observers onboard each large purse seine vessel in the ETP, and second, that even the approximately 1,000 deaths observed annually in the ETP are too many (and by implication should be reduced to zero). Mexico comments on both of these arguments below.

1. U.S. Theory of Unobserved Mortalities

43. The entire premise of the U.S. theory of unobserved mortalities is that the populations of two dolphin species that it has unilaterally determined as "depleted" are not growing at the rate that would be expected given the very low rates of observed mortalities. Thus, paragraph 79 of the U.S. Question Responses states:

> While it is expected ETP dolphin populations should be recovering at 4-8% per year given reported mortality in the fishery, results from the most recent assessment model indicate population growth rates for northeastern offshore spotted dolphins and eastern spinner dolphins are very likely (83% probability) less than 3% per year. The median population growth rates for these two dolphin stocks were estimated to be 1.7% and 1.4% per year, respectively. Further, given the scientific uncertainty inherent in the abundance estimates, it is possible that these dolphin populations are actually decreasing. Thus there must be some amount of unobserved mortality would account for the lack of recovery of these dolphin populations.

44. Similarly, at paragraph 85:

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[23] The letter identifies three alleged Mexican producers of dolphin safe tuna: (i) *Productos Pesqueros de Bahía Tortugas* and (ii) *Operadores y Asesores Marítimos, S.A. de C.V.* that were not in the tuna business, and (iii) *González, Pérez y Reyes, S.A. de C.V.* that had a small cannery that shut down over ten years ago.

> Given that estimated population growth rates are much lower than a recovering population would exhibit, the actual unobserved mortality is certainly greater, and potentially much greater – on the order of tens of thousands of animals per year. As explained further in the U.S. response to Question 37, the magnitude of the difference between the estimated population growth rate and that of a recovering dolphin population equates to approximately 34,000 missing dolphins each year.

45. Similarly, at paragraph 91:

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

46. The available evidence indicates that the original source of the 1.7% and 1.4% figures is the Commerce Department's 2002 report, which was prepared to fulfill legal requirements imposed under the U.S. measures.[24] Thus, with respect to the northeastern offshore spotted dolphins, the 2002 report states:

> The simplest model with one growth rate and one carrying capacity estimated a low maximum growth rate (**0.017**, 95% probability interval: 0.002, 0.036).[25] (Emphasis in original)

47. With respect to eastern spinner dolphin, that same report states:

> The simplest model with one growth rate and one carrying capacity estimated a very low maximum growth rate (**0.014**, 95% probability interval: 0.001, 0.052) for the stock at its estimated depletion level and with the continued fishery mortality.[26] (Emphasis in original)

48. Mexico observes that these figures were presented with a 95% probability interval that allows for the possibility that the growth rates were 3.6% and 5.2%. Mexico also notes that,

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[24] Mexico's Responses to the Panel's Questions, paragraphs 74-76.

[25] National Oceanic and Atmospheric Administration, "Report of the Scientific Research Program Under the International Dolphin Conservation Program Act," September 17, 2002, p. 88. Exhibit US-19.

[26] *Ibid.* at 91.

even relying on these figures, the U.S. Department of Commerce issued a determination in 2002 that there was not reliable evidence that the dolphin sets were causing significant harm to dolphin populations.[27]

49. The 2007 article which the United States cites as the "the most recent assessment model"[28] relied on the same observation data from research trips in the ETP as used in the 2002 report, and applied similar mathematical formulas and projections to that data. Not surprisingly, given that three of the four authors of the 2007 article were listed as authors of the 2002 Department of Commerce report, the 2007 article comes to the same conclusions: 1.7% for northeastern offshore spotted dolphins, and 1.4% for eastern spinner dolphins.[29]

50. However, in its responses to Panel Questions 34 and 37, the United States fails to mention the actual most recent assessment model, which is the report published in 2008 by the Department of Commerce – the same agency that published the 2002 report. The 2008 report, which is entitled Estimates of 2006 Dolphin Abundance In The Eastern Tropical Pacific, With Revised Estimates From 1986-2003, was based on new research conducted in 2006, as well as a re-examination of the observation data collected in prior research voyages. Mexico cited this report in its First Written Submission, and it was discussed during the first meeting with the Panel, but since it is directly relevant to the Panel's questions, Mexico is reviewing it again here.

51. The 2008 report included the following conclusions:

> Over the 8-year period from 1998-2006 when reported dolphin bycatch was at low levels relative to population sizes, all 3 of the officially depleted dolphin stocks (coastal and northeastern offshore spotted and eastern spinner dolphins) were estimated to be growing at rates considered to be near the 4-8% maximum possible for dolphins (Reilly and Barlow 1986) (Table 13).[30]

52. Table 13 indicates that the estimated rate of growth for northeastern offshore spotted dolphins was 3.5%, and for eastern spinner dolphins 9.2%.[31]

53. The report also states:

> Previous studies considering data through 2000 (Lennert-Cody et al. 2001, Gerrodette and Forcada 2005, Wade et al. 2007) have concluded that neither of the two focal dolphin stocks was recovering at a rate consistent with its depleted

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27 Mexico's Responses to the Panel's Questions, paragraph 76.

28 U.S. Answers to Panel's First Set of Questions, paragraphs 79 and 92.

29 "Depletion of spotted and spinner dolphins in the eastern Tropical Pacific: modeling hypotheses for their lack of recovery" 343 Marine Ecology Progress Series (2007), p. 10. Exhibit US-21.

30 Exhibit MEX-33, p. 12.

31 *Ibid*., p. 28.

> status and low reported bycatch. The new, higher estimates for 2003 and 2006 reported here, however, may indicate that the stocks are beginning to recover.

54. The latter two reports cited (Gerrodette and Forcada 2005 and Wade et al. 2007) are the two reports on which the United States is relying for its claims of low population growth.[32] The United States also continues to rely heavily on the very same 2002 report (published in 2005) that the 2008 report corrected.[33]

55. The 2008 report explains why the interpretation of data from prior research has been adjusted, as follows:

> For years prior to 2006, estimates given here differed from past estimates for several reasons. The first was that 2006 aerial photographic data affected both the individual school-size correction bias for individual observers who worked in previous years and the pooled school-size bias correction factor used for uncalibrated observers (Gerrodette et al. 2002). **Observers as a group have generally been consistent in their tendency to underestimate schools** (Fig. 14). However, the effects of using the latest bias correction data could be variable among years because bias correction was carried out on an individual observer-individual sighting basis; thus, it was possible for a few estimates of large schools by a particular observer or two to have had a larger effect. **The second reason estimates in this report were different from past years was that sightings of 12 unidentified common and unidentified spinner dolphins were included in the proration scheme. Previous analyses were supposed to include these unidentified sightings, but during the preparation of this report it was discovered that they had been left out**. The inclusion of these additional unidentified sightings increased the estimates of eastern and whitebelly spinner dolphins in the case of unidentified spinner dolphins and of shortbeaked common dolphins in the case of unidentified common dolphins. The amount of increase was variable among years and stocks depending on the relative proportion of identified and unidentified sightings. **The third general reason estimates in this report were different from past years was a number of changes to the computer code to correct small bugs, make analyses more consistent across years, and enable the code to execute faster.** Examples of such changes included: elimination of sightings of Fraser's, Pacific white-sided and dusky dolphins from unidentified dolphins, bootstrap sampling of school size from a lognormal rather than normal distribution, and, for 1986-1990, consistent pooling

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[32] The United States cites the 2007 report as the "latest" in U.S. Answers to Panel's First Set of Questions, paragraphs 79 and 81. The 2005 report is cited in footnote 132.

[33] U.S. Answers to Panel's First Set of Questions, paragraphs 81, 82, 87, 89 and 92. It is referenced as "Reilly et al. 2005."

> for *f*(0) estimation across all spinner stocks and across rough-toothed and Risso's dolphin sightings.[34] (Emphasis added)

56. Thus, the report indicates that the prior data were previously misinterpreted because (i) the observers consistently underestimated the number of dolphins they saw, (ii) some of the dolphins that were seen were accidentally left out of the data, and (iii) there were problems with the computer code used to run projections.

57. Nonetheless, the United States continues to cite the old estimates as though they were conclusive facts, and inexplicably fails to mention that those estimates were superseded by a more recent report by the U.S. Department of Commerce, which not only had the benefit of more recent field research, but also found errors in the underlying data relied upon by earlier reports.

58. In its First Written Submission, the United States criticized reliance on the 2008 report because it stated that there was a 95% probability interval that allowed for the possibility that growth was lower.[35] But as discussed above, the prior estimates on which the United States is relying had the same 95% probability interval, which allowed for the possibility that growth was higher than reported. For the United States to assert that the 2008 report is unreliable because of the 95% probability interval, but then treat the 2002 estimates with the same probability interval as conclusive (especially when the 2002 report incorporated errors such as omitting sightings of dolphins), is completely unscientific and arbitrary.

59. Mexico has previously explained that it disagrees with the general U.S. methodology for estimating dolphin populations and population growth, and the IATTC has also criticized the U.S approach.[36] However, even applying the U.S. approach, the 2008 report indicates that the older U.S. estimates were wrong. (Mexico notes that three of the four authors of the 2008 report also participated in the Department of Commerce's 2002 report, and one of them was an author of both the 2005 and 2007 articles cited by the United States.)

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[34] Exhibit MEX-33, ps. 11-12.

[35] U.S. First Written Submission, paragraph 49. However, when NOAA issued the report in 2008, one of the authors stated:

> "'These estimates are encouraging because they are consistent with what we would expect to see if these stocks are recovering, now that reported fishery mortality has been dramatically reduced,' said Dr. Lisa Ballance, director of NOAA's Southwest Fisheries Science Center protected resources division."

ScienceDaily, "Eastern Tropical Pacific Ocean Dolphin Populations Improving" (June 6, 2008), available at http://www.sciencedaily.com/releases/2008/06/080605123913.htm. Exhibit MEX-89.

[36] *See e.g.*, Letter from IATTC to Secretary of Commerce enclosing Scientific Report On The Status Of Dolphin Stocks In The Eastern Pacific Ocean (October 30, 2002), Scientific Report, p. 2. Exhibit MEX-67. Among other things, the United States minimized or disregarded the possibility that any other factor could affect the population growth of the two dolphin stocks, such as growth in populations of other marine mammal species.

60. The prior U.S. speculation about unobserved mortalities all is based on the assumption that the dolphin populations at issue were not recovering at their expected rates. If the dolphin populations are growing at the maximum rates that could be expected – as the 2008 report states – it follows that there cannot be a significant amount of unobserved mortalities. Put another way, the entire factual premise of the U.S. position is based on population growth statistics that have been superseded.

61. Mexico's First Written Submission noted that even though the 2008 report demonstrated that the facts on which the U.S. courts relied in their rulings were inaccurate, there was no mechanism in the U.S. measures to reconsider the decisions that led the United States not to modify its dolphin safe labeling standard as it had agreed in the Panama Declaration. The United States continues to rely on the old estimates in this proceeding, disregarding the more recent evidence of its own making.

2. Purported U.S. Goal of No Mortality

62. The United States makes the following statement its Question Responses:

> Mexico may be considering 1,239 dolphin deaths as "virtually" none, but with 1,239 dolphin deaths in 2009 it is not accurate to say that dolphin mortality in the purse seine tuna fishery in the ETP has been virtually eliminated.[37]

63. The implication of this assertion (the United States made a similar comment during the first meeting with the panel) is that anything more than zero or a few mortalities is unacceptable.

64. However, the impact of bycatch on populations is not measured scientifically by whether a particular quantity, viewed subjectively in isolation, seems high. Rather, it is measured in relation to the size of the affected populations. For this reason, with respect to smaller populations in a specific fishery, bycatch of only 10 animals could be much too high, while bycatch of thousands of animals in a larger population could be considered minimal. This approach is reflected in the United States' own rules on evaluating bycatch (apparently applied to all fisheries except the ETP), which is based on a Potential Biological Removal ("PBR") threshold. The PBR is intended to be an estimate of the maximum level of takings that may be removed from a stock without affecting the ability of the stock to reach or maintain its optimum sustainable population. The United States designates fisheries as "Category I" if the bycatch of a species of marine mammals is greater than 50% of the PBR.

65. The Panel's Question 36 asked the United States "Is a bycatch of 1000 dolphins per year significant, in terms of population recovery or conservation?" The United States responded "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."[38] Mexico agrees with the

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[37] U.S. Answers to Panel's First Set of Questions, paragraph 68.

[38] U.S. Answers to Panel's First Set of Questions, paragraph 89.

United States on this point, which is also consistent with the position of the United States in the creation of the AIDCP.

66. In particular, in 2009 there were 1,239 dolphin mortalities. Of this amount virtually all were from the stocks of spotted, eastern spinner, and common dolphins (1,216) and 23 dolphins were from other stocks.[39] The total of the estimated stocks of these three species in the ETP is currently estimated at 6,844,400.[40] The combined mortality rate for these three species therefore is 0.00017 (1,216/6,844,400) -- i.e., a fraction of one tenth of one percent.

67. The AIDCP organization in fact establishes Stock Mortality Limits (SMLs) for individual populations of the species within certain geographical areas. This is required by Annex 3 of the AIDCP, which states that the Parties must establish a per-stock, per-year dolphin mortality cap for each stock of dolphins, which since 2001 are required to be 0.1 percent of the "Minimum Estimated Abundance (Nmin) as calculated by the U.S. National Marine Fisheries Service or equivalent calculation standard as might be developed or recommended by the Scientific Advisory Board".[41] The AIDCP organization periodically reviews new estimates of dolphin populations.[42] The total of all mortalities always be less than 5,000, but in any event mortalities have not come close to that figure for many years.

68. In paragraph 48 of its Question Responses, the United States makes an awkward attempt to compare the quantity of marine mammal mortalities caused by the Hawaiian longline fishery to dolphin mortalities in the ETP. But according to the exhibit submitted by the United States (Exhibit US-62), the population of the threatened pelagic false killer whale species in the waters adjacent to Hawaii is only 484, and accordingly the number of animals killed and seriously injured in the fishery is proportionately higher than dolphin mortalities in the ETP.[43]

69. Mexico notes the following factual information regarding the U.S. comments about its system for evaluating marine mammal mortalities with respect to fisheries under its jurisdiction:

- The United States provides a general definition of "interaction" in relation to the Hawaiian fishery,[44] but omits to explain that the report it submitted indicates that

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39 "IATTC-81-05 – Tunas and billfishes in the EPO in 2009", p. 98. Exhibit MEX-90.

40 International Dolphin Conservation Program, Document SAB-07-05, Updated Estimates Of Nmin And Stock Mortality Limits (October 30, 2009), p. 1. Exhibit MEX-91.

41 AIDCP Annex 3. Exhibit MEX-11.

42 *See* International Dolphin Conservation Program, Technical Workshop On Calculating Nmin For The Dolphin Stocks Of The Eastern Pacific Ocean, La Jolla, California (USA), 2-5 August 2005 (Exhibit MEX-92); Document SAB 07-05 (Exhibit MEX-91).

43 Exhibit US-62, p. 8.

44 U.S. Answers to Panel's First Set of Questions, footnote 44.

90% of all "interactions" with false killer whales result in death or serious injury.[45]

- The U.S. report also indicates that observer coverage of the Hawaiian fishery is under 20%, because of lack of funding.[46] Obviously the fishing companies are not required to pay for observers.

- False killer whales are a species of dolphin. Notwithstanding that the United States has designated the fishery as Category I because the dolphin mortality level is purportedly unacceptable, the United States has not designated that fishery as one in which there is "regular and significant" dolphin mortalities, in accordance with 16 U.S.C. 1385(d). Such a designation would require the same certification as required for the ETP (no nets set upon dolphins and no dolphins killed or seriously injured), which in turn would require 100% observer coverage.

- The United States argues that tuna caught in the Hawaiian fishery is not canned ("these fish are caught to be sold as fresh fish, not a tuna product that would receive a dolphin safe label"),[47] apparently with the intent to imply that the dolphin mortality rate in that fishery is therefore irrelevant.

- To the best of Mexico's knowledge, the United States does not include in its evaluations of its own fisheries (in Hawaii and elsewhere) projections of the indirect effects of the fisheries on dolphins and other marine mammals, such as those resulting from the separation of calves from their dead or seriously injured mothers and the stress resulting from evading longlines and purse seine nets.

- The United States argues that the number of other marine mammal species that are killed or seriously injured in this fishery is small, but does not address the fact that the observer coverage of the fishing vessels is extremely limited, and therefore the numbers actually killed or seriously injured is unknown.[48]

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45 Exhibit US-62, p. 20 ("PC" in the table on page 20 represents false killer whales.).

46 Exhibit US-62, p. 3 ("Achieving this requirement under full targeted coverage, typically 20% coverage, throughout the year requires having enough observers on contract to accommodate higher levels of fleet activity and paying them when they are not deployed on a vessel. These requirements frequently cannot be met under the current level of funding".).

47 U.S. Answers to Panel's First Set of Questions, paragraph 47.

48 In its First Written Submission, Mexico inadvertently included Bryde's whales, spinner dolphins and sperm whales in the list of marine mammal stocks affected by this fishery. The other eight species Mexico identified are listed in the U.S. Federal Register notice (Exhibit MEX-38) as "Marine mammal species and stocks incidentally killed or injured" in the Hawaii deep-set longline fishery. Exhibit MEX-38, p. 58881.

70. Of course, the Hawaii fishery is only one of a number of U.S. fisheries in which dolphins and other marine mammals are killed. The United States complains about Mexico citing marine mammal deaths in the U.S. mid-Atlantic gillnet fishery, stating "To the extent Mexico is talking about a non-tuna fishery, we fail to see how that would relate in any way to the issues in this dispute which concern the conditions under which tuna products may be labeled dolphin safe."[49] The United States undoubtedly will also "fail to see" how the deaths of over 800 harbor porpoises per year in the U.S. Gulf of Maine fisheries – to which Mexico referred in its question responses – relate to this dispute.[50] However, when evaluating the purported U.S. objectives for the measures at issue, and the U.S. claims of dissatisfaction with the AICDP, it is highly relevant to be aware that the United States tolerates the deaths of many marine mammals each year in fisheries that are under its own control, and that according to the Government Accountability Office and the NMFS itself, the United States has not committed sufficient resources to implement its own requirements for "take reduction teams" in many of the fisheries it has identified as problematic for marine mammals.[51] Moreover, there is no scientific basis for the United States to claim that the death of a marine mammal in a tuna fishery is more harmful than the death of a marine mammal in a monkfish or other non-tuna fishery, or that dolphin mortalities are irrelevant if the tuna is not destined for canning.

C. Unilateral Action by the United States

71. Despite the fact that the United States and Mexico have both played a decisive role in negotiating multilateral agreements to ensure that tuna could be caught in ways that protected dolphins and other marine species in the ETP, the United States has chosen to adopt its own dolphin safe labeling regime which diverges from and undermines the dolphin safe labeling regime painstakingly adopted and implemented in the framework of the AIDCP by the fourteen member nations of the InterAmerican Tropical Tuna Commission (IATTC).

72. As Mexico has explained in detail in previous submissions, the goal of protecting dolphins in the ETP has been accomplished under a multilateral treaty - AIDCP. But still, Mexican tuna products are prohibited from using in the U.S. market a dolphin safe label that complies with the AIDCP framework.

73. Mexico is in full compliance with the requirements of the AIDCP. Indeed, the United States has made an affirmative finding on that point, permitting Mexico to import tuna from the ETP into the United States. However, for Mexico and other IATTC members, the incentive to

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[49] U.S. Answers to Panel's First Set of Questions, paragraph 47.

[50] Other fisheries the United States has classified as Category I include the "Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Longline Fishery", which targets tuna as well as some other types of fish. See NOAA description, available at http://www.nmfs.noaa.gov/pr/pdfs/fisheries/atlantic_caribbean_gulf_large_pelagics_longline.pdf. Exhibit MEX-93.

[51] Mexico's Responses to the Panel's Questions, paragraph 27.

formalize the procedures already being followed by creating an international binding agreement was to gain commercially meaningful access to the U.S. market through the establishment of a common multilateral dolphin safe standard. A fundamental premise of the negotiation, understood by all member countries, was that the United States would change its law to provide that tuna products harvested in the ETP in accordance with the AIDCP would be eligible for the U.S. "dolphin safe" label. Now, twelve years later, under current U.S. legislation, complying with the requirements of the AICDP is still not sufficient to allow Mexico to use the "dolphin-safe" label essential to marketplace value for tuna products in the United States.

74. The U.S. Congress authorized in 1997 a change in the "dolphin safe" labeling standard subject to the results of studies performed by the Department of Commerce to determine whether there were adverse effects on the "depleted stocks". The Department of Commerce concluded that there was not sufficient evidence to conclude that the intentional encirclement of dolphins with purse-seine nets was having a significant adverse effect on dolphin stocks in the ETP. Now the United States rejects its previous position.

75. Unfortunately, political interests and the U.S. courts blocked the change in the U.S. dolphin safe labeling requirements and the United States made no efforts in the multilateral framework to find a solution based on scientific evidence.

76. Mexico is not aware of any action of any kind by the United States to address this issue in the AIDCP, in an IATTC meeting, or in any other international regional fisheries organization. The United States is an active participant in those organizations, and yet it maintains a unilateral measure that undermines the purposes of those multilateral efforts. In Mexico's view, if the United States has continuing concerns relating to the safety of dolphins in tuna fishing, the United States should have tried to address those concerned multilaterally through the established multilateral arrangements first, and before taking unilateral action. U.S. officials have often expressed their support for multilateral environmental agreements where the health of the global commons is at stake. But in this case, the United States has acted in a way that puts at risk the AIDCP, which is internationally recognized as one of the most effective multilateral environmental agreements ever negotiated.

77. The United States now asserts that the AIDCP dolphin safe certification does not add to what the AIDCP already had achieved or could achieve in terms of reducing dolphin mortality. Mexico disagrees with this assertion. The AIDCP dolphin-safe certification system encourages fishing fleets to diligently apply the procedures of the AIDCP so that as much tuna as possible qualifies as dolphin safe. Through this certification the Parties to the AIDCP ensure that no dolphins were killed or seriously injured in the set where tuna was caught and, therefore, allows the consumers to receive accurate information on that tuna.

D. Effects on Other Species

78. Regarding the U.S. response to the Question 31 of the Panel, relating to the bycatch figures reported by the IATTC, Mexico has the following comments.

79. The United States asserts that "bycatch tables included in Mexico's First Written Submission … are misleading and incomplete."[52] However, the tables in paragraph 35 are exact copies of the tables from the IATTC's 2007 Annual Report.[53] The United States argues that the data on "captures" should include all dolphins that the United States estimates have been encircled by nets. In making this argument, the United States uses the word "capture" in an imprecise manner, ignoring the definition provided by the IATTC. To avoid any further confusion about the statistics, Mexico is reproducing below the complete explanation from the IATTC's 2008 Annual Report:

> IATTC observers began to collect information on captures and bycatches during purse-seine fishing operations in the eastern Pacific Ocean (EPO) in late 1992, and this activity continued through 2008. In this subsection "captures" refers to animals that are physically retained in the net. There are three possible fates for the captures: (1) they can be retained on board for utilization (catches); (2) they can be discarded dead or likely to die (bycatches); or (3) they can be released alive (releases). The captures and bycatches in the EPO by vessels with fish-carrying capacities greater than 363 metric tons (t) were estimated by
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> CAPTURE = (observed capture/set) x SETS
>
> and
>
> BYCATCH = (observed bycatch/set) x SETS
>
> where observed capture/set and observed bycatch/set are the ratios of the sums of capture and bycatch, respectively, to the number of sets, for sets for which observers collected capture and bycatch information, and SETS is the estimate of the total number of sets by vessels with fish-carrying capacities greater than 363 t.
>
> Bycatches of tunas
>
> Estimates of the bycatches of commercially-important tunas and of black skipjack tuna, bullet tuna, and bonito by vessels with fish-carrying-capacities greater than 363 t are shown in Table 3a. Bycatches are always wasteful, as they reduce the recruitment of catchable-size fish to the fishery and/or the yield per recruit. Captures of small yellowfin and bigeye, even if they are retained, reduce the yields per recruit of these species.
>
> Bycatches of other species

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52 U.S. Answers to Panel's First Set of Questions, paragraph 70.

53 Mexico agrees that the table in paragraph 36 of its First Written Submission incorrectly combined statistics expressed in tons with statistics expressed in individuals. Nonetheless, that does not affect the key conclusions in paragraph 37, such as the fact that in 2007 dolphin sets on tuna resulted in discards of 250 tons of immature tuna, while FAD sets resulted in discards of 10,344 tons of tuna.

> Estimates of the captures of animals other than commercially-important tunas by vessels with fish carrying capacities greater than 363 t are shown in Tables 3b and 3c. The captures of nearly all non-target species except dolphins are greatest in sets on fish associated with floating objects, intermediate in sets on unassociated schools of fish, and least in sets on fish associated with dolphins. Billfishes, dorado (*Coryphaena* spp.), wahoo (*Acanthocybium solandri*), rainbow runners (*Elagatis bipinnulata*), yellowtail (*Seriola lalandi*), and some species of sharks and rays are the objects of commercial and recreational fisheries in the EPO. Many of these are retained aboard the vessels for eventual sale. The sea turtles caught by purse-seine vessels include olive ridley (*Lepidochelys olivacea*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and loggerhead (*Caretta caretta*) turtles, all of which are considered to be endangered or threatened. Virtually all of these are released in viable condition; Table 3c includes only the dolphins and turtles that were killed or had sustained injuries that were judged likely to lead to death. The information available on the biology of the species of fish listed in Table 3c is insufficient to determine the effects of their capture by the purse-seine fishery.[54]

80. As can be seen, the statistics on captures are for "animals that are physically retained in the net" – in other words, hauled onboard the vessel. The IATTC data are not misleading in any manner.

81. The United States then purports to refute a claim it says was made by Mexico: what the United States describes as an "assertion made by Mexico that from an ecosystem perspective one triggerfish equals one wahoo equals one dolphin."[55] However, Mexico never made such an assertion. Indeed, a scientific evaluation of the bycatch of dolphin sets and log sets, based upon data available in 1998, made the following comparison:

> If we maintain this scheme of a set-by-set switch, we can compare, for instance, the type of set with the greatest bycatches with that with the least by: (1) subtracting the average mortality per set on dolphins from the average on logs for all the common species; (2) dividing both sides by the average mortality per set for the dolphins, to obtain a crude correspondence showing the differential impacts of the two ways of fishing. The following `equation' is the result of those operations:

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54 IATTC Annual Report 2008, ps. 10-11. Exhibit US-24.

55 U.S. Answers to Panel's First Set of Questions, paragraph 71.

Differential costs of fishing

Dolphin sets	Log Sets
1 dolphin	15 620 small tunas
0.1 sailfish	382 mahi-mahi
0.1 manta ray	190 wahoo .
.	7.6 rainbow runners .
	11.0 blacktip sharks .
	4.0 silky sharks .
	2.4 whitetip sharks .
	0.4 hammerhead sharks .
	2.9 other sharks and rays .
	0.3 black marlin .
	0.3 blue marlin
	0.1 striped marlin
	0.1 other billfishes
	4.3 other large fish .
	428 triggerfishes .
	800 other small fish .
	0.04 sea turtles

Except for the dolphins, the sailfish, and the manta rays, the bycatches of all other species are much greater in log sets than in dolphin sets. The protection of the one dolphin on the left side of the equation results in the mortality of many other organisms. How can we compare these impacts from the ecological point of view? The answer to the question: how many sharks is a dolphin worth? is not to be found in the ecological literature. We do not know what is the impact (even for the dolphins!) of the mortality on the right side of the equation. Are all these species plentiful? Is this level of mortality sustainable, or negligible? In the case of the dolphins, the current level of mortality is not only sustainable but so low that it should allow these species to recover to levels approaching those which existed before the advent of the purse seine fishery for tunas. This equation emphasizes that there are two problems, not one, competing for our attention. Solving one at the expense of exacerbating the other is not the ecologically sound way out of this situation. Even though many people have a stronger aversion to mortalities of dolphins than mortalities of sharks or other species, this preference has no scientific basis. The bycatch in log sets is an issue that can and should be addressed with a combination of management and technological innovation. Reducing its magnitude is another goal that should be pursued. Intensifying its

> impact to eliminate the mortality of dolphins through fishing does not have a sound ecological basis.[56]

Thus, the proper comparison is not between one dolphin and one triggerfish, but between one dolphin and thousands of animals of other species.

82. In paragraph 73 of the U.S. Question Responses, Mexico understands that the United States is claiming that fishing on FADs is the most ecologically responsible manner to harvest tuna ("Fishing in association with floating objects has a less focused impact than sets on dolphins because a broader range of species and trophic levels, particularly shorter-lived and lower trophic level species, are removed."). To Mexico' knowledge, this is the first time that the United States has officially promoted such a position, which conflicts with the position of the United States when it adopted the International Dolphin Conservation Program Act.[57]

83. Mexico observes that the Western and Central Pacific Fisheries Commission implemented a ban on FAD fishing during August and September 2009, and intended to extend the ban to three months in future years. The purpose of the ban is to try to reduce the capture of juvenile bigeye tuna.[58]

84. Similarly, the International Commission for the Conservation of Atlantic Tunas ("ICCAT") has been recommending limitations on FAD fishing for years, with limited success. The United States recently made the following statement to the ICCAT:

> Of primary concern are the substantial catches of juvenile bigeye and yellowfin tunas and the ineffective nature of the "Piccolo" area closure in the Gulf of Guinea, as adopted in 2004. Levels of small juvenile bigeye tuna (<3.2 kg) caught in surface fisheries remain unacceptably high, and according to the SCRS reached nearly 70 percent of the total surface catch in terms of numbers of fish in 2007 and continues to increase. Despite concerns regarding this increasing trend, there has been an observed increase in the number of tropical purse seine vessels participating in this fishery in 2007 and 2008, and this appears to be continuing in 2009. The United States believes the observed increase in capacity forebodes ever greater increases in the catches of small fish.
>
> The high catches of small juvenile fish have the real potential of leading to rapid declines in the stock abundance in the near future. Furthermore, yield per recruit and maximum sustainable yield would increase if more of these juvenile fish were

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[56] M. Hall, "An ecological view of the tuna-dolphin problem: impacts and trade-offs, Reviews in Fish Biology and Fisheries 8 (1998)", p. 25-26. Exhibit MEX-3.

[57] *See, e.g.*, Letter from Vice President Al Gore to Representative Gilchrest (June 3, 1996), Exhibit MEX-62.

[58] Secretariat of the Pacific Community, Status of Tuna Stocks and Management Challenges in the WCPO, slide 20. Exhibit MEX-94.

> allowed to grow before being caught. As a result, the United States agrees with the SCRS recommendation that a larger time/area closure would be more precautionary than the current, ineffective small closure. We call on the Commission to adopt this so that it can be implemented in 2010, as stated in Recommendation 08-01.[59]

85. The U.S. claim of support for increased FAD sets in the ETP cannot be reconciled with its actions in the ICCAT and its concurrence with the FAD limitations imposed by the WCPFC.

E. Association Between Tuna and Dolphins Outside the ETP

86. The United States asserts that there is no regular and significant association between dolphins and tuna outside the ETP and therefore that it is unnecessary for the United States to pay attention to whether dolphins are being killed or seriously injured outside the ETP. For example, the U.S. response to Question 12 of the Panel includes the following statements:

> "Neither the DPCIA nor its implementing regulations define 'regular and significant,' and because the United States is not aware of any evidence that may suggest anything approaching a regular and significant association between tuna and dolphins outside the ETP, it has not had the occasion to directly address the interpretation of 'regular and significant'."[60]
>
> "As explained in the U.S. First Written Submission, the ETP is fundamentally different from all other oceans in that it is the only ocean where tuna and dolphins have a known regular and significant association …."[61]
>
> "Regional fisheries management organizations are active in monitoring all of the world's oceans with regard to bycatch issues, and the United States actively participates in or observes these RFMOs. If there were a regular and significant association between tuna and dolphins in a fishery outside the ETP, it would be known."[62]

87. Mexico has the following comments on the U.S. assertion.

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59 ICCAT, Report for biennial period, 2008-09 PART II (2009) - Vol. 1 (2010), p. 239. The Recommendation 08-01 in turn recommends the adoption of a resolution to limit FAD fishing in a particular region. *Ibid*., p. 247. Exhibit MEX-95.

60 U.S. Answers to Panel's First Set of Questions, paragraph 30.

61 *Ibid.*, paragraph 31.

62 *Ibid*., paragraph 33.

1. No Definition of "Regular and Significant"

88. The United States concedes that there is no definition of "regular and significant," and that it has "not had the occasion" to consider defining that term during the twenty years since this legal standard was created.[63] If "regular and significant" means "no mortalities", many fisheries, including the Western and Central Pacific tuna fishery, should be designated, Thus, it is obvious that there is no scientific basis for the decision not to evaluate whether other fisheries have a "regular and significant association" with dolphins or "regular and significant" dolphin mortalities.

2. Other Regional Fisheries Management Organizations

89. The United States greatly overstates the monitoring activities of the non-ETP regional fisheries management organizations. Mexico has produced evidence – undisputed by the United States – that no regional fisheries management organization other than the IATTC has had a comprehensive program for many years to monitor bycatch of marine mammals. This fact is further confirmed by reviewing their activities in more detail.

a. Indian Ocean Tuna Commission

90. The Indian Ocean Tuna Commission ("IOTC") is still in the initial stages establishing programs to monitor bycatch. An October 2010 report of the IOTC Working Party on Ecosystems and Bycatch ("WPEB") includes the following comments:

> 12. The paucity of data held by the Secretariat on the different bycatch species groups makes any attempts to estimate levels of bycatch very difficult.
>
> 13. The WPEB recalled the existing data and information reporting requirements for members …. It was noted that despite adoption of Resolution 08/01 by the Commission in June 2008, recently superseded by Resolution 10/02, levels of reporting of data on sharks and other bycatch species remains very poor.[64]

91. Regarding observers, the report stated that the IOTC had resolved to implement a "regional observer scheme" ("ROS") beginning in July 2010. The report elaborates as follows:

> 26. The targets set out in the Resolutions are to have coverage of 5% of fishing operations for vessels larger than 24m from 1st July 2010, to gradually increase towards a 5% coverage for vessels smaller than 24m fishing outside their EEZ, and to develop sampling programmes to monitor artisanal fisheries at landings.

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63 U.S. Answers to Panel's First Set of Questions, paragraph 30.

64 Report of the Sixth Session of the IOTC Working Party on Ecosystems and Bycatch, 27–30 October 2010, IOTC-2010-WPEB-R[E], p. 4. Exhibit MEX-96.

* * *

> 30. The WPEB was informed that observers have been deployed by Japan, China, South Africa and by France (La Réunion and TAAF) and that national projects had been initiated in India, Kenya and Seychelles. It was noted that piracy is a serious impediment to the deployment of observers in the WIO.
>
> 31. The WPEB acknowledged the progress made by the Secretariat in developing the materials needed to start the ROS. It was noted, however, that although the ROS started on 1st July 2010, to date, **no observer trip reports had been sent to the Secretariat**.[65] (Emphasis added)

92. Thus, it is obvious that the United States cannot justify relying on data from the IOTC as a basis for concluding that marine mammals are unharmed in the Indian Ocean tuna fishery.

b. International Commission for the Conservation of Atlantic Tunas

93. The International Commission for the Conservation of Atlantic Tunas ("ICCAT") also has very limited information on bycatch. It publishes a webpage listing species that have been caught as bycatch, with the following explanation:

> Bycatch is the unintentional/incidental capture of non-target species during fishing operations. Different types of fisheries have different types and levels of bycatch, depending on the gear used, the time, area and depth fished, etc. Article IV of the Convention states: "*the Commission shall be responsible for the study of the population of tuna and tuna-like fishes (the Scombriformes with the exception of Trichiuridae and Gempylidae and the genus* Scomber*) and such other species of fishes exploited in tuna fishing in the Convention area as are not under investigation by another international fishery organization*".
>
> The following is a list of bycatch species recorded as being ever caught by any major tuna fishery in the Atlantic/Mediterranean. Note that the lists are qualitative and are not indicative of quantity nor mortality. Thus, the presence of a species in the lists does not imply that it is caught in significant quantities, nor that individuals that are caught necessarily die.[66]

94. The list, last updated in 2007, includes 26 species of dolphins and whales. Of those, 15 are indicated to have been caught in purse seine nets.

95. The latest biennial report of the ICCAT, published in 2010, includes the following statement on observer coverage:

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65 *Ibid.*, p. 8.

66 "Bycatch Species", available at http://www.iccat.int/en/bycatchspp.htm. Exhibit MEX-97.

Observers on board

17. In order to obtain data on the composition of the catches, particularly those of spawners, relative to the fishing areas and seasons, there shall be observers on board at least 5% of longline vessels over 24 meters fishing for bigeye.

18. Observers shall undertake robust data collection on all aspects of the total catch (including by-catch such as sea turtles, marine mammals, seabirds, etc.), which, at a minimum, includes size, biological samples to determine age, and catch per unit of effort information by species. The biological data collected on the fleet as a whole by these observers shall be provided to the SCRS.

19. For the scientific aspects of the program, the SCRS shall report on the coverage level achieved by each CPC and provide a summary of the data collected and any relevant findings associated with that data. SCRS shall also provide any recommendations to improve the effectiveness of CPC observer programs.[67]

ICCAT Regional Observer Program

20. The ICCAT Regional Observer Program in **Annex 2** shall be established to ensure observer coverage of 100% of all fishing vessels over 20 m fishing for bigeye tuna in the area referred to in paragraph 12.

96. The Regional Observer Program in Annex 2 will be limited to large vessels fishing for bigeye tuna in a specific region. The specific tasks of the observers do not appear to include recording data on bycatch.[68]

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[67] ICCAT, Report for biennial period, 2008-09 PART II (2009) - Vol. 1 (2010), p.. 242-43. Exhibit MEX-95.

[68] The tasks of these observers are described as follows:

"In particular the observers shall:

i) record and report upon the fishing activities carried out;

ii) observe and estimate catches and verify entries made in the logbook;

iii) sight and record vessels which may be fishing in contravention to ICCAT conservation and management measures;

iv) verify the position of the vessel when engaged in catching activity;

v) carry out scientific work such as collecting task II data when required by the Commission, based on the directives from the SCRS."

Ibid., p. 245. None of these tasks appear to include recording bycatch.

97. Thus, the United States also cannot justify relying on data from the ICCAT as a basis for concluding that marine mammals are unharmed in the Atlantic tuna fishery – especially knowing that the fishery "interacts" with at least 26 species of marine mammals.

c. Western and Central Pacific Fisheries Commission

98. The United States states that it is "curious" that Mexico has not focused on the "Western Central Pacific Ocean, where almost all U.S. purse seine vessels fish for tuna." The United States asserts, based on a citation to a letter that it did not submit as evidence, that there independent observers witnessed 1,500 sets made by U.S. vessels and saw few interactions with dolphins.[69] The United States left unexplained whether the observers were specifically trained to watch for dolphin interactions, where the observed vessels were fishing, whether the vessels were using purse seine nets or longlines, and whether or not the dolphins were killed or seriously injured.[70]

99. To put the issue of bycatch in the WCPO in perspective, it is important to note that there were approximately 100,000 purse seine sets in that fishery in 2009,[71] and there has been limited observer coverage. Accordingly, the U.S. effort to draw conclusions from a sampling of 1.5% of the sets would be meaningless, even if the U.S. statement was supported by evidence.

100. On the other hand, the Secretariat of the Pacific has published an evaluation of the impact of the WCPO fishery based on somewhat more extensive data. With regard to marine mammals, the report states:

> For the WCP–CA, incidences of capture of marine mammals in the equatorial purse-seine and area-specific longline fisheries were summarised from observer data to identify (where possible) the main species caught and provide an indication of the level of fishery interaction. However, it is important to note that no attempt has been made to apply these data to provide overall estimates for the fishery. This work would require a more detailed analysis of observer coverage rates of individual fleets and consideration of appropriate spatial and temporal stratification. It is intended to undertake such an analysis during the next year.
>
> There is a relatively high level of observer coverage in the equatorial purse-seine fishery, with 33,319 sets observed in the last 11 years (1995–2005). Marine mammals were caught in a very small proportion of these observed sets, mainly

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69 The United States left unexplained whether the observers were specifically trained to watch for marine mammal interactions, or whether their main task was to monitor how much tuna was being harvested. Unlike the IATTC, the WCPFC does not have a program specifically to monitor marine mammals.

70 False killer whales and pilot whales are species of dolphins.

71 Secretariat of the Pacific Community, Status of Tuna Stocks and Management Challenges in the WCPO, slide 21. Exhibit MEX-94.

> from sets targeting tuna schools associated with either whales or dolphins. Most of the marine mammals caught in these sets were not identified beyond the taxonomic order and the fate of most of the observed marine mammals was unknown (Table 1). Overall, a small number of dead marine mammals were observed in the fishery.[72]

101. Several points are apparent from this analysis. First, no data have been publicly available – even projections – on the overall interaction of this fishery with marine mammals. Second, observers witnessed dolphin and whale sets being made, indicating that there is an association between tuna and marine mammals in at least some parts of the WCPO. Third, the total number of purse seine sets observed over eleven years (33,319) is approximately one third of the total number of purse seine sets currently being made in the WCPO.

102. The relevant portion of the report's Table 1 on marine mammal bycatch in the purse seine fishery is reproduced below:

Fishery	Family	Common name	Number observed by fate			
			Alive	Dead	Unknown	Total
Purse-seine, equatorial N = 33,319	Marine mammals	Bottlenose dolphin	0	0	75	75
		Dolphin (unidentified)	3	4	52	59
		Marine mammal (unidentified)	33	42	1106	1181
		Total	36	46	1233	1315
	Marine turtles	Green turtle	2	0	9	11
		Hawksbill turtle	7	0	7	14
		Leatherback turtle	0	0	3	3
		Loggerhead turtle	0	0	3	3
		Olive ridley turtle	3	4	6	13
		Marine turtle (unidentified)	22	0	89	111
		Total	34	4	117	155

103. The observers clearly were not trained to oversee marine mammal bycatch, and therefore in most cases were unable either to identify the species caught in the nets or their ultimate "fate." The available statistics indicated that 56% of the captured marine mammals were known to be killed, and 44% were thought to have survived (36 out of 82). Note that, without the special training, equipment, crew's assistance, and strict procedures of the IATTC, the marine mammals captured in these sets likely were hauled onboard the vessels mixed with tons of tuna, dumped on the deck, and then thrown overboard, and accordingly the likelihood that they did not sustain serious injury is small. Even using the 56% mortality rate, which is probably low, when applied to the total number of marine mammals whose fate is "unknown" (1,233), the resulting number of dead is 690, to which the 42 known dead must be added. The total is 732.

104. As the 33,319 observed sets represent about one third of current total sets, the implication is that the WCPO purse seine fishery causes almost 2,200 marine mammal mortalities annually.

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[72] Secretariat of the Pacific Community, "The Western And Central Pacific Tuna Fishery: 2006 Overview And Status Of Stocks," 2008, ps. 59-60. Exhibit MEX-98.

Because the observers were not trained for dolphin observation, and apparently did not count serious injuries, it is likely that this figure underestimates the total.

105. In relation to the quantities of tuna being harvested, this number of mortalities may be viewed as "small." But the same is true for the ETP. Moreover, Mexico is not aware that efforts have been made to analyze the impact this mortality might have on dolphin populations in the WCPO by conducting abundance surveys, evaluate whether dolphin populations in the WCPO are growing at expected rates, or study the indirect effects on the WCPO dolphin populations caused by separation of mothers from calves and stress to dolphins resulting from their interactions with WCPO fishing vessels.

d. Other Regional Fisheries – Conclusions

106. As can be seen from the above information, other regional fisheries management organizations are still in the early stages of beginning to monitor the impact of fishing operations on marine mammals. Accordingly, the evidence of dolphin mortalities in these other fisheries already presented by Mexico cannot be refuted by citing to inaction by those fisheries management organizations.[73]

107. There is considerable other evidence available of significant marine mammal associations and mortalities in non-ETP fisheries, both for tuna and other target species.[74] Indeed, the NOAA Administrative Report presented by the United States as Exhibit US-10 states that "[a]lthough several of the references in this bibliography suggest that tuna do not associate with dolphins in the Atlantic, Indian, and western Pacific Oceans as systematically as they do in the eastern tropical Pacific, tuna-dolphin associations have been sighted and deliberately set upon in these areas". The Report recognizes that "the available data are difficult or impossible to standardize because of the inconsistency in methods which the data were collected and in the durations of such data collection efforts. The Report concludes that "an obvious problem with concluding

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[73] *See e.g.*, Mexico's First Written Submission, paragraphs 13-18; Opening Statement of Mexico at the First Meeting with the Panel, paragraph 53.

[74] *See, e.g.*, U.K. House of Commons, Environment, Food and Rural Affairs Committee, "Caught in the net: by-catch of dolphins and porpoises off the UK coast", printed January 21, 2004, Memorandum submitted by Whale and Dolphin Conservation Society, EV-26-27:

> "The losses of harbour porpoises in the Celtic Sea bottomset gillnet fishery were investigated using onboard observers in the early 1990s. This revealed an estimated mortality of 2,200 animals per annum, or roughly 6% of the local population."
>
> "Observers on Danish vessels fishing in the North Sea have provided an estimate of 6,785 porpoises caught annually in the Danish gillnet fishery and approximately 1,000 were found to be caught in UK gillnets in the North Sea."
>
> "More recently, an Irish study of a trial pelagic pair trawl fishery for albacore tuna observed 30 dolphins being caught in a single haul, with 145 cetaceans caught by just four pairs of trawlers in a single season. During 2001 observers placed on UK pair trawlers targeting the winter sea bass fishery recorded a catch of 53 dolphins in 116 hauls." Exhibit MEX-99.

[…] that incidental mortality of dolphins in tuna purse-seines outside the ETP is minimal is that many of the existing reports have been produced by groups with vested interests in one or another viewpoint: groups related to commercial fishing interests will obviously hope to find little evidence of tuna-dolphin problems similar those occurring in the ETP…"[75]

108. Protections for marine mammals are needed globally, but for the vast majority of fisheries efforts are still only in the initial stages of information gathering or suffer from inadequate resources. It is arbitrary for the United States to single out the ETP – and Mexico's tuna products industry – for special negative treatment when the AIDCP remains the world's only successful multilateral agreement for the protection of marine mammals.

109. The foregoing information further confirms the conclusions in a 2007 report on global bycatch issues published by the U.S. Department of Commerce, which Mexico cited in its First Written Submission. That report stated:

> With the exception of the provisions related to the Inter-American Tropical Tuna Commission, these provisions [of the Marine Mammal Protection Act] have gone largely unused by either the Department of Commerce or Department of State. Congressional oversight has focused on the incidental capture of dolphins in tuna purse-seine nets and not on other forms of international bycatch. Therefore, with limited resources provided to both agencies, the priority has been action to reduce the bycatch of dolphins in the yellowfin tuna fishery and very little effort has been expended to initiate bilateral discussion, modify existing international treaties, or initiate a new international convention to address other forms of global bycatch.[76]

110. In other words, the United States has concentrated its regulatory efforts on tuna fishing in the ETP, and has not devoted the same attention to other fisheries, even though there is substantial evidence of harm to marine mammals in those other fisheries at least comparable to that in the ETP.

IV. LEGAL ARGUMENT

111. The U.S. measures are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

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[75] *See* Exhibit US-10, ps. 2 and 38.

[76] Young and Iudicello, "Worldwide Bycatch Of Cetaceans," U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, July 2007, p. 38. Exhibit MEX-5.

A. General

1. The Need to Address All of Mexico's Claims

112. It is essential to the effective resolution of this dispute that the Panel rule on all of the claims raised by Mexico under Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement because of: (i) the nature of the measures at issue; (ii) the fact that this is the first time that such measures have been subject to dispute settlement under the DSU; (iii) the differences in the wording and potential application of the provisions of the GATT 1994 and the TBT Agreement to the measures; and (iv) the importance of the effective discipline of such non-tariff measures to developing country Members such as Mexico. This final reason—the importance of these disciplines to developing country Members— is particularly important because developing country Members may be most likely to be exposed to the adverse effects of non-tariff measures such as those at issue in this dispute.

113. The exercise of judicial economy with respect to one or more of Mexico's claims must therefore be avoided.

2. Order in which the Panel Should Address Mexico's Claims

114. Given that the order of addressing claims is important only when a panel exercises judicial economy and that Mexico requests that judicial economy be avoided, Mexico's claims should be examined in their logical order.[77]

115. It is logical for the Panel first to address Mexico's claims of discrimination under GATT Articles I:1 and III:4 and Article 2.1 of the TBT Agreement. An examination of Mexico's other claims under Articles 2.2 and 2.4 of the TBT Agreement should then follow.

3. The Disciplining of Unilateral Actions by WTO Members

116. The U.S. measures challenged in this dispute *de facto* condition access to the principal U.S. distribution channels for tuna products on compliance with a fishing method that has been unilaterally imposed by the United States. This is confirmed by a stated objective of the U.S. measures which is to use the U.S. market to encourage fishing fleets such as those of Mexico to change their fishing areas and/or practices.[78]

117. The unilateral actions reflected in the U.S. measures appear to be inconsistent with the United States' own interpretation of its jurisdiction over fisheries outside its territory. In its response to Question 15 of the Panel, the United States acknowledges that:

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[77] *See* Mexico's Responses to the Panel's Questions, paragraphs 1-5.

[78] U.S. First Written Submission, paragraphs 6, 7, 18, 99, 146, 170; Opening Statement of the United States at the First Substantive Meeting of the Panel, paragraph 48.

> [W]hile the United States has jurisdiction over U.S. vessels and its EEZs, it does not have authority to, and does not, impose "standards" on highseas fisheries that regulate the conduct of non-U.S. vessels. Instead, under customary international law as reflected in the United Nations Convention on the Law of the Sea, high-seas fisheries are a shared resource, and high-seas fisheries for tuna are managed through regional fisheries management organizations. Through these organizations members agree upon ways to manage those fisheries and implement those agreements by imposing requirements on their respective vessels through domestic regulations or other domestic administrative procedures.[79]

118. The obligations in the WTO Agreements must not be interpreted so as to allow a WTO Member to condition access to its domestic market based on compliance with that Member's unilateral policy relating to actions outside its territory including unincorporated process and production methods (PPMs).[80] Such an interpretation would undermine the effectiveness of core WTO disciplines. The only circumstances where such actions should be permitted are where they can be justified under one of the specific exceptions to the WTO obligations. None of those exceptions have been invoked by the United States nor do any of them apply to the U.S. measures.

119. The U.S. measures undermine core objectives of the WTO Agreements as well as important environmental and development goals. With respect to the environment, the U.S. measures are inconsistent with the fishing method established by a very successful multilateral environmental agreement. Furthermore, these measures pressure the Mexican tuna fleet to use alternative fishing methods in the ETP that are very destructive to the marine ecosystem. By denying the use of the dolphin safe label when authorized under the AIDCP, the U.S. measures also undermine that international agreement in that they remove an important commercial incentive to comply with the international agreement. In this sense, the United States' assertion that the "AIDCP and DPCIA objectives aimed at protecting dolphins are complementary" is incorrect.[81] Rather, the U.S. measures undermine the AIDCP. With respect to development goals, the U.S. measures pressure the tuna fleet of a developing country Member to use fishing methods and/or fishing areas that yield lower commercial returns and, in the case of changing fishing methods in the ETP, undermine the sustainability of the ETP tuna fishery.[82]

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79 U.S. Answers to Panel's First Set of Questions, paragraph 45.

80 Unincorporated process and production methods (PPMs), which are also referred to as non-product related PPMs, leave no trace in the final product and are not reflected in the physical attributes of the product. The fishing methods at issue in this dispute are an example. They leave no trace in the tuna products nor are they reflected in the physical attributes of the tuna products.

81 U.S. Answers to Panel's First Set of Questions, paragraph 66.

82 *See* Confidential Exhibits MEX- 86(A), MEX-86 (B) and MEX-86(C).

4. "Zero Tolerance"

120. The United States justifies its measure by saying, in essence, that a dramatic reduction of dolphin mortality to a number that is already statistically insignificant is not enough. Noting that the TBT agreement gives WTO members the right to set their own standards, the United States defends its right to pursue a policy where no dolphin would die---zero tolerance.

121. There is no WTO case law addressing the issue of whether a WTO member can adopt measures that pursue a policy of zero tolerance. We believe that this argument by the United States raises an important systemic issue. Members of the WTO must be free---as they are---under both the TBT Agreement and the SPS Agreement to consider various risk factors as they determine where to set their standards for health and safety. But a standard of zero tolerance would be unworkable in the real world.

122. To take an everyday example, if zero tolerance were the standard, aspirin would not be allowed in the marketplace, because the use of too much aspirin can have injurious health effects. For that reason, everywhere in the world aspirin is marketed with warning labels to ensure that dosage is appropriately limited. And with aspirin, as with any other drug, the warning label also reminds people with certain conditions that they should not use it at all. And yet, it is still likely that someone will take too many aspirin, or use it when he/she should not, perhaps resulting in death. Should aspirin not be on the market because of that possibility?

123. Likewise, if the standard of dolphin mortality is zero tolerance, then no multilateral or unilateral effort to protect dolphins will ever be acceptable, because no such effort will ever succeed in eliminating the possibility that one or more dolphins may be killed incidentally. The "perfect" thereby becomes the enemy of the "good," and makes it all the harder to do the good for dolphins -- and for tuna and other species -- that can and must be done.

124. As discussed above, observed dolphin mortalities and serious injury have been reduced to statistically insignificant levels and according to the 2008 Department of Commerce study dolphin stocks are growing at near maximum possible rates. That great accomplishment should not be thrown away by the United States if it causes the AIDCP to unravel as it pursues the unattainable goal of zero dolphin mortality.

B. Mexico's Discrimination Claims under Articles I and III of the GATT 1994 and Article 2.1 of the TBT Agreement

125. This section addresses Mexico's discrimination claims. The issue of whether the U.S. measures amount to a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement (a precondition for the application of the non-discrimination obligation in Article 2.1 of the TBT Agreement) is addressed in the next section.

1. Issues that are Common to Mexico's Discrimination Claims

126. Certain issues are common to Mexico's discrimination claims under Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

a. Like Products

127. Both Mexico and the United States agree that the relevant products for the like product analysis are "tuna products".[83]

128. Mexico has presented detailed submissions demonstrating that tuna products from Mexico, the United States and other countries are like.[84] The United States has not contested Mexico's submissions on this point.

129. The sole issue that has been raised regarding the like products issue is in Question 70 from the Panel—i.e., whether, in the light of the U.S. consumer preferences tuna products that are labeled dolphin safe are "like" tuna products that are not labeled dolphin safe. Mexico has presented a detailed response to this question which explains why consumer preferences support Mexico's position that the products are like.[85] Consumer preferences and perceptions are further elaborated upon below.

130. In addition, for a brief period in January 2003 when the United States changed the definition of dolphin safe, a U.S. distributor of Mexican tuna products was able to import Mexican tuna products with a dolphin safe label. That distributor was able to sell Mexican tuna products to a large U.S. grocery chain. Later, when the dolphin safe label was prohibited for Mexican tuna products, the sales were no longer possible.[86] The ability to sell Mexican tuna products with the dolphin safe label confirms that Mexican AIDCP dolphin safe tuna products and tuna products from the United States and other countries that are dolphin safe under the U.S. measures are "like" from the perspective of U.S. consumers and retailers.

131. The consumer preference in the United States is for dolphin safe tuna. Mexican tuna is dolphin safe tuna under the AIDCP. Clearly, tuna products from Mexico, the United States and other countries are like products.

b. Timeframe for Examining the Facts Related to Mexico's *de facto* Discrimination Claims

132. Mexico's discrimination claims concern *de facto* discrimination. The U.S. measures violate Articles I:1, III:4 and 2.1 because their effect is to adversely modify the conditions of competition in the U.S. marketplace for Mexican tuna products when compared to like tuna products from the United States and other countries. This denial of competitive opportunities is shown by the relevant facts as they existed at the time of the establishment of the Panel.

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83 *See* Mexico's Responses to the Panel's Questions, paragraphs 272 and 273, and U.S. Answers to Panel's First Set of Questions, paragraph 160.

84 Mexico's First Written Submission, paragraphs 146-154 and 173-180.

85 *See* Mexico's Responses to the Panel's Questions, paragraphs 250-268.

86 *See* Confidential Exhibit MEX-100.

133. The United States and European Union in its third party submission argue that the facts as they existed when the U.S. measures were first introduced in 1990 are relevant to Mexico's *de facto* discrimination claim.[87] They argue that at the time the measures were first introduced they did not modify the conditions of competition to the detriment of imported goods since both the domestic and the foreign industries were using fishing methods that did not meet the requirements of the challenged measures and had to modify their fishing methods.

134. It is not necessary for the Panel to determine whether or not the U.S. measures when introduced in 1990 *de facto* discriminated against Mexican tuna products. The Panel must examine the facts as of the date of the Panel's establishment and determine whether, on the basis of those facts, there is *de facto* discrimination.

135. In the event that the situation in the 1990s is considered by the Panel, it cannot be assumed, as the United States and European Union appear to have done, that there was no *de facto* discrimination at that time. Among other things, the Mexican fleet was subject in 1990 to a U.S. embargo on tuna imports. At the time, the facts and circumstances related to the Mexican, U.S. and other fleets would have varied. Thus, even though the newly introduced measures applied to the ETP tuna fishery as a whole, the effects on different fleets and tuna products from different origins could have been very different. It is not possible without a complete assessment of all relevant facts to determine whether there was *de facto* discrimination at that time. As it is the case today, the measures when introduced were ostensibly neutral. However, it cannot be assumed that in 1990 they were not *de facto* discriminatory.

136. The importance of examining facts as they exist at the time of the establishment of the Panel is illustrated by an argument made by the European Union in the public proceedings in the *U.S. – COOL* dispute (DS 386). In this dispute, the European Union is arguing that the Panel should consider historic facts that existed long before a Panel's establishment when assessing whether *de facto* discrimination exists today. In the *U.S. – COOL* dispute, the European Union is arguing the opposite. It argues that "the immediate regulatory shock" of a regulation does not, in itself, necessarily demonstrate less favourable treatment and, therefore, the Panel must look at future facts.[88] Essentially in the COOL dispute the European Union is arguing that WTO

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[87] U.S. First Written Submission, paragraphs 92-93, 117; U.S. Answers to Panel's First Set of Questions, paragraphs 53-55 and 158; Replies of the European Union to the Panel's Questions, paragraphs 4 and 22.

[88] In the COOL dispute, the EU's argument is as follows:

> The European Union observes that it may be quite possible or even likely that any new regulation may involve a regulatory shock for all firms and products. If one sets out to observe whether there is an adverse effect on imports, that generally being approached as relative concept, one may compare the situation before and after the new measure. However, a great deal may depend on how long after one makes the comparison. If one looks immediately after the new measure, it may not be surprising if one finds an adverse effect. But if one looks a reasonable period later, one may find that the regulatory shock has worked itself out of the market, and that there is equal opportunity for the different goods concerned notwithstanding the regulatory measure.

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Members must wait an unspecified time before challenging a measure that *de facto* discriminates in order to accommodate the possibility that the facts may change in such a way as to eliminate the discrimination. Mexico sees no basis for this argument in the GATT 1994, the TBT Agreement, or anywhere else in the covered agreements.

137. Under the EU arguments in this dispute and in *US - COOL*, a *de facto* discrimination claim could not succeed unless such discrimination is proven to exist historically, currently and in the future. If accepted, these arguments will fundamentally undermine the *de facto* application of the WTO disciplines which prevents Members from doing indirectly what they cannot do directly. This would open the door to untold inconsistencies with fundamental WTO obligations throughout the WTO-based multilateral trading system.

138. The unadopted GATT 1947 panel report in *United States - Tuna (Mexico)* further illustrates the importance of the Panel examining the facts as they exist at the time of its establishment. As explained in Mexico's response to Question 71 of the Panel, at the time of the GATT 1947 panel, the United States had a trade embargo in place against Mexican tuna. As a consequence, Mexican tuna imports were blocked so there was no factual basis upon which to assess the effects of the dolphin safe labelling provisions in the U.S. market. In other words, there was no evidence of the *de facto* discrimination and trade restrictive effects of the challenged measures.

139. The *de facto* discriminatory and trade restrictive effects are clearly occurring today and it is the existence of those effects that gives rise to Mexico's request that the Panel rule upon its claims of *de facto* discrimination in this dispute.

c. The Facially Neutral U.S. Measures *De Facto* Discriminate

140. Mexico and the United States agree that the U.S. measures are, on their face, origin neutral. They disagree, however, on whether the measures *de facto* discriminate. The United States argues, *inter alia*, that:

- The U.S. measures provide that tuna products of any origin that contains tuna that was caught by setting on dolphins may not be labeled dolphin safe and that the

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> What is a reasonable time may depend on the facts of the case. Some regulatory changes, by definition, might take many years to work their way through the system, if the underlying assets necessary to operate in the relevant industry have an extended useful economic life and it is not efficient or viable to accelerate replacement. Of course, if the change in regulation can never be overcome by the importers (and a commonly used example is cattle must have spent at least six months of each year above 1500 metres – a rule that Switzerland might comply with but not the Netherlands, for example) then that might be relevant to the application of Article III:4 of the GATT 1994.

Replies To Questions from the Panel Following the First Hearing By the European Union, DS386 (September 29, 2010), paragraphs 29-30.

use of the dolphin safe label is equally prohibited for U.S. tuna and tuna from other countries if it was caught by setting on dolphins.[89] The U.S. provisions do not condition eligibility to use the dolphin safe label on the origin of the tuna product, but rather on the manner in which it was caught, in particular if dolphins were set upon, killed or seriously injured.[90]

- To the extent that eligibility to use the dolphin safe label is a "condition of competition," the U.S. provisions do not alter the conditions of competition to the detriment of Mexican tuna or tuna products. The U.S. provisions provide that any tuna products – regardless of origin – may use the dolphin safe label if they meet the criteria for the label. These criteria are origin neutral.[91]

- The U.S. dolphin safe labeling provisions afford use of the dolphin safe label equally to all tuna products that meet the conditions set out in those provisions and deny that possibility equally to all tuna products that fail to meet those conditions.[92]

141. The United States also refers to the Panel Report in *EC – Approval and Marketing of Biotech Products* and the Appellate Body Report in *Dominican Republic – Import and Sale of Cigarettes* to support its argument that the U.S. measures do not discriminate.[93]

142. The basic argument of the United States is that a measure that is "origin neutral" on its face is by definition consistent with the national treatment obligation. The Appellate Body made it clear in *Korea – Various Measures on Beef* that a measure can treat domestic and like imported products differently without violating the national treatment obligation. However, the Appellate Body did not state – in that report or elsewhere - that a measure that does NOT treat domestic and imported like products differently - a measure that is "origin neutral" on its face - is, for that reason, consistent with the national treatment obligation. In other words, simply because a measure is "origin neutral" does not mean that it is automatically non-discriminatory. Rather, a measure that is "origin neutral" on its face can violate the national treatment obligation if it has the effect in application of modifying the conditions of competition to the detriment of the imported product by denying the imported product an equality of competitive opportunities with a like domestic product in the marketplace of the importing WTO Member. That is precisely the effect of the supposedly "origin neutral" measures at issue in this dispute. Although presented in the context of national treatment, this principle also applies to Mexico's most-favoured-nation discrimination claims.

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89 *Ibid*., paragraph 97.

90 U.S. First Written Submission, paragraph 105.

91 *Ibid*., paragraph 106.

92 *Ibid*., paragraph 109.

93 U.S. Answers to Panel's First Set of Questions, paragraphs 164-165.

143. The passage in the *EC – Approval and Marketing of Biotech Products* panel report to which the United States refers does not support its argument. The relevant paragraph of the Panel Report reads as follows:

> At any rate, even if it were the case that, as a result of the measures challenged by Argentina, the relevant imported biotech products cannot be marketed, while corresponding domestic nonbiotech products can be marketed, in accordance with the aforementioned statements by the Appellate Body this would **not be sufficient, in and of itself**, to raise a presumption that the European Communities accorded less favourable treatment to the group of like *imported* products than to the group of like *domestic* products. We note that Argentina does not assert that domestic biotech products have not been less favourably treated in the same way as imported biotech products, or that the like domestic non-biotech varieties have been more favourably treated than the like imported nonbiotech varieties. In other words, Argentina is not alleging that the treatment of products has differed depending on their origin. In these circumstances, **it is not self-evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin of these products rather than, for instance, a perceived difference between biotech products and non-biotech products in terms of their safety, etc.** In our view, Argentina has not adduced argument and evidence sufficient to raise a presumption that the alleged less favourable treatment is explained by the foreign origin of the relevant biotech products.[94] (Emphasis added)

144. The highlighted text in the Panel's reasoning indicates that, in the Panel's view, Argentina did not provide sufficient evidence of the alleged *de facto* discrimination. Moreover, by combining the discussion of less favourable treatment with "a perceived difference between biotech products and non-biotech products" it appears that the Panel has improperly conflated the concepts of "treatment no less favourable" and "like product". In this dispute, the issue of insufficient evidence does not arise because Mexico has provided *prima facie* evidence of the *de facto* discriminatory effect of the U.S. measures. Moreover, as explained above, tuna products from Mexico, the United States and other countries are clearly like products so there is no issue as to whether there is "a perceived difference" between tuna products "in terms of their safety, etc."

145. The passage in *Dominican Republic – Import and Sale of Cigarettes* to which the United States refers does not imply that a measure will necessarily be consistent with the national treatment obligation if it has a detrimental effect unrelated to the foreign origin of the product. That ruling must be understood in the context of the facts of that dispute. Those facts are readily distinguishable from the facts in this case. First, the facts suggest that the Appellate Body was of the view that the mere fact that some cigarettes produced by two domestic producers were

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[94] *EC – Approval and Marketing of Biotech Products*, paragraph 7.2514 as referred to in U.S. Answers to Panel's First Set of Questions, paragraph 164.

advantaged by the effect of the measure compared to the cigarettes carried by one importer was not sufficient to establish less favourable treatment. In this dispute the discriminatory effect is not between certain producers and importers but on the group of Mexican tuna products overall compared to the group of like tuna products from the United States and, in the case of Mexico's MFN claims, other countries. Second, the relevant paragraph of the Appellate Body Report reads as follows:

> Nor do we accept Honduras' argument that the bond requirement accords "less favourable treatment" to imported cigarettes because, as the sales of domestic cigarettes are greater than those of imported cigarettes on the Dominican Republic market, the per-unit cost of the bond requirement for imported cigarettes is higher than for domestic products. The Appellate Body indicated in *Korea – Various Measures on Beef* that imported products are treated less favourably than like products if a measure modifies the conditions of competition in the relevant market *to the detriment of imported products*. However, 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, such as the market share of the importer in this case. In this specific case, **the mere demonstration that the per-unit cost of the bond requirement for imported cigarettes was higher than for some domestic cigarettes during a particular period is not, in our view, *sufficient* to establish "less favourable treatment"** under Article III:4 of the GATT 1994. Indeed, **the difference between the per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers** (the per-unit cost of the bond requirement being the result of dividing the cost of the bond by the number of cigarettes sold on the Dominican Republic market). In this case, the difference between **the per-unit costs of the bond requirement alleged by Honduras does not depend on the foreign origin of the imported cigarettes**. Therefore, in our view, the Panel was correct in dismissing the argument that the bond requirement accords less favourable treatment to imported cigarettes because the per-unit cost of the bond was higher for the importer of Honduran cigarettes than for two domestic producers.[95] (Emphasis added).

146. The Appellate Body was of the view that the "mere demonstration that the per-unit cost of the bond required for imported cigarettes was higher" was not sufficient because this difference was explained by the smaller market share of the importer, a fact that did not depend on the foreign origin of the product. To take the Appellate Body's reasoning further, on the facts as they were presented, it would not matter from which country the "importer", or more generically the re-seller, purchased the cigarettes (e.g., domestic or foreign or which foreign

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[95] *Dominican Republic – Import and Sale of Cigarettes*, paragraph 96 as referred to in U.S. Answers to Panel's First Set of Questions, paragraph 165 and footnote 139.

country) because the alleged adverse effect related solely to the volume of cigarettes carried by the importer/re-seller. The discrimination in this dispute, however, does not depend on the characteristics of individual importers but, rather, on the fishing practices of the fleet that caught the tuna for exportation to the United States in the form of tuna products. To continue the *Dominican Republic – Import and Sale of Cigarettes* example, in this dispute it *would matter* from which country the importer/re-seller purchased the tuna products because the fishing methods of that country would dictate whether the importer/re-seller would have access to the principal distribution channels for the tuna products.

147. The situation in this dispute is analogous to the facts in one of the seminal GATT 1947 non-discrimination reports, *Belgium – Family Allowances*.[96] In that instance, the Panel found that a Belgian law that levied a charge on foreign goods that were purchased by Belgian public bodies and that originated in countries *whose system of family allowances did not meet specific requirements*, was in violation of the non-discrimination obligations Articles I:1 and possibly III:2. There, as here, the discriminatory treatment related to conditions that the foreign country did not meet. In that case the foreign country did not have a specific family allowances system and in this case the foreign country does not use a particular fishing method. In both cases, the non-discrimination provision is violated.

148. The fact that the U.S. measures are aimed at encouraging foreign fishing fleets such as those of Mexico to change their fishing areas and/or methods is further evidence of the link between the U.S. measures and the WTO-inconsistent discrimination.[97] Such an attempt at extraterritorial regulation by the United States is inconsistent with the national treatment and most-favoured nation obligations. Conceivably, in some limited circumstances, a unilateral effort aimed at altering the behavior of another sovereign country could be justified under one of the specific exceptions to the WTO obligations. None of those exceptions has been invoked by the United States nor do any of them apply to the U.S. measures.

d. Mexico's Discrimination Claims are not Dependent on Different Treatment for Fisheries within and outside the ETP

149. There has been much discussion in the course of this dispute about the difference in the treatment of the dolphin safe designation for fisheries within and outside the ETP. As discussed in Mexico's response to Question 14 of the Panel, Mexico raises the difference in regulation in the ETP and non-ETP fisheries to demonstrate that the U.S. measures do not fulfill either the first objective stated by the United States or the objective that is reflected in the design, structure and character of the measures which is the protection of dolphins.[98]

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[96] GATT Panel Report, *Belgian Family Allowances (Allocations Familiales)*, adopted 7 November 1952, BISD 1S/59.

[97] U.S. First Written Submission, paragraphs 6, 7, 18, 99, 146, 170; Opening Statement of the United States at the First Substantive Meeting of the Panel, paragraph 48.

[98] *Ibid*., paragraph 14.

150. Mexico's *de facto* discrimination claims are not dependent on demonstrating that the treatment of ETP and non-ETP fisheries is different. While differences in treatment may further exacerbate the discrimination being faced by Mexican tuna products, 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 products from the United States and other countries.

e. U.S. Pressure on the Mexican Fleet to Change Fishing Areas and/or Methods

151. The United States argues that Mexico overstates the cost and difficulty of using other techniques to catch tuna and in fact provides no evidence to support its claim that using other techniques would require Mexican vessels to "incur considerable financial and other costs".[99] The European Union understands that there are no technical or legal barriers preventing any of the WTO Members bordering the ETP to fish tuna outside the ETP.[100]

152. Whether or not and to what magnitude costs would be incurred by the Mexican tuna fleet to change fishing areas or methods is immaterial to Mexico's *de facto* discrimination claims. In light of the prevailing facts and circumstances, access to the principal U.S. distribution channels for Mexican tuna products is being denied by the U.S. measures. The mere fact that the U.S. measures unilaterally exert pressure on the Mexican fleet to change its fishing areas and/or methods (i.e., change the prevailing facts and circumstances) is itself evidence of the *de facto* discriminatory effect of the U.S. measures. Moreover, the fact that there may be alternative ways to obtain the dolphin safe label and thereby access to the principal U.S. distribution channels does not alter the fact that Mexican tuna products that are caught using the established fishing methods of the Mexican fleet are *de facto* treated less favourably.[101]

153. Notwithstanding that there is no evidentiary burden on Mexico to prove the costs associated with changing fishing areas and/or methods, Mexico has done so. These costs include:

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99 U.S. First Written Submission, paragraphs 113 and 115.

100 Replies of the European Union to the Panel's Questions, paragraph 11.

101 In *Canada – Wheat Exports and Grain Imports*, the Panel found that the fact alternative commercially more attractive distribution channels were open to imports did not alter the fact that the Canadian measure treated imported grain less favourably than like domestic grain. See Panel Reports, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R, paragraphs 6.213 and 6.295. In *Canada – Autos*, the Panel found that where an advantage accorded to the sale or use of domestic products but not to the sale or use of like imported products, it did not matter that the advantage could also be obtained by means other than the sale or use of domestic products. See Panel Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, paragraph 10.87.

- Catching juvenile tuna which is both less commercially viable and environmentally sustainable because of smaller catches and depletion of stocks;
- To avoid destroying the yellowfin fishery close to Mexico, the fleet would have to cut production dramatically or move to another region to fish for different species of tuna, skipjack, which is more commonly found in association with FADs;
- Mexican vessels would have to travel longer distances; and
- Catching less economically valuable tuna, namely skipjack.[102]

154. The EU's understanding that there are no technical or legal barriers preventing any of the WTO Members bordering the ETP to fish tuna outside the ETP is also erroneous. As explained by Mexico, licenses would have to be obtained which are expensive and, to date, unobtainable.[103]

f. Private Actions

155. The United States asserts that "the choices of retailers and consumers not to purchase tuna products that are not dolphin safe is not an 'impact of the measure' with which Article III:4 is concerned. Rather, according to the United States it would need to be an impact called for by the measure itself, and there is nothing in the U.S. dolphin safe labeling provisions that limit the importation, sale, distribution or other marketing of tuna products that are not dolphin safe or are not labeled dolphin safe. The limited demand for non-dolphin safe tuna products is a result of retailer and consumer preferences for dolphin safe tuna, not the U.S. dolphin safe labeling provisions."[104]

156. The United States is incorrect in asserting that the "limited demand for non dolphin safe tuna is a result of the retailers and consumer preferences for dolphin safe tuna, not the U.S. dolphin safe labeling provisions". On this specific issue, the United States has misconstrued the ruling of the Appellate Body in *Korea – Various Measures on Beef*. As the United States recognized, the Appellate Body stated in *Korea – Various Measures on Beef* that "[w]hat is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[105] The Appellate Body further elaborated, however, as follows:

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102 *See* Confidential Exhibits MEX-86(A), MEX-86(B) and MEX-86(C); *See also* Mexico's Responses to the Panel's Questions, paragraphs 84-90.

103 *Ibid*., paragraph 89.

104 U.S. Answers to Panel's First Set of Questions, paragraph 173.

105 Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paragraph 149.

> We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. **The legal necessity of making a choice was, however, imposed by the measure itself**. **The restricted nature of that choice should be noted.** The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, **the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure**. **In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product**. (Emphasis added)

157. The facts of this dispute are different from those in *Korea – Various Measures on Beef;* however, the principles set out in this statement by the Appellate Body are applicable to this dispute. Moreover, while the statement was made in the context of Article III:4 of the GATT 1994, it is also applicable to Mexico's discrimination claims under Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement.

158. The U.S. measures are restricting the conditions under which the "dolphin safe" label may be used and, therefore, are restricting the nature of the choice that can be made by U.S. consumers. Both the United States and Mexico agree that U.S. consumers will make choices based on whether or not the dolphin safe label is included on a tuna product. As a direct consequence of the prohibition in the U.S. measures, dolphin safe labels other than those meeting the specific conditions of the U.S. measures cannot be used. Thus, U.S. consumers are denied the option of choosing Mexican tuna products that are labeled with the international AIDCP dolphin safe label. In this way, it is the U.S. measures that are responsible for the establishment of competitive conditions that are less favourable for the imported product than for the like product from the United States and other countries. In other words, it is the government intervention in the form of the U.S. measures that adversely affects the conditions of competition.[106]

159. To the extent some element of private choice is involved, it does not relieve the United States of responsibility for the resulting establishment of competitive conditions less favourable for imported Mexican tuna products than like tuna products from the United States and other countries, given the undeniable impact of the U.S. measures on the consumers' choice.

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[106] Brazil noted in its oral statement at the first meeting with the Panel that a measure that produces effects by influencing the choices of consumers, such as a labelling measure, may modify the conditions of competition to the detriment of imported products (Oral Statement, paragraph 2). Mexico agrees with this statement. Moreover, this is exactly was has happened as a consequence of the U.S. measures. Brazil also correctly observes that consumer preferences or perceptions "can be very difficult to assess objectively" and "may even be influenced by government regulation such as the challenged measure" (Oral Statement, paragraph 7).

g. The Relevance of Consumer Preferences and Perceptions

160. Consumer preferences and perceptions are relevant in this dispute to the extent that having a label that displays the words or a symbol signifying "dolphin safe" is required to have access to the major distribution channels for tuna products in the U.S. market.[107] The United States asserts that consumers generally have a preference for tuna products that contain tuna that was caught in a manner that does not adversely affect dolphins and that products labeled as dolphin safe assure this.[108] This is incorrect and is not supported by the evidence before this Panel. As discussed in the previous section regarding "Private Actions" and in Mexico's response to Question 41 of the Panel, it is the U.S. measures that restrict the choice that can be made by U.S. consumers when assessing whether tuna products are dolphin safe and that have created the expectations that follow the regulatory requirements set out in the measures. It is not the preferences and perceptions of those consumers.

161. Mexico has presented evidence showing that a significant portion of the final consumers of tuna in the United States identify the term dolphin safe with the notion that "no dolphins were injured or killed in the course of capturing tuna" (AIDCP standard) rather than with the idea that the tuna was caught in a manner that does not adversely affect dolphins (U.S. standard).[109] As noted earlier, the U.S. label does not ensure that no dolphins were killed.

162. Thus, when U.S. consumers see a dolphin safe label on a tuna product they are not thinking that the tuna was caught in a manner that does not adversely affect dolphins, but rather, that no dolphins were injured or killed in the course of capturing the tuna.

163. Although the United States argues that consumers' preferences are identical in all segments of the market[110], in Mexico´s view there are differences between the preferences of canneries retailers and final consumers.[111]

164. The U.S. canneries do not buy tuna that is caught in the ETP using the dolphin set method due to the regulatory distinctions created by the U.S. measures. If canneries buy tuna caught in association with dolphins they cannot label that tuna as dolphin safe under the U.S. measures. As Mexico has stated, in April, 1990 the U.S. canneries announced their policies of

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[107] Mexico's Responses to the Panel's Questions, paragraphs 41-42, 47, 91-112.

[108] U.S. First Written Submission, paragraph 92; U.S. Answers to Panel's First Set of Questions, paragraphs 97, 102, 104, 106 and 107.

[109] *See* Exhibit MEX-64.

[110] U.S. First Written Submission, paragraph 92; U.S. Answers to Panel's First Set of Questions, paragraphs 102 and 103.

[111] *See* Mexico's Responses to the Panel's Questions, paragraphs 92 to 96.

not purchasing tuna caught in association with dolphins knowing of the imminent enactment of the DPCIA which had been proposed since 1989.[112]

165. The continuation of these policies is in the interests of the canneries. Their tuna operations are outside the ETP where they have been given access to fish in the EEZs of countries in the Central and Western Pacific. They process very little tuna from the ETP. Therefore, under the U.S. measures, they are able to apply the dolphin safe label on their tuna products with the only requirement being that the captain of the vessel sign a certification that "no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested." This certification is unverifiable since there is no requirement for certifications by independent observers.[113] The ability to use the dolphin safe label in this manner provides the U.S. canneries with a competitive advantage over Mexican tuna products because Mexican tuna products are excluded from the major U.S. groceries due to the fact that they cannot bear the dolphin safe label.

166. With respect to the preferences of retailers and final consumers, both are identical in the sense that they look for dolphin safe labeled tuna products. As Mexico has stated, the retailers' interest is to sell tuna products which is why they require a dolphin safe label. In this sense, they do not have a specific need to know what the label means, they just want the label affixed to the tuna products. Without a dolphin safe label, retailers would not buy Mexican tuna products and those products would remain excluded from the major distribution channels.[114]

167. As Mexico has explained above, the final consumers who are the customers of the retailers, look for tuna products that are labeled as "dolphin safe" which to them means that "no dolphins were killed or seriously injured during the capture of tuna". This is clearly a standard that Mexican tuna products comply with under the AIDCP.

168. The United States argues that at the time the U.S. dolphin safe labeling provisions were enacted (i.e. November 1990), there was a strong consumer sentiment that setting on dolphins to catch tuna "was unacceptable". For example, Representative Barbara Boxer spoke in favor of a definition of dolphin safe regarding the method of capturing tuna.[115] It is important to recognize that at the time of this statement by Representative Boxer, the multilateral agreements had not yet been concluded and an estimated 80,000-100,000 dolphins were being killed annually in the ETP.

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112 Mexico's Responses to the Panel's Questions, paragraph 103.

113 *See* Opening Statement of Mexico at the First Panel Meeting, paragraph 28; and Mexico´s Responses to the Panel's Questions, paragraphs 103-112.

114 *See* Mexico´s First Written Submission, paragraphs 71 and 160; Mexico´s Responses to the Panel's Questions, paragraph 93; *See also* Confidential Exhibits MEX-58 and MEX-100.

115 U.S. Answers to Panel's First Set of Questions, paragraph 99.

169. The first multilateral agreement that established voluntary limits on the number of dolphins that could be killed in the ETP was the La Jolla Agreement, concluded in 1992. The success of the La Jolla Agreement was evident in the fact that the goal of reducing dolphin mortality to less than 5,000 dolphins by 1999 was achieved in 1993 and was sustained in every year thereafter.

170. As explained in Mexico's first written submission, with the aim of formalizing La Jolla Agreement into a legally binding instrument, in 1995 the Parties to it (including the United States) concluded the Panama Declaration. In order to fulfill its commitments under the Panama Declaration, the U.S. enacted the IDCPA. During the discussions of this bill, Senator Ted Stevens recognized that the new U.S. legislation would guarantee U.S. consumers that no dolphins were killed during the harvest of tuna that is labeled as dolphin safe. This was because under the existing U.S. law, dolphins may have been killed but as long as the tuna was not harvested by intentionally encircling dolphins it could be labeled as dolphin safe. Senator Stevens made the following remarks before the Senate on September 30, 1996:

> On October 4, 1995, 12 nations agreed in the Panama Declaration to create a binding regime to reduce dolphin mortality and conserve fish in the Eastern Tropical Pacific Ocean [ETP]. The Panama Declaration would cap dolphin mortality in the ETP at 5,000 dolphins per year, with the goal of eventually eliminating dolphin mortality. To put this cap in perspective, in the 1970's, over 300,000 dolphin were being killed each year.
>
> We now have the opportunity to lock in the significant reductions that have been achieved in the killing of dolphins in the ETP. In addition, the Panama Declaration would create binding measures for fishing vessels for observers, bycatch reduction and measures to protect specific stocks of dolphins in the ETP.
>
> On November 17, 1995, Senator Breaux and I introduced S. 1420, the International Dolphin Conservation Program Act, to implement the Panama Declaration. Cosponsors include Senators Chafee, Johnston, Moseley-Braun, Murkowski, Thurmond, and Simpson. The Commerce Committee held a hearing on S. 1420 in April, and voted to approve the bill on June 6, 1996, without objection. At the hearing in April, **we heard the testimony of Senators Boxer and Biden. The bill approved by the committee in June accommodated their concerns to the extent that we could. We've also tried to accommodate Senator Smith, who raised some concerns about the legislation**.
>
> The bill passed by the House (H.R. 2823) addresses the concerns of the three Senators as much as possible too. If we make further changes, however, we will not fulfill the requirements of the Panama Declaration, and we may as well pass nothing. The new binding conservation measures under the Panama Declaration can only take effect with the specific changes to U.S. law in S. 1420 and H.R. 2823. The two key changes to U.S. law are: (1) a change to allow tuna caught in compliance with the Panama Declaration (including through the encirclement of dolphins) to be imported into the United States; and (2) a change so that `dolphin

> safe' in the U.S. will mean tuna caught in a set in which no dolphin mortality occurred (rather than through nonencirclement).
>
> S. 1420 and H.R. 2823 would make these changes and would allow the new regime envisioned in the Panama Declaration to go forward. If the U.S. does not make the changes, other nations will move forward without adequate conservation measures--and progress in protecting dolphins in the ETP will be lost.
>
> Our legislation **would guarantee U.S. consumers that no dolphin were killed during the harvest of tuna that is labeled as 'dolphin safe.' Under existing law, dolphins may have been killed, but as long as the tuna was not harvested by intentionally encircling dolphins, it can be labeled as `dolphin safe.'** Our legislation is supported by: (1) U.S. tuna boat owners; (2) the mainstream environmental community including Greenpeace, the Center for Marine Conservation, the Environmental Defense Fund, the National Wildlife Federation, and the World Wildlife Fund; (3) the American Sportfishing Association; (4) U.S. Labor, including the National Fishermen's Union, Seafarers International, and the United Industrial Workers; (5) the 12 nations who signed the Panama Declaration (Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela); and (6) the Administration.[116] (Emphasis added)

171. This illustrates that if the US dolphin safe standard were changed from a "method of capture" standard to the "non-mortality or serious injury" standard, the U.S. consumers would have the assurances that no dolphins were killed during the harvest of tuna that is labeled as "dolphin safe".

2. Article I:1 of the GATT 1994

172. Mexico has presented detailed arguments on its claim under Article I:1 of the GATT 1994.[117] A review of the submissions of the United States and the third parties indicates that there are only two issues in addition to the common issues addressed above that require further elaboration. These are the meaning of "advantage" and "shall be accorded immediately and unconditionally".

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[116] Statement of Senator Ted Stevens, International Dolphin Conservation Program Act, Hearing before the Senate, 142 Congressional Record S11969 (September 30, 1996). Exhibit MEX-101.

[117] Mexico's First Written Submission, paragraphs 170-191.

a. Advantage

173. Mexico's position on the advantage, favour or privilege conferred by the U.S. measures is set out in its first written submission.[118] The advantage, favour or privilege in this dispute is the right to designate tuna products as dolphin safe.[119]

174. In its first written submission, the United States argues that Mexico is wrong in its articulation of the "advantage, favour or privilege" granted by the United States by virtue of its dolphin safe labeling regime. [120] It argues that the advantage, favour, or privilege at issue in this dispute is not merely the right to label tuna products as dolphin safe and that no Member has the right to unconditionally label its products dolphin safe under the U.S. law.[121] In the view of the United States, the advantage, favour, or privilege is the opportunity to use the dolphin safe label if the conditions on use of the dolphin safe label are met.[122]

175. The argument put forward by the United States conflates the concept of an "advantage, favour or privilege" with the conditions that are imposed on the granting of that advantage, favour or privilege.

176. Mexico has established that the dolphin safe label, whether meeting the U.S. conditions or the international AIDCP standard, has commercial value in the U.S. market in the sense that access to the label enables tuna products to be sold in the principal distribution channels of the U.S. market.[123]

177. It is the application of a dolphin safe label that has value, not the conditions attached to that label. This is made clear in the recent poll that demonstrated that 48% of the public believe that the term dolphin safe means no dolphins were injured or killed in the course of capturing tuna (AIDCP standard) and only 12% believe it means dolphins were not encircled and then released in the capture of tuna (U.S. standard).[124] It is also made clear by the fact that it is of commercial value to Mexican tuna exporters and distributors to be able to use the AIDCP dolphin safe label in the U.S. market should the prohibition be lifted.[125]

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118 Mexico's First Written Submission, paragraphs 181-184.

119 *Ibid*.

120 U.S. First Written Submission, paragraph 123 and U.S. Answers to Panel's First Set of Questions, paragraphs 175-176.

121 *Ibid*.

122 *Ibid*.

123 *See* Confidential Exhibits MEX-58 and MEX-100.

124 Exhibit MEX-64.

125 *See* Confidential Exhibits MEX-58 and MEX-100.

178. The United States also refers to the following passage in the unadopted GATT 1947 panel report in *United States - Tuna (Mexico)* in support of its argument that the U.S. measures do not confer an "advantage" within the meaning of Article I:1 of the GATT 1994:

> The Panel proceeded to examine the subsidiary argument by Mexico that the labelling provisions of the DPCIA were inconsistent with Article I:1 because they discriminated against Mexico as a country fishing in the ETP. The Panel noted that the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the "Dolphin Safe" label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the "Dolphin Safe" label. The labelling provisions therefore did not make the right to sell tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods. The only issue before the Panel was therefore whether the provisions of the DPCIA governing the right of access to the label met the requirements of Article I:1.[126]

179. As explained by Mexico in its response to Question 71 of the Panel, the facts that were before the GATT 1947 panel were very different from those before this panel. At that time, the nature of the "advantage" was not apparent. For example, the above quotation includes the statement "tuna products can be sold freely both with and without the 'Dolphin Safe' label". This is clearly not the case today. In the absence of the dolphin safe label, Mexican tuna products cannot be sold in the principal distribution channels in the U.S. market. The right to designate tuna products as dolphin safe is an "advantage" because it provides access to the major distribution channels in the U.S. tuna products market.

b. Shall be Accorded Immediately and Unconditionally

180. In its third party submission and its responses to the question of the Panel, the European Union argues that "the requirement of 'unconditionally' in Article I:1 of the GATT requires the domestic measure to extend the advantage to all goods meeting the *conditions prescribed in the measure*" and that it "requires the grant of the advantage only to those products of all WTO Members that satisfy the same conditions".[127]

181. The European Union bases this interpretation on the following passage from the report of the panel in *Canada – Autos*:

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[126] Paragraph 5.42 of the panel report cited by the United States at paragraph 176 of its answer to Question 82 of U.S. Answers to Panel's First Set of Questions.

[127] Replies of the European Union to the Panel's Questions, paragraph 7; EU Third Party Written Submission, paragraph 20.

> 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. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products. We therefore do not believe that, as argued by Japan, the word "unconditionally" in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products.[128]

182. This passage does not stand for the proposition put forward by the European Union. Rather, as explained by the panel in *Colombia – Ports of Entry*, the panel in *Canada – Autos* considered that the issue of whether an advantage within the meaning of Article I:1 is accorded "unconditionally" cannot be determined independently of whether it involves discrimination between like products of different countries.[129] Whether conditions attached to an advantage granted in connection with the importation of a product offend Article I:1 depends on whether or not such conditions discriminate.[130] The following is an important passage in the panel report in *Canada – Autos*:

> Article I:1 requires that, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded "immediately and unconditionally" to the like product originating in the territories of all other Members. We agree with Japan that the ordinary meaning of "unconditionally" is "not subject to conditions". However, in our view Japan misinterprets the meaning of the word "unconditionally" in the context in which it appears in Article I:1. The word "unconditionally" in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country. 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**

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128 Panel Report, paragraph 10.24 cited at paragraph 19 of the EU Third Party Written Submission.

129 Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted 20 May 2009, paragraph 7.361.

130 *Ibid*.

> **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 without discrimination as to origin.[131] (Emphasis added)

183. In this dispute, the U.S. measures make the advantage (i.e., right to use the dolphin safe label) subject to conditions with respect to the situation or conduct of Mexico (i.e., fishing methods for tuna). These conditions discriminate against tuna products from Mexican in favour of tuna products from other countries.

184. The facts in this dispute are analogous to those in *Belgium – Family Allowances* in which the panel condemned a measure which discriminated against imports depending on the type of family allowance system that was in place in the exporting country.[132] In this dispute, the U.S. measures discriminate against imports depending on the type of fishing method employed by the exporting country.

185. Accordingly, contrary to Article I:1, the United States has granted an advantage to tuna products of other WTO Members and has not accorded that advantage immediately and unconditionally to like tuna products of all other Members, namely Mexico.

3. Article III:4 of the GATT 1994

186. Mexico has presented detailed arguments on its claim under Article III:4 of the GATT 1994.[133] A review of the submissions of the United States and the third parties indicates that the only issue in addition to the common issues addressed above that requires further elaboration is raised in the United States' response to Question 79 of the Panel. That response reads as follows:

> The fact that one-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and therefore tuna caught by these vessels is eligible to be labeled dolphin safe under the U.S. provisions, is evidence that U.S. provisions do not use origin to distinguish between tuna products that are eligible to be labeled dolphin safe. Whether a measure that is origin-neutral on its face in fact affords less favorable treatment to imported products as compared to like domestics will depend on the particular facts of each case. Thus, in a particular case, establishing a claim of less favorable treatment may require evidence that almost all or even all imported products (that are "like" domestic

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131 Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, paragraph 10.23. This paragraph of the report was not appealed (see Appellate Body Report, paragraph 76 and footnote 69).

132 GATT Panel Report, *Belgian Family Allowances (Allocations Familiales)*, adopted 7 November 1952, BISD 1S/59.

133 Mexico's First Written Submission, paragraphs 143-169; Mexico's Responses to the Panel's Questions, paragraphs 250-284.

> products) are singled out for less favorable treatment. In *Mexico – Soft Drinks* and *Chile – Alcohol* the facts that demonstrated that were that "almost 100 per cent" or 95 percent of imported products were subject to the higher tax rate.[134]

187. Elsewhere in its response to the questions of the Panel, the United States observes that in 2009 imports of tuna and tuna products from Mexico totaled $13 million.[135]

188. Mexico clarified these facts in its response to Question 23 of the Panel. Mexico has five active vessels below 363 metric tons carrying capacity and whose tuna therefore would be considered "dolphin safe" under the U.S. measures. That tuna amounted to less than 4 percent of the total catch for the Mexican fleet and is not necessarily suitable for export to the U.S. market. Mexican exports of tuna products in 2009 were approximately $7.5 and went to the only market available at the present time which is small Latin groceries and other ethnic food stores. Thus, even if the United States' interpretation of the applicable law and the test that it proposes is accepted, approximately 96 percent of Mexican tuna could not be labeled as dolphin safe when processed into tuna products and, therefore, could not access the principal distribution channels in the U.S. market. A similar high percentage, if not 100 percent, of U.S. tuna products could be labeled as dolphin safe and could access those channels. These ratios demonstrate that, even under the proposed U.S. test, Mexican tuna products are singled out for less favourable treatment.

189. However, the United States' interpretation of the applicable law and the proposed test is incorrect. It is legally irrelevant that some Mexican tuna products or even tuna products from other WTO Members could be labeled as dolphin safe and access the principal U.S. distribution channels. Such access does not eliminate the *de facto* discrimination that has been caused by the upsetting of the balance of competitive opportunities between Mexican tuna products and like U.S. products. A measure does not have to give rise to less favourable treatment for like imported products in each and every case in order to accord treatment no less favourable.[136] The possible absence of less favourable treatment of like imported product in some instances does not detract from the fact that there might be less favourable treatment in other instances.[137] Finally, a Member cannot balance more favourable treatment of imported products in some instances against less favourable treatment of imported products in other instances.[138]

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134 U.S. Answers to Panel's First Set of Questions, paragraph 174.

135 *Ibid*., paragraph 56.

136 Appellate Body Report, *United States - Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, paragraph 221.

137 Panel Reports, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R, paragraph 6.349.

138 Appellate Body Report, *India - Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008, footnote 405; Panel Report, *Argentina -*

Footnote continued on next page

190. For these reasons the *de minimis* access that Mexican tuna products may have to the U.S. market is immaterial to Mexico's discrimination claim under Article III:4.

4. Article 2.1 of the *TBT Agreement*

191. Mexico has presented detailed arguments on its claim under Article 2.1 of the TBT Agreement.[139] The United States' rebuttal of Mexico's arguments with respect to this claim mirror the United States' rebuttal arguments for Mexico's claims under Articles I:1 and III:4 of the GATT 1994.[140] Mexico addresses all of the points raised in the United States' rebuttal arguments above.

C. Other TBT Agreement Claims

1. The U.S. Measures are a Technical Regulation

192. Mexico has presented detailed argument on why the U.S. measures meet the definition of a technical regulation under Annex 1.1.[141]

193. The United States argues that the U.S. dolphin safe provisions identified by Mexico in this dispute are "voluntary measures" and therefore are not mandatory. On this basis the United States asserts that the U.S. measures do not meet the definition of a technical regulation under Annex 1.1 of the TBT Agreement.[142] This position is without merit.

194. As explained by Mexico,[143] the mandatory language is found in the document in the form of the DPCIA language that specifies it is unlawful to include on the label of any tuna product offered for sale in the United States the term "dolphin safe" or any analogous term or symbol if the product contains tuna harvested in the ETP by a large purse-seine vessel using a

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Footnote continued from previous page

Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R and Corr.1, adopted 16 February 2001, paragraph 11.260 and footnote 535.

139 Mexico's First Written Submission, paragraphs 255-262; Mexico's Responses to the Panel's Questions, paragraphs 171-183.

140 U.S. First Written Submission, paragraphs 139-140; U.S. Answers to Panel's First Set of Questions, paragraphs 132-133.

141 Mexico's First Written Submission, paragraphs 193-203; Mexico's Responses to the Panel's Questions, paragraphs 115-169.

142 U.S. First Written Submission, paragraph 138, Opening Statement of the United States at the First Substantive Meeting of the Panel, paragraph 5.

143 *See* Mexico's Responses to the Panel's Questions, paragraph 120.

purse-seine net intentionally deployed on or to encircle dolphins. This language is also found in the enforcement provisions in the DPCIA.[144]

195. In simple terms, the U.S. measures maintain an overall prohibition on the use of the term "*dolphin safe*" in any label, or the use of similar terms or symbols, if the tuna has caught using a dolphin set fishing method. In order to label a tuna product in the U.S. with a dolphin safe label, it is necessary to comply with specific requirements provided in the U.S. measures. These requirements are imposed in negative form (i.e. dolphin safe tuna products offered for sale in the United States must not possess certain characteristics).The United States argues that it is voluntary whether or not to label products as dolphin safe and that it is legal to sell tuna products in the United States that are not dolphin safe and that do not bear the dolphin safe label.[145] From a *de jure* perspective, this statement may be correct. However, as Mexico has clearly established, from a *de facto* perspective, the label is essential if the tuna products are to be sold in the principal distribution channels in the U.S. market.

196. This statement by the United States misses the key point in respect of whether the U.S. measures are "mandatory" within the meaning of Annex 1.1. What makes the U.S. measures in this dispute mandatory is not whether a label is *de jure* required in order to sell tuna products in the U.S. market. Rather, it is the fact that the U.S. measures restrict retailers, consumers and producers to a single choice for labeling tuna products as dolphin safe. There is no available option for U.S. consumers to buy tuna products that have been produced from tuna caught in accordance with the international AIDCP standard for the protection of dolphins and is labeled as dolphin safe under that standard. By virtue of the U.S. measures, it is not possible to label tuna products as dolphin safe under more than one *standard* (e.g., U.S. standard, AIDCP standard). In this way, the U.S. measures are mandatory and amount to a technical regulation within the meaning of Annex 1.1.

197. The situation in this dispute is very similar to that addressed by the Appellate Body in *EC – Sardines.* That dispute concerned the marketing of "preserved sardines" in the European Communities. More specifically, the dispute concerned two species of small fish and whether they could be labeled as sardines-- *Sardina pilchardus Walbaum* ("*Sardina pilchardus*") and *Sardinops sagax sagax* ("*Sardinops sagax*"). Both fish were used in the preparation of preserved and canned fish products, packed in water, oil or other suitable medium. The label "preserved sardines" was not required to sell the fish in the European market. The challenged measure provided that only products prepared from *Sardina pilchardus* could be marketed as preserved sardines. In other words, only products of that species could have the word "sardines" as part of the name on the container.

198. In this dispute, the US measures cover two different types of tuna based on the fishing method used to harvest them – dolphin safe tuna in accordance with the U.S. provisions and dolphin safe tuna in accordance with international AIDCP provisions. Both kinds of tuna are

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144 *See* 16 U.S.C. § 1385(e). Exhibit US-5.

145 *Ibid*., paragraph 102.

used in the preparation of preserved and canned tuna products, packed in water, oil or other suitable medium. Much like the European measures in *Sardine*s, the U.S. measures provide that the only products that can have the term dolphin safe or a similar term or symbol are those that meet the U.S. legal provisions.

199. It is also important to note in this regard that the U.S. dolphin safe labeling measure for the ETP is backed by an extensive conformity assessment procedure, in the form of the tracking and verification system adopted by the United States to ensure that ETP tuna and tuna products made from such tuna comply with the U.S. requirements. The fact that there is such a conformity assessment mechanism reinforces Mexico's position that the measure is a technical regulation and not a standard.

2. Article 2.2

200. Mexico has presented detailed arguments on its claim under Article 2.2 of the TBT Agreement.[146]

a. The U.S. Measures do Not Fulfill their Stated Objectives

201. Mexico continues to question the legitimacy of the objectives of the U.S. measures in particular the objective to unilaterally and extraterritorially impose the U.S. fishing method requirements as a condition for access to the principal distribution channels in the U.S. tuna products market in order to get foreign tuna fleets to change their fishing methods. Mexico also questions the "zero tolerance" standard that appears to underlie the U.S. measures (discussed above). However, even assuming that the objectives of the U.S. measures are legitimate, the measures do not fulfill those objectives.

202. The U.S. asserts that the U.S. measures have two objectives: (i) to ensure that consumers are not mislead or deceived about whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins; and (ii) to contribute to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to set upon dolphins.[147] In the view of the United States, the U.S. dolphin safe labeling provisions help ensure that tuna products labeled dolphin safe are in fact dolphin safe.[148] When a dolphin safe label appears on tuna products, in the view of the United States it accurately conveys to consumers that the product does not contain tuna that was caught in a manner that adversely affects dolphins.[149]

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146 Mexico's First Written Submission, paragraphs 204-225; Mexico's Responses to the Panel's Questions, paragraphs 113-249.

147 U.S. First Written Submission, paragraph 28; U.S. Answers to Panel's First Set of Questions, paragraphs 145-149.

148 U.S. First Written Submission, paragraph 156.

149 U.S. First Written Submission, paragraph 2.

203. There are several reasons why the U.S. measures do not fulfil these stated objectives.

204. First, the U.S. measures are based on the *assumption* that the fishing method utilized by the Mexican fishing fleet and regulated by the AIDCP adversely affects dolphins. As discussed above, there is no scientific evidence that setting upon dolphins in a manner consistent with the AIDCP adversely affects dolphins from a stock sustainability perspective. Rather, the most recent study (2008 Department of Commerce) indicates that dolphin stocks are recovering, indicating that the fishing methods are *not* having an adverse effect on dolphins. The fundamental premise of the U.S. measures has not been substantiated. Thus, it cannot be said that the U.S. measures "ensure that consumers are not mislead or deceived about whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins".

205. Second, as is made abundantly clear in the discussion above, tuna products that are labeled as dolphin safe under the U.S. measures might contain tuna that was caught in a set where dolphins were killed or seriously injured. This is because for fisheries outside the ETP, the stringent requirements of the AIDCP are not applied and as long as dolphins are not set upon with a purse seine net, the tuna can be labeled as dolphin safe irrespective of whether dolphins were killed or seriously injured when the tuna was caught. Thus, contrary to the stated objectives of the United States, it cannot be said that the U.S. measures "ensure that tuna products labeled as dolphin safe are in fact dolphin safe" and that the label "accurately conveys to consumers that the product does not contain tuna that was caught in a manner that adversely affects dolphins". This would also be true if, as the United States now argues, the dolphin safe standard for non-ETP tuna varies depending on whether the official or alternative label is used; in either case, no typical consumer could conceivably understand what the dolphin safe label actually means.

206. Finally, since the U.S. measures essentially block from the principal distribution channels tuna caught only in the ETP, the objective of encouraging foreign fishing fleets not to set upon dolphins applies only to fleets fishing in the ETP. The fishing method of those fleets is governed by the AIDCP and the U.S. measures do not go any further than the AIDCP. Thus, the U.S. measures have no effect on encouraging foreign fishing fleets not to set upon dolphins.

207. For these reasons, the U.S. measures do not fulfil their stated objectives.

b. The Fulfillment of the Objectives using Less Trade Restrictive Measures

208. To the extent that the U.S. measures fulfill any objectives, taking into account the risks of non-fulfillment, those objectives could be fulfilled using less trade restrictive measures.

209. The risks of non-fulfillment of the objectives is low because, as explained in Mexico's first written submission, there is a very low if non-existent risk of adverse consequences should the objectives not be carried out. This is because all of the objectives of the U.S. measures are already being fulfilled by the AIDCP.

210. A less trade restrictive way of fulfilling the objectives would be to create dolphin safe standards rather than a technical regulation whereby the AIDCP standard could be recognized

and a label complying with the AIDCP standard used. At the same time, the different U.S. standard could be recognized and a label complying with that standard used. In this way U.S. consumers will be fully informed of all aspects of dolphin safe fishing methods and they can choose accordingly when purchasing tuna products from U.S. retailers.

3. Article 2.4

211. Mexico has already explained in detail why the U.S. measures are inconsistent with Article 2.4 and it is unnecessary to repeat that explanation in its entirety here. [150]

212. The U.S. argument that the AIDCP organization is not a "body" within the meaning of Article 2.4 is without merit. As Mexico has explained, the 1991 Guide states in Article 4.1 that a "body" is defined as a "[l]egal or administrative entity that has specific tasks and composition. NOTE - Examples of bodies are organizations, authorities, companies and foundations." Article 4.2 states that an "organization" is defined as a "[b]ody that is based on the membership of other bodies or individuals and has an established constitution and its own administration." National governments are "bodies," and the AIDCP is based on their membership. The AIDCP has its own administration, which is implemented by the Secretariat of the IATTC.[151]

213. As Mexico has also explained, the core purpose of the AIDCP organization – which is composed of the member central governments acting collectively, and is administered by the secretariat of the IATTC – is to establish standards for tuna fishing to protect marine mammals. There is no support for the U.S. claim (in its answer to Panel Question 62) that the AIDCP organization is not a "recognized" or "standardizing" body for establishing when tuna caught in the ETP is dolphin safe.

214. The United States is a founding member of the AIDCP. It fully participated in the creation and establishment of the AIDCP's dolphin safe standard. Indeed, the very purpose of that standard was to facilitate access to the U.S. market. The United States enacted the International Dolphin Conservation Program Act in 1997 in order to implement its obligations under the AIDCP, including changing the U.S. dolphin safe standard to conform to the AIDCP's standard, and in fact the United States did so for a three-week period in January 2003, before a court required that it go back to its old standard.

215. Accordingly, the potential problems with applying Article 2.4 to standards in which a Member has not participated raised by the United States in its response to Panel Question 63 do

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[150] *See* Mexico's First Written Submission, paragraphs 226-254; Opening Statement of Mexico at the First Panel Meeting, paragraph 57, and Mexico's Responses to the Panel's Questions, paragraphs 184-206.

[151] Article XIV of the AIDCP states: "Envisioning that the IATTC shall have an integral role in coordinating the implementation of this Agreement, the Parties shall, *inter alia*, request the IATTC to provide Secretariat support and to perform such other functions as are set forth in this Agreement or are agreed upon pursuant to this Agreement." Exhibit MEX-11.

not arise in this dispute. The issue raised in this dispute is whether it is inconsistent with WTO obligations for a Member to maintain a unilateral technical regulation that conflicts with an international standard to which the Member expressly agreed.

V. CONCLUSIONS

216. On the basis of the foregoing, Mexico respectfully requests that the Panel find that the U.S. measures are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

List of Exhibits

Number	Title
MEX-86(A) BCI	Affidavit from José Alberto García Canchola.
MEX-86(B) BCI	Affidavit from PINSA.
MEX-86(C) BCI	Affidavit from Herdez del Fuerte.
MEX-87	NOAA, Fisheries of the United States - 2009, available at http://www.st.nmfs.noaa.gov/st1/fus/fus09/05_process2009.pdf
MEX-88	NOAA, Fisheries of the United States, Fisheries Statistics and Economics Division, available at http://www.st.nmfs.noaa.gov/pls/webpls/trade_prdct_cntry_ind.results?qtype=IMP&qyearfrom=2000&qyearto=2010&qprod_name=TUNA+%25+ATC+%28%25&qcountry=%25&qsort=COUNTRY&qoutput=PRINTER
MEX-89	ScienceDaily, "Eastern Tropical Pacific Ocean Dolphin Populations Improving" (June 6, 2008), available at http://www.sciencedaily.com/releases/2008/06/080605123913.htm.
MEX-90	IATTC-81-05 – Tunas and billfishes in the EPO in 2009.
MEX-91	International Dolphin Conservation Program, Document SAB-07-05, Updated Estimates Of Nmin And Stock Mortality Limits (October 30, 2009).
MEX-92	International Dolphin Conservation Program, Technical Workshop On Calculating Nmin For The Dolphin Stocks Of The Eastern Pacific Ocean, La Jolla, California (USA), 2-5 August 2005.
MEX-93	NOAA, Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Longline Fishery, available at http://www.nmfs.noaa.gov/pr/pdfs/fisheries/atlantic_caribbean_gulf_large_pelagics_longline.pdf
MEX-94	Secretariat of the Pacific Community, Status of Tuna Stocks and Management Challenges in the WCPO.

Number	Title
MEX-95	ICCAT, Report for biennial period, 2008-09 PART II (2009) - Vol. 1 (2010).
MEX-96	Report of the Sixth Session of the IOTC Working Party on Ecosystems and Bycatch, 27–30 October 2010, IOTC-2010-WPEB-R[E].
MEX-97	ICCAT, "Bycatch Species", available at http://www.iccat.int/en/bycatchspp.htm
MEX-98	Secretariat of the Pacific Community, "The Western And Central Pacific Tuna Fishery: 2006 Overview And Status Of Stocks," 2008.
MEX-99	U.K. House of Commons, Environment, Food and Rural Affairs Committee, "Caught in the net: by-catch of dolphins and porpoises off the UK coast", printed January 21, 2004.
MEX-100 BCI	Affidavit from Mexilink.
MEX-101	Statement of Senator Ted Stevens, International Dolphin Conservation Program Act, Hearing before the Senate, 142 Congressional Record S11969 (September 30, 1996).