

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(WT/DS381)



**Executive Summary of the
First Written Submission of the
United Mexican States**

15 April 2014

I. INTRODUCTION

1. This proceeding concerns a disagreement as to the consistency with the WTO covered agreements of measures taken to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (Tuna dispute).
2. In the original proceedings, Mexico demonstrated that the multilateral Agreement on International Dolphin Conservation Program (AIDCP) has been a tremendous success, reducing dolphin mortality in the Eastern Tropical Pacific (ETP). Mexico also showed that the alternative method of fishing on fish aggregating devices (FADs) promoted by the United States is extremely harmful to tuna stocks because that method captures juvenile tuna. FAD fishing also results in highly destructive bycatch of billfish, turtles, sharks, and other species.
3. On 13 June 2012, the DSB adopted the reports and ruled that the U.S. “dolphin-safe” labelling provisions were inconsistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and recommended that the United States bring its measure into conformity with its obligations under that Agreement.
4. On 9 July 2013, the United States published in its Federal Register a Final Rule entitled “Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products” (2013 Final Rule). The action taken by the United States does not bring its measure into compliance with the WTO Agreements, and also perpetuates a tragic situation for dolphins worldwide and the global marine environment. Although the “effective date” of the Final Rule was stated to be July 13, 2013, the notice accompanying its publication also stated that the United States would not require compliance until 1 January 2014.
5. The “measure taken to comply with the recommendations and rulings” of the DSB (Amended Tuna Measure) comprises: (a) Section 1385 (“Dolphin Protection Consumer Information Act” (DPCIA)), as contained in Subchapter II (“Conservation and Protection of Marine Mammals”) of Chapter 31 (“Marine Mammal Protection”), in Title 16 of the U.S. Code; (b) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H (“Dolphin Safe Tuna Labeling”), as amended by the 2013 Final Rule; (c) The court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007); and (d) any implementing guidance, directives, policy announcements or any other document issued in relation to instruments (a) through (c) above, including any modifications or amendments in relation to those instruments.
6. The Amended Tuna Measure, like the original Tuna Measure, imposes discriminatory requirements for access to the United States’ “dolphin-safe” label in violation of Article 2.1 of the TBT Agreement, and Articles I:1 and III:4 of the GATT 1994.

II. THE AMENDED TUNA MEASURE

7. The Amended Tuna Measure entailed changes only to the implementing regulations, and not to either the DPCIA or the *Hogarth* ruling. Key aspects of the original Tuna Measure were maintained in the Amended Tuna Measure, particularly that tuna caught by setting on dolphins is not eligible for a dolphin-safe label.

A. The Dolphin Protection Consumer Information Act

8. In the original proceeding, the Panel reviewed the most pertinent aspects of the DPCIA. Those provisions remain unchanged. The three major categories of requirements of the DPCIA are (i) the definition/scope of “dolphin-safe,” (ii) the obligation to have independent observers ensuring compliance, and (iii) specification of the documentation needed to support the certification.

9. In accordance with subsection (d)(1)(C) of the statute, a tuna product containing tuna caught inside the ETP can be labeled as dolphin-safe only if the product is supported by: (a) 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; (b) a statement by the onboard, independent and AIDCP-approved observer, also providing certification under subsection (h); (c) a statement by the Secretary of Commerce, a Secretary’s designee, a representative of the Inter-American Tropical Tuna Commission (IATTC), or a representative of a nation whose national program meets the requirements of the AIDCP, stating that an AIDCP-approved observer was onboard during the entire trip.

10. The statute contemplated the possibility that the U.S. definition of “dolphin-safe tuna” could be made consistent with the definition in the AIDCP. This potential change in the dolphin-safe labelling standard for the ETP was made contingent on the outcome of studies of dolphin populations in the ETP. In 1999, the U.S. Department of Commerce (USDOC) made an Initial Finding that 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. The USDOC then did additional studies and, in a Final Finding issued in December 2002, reached the same conclusion that it had previously reached in the Initial Finding. These findings should have allowed the U.S. definition of “dolphin-safe” to be amended to allow tuna caught in compliance with the AIDCP to bear the dolphin-safe label. However, the U.S. courts, in the *Hogarth* case, held that the USDOC’s findings were not in accordance with the statute’s requirements, and ordered that the definition of “dolphin-safe” continue to ban the use of dolphin sets entirely. The statute does not permit that determination to be re-evaluated at any time in the future. For tuna caught outside the ETP using purse seine nets, the statute only requires a self-certification by the captain of the vessel that a purse seine net was not intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested. For tuna caught without the use of purse seine nets (e.g., longline or trawl), no certification is required at all. For tuna by a vessel less than 400 short tons, no certification is required at all. These requirements have been modified by the 2013 Final Rule.

11. In addition, the DPCIA purports to prohibit the use of the “dolphin-safe” label on tuna caught “on the high seas by a vessel engaged in driftnet fishing.” However, in actual operation this restriction has no meaning, because it has never been implemented by the Department of Commerce. Indeed, the United States itself allows fishing with driftnets in its Exclusive Economic Zone.

12. The DPCIA designates when a dolphin-safe certification must be supported by an independent observer. The DPCIA does not require independent observers outside the ETP,

except where the USDOC has designated a purse seine fishery as having a regular and significant association between tuna and dolphins or a non-purse seine fishery as having regular and significant dolphin mortality. The USDOC has not designated any fishery under these categories, so observers are not required for any fishery other than the ETP.

13. In the case of a tuna product containing tuna harvested in the ETP by a purse seine vessel, the DPCIA states that the certifications by the captain and observer must “comply with regulations promulgated by the Secretary which provide for the verification of tuna products as dolphin safe.” Those regulations incorporate the requirements for tuna tracking to which the members of the AIDCP have agreed. For other tuna products (i.e., non-ETP tuna), the DPCIA contains no requirement to verify the products as dolphin-safe.

14. Under U.S. law, implementing regulations may not change any of the requirements set out in the authorizing statute. Accordingly, all of the DPCIA’s requirements that were the subject of review by the Panel and Appellate Body remain in effect today, unchanged. The statute is therefore an integral element of the Amended Tuna Measure.

B. U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H

15. The implementing regulations for the DPCIA address the certifications for “dolphin-safe” and also impose specific requirements, which vary depending on whether the tuna is sourced from the ETP or elsewhere, for: segregating tuna; having independent observers on board vessels; and documenting and verifying compliance.

16. For tuna products made from tuna caught by large purse seine vessels in the ETP, the content of the certification requirement is the same as set forth in the DPCIA. For tuna products containing tuna caught outside the ETP with purse seine nets, the 2013 Final Rule changed the certification to require an additional statement from the captain of the vessel that no dolphins were killed or seriously injured in the sets in which the tuna were caught.

17. For tuna products containing tuna caught (i) not using purse seine nets or (ii) by smaller vessels, that did not require any certification, the 2013 Final Rule requires that all such tuna be supported by a captain’s statement that that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. Note that if the dolphin-set fishing method is used even a single time during a voyage, none of the tuna caught during the voyage may be designated as dolphin-safe, including tuna caught without using dolphin sets. The three major tuna products in the U.S. market – Starkist, Chicken of the Sea and Bumble Bee – jointly submitted comments on the new requirement for captains’ certifications from vessels not using purse seine nets, saying that such certificates will not be credible.

18. Under the original Tuna Measure, for tuna caught by large purse seine vessels in the ETP only, tuna caught in sets designated as dolphin-safe by the vessel observer must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading at port. For tuna caught outside the ETP, there were no such requirements. Under the Amended Tuna Measure, similar requirements for segregating purportedly now apply to all tuna and tuna products. However, because of the absence of monitoring, verification, and tracking requirements for non-ETP tuna products, the separation-of-tuna obligations for non-ETP tuna are unenforceable and meaningless.

19. For tuna caught by large purse seine vessels in the ETP, including vessels of the Mexican fleet, the original Tuna Measure requires an independent observer on every vessel to monitor

compliance with dolphin-safe requirements. The AIDCP requires that every large purse seine vessel carry an independent observer, and Mexico has implemented that requirement in its domestic regulations (NOM-001-SAG/PESC-2013).

20. Under the Tuna Measure, no requirements for independent observers were imposed other than for large purse seine vessels fishing in the ETP. The 2013 Final Rule appears to create the possibility that the USDOC could require independent observer verification of dolphin-safe certifications. However, the USDOC has neither made a determination that observers participating in any non-ETP observer program are so qualified and authorized, nor has it announced plans to even consider doing so.

21. Under the original Tuna Measure, tuna products containing tuna harvested in the ETP have to be supported not only by the required certification, but also by “the documentation requirements for dolphin-safe tuna under § 216.92 and 216.93”. These requirements have been maintained under the Amended Tuna Measure. There are no documentation requirements, other than a captain’s self-certification, for other tuna products.

22. For U.S. tuna products, section 216.93 establishes a “tracking and verification program” for large U.S. purse seine vessels fishing in the ETP (but not elsewhere) which is designed to be consistent with the AIDCP. U.S. statistics indicate that in 2013 tuna from the ETP constituted about one percent of the tuna used to make tuna products in U.S. canneries. Accordingly, the requirement for ETP tuna tracking forms imposes extremely little, if any, burden on the U.S. processing industry.

23. Compliance with the AIDCP brings with it strict obligations to comply with the tuna tracking system of the AIDCP – the same tracking system that the U.S. regulations implement for U.S. vessels through section 216.93(a). The rules for tracking dolphin-safe tuna are very detailed and comprehensive, and apply from the moment of capture of the tuna all the way through unloading of the tuna, and then to the processing and marketing of the tuna products containing that tuna. Mexico implemented the AIDCP tuna tracking requirements through the regulation NOM-EM-002-PESC-1999, which was issued in December 1999 and subsequently updated through NOM-001-SAG/PESC-2013. The United States has verified Mexico’s compliance with the AIDCP continuously since 2000.

24. For Mexican tuna products to be eligible for the dolphin-safe label under the Amended Tuna Measure: the tuna must be certified as having being caught without killing or seriously injuring a dolphin in the set in which the tuna was caught and that dolphin sets have not been used during the entire voyage in which the tuna was caught; an independent observer must verify that the certification is accurate; and the certification must be supported by the above-described extensive tracking system, which is audited by the Mexican government.

25. There are no documentation requirements for any type of non-ETP tuna products other than the captain’s self-certification.

C. The Hogarth Ruling

26. The Ninth Circuit Court of Appeals has the effect of permanently denying Mexican tuna products the benefit of the “dolphin-safe” label in the U.S. marketplace, and this ruling remains an integral element of the Amended Tuna Measure.

D. The 2013 Final Rule

27. The United States did not modify the DPCIA. The revised regulations made only a few changes to the prior regulations. An important feature of the new regulations is that they delayed implementation of the changes. In effect, therefore, the United States unilaterally granted itself a further extension to the RPT by not enforcing the measure that it has introduced for the purpose of bringing itself into compliance. The captains' certifications are not publically available, and there is no transparency regarding how non-ETP vessels and processors verify compliance. A key aspect of the Amended Tuna Measure is that, for tuna caught outside the ETP, the United States still allows the use of the dolphin-safe label when dolphins were killed and seriously injured, and even when nets were set around dolphins.

III. BACKGROUND INFORMATION ON THE GLOBAL TUNA INDUSTRY, ALTERNATIVE FISHING METHODS, AND STATUS OF DOLPHIN POPULATIONS IN THE ETP

28. Dolphin mortalities are a significant problem outside the ETP. Fishers set nets on dolphins outside the ETP, and fishing methods other than the dolphin set method kill and seriously injure dolphins. Moreover, outside the ETP, tuna is frequently brokered through intermediaries and there are no mandatory procedures for tracking the dolphin-safe status of tuna. Meanwhile, the latest evidence indicates that the dolphin stocks in the ETP that the United States designated as "depleted" are actually growing at their maximum expected rates, contrary to what the United States believed in 2002, when the Department of Commerce made its "Final Findings."

A. Fishers Set Nets on Dolphins Outside the ETP, and Other Fishing Methods Kill and Seriously Injure Dolphins

29. During the original proceedings, the Panel found that there were associations between dolphins and tuna outside the ETP, and that methods of fishing other than dolphin sets cause dolphin mortalities. Mexico has collected substantial additional evidence showing that (i) tuna fishers intentionally set nets on marine mammals outside the ETP, and (ii) other methods of fishing for tuna are causing many thousands of dolphin mortalities.

1. Fishers Intentionally Set Purse Seine Nets on Marine Mammals outside the ETP

30. There has been a widely repeated claim that the association between dolphins and tuna in the ETP is "unique", and that dolphin sets rarely occur elsewhere. The evidence demonstrates otherwise.

31. An Administrative Report of the National Oceanic and Atmospheric Administration (NOAA) states that "an obvious problem with concluding ... that incidental mortality of dolphins in tuna purse-seines outside the ETP is minimal is that many of the existing reports have been produced by groups with vested interests in one or another viewpoint: groups related to commercial fishing interests will obviously hope to find little evidence of tuna-dolphin problems similar those occurring in the ETP...".

32. More recently, the Secretariat of the Pacific has published an evaluation of the impact of the Western and Central Pacific Ocean (WCPO) fishery on cetaceans. No data have been made

publicly available on the overall interaction of this fishery with marine mammals. Nonetheless, the key point is that observers witnessed dolphin and whale sets being made, indicating that there is an association between tuna and marine mammals in the WCPO. Accordingly, there are good reasons to believe that these figures are significantly underestimated.

33. Other sources confirm that nets are intentionally set on marine mammals in the WCPO. In 2012, the WCPFC adopted a measure to protect whale sharks. In April 2013, Australia and the Maldives presented a proposal to the IOTC to adopt a measure to protect whale sharks.

34. The fact that vessels claim to fish only on FADs does not mean that dolphins are not being harmed. For example, a report on bycatch of dolphins sponsored by the USDOC states “[i]n the Philippines, scientists estimated that about 2,000 dolphins—primarily spinner, pantropical spotted, and Fraser’s—were being killed each year, probably at unsustainable levels, by a fleet of five tuna purse-seiners using fish-aggregating devices”.

35. A recent enforcement action taken by the USDOC against U.S. vessels further validates that fishers intentionally set nets on dolphins in the WCPO. The case at issue, entitled *In the Matter of Matthew James Freitas, et al.* (“Freitas case”), involved five U.S.-flagged vessels that fish in the WCPO with FADs, and all of which are managed by the South Pacific Tuna Corporation (SPTC). Two of the vessels were penalized for setting purse seine nets on marine mammals, in violation of the U.S. MMPA. Although the Freitas case refers to the animals as “whales”, it also provides details that the animals were pilot whales and false killer whales, which are species of dolphin.

2. Gillnet Fishing Kills and Injures Dolphins

36. As explained by the Fisheries and Aquaculture Department of the United Nations Food and Agriculture Organization (FAO), drifting gillnets are used to catch tuna. In 2004-2005, the Central Marine Fisheries Institute in India conducted a study to quantify the number of cetaceans incidentally caught as by-catch by local fishers. The study concluded that such fishing operations could be killing about 10,000 cetaceans including dolphins every year, which it considered “alarmingly high.”

37. A report prepared for the IOTC in 2012 on the gillnet tuna fishery in the coastal waters of Pakistan included the following information “[d]olphins seem to be more frequent in getting entangled in tuna gillnets ... According to fishermen, most of dolphins entangled in gillnet die immediately ... Although it is not possible to accurately estimate the number of dolphins killed every year in tuna gillnet fisheries of Pakistan but based on limited information collected recently (Moazzam, 2012) it is estimated that 25- 35 dolphins are killed every month.”

38. There have also been reports of substantial dolphin bycatch in tuna gillnet fishing operations in Europe.

3. Longline Fishing Kills and Injures Dolphins

39. The association between dolphins and longline fishing is well-established. In the past, analyses of this issue tended to focus on negative effects on fishing caused by “depredation” – i.e., the consuming by marine mammals of both bait and target fish on longline hooks – but it is now widely recognized that dolphins are severely harmed by such interactions.

40. A recent study summarized that “[o]perational interactions between odontocetes [cetaceans in the suborder Odontoceti or “toothed whales”, it includes all species of dolphins and porpoises] and the longline industry is a global problem.” Another recent study examined the whale and dolphin species involved in pelagic longline depredation in the tropical and subtropical waters of the western Indian Ocean. The report draws a connection between where these species are found and where pelagic longline fishing areas exist in the Indian Ocean. Other reports confirm that dolphins are attracted to longline fishing operations.

41. Unfortunately, there are no comprehensive programs to monitor the harm caused to dolphins by longline fishing. Difficulties also arise from the fact that the lines can be as long as 90 miles in length, which would impair the ability of observers to see the deaths and injuries as they are occurring. There is no doubt, however, that longline fishing operations kill and maim dolphins.

42. The United States itself has designated the longline tuna fishery in the area of the U.S. State of Hawaii as threatening the population of false killer whales (a species of dolphin) in that region, which are classified as “endangered” and “depleted”. Yet this tuna is eligible for a dolphin-safe label. The United States has also designated the “Atlantic pelagic longline fishery” as a fishery harmful to marine mammals that requires a “take reduction plan”. The United States does not maintain a comprehensive observer program for its longline fleet operating off the U.S. coast in the Atlantic; the coverage is only eight percent.

43. A report published by the Sea Turtle Restoration Project on longline fishing estimates that over 18,000 dolphins are killed annually by longline fishing in the Pacific Ocean. The report bases its estimate on an extrapolation of data from the Hawaii longline fishery. The report cautions that the number is likely underestimated.

44. Another report discusses the damage to dolphin’s dorsal fins caused by longline fishing. Longlines also get tangled on dolphins’ tails. Thus, even when dolphins do not immediately die from an interaction with a longline, they are at risk to suffer from maiming of their mouths, dorsal fins and other body parts, as well as from eventual drowning when they cannot free themselves from the lines.

45. Mexican longline vessels fishing in the Gulf of Mexico for tuna are subject to comprehensive regulations (NOM-023-SAG/PESCA-2014) that require an independent observer on every vessel to monitor fishing practices. To Mexico’s knowledge, it is the only country that requires 100 percent observer coverage of its longline vessels; the United States has no such regulation.

4. Trawl Fishing Kills and Injures Dolphins

46. Dolphins are regularly captured in trawl nets. For example, a report included in a 2004 study prepared for the United Kingdom’s House of Commons stated “an Irish study of a trial pelagic pair trawl fishery for albacore tuna observed 30 dolphins being caught in a single haul, with 145 cetaceans caught by just four pairs of trawlers in a single season.”

47. Clearly dolphins and other marine mammals are at grave risk in tuna fisheries outside the ETP and from fishing methods other than dolphin sets, yet the United States has done nothing to discourage American consumers from purchasing such tuna.

B. Tracking Procedures for Dolphin-Safe Tuna

48. To understand both the complexity and necessity of a tracking system for dolphin-safe tuna, it is crucial to review how tuna is sourced, handled and tracked during the manufacturing process.

49. The major Mexican producers are vertically integrated. Specifically, they have their own fishing fleets, which deliver tuna to their processing facilities within Mexico. Thus, the chain of ownership over the tuna caught by the Mexican fleet is maintained from the time of harvesting through the processing of the tuna into tuna products and the eventual marketing of the tuna products.

50. Outside the ETP, because of the extensive use of intermediaries (brokers), it would be difficult to trace the dolphin-safe status of tuna even if there were enforceable requirements to do so outside the ETP. There are no verifiable procedures or requirements for such tracking for non-ETP vessels and non-ETP tuna processors.

51. Unlike the Mexican industry, most major tuna products companies in other countries are not vertically integrated. They purchase tuna from third party companies, and in many cases the tuna has passed through at least two parties before it is processed.

52. For both longline and purse seine fishing, an important role is played by refrigerated fish carriers, who consolidate the catch of multiple fishing vessels. Some of these are believed to be engaged in transshipment at sea. Transshipment at sea can be particularly vulnerable to “tuna laundering,” where “black boats” may conduct illegal, unauthorized and unrestricted (IUU) fishing and then transfer their catch to licensed vessels to transship. It has been indicated that observers likely cannot detect IUU fishing and fish laundering.

53. Importantly, the reporting required for transshipments does not address the U.S. dolphin-safe requirements. There are no authorities with responsibility to monitor whether captains’ certificates match to a particular lot of tuna, or whether that tuna has been mixed with uncertified tuna in a storage well.

54. Where the vessels have not caught the tuna in the ETP, there is no requirement for dolphin-safe tuna tracking, no TTF forms, and no means to verify the accuracy of the information about how the tuna was caught and whether or not dolphins were killed or seriously injured during the capture of the tuna. Except for tuna caught in the ETP, there is no procedure through which the USDOC can verify – or rely on another country to verify – that a tuna product represented to contain dolphin-safe tuna actually does so. Other than the AIDCP the United States has no international agreements obligating other countries to enforce or verify compliance with dolphin-safe standards. Other than in the ETP, there is no way to determine whether a captain’s claim not to have set nets around dolphins during an entire voyage is accurate, whether a claim that no dolphins were killed or seriously injured in a particular set in which the tuna was caught is accurate, whether tuna caught in a dolphin-safe set has been kept segregated from tuna caught in a non-dolphin-safe set, or even whether a certification accompanying imported tuna products matches up correctly to the vessel and voyage that caught the tuna.

55. Because of the absence of controls and tracking mechanisms for non-ETP vessels, tuna processors outside of Mexico in other countries cannot verify (let alone segregate and track) dolphin-safe tuna after they receive it.

56. The U.S. MMPA, independent of the Amended Tuna Measure, requires U.S. vessels to report the “taking” of marine mammals outside the ETP. However, in the absence of independent observers to monitor compliance, the effectiveness of that requirement is questionable.

57. Testimony in the recent enforcement action in the Freitas case, further validates that without independent observers, a captain’s certificate is unreliable. Thus, it is impossible for those vessels to comply with the Amended Tuna Measure’s requirement that tuna caught in a set that harms dolphins be segregated from tuna caught in dolphin-safe sets. It is important to emphasize that the Freitas case involved U.S.-flagged vessels. Foreign-flagged vessels are not subject to U.S. jurisdiction and have even less incentive to comply with the Amended Tuna Measure.

58. The two canneries in American Samoa apparently receive at least some tuna directly offloaded from the vessels that caught the tuna, and in such cases could verify that a captain’s statement matched the vessel. However, there is no tuna tracking system for such tuna, so there is no other documentation available to verify that the tuna was caught in dolphin-safe sets, or kept separate from non-dolphin-safe tuna. Other U.S. canneries (in California and in Georgia) import tuna loins from Thailand, not whole fish. Because the tuna from which those loins were made were landed, skinned and boned in another country, it would be even more difficult to track them to a specific vessel, voyage and storage well – if any effort were being made to do so.

59. Virtually no ETP tuna is used by U.S. processors and ETP tuna products have a very small share of the U.S. market. Accordingly, the overwhelming majority of tuna products sold in the U.S. market as “dolphin-safe” lack documentation of compliance from any moment earlier than import into the United States.

C. Status of Dolphin Populations in the ETP

60. The AIDCP regime remains extremely effective. The incidental mortality of dolphins in the ETP tuna fishery in 2012 was only 870 animals, an 11.8 percent decrease from the 986 mortalities recorded in 2011. As was addressed in the original proceedings, the primary excuse of the United States for refusing to change the definition of “dolphin-safe” to conform to the AIDCP was that the populations of the two dolphin stocks it considers to be “depleted” were not recovering at a rate the United States considered acceptable. In 2009, however, the United States agreed with AIDCP to increase the DMLs for these two dolphin stocks, reflecting the more recent evidence that the populations of the stocks are, in fact, growing.

61. Under the Amended Tuna Measure, the USDOC lacks authority to evaluate any evidence regarding dolphin stocks and their recovery, including the evidence referred to above, which has become available since its Final Finding was published in 2002.

IV. LEGAL ARGUMENT

A. The Panel Must Rule on all of Mexico’s Violation Claims

62. In order to resolve this dispute, it is necessary for the Panel to rule on all of Mexico’s claims under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. The scope and content of the obligations under these provisions are not the same. If the Panel does not make all of the necessary findings under Mexico’s three claims, there would only be a partial resolution of the dispute.

B. The Amended Tuna Measure is Inconsistent with Article 2.1 of the TBT Agreement

63. For a violation of Article 2.1 of the TBT Agreement, the following elements must be satisfied: (i) the measure at issue must be a “technical regulation” within the meaning of Annex 1.1; (ii) the imported products at issue must be like the domestic product and the products of other origins; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products and to like products originating in other countries.

64. The Amended Tuna Measure fulfills each of the three criteria of the legal test under Annex 1.1 the TBT Agreement, and therefore continues to qualify as a “technical regulation”. Also, the relevant imported products at issue – i.e., tuna products from Mexico – continue to be “like” tuna products of U.S. origin and tuna products originating in any other country. The remaining aspect to be considered is whether the Amended Tuna Measure accords to imported products less favourable treatment.

1. Treatment no Less Favourable

65. The key elements of the design and structure of the measure that operated together to deny competitive opportunities were set out in the provisions of the DPCIA that govern dolphin-safe labeling. These elements remain integral components of the Amended Tuna Measure and have not been changed.

66. The features of the relevant market remain unchanged. U.S. retailers and consumers are sensitive to the dolphin-safe issue, and tuna products labeled “dolphin-safe” have an advantage in the marketplace. Major U.S. grocery chains continue to refuse to buy Mexican tuna products because they are unable to sell the brand that does not have the dolphin-safe label.

67. The situation of Mexican tuna producers continues without any material changes from the situation they had during the original proceedings. The U.S. tuna fleet continues not to fish in the ETP. Thus, most tuna caught by Mexican vessels would not be eligible for inclusion in a dolphin-safe product under the U.S. dolphin-safe labelling provisions, while virtually all tuna caught by U.S. vessels is potentially eligible for the label. During 2013, approximately 86 percent of the tuna used by U.S. canners was caught in the Western Pacific. U.S. canners obtained only about one percent of their supply from the ETP. Thus, U.S. canneries used virtually no tuna caught in the ETP.

68. Nothing in the Amended Tuna Measure reduces or minimizes the detrimental impact on imported Mexican tuna products. Accordingly, it is clear that the operation of the Amended Tuna Measure in the relevant market has a *de facto* detrimental impact on the group of like imported products.

69. Based on the two-step approach established by the Appellate Body in *US – Tuna II (Mexico)*, the Panel must analyze whether the above-noted detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.

70. The relevant regulatory distinction (i.e., the difference in labeling conditions and requirements) includes the following conditions and requirements of the Amended Tuna Measure: (i) the disqualification of setting on dolphins in accordance with the AIDCP as a fishing method that can be used to catch tuna in the ETP in a dolphin-safe manner and the

qualification of other fishing methods to catch tuna in a dolphin-safe manner; (ii) the record-keeping and verification requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the different requirements for tuna caught outside the ETP using both the same and different fishing methods; and (iii) the mandatory independent observer requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the absence of such requirements for tuna caught outside the ETP using the same and different fishing methods.

71. When the facts and circumstances related to the design and application of these conditions and requirements are examined, it is clear that the detrimental impact on imports of Mexican tuna products does not stem exclusively from a legitimate regulatory distinction. Rather, the detrimental impact reflects discrimination against the group of imported products.

(1) The Differences in Labelling Conditions and Requirements are Not Legitimate

72. In the original dispute, the Appellate Body concluded that the United States had not demonstrated that the difference in labelling conditions was “calibrated” to the risks to dolphins arising from different fishing methods in different areas of the ocean. It followed from this that the United States had not demonstrated that the detrimental impact of the U.S. measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction. The Appellate Body also observed that the U.S. measure fully addressed the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it did not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP.

(a) Disqualification/Qualification of Fishing Methods

73. Under the Amended Tuna Measure, the labeling conditions and requirements differ depending on the fishing method used to catch tuna. Setting on dolphins is a fishing method that is permanently “disqualified” from being used to catch dolphin-safe tuna, even if the utilization of this method complies with the stringent AIDCP requirements and there are no dolphin mortalities or serious injuries in the set in which the tuna is caught, as confirmed by an independent on-board observer and certified under the comprehensive tracking and verification system established by the AIDCP and Mexican law.

74. The situation is different for the fishing methods used to catch tuna outside the ETP. With the exception of driftnet fishing for tuna on the high seas by the Italian fleet, all of the other tuna fishing methods (including other driftnet fishing) are qualified to be used to catch tuna in a dolphin-safe manner, even though it is well documented that these methods cause substantial dolphin mortalities and serious injuries.

75. The facts and circumstances related to the design and the application of the measure at issue clearly establish that the regulatory distinction, i.e., the difference in these labeling conditions and requirements, is not even-handed. As a consequence, under the approaches of both the Appellate Body and the Panel in *EC – Seal Products*, the detrimental impact on Mexican imports does not stem exclusively from a legitimate regulatory distinction.

76. The regulatory distinction is not legitimate because it is not rationally connected to the objective of the measure. The objectives of the original Tuna Measure were: (i) “ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins”; and (ii) “contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins”. The Amended Tuna Measure maintains the same objectives. The “qualified” tuna fishing methods have substantial adverse effects on dolphins and pose substantial risks for dolphins, therefore, their qualification for use in catching “dolphin-safe” tuna is inconsistent with the objectives of the Amended Tuna Measure. The “disqualification” of Mexico’s principal fishing method and the “qualification” of other alternative fishing methods do not bear a rational connection to the objectives of the Amended Tuna Measure. There are no reasons extraneous to the objective of dolphin protection that provide a cause or rationale to justify allowing tuna caught by these fishing methods to be designated as “dolphin-safe”. The distinction in labelling conditions and requirements relating to the disqualification/qualification of fishing methods is designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination, such that it lacks even-handedness.

(b) Record-keeping and Verification Requirements

77. The relevant regulatory distinction includes record-keeping and verification requirements. These are important because the fundamental character of the Amended Tuna Measure is the distinction between tuna products that are and are not dolphin-safe under the U.S. definition. Consistent with this fundamental character, and in order to achieve the objectives of the Amended Tuna Measure, accurate information must be provided to consumers on whether the tuna contained in a tuna product is caught in a manner that adversely affects dolphins. It is only through the provision of accurate information that the label can be made available exclusively to products containing tuna that was not caught in a manner that adversely affects dolphins.

78. Under the Amended Tuna Measure, the record-keeping and verification requirements differ depending on the geographic area in which the tuna are caught.

79. Strict record-keeping and verification requirements and procedures are applied to tuna caught in the ETP which provide a meticulous audit trail which ensures that the information provided on the dolphin-safe status of Mexican tuna under the U.S. definition of dolphin-safe is accurate. In stark contrast, similar requirements and procedures are not applied to tuna that is caught in other geographic areas outside the ETP. The route taken by this tuna to U.S. consumers is more complex than the route taken by Mexican tuna, and there are many actions that could occur during a fishing voyage and in the downstream processing and distribution chain that could eliminate the dolphin-safe status of such tuna. As a consequence, accurate information is not being provided. The difference in record-keeping and verification requirements for tuna caught inside and outside the ETP does not bear a rational connection to the objectives of the Amended Tuna Measure. Inside the ETP the requirements are comprehensive and the information accurate. Outside the ETP, the requirements are unreliable and do not provide accurate information on the dolphin-safe status of the tuna products comprising this tuna. Thus, U.S. consumers are not receiving accurate information on such tuna products and could be misled or deceived or could encourage fishing fleets to catch tuna in a manner that adversely affects

dolphins. . There are no reasons extraneous to the objective of dolphin protection that provide a cause or rationale for providing inaccurate information on the dolphin-safe status of tuna that is caught outside the ETP, while only providing accurate information for tuna that is caught within the ETP. All dolphin-safe tuna should be accurately labeled. Under the Amended Tuna Measure, differences in record-keeping and verification requirements are designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination, such that it lacks even-handedness.

(c) Mandatory Independent Observer Requirements

80. Mexico addresses the mandatory independent observer requirement separately because of its fundamental importance to the designation of tuna as dolphin-safe at the time of capture. Notwithstanding the fact that none of the tuna that is caught using “qualified” fishing methods can be accurately designated as dolphin-safe, it will not matter if a comprehensive and meticulous audit trail is implemented downstream to the U.S. consumer if the initial dolphin-safe designation is inaccurate. The entire audit trail will be tainted.

81. Observers who are independent, specially trained, and approved by the AIDCP are mandated for tuna fishing in the ETP, and they ensure the accuracy of information concerning the dolphin-safe status of tuna caught in the ETP. Outside of the ETP, there is no requirement for independent observers. Instead, under the Amended Tuna Measure, the dolphin-safe status of tuna is based solely on self-certification by the captain in charge of the fishing vessel. Such self-certification is meaningless. Captains of vessels are not qualified to make dolphin-safe determinations and, even if they were qualified, their certifications are inherently unreliable. While the measure contemplates the possibility of observers being used outside the ETP in certain circumstances, this is meaningless because the USDOC has made no determination that the circumstances are met, i.e., that observers are qualified and authorized in non-ETP fisheries.

82. The difference in the treatment of independent observers inside and outside the ETP is not rationally connected to the objective of the measure. Captain self-certification for tuna caught outside the ETP does not provide reliable or accurate information on the dolphin-safe status of the tuna products comprising this tuna. As a consequence, the initial designation of the dolphin-safe status of tuna caught outside the ETP is unreliable and inaccurate. This taints all subsequent stages in the audit trail up to the U.S. consumer. Thus, U.S. consumers are receiving unreliable and inaccurate information on such tuna products, and they could be misled or deceived, or could unknowingly be supporting or encouraging fishing fleets to catch tuna in a manner that adversely affects dolphins. There are no reasons extraneous to the objective of dolphin protection that provide a cause or rationale that can justify providing U.S. consumers with reliable and accurate information for tuna that is caught within the ETP, while providing them with unreliable and inaccurate information for tuna that is caught outside the ETP. The differences in the treatment of independent observers inside and outside the ETP are designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination, such that it lacks even-handedness.

C. The Amended Tuna Measure is Inconsistent with Article I:1 of the GATT 1994

83. 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?

84. For the same reasons set out above for Mexico’s claim under Article 2.1 of the TBT Agreement, the imported products at issue are “like” domestic tuna products within the meaning of Article I:1 of the GATT 1994.

85. The Amended Tuna Measure confers an advantage, within the meaning of Article I:1 of the GATT 1994, to tuna products of U.S. origin and tuna products originating in countries other than Mexico. The advantage granted by the Amended Tuna Measure is the authorization to use “dolphin-safe” labelling in the United States on tuna products. This advantage is granted only to tuna products containing tuna that meets the applicable conditions and requirements set out under the implementing regulations of the Amended Tuna Measure. The Amended Tuna Measure therefore affects “the internal sale, offering for sale, [and] purchase” of tuna products in the United States. This advantage is made available to tuna products originating in other countries, including Thailand and the Philippines, who are the largest sources of imported tuna products into the United States.

86. The “advantage” of access to the dolphin-safe label is not accorded immediately and unconditionally to the like tuna products originating in the territories of all other WTO Members, namely Mexico. The Panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions. This continues to be the case.

D. The Amended Tuna Measure is Inconsistent with Article III:4 of the GATT 1994

87. The Amended Tuna Measure accords Mexican tuna products treatment less favourable than that accorded to U.S. tuna products in a manner that is inconsistent with Article III:4 of the GATT 1994. The Appellate Body has made clear that the scope and content of the provisions of Article III:4 and Article 2.1 of the TBT Agreement are different. Accordingly, the Panel’s decision on Mexico’s claim under Article 2.1 will not necessarily resolve Mexico’s Article III:4 claim, and it is therefore crucial that the Panel make findings on the Article III:4 claim.

88. The Appellate Body explained that a Member’s measure is inconsistent with Article III:4 if three elements are met: (i) the imported and domestic products at issue are “like products”; (ii) the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (iii) the imported products are accorded “less favourable” treatment than that accorded to like domestic products.

89. For the same reasons set out above for Mexico’s claim under Article 2.1 of the TBT Agreement, the imported products at issue are “like” domestic tuna products within the meaning of Article III:4 of the GATT 1994.

90. The Amended Tuna Measure, which comprises a group of laws and regulations that set out the dolphin-safe labeling requirements, pertains to the category of “laws, regulations and requirements”.

91. The Amended Tuna Measure clearly “affects” the internal sale, offering for sale, purchase and distribution of tuna products. As found by the Panel and the Appellate Body, access to the “dolphin-safe” label constitutes an “advantage” on the US market; lack of access to

the “dolphin-safe” label has a detrimental impact on the competitive opportunities in the U.S. market; and government intervention, in the form of adoption and application of the U.S. “dolphin-safe” labelling provisions, affects the conditions under which like goods, both domestic and imported, compete in the market within a Member’s territory.

92. Also, Article III:4 stipulates that WTO Members shall accord imported products “treatment no less favourable” than the treatment accorded to like products of national origin. As explained above, the Appellate Body found that access to the “dolphin-safe” label constitutes an “advantage” on the US market, lack of access to the “dolphin-safe” label has a detrimental impact on the competitive opportunities in the US market, and government intervention, in the form of adoption and application of the US “dolphin-safe” labelling provisions, affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory. Moreover, the Panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label. This continues to be the case.

V. CONCLUSION

93. On the basis of the foregoing, Mexico respectfully requests that the Panel find that the United States has failed to comply with the recommendations and rulings adopted by the DSB on the basis that the Amended Tuna Measure remains inconsistent with Articles 2.1 of the TBT Agreement, Article I:1 and Article III:4 of the GATT 1994.