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

(WT/DS381)

First Written Submission of the United Mexican States

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TABLE OF CONTENTS

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 the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001
Border Tax Adjustments	Report of the Working Party on Border Tax Adjustments, adopted 2 December 1970, BISD 18S/97
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Autos	Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
Canada – Wheat Exports	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
China - Autos	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, adopted 12 January 2009, as modified by the Appellate Body, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
Colombia – Port of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R*, adopted 20 May 2009
Dominican Republic - Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
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EC – Bananas III (Article 21.5 – US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, as upheld by the Appellate Body Reports, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Sardines	Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the

	Appellate Body Report, WT/DS231/AB/R
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R
EC – Trademarks and Geographical Indications (Australia)	Panel Report, *European Communities – Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by Australia)*, WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002
Italy – Agricultural Machinery	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60
Japan – Alcohol	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Korea – 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
Spain-Coffee	GATT Panel Report, *Spain – Tariff Treatment of unroasted coffee,* BISD 28S/102, adopted 11 June 1981
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
US – Gambling	Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005
US – Gasoline	Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Section 337	GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989
US – Tuna (EEC)	GATT Panel Report, *United States-Restrictions on Imports of Tuna*, 16 June 1994, unadopted, DS29/R444, 33 I.L.M. 839 (1994)
US – Tuna (Mexico)	GATT Panel Report, *United States-Restrictions on Imports of Tuna*, 3 Sept. 1991, unadopted, BISD 39S/155 30 I.L.M. 1594

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. For over twenty years, yellowfin tuna caught by the Mexican fishing fleet in the Eastern Tropical Pacific (ETP) have been denied effective access to the U.S. market by virtue of various GATT and WTO inconsistent measures. Sales of Mexican yellowfin tuna in the U.S. market have been severely restricted.

2. Initially, the exclusion took the form of an absolute embargo on the importation of Mexican tuna and tuna products. In 1990, Mexico challenged this embargo in dispute settlement proceedings under the General Agreement on Tariffs and Trade ("GATT"). Mexico prevailed when the panel ruled that the U.S. measure imposing the import ban was inconsistent with GATT obligations.[1] Notwithstanding that the embargo was lifted, the United States found a new way to prevent Mexican tuna from competing in the U.S. market.

3. After many years of effort, Mexico has exhausted all possibilities to achieve a mutually agreed solution in multilateral and bilateral fora. Accordingly, Mexico has no other choice but to initiate this dispute settlement proceeding.

4. The essence of the current dispute relates to the prohibition of the use of a U.S. dolphin safe label on imports of tuna products from Mexico, while such a label is permitted to be used on tuna products from other countries, including the United States.[2] The U.S. measures are inconsistent with the fundamental obligations of non-discrimination. The measures grant other foreign tuna and tuna products an advantage in the U.S. marketplace that has not been accorded immediately and unconditionally to Mexican tuna and tuna products, and are thus inconsistent with the obligation of the United States in Article I:1 of the GATT. Likewise, these U.S. measures accord Mexican tuna and tuna products treatment less favorable than that accorded to U.S. tuna and tuna products in the U.S. marketplace, and are thus inconsistent with the obligation of the United States in Article III:4 of the GATT.

5. Furthermore, the U.S. measures are inconsistent with Articles 2.1, 2.2, and 2.4 of the Agreement on Technical Barriers to Trade ("TBT Agreement") because they create unnecessary obstacles to international trade, are not based on the relevant international standard, discriminate against Mexican tuna products and tuna, and address objectives that can be addressed in a less trade-restrictive manner.

6. The U.S. measures adversely affect the importation of Mexican tuna and tuna products and its internal sale and distribution in the U.S. market. The measures also affect the market for Mexican tuna for use in manufacturing tuna products, both within and outside the U.S.

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[1] GATT Panel Report, *United States-Restrictions on Imports of Tuna*, 3 Sept. 1991, unadopted, BISD 39S/155 30 I.L.M. 1594 ("Tuna-Dolphin I"). .

[2] For the purpose of this dispute, "tuna products" means a food item which contains tuna and which has been processed for retail sale except for certain perishable items.

7. The concept of dolphin safe tuna has sometimes been the subject of confusing publicity. However, the scientific evidence shows that Mexico has maintained a sound and environmentally sustainable method for fishing for tuna -- a method which has been endorsed in a multilateral environmental agreement to which the United States is a party. Specifically, Mexico has participated in all multilateral initiatives to protect dolphins while fishing for tuna, and is a party to the Agreement on the International Dolphin Conservation Program ("AIDCP") under the auspices of the Inter-American Tropical Tuna Commission (IATTC). The AIDCP is a multilateral environmental agreement that has the objective of minimizing to the greatest extent possible dolphin mortality in the Eastern Tropical Pacific ("ETP") and ensuring the sustainability of tuna stocks and associated species in the ETP pelagic ecosystem. The AIDCP is an unqualified success, and has enormously reduced dolphin mortality to statistically insignificant levels while promoting sustainable fishing practices.[3] Mexico has diligently applied an environmentally sustainable method for fishing and promoted the use of fishing gear and techniques that minimize the catch of non-target species. As discussed herein, there is strong scientific and empirical evidence that the fishing method used by the Mexican tuna fleet, when administered under the AIDCP, is the most environmentally sound method for harvesting tuna.

8. Mexico and the Mexican fishing fleet have invested substantially to comply with the stringent requirements of the AIDCP, including the tracking, verification and monitoring procedures for AIDCP dolphin safe certification. Among the key incentives for Mexico and the industry to make these investments was the commitment by the United States, as a signatory to the Panama Declaration and later to the AIDCP, to amend its law to allow tuna products containing tuna caught in compliance with the AIDCP to bear a "dolphin safe" label when sold in the United States. The United States has not implemented this commitment. As a consequence, Mexican tuna products are prohibited by the U.S. measures from using a dolphin safe label. Without a label, the ability to sell Mexican tuna products in the U.S. market is severely curtailed and the ability to import Mexican tuna products into the U.S. market is thereby restricted.

9. While prohibiting the use of a dolphin safe label on Mexican tuna products, the United States allows tuna products containing tuna fished from every other ocean region to be labeled dolphin safe, even though those other fisheries have not adopted comparable measures to protect dolphins. Thus, tuna products of other WTO Members, including the United States, benefit from a dolphin safe label and their sale in the U.S. market is not similarly curtailed or otherwise encumbered by the same rigid tracking and verification system imposed upon Mexican and other tuna captured in the ETP purse seine fishery.

10. The actions of the United States not only adversely affect trade and violate provisions of the WTO Agreements. They undermine important environmental objectives by creating a strong commercial incentive to use alternative fishing methods that are recognized to cause substantial environmental harm. Moreover, by refusing to allow the use of a dolphin safe label, they

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[3] U.S. Department of State, *Dolphin Conservation Agreement Wins Award at United Nations Food and Agriculture Organization*, Media Note, November 22, 2005, available for download at: http://swr.nmfs.noaa.gov/news/dca.pdf. MEX-1.

eliminate the commercial incentive to participate in the AIDCP and thereby undermine and potentially threaten the viability of a very successful multilateral environmental agreement.

II. FACTS AND BACKGROUND INFORMATION

A. Tuna Fishing

1. Tuna And Dolphins

11. For reasons that are not fully understood by scientists, there is a natural association between tuna and dolphins. Schools of mature yellowfin tuna tend to aggregate and swim – to "associate"– near certain species of dolphins in ocean waters. Therefore, where there are herds of dolphins and certain ocean environments exist, schools of tuna are often swimming nearby.

12. In the ETP, several species of dolphins are found in association with tuna – primarily the northeastern spotted dolphin and the eastern spinner dolphin.[4] The principal type of tuna that associates with dolphins in the ETP is the yellowfin tuna.

13. The association between tuna and dolphins is not, however, unique to the ETP. Scientific research indicates that there are associations of tuna with dolphins in other oceans of the world, including the Eastern and Western Atlantic, the Indian Ocean, the Central and Western Pacific, and the Gulf of Mexico (see Chart 1).[5]

14. A report published by the U.S. National Research Council also verifies that the association of tuna with dolphins is not limited to the ETP. It states that this association has been observed — and used by fishermen — in other ocean areas like the Eastern and Western Atlantic, the Indian Ocean, the central and western Pacific and the Gulf of Mexico (see Chart 1).[6]

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[4] National Research Council, *Dolphins and the Tuna Industry* (National Academy Press: Washington, D.C., 1992), p. 43. MEX-2.

[5] Martin A. Hall, "An ecological view of the tuna-dolphin problem: impacts and trade-offs," Reviews in Fish Biology and Fisheries, 8, 1-34 (1998), at 6, 8. MEX-3. See also Eric Clua and Francois Grosvalet, "Mixed-species feeding aggregation of dolphins, large tunas and seabirds in the Azores," Aquatic Living Resources 14 (2001), 11-18, at 11 ("The association of yellowfin tuna (*Thunnus albacares*) with dolphins has been observed in all oceans of the world…."). MEX-4.

[6] See National Research Council, *supra* p. 48. MEX-2.

Chart 1
ASSOCIATION BETWEEN TUNA AND DOLPHINS OUTSIDE THE ETP

Oceans	Type of tuna	References included in Martin A. Hall´s *An ecological view of the tuna-dolphin problem: impacts and trade offs*[7]	References included in the National Research Council's *Dolphins and the Tuna Industry*[8]
Eastern Atlantic	Yellowfin tuna	Bane (1961), Simmons (1968), Mitchell (1975), Levenez *et al*. (1980), Maigret (1981a, b, c), Coan and Sakagawa (1982), Pereira (1985), Stretta and Slepoukha (1986), Cayré *et al*. (1988) and Santana *et al*. (1991).	Cayre et al., 1988; Coan and Sakagawa, 1982; Levenez et al., 1980; Maigret, 1981, 1990; Mitchell, 1975; Pereira, 1985; Simmons, 1968; and Stretta and Slepoukha, 1986.
Western Atlantic	Yellowfin tuna	Caldwell and Caldwell (1971).	Caldwell and Caldwell, (1971).
Indian Ocean	Yellowfin tuna	Potier and Marsac (1984), Montaudouin *et al*. (1990), De Silva and Boniface (1991), De Silva and Dayaratne (1991), and Leatherwood and Reeves (1991) mention the association.	Leatherwood and Reeves, 1989; Montaudouin et al., 1990; and Potier and Marsac, 1984 (Indian Ocean).
Central and Western Pacific	Yellowfin tuna	Pacific Tuna Development Foundation (1977), Stuntz (1981) and Dolar (1994) report on sightings or sets.	For Central Pacific, there are reports by Stuntz, 1981. For Western Pacific, there are reports by Dolar, 1990; and Pacific Tuna Development Foundation, 1977.
Gulf of Mexico	Yellowfin tuna	Living Marine Resources (1982).	Living Marine Resources, Inc., 1982.
Mediterranean	Bluefinn tuna Skipjack Bigeye	Vilicic, 1985, cited in Alegria Hernandez, 1990 the yellowfin tuna.	

15. Even in fisheries where tuna may not associate with dolphins with the intensity they do in the ETP, fishing results in the killing of many dolphins and other cetaceans (i.e. bycatch). A report on worldwide bycatch of cetaceans commissioned by the Department of Commerce

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7 *See* Martin Hall *supra*. MEX-3.

8 *See* National Research Council *supra* p. 48. MEX-2.

("DOC") ("Commerce Bycatch Report"), published in 2007, states that there are a number of cetaceans species affected in different fisheries and by different fishing methods.[9]

16. According to the Commerce Bycatch Report, the species at risk from fishery bycatch in the Atlantic include Northern right whale, harbor porpoise, common dolphin, striped dolphin, tucuxi, humpback dolphin, sperm whale, dusky dolphin, Commerson´s dolphin and Franciscana.[10]

17. Regarding the Pacific, the Commerce Bycatch Report identifies the following species at risk from fishery bycatch: finless porpoise, baijiis, Dall's porpoise, spinner dolphin, Fraser's dolphin, Irrawaddy dolphin, vaquita, false killer whales, Hector's dolphin, Maui's dolphin, Dusky dolphin, Burmeister's porpoise, Risso's dolphin, bottlenosed dolphin, humpback dolphin, Ganges river dolphin and Irrawaddy river dolphin.[11]

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[9] Young and Iudicello, "Worldwide Bycatch Of Cetaceans," U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Tech. Memo. NMFS-OPR-36) July 2007, at viii. MEX-5.

[10] *Id.* at viii. MEX-5.

[11] *Id*. at ix. MEX-5.

18. The following chart summarizes the information with respect to the major fisheries, fishing nations and fishing methods provided in the report: [12]

Chart 2

Ocean	Major fisheries	Major fishing nations	Fishing methods	Cetaceans Killed
Atlantic- Northwest Atlantic, Northeast Atlantic, Western Central Atlantic, Eastern Central Atlantic, Mediterranean and Black Sea, Southwest Atlantic.	Atlantic herring, skipjack tuna, chub mackerel, Atlantic cod, Argentine shortfin squid, European pilchard, Gulf menhaden, European sprat, Atlantic mackerel, and European anchovy.	U.S., Norway, Iceland, Denmark, Spain, and Canada.	Trap lines, gillnets, coastal gillnets, pelagic driftnets, midwater trawls.	Northern right whale, harbor porpoise, common dolphin, striped dolphin, tucuxi, humpback dolphin, sperm whale, dusky dolphin, Commerson´s dolphin and Franciscana
Pacific- Northwest Pacific (including the Sea of Japan, East and South China Seas, Yangtze River), Western Central Pacific (including Mekong River, Mahakam River, Songkhla Lake, and Ayeyarwady River), Eastern Central Pacific, Southwest Pacific, Southeast Pacific, Western Indian Ocean, Eastern Indian Ocean.	Peruvian anchovy, Alaska pollock, skipjack tuna, chub mackerel, Japanese anchovy, Chilean jack mackerel, largehead hairtail, blue whiting, yellowfin tuna, capelin, Araucanian herring, and Akiami paste shrimp.	China, Peru, Japan, Chile, U.S., Indonesia, Russian Federation, India, Thailand, Republic of Korea, Philippines, Malaysia, Mexico, Vietnam, and Taiwan.	Drift and set gillnets in combination with direct harpooning, anti-shark gillnets, drift and bottom-set gillnets, anti-shark nets, coastal gillnets, gillnets, heavy-mesh drift gillnets for elasmobranches, direct harvests and salmon driftnets, coastal nets and traps, electrofishing, rolling hooks, purse seine, crab nets, longlines.	Finless porpoise, baijiis, Dall´s porpoise, spinner dolphin, Fraser's dolphin, Irrawaddy dolphin, vaquita, false killer whales, Hector's dolphin, Maui´s dolphin, Dusky dolphin, Burmeister's porpoise, Risso's dolphin, bottlenosed dolphin, humpback dolphin, Ganges river dolphin and Irrawaddy river dolphin

19. Notwithstanding the evidence that dolphins and other marine mammals are being killed in significant numbers in ocean regions other than the ETP, no measures have been taken in those other regions even remotely comparable to those taken for the ETP. As the Commerce Bycatch Report explains:

[12] *Id*. at viii and ix. MEX-5.

> The MMPA [Marine Mammal Protection Act] requires the Secretary of Commerce, working through the Secretary of State, to initiate negotiations "as soon as possible" for the development of bilateral or multilateral agreements with other nations for the protection and conservation of all marine mammals covered by the MMPA [footnote omitted]. Many of the provisions in section 108 relate to bycatch reduction, calling on the Secretary of State to initiate negotiations with all foreign governments engaged in commercial fishing found to be unduly harmful to any species or population stock of marine mammal to develop bilateral and multilateral treaties with such countries to protect marine mammals. [Footnote omitted.] Likewise, this subsection also calls upon the Secretary of State to enter into international arrangements (either through the Inter-American Tropical Tuna Commission or such other bilateral or multilateral institutions) for the conservation of marine mammals caught incidentally in the course of harvesting yellowfin tuna with purse seines. [Footnote omitted.] The final two provisions of section 108(a) call on the Secretary of State to seek to amend any existing international treaty to which the U.S. is a party for the protection and conservation of any species of marine mammal, to make such treaty consistent with the purposes and policies of the MMPA, and to seek an international ministerial meeting on marine mammals by July 1, 1973, to negotiate a binding international convention for the protection and conservation of all marine mammals. [Footnote omitted.]
>
> With the exception of the provisions related to the Inter-American Tropical Tuna Commission, these provisions 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.[13]
>
> (Emphasis added.)

20. Despite the fact that dolphins (and other several species) are affected from fishery bycatch in other oceans, the United States has chosen to regulate fishing methods to protect dolphins only with respect to tuna caught in the ETP.

2. Tuna Fishing and Dolphin Mortality In the ETP

21. The ETP is defined by Article III of the "Antigua Convention"[14] as follows: "The area of application of the Convention ("the Convention Area") comprises the area of the Pacific Ocean

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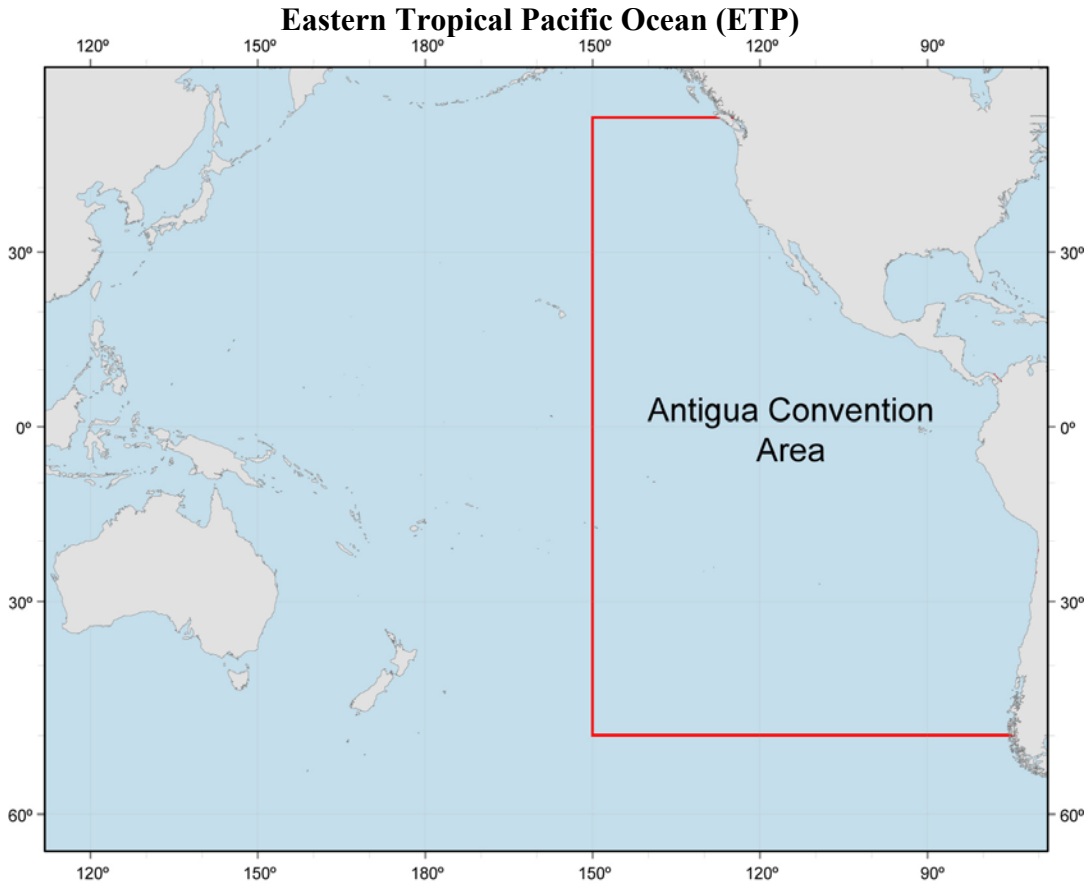
[13] *Id.* at 38.

[14] MEX-57.

bounded by the coastline of North, Central, and South America and by the following lines: i. the 50°N parallel from the coast of North America to its intersection with the 150°W meridian; ii. the 150°W meridian to its intersection with the 50°S parallel; and iii. the 50°S parallel to its intersection with the coast of South America." (The "Antigua Convention" is a short-hand reference to the Convention For The Strengthening Of The Inter-American Tropical Tuna Commission Established By The 1949 Convention Between The United States Of America And The Republic Of Costa Rica).

22. Below is a map illustrating the geographic region of the ETP.



Available at: http://www.iattc.org/EPOmapENG.htm

23. Beginning in the 1950s, with advances in refrigeration, with the advent of larger seagoing fishing vessels, and especially with the development of purse-seine nets, tuna fishing vessels from the United States, Mexico and elsewhere in the region increasingly fished for tuna in the ETP. The presence of high density of mature yellowfin tuna near the Pacific coast of Mexico gives the Mexican fleet a natural comparative advantage.

24. Because only mature yellowfin tuna are able to swim fast enough to swim with dolphins, tuna fishing by setting on dolphins produces a large catch of mature tuna appealing to the marketplace, and little bycatch. In contrast, other tuna fishing methods use artificial "Fish Aggregating Devices," or "FADs," to cast shadows that attract tuna and other fish species. As discussed below, FAD sets attract more immature tuna as well as a variety of other bycatch, including sea turtles, sharks and other threatened and endangered species.

25. No accurate data are available on "incidental dolphin mortality" from tuna fishing during the early years of fishing by setting on dolphins, but the U.S. National Research Council has estimated that, from 1960 to 1972, more than 100,000 dolphins were killed each year by the U.S. fleet alone.[15] Subsequent to the enactment of U.S. legislation imposing restrictions on fishing in the ETP, U.S. vessels soon began to fish for tuna elsewhere, outside the ETP. However, vessels from other countries, including Mexico, increased their activities there.

26. In the case of Mexico, there was no commercial, environmental or any other reason for the Mexican fleet to relocate outside its natural and traditional fishing area within the ETP. Eventually, as described below, multilateral action was taken by the United States, Mexico, and other countries in the region to reduce overall dolphin mortality by establishing an international dolphin conservation program.

3. Fishing Methods

27. All methods of commercial fishing for tuna (and other species) result in catching other than the target fish. This "bycatch" – fish and other sea life that is discarded dead – can be composed both of other non-target species and juveniles of the target species. For the purposes of this proceeding, the following fishing methods are the most relevant:

a. Fishing In Association With Dolphins

28. The "purse-seine" net fishing method involves locating a school of fish and send out a motorboat (a "seine skiff") to hold the other end of the purse-seine net. The fishing vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel. The fishing vessel then purses the net by winching in a cable at the bottom edge of the net, and draws in the top cables of the net to gather its entire contents.[16]

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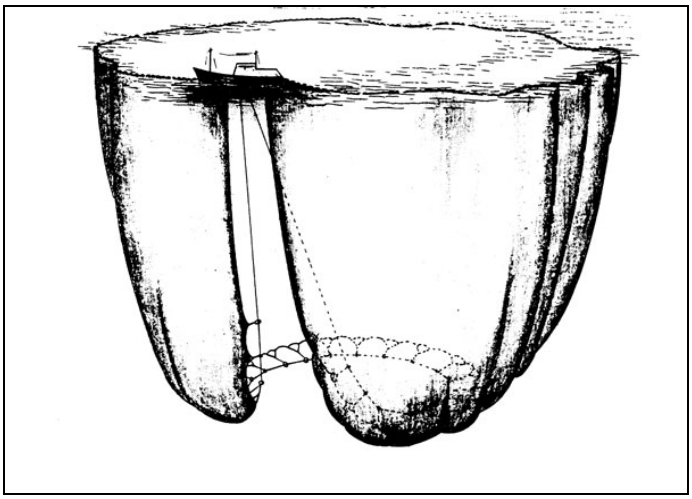
[15] National Research Council *supra* at 4. MEX-2.

[16] GATT Panel Report, *United States-Restrictions on Imports of Tuna*, 3 Sept. 1991, unadopted, BISD 39S/155 30 I.L.M. 1594 ("Tuna-Dolphin I"), p. 2.1.

Image of a Purse-seine Net[17]



Source: Food and Agricultural Organization of the United Nations (FAO), http://www.fao.org/fi/common/format/popUpImage.jsp?xp_imageid=7262

29. As previously described, in the ETP the association between dolphins and tuna has long been observed, such that fishermen locate schools of underwater tuna by finding and chasing dolphins on the oceans surface and intentionally encircling them with nets to harvest the tuna underneath.[18] Using certain procedures recommended or required by the IATTC and AIDCP, it has been possible to virtually eliminate dolphin mortalities. The techniques used include backing down the edges of the nets to create a channel through which the dolphins may escape, using divers and personnel in small boats to assist the dolphins, covering the top portion of the purse-seine with a skirt of mesh that prevents dolphins from catching their beaks or heads in the net in the event of a net "canopy", and prohibiting fishing after sundown to ensure that dolphins within the net can be seen. Importantly, every vessel capable of setting purse-seine nets on dolphins has an independent observer on board to monitor whether any dolphin has been harmed and to ensure that all rules of the agreement are followed.

30. Because only mature yellowfin tuna are able to swim fast enough to "associate" with dolphins, tuna fishing by setting on dolphins produces a large catch of mature tuna appealing to the marketplace, and little bycatch.

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[17] The FAO describes the purse seine as "a long wall of netting framed with floatline and leadline (usually, of equal or longer length than the former) and having purse rings hanging from the lower edge of the gear, through which runs a purse line made from steel wire or rope which allow the pursing of the net. For most of the situation, it is the most efficient gear for catching large and small pelagic species that is shoaling". *See* http://www.fao.org/fishery/geartype/249/en. MEX-06.

[18] GATT Panel Report, *United States-Restrictions on Imports of Tuna*, 3 Sept. 1991, unadopted, BISD 39S/155 30 I.L.M. 1594 ("Tuna-Dolphin I"), p. 2.2.

b. Fish Aggregating Devices (FADs)

31. The most popular alternative tuna fishing method to set purse-seine nets around dolphins is "Fish Aggregating Devices," or "FADs."

32. The Food And Agriculture Organization Of The United Nations ("FAO") describes FADs as "a permanent, semi-permanent or temporary structure or device made from any material and used to lure fish".[19] The FAO website related to Fisheries Technology explains as follows:

> Almost all existing documentation on the use of various types of FADs in different areas indicates that, after a short period, fish are observed around the structure, irrespective of its design.
>
> Traditional FADs, based on long-term fishing experience, are made on-the-spot with local materials and used in shallow coastal waters (depth 50-200 m) by small-scale fishers to catch small pelagic fish and bait, e.g. payaos (Philippines), unjang (Malaysia), rumpon (Indonesia). Modern FADs, the result of imported technology and materials, can be anchored to over 3 000 meters. Certain models have large surface dimensions.
>
> Simple or advanced FADs are left drifting in deep waters to help offshore, artisanal and industrial fleets catch big pelagic fish, mainly tuna. Hundreds of simple, traditional types of drifting FADs are used by each large, modern tuna purse seiner operating in certain areas.[20]

33. As discussed below, FADs sets attract more immature tuna as well as a variety of other bycatch, including sea turtles and other threatened and endangered species.

c. Comparison Of Fishing Methods

34. The methods of fishing for tuna that are alternatives to setting nets on dolphins have different, but significant, ecological consequences:

> The continuing push for zero dolphin mortality and outlawing of dolphin sets altogether has led a growing portion of the international fleet to switch to alternative ways of fishing for tuna in order to sell to U.S. and other dolphin safe markets. The most popular of these is the setting of nets around floating objects in the water, where skipjack tuna (Katsuwonus pelamis) and other species often tend to aggregate. Indeed, this is a very productive way of catching skipjack. At issue, however, are the yellowfin (Thunnus albacares) and bigeye tuna (Thunnus obesus) associated with these objects that tend to be younger and smaller than either bigeye caught in longlines or the fully mature yellowfin capable of keeping up with fast-moving dolphin herds. The increase in "floating object sets" in the

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19 *See* http://www.fao.org/fishery/equipment/fad/en. MEX-7.

20 *Id.*

> 1990s brought about an enormous increase in bycatch of these nonusable juvenile tuna—as well as sharks, billfish, mahi-mahi (Coryphaena hippurus), sea turtles, and others.
>
> . . . . In this case, the problem of unwanted catch was never really solved; it was simply displaced, away from highly charismatic dolphins to other, less visible components of the marine ecosystem. Consumers, anxious to do the right thing but unaware of the tradeoffs involved, were led to believe in a questionable conservation victory.[21]

35. The IATTC has made analyses of the varying impacts of alternative fishing methods. The following chart compares the bycatch of tuna sets to FAD sets and sets on free swimming schools:

Estimated discards and bycatches of tunas and bonito in the EPO, in metric tons, by vessels with fish-carrying capacities greater than 363 metric tons.
Descartes y capturas incidentales estimadas de atunes y bonitos en el OPO, en toneladas métricas, por buques de más de 363 toneladas métricas de capacidad de acarreo de pescado.

Year	Species	Set type			Total
		Dolphin	Unassociated	Floating Object	
Año	Especie	Tipo de lance			Total
		Delfín	No asociado	Objeto flotante	
2007	Yellowfin—Aleta amarilla	216	840	890	1,946
	Skipjack—Barrilete	10	927	6,222	7,159
	Bigeye—Patudo	0	7	1,032	1,039
	Black skipjack—Barrilete negro	6	326	1,293	1,625
	Bullet—Melva	18	336	868	1,221
	Bluefin—Aleta azul	0	0	0	0
	Albacore—Albacora	0	0	0	0
	Bonito	0	589	39	628
	Total	250	3,024	10,344	13,619

[21] S. Norris, "Thinking Like An Ocean," Conservation Vol. 3, No. 4 (Fall 2002). MEX-9.

Estimated bycatches of billfishes in the EPO, in numbers of individuals, by vessels with fish-carrying capacities greater than 363 metric tons.
Capturas incidentales estimadas de peces picudos en el OPO, en número de individuos, por buques de más de 363 toneladas métricas de capacidad de acarreo de pescado.

Year	Species	Set type			Total
		Dolphin	Unassociated	Floating Object	
Año	Especie	Tipo de lance			Total
		Delfín	No asociado	Objeto flotante	
2007	Swordfish—Pez espada	11	37	6	54
	Blue marlin—Marlín azul	76	95	891	1,061
	Black marlin—Marlín negro	87	76	504	667
	Striped marlin—Marlín rayado	114	101	203	418
	Shortbill spearfish—Marlín trompa corta	10	4	25	39
	Sailfish—Pez vela	971	708	57	1,736
	Unidentified marlin-- Marlín no identificado	13	13	53	79
	Unidentified bill fish—Picudo no identificado	32	39	39	109
	Total	1,314	1,071	1,778	4,164

Estimated bycatches of animals other than tunas and billfishes in the EPO, in numbers of individuals, by vessels with fish-carrying capacities greater than 363 metric tons.
Capturas incidentales estimadas de animals aparte de atunes y picudos en el OPO, en número de individuos, por buques de más de 363 toneladas métricas de capacidad de acarreo de pescado.

Year	Species	Set type			Total
		Dolphin	Unassociated	Floating Object	
Año	Especie	Tipo de lance			Total
		Delfín	No asociado	Objeto flotante	
2007	Marine mammals—Mamíferos marinos	837	1	0	838
	Dorado	341	21,243	368,914	390,498
	Wahoo—Peto	99	856	214,963	215,918
	Rainbow runner—Salmón	0	330	226,975	227,304
	Yellowtail—Jurel	1	27,081	14,274	41,356
	Other large teleost fish—Otros peces teleósteos grandes	27	969	3,508	4,503
	Trigger fish—Peces ballesta	43	914	290,598	291,555
	Other small teleost fish—Otros peces teleósteos pequeños	114	15,708	35,177	51,000
	Sharks and rays—Tiburones y rayas	2,480	7,285	27,101	36,866
	Sea turtles—Tortugas marinas	5	4	15	24
	Unidentified fish—Peces no identificados	49	3,800	1,058	4,908
	Total	3,996	78,191	1,182,583	1,264,770

Data from IATTC Annual Report 2007,Table 3. MEX-10.

36. These data can be aggregated as follows:

		Set type							
Year	**Species**	**Dolphin**	**% of Total**	**Unassociated**	**% of Total**	**Floating Object**	**% of Total**	**Total**	**% of Total**
		Tipo de lance							
Ano	**Especie**	**Delfín**		**No asociado**		**Objeto flotante**		**Total**	
2007	Tunas & Bonito	250	1.8%	3,024	22.2%	10,344	76.0%	13,619	100%
	Billfishes	1,314	31.6%	1,071	25.7%	1,778	42.7%	4,164	100%
	Other Species	3,996	0.3%	78,191	6.2%	1,182,583	93.5%	1,264,770	100%
	Total	5,560	**0.4%**	82,286	6.4%	1,194,705	**93.2%**	1,282,553	100%

37. As can be seen in the aggregate data, dolphin sets on tuna resulted in less than half of one percent of recorded bycatch. In stark contrast, FAD sets resulted in 93.2 percent of recorded bycatch. More specifically, dolphin sets on tuna resulted in the discard of 250 tons of immature tuna in 2007; FAD sets resulted in discards of 10,344 tons of tuna. In addition, dolphin sets killed 341 dorado, while FAD sets killed 368,914; dolphin sets killed 99 wahoo, while FAD sets killed 214,963; dolphin sets killed no rainbow runners; FAD sets killed 226,975; dolphin sets killed 43 trigger fish; FAD sets killed 290,598. These statistics are particularly significant because 37% of the total sets monitored during 2007 were dolphin sets, while only 31% were FAD sets.[22] In other words, a fewer number of FAD sets (5,701) resulted in far greater bycatch than the greater number of dolphin sets (6,844).

38. Accordingly, there is strong scientific and empirical support for the view that the dolphin set method – when administered under the AIDCP to protect dolphins – is the most environmentally sound method for harvesting tuna.

B. Efforts to Protect Dolphins

1. Multilateral Efforts

39. The international effort to provide for appropriate conservation of stocks of tuna, dolphins and other species in the fisheries of the ETP had its origins in the Convention for the Establishment of an Inter-American Tropical Tuna Commission of 1949, which was originally between the United States and Costa Rica. Membership in the IATTC has expanded through the years to include Mexico, Ecuador, El Salvador, and other countries with tuna fishing interests in the ETP. Current international efforts to protect dolphins when tuna fishing in the ETP under the

[22] IATTC Annual Report 2007, Table 2. MEX-10.

AIDPC are conducted under the auspices of the IATTC Secretariat, which is based in La Jolla, California.

40. At present, the member countries of the IATTC are Costa Rica, Ecuador, El Salvador, France, Guatemala, Japan, Mexico, Nicaragua, Panama, Peru, the Republic of Korea, Spain, the United States, Vanuatu, and Venezuela. "Cooperating Non Parties" and "Cooperating Fishing Entities" of the IATTC are Belize, Canada, China, the Cook Islands, the European Union, and Chinese Taipei.

41. The IATTC was established initially for the purpose of conserving tuna, but over time its role has changed to encompass the protection of dolphins and other species as well in the fisheries of the ETP.

42. Particularly, in 1976 the IATTC broadened its responsibilities to include the treatment of problems arising from the tuna-dolphin relationship in the ETP, which led to the creation of a comprehensive program that would later be known as the International Dolphin Conservation Program ("IDCP").

43. In 1986, an IATTC observer program, including all countries with fleets of large "class 6" (over 400 metric tons) tuna vessels operating in the ETP, became operational. As part of the international program and comparable national programs established by some of the Parties place observers on all tuna vessels capable of fishing for tuna in association with dolphins in the ETP. The observers are biologists and scientific personnel who are independent of the vessel owners and operators. In addition to this observer program, the AIDCP also includes research and monitoring programs for dolphins and other fishery bycatch, development of fishing gear less harmful to dolphins, and training of captains and crews of the international fleet in ways that diminish incidental dolphin mortality from tuna fishing by "setting" on dolphins.

44. The multilateral endeavors of the IATTC were later encompassed in a series of multilateral agreements that were negotiated in the wake of the "tuna-dolphin" controversy in the ETP. Both Mexico and the United States are parties to all of these agreements, and both played a crucial role in negotiating them.

45. The first of these agreements, the La Jolla Agreement, was concluded in 1992, and established voluntary restrictions on fishing gear and fishing methods, as well as limits on the number of dolphins that could be killed incidentally in the tuna fishery of the ETP. By the terms of the La Jolla Agreement, the maximum number of permitted dolphin deaths was to decline each year for seven years, with a goal of reducing dolphin deaths in the fishery to a number less than 5,000 by 1999. That target was achieved in 1993, the first year of the agreement's application, and was sustained in every year thereafter.

46. The La Jolla Agreement was non-binding on the Parties and their fleets. Believing the formalization of the La Jolla Agreement into a legally binding instrument was the most effective way to normalize global trade in tuna captured under the IDCP, in 1995 the United States, Mexico, and others among the member countries of the IATTC negotiated and concluded the Panama Declaration. The signatories to the Panama Declaration agreed that if the United States (i) amended U.S. laws on tuna imports to allow yellowfin tuna to be imported from countries

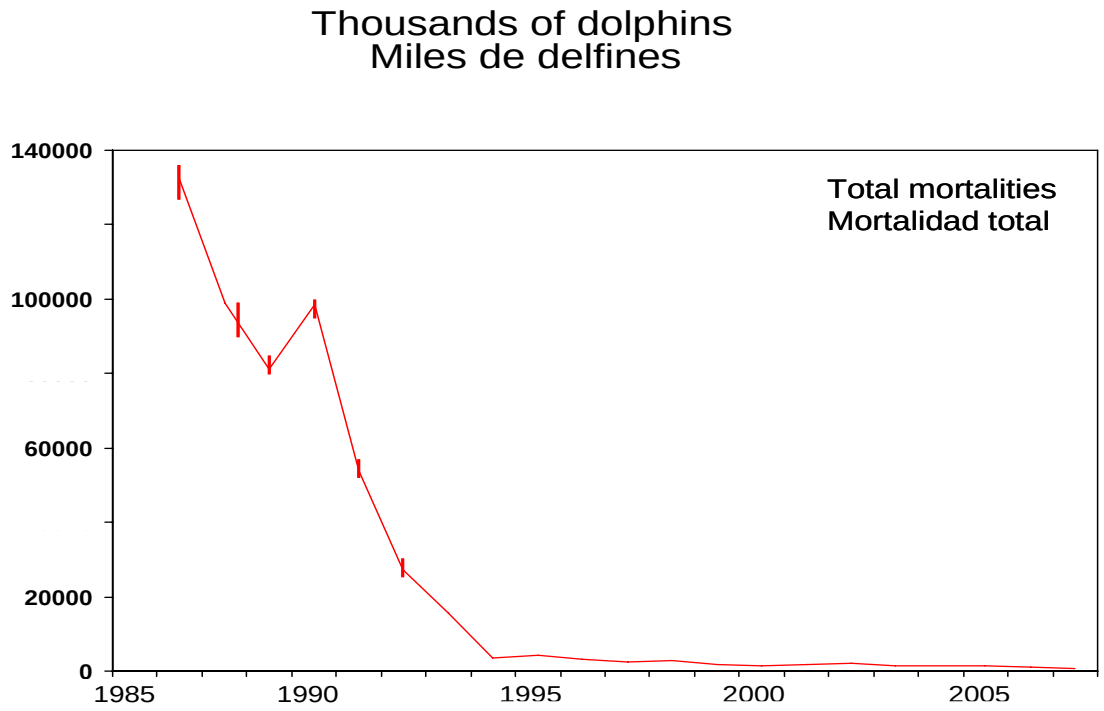
participating in the IDCP, and (ii) changed its labeling definition of "dolphin safe" from a "method of capture" standard to the "non-mortality or serious injury" standard established under the Panama Declaration, they would then enter into a binding international agreement to enhance and continue long-term cooperative multilateral dolphin protection in the ETP.

47. Based on assurances from the United States, in 1998 the participating countries concluded the AIDCP, a binding agreement for dolphin conservation and overall ecosystem management in the ETP. The AIDCP became effective on February 15, 1999. To date, Mexico, the United States, Panama, Ecuador, El Salvador, Vanuatu, Venezuela, Nicaragua, Costa Rica, Honduras, Peru, and Guatemala have ratified the AIDCP. Bolivia, Colombia, and the European Union currently are applying the AIDCP provisionally.

48. The success of the AIDCP can be traced to the International Review Panel ("IRP") and the per-vessel, per year Dolphin Mortality Limits ("DMLs) established under the program. The IRP, composed of five government representatives (from among the Parties), two representatives of environmental organizations, and two representatives of the tuna fishing industry, reviews observer data and operational reports to monitor compliance with the AIDCP. The IRP establishes the DMLs each year, along with protective measures for individual dolphin stocks, ensuring their survival, and pursuant to Article XII, Article XVI and Annex VII of the AIDCP, refers to the Parties information about possible infractions aboard vessels flying that Party's flag for possible enforcement action under their national laws and regulations.[23]

49. Through this comprehensive program established under the AIDCP of monitoring, tracking, verification, and certification – with its emphasis on having independent observers on board tuna fishing vessels – and former international programs, the participating countries have succeeded since 1986 in dramatically reducing incidental dolphin mortality. Observed dolphin deaths in the ETP in 1986 totaled 133,000. Since then, those numbers have plummeted, as follows:

[23] Agreement on the International Dolphin Conservation Program, as amended Oct. 2009. MEX-11.



Source of data: IATTC Annual Report 2006 (Table 7). MEX-12.

50. Following are the estimated numbers of sets on fish associated with dolphins, related mortalities, and the mortalities per set.

Year	Sets	Mortalities	Mortalities Per Set
1987	13,343	98,882	7.40
1988	11,209	81,129	7.23
1989	12,860	98,451	7.60
1990	11,028	53,874	4.90
1991	9,661	27,127	2.80
1992	10,424	15,539	1.50
1993	6,987	3,601	0.52
1994	7,809	4,096	0.52
1995	7,185	3,274	0.46
1996	7,486	2,547	0.34
1997	9,020	3,005	0.30
1998	10,645	1,877	0.18
1999	8,648	1,348	0.16
2000	9,235	1,636	0.18
2001	9,823	2,131	0.22
2002	12,446	1,515	0.12
2003	13,839	1,502	0.11
2004	11,783	1,469	0.12
2005	12,173	1,151	0.09
2006	8,923	886	0.10

Source: IATTC Annual Report 2006 (Table 3) and IATTC Annual Report 2000 (Table 5). MEX-13.

51. As one commentator has observed about the lengthy tuna-dolphin dispute, "Nearly lost in the legal conflict has been the story of the quiet emergence of one of the most innovative and effective environmental regimes in the world – a regime which has reduced dolphin mortality by

over 99% while eliciting a very high level of compliance from all fishers and flagstates in the fishery."[24]

52. No other fishery in the world has implemented a program remotely comparable to the AIDCP – especially its requirement that an independent observer be onboard 100% of the fishing trips of every vessel and present to the program office written reports on all aspects of each set of the net. Because other fisheries rely primarily, if not exclusively, on self-reporting by fishers, by comparison the data available on dolphin mortalities in other fisheries is not as comprehensive.

53. Nonetheless, there is strong evidence that dolphins are harmed in other fisheries, and yet no other international fishery has adopted protective measures even remotely comparable to those of the IATTC. In particular, in the ETP there is observer coverage for 100% of the fishing trips by purse-seine vessels with greater than 363 metric tons carrying capacity, and the purpose of the observation program is to monitor the incidental catch of dolphins for compliance with DMLs, as well as compliance with IATTC management and conservation measures by the owners, captains and crews of the vessels.

54. The other international regional fisheries management organizations overseeing tuna fishing are as follows:

- International Commission for the Conservation of Atlantic Tunas (ICCAT).
- Indian Ocean Tuna Commission (IOTC).
- Western and Central Pacific Fisheries Commission (WCPFC).
- Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

55. None of these fisheries has a program in which observers monitor for dolphin mortalities. Moreover, where the fisheries have an observer program, they do not have 100% coverage. For example, the CCSBT has a target of 10% coverage, and the IOTC has a target of 5%. Other fisheries have observer coverage that varies. Moreover, the observers in these other fisheries do not monitor for dolphin mortalities, but rather for compliance with fisheries management guidelines.[25]

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[24] Richard W. Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict," 12 Georgetown International Environmental Law Review 1 (1999-2000), p. 6. MEX-8.

[25] *See* Document Mop-21-09, "Comparison Of On-Board Observer Programs In Regional Fisheries Management Organizations," Presented at 21st Meeting Of The Parties, AIDCP (June 5, 2009). MEX-14.

2. Actions Of The United States

a. U.S. Actions With Respect To ETP

56. The principal U.S. law relating to the overall issue of the protection of dolphins and other marine mammals is the Marine Mammal Protection Act of 1972, as amended, (the "MMPA").[26] As enacted in 1972, the MMPA prohibited the "taking" – including the harassing, hunting, capturing, or killing – of any marine mammal, whether directly or incidentally, in connection with the harvesting of fish.[27] It originally focused on the principle of fisheries management to foster a sustainable population, and primarily relied on a permit system to regulate fishing practices. "Marine mammal" was defined in the MMPA to include cetaceans such as dolphins.[28]

57. Despite the multilateral efforts initiated under the auspices of the IATTC, the United States amended in 1988 provisions of the MMPA to prohibit the import into the United States of any marine product, and any fish or fish product harvested where there was not a program comparable to that of the United States in minimizing the incidental taking of marine mammals[29] (significantly, as discussed below, the MMPA maintains a different regime for U.S. fisheries).

58. Pursuant to these 1988 amendments, in August 1990 the United States imposed an import embargo on imports of tuna from Mexico (and other countries) for failure to achieve comparability with U.S. tuna harvesting standards that prohibited setting on dolphins.[30]

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[26] 16 U.S.C. §1381 et seq. MEX-15

[27] 16 U.S.C. § 1371(a). MEX-16.

[28] 16 U.S.C. § 1362(6). MEX-17.

[29] Marine Mammal Protection Act Amendments of 1988, Public Law 100-711, 102 Stat. 4755 (1988). MEX-18.

[30] A representative of the Mexican industry described the impact of the U.S. measures in 2000 as follows:

> "I believe it is appropriate and instructive for the Mexican industry to give its perspective on the history and evolution of the tuna fishery in the eastern Tropical Pacific (ETP), and the impact on us by the embargoes of the United States. In the course of my comments, any references I make to "embargoes," encompass not only embargoes in the legal sense, but also effective market access blockades in any form or, in the technical parlance: "non-tariff barriers to trade."
>
> … The imposition of the primary and secondary embargoes, and the establishment of the labeling standard had an immediate and profoundly negative impact on the global tuna markets generally, and on the fishing and related industries in Mexico in particular. Since 1988, our export markets have been interrupted, and the global trade in tuna and tuna products has been terribly distorted.
>
> What were the consequences for our industry? In 1987, the carrying capacity of our fleet was 85,000 tons….by 1995 it was only 45,000 tons. Since then, the U.S. embargoes and their ripple effects around the world, have cost us 6,000 jobs, in direct employment, and 24,000 jobs in indirect employment…most of those in communities heavily reliant upon the fishing industry for their collective livelihoods. In dollar terms, we have lost 150,000 tons in annual production capacity and we have lost nearly 200 million dollars per year in potential exports during this period.."

Statement of Alfonso Rosinol at the AIDCP Article XX Bilateral Consultations held in Washington DC 28 September 2000, p. 1 -2. MEX-19.

59. Mexico challenged this embargo in dispute settlement proceedings under the General Agreement on Tariffs and Trade ("GATT"). Mexico prevailed when a GATT panel ruled that the U.S. measure imposing the import ban was inconsistent with its GATT obligations.[31] Mexico chose, however, not to seek implementation of that GATT ruling. In any event, under the rules of the multilateral trading system as they were at that time, the United States would have been able to block the implementation of the ruling by refusing to join in a consensus to adopt it.

60. Subsequently, the E.C. also brought a complaint challenging an intermediate embargo in the MMPA that prohibited imports of tuna and tuna products from countries that did not, in their own trade, insist on the same U.S. standards from countries subject to the import ban of the United States. The E.C., like Mexico, prevailed before a GATT panel, which ruled similarly in this second "tuna-dolphin" case that the United States was acting inconsistently with its GATT obligations.[32] This ruling also was not adopted. Accordingly, the U.S. restrictions remained in place.

61. In addition to the direct ban on imports, in 1990 the United States enacted legislation that established a standard for labeling tuna products as "dolphin safe." That law, known as the Dolphin Protection Consumer Information Act of 1990 ("DPCIA"), amended the MMPA.[33]

62. In establishing a labeling standard, Section 1385(d)(1) makes it a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) to label a tuna product as "dolphin safe" if it does not meet certain requirements. These requirements vary according to where and how the tuna is harvested. With respect to tuna harvested by a vessel using purse-seine nets in the ETP, the DPCIA provided that the product could not be labeled "dolphin safe" if caught on a trip involving intentional deployment on, or encirclement of, dolphins. Accordingly, Mexican tuna and tuna products harvested while setting on dolphins are denied the "dolphin safe" label in the U.S. marketplace, even if no mortality or serious injury of a marine mammal was observed.

63. As discussed above, the La Jolla Agreement led to the signing in 1995 of the Panama Declaration, under which the United States, Mexico and ten other countries committed to strengthen the protection of dolphins by (a) reducing dolphin mortality to levels approaching zero, with the goal of eliminating dolphin mortality in the ETP; (b) establishing annual DMLs; (c) avoiding bycatch of immature yellowfin tuna and other non-target species such as sea turtles; (d) strengthening national scientific advisory committees; (e) creating incentives for vessel captains; and (f) enhancing the compliance of participating countries.

64. The Panama Declaration also contained commitments to negotiate a new binding agreement to establish the IDCP, which was made expressly contingent upon the United States amending its laws to (a) lift the embargoes imposed under the MMPA; (b) permit the sale of both dolphin safe and non-dolphin safe tuna in the U.S. market; and (c) change the definition of

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[31] United States-Tuna (Mexico) GATT Panel Report, *United States-Restrictions on Imports of Tuna*, 3 Sept. 1991, unadopted, BISD 39S/155 30 I.L.M. 1594 *("Tuna-Dolphin I").*

[32] United States-Tuna (EEC), GATT Panel Report, *United States-Restrictions on Imports of Tuna*, 16 June 1994, unadopted, DS29/R444, 33 I.L.M. 839 (1994) *("Tuna-Dolphin II").*

[33] The DPCIA is codified at 16 U.S.C. §1385.

"dolphin safe tuna" to mean "tuna harvested without dolphin mortality," rather than tuna harvested without any dolphin encirclement. The pertinent language of the Panama Declaration is as follows:

> Recognizing the strong commitments of nations participating in the La Jolla Agreement and the substantial successes realized through the multilateral cooperation and supporting nation action under that Agreement, the Governments meeting in Panama, including those which are, or have announced their intention to become, members of the Inter-American Tropical Tuna Commission (IATTC), announce their intention to formalize by January 31, 1996, the La Jolla Agreement as a binding legal instrument which shall be open to all nations with coastlines bordering the EPO or with vessels fishing for tuna in this region. This shall be accomplished by adoption of the IATTC resolution or other legally binding instrument. The adoption of the IATTC resolution or other legally binding instrument, that utilizes to the maximum extent possible the existing structure of the IATTC, is contingent upon the enactment of changes in United States law as envisioned in Annex 1 to this Declaration.[34]
>
> (Emphasis added.)

65. Annex 1 of the Agreement provides:

> Envisioned changes in United States law
>
> 1. Primary and Secondary Embargoes: Effectively lifted for tuna caught in compliance with the La Jolla Agreement as formalized and modified through the processes set forth in the Panama Declaration.
>
> 2. Market Access: Effectively opened to tuna caught in compliance with the La Jolla Agreement as formalized and modified through the processes set forth in the Panama Declaration with respect to States to include:: IATTC Member States and other States that have initiated steps, in accordance with Article 5.3 of the IATTC Convention, to become members of that organization.
>
> 3. Labeling: The term "dolphin safe" may not be used for any tuna caught in the EPO by a purse-seine vessel in a set in which a dolphin mortality occurred as documented by observers by weight calculation and well location.[35]

66. In 1997, the U.S. Congress enacted the International Dolphin Conservation Program Act ("IDCPA"), which incorporated new provisions into the MMPA.[36] The IDCPA stated three purposes: (a) to give effect to the Panama Declaration; (b) "to recognize that nations fishing for tuna in the [ETP] have achieved significant reductions in dolphin mortality;" and (c) "to

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34 Declaration of Panama. MEX-20.

35 *Id*.

36 Pub. L. No. 105-42, 111 Stat. 1122 (1997). MEX-21.

eliminate the ban on imports of tuna from those nations that are in compliance with the [IDCP]."[37] The IDCPA amended the MMPA so that a country would be permitted to export tuna fished from the ETP to the United States if it provided documentary evidence that (a) it participates in the IDCP and is a member of the IATTC; (b) it meets its obligations under the IDCP and the IATTC; and (c) it does not exceed specified dolphin mortality limits.[38]

67. The IDCPA was to become effective when the U.S. Secretary of State certified that a legally-binding instrument establishing the IDCP had been adopted and was put into force.[39] As discussed above, the AIDCP became effective on February 15, 1999.

68. Thus, under current U.S. law, tuna and tuna products can be imported from countries participating in the AIDCP if that country is meeting its obligations under the AIDCP and the IATTC (including its financial obligations), and if the incidental dolphin deaths caused by that country's tuna fishing vessels do not exceed the dolphin mortality limits established by the AIDCP.[40]

69. In April 2000, the DOC made an affirmative finding that Mexico had met the requirements of Sections 101(a)(2)(B) and (C) of the MMPA to import yellowfin tuna harvested in the ETP by vessels using purse-seine nets into the United States.[41] These affirmative findings are valid for five years, and are also reviewed on an annual basis. Mexico's latest affirmative finding is valid for the period from April 1, 2005 to March 31, 2010.[42]

70. Therefore, Mexico should be able to export tuna and tuna products freely in the United States[43]. However, the difficulty for Mexico to export still exists, even though it is no longer with a direct ban on imports. Thus, the difficulty has been with the right to label its tuna and tuna products sold in the United States as "dolphin safe."

71. Under current U.S. law, compliance with the AIDCP is insufficient to be permitted to label products as "dolphin safe." This makes all the difference in a marketplace in which wholesalers, distributors and retailers have become accustomed to carry only dolphin safe

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37 *Id.* at § 2.

38 16 U.S.C. §1371(a)(2)(B). MEX-16.

39 *See* Pub. Law 105-42 at § 8, 111 Stat. at 1139. MEX-18.

40 16 U.S.C. §1371(a)(2); 50 C.F.R. § 216.24(f). MEX-16 and MEX-22.

41 *See* Federal Register Vol. 65, No. 89 (May 8, 2000). MEX-23.

42 *See* Federal Register, Vol. 72, No. 140 (July 23, 2007). MEX-24.

43 Currently, the following countries remain subject to an embargo on imports of yellowfin tuna harvested in the ETP: Belize, Bolivia, Colombia, Guatemala, Honduras, Nicaragua, Panama, Vanuatu, Venezuela, and Peru. Besides Mexico, Spain, Ecuador and El Salvador have had affirmative findings and therefore are authorized to export tuna from the ETP to the United States. Previously, Costa Rica, Italy and Japan had been subject to an intermediary nation embargo that was lifted as of August 19, 2000.

labeled tuna to avoid threats of boycotts, pickets and marketing campaigns in front of retail stores by certain non-governmental organizations.[44]

72. As explained above, in the 1995 Panama Declaration it was agreed that the definition of "dolphin safe" would be changed from "no encirclement of dolphins" to "no dolphin mortality or serious injury." The United States pledged to modify its restrictions on the availability of the "dolphin safe" label in exchange for the modification and formalization of the La Jolla Agreement into a legally binding instrument of international law, thereby cementing the multilateral program for the management of the fishery and minimization of marine mammal and other bycatch in the ETP fishery. This in turn led Mexico and other countries in the region to agree with the United States on the successful multilateral conclusion of the AIDCP.

73. The Panama Declaration anticipated that the United States would accept compliance with the newly-binding IDCP as sufficient assurance that tuna and tuna products harvested in the ETP were "dolphin safe." Instead, at the last moment, the U.S. Congress chose to add additional prerequisites for the eligibility of ETP-harvested tuna for the "dolphin safe" label.

74. In particular, the legislation authorized a change in the "dolphin safe" labeling standard, but not immediately or automatically. Instead, the Congress made the amendment contingent on the outcome of studies it required the DOC to perform. Pursuant to this amendment, the U.S. Secretary of Commerce was directed to make initial and final findings of "whether the intentional deployment on or encirclement of dolphin with purse-seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean."[45] These findings would in turn be a part of the information used by the U.S. Secretary of Commerce to determine whether to revise the definition of "dolphin safe" tuna.[46]

75. The intent of the U.S. Congress and Administration, as reflected in the legislative history and subsequent bilateral consultations, was that the standard would be changed in accordance with the U.S. international obligation unless there was clear evidence that the method of fishing was actually having a significant adverse impact on dolphin stocks.[47] (As discussed below, this

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44 *See* confidential evidence in MEX-58.

45 *See* 16 U.S.C. §1385(g)(2). Appendix A.

46 *See* 16 U.S.C. § 1385(d). Appendix A.

47 *See, e.g.*, Statement of Sen. Olympia Snowe, then Chairman of the Fisheries Subcommittee of the Commerce Committee, preceding final Senate passage of the IDCPA:

> "This bill enjoys a tremendous amount of public support. The Clinton administration, which negotiated the agreement, strongly supports this bill. As Senator MCCAIN indicated, a number of environmental groups are champions of this legislation as well. The World Wildlife Fund, National Wildlife Federation, Center for Marine Conservation, Environmental Defense Fund, and Greenpeace have all strongly supported this bill. .... The Panama Declaration and S. 39 represent a landmark international effort to achieve two critical objectives: to protect dolphins in the ETP, and to protect the entire marine ecosystem of this vast region.
>
> *..... * *
>
> It requires the expeditious commencement of research to further study the effect of dolphin setting on dolphins. Tuna caught by dolphin sets may not be labeled dolphin safe until at least March 1999, at which time the Secretary of Commerce must review the preliminary results of the study, and make a

Footnote continued on next page

burden of proof was later reversed by the U.S. courts, which held that the standard could not be changed unless there was clear proof that the fishing method was not harming dolphin stocks.) After the legislation was enacted, Mexico proceeded with implementation of the AIDCP program in the good faith belief that the United States would comply with its international obligations

76. The Secretary's study mandated in the legislation was to consist of two different projects: (i) population abundance surveys of depleted dolphin stocks under 16 U.S.C. § 1414a(2), and (ii) stress studies under 16 U.S.C. § 1414a(3).[48] The stress studies were to include a review of relevant stress-related research and a three-year series of necropsy samples from dolphins obtained by commercial vessels, a one-year review of relevant historical demographic and biological data related to dolphins and dolphin stocks in the ETP, and an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement

77. A finding that there was no evidence of significant adverse impact – if allowed to take effect – would have made Mexican tuna and tuna products harvested by setting on dolphins in the ETP in accordance with AIDCP requirements eligible for the "dolphin safe" label in the U.S. marketplace.

78. In May 1999, the DOC published its initial finding pursuant to the IDCPA.[49] In the Initial Finding, the DOC determined that there was insufficient evidence to conclude that intentional encirclement of dolphins with purse-seine nets was having a significant adverse effect on what the United States labeled as "depleted" dolphin stocks in the ETP". However, the underlying report asserted that dolphin populations had not recovered and stated that it remained possible that the fishing method was the reason.

79. Certain NGOs, challenged the Initial Finding in the District Court for the Northern District of California, with the U.S. Government defending the actions of the DOC. The District Court granted the plaintiffs' motion for summary judgment, holding that the DOC abused its discretion when it triggered a change in the dolphin safe label standard on the ground that it lacked sufficient evidence of no significant adverse impacts.[50]

Footnote continued from previous page

> determination as to whether or not dolphin setting is causing significant adverse impacts to depleted dolphin stocks in the ETP. If the Secretary finds no significant impact, then the label changes to permit tuna caught with dolphin sets to be labeled dolphin safe, as long as no dolphins were killed or seriously injured during harvest.
>
> Between July 1, 2001, and December 31, 2002, the Secretary will review the completed results of the study, and make another determination. If significant adverse impacts to dolphins are found at that time, he must prohibit the labeling of tuna caught with dolphin sets as dolphin safe."

Congressional Record S8299 (July 30, 1997). MEX-59.

[48] MEX-25.

[49] 64 Fed. Reg. 24590 (May 7, 1999) ("Initial Finding"). MEX-26.

[50] *Brower v. Daley*, 93 F. Supp.2d 1071, 1087 (N.D. Cal. 2000). MEX-27.

80. The Court of Appeals for the Ninth Circuit affirmed, holding that the agency should not have made what it characterized as a default finding of no adverse impact in the absence of conclusive scientific data.[51]

81. The agency then did additional studies and reached the same conclusion as before in a Final Finding issued in December 2002, but again asserting that dolphin populations were not recovering at the "expected rate".

82. The district court held that the Final Finding was unlawful, on the basis of its view that the agency had not fully complied with the requirements for the scientific studies.[52] The Ninth Circuit again affirmed the district court in July 2007.

83. The Ninth Circuit itself summarized the effect of its ruling as follows:

> We, therefore, instruct the district court to limit its mandate to one that directs the Secretary to vacate the agency's Final Finding of no significant adverse impact. This means as a practical matter that pursuant to the current statute, there will be no change in tuna labeling standards absent new Congressional directive. The label of "dolphin-safe" will continue to signify that the tuna was not harvested with purse-seine nets, and that no dolphins were killed or seriously injured when the tuna were caught.[53]

84. The court subsequently revised its opinion so that the last sentence above was changed to say: "the label of "dolphin safe" will continue to signify that the tuna was harvested in compliance with the requirements of 16 U.S.C. § 1385."[54]

85. After the district court's initial decision, the Assistant Administrator For Fisheries of the DOC sent a letter to a representative of the Mexican industry that stated, among other things, as follows:

> The Secretary of Commerce and I are both very disappointed with the ruling because it halted implementation of the new U.S. labeling standard, developed as a part of the Panama Declaration to protect dolphins in the ETP. As you know, much hard work went into the development of the Panama Declaration to protect dolphins in the ETP. As you know, much hard work went into the development of the Agreement on the International Dolphin Conservation Program and the new U.S. labeling standard, and the United States firmly believes that binding, international agreements are key to the protection of dolphins and the long-term conservation of marine resources in the ETP.

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51 *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001). MEX-28.

52 *Earth Island Inst. v. Evans*, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. 2004). MEX-29.

53 *Earth Island Inst. v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007). MEX-30.

54 *Earth Island Inst. v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). MEX-31.

> On May 18, 2000, the U.S. Department of Justice (DOJ) filed an appeal in the Brower v. Daley case, and I assure you that NMFS is working closely with the DOJ to reach a satisfactory decision. .... However, pending the decision on the appeal, yellowfin tuna harvested in the ETP by large purse seine vessels and imported into the United States will be considered "dolphin safe" only if no intentional setting on dolphins occurred during the trip ...."[55]

86. After the Ninth Circuit's ruling, however, the U.S. Government declined to seek review by the Supreme Court, and accordingly the Ninth Circuit's decision became final and binding.

87. Importantly, the DOC has continued to monitor dolphin populations in the ETP, and in its latest report, admitted that it under-estimated dolphin populations in its prior reports. The most recent report, published in 2008, states as follows:

> 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 ….[56]

88. Although the report contained speculation about reasons why this conclusion might not be fully accurate, it verified that the data in the earlier reports – on which the U.S. courts relied in rejecting the change to the dolphin safe standard – was incorrect.[57] Accordingly, the available scientific evidence supports the conclusion that the fishing method being used by the Mexican fleet is not interfering with the recovery of the dolphin species at issue. However, U.S. law does not permit revision of the DOC's justification for its findings nor re-consideration by the courts of whether the change in the labeling standard can be implemented.

89. Mexico's position on the U.S. commitment previously was shared by the U.S. Government. As part of the submissions of the U.S. Government to the district court in the *Hogarth* case, an affidavit was filed by John F. Turner, who at that time was the Assistant Secretary for Oceans and International Environmental and Scientific Affairs at the U.S. Department of State. Mr. Turner testified as follows:

> 17. Now that the foreign nations have achieved such remarkable success in fulfilling their commitments to protect dolphins under the Declaration of Panama,

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[55] Letter from Penelope D. Dalton, Assistant Administrator for Fisheries, to Mark Robertson (Sept. 14, 2000). MEX-32.

[56] NOAA Technical Memorandum NMFS, "Estimates Of 2006 Dolphin Abundance In The Eastern Tropical Pacific, With Revised Estimates From 1986-2003," (April 2008) at 12. MEX-33.

[57] *See, e.g.*, *id.* at 11-12 ("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 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.").

the 1999 Agreement and the IDCP, they reasonably expect the United States to fulfil its commitments to them.

18. In this regard, I believe that the IDCP itself, and the successful protection of dolphins achieved under it, will be placed in severe jeopardy if the court grants the plaintiffs' motion for a preliminary injunction.

19. I note that this fishery takes place entirely in waters beyond U.S. jurisdiction and is conducted almost exclusively by vessels owned and registered in foreign nations. As such, the United States lacks any ability to regulate the fishery directly, as U.S. law does not apply to the vessels in question, operating in international waters or waters under the jurisdiction of another country. The only incentive that the United States has to offer to these nations and to their fishermen in exchange for their continuing willingness to bear the costs of fishing in accordance with the strict procedures of the IDCP is the ability to sell their tuna in the U.S. market.

20. It is my understanding that, without the "dolphin-safe" label, the ability of fishermen to sell tuna in the U.S. market is severely curtailed. That is why the foreign nations sought a commitment from the United States in the Declaration of Panama to seek a change in the definition of "dolphin-safe" tuna in the first place.

21. If the court grants the plaintiffs' motion, tuna harvested in compliance with the IDCP will not be able to receive the dolphin-safe label in the U.S. market even if no dolphins died or were seriously injured during the harvest. Such a result would, in my view, cause the following adverse consequences:

- likely refusal of some foreign governments to abide by the dolphin protection requirements of the IDCP;

- likely withdrawal of some foreign governments from the 1999 Agreement that established the IDCP (as they strongly indicated they would after the 1999 preliminary finding of the Secretary of Commerce failed to result in the change of the dolphin-safe definition);

- the potential collapse of the IDCP, the preservation of which remains an important goal of U.S. foreign policy;

- a likely large increase in dolphin mortality caused by the tuna fishery in the Eastern Pacific Ocean;

- a possible shift in the balance of fishing effort to other purse-seine fishing methods that have their own ecological costs, such as high rates of bycatch for target and non-target species;

- a significant reduction in our ability to monitor dolphin mortality in the fishery (without the current requirement for 100 percent observer coverage) and, as a

result, to measure and understand the impact of the fishery on dolphin populations; and

- a loss of credibility for the United States as a country that honors its international commitments.

22. In contrast, I believe that, if the final finding of the Secretary of Commerce is upheld, the following positive results will ensue:

- maintenance of the IDCP and its requirements for protection of dolphins;
- a willingness on the part of the foreign nations involved to strengthen the IDCP even further;
- a willingness on the part of the foreign nations involved to collaborate in additional scientific research that will shed even greater light on interactions between the fishery and dolphins; and
- stronger cooperation between the United States and the foreign nations concerned on the many other issues pending before the IATTC, particularly the need to improve management of all tuna fisheries in the Eastern Pacific Ocean (including those unrelated to dolphins).[58]

90. The NGOs that challenged the actions of DOC in connection with the dolphin safe label also challenged the U.S. implementation of the elimination of the import embargo. The challenge regarding the import embargo was considered by a different court, which ultimately upheld the lifting of the embargo in compliance with the conditions of the legislation.[59] A group of environmental NGOs – The Center For Marine Conservation, Environmental Defense, National Wildlife Federation, and World Wildlife Fund – filed an amicus curiae brief supporting the position of the U.S. Government in that case. In their brief, these NGOs made statements such as the following:

- "In the last five years, the U.S. has altered course on dolphin conservation to reflect the enormous strides made by the international tuna fleet in fishing safely on dolphins. Recognizing that the unilateral embargo on tuna caught by setting nets on dolphins imposed in the 1990s actually failed to protect dolphins, the U.S. amended its domestic and international policies, moving towards an

[58] Declaration of John F. Turner, filed as an exhibit to Federal Defendants' Opposition To Plaintiffs' Motion For Preliminary Injunction, in *Earth Island Institute et al. v. Donald Evans et al.*, Case No. C-99-3892-TEH. MEX-34.

[59] *Defenders of Wildlife. v.Hogarth,* 177 F. Supp. 2d 1336 (Ct. Int'l Trade 2001), *aff'd*, 330 F.3d 1358 (Fed. Cir. 2003). MEX-61.

internationally cooperative approach that has been proven to protect dolphins and cause much fewer adverse effects on the ETP ecosystem as a whole."[60]

- "The AIDCP embodies the international community's agreement to implement the most successful dolphin protection measures ever established. The AIDCP creates standards for dolphin-safe tuna fishing, establishes training and certification in the use of dolphin-safety techniques and fishing practices, and provides enforcement mechanisms that require signature nations and their fishing fleets to abide by conservative dolphin mortality limits, per-stock mortality limits, and dolphin-safe techniques and fishing practices. In addition, it establishes a truly international and cooperative tracking system to verify that tuna labeled "dolphin safe" was caught without harming dolphins. Access to the U.S. market is an important incentive for signatory nations and their tuna fleets to continue to comply with the AIDCP requirements, which have drastically lowered dolphin mortalities."[61]

b. Comparison With The Standards Applied By The United States To Its Domestic Waters

91. It is instructive to note that the United States applies different standards to its own commercial fisheries than those it applies to the Mexican fleet in the ETP. Specifically, although the United States has formally acknowledged bycatch mortalities of dolphins and other marine mammals in those fisheries – in some cases at rates higher than those in the ETP – the United States has not provided for 100% independent observer coverage or other reliable monitoring systems for those fisheries, and places no restrictions on how the seafood from those fisheries may be sold and marketed in the United States.

92. Specifically, Section 118 of the MMPA sets forth an exception to the general prohibition on marine mammal mortalities. That section governs "the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States or vessels which have valid fishing permits . . . ."[62] A list of U.S. commercial fisheries is published annually in the *Federal Register* and classifies fisheries into one of three categories based on the level of serious injury and mortality of marine mammals that occur in each fishery, reported in annual stock assessment reports. The most current list of U.S. commercial fisheries was published on November 16, 2009.[63]

93. For example, the "Category 1" fisheries are defined as those in which the incidental killing of marine mammals is greater than 50% of the Potential Biological Removal ("PBR")

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60 Memorandum of Amicus Curiae, filed in Defenders of Wildlife v. Dalton, Court No. 00-02-00060 (April 27, 2001) at p. 4. MEX-36.

61 *Id.* at 12.

62 16 U.S.C. § 1387(a)(1). MEX-37.

63 74 Fed. Reg. 58859 (Nov. 16, 2009). MEX-38.

threshold.[64] Among the Category 1 fisheries is a long line tuna fishery in Hawaii, with 129 participating vessels, which is described as killing or injuring Blaineville's beaked whales, bottlenose dolphins, Bryde's whales, false killer whales, humpback whales, Pantropical spotted dolphins, Risso's dolphins, short-finned pilot whales, spinner dolphins, sperm whales, and striped dolphins.[65] Similarly, another Category 1 fishery, the "mid-Atlantic gillnet fishery" (which apparently fishes for monkfish and other species and has over 670 vessels participating) is described as killing or injuring bottlenose dolphins, common dolphins, gray seals, harbor porpoises, harbor seals, harp seals, humpback whales, long-finned pilot whales, minke whales, short-finned pilot whales, and white-sided dolphins.[66]

94. U.S. fishers operating in those fisheries are obliged to register and submit reports on killed or injured marine mammals, and are subject to being requested to carry observers on individual trips, but they do not have independent observers on each fishing trip, or have to bear the costs of such observers, as does the Mexican fleet under the IDCP program.

95. The absence of extensive observer coverage is highly significant:

> Few U.S. fishers report marine mammal bycatch voluntarily, although they are required to do so by the Marine Mammal Protection Act. For example, in 1990 fishers reported a bycatch of 74 harbor porpoises in the Gulf of Maine, whereas the total bycatch extrapolated from an observer program was 2900 (CV = 0.32) (Bisack & DiNardo 1992; Weber 2002:159). It is widely accepted that accurate estimation of bycatch rates in any fishery requires an independent observer scheme (Northridge 1996).[67]

96. Thus, the U.S. Government has verified that U.S. fishers kill dolphins and other marine mammals in fishing for tuna and other seafood, but lacks reliable data on the extent of the mortalities because it relies primarily on self-reporting by the fishers.

97. In sum, despite the evidence that dolphins and other marine mammals are killed in fisheries in the U.S. domestic waters, the United States has not adopted requirements for the dolphin safe label for tuna or other fish caught in those fisheries remotely comparable to the standards applied by the U.S. regulations for the ETP.

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64 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. PBRs are developed for individual fisheries and stocks using a complicated formula.

65 74 Fed. Reg. 58859, 58881. MEX-38.

66 74 Fed. Reg. 58859, 58891. MEX-38.

67 Read, Drinker, & Northridge, "Bycatch of Marine Mammals in U.S. and Global Fisheries," in 20 Conservation Biology (2006) 163, 167. MEX-39.

C. The Operations of the U.S. Fishing Fleet And Tuna Processors

98. Comprehensive information on the current activities of the U.S. tuna fishing fleet is not publicly available. A research paper published by the School of Ocean and Earth Science and Technology of the University of Hawaii (apparently in 2002) provides substantial background, however. The paper, entitled "Status of the United States Western Pacific Tuna Purse-seine Fleet and Factors Affecting Its Future," objectively reviewed the recent history of U.S. tuna fishing practices, and included information gathered from confidential interviews with industry participants.

99. Among the data presented in the paper are the following:

- In the Western Pacific, the U.S. fleet primarily uses two methods: (a) setting nets on drifting objects (e.g., FADS and logs) and (b) unassociated school sets (i.e., searching for schools of fish not associated with drifting objects).

- In 2002, the number of U.S. flag vessels (over 400 tons) fishing in the Western Pacific was about 28 or 29, while the number in the Eastern Pacific was about 2 or 3.

100. The paper states:

> Most of the tuna caught by the U.S. purse seine fleet in the western Pacific is processed by the two canners in American Samoa, StarKist and Chicken of the Sea, and subsequently sold in the U.S. It is estimated that in 2001 approximately 200,000 t of tuna was processed at the two canneries in American Samoa, of which approximately 120,000 tons or 60% originated from the U.S. purse seine fleet in the western Pacific. It is estimated that production of the American Samoa canneries currently supply about 50% of the U.S. market for canned tuna.[68]

101. The paper also reports that:

> TriMarine, a firm that has become the world's highest volume trader in frozen tuna, owns the ... one-quarter of the [U.S.] fleet. Traders have evolved to where they are usually full participants in the market, buying and selling on their own account rather than acting as brokers that charge a fee for selling someone else's fish. The firm already owned several non-U.S. flag tuna vessels when it purchased the former StarKist fleet in mid-2001, bringing its total fleet size at the time to twelve vessels.[69]

102. StarKist, a U.S. corporation, is the largest seller of processed tuna products in the United States. It was owned by Del Monte from 2002 until its sale to the South Korean company Dongwon Enterprise Co. in late 2008. According to a public filing by Del Monte, at the time of

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[68] Gillett, McCoy, and Itano, "Status of the United States Western Pacific Tuna Purse Seine Fleet and Factors Affecting Its Future,"(SOEST 02-01, JIMAR Contribution 02-344) p. 17. MEX-40.

[69] *Id*. at 17.

the sale Starkist had manufacturing capabilities in American Samoa and Manta, Ecuador, and "manufacturing assets" in Terminal Island, California and Guayaquil, Ecuador.[70] An earlier filing by Del Monte stated that Starkist used third-party co-packers in Thailand and Ecuador for canned and most of its pouched tuna products.[71]

103. According to its website, Bumblebee (owned by a U.S. private equity firm) has tuna processing facilities in Puerto Rico and California.[72] Chicken of the Sea (now ultimately owned by the Thai Union Group) recently has had canning facilities in American Samoa, Thailand and Indonesia.[73] In 2009 Thai Union shifted the Samoan cannery operations to a new facility in Georgia in the United States[74].

104. StarKist, Bumblebee and Chicken of the Sea all refuse to purchase tuna from the Mexican tuna fleet because of the dolphin safe issue.[75] Mexican producers of canned tuna are unable to sell their products through the major U.S. grocery retail chains because they are prohibited from using the dolphin safe label, while tuna from the rest of the world, sold in canned tuna products by StarKist, Bumblebee and Chicken of the Sea, can be so labeled.[76]

D. The Mexican Fishing Fleet

105. Between 1980 and 1987, Mexico developed a fleet of 85,000 tons of carrying capacity, along with an associated infrastructure and employment base. A number of coastal communities were effectively built and sustained on the comparative advantage given by the strength of the tuna resource along Mexico's coast, and the markets for that resource around the world.

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70 Del Monte Form 10K (July 1, 2009) p. 76. MEX-41.

71 Del Monte Form 10K (2008) p. 10. MEX-42.

72 See http://www.bumblebee.com/About/. MEX-43.

73 Regarding Thai canning facilities, see description of Thai Union Manufacturing Co. (" Approximately 400 metric tons of tuna are currently processed each day by 6,000 quality-conscious men and women at our canning facilities, regarded in the industry as the largest in Asia.") available at http://www.thaiuniongroup.com/home/framecontent.php?pro=subsidiaries&t=&id=11&lang=&company=&ads= MEX-44. Regarding Indonesian canning facility, see Thai Union Press Release, "TUF Invests Bt 154 Million to Expand Manufacturing Base into Indonesia in Response to Growing Tuna Demand" (November 16, 2006), available at http://tuf.listedcompany.com/news.html/id/176869/group/newsroom_press. MEX-45.

74 Thai Union Press Release, "TUF Q3 Net Breaking Bt 1 Billion Mark as 9 Month Profit Already Surpassing the Past Record" (Oct. 28, 2009) ("... the relocation of production from the American Samoa plant to a new facility in the state of Georgia, USA, has been completed. The Georgia plant has started manufacturing canned tuna, with an output capacity of 4 million standard cases per year," available at http://www.thaiuniongroup.com/home/home.php?pro=today&t=press&id=185&lang=. MEX-46.

75 See Bumblebee website ("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."), available at http://www.bumblebee.com/FAQ/#2; Starkist website ("StarKist will not purchase any tuna caught in association with dolphins."), http://www.starkist.com/template.asp?section=aboutUs/index.html; and Chicken of the Sea website ("None of the tuna we purchase is caught in association with dolphin."), available at http://chickenofthesea.com/dolphin_safe.aspx. MEX-47.

76 See confidential evidence in MEX-58.

106. As Mexico built its fleet and entered the tuna fishery in a meaningful way, it did so in a manner that was sensitive to the mortalities of dolphins, so important to the identification of concentrations of mature tuna. The Mexican fleet sought to maximize industrial yield and market price by concentrating fishing effort on large yellowfin. The fleet endeavored to ensure the long-term sustainability of the tuna resource in the ETP by concentrating on these mature fish that had already contributed to the biomass and that could be captured with the minimum of bycatch and discards.

107. Largely through the practical application of this fishing philosophy by the Mexican and other large fleets, the amount of tuna available for harvest in the ETP grew from 180,000 tons in 1987, to 365,000 tons in 1994.[77]

108. Not only was the Mexican fleet aware of the need to protect the stocks of tuna, but also it was fully aware of the importance of protecting dolphins while fishing tuna. Therefore, in harmony with the efforts of the Mexican Government in the multilateral arena, the Mexican fleet invested large amounts of money in the dolphin protection efforts such as training of captains and crews, development of fishing gear less harmful to dolphins, research and monitoring programs, and an independent observer in every fishing trip of the Mexican fleet.

109. The efforts of the Mexican fishing fleet contributed substantially to the reduction of dolphin mortality to the levels less than 0.004%.

E. Adverse Effects of the Measures

110. The U.S. measures have direct and indirect adverse effects.

111. The direct adverse effect relates to tuna products imported, distributed and sold in the U.S. market. The U.S. distribution and retail networks for tuna products are acutely aware of the dolphin safe issue and the fact that they will encounter actions such as boycotts, promoted by certain economically interested NGOs, if they carry tuna that is not designated as dolphin safe. Large U.S. grocery chains have indicated that they will be unable to carry any Mexican tuna products unless the tuna products bear a U.S. government approved dolphin safe label.[78]

112. There is also an indirect adverse effect on tuna caught by the Mexican tuna fleet. There are three major processed tuna brands sold in the United States – StarKist, Bumblebee, and Chicken of the Sea. It has been reported that, in 2001, Starkist had 44% of the U.S. market, Bumble Bee 24% and Chicken of the Sea 17%, and that other brands and private label products comprise the remaining 17%.[79] Sales of tuna products in the U.S. market by these three companies are unaffected by the U.S. measures because the companies refuse to purchase tuna

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[77] See Statement of Alfonso Rosinol at the AIDCP Article XX Bilateral Consultations held in Washington DC 28 September 2000, p. 2. MEX-19.

[78] *See* business confidential MEX-58.

[79] Department of Labor, American Samoa Economic Report 2005, Part III (The Tuna Processing Industry), at http://www.dol.gov/esa/whd/AS/sec3.htm. MEX-48.

caught in the ETP including Mexican tuna because tuna products containing such tuna cannot be labeled as dolphin safe. Instead, these companies purchase U.S. tuna and tuna originating in other countries that can be labeled dolphin safe under the U.S. measures.

113. Because the Mexican tuna product brands would compete with Starkist, Bumble Bee and Chicken of the Sea, it appears to be in the economic interest of those companies to support the current U.S. standard.[80] For the reasons outlined above, the current U.S. standard provides these companies—who carry only U.S. tuna products or tuna products of other countries—a competitive advantage in the U.S. market over Mexican tuna products.

III. SUBJECT PRODUCTS

114. The subject products are tuna and tuna products.

115. "Tuna" include all species of tuna purchased by canneries for processing into tuna products including Yellowfin, Albacore, and Skipjack.

116. "Tuna products" are defined in the DPCIA. The term "tuna product" is defined in Section 1385(c)(5) as "a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days".[81] The most common form of tuna products is tuna in retail-ready cans or pouches.[82]

117. Because tuna are harvested in international waters, it is necessary to determine the country of origin of tuna and tuna products when applying the WTO provisions raised in Mexico's claims. Since this dispute concerns U.S. measures, it is suitable to employ the U.S. rules for determining the origin of tuna and tuna products.

118. In the United States, the court decision *Koru North America v. United States*, established that the origin of fish caught on the high seas is determined by the flag of the catching vessel.[83]

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80 *See, e.g.*, J. Brown, An Account of the Dolphin safe Tuna Issue in the UK, Marine Policy 29 (2005):

> "Indeed, in the USA private gain was an evident driving force among the dominant tuna processing firms in adopting the dolphin safe scheme [footnote omitted]. This contrasts with the commonly held view that forcing a billion dollar industry to withdraw from the ETP was a major victory of the environmentalist pressure groups, and was an indicator of the increasing strength of the 'greens.' At the time these firms had lost interest in the ETP as a source of raw tuna as they were breaking their ties with the harvesting sector and turning to buying on the world market. The new USA environmental legislation was also behind the re-instatement of the embargo on imports from Mexico, and for raising costs of smaller domestic competitors. It was thus in the interest of larger canners to support the environmental policy."

MEX-49.

81 *See* Appendix A.

82 *See e.g.*: Starkist - http://www.starkist.com/template.asp?section=products/index.html (Mexico MEX-X); Bumble Bee - http://www.bumblebee.com/Products/Family/?Family_ID=1; and Chicken of the Sea - http://chickenofthesea.com/product_line_list.aspx?FID=3 and http://chickenofthesea.com/product_line_list.aspx?FID=11 MEX-50.

83 *Koru North America v. United States*, 701 F. Supp. 229 (Ct. Int'l Tr. 1988). MEX-51.

Accordingly, fresh tuna caught by U.S. flag vessels in international waters is U.S. origin, tuna caught by Mexican vessels is Mexican origin, and tuna caught by the vessels of other countries take on the origin of the flag country in question.

119. The processing of tuna into canned or pouched tuna is considered under U.S. law to be a substantial transformation that changes the country of origin of the fish to the country where the processing takes place.[84] The NAFTA "tariff shift" rules of origin are consistent with this principle.[85] Accordingly, the country in which the processing occurs is the country of origin of a tuna product.

120. As discussed below, a very significant portion of the canned tuna sold in the United States is processed in canneries in American Samoa and Puerto Rico, which are both U.S. territories, and therefore is sold in the U.S. market as U.S. origin product. The sources of the tuna processed into those cans are not publicly available, and potentially could be tuna caught by the fleets of any of a number of different countries.

IV. SPECIFIC MEASURES AT ISSUE

121. Although several U.S. statutes, regulations and court decisions are involved, the most pertinent measures are 16 U.S.C. § 1385, the implementing regulations at 50 C.F.R. Sections 216.91 and .92, and the court's ruling in Hogarth.

A. Statute

122. 16 U.S.C. § 1385 provides in pertinent part as follows:[86]

> (d) LABELING STANDARD
>
> (1) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "dolphin safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested--
>
> (A) on the high seas by a vessel engaged in driftnet fishing;

---

[84] *Compare* Customs and Border Protection Headquarters Ruling 733865 (April 15, 1991) (tuna originating in Taiwan was substantially transformed by processing in South Africa). MEX-52.

[85] Fresh tuna is classified under the Harmonized Tariff System subheadings 0302.32, .33, .34, .35, .36, and .39. Frozen tuna is classified under subheadings 0303.41 through .49, and prepared tuna (in airtight containers) is classified under 1604.14. The NAFTA rule of origin is "A change to headings 1601 through 1605 from any other chapter." MEX-60.

[86] A more complete copy of the statute is reproduced in Appendix A.

> (B) outside the eastern tropical Pacific Ocean by a vessel using purse seine nets--
>
> > (i) in a fishery in which the Secretary has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean), unless such product is accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or
> >
> > (ii) in any other fishery (other than a fishery described in subparagraph (D)) unless the product is accompanied by a written statement executed by the captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested;

123. Subsection (d)(1)(B) of the statute sets out the requirements for obtaining the dolphin-safe label with regards to tuna products containing tuna caught outside the ETP.

124. Clause (i) refers to tuna products that contain tuna harvested "in a fishery in which the Secretary has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean)." This particular provision has no practical implications because the Secretary of Commerce has, thus far, not made any determination concerning association between dolphins and tuna in other fisheries.

125. Clause (ii) refers to a tuna product that contains tuna harvested in any other fishery. In this scenario, such tuna product is able to obtain the dolphin safe label so long as it is accompanied by a statement from the vessel's captain certifying that "no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested". Under this provision tuna products containing tuna harvested outside the ETP are allowed to obtain the dolphin safe label. The tuna harvested by the Mexican fleet does not qualify as dolphin safe under this provision as its fishing activities take place within the ETP.

126. Section 1385(d)(1) continues as follows:

> (C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin safe under paragraph (2); or
>
> (D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality

or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary.

(2) For purposes of paragraph (1)(C), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets is dolphin safe if—

(A) the vessel is of a type and size that the Secretary has determined, consistent with the International Dolphin Conservation Program, is not capable of deploying its purse seine nets on or to encircle dolphins; or

(B) (i) the product is accompanied by a written statement executed by the captain providing the certification required under subsection (h);

(ii) the product is accompanied by a written statement executed by-

(I) the Secretary or the Secretary's designee;

(II) a representative of the Inter-American Tropical Tuna Commission; or

(III) an authorized representative of a participating nation whose national program meets the requirements of the International Dolphin Conservation Program,

which states that there was an observer approved by the International Dolphin Conservation Program on board the vessel during the entire trip and that such observer provided the certification required under subsection (h); and

(iii) the statements referred to in clauses (i) and (ii) are endorsed in writing by each exporter, importer, and processor of the product; and

(C) the written statements and endorsements referred to in subparagraph (B) comply with regulations promulgated by the Secretary which provide for the verification of tuna products as dolphin safe.

127. In accordance with subsection (d)(1)(C) of the statute, quoted above, a tuna product containing tuna caught inside the ETP can be labeled as dolphin safe only if such tuna product is accompanied by:

- a statement by the vessel's captain providing certification under subsection (h), i.e. that 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 during the sets in which the tuna were caught;

- a statement by the onboard observer, also providing certification under subsection (h);

- a statement by the Secretary of Commerce, a Secretary's designee, a representative of the IATTC, or a representative of a nation whose national program meets the requirements of the IDCP, stating that an IDCP-approved observer was onboard during the entire trip.

128. Even though subsection (h) also contemplates the possibility that the captain's and observer's certification be that "no dolphins were killed or seriously injured during the sets in which the tuna were caught", such possibility was rendered inapplicable by the 2007 Court decision in *Hogarth*. The main difference with this standard – that would have applied but for the Court decision– is that it focuses on dolphin mortality and not on the fishing method. In other words, it does not require certification that no purse-seine nets were intentionally deployed on, or to, encircle dolphins.

129. A key element in the operation of the measure is the requirement imposed by the U.S. Congress that that the change in the dolphin safe labeling standard be contingent on the outcome of studies of dolphin populations in the ETP. To implement this condition, subsections (g) and (h) provide:

> (g) SECRETARIAL FINDINGS
>
> (1) Between March 1, 1999, and March 31, 1999, the Secretary shall, on the basis of the research conducted before March 1, 1999, under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make an initial finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The initial finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.
>
> (2) Between July 1, 2001, and December 31, 2002, the Secretary shall, on the basis of the completed study conducted under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the

> International Dolphin Conservation Program, and any other relevant information, make a finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.
>
> (h) CERTIFICATION BY CAPTAIN AND OBSERVER.
>
> (1) Unless otherwise required by paragraph (2), the certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified in subsection (d)(2)(B)(ii) shall be that no dolphins were killed or seriously injured during the sets in which the tuna were caught.
>
> (2) The certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified under subsection (d)(2)(B)(ii) shall be that 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 during the sets in which the tuna were caught, if the tuna were caught on a trip commencing--
>
> (A) before the effective date of the initial finding by the Secretary under subsection (g)(1);
>
> (B) after the effective date of such initial finding and before the effective date of the finding of the Secretary under subsection (g)(2), where the initial finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock; or
>
> (C) after the effective date of the finding under subsection (g)(2), where such finding is that the intentional deployment of or encirclement of dolphins is having a significant adverse impact on any such depleted stock.[87]

130. Subsection (h) establishes the different possible certification requirements that could be acceptable for purposes of obtaining the dolphin safe label when fishing for tuna inside the ETP. The applicability of the different possibilities was to depend on the result of the Secretarial Findings pursuant to Subsection 1385(g) -- specifically, on whether or not the Secretary found that "the intentional deployment on or encirclement of dolphins with purse-seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean".

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[87] *See* Appendix A.

131. Subsection (h)(1) sets forth the certification standard that would have applied had the Secretary's finding of no significant adverse impact on dolphins not been overturned in 2007 by the U.S. courts. Tuna caught by the Mexican fleet in the ETP could then have qualified for the dolphin safe label because the standard under Subsection (h)(1) allows the use of purse-seine nets on dolphins to the extent that such fishing method does not kill or seriously injure dolphins during the sets in which the tuna were caught. This matches the dolphin safe criterion under the AIDCP.

132. Because the courts rejected the determination of the Secretary of Commerce, the certification standard in subsection (h)(2) continues to apply to all vessels that fish for tuna inside the ETP, including the Mexican fleet. The captain's certification under this provision must state that "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 during the sets in which the tuna were caught".

B. Regulations

133. The implementing regulations published at 50 CFR § 216.91 provide as follows:[88]

> (a) It is a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna products that are exported from or offered for sale in the United States to include on the label of those products the term "dolphin safe" or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins if the products contain tuna harvested:
>
> > (1) ETP large purse seine vessel. In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity unless:
> >
> > > (i) the documentation requirements for dolphin safe tuna under § 216.92 and 216.93 are met;
> > >
> > > (ii) No dolphins were killed or seriously injured during the sets in which the tuna were caught; and
> > >
> > > (iii) None of the tuna were caught on a trip using a purse seine net intentionally deployed on or to encircle dolphins, provided that this paragraph (a)(1)(iii) will not apply if the Assistant Administrator publishes a notification in the Federal Register announcing a finding under 16 U.S.C. 1385(g)(2) that the intentional deployment of purse seine nets on or encirclement of dolphins is not having a significant adverse impact on any depleted stock.

---

[88] A more complete reproduction of the relevant regulations is set forth in Appendix B.

* * *

(3) Driftnet. By a vessel engaged in large-scale driftnet fishing; or

(4) Other fisheries. By a vessel in a fishery other than one described in paragraphs (a)(1) through(a)(3) of this section that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Assistant Administrator determines that such an observer statement is necessary.[89]

C. The Court Decision

134. As discussed above, in July 2007, in *Hogarth*, the Ninth Circuit upheld the federal district court ruling, and stated that its ruling would meant that absent a new Congressional directive, the standard for the dolphin safe label could not be changed.

135. The U.S. government chose not to appeal the decision in *Hogarth* to the Supreme Court of the United States. Thus, the decision of the Ninth Circuit in *Hogarth* is final and binding, and its effect is to continue to deny Mexican tuna and tuna products the benefit of the "dolphin safe" label in the U.S. marketplace.

136. The U.S. government chose not to appeal the decision in *Hogarth* to the Supreme Court of the United States. Thus, the decision of the Ninth Circuit in *Hogarth* is final and binding, and its effect is to continue to deny Mexican tuna and tuna products the benefit of the "dolphin safe" label in the U.S. marketplace.

D. Current Legal Standard For Mexican Tuna Products That Contain Tuna Harvested In The ETP

137. Thus, as it stands, because of the Hogarth ruling and the underlying statute and regulations, Mexican tuna products containing tuna harvested by vessels using purse-seine nets in the ETP are entitled to use the "dolphin safe" label only if an AIDCP observer was on board the vessel, and both the observer and the captain of the vessel certify "that 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 during the sets in which the tuna were caught …".

---

[89] The U.S. Government has not designated any other tuna fishery as having a regular and significant mortality or serious injury of dolphins.

138. In contrast, if tuna products contain tuna harvested outside the ETP by a vessel using purse-seine nets, those products are eligible for the "dolphin safe" label simply if the captain of the vessel executes a written statement certifying that "no purse-seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested." There is no requirement of an observer. There is no requirement of participation in an international program similar to the AIDCP. Moreover, there is no requirement of an attestation that no dolphins were killed or seriously injured during the tuna fishing.

139. The legal framework for obtaining the U.S. dolphin safe label can be summarized in the following table:

REQUIREMENTS FOR OBTAINING THE U.S. DOLPHIN-SAFE LABEL	
Outside the ETP – purse-seine nets 1385(d)(1)(B)	**Inside the ETP – purse-seine net 1385(d)(1)(C)**
Statement by captain certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested. 1385(d)(1)(B)(ii).	(i) Tuna harvested by a vessel of a type and size that the Secretary has determined, consistent with the IDCP, is not capable of deploying purse seine nets on or to encircle dolphins can obtain the dolphin safe label. 1385(d)(2)(A). (ii) Tuna harvested by a vessel capable of deploying purse seine nets can obtain the dolphin safe label if it is accompanied by the following (1385(d)(2)(B)): • Statement by the captain and observer certifying that (1385(d)(2)(B)): - no dolphins were killed or seriously injured during the sets in which the tuna were caught. 1385(h)(1).[90] - 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 no dolphins were killed or seriously injured during the sets in which the tuna were caught. 1385(d)(2)(B)(i) and 1385(h)(2) • Statement by the Secretary, Secretary's designee, a representative of the IATTC, or a representative of a nation whose national program meets the requirements of the IDCP, ascertaining that an IDCP-approved observer was on board the vessel during the entire trip. 1385(d)(2)(B)(ii) • The foregoing statements must be endorsed in writing by each exporter, importer and processor of the product. 1385(d)(2)(B)(iii).

[90] The applicability of this certification requirement was contingent upon a Secretarial Finding concluding that "the intentional deployment of purse seine nets on or encirclement of dolphins is not having a significant adverse impact on any depleted stock" (Section 219.91(a)(1)(iii) of the Code of Federal Regulations). Although the Secretary made a Final Finding on 31 December 2002 to the effect that "the intentional deployment on or encirclement of dolphin with purse seine nets is not having a significant adverse effect on any depleted stock in the ETP", the finding was overturned by the Ninth Circuit Court in July 2007. Therefore, this certification requirement cannot be applied..

V. LEGAL ARGUMENT

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

A. GATT 1994

141. The U.S. measures are laws, regulations and requirements affecting the internal sale, offering for sale, purchase, distribution and use of Mexican tuna products and tuna imported into the United States and accord less favourable treatment to Mexican tuna products and tuna than that accorded to the like products of U.S. origin and, therefore, are inconsistent with Article III:4 of GATT 1994.

142. The U.S. measures are also an advantage, favour or privilege granted by the United States to tuna products and tuna originating in certain WTO Members that has not been accorded immediately and unconditionally to the like products originating in Mexico and, therefore, are inconsistent with Article I:1 of GATT 1994.

1. Mexico's Claim Under Article III:4 of GATT 1994

143. The fundamental purpose of Article III is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic production"[91] "The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied … so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products."[92] As discussed below, the U.S. measures accord less favourable treatment to Mexican like tuna products and tuna. Accordingly, they afford protection to the production of like U.S. tuna products and tuna.

144. Article III:4 provides:

> The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

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91 Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, at para. 35 (citing GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, para. 5.10).

92 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 100.

145. In *Korea – Various Measures on Beef*, the Appellate Body identified the three elements of a violation of Article III:4 as follows:

> For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.[93]

a. Like Products

146. In EC – Asbestos, the Appellate Body stated that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products".[94] It further stated that the scope of "like" in Article III:4 is broader than the scope of "like" in Article III:2, first sentence.[95] It observed that the Report of the Working Party on Border Tax Adjustments outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body.[96] The approach consists of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products; and (iv) the tariff classification of the products.[97] A panel must examine the evidence relating to each of those four criteria and, then, weigh all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as "like".[98]

147. As noted above, the subject products are "tuna products" and "tuna". As defined in the DPCIA, a "tuna product" is "a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days". Although Mexico's challenge applies in respect of all tuna products, for the purpose of demonstrating the violation of GATT Article III:4, Mexico will use the most common tuna product, which is tuna meat packaged in retail ready cans and pouches. These products consist of the meat of various species of tuna (e.g., Yellowfin, Albacore, and Skipjack), usually along with oil or water, which is packaged for retail sale in a can or vacuum-sealed pouch. "Tuna" include all species of tuna purchased by canneries for processing into tuna products including Yellowfin, Albacore, and Skipjack.

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93 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, para. 133.

94 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 99.

95 *Id*.

96 *Id*., para. 101.

97 *Id*.

98 *Id*., para. 109.

148. The physical properties of Mexican tuna products are identical to those of U.S. tuna products insofar as products from both WTO Members comprise tuna meat in a retail-ready package. To the extent that there are physical differences in the species of the tuna meat, the differences do not materially affect the competitive relationship between Mexican and U.S. tuna products. Mexican and certain U.S. tuna products contain tuna meat from identical tuna species such as Yellowfin tuna.[99] However, canned and pouched tuna meat from the various tuna species compete against each other in the U.S. tuna market as illustrated by the various species of tuna meat packaged by StarKist, a U.S. corporation that is the largest seller of tuna products in the United States.[100]

149. The physical properties of Mexican tuna are identical to those of U.S. tuna insofar as they are a marine fish that is purchased by canneries for processing into tuna products. To the extent that there are physical differences associated with different species of tuna, the differences do not materially affect the competitive relationship between Mexican and U.S. tuna. Mexican and U.S. tuna include the same species – Yellowfin – which is viewed as a high quality species of tuna.[101] However, U.S. canneries process various species of tuna in the same manner.

150. The end-uses of Mexican tuna products and Mexican tuna are identical to U.S. tuna products and tuna. Tuna products from both Mexico and the United States are destined for consumption by final consumers. Tuna from both Mexico and the United States are destined for processing into tuna products at a cannery.

151. But for the regulatory distinction that is at the core of this dispute (i.e., dolphin safe), consumers' tastes and habits respecting Mexican tuna products and tuna are identical to U.S. tuna products and tuna.

152. The Mexican and U.S. tuna products and tuna are categorized under the same tariff classifications.[102]

153. As noted above, "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products". For the foregoing reasons, Mexican and U.S. tuna products directly compete against each other in the U.S. wholesale, distribution and retail market. Similarly, Mexican and U.S. tuna directly compete against each other in the U.S. cannery market.

154. In conclusion, all relevant evidence supports a finding that Mexican and U.S. tuna products and tuna are "like".

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[99] The Mexican fleet primarily catches Yellowfin tuna and that tuna is packaged into tuna products (e.g., canned tuna). U.S. tuna products (e.g., canned tuna) contain Yellowfin tuna. An example is StarKist Select tuna. See http://www.starkist.com/template.asp?section=products/gourmet.asp. MEX-50.

[100] *See* http://www.starkist.com/template.asp?section=products/index.html. MEX-54. .

[101] Both the Mexican and U.S. fleets catch Yellowfin tuna.

[102] Both Mexican and U.S. tuna products are classified under subheading 1604.14 of the Harmonized System, and both Mexican and U.S. fresh and frozen tuna are classified under subheadings 0302.31-0302.39 and 0303.41 - 0303.49 of the Harmonized System.

b. Law, Regulation, Or Requirement Affecting Their Internal Sale, Offering For Sale, Purchase, Transportation, Distribution, Or Use

155. The U.S. measures are set out in U.S. legislation and regulations as interpreted and applied by the U.S. judiciary. Mandatory criteria have been established for the use of labels that contain the term "dolphin safe" or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins. Thus, the U.S. measures clearly amount to a law, regulation or requirement within the meaning of Article III:4.

156. With regards to the term "affecting" used in Article III:4, the Appellate Body has explained:

> The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing".[103]

157. In explaining this broad scope of application the Appellate Body in *US – Foreign Sales Corporations* has referenced its own findings in *EC – Bananas III* that, "[t]his interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'."[104]

158. The GATT Panel in *Italian Agricultural Machinery* observed that the word "affecting", as employed in Article III:4, covers "not only the laws and regulations which directly govern […] the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products on the internal market"[105]

159. Prior WTO panels have concluded that Article III:4 encompasses measures that (i) provide an incentive to purchase local products;[106] (ii) provide a disincentive to accept and

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[103] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 220. See also, 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, para. 209-210.

[104] 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, para. 209-210.

[105] GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, para. 12.

[106] Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, para. 7.197.

distribute the imported product to end-users;[107] and (iii) that influence a manufacture's choice between domestic and imported products.[108]

160. Participants in the U.S. tuna and tuna product market are highly sensitive to issues related to dolphin mortality. This applies to participants at the processor (e.g., canner), wholesale, retail and, to some extent, consumer levels of trade. Participants will make decisions on whether or not to purchase, offer for sale, distribute, process or use tuna products and tuna on the basis of whether they are designated as dolphin safe or, in the case of tuna, can be designated as dolphin safe after processing. Most participants will not purchase, offer for sale, distribute or use tuna products and tuna that are not designated as dolphin safe or cannot be designated as dolphin safe after processing.[109] The market situation is such that it is a significant commercial disadvantage to be prohibited from designating tuna products as dolphin safe.

161. Thus, it is clear that the U.S. measures "affect" the internal sale, offering for sale, purchase, transportation, distribution, or use of tuna products and tuna.

c. "Less favourable" Treatment

162. In *Korea – Various Measures on Beef*, the Appellate Body stated that, under Article III:4 of the GATT 1994, the question of whether:

> ... imported products are treated "less favourably" than like domestic products should be assessed ... by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.[110] [emphasis in original]

163. The central question is whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products.[111] In other words, a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products.[112]

164. The U.S. measures do not, on their face, discriminate on the basis of the foreign country that is the source of particular tuna and tuna products. Rather, they discriminate on the basis of

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[107] 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, para. 6.267.

[108] Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, adopted 12 January 2009, as modified by the Appellate Body, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, Panel Report, para. 7.256.

[109] See confidential evidence in MEX-58.

[110] 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, para. 137.

[111] Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para. 93.

[112] *Id*.

where the tuna is harvested and the fishing method. But this has the effect of favouring U.S. tuna and tuna products over like Mexican tuna and tuna products because the fishing fleets of the two countries harvest tuna in different ocean fisheries using different fishing methods. Thus, the less favourable treatment at issue is of a *de facto* rather than *de jure* character. However, Article III:4 covers both *de jure* and *de facto* inconsistency and therefore applies to the facts of this dispute.[113]

165. The *de facto* less favourable treatment in this dispute occurs as follows:

- Reflecting the longstanding fishing practice of the Mexican fishery, Mexican tuna are almost exclusively caught in the ETP using purse-seine nets that are set upon dolphins. This is the most environmentally responsible way to fish for tuna in the Mexican fleet's traditional tuna fishing grounds. In the light of these facts, by virtue of the U.S. measures Mexican tuna products that contain Mexican tuna can never be designated as dolphin safe even though the Mexican fleet complies with the stringent dolphin safe requirements of the AIDCP.

- In contrast, the U.S. fleet fishes outside of the ETP using other fishing methods such as purse-seine nets that are set upon FADs. Under the U.S. measures, U.S. tuna products that contain this tuna can be designated as dolphin safe even where marine mammal mortalities might, and historically have been shown to occur and where other principles of bycatch reduction might be compromised.

- Accordingly, by virtue of government intervention in the form of the U.S. measures, Mexican tuna products cannot be designated as dolphin safe while U.S. tuna products can.

- It is an established feature of the U.S. tuna product market that participants in the market are sensitive to issues related to dolphin mortality and will make decisions on whether or not to purchase, offer for sale, distribute or use tuna products on the basis of whether they are designated as dolphin safe. Most participants will not purchase, offer for sale, distribute or use tuna products that are not designated as dolphin safe.

- Accordingly, most U.S. market participants will not purchase, offer for sale, distribute or use Mexican tuna products but will purchase, offer for sale, distribute or use U.S. tuna products. The U.S. measures prevent Mexico and the Mexican tuna industry from taking action to re-balance the competitive opportunities between Mexican tuna products and like U.S. products by labeling their tuna products as dolphin safe and promoting the legitimacy and integrity of the AIDCP standards. This has led to a situation whereby U.S. tuna and tuna products are prevalent throughout the U.S. market, while it is not commercially viable to sell imported Mexican tuna products in the U.S. market.

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[113] Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 140.

- Although the U.S. measures apply to the labeling of tuna products, they have an indirect discriminatory effect on Mexican tuna. By virtue of the U.S. measures, tuna products containing Mexican tuna cannot be designated as dolphin safe. As a consequence, fish canneries located in U.S. territory (e.g., Samoa) or producing tuna destined for the U.S. market will not accept Mexican tuna for processing into tuna products. These canneries will, however, accept U.S. tuna that can be designated dolphin safe once processed.

166. This *de facto* less favourable treatment between Mexican tuna products and like U.S. tuna products modifies the conditions of competition in the relevant market – i.e., the U.S. tuna products market – to the detriment of imported Mexican tuna products. Similarly, the *de facto* discrimination between Mexican tuna and like U.S. tuna modifies the conditions of competition in the U.S. cannery market to the detriment of Mexican tuna. In this way, the U.S. measures affecting these like products provide less favourable treatment and thus violate the national treatment obligation in Article III:4 of the GATT 1994.

167. The actions that would be required of the Mexican fleet to enable Mexican tuna products to be designated as dolphin safe under the U.S. measures illustrates how the balance of competitive opportunities between imported and like domestic products has been modified. The Mexican fleet would either have to abandon fishing for tuna in its traditional fishing grounds or continue to fish for tuna in the ETP but abandon its fishing method for an alternative method that would have significant adverse implications on the marine ecosystem of the ETP and the sustainability of the tuna fishery. Both of these options would require the Mexican fleet to incur considerable financial and other costs. These costs would have to be passed on to Mexican tuna and tuna products, making them less competitive in the U.S. market relative to like U.S. products which do not have to incur such additional costs. The second option would also have a substantial environmental cost, because the most environmentally responsible method for fishing tuna in the ETP would be replaced with an alternative method that would result in substantially more bycatch and have a significant adverse impact on ETP tuna and other living marine resources. In the long term, this environmental impact would further increase the cost of the Mexican tuna fleet as the mature tuna fishery declines further because of additional pressure from the Mexican fleet on stocks of immature tuna that are already under pressure from other fleets fishing in a manner that ensures them access to the U.S. market. By any standard, an internal measure that increases the cost of imported products in order to participate in a domestic market but does not increase the cost of like domestic products violates the national treatment obligation in Article III:4 of the GATT 1994.

168. The U.S. measures prohibit legitimate actions that could otherwise be taken in a free market and thereby modify the conditions of competition to the detriment of Mexican products.

169. For these reasons, the U.S. measures are inconsistent with Article III:4 of the GATT 1994.

2. Mexico's Claim Under Article I:1 of GATT 1994

170. The relevant part of Article I:1 of GATT 1994 provides:

> …with respect to all matters referred to in paragraphs 2 and 4 of Article III any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

171. The object and purpose of Article I:1 is to prohibit discrimination among like products originating in or destined for different countries.[114] It protects competitive opportunities of imported products, not trade flows.[115] It imposes upon WTO Members the obligation to treat like foreign products equally, irrespective of their origin.[116]

172. In the circumstances of this dispute, to determine whether there is a violation of Article I:1, three questions must be answered: (i) are the imported products concerned "like" products; (ii) does the measure at issue confer an advantage, favour or privilege on products originating in any other country; and (iii) was the advantage, favour or privilege granted "immediately and unconditionally" to the like product originating in the territories of all other Members?

a. Like Products

173. As noted above, the subject products are "tuna products" and "tuna". Although Mexico's challenge applies to all tuna products, for the purpose of demonstrating the violation of GATT Article I:1, Mexico will use the most common tuna product, which is tuna meat packaged in retail ready cans and pouches.

174. Factors commonly used to determine likeness under Articles III, X and XIII of the GATT 1994, may assist in determining the likeness of products under Article I. Therefore, the four criteria used to determine likeness under Article III:4 discussed above, reviewed in the proper context and in consideration of the object and purpose of the Agreement, assist in determining likeness under Article I:1.[117] All criteria indicate that tuna and tuna products, irrespective of which country they originate, are like products.

175. The physical properties of Mexican tuna products are identical to those of tuna products originating in other countries insofar as the products comprise tuna meat in a retail ready package. To the extent that there are physical differences in the species of the tuna meat, the differences do not materially affect the competitive relationship between Mexican tuna products and tuna products from other countries. Mexican tuna products and tuna products originating in

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[114] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 84.

[115] Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, para. 11.20.

[116] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, para. 89; (citing, Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para.190).

[117] GATT Panel Report, *Spain – Tariff Treatment of unroasted coffee,* BISD 28S/102, adopted 11 June 1981, para. 4.1 – 4.11.

other countries contain tuna meat from identical tuna species such as Yellowfin tuna.[118] However, canned and pouched tuna meat from the various tuna species compete against each other in the U.S. tuna market as illustrated by the various species of tuna meat packaged by the leading processors that process tuna in various countries and export their tuna to the United States.[119]

176. The physical properties of Mexican tuna are identical to those of tuna originating in other countries insofar as they are a marine fish that is purchased by canneries for processing into tuna products. To the extent that there are physical differences associated with different species of tuna, the differences do not materially affect the competitive relationship between Mexican tuna and tuna products. Mexican tuna and tuna originating in other countries include the same species (Yellowfin), which is viewed as a high quality species of tuna. However, canneries located in different countries process various species of tuna in the same manner.

177. The end-uses of Mexican tuna products and Mexican tuna are identical to tuna products and tuna originating in other countries. Tuna products from all countries including Mexico are destined for consumption by final consumers. Tuna from all countries are destined for processing into tuna products at a cannery.

178. But for the regulatory distinction that is at the core of this dispute (i.e., dolphin safe), consumers' tastes and habits respecting Mexican tuna products and tuna are identical to tuna products and tuna originating in other countries.

179. The tuna products and tuna from Mexico and other countries are categorized under the same tariff classifications.[120]

180. Accordingly, all relevant evidence supports a finding that Mexico's and other countries' tuna and tuna products are "like" within the meaning of Article I:1.

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[118] The Mexican fleet primarily catches Yellowfin tuna and that tuna is packaged into tuna products (e.g., canned tuna). The fleets of other countries also catch Yellowfin tuna and package it in various countries for shipment including to the United States. See for example the following Yellowfin tuna packaged by the three leading processors that sell into the United States: StarKist "Select Tuna" - http://www.starkist.com/template.asp?section=products/gourmet.asp ; Bumble Bee "Prime Fillet" – see http://www.bumblebee.com/Products/Family/?Family_ID=1; Chicken of the Sea "Light Tuna" – see http://chickenofthesea.com/product_line_list.aspx?FID=11. MEX-50.

[119] See for example albacore and other products: Bumble Bee - http://www.bumblebee.com/Products/Family/?Family_ID=1; Chicken of the Sea: - http://chickenofthesea.com/product_line_list.aspx?FID=11 (MEX-50); Starkist - http://www.starkist.com/template.asp?section=products/index.html; Chicken of the Sea - http://chickenofthesea.com/product_line_list.aspx?FID=3 (MEX-54).

[120] *See supra* note 102.

b. Advantage, Favour Or Privilege On A Product Originating In Other WTO Members

181. A broad definition has been given to the term "advantage" in Article I:1.[121] In *Canada – Autos*, the Appellate Body stated that Article I:1 "[r]equires that 'any advantage', favour, privilege or immunity granted by any Member to 'any product' originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of 'all other Members'. The words of Article I:1 refer not to 'some' advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to 'any advantage'; not to 'some' products, but to 'any product'; and not to like products from 'some' other Members, but to like products originating in or destined for 'all other ' Members." (emphasis omitted.)[122]

182. The words "favour" and "privilege" should likewise be given a broad interpretation. The advantage, favour or privilege in this dispute is the right to designate tuna products as dolphin safe. As discussed above in the context of Article III:4, having a dolphin safe designation provides a significant commercial advantage and is clearly an "advantage", "favour" or "privilege".

183. This advantage, favour or privilege is conferred upon tuna products and tuna originating in those countries whose tuna fishing fleets do not fish in the ETP and those countries whose fishing fleets fish in the ETP but use a different fishing method than the Mexican fleet.

184. Accordingly, U.S. measures confer an advantage, favour or privilege on products originating in any other country within the meaning of Article I:1.

c. Accorded Immediately And Unconditionally To The Like Product Originating In The Territories Of <u>All</u> Other Members

185. As in the case of Mexico's national treatment claim under Article III:4, the U.S. measures do not, on their face, discriminate on the basis of the foreign country that is the source of particular tuna and tuna products. Rather, they discriminate on the basis of where the tuna is harvested and the fishing method. But this has the effect of favouring tuna and tuna products from some countries over others because different countries harvest tuna in different ocean fisheries using different fishing methods. Accordingly, as in the case of Article III:4, the discrimination is *de facto* rather than *de jure* in character. As with Article III:4, the most-favoured-nation obligation in Article I:1 covers both *de jure* and *de facto* discrimination and therefore applies to the facts of this dispute.[123]

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[121] Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 79; Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted 20 May 2009, paras. 7.344-7.345.

[122] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 79.

[123] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 78.

186. The *de facto* discrimination in this dispute occurs as follows:

- Reflecting the longstanding fishing practice of the Mexican fishery, Mexican tuna are almost exclusively caught in the ETP using purse-seine nets that are set upon dolphins. As already noted, this is the most environmentally responsible way to fish for tuna in the Mexican fleet's traditional tuna fishing grounds. By virtue of the U.S. measures, Mexican tuna products that contain Mexican tuna can never be designated as dolphin safe even though the Mexican fleet complies with the stringent dolphin safe requirements of the AIDCP.

- In contrast, the fleets of other countries fish outside of the ETP using other fishing methods such as purse-seine nets that are set upon FADs. They also fish in the ETP using methods different from that used by the Mexican tuna fleet. Under the U.S. measures, tuna products that contain tuna originating from these countries' fleets can be designated as dolphin safe and a dolphin safe label can be affixed to those products.

- Accordingly, by virtue of government intervention in the form of the U.S. measures, Mexican tuna products cannot be designated as dolphin safe while tuna products originating in other countries can.

- It is an established feature of the U.S. tuna product market that participants in the U.S. tuna product market are sensitive to issues related to dolphin mortality and will make decisions on whether or not to purchase, offer for sale, distribute or use tuna products on the basis of whether they are designated as dolphin safe. Most participants will not purchase, offer for sale, distribute or use tuna products that are not designated as dolphin safe.

- Thus, most U.S. market participants will not purchase, offer for sale, distribute or use Mexican tuna products but will purchase, offer for sale, distribute or use tuna products originating in other countries. The U.S. measures prevent Mexico and the Mexican tuna industry from taking action to re-balance the competitive opportunities between Mexican tuna products and like products originating in other countries by labeling their tuna products as dolphin safe and promoting the legitimacy and integrity of the AIDCP standards. This has led to a situation whereby tuna and tuna products from certain countries are prevalent in the U.S. market, while it is not commercially viable to sell imported Mexican tuna products in the U.S. market.

- As in the case of Mexico's claim under Article III:4, although the U.S. measures apply to the labeling of tuna products, they have an indirect discriminatory effect on Mexican tuna. By virtue of the U.S. measures, tuna products containing Mexican tuna cannot be designated as dolphin safe. As a consequence, fish canneries located in other WTO members will not accept Mexican tuna for processing into tuna products. These canneries will, however, accept tuna in other countries that can be designated dolphin safe once processed.

187. This *de facto* discrimination between Mexican tuna products and like tuna products originating in other countries modifies the conditions of competition in the U.S. tuna products market to the detriment of imported products originating in a WTO Member, namely tuna products originating in Mexico. Similarly, the *de facto* discrimination between Mexican tuna and like tuna originating in other countries modifies the conditions of competition in the U.S. cannery market to the detriment of tuna originating in Mexico. In this way, the U.S. measures violate the most-favoured-nation obligation in Article I:1 of the GATT 1994.

188. As in the case of Mexico's Article III:4 claim, the action that would be required of the Mexican fleet to enable Mexican tuna products to be designated as dolphin safe under the U.S. measures illustrates how the balance of competitive opportunities between like imported products has been modified. The Mexican fleet would either have to abandon fishing for tuna in its traditional fishing grounds or continue to fish for tuna in the ETP but abandon its fishing method for an alternative method. Both of these options would require the Mexican fleet to incur considerable financial and other costs. These costs would be passed on to Mexican tuna and tuna products, making them less competitive in the U.S. market relative to like imported products which do not have to incur such additional costs. The second option also has a substantial environmental cost because the most environmentally responsible method for fishing tuna in the ETP would be replaced with an alternative method that involves substantially more bycatch and a substantial adverse impact on ETP tuna and other sealife. In the long term, this environmental impact would further increase the cost of the Mexican tuna fleet as the mature tuna fishery declines because of the depleted stocks of immature tuna. By any standard, an internal measure that increases the cost of imported products originating in certain WTO Members in order to participate in a domestic market but does not increase the cost of like products originating in other countries violates the most-favoured-nation obligation in Article I:1 of the GATT 1994.

189. The U.S. measures prohibit legitimate actions that could otherwise be taken in a free market and thereby modify the conditions of competition to the detriment of Mexican products.

190. For these reasons, the U.S. measures are inconsistent with Article I:1 of the GATT 1994.

3. Conclusions

191. On the basis of the foregoing, the U.S. measures are inconsistent with Articles III:4 and I:1 of the GATT 1994. Moreover, on the basis of the relevant facts, none of the general exceptions in the GATT 1994 apply to the U.S. measures.[124]

B. Claims Under The TBT Agreement

192. The U.S. measures are a technical regulation that is inconsistent with Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

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[124] Should the United States invoke any of the general exceptions, Mexico will address the United States' arguments in its subsequent submissions.

1. The U.S. Measures Constitute A Technical Regulation

193. The obligations in Articles 2.1, 2.2, and 2.4 of the TBT Agreement apply to technical regulations.

194. The U.S. measures constitute a technical regulation within the meaning of the TBT Agreement. Pursuant to Annex 1.1 of the Agreement, a technical regulation is defined as a:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.
>
> *Explanatory note*
>
> The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

195. In this instance, the "document" comprises the statutory and regulatory provisions that make up the labeling provisions. A document must meet three criteria in order to fall within the definition of a technical regulation:

> (1) the document must apply to an identifiable product or group of products;
>
> (2) the document must lay down one or more characteristics of the product; these product characteristics may be intrinsic, or they may be related to the product;
>
> (3) compliance with the product characteristics must be mandatory.[125]

a. The First Criterion

196. The first criterion is met. The provisions of the DPCIA apply specifically to a "tuna product" as defined in Section 1385(c)(5):

> the term "tuna product" means a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.[126]

This is the identifiable group of products to which the document applies.

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[125] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paras. 66-70; Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 176.

[126] *See* 16 U.S.C. §1385(c)(5). Appendix A.

b. The Second Criterion

197. The second criterion is also met. The definition expressly includes "marking or labelling requirements". The Appellate Body has clarified that a "labeling requirement" is a product characteristic.[127] Moreover, a "product characteristic" includes not only features and qualities intrinsic to the product itself, but related "characteristics", such as the means of identification, the presentation and the appearance of the product.[128] Under this interpretation, a "means of identification" is itself a product characteristic.[129] Thus, the label on a product is itself a product characteristic.[130]

198. The U.S. measures govern the conditions under which a tuna product can be labeled as "dolphin safe". This requirement is a product characteristic of the tuna product that is laid down by the U.S. measures.

c. The Third Criterion

199. With regard to the third criterion, the Appellate Body has stated as follows:

> The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance*" with the "product characteristics" laid down in the "document" must be "*mandatory*". A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".[131]

200. Under the DPCIA, 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 purse-seine net intentionally deployed on or to encircle dolphins. This prohibition against the use of the "dolphin safe" label remains in force even when the international standards of the AIDCP are met. Accordingly, the regulation is mandatory.

201. In *EC - Asbestos*, the Appellate Body determined that product characteristics may be prescribed or imposed in either a positive or a negative form:

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[127] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 67.

[128] *Id*.

[129] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 191.

[130] Panel Report, *European Communities – Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Complaint by Australia), WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005, para. 7.449.

[131] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 68.

> "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products must possess certain "characteristics", or the document may require, negatively, that products must not possess certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.[132]

202. This passage supports the view that the prohibition set out in the DPCIA satisfies the third criterion. Tuna products offered for sale in the United States must not possess certain characteristics (*i.e.,* distinguishing marks – the dolphin safe label or any other analogous label or mark) unless the prescribed requirements are met.

203. Even if the labeling scheme were not to be considered *a priori* mandatory, it is *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin safe designation.

2. The Measures Are Inconsistent With Article 2.2

204. Article 2.2 provides:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

205. A technical regulation creates an unnecessary obstacle to international trade if its objective is not legitimate or if the regulation is more trade-restrictive than necessary to fulfill a legitimate objective taking account of the risks non-fulfillment would create. Accordingly, two issues must be addressed under this provision, specifically, whether the technical regulation:

> (1) fulfils a legitimate objective; and

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[132] *Id*., para. 69; see also Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 176 and Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, paras. 7.43-7.45; and Panel Report, *European Communities – Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Complaint by Australia), WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005, paras. 7.454-7.456.

(2) is not more trade-restrictive than necessary to fulfil such objective taking account of the risks non-fulfillment would create.

a. The Measures Do Not Fulfill A Legitimate Objective

206. The term "fulfil" means "bring to consummation; perform, carry out (a task); comply (with conditions)".[133] As specified in the text of Article 2.2., "legitimate objective" includes "the protection of … animal … life or health, or the environment". Accordingly, it must be determined whether the U.S. measures (i.e., the technical regulation at issue) perform or carry out the protection of animal life or health or the environment or some other legitimate objective.

207. The evidence indicates that the U.S. measures do not protect animal life or health or the environment in the general sense. Rather, the measures fulfil the opposite of these legitimate objectives by: (i) promoting the use of alternative fishing methods that result in enormously higher bycatch and therefore wasteful depletion of ocean sealife; and (ii) by undermining the economic incentive for countries and fishing fleets to participate in a very successful multilateral environmental agreement.

208. The objective of the U.S. measures is narrower than the protection of animal life or health or the environment. It is to preserve dolphin stocks in the course of tuna fishing operations in the ETP. This objective is confirmed by the nature of the measures (i.e., dolphin safe labeling and special rules for the ETP tuna fishery) and in Section 1385(b) of the DPCIA, which sets out certain findings by the Congress.[134]

209. Accordingly, the U.S. measures trade off the protection of the life or health of other animals and the protection of the environment in general against the professed protection of the life or health of a single marine species in the geographic confines of the ETP. Using the 2007 IATTC data referred to above, for every dolphin or other marine mammal killed in the ETP using the prohibited method (i.e., purse-seine sets upon dolphins), the alternative fishing methods that are favoured by the U.S. measures killed 1,526 other marine animals.

210. In Mexico's view, measures that trade off the life or health of different animal species in this manner and magnitude and which undermine broader environmental objectives that are enshrined in a successful multilateral environmental agreement cannot be found to "fulfil a legitimate objective" within the meaning of Article 2.2 of the TBT Agreement.

211. In the alternative, even if such measures could in principle be found to fulfil a legitimate objective, the U.S. measures do not fulfil their stated objective of preserving dolphin stocks in

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[133] The *Concise Oxford English Dictionary*, Ninth Edition, Della Thompson (ed.) (Oxford University Press, 1995), p.547. MEX-53.

[134] The legislation stated the following findings: "(1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world; (2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and (3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins." Appendix A.

the ETP. In examining whether the measures fulfil this objective, the panel must consider not only the express legal provisions of the measures, but also their design, architecture and structure.[135] For the following reasons, the U.S. measures do not fulfil their stated objective:

- The protection of dolphins in the ETP tuna fishery and the consequent preservation of dolphin stocks is governed by the highly successful AIDCP, an agreement to which the U.S. is a signatory. The U.S. measures do not add to that protection, particularly in respect of the actions of fishing fleets from countries that are signatories to the AIDCP and that are already fishing in the most environmentally responsible manner. All the U.S. measures accomplish is to block imports of tuna products and tuna from those countries and, thereby, protect the U.S. tuna industry. The U.S. measures will not influence or modify the conduct of the ETP tuna fishery so as to further preserve dolphin stocks. If anything, by withdrawing the economic incentive for countries and fishing fleets to comply with the AIDCP, the U.S. measures undermine the viability of the very agreement that has reduced dolphin mortality from approximately 100,000 dolphins per year to less than 1 percent of that amount. Clearly, undermining such an essential multilateral environmental agreement does not fulfil the objective of preserving dolphin stocks in the ETP.

- An important aspect of the U.S. measures is the court ruling, which is at the core of the measures. The ruling goes against the requirements of the applicable international agreement (i.e., the AIDCP) and against the determination of the U.S. administration. Both the AIDCP and the U.S. executive branch supported the view that the legitimate environmental objective at issue – the preservation of dolphin stocks – is fulfilled by the standard for dolphin safe labeling to which the United States agreed in the Panama Declaration and the interpretation of the dolphin safe labeling law that was overturned by the court. Importantly, the key underlying factual premise of the court's ruling – the belief that dolphin stocks in the ETP were not recovering – was later shown to be incorrect.[136] Thus, the court ruling does not fulfil the objective of preserving dolphin stocks in the ETP.

- The statute itself, by creating the possibility for the United States to go back on its international commitment to implement the dolphin safe labeling standard to which it agreed in the Panama Declaration, and which was the basis for the later adoption of the AIDCP, also does not fulfil a legitimate objective. The new and additional condition unilaterally adopted by the United States – requiring that a determination be made by the Commerce Department based on a vague standard, without consultation with the IATTC, and subject to reversal by courts without

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[135] Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R, para. 7.200. Although the panel made this statement in the context of Article XX of the GATT 1994, it is equally applicable to the examination of whether a technical requirement fulfils a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.

[136] NOAA Technical Memorandum NMFS, *supra*. MEX-33.

scientific expertise – was designed primarily to fulfil the objective of satisfying domestic political interests. The fact that the United States does not apply the same strict standards to other fisheries – including those within its own territorial waters – affirms that the current purpose of the unique restrictions on the ETP are not based on environmental concerns nor on preserving dolphin stocks.

212. For these reasons, the U.S. measures do **not** fulfil a legitimate objective. Accordingly, the U.S. measures are inconsistent with Article 2.2 of the TBT Agreement.

b. The U.S. Measures Are More Trade-Restrictive Than Necessary Taking Account Of The Risks Non-Fulfillment Would Create

213. In the alternative, if the U.S. measures are found to fulfil a legitimate objective, the measures are more trade-restrictive than necessary to fulfil that legitimate objective taking into account the risks non-fulfillment would create.

214. There is no WTO jurisprudence on the meaning of the phrase "more trade-restrictive than necessary to fulfil a legitimate objective taking into account the risks non-fulfillment would create".

(i) "Trade Restrictive"

215. The ordinary meaning of "restrictive" is "imposing restrictions"; "restriction" is "the act or an instance of restricting; the state of being restricted"; and "restrict" is "confine, bound, limit".[137]

216. The meaning of "restriction" has been elaborated upon in jurisprudence concerning other WTO provisions. The term "restriction" should not be given a narrow meaning.[138] A "disguised restriction" in the context of Article XX of the GATT 1994 has been interpreted to include "disguised discrimination in international trade".[139] Any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1 of the GATT 1994.[140] In the context of Article XI and other non-discrimination provisions of the

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[137] *The Concise Oxford English Dictionary*, Ninth Edition, Della Thompson (ed.) (Oxford University Press, 1995),.p. 1174. MEX-53.

[138] Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, para. 8.235.

[139] Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, para. 66.

[140] Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, para. 7.265.

GATT 1994, it has been found that GATT disciplines on the use of restrictions are not meant to protect "trade flows", but rather the "competitive opportunities of imported products".[141]

217. On the basis of the foregoing, measures that are "trade restrictive" include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imports.

(ii) "Necessary"

218. The ordinary meaning of "necessary" is "requiring to be done, achieved; requisite, essential".[142] Although the term "necessary" has not been interpreted by a WTO panel or the Appellate Body in the context of Article 2.2 of the TBT Agreement, it has been interpreted in the context of Articles XX(b) and XX(d) of the GATT 1994 and Article XIV of the GATS. In these contexts, the following statements have been made about the meaning of this term:

- "[I]n order to determine whether a measure is 'necessary' within the meaning of Article XX(b), a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake."[143]

- "[A]s used in Article XX(d), the term 'necessary' refers to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable' and, at the other end, is 'necessary' taken to mean as 'making a contribution to'. A 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[144]

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[141] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW2/ECU, adopted 17 December 2008, as modified by the Appellate Body Report, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, para. 7.331, Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, as upheld by the Appellate Body Reports, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, para. 7.678.

[142] *The Concise Oxford English Dictionary*, Ninth Edition, Della Thompson (ed.) (Oxford University Press, 1995) p. 910. MEX-53.

[143] Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para. 178 (footnotes removed).

[144] 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, para. 160-161.

- In the context of interpreting Article XX(d), the determination of whether a measure, which is not "indispensable", may nevertheless be "necessary", involves in every case a process of weighing and balancing a series of factors.[145] The question is whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".[146]

- In the context of Article XIV(a) of the GATS, the assessment of the necessity of a measure involves a weighing and balancing of the relative importance of the interests or values furthered by the challenged measure, along with other factors, which will usually include the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.[147]

219. Accordingly, for a measure to be "necessary", the following factors must be examined, weighed and balanced: the importance of the interests or values at stake; the extent of the contribution of the measure to the achievement of the measure's objective; the trade restrictiveness of the measure; and whether there are reasonably available alternative measures which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.

(iii) "Risks Non-fulfillment Would Create"

220. The relevant part of Article 2.2. of the TBT Agreement states:

> […] technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create. […] In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

221. The ordinary meaning of "risk" is "a chance or possibility of danger, loss, injury, or other adverse consequences".[148] The phrase "risks non-fulfillment would create" refers to the chance or possibility of adverse consequences should the legitimate objective not be carried out. In assessing this chance or possibility, the Panel should consider available scientific and technical information.

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145 *Id*., para. 164.

146 *Id.*, para. 166.

147 Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005, paras. 304-311.

148 *The Concise Oxford English Dictionary*, Ninth Edition, Della Thompson (ed.) (Oxford University Press, 1995), p. 1189.- MEX-53.

(iv) Application To The Facts Of This Dispute

222. On the basis of the foregoing and in the context of the facts of this dispute, the phrase "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create" means:

> The U.S. measures shall not be more trade-restrictive (i.e., deny competitive opportunities to imports of Mexican tuna products and tuna) than necessary (i.e., in light of the importance of the objective of preserving dolphin stocks in the ETP tuna fishery and the contribution of the U.S. measures to the achievement of that objective, there are no reasonably available less trade-restrictive measures that provide an equivalent contribution to the achievement of the objective), taking account of the risks non-fulfillment would create (i.e., in light of the available scientific and technical information, the chance or possibility of adverse consequences should the objective not be carried out).

223. The U.S. measures do not meet this requirement.

224. The preservation of dolphin stocks in the ETP tuna fishery is an important objective. According to available scientific and technical information, that objective is being fulfilled by the AIDCP, an existing multilateral environmental agreement to which the U.S. is a signatory. The U.S. measures do not further contribute to the achievement of this objective. In the absence of the U.S. measures, the preservation of dolphin stocks in the ETP tuna fishery will continue to be accomplished by the requirements and procedures of the AIDCP. Since the U.S. measures are not necessary, the fact they deny competitive opportunities to Mexican tuna products and tuna and thereby create trade restrictions means that they are more trade-restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement.

225. In this way, the U.S. measures are inconsistent with Article 2.2 of the TBT Agreement.

3. The U.S. Measures Are Inconsistent with Article 2.4

226. The U.S. dolphin safe labeling measures are not based on an existing relevant international standard, contrary to the obligation contained in Article 2.4 of the TBT Agreement.

227. Article 2.4 of the TBT Agreement states:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

228. The U.S. measures are inconsistent with Article 2.4 of the TBT Agreement because: (a) a relevant international standard exists; (b) the United States failed to base its regulation on that

international standard; and (c) the relevant international standard is not an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued.

a. AIDCP Standard

229. On June 20, 2001, the Parties to the AIDCP adopted the "Resolution To Adopt The Modified System For Tracking And Verification Of Tuna**"**. That resolution includes the following definitions:

> The terms used in this document are defined as follows:
>
> a. *Dolphin safe* tuna is tuna captured in sets in which there is no mortality or serious injury of dolphins;
>
> b. *Non-dolphin safe* tuna is tuna captured in sets in which mortality or serious injury of dolphins occurs ....[149]

230. On that same date (June 20, 2001), the Parties to the AIDCP also adopted the "Resolution To Establish Procedures For AIDCP Dolphin Safe Tuna Certification." That document states that "[t]he terms used in this document are as defined in the AIDCP System for Tracking and Verification of Tuna."[150] Accordingly the AIDCP's definitions of "dolphin safe" and "non-dolphin safe" apply with respect to the AIDCP's rules on dolphin safe certification.

b. The AIDCP Standard Is A Relevant International Standard

231. According to the reasoning followed by the panel in *EC – Sardines*, before addressing the question of whether an international standard is relevant, it must first be determined that an international standard exists.[151]

(i) International Standard

232. An international standard exists if such document meets the definition of "standard" provided in Annex 1.2 of the TBT.[152] Annex 1.2 of the TBT Agreement defines "standard" as a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

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149 MEX-55. Hereinafter, these definitions are referred to as the "AIDCP Standard."

150 MEX-56.

151 Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, para. 7.63.

152 *Id*.

233. Mexico submits that the AIDCP Standard is a standard for purposes of Annex 1.2 of the TBT Agreement for the following reasons:

234. *The AIDCP provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods*. The AIDCP Standard provides rules expressly dealing with the characterization of tuna as dolphin safe and non-dolphin safe.

235. *Compliance with the AIDCP dolphin safe certification standard is not mandatory*. Section 2.1 of the Resolution To Establish Procedures For AIDCP Dolphin Safe Tuna Certification provides: "Application of the procedures for the use of the *AIDCP Dolphin Safe* Tuna Certificate shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of a Party."

236. *The AIDCP Standard is a document approved by a recognized body*. The AIDCP Standard was prepared and approved by the AIDCP member governments, which constitute a recognized body. In this regard the TBT Agreement does not define "recognized body," but Annex I of the TBT Agreement, captioned "Terms and Their Definitions for the Purpose of this Agreement, provides in a prefatory paragraph that:

> The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

237. 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." The AIDCP fits this definition. 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." The AIDCP also fits this definition, as it is composed of governments and is administered by the Secretariat of the IATTC.

238. A "standardizing body," under Article 4.3, is a "[b]ody that has recognized activities in standardization." Under Article 1.1, "standardization" is "[a]ctivity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of an optimum degree of order in a given context." A "provision," per Article 7.1, is an "[e]xpression in the content of a normative document, that takes the form of a statement, an instruction, a recommendation, or a requirement."[153] Taking all this into account, the characterization of tuna as dolphin safe is an activity that falls within the definition of a "provision" suitable for "standardization," and the AIDCP organization is a "recognized body" for purposes of the definition of a "standard" in Annex I.2 of the TBT Agreement.

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[153] Pursuant to Article 3.1, a "normative document" is a "Document that provides rules, guidelines or characteristics for activities or their results." Article 7.2 provides that a "statement" is a "Provision" that conveys information, while Article 7.3 provides that an "instruction" is a "Provision that conveys an action to be performed." Pursuant to Article 7.4, a "recommendation" is a "Provision that conveys advice or guidance," while Article 7.5 provides that a "requirement" is a "Provision that conveys criteria to be fulfiled."

239. For these reasons, the AIDCP Standard falls within the definition of "standard" contained in Annex 1.2 of the TBT Agreement.

(ii) Relevant

240. As to the characteristic of "relevant", in *EC – Sardines*, the panel articulated that for a international standard to be considered relevant it "must *bear upon, relate to or be pertinent"* to the challenged measure.[154] Hence, the issue that must be addressed is whether the AIDCP bears upon, relates to or is pertinent to the tuna labeling measures.

241. The AIDCP Standard, as incorporated into the Resolution To Establish Procedures For AIDCP Dolphin Safe Tuna Certification, is used to determine when tuna and tuna product can be certified as dolphin safe and bear a dolphin safe label.[155] Therefore, it serves the exact same purpose as the U.S. dolphin safe label measures. Moreover, the measures apply to the same product, i.e. tuna, which are caught in the same area,[156] and are then processed into canned tuna and bear a dolphin safe label.

242. Accordingly, the AIDCP Standard is "relevant" within the meaning of Article 2.4.

c. The United States Failed To Base Its Regulation On The Relevant International Standard

243. Article 2.4 of the TBT Agreement recognizes the importance of relevant international standards and sets out the obligation that Members "shall use them, or the relevant parts of them, as a basis for their technical regulations".

244. In interpreting the meaning of the phrase "as a basis for", the Appellate Body observed:

> From these various definitions, we would highlight the similar terms 'principal constituent', 'fundamental principle', 'main constituent', and 'determining principle' – all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other.[157]

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[154] Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, para. 7.68. Accepted in the Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 230.

[155] *See, e.g.* Section 1 (Definitions): "AIDCP *Dolphin Safe Tuna* Label: Graphic representation which distinguishes *dolphin safe* tuna and tuna products, as defined in the System for Tracking and Verifying Tuna, which can be used on the packaging of tuna certified under this resolution." MEX-55.

[156] See, the definition of of :eastern tropical Pacific Ocean" set out in 16 U.S.C. §1385(c)(2) and the definition of "Agreement Area" as set out in the Annex I of the AIDCP.

[157] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 245.

245. The United States contemplated the application of the AIDCP Standard – which is incorporated into the U.S. national statute – but rejected its application in favour of a unilateral standard, a setting of nets on dolphins standard. Under these circumstances, it is obvious that the current U.S. standard is not "based on" the AIDCP Standard.

246. In *EC – Sardines*, the Appellate Body explained that when a technical regulation that conflicts with an international standard, the technical regulation is not "based" on that standard. It stated specifically:

> In our view, it can certainly be said—at a minimum—that something cannot be considered a "basis" for something else if the two are contradictory. Therefore, under Article 2.4, if the technical regulation and the international standard contradict each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.[158]

247. In view of the fact that the U.S. dolphin safe labeling measures stipulate rules for labeling tuna that directly contradict the guidelines contained in the AIDCP, Mexico claims that the United States did not use the AIDCP Standard as a basis for its dolphin safe labeling measures.

d. The Relevant International Standard Does Not Constitute An Ineffective Or Inappropriate Means For The Fulfillment Of The Legitimate Objectives Pursued

248. As part of Mexico's claim under Article 2.2 of the TBT Agreement, Mexico has explained why the U.S. measures do not pursue a legitimate objective. Mexico hereby reaffirms this conclusion, for purposes of describing the violations of Article 2.4 of the TBT Agreement.[159]

249. However, in the event that the Panel concludes that the measures pursue a legitimate objective, Mexico submits that the AIDCP Standard is an effective and appropriate means for the fulfillment of a legitimate objective.

250. With respect to the meaning of the terms "ineffective" or "inappropriate", the Panel in *EC – Sardines* explained:

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158 *Id*., para. 248.

159 Regarding "legitimate objectives", the Appellate Body in *EC-Sardines* concluded: "As to the second question, we are of the view that the Panel was also correct in concluding that the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which refers also to "legitimate objectives", and includes a description of what the nature of some objectives can be. Two implications flow from the Panel's interpretation. First, the term 'legitimate objectives' in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: 'national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.' Second, given the use of the term 'inter alia' in Article 2.2, the objectives covered by the term 'legitimate objectives' in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure." *Id*., para. 286.

> Concerning the terms "ineffective" and "inappropriate", we note that "ineffective" refers to something which is not "having the function of accomplishing", "having a result", or "brought to bear", whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting". Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfillment of the legitimate objective pursued.[160] (Emphasis added)

The Panel added that the "question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed."[161]

251. The AIDCP Standard is an effective means for achieving the pursued objective of protecting dolphins. Dolphin mortality in the ETP has decreased 99%.[162] This result demonstrates the effectiveness of the AIDCP Standard. Moreover, as the United States, an original Party to the AIDCP, agreed to the standard itself, it can be concluded that AIDCP standard is an effective means for accomplishing the objective of informing consumers that tuna was fished in a manner safe for dolphins.

252. The AIDCP Standard is also an appropriate means for achieving the pursued objective of protecting dolphins. Not only has the AIDCP Standard been effective in decreasing the dolphin mortality, it allows the best method of fishing for tuna. The use of other fishing methods, such as FADs, create a large amount of bycatch which does not occur at nearly the same rates with the methods used by the Mexican fleet.[163]

253. For these reasons, Mexico is of the view that the relevant international standard, the AIDCP Standard, constitutes an effective and appropriate means for the fulfillment of the objective of informing consumers.

254. Accordingly, the U.S. measures are inconsistent with Article 2.4 of the TBT Agreement.

4. The U.S. Measures Are Inconsistent with Article 2.1

255. Article 2.1 provides as follows:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable

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160 Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, para. 7.116.

161 *Id*.

162 *See supra* Section II.B.1.

163 *See supra* Section II.A.3.c.

> than that accorded to like products of national origin and to like products originating in any other country

256. This provision of the TBT Agreement imposes national treatment and most-favoured-nation treatment obligations on technical regulations. It is similar to the national treatment obligation in Article III:4 of the GATT 1994, except that it applies both national treatment and most-favoured-nation obligations. Like Articles I:1 and III:4 of the GATT 1994, Article 2.1 prohibits both *de jure* discrimination and *de facto* discrimination.[164].

257. The essential elements of an inconsistency with Article 2.1 are: (i) that the measure at issue is a "technical regulation"; (ii) that products of national origin and products originating in any other country are "like products" with respect to the imported products within the meaning of that provision; and (iii) that the imported products are accorded "less favourable" treatment than that accorded to like products of national origin and to like products originating in any other country.[165]

258. As discussed above, the U.S. measures are a technical regulation.

259. The meaning of the term "like products" in Article 2.1 has not been elaborated upon in WTO jurisprudence. Given that the language in Article 2.1 is similar to that in Article III:4 of the GATT 1994, it is reasonable to use the four criteria used to determine likeness under Article III:4 discussed above, reviewed in the proper context and in consideration of the object and purpose, to assist in determining likeness under Article 2.1. As discussed above, all criteria indicate that tuna and tuna products, irrespective of which country they originate, are like products.

260. For the same reasons set out above for Mexico's claim under GATT Article III:4, the U.S. measures do not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products of national origin.

261. For the same reasons set out above for Mexico's claim under GATT Article I:1, the U.S. measures do not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products originating in any other country.

262. For these reasons, the U.S. measures are inconsistent with Article 2.1 of the TBT Agreement.

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[164] In *Canada – Autos*, the Appellate Body observed that Article III:4 of the GATT 1994 covered both *de jure* and *de facto* inconsistency and, on this basis, found that a similar provision that disciplined measures that favoured the use of domestic over imported goods (i.e., Article 3.1(a) of the SCM Agreement) would also apply not only to *de jure* inconsistency but to *de facto* inconsistency. The same reasoning applies to Article 2.1 of the TBT Agreement which is even more analogous to Article III:4 than Article 3.1(a) of the SCM Agreement. See Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 140.

[165] Panel Report, *European Communities - Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Complaint by Australia), WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005, para. 7.444.

VI. CONCLUSIONS

263. 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.

Appendix A
16 U.S.C. § 1385

16 U.S.C. § 1385. Dolphin protection

(a) SHORT TITLE

This section may be cited as the "Dolphin Protection Consumer Information Act".

(b) FINDINGS

The Congress finds that–

(1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world;

(2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and

(3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.

(c) DEFINITIONS

For purposes of this section —

(1) the terms "driftnet" and "driftnet fishing" have the meanings given those terms in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 **(**16 U.S.C. § 1822 note);

(2) the term "eastern tropical Pacific Ocean" means the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America;

(3) the term "label" means a display of written, printed, or graphic matter on or affixed to the immediate container of any article;

(4) the term "Secretary" means the Secretary of Commerce; and

(5) the term "tuna product" means a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.

(d) LABELING STANDARD. —

(1) It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "dolphin safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested--

(A) on the high seas by a vessel engaged in driftnet fishing;

(B) outside the eastern tropical Pacific Ocean by a vessel using purse seine nets--

(i) in a fishery in which the Secretary has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean), unless such product is accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

(ii) in any other fishery (other than a fishery described in subparagraph (D)) unless the product is accompanied by a written statement executed by the captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested;

(C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin safe under paragraph (2); or

(D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary.

(2) For purposes of paragraph (1)(C), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets is dolphin safe if—

(A) the vessel is of a type and size that the Secretary has determined, consistent with the International Dolphin Conservation Program, is not capable of deploying its purse seine nets on or to encircle dolphins; or

(B) (i) the product is accompanied by a written statement executed by the captain providing the certification required under subsection (h);

(ii) the product is accompanied by a written statement executed by-

(I) the Secretary or the Secretary's designee;

(II) a representative of the Inter-American Tropical Tuna Commission; or

(III) an authorized representative of a participating nation whose national program meets the requirements of the International Dolphin Conservation Program,

which states that there was an observer approved by the International Dolphin Conservation Program on board the vessel during the entire trip and that such observer provided the certification required under subsection (h); and

(iii) the statements referred to in clauses (i) and (ii) are endorsed in writing by each exporter, importer, and processor of the product; and

(C) the written statements and endorsements referred to in subparagraph (B) comply with regulations promulgated by the Secretary which provide for the verification of tuna products as dolphin safe.

(3)(A) The Secretary of Commerce shall develop an official mark that may be used to label tuna products as dolphin safe in accordance with this Act.

(B) A tuna product that bears the dolphin safe mark developed under subparagraph (A) shall not bear any other label or mark that refers to dolphins, porpoises, or marine mammals.

(C) It is a violation of section 45 of title 15 to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the mark developed under subparagraph (A) unless—

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

(ii) the label is supported by a tracking and verification program which is comparable in effectiveness to the program established under subsection (f) of this section; and

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

(D) If the Secretary determines that the use of a label referred to in subparagraph (C) is substantially undermining the conservation goals of the International Dolphin Conservation Program, the Secretary shall report that determination to the United States Senate Committee on Commerce, Science, and Transportation and the United States House of Representatives Committees on Resources and on Commerce, along with recommendations to correct such problems.

(E) It is a violation of section 45 of title 15 willingly and knowingly to use a label referred to in subparagraph (C) in a campaign or effort to mislead or deceive consumers about the level of protection afforded dolphins under the International Dolphin Conservation Program.

* * *

(g) SECRETARIAL FINDINGS.--(1) Between March 1, 1999, and March 31, 1999, the Secretary shall, on the basis of the research conducted before March 1, 1999, under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make an initial finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The initial finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

(2) Between July 1, 2001, and December 31, 2002, the Secretary shall, on the basis of the completed study conducted under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make a finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

(h) CERTIFICATION BY CAPTAIN BY OBSERVER.--

(1) Unless otherwise required by paragraph (2), the certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified in subsection (d)(2)(B)(ii) shall be that no dolphins were killed or seriously injured during the sets in which the tuna were caught.

(2) The certification by the captain under subsection (d)(2)(B)(i) and the certification provided by the observer as specified under subsection (d)(2)(B)(ii) shall be that 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 during the sets in which the tuna were caught, if the tuna were caught on a trip commencing--

(A) before the effective date of the initial finding by the Secretary under subsection (g)(1);

(B) after the effective date of such initial finding and before the effective date of the finding of the Secretary under subsection (g)(2), where the initial finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock; or

(C) after the effective date of the finding under subsection (g)(2), where such finding is that the intentional deployment of or encirclement of dolphins is having a significant adverse impact on any such depleted stock.

Appendix B
50 CFR 216.91 and .92

216.91 Dolphin safe labeling standards.

(a) It is a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna products that are exported from or offered for sale in the United States to include on the label of those products the term "dolphin safe" or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins if the products contain tuna harvested:

(1) *ETP large purse seine vessel.* In the ETP by a purse seine vessel of greater than 400 st (362.8 mt) carrying capacity unless:

(i) the documentation requirements for dolphin safe tuna under § 216.92 and 216.93 are met;

(ii) No dolphins were killed or seriously injured during the sets in which the tuna were caught; and

(iii) None of the tuna were caught on a trip using a purse seine net intentionally deployed on or to encircle dolphins, provided that this paragraph (a)(1)(iii) will not apply if the Assistant Administrator publishes a notification in the Federal Register announcing a finding under 16 U.S.C. 1385(g)(2) that the intentional deployment of purse seine nets on or encirclement of dolphins is not having a significant adverse impact on any depleted stock.

* * *

(3) *Driftnet.* By a vessel engaged in large-scale driftnet fishing; or

(4) *Other fisheries.* By a vessel in a fishery other than one described in paragraphs (a)(1) through(a)(3) of this section that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement, executed by the Captain of the vessel and an observer participating in a national or international program acceptable to the Assistant Administrator, that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught,

provided that the Assistant Administrator determines that such an observer statement is necessary.[1]

§ 216.92 Dolphin safe requirements for tuna harvested in the ETP by large purse seine vessels.

(a) *U.S. vessels.* Tuna products that contain tuna harvested by U.S. flag purse seine vessels of greater than 400 st (362.8 mt) carrying capacity in the ETP may be labeled dolphin safe only if the following requirements are met:

(1) Tuna Tracking Forms containing a complete record of all the fishing activities on the trip, certified by the vessel Captain and the observer, are submitted to the Administrator, Southwest Region, at the end of the fishing trip during which the tuna was harvested;

(2) The tuna is delivered for processing to a U.S. tuna processor in a plant located in one of the 50 states, Puerto Rico, or American Samoa that is in compliance with the tuna tracking and verification requirements of § 216.93; and

(3) The tuna or tuna products meet the dolphin safe labeling standards under § 216.91.

(b) *Imported tuna.*

(1) Yellowfin tuna or tuna products harvested in the ETP by vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States may be labeled dolphin safe only if the yellowfin tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that has obtained an affirmative finding under§ 216.24(f)(8).

(2) Tuna or tuna products, other than yellowfin tuna, harvested in the ETP by purse seine vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States may be labeled dolphin safe only if:

(i) The tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that is a Party to the Agreement on the IDCP or has applied to become a Party and is adhering to all the requirements of the Agreement on the IDCP Tuna Tracking and Verification Plan; accompanied by a properly completed FCO; and

[1] The U.S. Government has not designated any other tuna fishery as having a regular and significant mortality or serious injury of dolphins.

(iii) The tuna or tuna products are accompanied by valid documentation signed by a representative of the appropriate IDCP member nation, containing the harvesting vessel names and tuna tracking form numbers represented in the shipment, and certifying that:

(A) There was an IDCP approved observer on board the vessel(s) during the entire trip(s); and

(B) The tuna contained in the shipment were caught according to the dolphin safe labeling standards of § 216.91.