

Before the World Trade Organization

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(DS381)



**MEXICO'S RESPONSES TO PANEL'S QUESTIONS FOLLOWING THE PANEL'S SUBSTANTIVE
MEETING WITH THE PARTIES**

Geneva

14 FEBRUARY 2017

TABLE OF EXHIBITS

Number	Title
MEX-95	Table summarizing the data available regarding the relative overall risks of adverse effects on dolphins caused by different fishing methods in different ocean areas
MEX-96	Agreement on the International Dolphin Conservation Program, as amended (July 2014), Annex VII
MEX-97	U.S. Coast Guard, Federal Requirements for Commercial Fishing Industry Vessels, available at http://www.fishsafe.info/FederalRequirementsCFV2009.pdf
MEX-98	33 CFR Part 151.10 (Control of oil discharges)
MEX-99	50 CFR Part 300 (International Fisheries Regulations), table of contents
MEX-100	50 CFR 300.218 (Reporting and record-keeping requirements)
MEX-101	NOAA Fisheries, Observer Program, available at http://www.fpir.noaa.gov/OBS/obs_observer_rqrmts_trng_duties.html
MEX-102	Department of Commerce, Differentiating Serious and Non-Serious Injury of Marine Mammals: Report of the Serious Injury Technical Workshop 10-13 September 2007, Seattle, Washington (September 2008)
MEX-103	AIDCP, "Report on the International Dolphin Conservation Program", Document MOP-34-05 (10 October 2016)
MEX-104	U.S. National Oceanic and Atmospheric Administration, Impact of "Ghost Fishing" via Derelict Fishing Gear (March 2015)
MEX-105	U.S. Department of Commerce, Differentiating Serious and Non-Serious Injury of Marine Mammals Taken Incidental to Commercial Fishing Operations: Report of the Serious Injury Workshop, 1-2 April 1997, Silver Spring, Maryland (January 1998)
MEX-106	International Dolphin Conservation Program, Tuna Tracking Form (Form A)
MEX-107	Mexican Regulation NOM-EM-002-PESC-1999, issued in December 1999
MEX-108	Mexican Regulation NOM-001-SAG/PESC-2013
MEX-109	Statement of Mario G. Aguilar, Mexico's Commissioner of Fisheries and Aquaculture
MEX-110	Affidavit of the Mexican tuna industry
MEX-111	FAO, Pole and Line, available at http://www.fao.org/fishery/geartype/314/en
MEX-112	M. Donahue & E. Edwards, An Annotated Bibliography of Available Literature regarding Cetacean Interactions with Tuna Purse Seine Fisheries Outside of the Eastern Tropical Pacific (November 1996)
MEX-113	Kobe II Bycatch Workshop Background Paper, available at http://www.tuna-org.org/Documents/Aus/Kobe_II_Bycatch_Workshop_Marine%20Mammal_FINAL_ENG.pdf
MEX-114	National Marine Fisheries Service Instruction 02-038-01 (effective Date January 27, 2012), Guidelines for Distinguishing Serious from Non-Serious Injury of Marine Mammals Pursuant to the Marine Mammal Protection Act
MEX-115	U.S. Department of Commerce, In the Matter of Matthew Freitas, et al., Initial Decision and Order (August 23, 2013)
MEX-116	WCPFC, Status of ROP Data Management, WCPFC-TCC11-2015-IP05_rev1 (10 September 2015)
MEX-117	L. Dolar, Incidental Takes of Small Cetaceans in Fisheries in Palawan, Central Visayas and Northern Mindanao in the Philippines, in Report of International Whaling Commission (Special Issue 15) (1994)

MEX-118	NOAA, Marine Mammal Stock Assessment Report, False Killer Whale: Hawaiian Islands (December 31, 2015)
MEX-119	NOAA, Marine Mammal Stock Assessment Report, Short-Finned Pilot Whale: Western North Atlantic Stock (May 2016)
MEX-120	L. Mannocci et al., Assessing the Impact of Bycatch on Dolphin Populations: the Case of the Common Dolphin in the Eastern North Atlantic, Plos One 7(2) e32615 (February 2012)
MEX-121	U.K. House of Commons Environment, Food and Rural Affairs Committee, Caught in the net: bycatch of dolphins and porpoises off the UK Coast (21 January 2004)

1 TO THE UNITED STATES:

1.1 Risks to Dolphins

1. With reference to Exhibits USA-13 and USA-179, the Panels note the explanation provided in the asterisk at the bottom of Table 1. The Panels would appreciate further explanation regarding the meaning of the headings of the different columns in this Table. To this end, please provide further clarity by using the data in the first row as an example.
2. With reference to paragraphs 50 and 51 of United States' first written submission, please clarify why Table 2 lists "Intentional Sets on Dolphins" in the ETP, while Table 3 lists only "Sets with Dolphin Interactions". Is there any difference between these two terms, or do they mean the same thing?
3. With respect to the revised table presented in Exhibit USA-179, which provides information on dolphin mortalities in various fisheries and in relation to various fishing methods, please explain whether similar information is available with respect to serious injury caused to dolphins in the same fisheries and by the same fishing methods covered in that Exhibit.
4. The Panels note that the tables provided in Exhibit USA-179 do not contain any information on gillnet, pole and line, and handline fishing. Please provide information for these three fishing methods, in the same format used in presenting the information regarding the other fishing methods in the mentioned Exhibit.
5. With reference to footnote 99 to paragraph 51 of the United States' first written submission, please provide page 64 of the document presented in Exhibit USA-60, which is referred to in the submission but not included in the Exhibit.
6. With reference to paragraph 52 of the United States' first written submission, please provide evidence for the assertion that "it is likely that there will be more tuna under a bigger herd of dolphins than under a smaller one". Please also provide more information, and evidence, regarding the activities described in footnote 108.
7. (A) With reference, *inter alia*, to paragraph 57 of the United States' first written submission, could the United States elaborate on (a) how it calculates the levels of dolphin interaction and harm on a "per set basis"; (b) how it "controls for the size of the fishery"; and (c) why controlling for the size of the fishery enables comparisons to be made across fisheries?

(B) With reference, *inter alia*, to paragraph 130 of the United States' first written submission, could the United States explain (a) what it means by the expression "[c]ontrolling for the number of sets"; and (b) the purpose of such controlling?

(C) With reference, *inter alia*, to paragraph 75 of the United States' second written submission, could the United States please explain (a) what it means by the expression "[c]ontrolling for the level of effort"; and (b) the purpose of such controlling?
8. With reference to paragraph 61 of Mexico's first written submission, does the United States agree that "the only objective scientific evidence of the magnitude of any unobservable harms caused by AIDCP-compliant dolphin encirclement is the evidence related to the growth of dolphin stocks"? Does the United States agree that unobservable harms "would most certainly be reflected in dolphin stocks"? In which other ways could unobservable harms be reflected or quantified?
9. With reference to paragraph 63 of Mexico's first written submission, please respond to Mexico's assertion that the United States' evidence of unobservable harms is "based on the incorrect assumption that two particular dolphin stocks were not growing at the expected rates".

10. With reference to paragraph 64 of Mexico's first written submission, does the United States agree with Mexico that the extent of unobserved harms can be represented numerically, e.g. as an additional percentage of dolphin mortalities?
11. With reference to paragraph 230 of Mexico's first written submission, please comment on Mexico's assertion that "[t]here is no practical difference between intentionally encircling dolphins with the knowledge that there is a chance of causing harm and being wilfully blind to the extremely high probability, if not certainty, that a fishing set or gear deployment will result in harm to dolphins".
12. With reference to paragraph 238 of Mexico's first written submission, please comment on Mexico's request that the "Panels carefully reconsider statements made by the first compliance panel that suggest that encircling in an AIDCP-compliant manner is "particularly harmful"".
13. With reference to paragraph 69 of Mexico's second written submission, please respond to Mexico's assertion that "[a]bsent comprehensive evidence demonstrating that gillnets can be used in tuna fisheries without harming dolphins, there is no reasonable explanation for the United States not to have made gillnet fishing ineligible for the dolphin-safe label".
14. With reference to paragraph 87 of the United States' third written submission, please explain what the word "representative" means or refers to in the first sentence of the paragraph.
15. With reference to Mexico's arguments, presented in paragraphs 54-57 of Mexico's first written submission , regarding the USDOC report contained in Exhibit MEX-13, please explain whether you agree with Mexico's interpretation of that report.
16. Exhibits USA-13 and USA-17 show that there is a higher level of interaction and mortality of dolphins in the Western and Central Pacific when compared to other ocean areas. For instance, there was an estimated mortality of 1,195 toothed cetaceans in the WCPFC tropical purse seine fishery in 2009 alone (USA-17), whereas in the Eastern Tropical Atlantic and Indian Ocean Tropical there was none (USA-13)). Therefore, are the Panels correct in understanding that there is a higher risk of dolphin interactions and mortalities in the Western and Central Pacific purse seine fishery when compared to other ocean areas outside the ETP, such as in the Eastern Tropical Atlantic and Indian Ocean Tropical? What significance, if any, does this have for the Panels' calibration analysis? Would it be the basis on which a determination could be made under the determination provisions?
17. With reference to Exhibit USA-19, page 354, does the following statement mean that the numbers reported in such study underestimate the actual bycatches?

"Bycatch and associated discarding are difficult to estimate on the basis of logbook information, as they are generally poorly or not reported by fishing masters".
18. With reference to paragraph 237 of Mexico's first written submission, should the risk profile of "AIDCP-compliant dolphin encirclement fishing method" include historical data from prior to the adoption of the AIDCP Agreement?
19. With reference to paragraph 55 of the United States' first written submission, please explain how the United States extracted the following information from Exhibits USA-19 and USA-20:

"In the purse seine fisheries in the eastern tropical Atlantic and tropical Indian Oceans, observers on 1,389 and 3,052 sets, respectively, between 2003 and 2009 observed zero marine mammal mortalities".

20. With reference to paragraph 26 of Mexico's opening oral statement, please comment on Mexico's arguments regarding the ways in which the Tuna Measure and the United States' method of assessing adverse effects on dolphins have evolved over time.
21. With reference to paragraph 50 of Mexico's opening oral statement and paragraphs 21-22 of the United States' opening oral statement, does the United States agree that FAD fishing and handline fishing sometimes involve intentional targeting of dolphins? If so, would tuna caught by these methods be eligible for the dolphin-safe label?
22. With reference to paragraph 57 of Mexico's opening oral statement, please respond to Mexico's suggestion that the United States has applied for a DML for one of its vessels for 2017.
23. With reference to paragraph 56 of Mexico's opening oral statement, does the United States agree that the assessment of overall risks to dolphins requires, *inter alia*, an estimate of unobserved mortalities and serious injuries in the different fishing areas supplying the US market?
24. With reference to paragraphs 25 and 35 of the United States' opening oral statement, could the United States please explain the difference in the direct dolphin mortality figures it has provided (69-227 and 95 per 1,000 dolphin sets)?

1.2 The 2016 Tuna Measure

25. With reference to footnote 93 of the United States' first written submission, please explain what the terms "harass" and "hunt" mean in 16 USC 1362(13).
26. With reference to paragraph 85 of the United States' first written submission, please explain:
 - (a) What is meant by a "government certificate validating"? In particular, what does "validation" entail, and how would a government "validate" the relevant documents or facts (for example, how could a government verify whether "chain of custody information is correct")?
 - (b) What is the relevant "catch documentation"; and
 - (c) What is the relevant "chain of custody information"?
27. Please respond to the allegations contained in paragraph 140 of Mexico's first written submission.
28. With reference to paragraph 132 of Mexico's first written submission, please elaborate on your response to Mexico's assertion that "[t]his interpretation of 'intentional' is vague and leaves considerable discretion to the captain to decide when he has acted intentionally".
29. With reference to paragraph 136 of Mexico's first written submission, please respond to Mexico's assertion that the Tuna Measure's requirements concerning the separation of dolphin-safe and non-dolphin-safe tuna from outside the ETP are "unenforceable and meaningless".
30. With reference to paragraph 141 of Mexico's first written submission, please comment on Mexico's assertion that "there are no procedures for making" a determination of "regular and significant dolphin mortality".
31. With reference to paragraph 108 of Mexico's second written submission:
 - a. Please comment on Mexico's assertion that there is no established "methodology for deciding when to consider evidence of dolphin mortalities in a fishery deserving of investigation".
 - b. Please elaborate on the methodology on the basis of which the September 2016 determination was made. Was that determination made on the basis

- of a pre-established mechanism that would apply to determinations in general?
- c. Please respond to Mexico's argument that there are other fisheries and country fleets in respect of which Mexico submitted evidence indicating the existence of "regular and significant mortality", but about which the United States did not make a determination.
 - d. Please explain why the United States made a determination in respect of a fishery from which it does not currently import tuna?
 - e. Does the United States' reliance on tonnage in the September 2016 determination undermine its claim that the Panels should assess risk on a per-set basis?
32. Please respond to Mexico's argument, in paragraph 149 of its first written submission, regarding commitments by retailers not to purchase Mexican tuna products.
33. With reference to paragraph 243 of Mexico's first written submission, does the United States agree that a fishery should be considered as being "high risk" if dolphin mortalities in that fishery are above the applicable PBR level?
34. With reference to paragraph 246 of Mexico's first written submission, please comment on Mexico's assertion that "the United States itself considers that dolphins are at severe risk in fisheries other than the ETP".
35. Please explain what is included in the concept of "serious injury". What is the difference between "serious injury" and other kinds of injury?
36. With reference to paragraph 32 of United States' second written submission, regarding the "unobservable harms caused by 'the chase itself,' such as cow-calf separation, muscular damage, and immune and reproductive system failures", does the 2016 Tuna Measure cover such unobservable harms outside the ETP large purse seine fishery? How? Does the concept of "serious injury" cover such unobserved harms?
37. Is there any data available on the share or quantity of tuna fish captured, or fishing sets executed, by non-ETP fisheries that are considered as non-dolphin safe by captains operating in those fisheries?
38. With reference to paragraph 7 of Mexico's opening oral statement, does the United States agree that the 2016 Tuna Measure identifies only two types of adverse effects on dolphins, namely, dolphin mortalities and serious injuries? If not, which provision makes clear that the Measure is also concerned with other types of adverse effects on dolphins, including unobservable harm resulting from chasing of dolphins in the case of large purse sein fishing by setting on dolphins?
39. With reference to paragraph 7 of Brazil's third party statement, please respond to Brazil's assertion that "the United States is belatedly attempting to adapt the formulation of the objective of the measure to suit its own purposes".

1.3 Legal Issues

40. With reference to paragraph 23 of the United States' third written submission, please elaborate on how a calibration analysis that allowed for labelling to be less accurate in respect of some tuna products than others would be consistent with the objective of protecting dolphins from adverse effects arising in different fisheries (i.e. the use of different fishing methods in different areas of the ocean)?
41. With reference to paragraph 62 of the United States' first written submission, is the United States' assertion that "a fishery that relies on the intentional targeting of dolphins is [not] like a fishery where dolphin interactions are incidental" consistent with the Appellate Body's findings in the first compliance proceedings that the

- conditions prevailing between countries are the same? (See Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.308.)
42. With reference to paragraph 141 of the United States' first written submission, how should the Panels assess whether a particular regulatory distinction represents a "fair response" to different risk profiles? Is "fair response" in this context coterminous with "calibrated"?
43. Please respond to the allegations made in paragraph 214 of Mexico's first written submission regarding the accuracy of the individual labelling conditions.
44. With reference to paragraph 219 of Mexico's first written submission, please respond to Mexico's assertion that, under the correct calibration analysis, "stronger certification and tracking and verification requirements will be necessary in ocean areas that have poor record-keeping and reporting reliability and significant illegal, unreported, and unregulated (IUU) fishing." How, if at all, should the Panels take the existence of IUU fishing into account in its analysis?
45. With reference to paragraph 259 of Mexico's first written submission, please respond to Mexico's argument that "a comparative assessment between the dangers associated with different fishing methods cannot be based simply on the nature of the activities".
46. Please respond to the allegations made in paragraph 294 of Mexico's first written submission regarding the tracking requirements.
47. With reference to paragraph 42 of Mexico's second written submission, please respond to Mexico's assertion that "the accuracy of the dolphin-safe label, as a consumer information measure, is essential to "the objective of protecting dolphins from adverse effects arising in different fisheries"".
48. With reference to paragraph 44 of Mexico's second written submission, does the United States agree that paragraphs 7.166 and 7.253 of the Appellate Body's report in the first compliance proceedings require the Panels to assess the "accuracy" of the different tracking and verification requirements as part of its calibration analysis?
49. With reference to paragraph 48 of Mexico's second written submission, does the United States agree that "[t]he relevant factors that must be considered in assessing whether the differences in labelling conditions are designed and applied in an even-handed manner will vary depending upon the particular circumstances of a regulatory distinction"?
50. With reference to paragraph 92 of Mexico's second written submission, please respond to Mexico's assertion that "the use of any fishing method that poses more than a *de minimis* risk to dolphins requires reliable certifications. Otherwise, the entire purpose of the tuna measure would be undermined".
51. With reference to paragraph 101 of Mexico's second written submission, in the view of the United States, is the evidence cited in this paragraph relevant to the Panels' calibration analysis? If so, how should it be factored into the Panels' analysis? If not, why not?
52. Please respond to the allegations contained in paragraph 107 of Mexico's second written submission regarding the United States' use of averages of dolphin mortalities.
53. With reference to paragraph 52 of the United States' third written submission, please clarify why, in the United States' view, "Mexico's proposed 'overall absolute effects' metric is inconsistent with the Appellate Body's guidance". Please explain what the United States means when it argues that such a metric "does not address the 'relative harms to dolphins' of different fishing methods".

54. With reference to paragraph 45 of the United States' opening oral statement, is it the United States' position that, as long as there are greater risks in the ETP large purse seine fishery, any difference in certification requirements should always be accepted as being calibrated to the differences in risk? Or is it that the permissible rate of inaccuracy in each fishery should be set in such a way that the estimated number of unobserved mortalities in each fishery would be the roughly the same?
55. With reference to paragraph 15 of Brazil's third party statement, please respond to Brazil's assertion that the Appellate Body "has never suggested that differences in risk profiles in different fisheries would justify diminishing the accuracy of the measure".
56. In the view of the United States, if it were proven that a fishing method other than ETP large purse sein fishing by setting on dolphins also causes unobservable harms to dolphins, would the calibration test require that such fishing method also be ineligible for the dolphin-safe label?

2 TO MEXICO:

2.1 Risks to Dolphins

57. In case the Panels decide to make their factual determinations regarding the level of observable harms caused by various fishing methods in different ocean regions on a per set basis, would Mexico wish to comment on the completeness and accuracy of the information provided in Exhibit USA-179? Does Mexico agree with the data contained in that Exhibit? If not, please explain why and provide a revised table, as appropriate.

1. Mexico has previously explained why the presentation of the data in Exhibit US-179 and its predecessor are unreliable. The data from outside the ETP is incomplete, and based on unverified captains' logs and information from observer programs that the United States itself does not consider reliable. The United States compounds these problems by making unsupported assumptions and calculation errors. Some examples of these issues are discussed below.

- On page 3 of Exhibit US-179, the United States has entered the number 31 as the aggregate number of mortalities and serious injuries caused by purse seine vessels of the listed countries in 2010. Based on the individual numbers listed by the United States, the correct number is 335.
- In the same table for the year 2015, the United States entered a total of 65, when the numbers it listed total to 119.
- The United States continues to suggest that its data from the Philippines are representative of all of the Philippines purse seine fishing, referring to it as the activities of Philippines vessels in the "the high seas pocket."¹ However, the Philippines report addresses fishing efforts only in "High Seas Pocket 1", which is a limited area that happens to be subject to strict conservation measures of the WCPFC.² In that area, the Philippines is limited to the use of "traditional" vessels, of which some unknown number using "ringnets". The 35 vessels that fish in High Seas Pocket 1 are only 23 percent of the 151 purse seine vessels that the Philippines has registered with the WCPFC,³ which does not include the municipal vessels

¹ United States' third written submission, para. 80.

² Philippines, Annual Report to the Commission, WCPFC-SC11/AR/CCM-20 (Sept. 28, 2015), p. 2 (Exhibit US-38).

³ Ibid., p. 3.

that caught a substantial portion of the Philippines' tuna catch and are not registered. The amount of tuna caught by the Philippines' vessels in High Seas Pocket 1 in 2014 is about 15 percent of the estimated total catch by Philippines purse seine vessels that year (28,634 metric tonnes (MT) out of 185,132 MT).⁴ Moreover, there is no indication that there are any observers on Philippine vessels outside of High Seas Pocket 1.

- At the same time, the United States omitted other relevant evidence, such as reports that a particular fleet of five purse seine vessels in the Philippines using FADs killed 2,000 dolphins per year, and a 2012 report that in the Philippines, FAD vessels fish at night with lights that attract dolphins and lead to their deaths.⁵
- The WCPFC itself estimated that its purse seine fishery had 1,195 dolphin mortalities in 2009, but the United States omits that information.⁶
- The scope of observer data available from the WCPFC is much more limited than the United States seeks to suggest. The WCPFC itself has reported that for purse seine vessels, "the coverage of 2014 observer data submitted to SPC is very low for Japan, China, Spain and Chinese Taipei."⁷ The WCPFC's data indicates, for example, that observer data for 107 out of the estimate 359 purse seine trips made by Chinese Taipei's purse seine fleet in 2014 was still missing as of September 2015.⁸ With respect to longline vessels, Korea and Chinese Taipei had provided no observer data at all for 2013 and 2014.⁹
- The United States uses the word "interaction" in an inconsistent fashion. It shows figures for estimates of all dolphins involved in any way in dolphin sets in the ETP, but does not include, for example, the many thousands of dolphins that feed off of longline hooks (i.e., depredation), or dolphins that are in the vicinity of purse seine net settings outside the ETP. Rather, it simply asserts that there are zero or minimal "interactions" for other types of fishing methods, as though that were a proven fact.¹⁰
- Even putting aside the issue of the reliability of observers outside the ETP, the United States lists observer coverage rates such as 3 to 6 percent (e.g., Australia longline, Chinese Taipei longline fisheries); 3 percent (e.g., Japanese longline fisheries), 7.8 percent of "vessel activities" (Indian Ocean purse seine fisheries), etc. Coverage rates at those levels do not produce reliable data.¹¹
- The United States averages data from national fisheries with more forthright and reliable reports (e.g., Papua New Guinea (PNG)) with those of other countries, in order to avoid providing a per-set number for the PNG alone.

⁴ Ibid., p. 5 (78,153 MT in the EEZ) and p. 7 (106,979 MT in PNG waters).

⁵ See Mexico's first written submission, paras. 74-75.

⁶ Summary Information on Whale Shark and Cetacean Interactions in the Tropical WCPFC Purse Seine Fishery, Paper prepared by SPC-OPF, 8th Regular Session, Koror, Palau (Nov. 2011), p.5 (Exhibit US-17).

⁷ WCPFC, Status of ROP Data Management, WCPFC-TCC11-2015-IP05_rev1 (10 September 2015), p. 7 (Exhibit MEX-116).

⁸ Ibid., p. 13, Table 2.

⁹ Ibid., p. 8.

¹⁰ See the United States' first written submission, paras. 55-56.

¹¹ See Mexico's second written submission, para. 79; Mexico's first written submission, paras. 82-85.

- The United States does not provide any information on mortalities in relation to PBR.
- The United States omits data on gillnet fishing.

2. In summary, Exhibit US-179 does not provide information that can reasonably be relied upon to compare the relative risks posed by different fishing methods or fishing areas – especially when the United States is purporting to apply a per-set metric that requires comprehensive and precise data. The fact that the United States itself rejected the per-set methodology in evaluating the Indian Ocean gillnet fisheries further highlights that this data is not usable for this purpose.

3. Exhibit MEX-95 contains a chart that Mexico proposes be used for the evaluation. The chart presents figures taken from published documents in the form presented in those documents (e.g., year, date range, mean average rates). Mexico's chart includes data, where available, on the relationship between mortalities and PBR. It also highlights reports that indicate high levels of dolphin bycatch and "interactions". In Mexico's view, to be consistent with the presumptions that the United States applies to fishing by the Mexican large purse fleet in the ETP, the tuna measure must presume that where there is evidence of harms to dolphins, such harms must be deemed to be significant absent scientific proof to the contrary. This means that, to be even-handed and not arbitrary, the United States must collect information about dolphin populations and dolphin mortalities from these fisheries, or presume they are causing adverse effects to dolphins.

4. As discussed in Mexico's response to question 79, below, it is not necessary for the Panels to undertake a comprehensive comparison of all fishing methods and ocean areas. Rather, it is the United States that must demonstrate that such a comparison has been undertaken. The evidentiary burden is on the United States to demonstrate that the different labelling conditions and requirements are "calibrated" and therefore not arbitrary under the chapeau of Article XX and, in the light of the *prima facie* case put forward by Mexico, are "calibrated" and therefore even-handed under the second part of the test under Article 2.1 of the TBT Agreement. The Panels need only find that there is evidence of one example where there is no calibration for the United States to be found not to have satisfied this burden. Exhibit MEX-95 shows several examples of fishing methods and fisheries where the risks to dolphins are equivalent to or higher than AIDCP-compliant fishing in the ETP, yet the labelling conditions and requirements are less strict for those fisheries. This outcome is inconsistent with the concept of calibration.

58. Please comment on the table contained at paragraph 50 of the United States' first written submission regarding the frequency of dolphin sets in the ETP. Does Mexico agree with the data contained therein? If not, why not?

5. Mexico does not dispute the data collected and published by the AIDCP, which is based on observer reports from 100 percent coverage of large purse seine vessels fishing in the ETP.

59. Please comment on the table contained at paragraph 51 of the United States' first written submission regarding the frequency of dolphin sets outside the ETP. Does Mexico agree with the data contained therein? If not, why not?

6. Mexico notes that the table in paragraph 51 does not purport to be a summary of the frequency of dolphin sets outside the ETP, but rather a representation of sets with "dolphin interactions." The U.S. data in this table (and in Exhibits US-13 and US-179) are wholly unreliable.

7. Mexico has previously explained that (i) the WCPFC reports cited by the United States do not encompass the full fishing area, (ii) the data are based on limited observer

coverage, and (iii) the WCPFC's data completely exclude the domestic fisheries of the Philippines and Indonesia.¹² Further, the table ignores the WCPFC's own estimate that 1,195 dolphins were killed by purse seine nets in 2009. As discussed in response to Question 57, there is no data available on how many dolphins "interact" with the nets in this region – for example, how many dolphins may be released (safely or not) – such as the dolphins in the photograph in paragraph 82 of Mexico's second written submission.

8. The United States' assertion that purse seine fishing is safe for dolphins in the Atlantic and Indian Oceans is unconvincing. In its opening statement, Mexico explained in detail why the articles on which the United States relies were not useful, pointing out that the authors themselves stated that the observer coverage was too low to produce reliable results. Mexico also pointed out that one of the reports indicated that the French and Spanish fleets apparently intentionally set nets on dolphins in the Atlantic and Indian Oceans,¹³ which the United States previously has claimed never happens.¹⁴ Data on those intentional sets does not appear to be included in the U.S. table.

9. A recent report discussing tuna-dolphin associations in the Indian Ocean commented as follows:

However, European purse seiners have been banned from setting on cetaceans by EU Regulation since 2007, and yet they continued to do so (Capietto et al., 2012). That may in part have been due to poor communication about the new regulation with the purse seine fishermen (Laurent Dagorn, pers. comm., July 2014); this needs to be improved. To assess the current and future levels of interaction between cetaceans and the purse seine fleets, very much higher levels of observer coverage will be required than have been deployed in the past. 100% observer coverage would be ideal, preferably including international observers, and backed with electronic surveillance.¹⁵

10. Mexico submitted evidence in the first compliance proceeding regarding an enforcement case in the United States titled *In the Matter of Matthew James Freitas, et al.* (hereinafter "Freitas case"), which involved five U.S.-flagged vessels that fish in the WCPO with FADs.¹⁶ All five were penalized for using FADs during a period when the WCPFC had established a "closure period" during which FADs could not be used, but two were also penalized for setting purse seine nets on marine mammals, in violation of the U.S. Marine Mammal Protection Act (MMPA). (They were not penalized in any manner for marketing tuna caught by the vessels as dolphin-safe.) NOAA had obtained information from regional observers from Micronesia and the Solomon Islands who were onboard the vessels to monitor compliance with the FAD restrictions pursuant to the rules of the WCPFC; it was fortuitous that two of them observed the setting of nets on marine mammals, as it was not part of their responsibilities or training to watch for that. The fine for setting a net in association with dolphins under the MMPA is USD\$11,000.¹⁷ Thus, there is conclusive evidence of intentional setting on dolphins in the Western and Central Pacific Ocean.

¹² Mexico's first written submission, para. 80.

¹³ Lauriane Escalle et al., "Cetaceans and Tuna Purse Seine Fisheries in the Atlantic and Indian Oceans: Interactions but Few Mortalities," 522 Mar. Ecol. Prog. Ser. 255, pp. 264 and 265 (2015) (Exhibit US-145).

¹⁴ See Mexico's opening statement, paras. 62-63.

¹⁵ Anderson, R. C. Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean, IPNLF Technical Report 2, International Pole and Line Foundation (2014), p. 77 (Exhibit MEX-42).

¹⁶ U.S. Department of Commerce, *In the Matter of Matthew Freitas, et al.*, Initial Decision and Order (August 23, 2013) (Exhibit MEX-115).

¹⁷ 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. See *ibid.*, pp. 32-33.

11. For the reasons discussed above, there is significant evidence both of intentional setting on dolphins and of substantial interactions with dolphins outside the ETP.

60. With reference to paragraph 136 of the United States' first written submission, does Mexico agree that "the certifiers' task is far more difficult inside the ETP large purse seine fishery than outside"? If not, why not?

12. Mexico does not agree that the certifier's task is more difficult inside the ETP large purse seine fishery than in other fisheries in other ocean regions. In Mexico's view, the opposite is true for the following reasons.

13. The "certifier" within the ETP large purse seine fishery is a highly-trained scientific observer whose sole function aboard a fishing vessel is specifically to observe all procedures relating to dolphins during fishing sets, to monitor compliance with all mandatory dolphin-protection procedures, and to provide written reports (which are subsequently reviewed by the AIDCP International Review Panel)¹⁸ on any and all bycatch and interactions with marine mammals, including detecting and reporting on any mortalities or serious injuries caused to dolphins in the course of a fishing set. This is the observer's sole priority.

14. Currently, the "certifier" outside the ETP large purse seine fishery is the captain of the fishing vessel. The captain has a number of other important responsibilities that are given more priority, relating to the operation of the vessel and fishery maneuvers, than observing fishing sets or gear deployments to detect harms to dolphins. Those other responsibilities require the captain's attention during a fishing set or gear deployment, rather than closely observing the fishing operation for signs of mortality or serious injury to dolphins. Using U.S. regulations for U.S. vessels as an example, first and foremost, the captain is responsible for:

- The safety of the crew and the security and seaworthiness of the vessel;¹⁹
- Navigation and monitoring of sonar, radar and other electronic aids;
- Locating and targeting fish, actively managing all aspects of the fishing operations, and getting the fish on board;
- Managing compliance with environmental regulations on vessel waste;²⁰ and
- Monitoring compliance, including reporting requirements, required for each of the major international tuna fishing areas.²¹ For example, under the U.S. regulations for the Western and Central Pacific Fisheries for Highly Migratory Species, a captain must oversee reports that include identification information for the vessel; description of fishing gear used; dates, times and locations of fishing; and species and amounts of fish retained and discarded. Reports must also be made on transshipments, purse seine discards, and transfers to other purse seine vessels. Daily reports must be made on the use of FADs, and reports must be made on

¹⁸ Agreement on the International Dolphin Conservation Program, as amended (July 2014), Annex VII (Exhibit MEX-96).

¹⁹ See, e.g., U.S. Coast Guard, Federal Requirements for Commercial Fishing Industry Vessels, available at <http://www.fishsafe.info/FederalRequirementsCFV2009.pdf> (Exhibit MEX-97).

²⁰ See, e.g., 33 CFR Part 151.10 (Control of oil discharges) (Exhibit MEX-98).

²¹ See 50 CFR Part 300 (International Fisheries Regulations), table of contents (Exhibit MEX-99).

encirclements of whale sharks (except when the encirclement takes place within another country's territorial waters).²²

15. Moreover, as the Panel previously found and the Appellate Body acknowledged in the first compliance proceedings, the United States did not rebut Mexico's showing that "captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured, and that this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the tuna measure".²³ This is reinforced by the fact that, in the cases where the United States has decided to require observers to certify whether dolphins were killed or injured in certain of its domestic fisheries, the expertise and training required for those observers is significant, involving a three-week training course,²⁴ while for captain certification, the extent of training is the on-line review of a superficial set of slides.

16. It should also be noted that the interactions with dolphins are anticipated and carefully controlled or prevented during AIDCP-compliant dolphin encirclement manoeuvres in the ETP large purse seine fishery. Any mortalities or serious injuries that might occur are evident because the affected animals will be either unable or less able to exit from the net as it is pursed closed and "rolled up". Harms to dolphins would also be noted by the crew rescue teams and divers inside the net area that patrol and observe the dolphins' behavior inside the net and their release during the so called "back down" procedure. In addition, if a dolphin needs help in exiting the net, the divers manually assist any dolphins remaining after backdown over the corkline. In contrast, fishing methods that are indifferent to dolphin interactions – i.e., involving incidental or "accidental" interactions, or intentional interactions that are unregulated – are, by their nature, unanticipated and/or uncontrolled, making them more difficult to identify and observe, particularly by a vessel captain who has simultaneous roles and responsibilities other than observation. Additionally, outside of the ETP, vessels are not equipped with the same dolphin safety equipment, crews are not trained in dolphin release procedures, and crew members do not enter the net to ensure there are no dolphins in the net or to facilitate dolphin release.

17. Further, dolphin interactions with longline or gillnet fishing gear may occur at a distance from the fishing vessel or after dark, which prevents them from being observed,²⁵ and dolphins may later die from injuries or complications arising from these interactions (e.g., strangulation on gear that has been broken off and partially swallowed during depredation).²⁶

61. With reference to paragraph 53 of Mexico's first written submission, does Mexico believe that setting on dolphins causes no unobservable harms? Please indicate which exhibit supports this assertion or, if not in the record, please provide evidence supporting this assertion.

²² 50 CFR 300.218 (Exhibit MEX-100).

²³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.166-7.167 and footnote 611.

²⁴ See, e.g., NOAA Fisheries, Observer Program, available at http://www.fpir.noaa.gov/OBS/obs_observer_rqrmts_trng_duties.html (Exhibit MEX-101).

²⁵ See, e.g., Department of Commerce, Differentiating Serious and Non-Serious Injury of Marine Mammals: Report of the Serious Injury Technical Workshop 10-13 September 2007, Seattle, Washington (September 2008), p. 18 ("The observer may or may not be able to see the nature of the injuries if the animal is released far from the boat or in poor visibility.") and p. 20 ("Many animals break the line and swim away with varying amounts of gear attached before they are close enough for the observer to see details. Tuna sets (the majority) are hauled after dark, making it difficult for observers to identify species and observe details of the interaction events.") (Exhibit MEX-102).

²⁶ See Mexico's first written submission, paras. 69-73 and 91-105.

18. Mexico has consistently made the point that there is no conclusive evidence that setting on dolphins causes unobservable harms. In this regard, it is important to note that the "evidence" submitted by the United States in this proceeding – comprising several speculative reports – is the exact same evidence that the United States submitted in the original proceeding.²⁷ The Panel in the original proceeding, after reviewing the evidence submitted by Mexico and the United States, made the following determination:

From the above, it appears that there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality. Nonetheless, we consider that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect. The information presented to us in this respect also suggests that this is a field of research in which the collection and analysis of information is inherently difficult, but that efforts have been ongoing to better understand these issues, including in the context of the implementation of the DPCIA.²⁸

The United States has not submitted any new evidence in support of its claim of unobservable harms. The article in Exhibit US-140, published in 2007, simply reviews past reports and does not include any new research. The 2010 article cited in paragraph 64 of the United States' third written submission, but which the United States did not submit as an exhibit, addresses a different subject – a proposed mathematical model for estimating how frequently individual dolphins are included in dolphin sets – and the quotation used by the United States is simply an extraneous reference to the old article contained in Exhibit US-45.

19. Mexico's first written submission reviewed the reports submitted by the United States. For example, Mexico pointed out that one of the studies based its analysis on studies of "terrestrial herd-forming mammals" such as bovids and concluded that it had identified only "a plausible mechanism for mother-calf separations during tuna purse-seine activities", rather than actual evidence²⁹ Another of the studies states that its measure of reproductive output did not correlate to the number of dolphin sets involving eastern spinner dolphins, and therefore that the author's theory did not apply to that dolphin stock.³⁰ Another of the studies was based on an evaluation of dead dolphins in which the cause of death was unknown.³¹ All of the reports are based on speculation.

20. Mexico also pointed out that the 2002 report of the U.S. Commerce Department – which is its most recent evaluation of dolphin sets in the ETP – reviewed evidence of stress that might be caused to dolphins during the fishing operations, and concluded as follows:

The responses observed in the sampled live animals were well within those ranges from which dolphins are expected to recover fully; however, it is possible that some dolphins may experience stronger responses, such as during occasional 'catastrophic' aspects of fishery operations when dolphins may become trapped under a canopy in the net. In theory, this could result in a surge in catecholamines intense enough to cause injury or death within hours or days of being released (a condition known as

²⁷ In the original proceeding, current Exhibit US-43 was US-4, current US-44 was US-27, current US-45 was US-26, current US-46 was US-11, and current US-48 was US-21.

²⁸ Panel Report, *US – Tuna (II) (Mexico)*, para. 7.504.

²⁹ Mexico's first written submission, para. 62.

³⁰ *Ibid.*

³¹ *Ibid.*

capture myopathy). To date, no live ETP dolphin exhibiting such a response has been identified or sampled.³²

21. Mexico submitted an article overlooked by the United States that included an analysis of live dolphins, but which stated that the stress levels observed were "more likely" caused by "chasing by swimmers, handling and sampling for this study"³³

22. As Mexico has previously explained, the evidence regarding unobserved effects of dolphin sets in the ETP is based on speculative hypotheses, all initially motivated based on the assumption that dolphin populations were not growing at expected rates – an assumption that the most recent data contradicts.³⁴ At the same time, Mexico has submitted incontrovertible evidence (including photographic evidence) that other fishing methods, such as gillnets and longlines, cause indirect, unobservable harms to dolphins. Mexico's point continues to be that, to the extent that factual presumptions are used (e.g., there is "sufficient evidence ... to raise a presumption that genuine concerns exist" using the words of the original Panel), they must be applied consistently to all fishing methods and all oceanic regions.

62. With reference to paragraph 230 of Mexico's first written submission, please elaborate on the difference between "risk profiles" and "associated levels of risk".

23. This appears to be a reference to paragraph 228 of Mexico's first written submission, and in particular to the sentence that states: "This necessarily requires an assessment of the risk profiles and associated levels of risks of the different fishing methods." Mexico used term "associated levels of risks" be viewed as a way to define "risk profiles." The term was not used to describe an independent concept.

63. With reference to paragraph 53 of the United States' second written submission, please comment on the United States' assertion that "Mexico does not dispute the data regarding death and serious injury caused by setting on dolphins in the ETP large purse seine fishery".

24. Mexico does not dispute the data collected and published by the AIDCP, which is based on independent observer reports from 100 percent coverage of large purse seine vessels fishing in the ETP. Mexico has vigorously disputed the United States' speculative allegations regarding indirect (unobserved) harms to dolphins in the ETP.

64. (A) With reference to paragraph 77 of the United States' second written submission, does Mexico agree that fishing methods other than setting on dolphins are "capable of being carried out without putting any dolphin at risk or involving any dolphins at all" (emphasis added)?

(B) With reference to paragraph 96 of the United States' first written submission, does Mexico agree that setting on dolphins cannot be practiced in a way that does not harm dolphins?

25. Mexico strongly disagrees with the statements in both questions.

³² S. Reilly et al., Report of the Scientific Research Program Under the International Dolphin Conservation Program Act (2005) (*italics emphasis original; underline emphasis added*) (Exhibit US-47).

³³ Mexico's first written submission, para. 62, citing David St. Aubin, et al., "Hematological, serum, and plasma chemical constituents in pantropical spotted dolphins (*Stenella attenuata*) following chase, encirclement, and tagging", *Marine Mammal Science*, 29(1), p. 29 (Exhibit MEX-14).

³⁴ Mexico's first written submission, paras. 41-43 and 54-60.

26. In Mexico's view, all fishing methods are capable of being carried out without causing any adverse effects to dolphins or without putting any dolphins at risk on a per fishing set or a per gear deployment basis, including the AIDCP dolphin encirclement fishing method. Note that the tuna measure makes the high seas driftnet method ineligible, even though it may not result in dolphin mortalities every time.

27. With respect to the AIDCP dolphin encirclement method, in 2015, 96.4 percent of dolphin sets were made without a dolphin mortality or serious injury.³⁵ Further, Mexico does not agree that unobserved mortalities and serious injuries from AIDCP dolphin-safe sets, if they exist at all, occur in every set or are material.

28. Note that dolphins are present in all tuna fisheries and that all major tuna fishing methods (except perhaps pole-and-line fishing) can kill and injure dolphins over the course of their use. Therefore, on a fishery-wide basis, the vast majority of tuna fishing methods cannot be carried out without causing adverse effects to dolphins or without putting any dolphins at risk. Despite the presence of dolphins in all other tuna fisheries and the evidence of dolphin mortalities in those non-ETP fisheries, the only fishery in the world that mandates dolphin safety training, procedures and equipment for its captains, crews and vessels is the ETP large purse seine fishery under the AIDCP.

29. Mexico disagrees that the standard for calibration is whether a fishing method "involves any dolphins". Such a standard is inconsistent with the design, structure and architecture of the measure which designates dolphin-safe status on the basis of dolphin mortalities and serious injuries and which, among other things, designates fishing methods as ineligible even if there is no intentional encirclement of dolphins, as is the case with high seas driftnet fishing. The method for assessing the relative overall risks of adverse effects to dolphins posed by different fishing methods and different ocean areas is based on the observed mortalities and serious injuries plus the unobserved or unobservable adverse effects. The risk profile of a fishing method that interacts with dolphins will be reflected in this evidence as will the risk profile of other fishing methods.

30. Also note that Mexico has shown that longline fishing involves dolphins because it attracts dolphins to the hooks, and that handline fishers use dolphins to locate tuna, and those methods therefore involve dolphins on a regular basis.³⁶ (This issue is discussed in more detail in response to Question 98). Yet those methods remain eligible.

65. With reference to paragraph 109 of the United States' second written submission, does Mexico agree that it is "uncontested that trawl fishing has a lower risk profile for dolphins than dolphin sets, including under the AIDCP"?

31. No, Mexico does not agree. The Panel in the original proceedings determined that trawl fishing can be harmful to dolphins.³⁷ In doing so, it cited to evidence submitted by Mexico, which it summarized as follows:

According to the UK Department of Environment, Food and Rural Affairs a study of a pair-trawl for tuna, conducted by the Republic of Ireland in 1998 and 1999, recorded a total bycatch of 180 cetaceans, including the Atlantic white-sided dolphin and the striped dolphin, Exhibit MEX-99,

³⁵ AIDCP, "Report on the International Dolphin Conservation Program", Document MOP-34-05 (10 October 2016), p. 17, Table 5, first column (Exhibit MEX-103).

³⁶ See Mexico's first written submission, paras. 93-94, 100; Mexico's second written submission, paras. 72, 76-77.

³⁷ Panel Report, *US – Tuna II (Mexico)*, para. 7.521.

pages 13, Ev 27. See also the information on European fisheries using pelagic trawl Exhibit MEX-99, p. Ev 26.³⁸

The Panel also cited to a discussion in this same report of the use of pair trawling gear to fish for albacore tuna.³⁹

32. Mexico is resubmitting the exhibit to which the Panel cited, a report of the U.K. House of Commons Environment, Food and Rural Affairs Committee.⁴⁰

33. A report published in 2012 discusses bycatch of common dolphins in the Eastern North Atlantic, arising from fisheries in that region that use pair trawls and gillnets to catch tuna and other types of fish. The report estimates that, for the period 2003 to 2009, the mean average of bycatch of common dolphins was 1,009 annually.⁴¹

34. Clearly trawl fishing has a very high risk profile, which is greater than for dolphin sets conducted under the regulations of the AIDCP.

66. Please comment on the allegation made in paragraph 83 of the United States' third written submission regarding dolphin mortalities caused by free school and floating object sets in the ETP.

35. As has been well-established, there are scientific observers, specifically trained to watch for dolphin mortalities and injuries, on 100 percent of the fishing voyages made by large purse seine vessels in the ETP. There are also significant sanctions that can be imposed on vessels that cause mortalities or serious injuries without having an assigned DML. Further, captains operating large purse seine vessels in the ETP are required to undergo extensive training on avoiding harm to dolphins. Accordingly, it is not surprising that there are relatively few mortalities arising from those fishing methods in the ETP.

36. At the same time, there is significant evidence that large purse seine vessels have killed many thousands of dolphins outside the ETP, including vessels using FADs. This reflects that the use of purse seine nets without qualified observers, special dolphin safety training, and enforcement mechanisms is dangerous to dolphins. The fact that the AIDCP is successful in minimizing dolphin mortalities in the ETP does not make the use of those methods safe for dolphins in other ocean regions. Indeed, the substantially higher mortalities caused by some individual purse seine sets outside the ETP highlights the importance of AIDCP-type regulation.

67. With reference to paragraph 143 of the United States' third written submission, please respond to the United States' assertion that "Mexico points to *no* fishery where the per set mortality exceeds 0.1265 dolphins per set".

37. To start with, Mexico notes that the per-set mortality of dolphin sets in the ETP in 2015 was 0.07.⁴² Mexico further notes that comprehensive and reliable data about per set or per deployment dolphin mortalities are not available for any other fishery. Accordingly, there is no basis for using per-set mortalities to compare fisheries. Indeed, the United States itself abandoned the per-set mortality metric when evaluating Indian

³⁸ Panel Report, *US – Tuna II (Mexico)*, footnote 734.

³⁹ Panel Report, *US – Tuna II (Mexico)*, footnote 737.

⁴⁰ U.K. House of Commons Environment, Food and Rural Affairs Committee, *Caught in the net: bycatch of dolphins and porpoises off the UK Coast* (21 January 2004) (Exhibit MEX-121).

⁴¹ L. Mannocci et al., *Assessing the Impact of Bycatch on Dolphin Populations: the Case of the Common Dolphin in the Eastern North Atlantic*, *Plos One* 7(2) e32615 (February 2012), pp. 1, 5 and 6 (Exhibit MEX-120).

⁴² AIDCP, "Report on The International Dolphin Conservation Program", Document MOP-34-05, p. (10 October 2016), p.7 (Exhibit MEX 103).

Ocean gillnet fisheries, because the necessary data has not been collected and published.⁴³

38. Moreover, the United States has not identified any example of a scientific evaluation that used per-set mortalities as a metric to compare completely different fisheries.

39. In a hypothetical situation in which reliable per-set figures were available for other fisheries, the United States' argument appears to suggest that the per-set mortality of dolphin sets in the ETP establishes the baseline for making a determination on whether any other fishery is harmful to dolphins. Under this approach, apparently the United States would consider a fishery to be not harmful to dolphins if the per-set mortality was 0.0699, as that would be lower than the 0.07 figure for the dolphin encirclement method in the ETP. Obviously, such a conclusion would be discriminatory, arbitrary and unsupported.

40. Given the design, structure and architecture of the measure, it would also be arbitrary for the United States to use a benchmark based solely on the attributes of AIDCP-compliant fishing in the ETP against which to compare all other fishing methods. Not only would such an approach arbitrarily draw a line on dolphin mortalities and serious injuries, but it would also create a subjective benchmark which could never be surpassed by Mexico's fishing fleet and thereby, if accepted, would create an opportunity for WTO Members to circumvent their obligation under Article 2.1 of the TBT Agreement and the requirements of the chapeau of Article XX simply by defining the characteristics of the targeted trade as the threshold for different treatment.

41. If the United States disclaims such an approach, it should identify an objective, scientific basis for deciding when a particular per-set mortality number should be treated as harmful to dolphins. Mexico has explained that, when a population is small, such as the dolphin stock affected by the Hawaii longline fishery that the United States itself has designated as "depleted" and "endangered", even a small number of mortalities can threaten the dolphin population with extinction.⁴⁴ That is why the PBR method has been favoured by the United States in other contexts for evaluating harm to marine mammals.

42. But the United States rejects the application of PBR under the tuna measure. It has argued that population effects are not relevant, because the measure purportedly is aimed at preventing harm to individual dolphins.⁴⁵ If that were genuinely the case, however, the per-set metric would also provide a relevant benchmark. Rather, if a fishing method is known to cause dolphin mortalities, under the stricter standard of protecting individual dolphins from harm, such a fishing method cannot be "dolphin-safe."

68. With reference to paragraph 53 of Mexico's opening oral statement, please explain the evidentiary basis for the argument that all major tuna fishing methods, other than pole-and-line fishing, cause unobservable adverse effects to dolphins.

43. Mexico has demonstrated that other fishing methods have unobservable, indirect harms. For example, dolphins are wounded by the hooks of longlines.⁴⁶ Injuries to

⁴³ United States' second written submission, paras. 168-169.

⁴⁴ See Mexico's opening statement, paras. 96 and 243.

⁴⁵ United States' second written submission, paras. 36, 122-123, 161-162; United States' third written submission, paras. 52 and 98.

⁴⁶ Mexico's first written submission, paras. 96-103.

dolphins from longlines can occur deep underwater or miles away from the vessel, where they cannot be seen even by an observer.⁴⁷

44. Mexico also showed that gillnets have unobservable effects. Dolphins sometimes can escape gillnets, but later choke on pieces of the net.⁴⁸ Gillnets (as well as longlines) are sources of "ghost fishing," where lost equipment adrift in the ocean can continue to kill dolphins and other sea life on their own.⁴⁹ Further, the very high numbers of dolphins killed by gillnets implies there must be cow-calf separation caused by this fishing method.

45. In areas where FAD fishing interacts with dolphins with no supervision of dolphin safety precautions, such as in the Western and Central Pacific, it should be presumed that there are also unobservable harms, similar to those the United States presumes exist in the ETP. In particular, outside the ETP, there are no mandatory procedures for protecting dolphins when they are being released from nets or hooks. Under those circumstances the dolphins may suffer much greater stress and risk of physical harm than the United States claims they experience in the ETP.

46. The U.S. Government itself has published research papers on indirect harms caused to dolphins and other marine mammals by other fishing methods. A Commerce Department paper focusing on the indirect effects of gillnet and longline fisheries stated as follows:

Gillnet: Small marine mammals, such as harbor porpoise and bottlenose dolphins, that contact and become entangled in gillnets seldom survive. This statement is supported by a lack of observer or fisher observations of living delphinids that are released from gillnet gear, and from a low frequency of healed wounds consistent with interactions with gillnet gear on dead, stranded marine mammals. A few stranded small marine mammals do, however, exhibit healed lesions consistent with previous interactions with gillnet gear, so it is clear that not all small marine mammals die as a result of those interactions.

Gillnet interactions are often identified as the cause of death of stranded harbor porpoise in the mid-Atlantic. Because lesions and wounds indicative of gillnet interactions may be easily missed during a perfunctory necropsy, a detailed protocol has been designed to aid biologists in determining whether gillnet interactions was the cause of death. Signs considered diagnostic of interactions with gillnet are 1) a lack of indications of bottom scavenging of the carcass, 2) gillnet marks on leading edge of flukes, pectoral fins, or dorsal fin, 3) gill net marks on body (may be mono- or multi-filament), 4) deep grooves in caudal peduncle, and 5) loss of appendage (Read and Murray, 1996). The most common lesion associated with a mortality caused by gillnet gear is the presence of narrow, linear lacerations in the epidermis caused by the gillnet pressing into the animal's body. Sometimes these lacerations can be used to estimate mesh size and whether the line was mono- or multi-filament.

* * *

⁴⁷ Longlines can be up to 150 kilometres in length. OECD Glossary of Statistical Terms (Exhibit MEX-27).

⁴⁸ Mexico's first written submission, para. 72.

⁴⁹ See, e.g., U.S. National Oceanic and Atmospheric Administration, Impact of "Ghost Fishing" via Derelict Fishing Gear (March 2015), pp. 8 (dolphins killed by ghost driftnets in Australia, 23 marine mammals recovered from derelict driftnets in Puget Sound, Washington), 9 (porpoises entangled in derelict longlines) (Exhibit MEX-104).

Longline: The Atlantic pelagic longline fishery, which targets swordfish and tunas primarily has interactions with pilot whales and Risso's dolphins. Although this fishery has a low rate of observed incidental mortality of marine mammals, it has a potentially high rate of incidental injury of marine mammals. Whether a hooked or entangled animal is considered seriously injured will affect the rate of serious injury and mortality incurred by this fishery. Specifically, although there was only one mortality observed in 1994 and 1995, if all hooked or entangled animals were assumed to have died, the average kill levels for 1994/1995 would be approximately 225 animals. If some portion of the animals hooked or entangled are considered seriously injured, the average kill levels would be lower. Pilot whales and Risso's dolphins may become entangled in the mainline or gangions, and may be hooked in the body or in the mouth. Animals are often released alive and trailing some type of long line gear either from their mouth (often hook only, or hook and gangion) or from their caudal peduncle (gangion and/or mainline).⁵⁰

47. Of particular interest is that this paper discusses the potential stress effects on marine mammals, including cetaceans, of being entangled in fishing gear. In other words, scientists theorize that fisheries and fishing methods other than the ETP large purse seine fishery may cause harmful stress to dolphins.⁵¹

48. Using the words of the original Panel, Mexico has provided "sufficient evidence ... to raise a presumption that genuine concerns exist" that other fishing methods cause unobservable adverse effects on dolphins.

49. The tuna measure does not address such unobservable adverse effects at all. The United States has made no effort to measure or estimate such harms, but rather simply presumes that they are de minimis. That is not calibration.

2.2 The 2016 Tuna Measure

69. With reference to paragraph 157 of the United States' first written submission, does Mexico agree that "the AIDCP regime requires that processed tuna be traceable back to the TTF, rather than to the particular set or well in which the tuna was caught or stored?"

50. No, the United States' assertion is directly contradicted by the evidence. In fact, this issue was addressed in detail in the first compliance proceeding. To comment on the United States' assertion, it is necessary to review all of the relevant evidence again.

Requirements for ETP tuna in tuna measure

51. For U.S. tuna products, 50 CFR 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. For large U.S. purse seine vessels fishing for tuna in the ETP, there is a procedure requiring the use of "tuna tracking forms." As explained in section 216.93(a):

Tuna tracking forms. Whenever a U.S. flag tuna purse seine vessel of greater than 400 st (362.8 mt) carrying capacity fishes in the ETP, IDCP approved Tuna Tracking Forms (TTFs), bearing a unique number assigned to that trip, are used by the observer to record every set made during that trip. One TTF is used to record dolphin-safe sets and a second TTF is used to record non-dolphin-safe sets. The information entered on the TTFs

⁵⁰ U.S. Department of Commerce, Differentiating Serious and Non-Serious Injury of Marine Mammals Taken Incidental to Commercial Fishing Operations: Report of the Serious Injury Workshop 1-2 April 1997, Silver Spring, Maryland (January 1998), pp. 2-3 (Exhibit MEX-105).

⁵¹ See *ibid.*, pp. 14-18, 21-22.

following each set includes the date, well number, weights by species composition, estimated tons loaded, and additional notes, if any. The observer and the vessel engineer initial the entry as soon as possible following each set, and the vessel captain and observer review and sign both TTFs at the end of the fishing trip certifying that the information on the forms is accurate. TTFs are confidential official documents of the IDCP, consistent with Article XVIII of the Agreement on the IDCP, and the Agreement on the IDCP Rules of Confidentiality.⁵²

The requirement for tuna tracking forms does not apply to U.S. vessels operating outside the ETP, nor to U.S. vessels fishing in the ETP that are not large purse seine vessels.

52. There are separate rules in the tuna measure for "imported" tuna products containing ETP tuna. Moreover, the regulations address yellowfin tuna products and other tuna products in separate subsections because of the embargo the United States has adopted for yellowfin tuna from other countries. Nonetheless, the dolphin-safe documentation requirements are the same for all tuna products containing ETP tuna caught by large purse seine vessels in the ETP.

53. Section 216.92(b), which applies to imported tuna products made with yellowfin tuna harvested in the ETP, requires that the tuna have been harvested by a "vessel belonging to a nation that has obtained an affirmative finding under § 216.24(f)(8)." As also discussed above, the Department of Commerce has issued and maintained an "affirmative finding" that Mexico is in compliance with the AIDCP and has implemented all requisite requirements within its national laws and regulations.

54. For other tuna products not containing yellowfin tuna and caught by a large purse seine vessel in the ETP, the U.S. regulations provide the following requirement for recordkeeping:

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 Plan⁵³

55. Thus, the same requirements for tracking and verification for yellowfin tuna products also apply to non-yellowfin tuna products.

AIDCP Requirements

56. The AIDCP requirements are described in the AIDCP's Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001), which states in pertinent part:

The national authority of the Party under whose jurisdiction a fishing vessel operates shall be responsible for tracking the tuna caught, transported, or unloaded by that vessel, but may, by mutual consent, delegate the observation of unloadings and transfers to the national authority of the Party in which the unloading or transfer takes place. The national authority of the Party in which the tuna is processed becomes responsible for the tracking and verification of the dolphin-safe status of all such tuna when it enters a processing plant located in the jurisdiction of that Party, regardless of the flag of the catcher vessel, and for communicating the information to the Secretariat.⁵⁴

⁵² 50 CFR § 216.93(a) (Exhibit MEX-2).

⁵³ 50 CFR § 216.92(b)(2)(i) (Exhibit MEX-2).

⁵⁴ AIDCP, "Resolution to Adopt the Modified System for Tracking and Verification of Tuna" (20 June 2001) (Exhibit MEX-59), p. 3.

57. The rules for tracking dolphin-safe tuna under the AIDCP 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 quotes the full procedures below because they are crucial to understanding the steps that are necessary to ensure that a tuna product validly contains dolphin-safe tuna:

3. TUNA TRACKING FORM (TTF)

The Secretariat shall be responsible for producing the TTFs, which shall be in both English and Spanish, in sufficient quantity to be used throughout the Agreement Area by all the Parties; for distributing the forms to the national authorities; for training a representative of each national authority in the proper use and handling of the form; and for maintaining physical control of all completed TTFs, once they are returned to the Secretariat by the national authority in accordance with its national laws and regulations.

1. TTFs utilized during a trip shall be identified by a unique number, which shall be the IATTC cruise number to which it corresponds, and shall have provision for recording and endorsing information concerning each set made during a fishing trip which would enable the contents of any of the vessel's wells to be identified as dolphin safe or non-dolphin safe.

2. Dolphin safe and non-dolphin safe tuna caught in the course of a trip shall be recorded on separate TTFs.

3. The Secretariat shall issue the TTFs to observers, except that in cases where the Party with jurisdiction over the vessel has a national observer program in operation, the pertinent national authority shall issue the TTFs to observers of its national observer program. The cruise number shall be recorded on the TTF at the beginning of each trip, and all tuna caught during that trip shall be recorded on the relevant TTF.

4. After a trip, the original TTF(s), with total confirmed quantities of tuna unloaded or transferred from that trip, shall be retained by the competent national authority, as follows:

a. If the tuna is to be processed within the territory of the Party under whose jurisdiction the fishing vessel operates, the original TTF(s) shall be submitted to the national authority of that Party;

b. If the tuna is to be processed within the jurisdiction of a Party other than the Party under whose jurisdiction the fishing vessel operates, at the completion of unloading the tuna the responsibility for tracking passes to the national authority of the Party in whose territory the tuna is to be processed. In such a case, the original TTF(s) is (are) submitted to the national authority of the Party under whose jurisdiction the tuna is to be processed, and a copy of the TTF(s) is (are) provided to the national authority of the Party under whose jurisdiction the vessel operates.

5. Within ten days of receipt of a TTF, the competent national authority shall transmit the TTF to the Secretariat.

6. TTFs shall be treated by the competent national authority as confidential official documents of the IDCP, consistent with Article XVIII of the AIDCP, and the AIDCP Rules of Confidentiality.

4. FISHING OPERATIONS

1. At sack-up during each set, and prior to brailing or loading of tuna aboard the vessel and into wells, the observer determines whether or not dolphin mortality or serious injury has occurred in the set and notifies the captain immediately of his determination.
2. On the basis of the observer's determination, the tuna is designated either dolphin safe or non-dolphin safe. The tuna is brailed and loaded into a prepared well or wells which already contain either dolphin safe tuna or non-dolphin safe tuna, as applicable, or into a prepared but empty well or wells which shall then be designated dolphin safe or non-dolphin safe, as applicable.
3. At the completion of brailing, when there is no further question as to whether the tuna is dolphin safe or not, the observer, in consultation with the engineer, shall record on the appropriate TTF the species and estimated quantity of tuna loaded into each well used in that set. Both the observer and the engineer shall initial the entry for each set.
4. Within a reasonable period after the completion of loading of non-dolphin safe tuna, the observer may confirm the number(s) of the well(s) receiving the tuna by noting the subsequent change in temperature in the well(s).
5. Transfers of tuna from the net of one fishing vessel to another fishing vessel at sea in the course of a trip shall be documented on the TTF(s), specifying the quantity, species, and dolphin safe status of the tuna being transferred. The transfer shall be documented on the TTF(s) of both the transferring and receiving vessels.
6. At the end of each fishing trip, when no more sets are to be made, the observer and the captain shall review the TTF(s), make any additional notes, and both will sign the form.

5. UNLOADING

1. The captain, managing owner, or agent of a vessel returning to port to unload part or all of its catch shall provide sufficient notice of the vessel's intended place and schedule of unloading to the competent national authority to allow for preparations to be made for monitoring the unloading of that tuna.
2. If a trip terminates when a vessel enters port to unload part of its catch, new TTF(s) shall be assigned to the new trip, and the information concerning any tuna retained on the vessel shall be recorded as the first entry on the TTF(s) for the new trip. If the trip is not terminated following a partial unloading, the vessel shall retain the original TTF(s) and shall submit a copy of that TTF(s), with original signatures, to the national authority of the Party where the tuna was unloaded. In either case, the species, dolphin safe status, and amount of tuna unloaded shall be noted on the respective original TTF(s).
3. If tuna is unloaded from a fishing vessel in port and subsequently loaded aboard a carrier vessel for transport to a processing location, the Party under whose jurisdiction the fishing vessel operates shall be responsible for obtaining the TTF(s), retaining documentation of the unloading, including recording of the total confirmed scale weight if the tuna is weighed at that time, verifying that the dolphin safe tuna is kept separated from the non-dolphin safe tuna during the carrier loading and transporting process, and transmitting all relevant documentation to the

Secretariat. Dolphin safe tuna and non-dolphin safe tuna may be stored in the same hold on a carrier vessel provided that the two are kept physically separate, using netting or similar material, and the non-dolphin safe tuna is clearly identified as such.

4. If the tuna is unloaded directly to a processing facility, the national authority of the Party in whose area of jurisdiction the tuna is to be processed shall be responsible for retaining documentation of the unloading of the tuna and recording of the separate confirmed scale weight for dolphin safe and nondolphin safe tuna. The competent national authority shall be responsible for returning the original TTF to the Secretariat for entry of the information into a database and for continued tracking of that tuna, and a copy of the TTF(s) shall be forwarded to the national authority of the Party under whose jurisdiction the fishing vessel operates if different from the State where the tuna is processed.

5. If the tuna is unloaded within the jurisdiction of a State not party to the Agreement, the national authority of the Party under whose jurisdiction the vessel operates shall make arrangements with the State in whose jurisdiction unloading occurs to certify the dolphin safe status of the tuna being unloaded and to ensure that the TTF(s) are transferred to the Secretariat.

6. Dolphin safe and non-dolphin safe tuna shall be unloaded from fishing or carrier vessels into separate bins. Each bin shall be identified with the corresponding TTF number, the dolphin safe status of the tuna, and confirmed scale weight for the tuna in that bin.

7. Each sale of a portion of the catch shall reference the corresponding TTF number, which will accompany the tuna through every step of processing. In the event of transfers of ownership after the national authority has transferred to the Secretariat possession of the TTF(s), the national authority of the transferring Party shall be responsible for reporting any such transfers of ownership to the Secretariat, specifying the TTF number(s), the species and quantity (scale weight) of tuna being transferred, and the recipient.

8. The Parties shall determine means by which to document, within this system, tuna unloaded by purse seine vessels operating in the Agreement Area but not covered by the AIDCP. Tracking shall include confirmation of unloaded weight and, at the discretion of each Party, review of the vessel logbook.

6. STORAGE, PROCESSING, AND MARKETING

The Parties may establish tracking and verification procedures for storage, processing, and marketing of tuna and tuna products that best fit the business practices within their own territories, as long as those procedures include the following requirements:

a. Any change in ownership of any unprocessed tuna covered by a TTF number shall be handled in accordance with Section 5, paragraphs 3, 4 and 7, and shall be reported to the Secretariat by the competent national authority.

b. During processing, dolphin safe and non-dolphin safe tuna shall not be processed on the same lines at the same time.

c. Processors shall maintain records complete enough to allow the lot numbers of processed tuna to be traced back to the corresponding TTF number.

d. Processed dolphin safe tuna destined for export shall be accompanied by a certification of its "dolphin safe" status issued by the competent national authority, including reference to the corresponding TTF number, provided that such documentation shall not reference details of fishing operations, except as relates to identification of types of fishing gear.

Any Party may utilize a certification concerning the "dolphin safe" status of tuna in accordance with the AIDCP, the System for Tracking and Verification of Tuna, and the procedures for Certification and Labeling of Dolphin Safe Tuna.

7. PERIODIC AUDITS AND SPOT CHECKS

Consistent with the principles and objectives of the AIDCP concerning multilateral cooperation in the management and implementation of this program, the national programs established by the Parties, to track and verify tuna harvested by vessels in the Agreement Area, along with the data management and certification program described within Sections 2, 3, 5 and 6 above, shall include periodic audits and spot checks for caught, landed and processed tuna products, mechanisms for communication and cooperation between and among national authorities, and timely access by the Secretariat to relevant data.

* * * *55

58. Notably, and contrary to the implication of the United States' assertion, the Tuna Tracking Form itself requires that the well in which each catch is stored be recorded on the form, which the observer must certify.⁵⁶

Mexico's Implementation of the Tracking Requirements

59. Mexico implemented the AIDCP tuna tracking requirements through the regulation NOM-EM-002-PESC-1999, issued in December 1999,⁵⁷ and it was updated through NOM-001-SAG/PESC-2013.⁵⁸ As discussed above, the United States has verified Mexico's compliance with the AIDCP continuously since 2000.

60. In a statement contained in Exhibit MEX-109 (Exhibit MEX-37 in the first compliance proceeding), Mario G. Aguilar, Mexico's Commissioner of Fisheries and Aquaculture, explained the detailed requirements that apply to the tracking and verification of AIDCP dolphin-safe tuna caught by the Mexican fleet. For example:

The observer determines whether there were any mortalities or injuries to dolphins and prepares a full report on each net set in the form of a Tuna Tracking Form (TTF). The tuna is loaded from the net into designated wells on the fishing vessel, with tuna captured in sets with any mortality or injury to dolphins being loaded into segregated non-dolphin safe wells, as confirmed and sealed by the observer. Well location; quantity; species; set number; time, date and location of capture; and all bycatch information is entered into the TTF by the observer and also countersigned by the fishing captain.

When the vessel arrives in port, and prior to unloading, the observer delivers the original Tuna Tracking Form (TTF) to the competent authority of the country of landing, under the following considerations:

⁵⁵ AIDCP, "Resolution to Adopt the Modified System for Tracking and Verification of Tuna" (20 June 2001) (Exhibit MEX-59).

⁵⁶ International Dolphin Conservation Program, Tuna Tracking Form (Form A) (Exhibit MEX-106).

⁵⁷ Exhibit MEX-107.

⁵⁸ Exhibit MEX-108.

a) For tuna captured by a Mexican-flagged vessel landing in its national territory, the observer delivers the original TTF to the competent authority of the country of landing (PNAAPD) [the Mexican National Tuna Harvesting and Dolphin Protection Program].

b) For tuna captured by a Mexican-flagged vessel landing in another country, the observer delivers the original TTF to the PNAAP or the competent authority of the country of landing and, if appropriate, sends copy to the PNAAPD.

c) For tuna captured by a foreign-flagged vessel and, upon prior authorization from the Direction General for Fisheries and Aquaculture Management for landing and processing in Mexico, the observer delivers the original TTF to the PNAAP and a copy of the TTF will be forwarded to the competent authority of the vessel's flag country.

d) A copy of the TTF received by the national authority will be forwarded to the IATTC. Secretariat within no more than 10 days.

* * *

a) PNAAPD conducts spot checks and technical visits to the plants intending to export tuna, to carry out a physical and documentary inspection of the tuna processing and record systems, as well as to verify the tracking process itself. These visits may be in the form of process audits, considering revisions to the amounts of tuna captured, the industrial process itself or at the request of plant authorities. These tracking audits may also be requested by importing countries through the IATTC, PNAAPD or the National Commission on Fishing and Aquaculture to verify the AIDCP dolphin-safe tuna of a particular can of tuna.

b) Upon inspection of the tuna, the corresponding AIDCP dolphin safe certificate shall be issued either by PNAAPD or by an accredited and approved third party.

c) PNAAPD, in coordination with the Inter-American Tropical Tuna Commission (IATTC), maintains a database containing all information related to the TTF certificates of the Mexican tuna fleet.⁵⁹

61. Accordingly, for Mexican tuna products to be eligible for the dolphin-safe label under the tuna measure, a dolphin-safe certification must be supported by the above-described extensive tracking system, which is audited by the Mexican government and can be spot-checked by any Party through the IATTC.

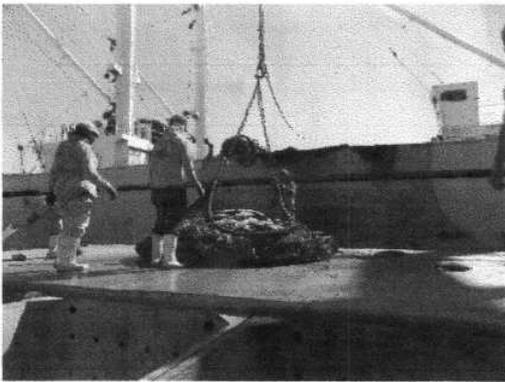
62. As previously discussed, the major Mexican producers are vertically integrated – meaning that they have their own fishing fleets, which deliver tuna to their processing facilities within Mexico. Thus, the chain of ownership over the tuna caught by the vessels of the Mexican fleet is maintained from the time of harvesting through the processing of the tuna into tuna products and the eventual marketing of the tuna products. As described in the affidavit of the Mexican tuna industry in Exhibit MEX-110 (Exhibit MEX-73 in the first compliance proceeding), the relevant production steps in Mexico include the following:

- When the vessel arrives, the tuna is scooped out of the wells and unloaded into bins. Each bin has a card that shows the well on the vessel in which the tuna was stored and the tuna tracking form (TTF) number. The weight of the tuna landed is recorded with reference to the source well location and dolphin-safe status and confirmed against the report of the observer and fishing captain at the time of capture.

⁵⁹ Statement of Mario G. Aguilar (Exhibit MEX-109).

- Next, the tuna is taken from the bins and placed on racks. The racks are numbered and the TTF numbers and bin numbers are cross referenced into the paperwork and computer records that follow the tuna.
- The racks are rolled into steam cookers and the tunas are cooked. After the tunas reach the proper temperature, they are put onto a production line where they are loined and cleaned, with entries made in the plant's records to allow proper coding of the cans and traceability back to the TTF. The loins are then moved to an adjacent production line where they are cleaned and broken down.
- The tuna is added to cans, which are sealed with a lid, and a code number is sprayed on the top of the can. The code denotes such information as production line, time, species, packing medium/seasoning/etc. This information, in turn, can be used to track the tuna back to the vessel and specific bin from which it was unloaded.
- Tracking codes from the cans are also sprayed onto the cases and a label with the same information is attached to the completed and wrapped pallet.

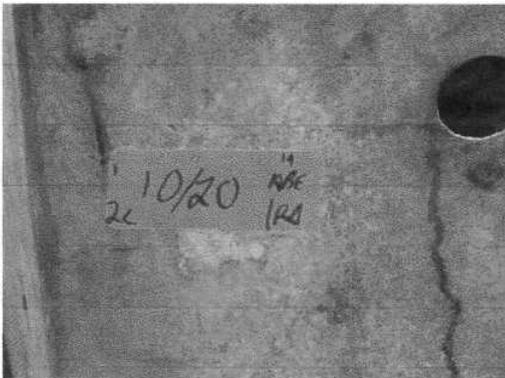
63. The Mexican industry's affidavit provides the following photographs that illustrate the careful tracking of each lot of tuna from the unloading of the vessel through the production process.



Dolphin safe tuna being brailled off the vessel



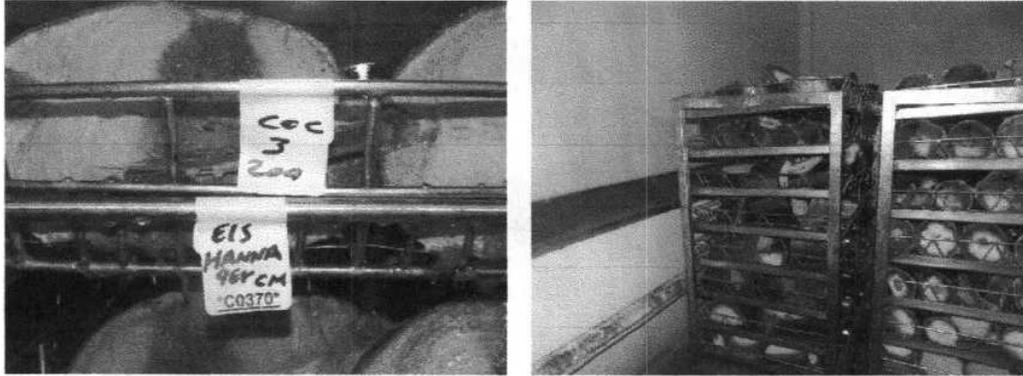
Tuna placed into bins



Label on bin showing vessel, well, date, weight



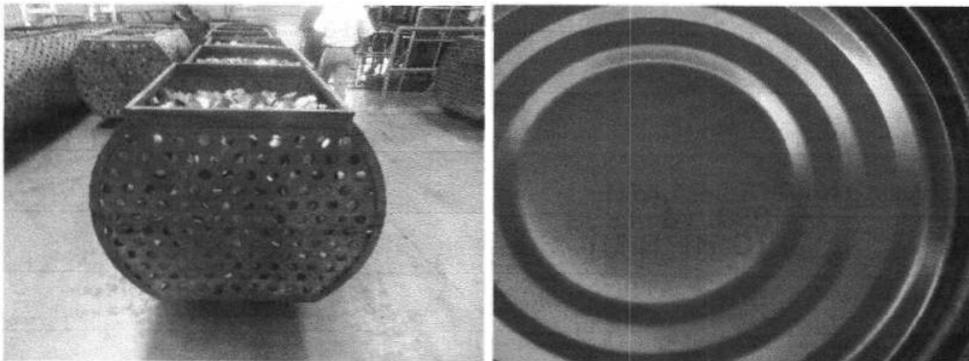
Labeled bins segregated in cold storage and species.



Frozen tuna on labeled racks prepared for cooking. Labels show production lot, vessel and tracking reference numbers.



Tuna being loined and cleaned on segregated line. As the tuna is removed from the labeled racks, numbers are input at the front of the production line to track the tuna by lot and weight.



Cans are labeled with tracking information as they are sealed and placed in bins for sterilization in the retort.



Cans enter the labeling line segregated by production bt. They are labeled and boxed, and the boxes are computer labeled with the same tracking code as that which appears on the cans inside.

70. With reference to paragraph 159 of the United States' first written submission, does Mexico agree that "there is no practical difference in the tracking and verification requirements between the AIDCP and NOAA regimes as to 'depth'"?

64. Mexico disagrees strongly with the United States' allegation. There continue to be very significant differences in the "depth" of the requirements under the AIDCP and the NOAA regimes.

65. Exhibit MEX-93 provides a side-by-side comparison of the AIDCP and NOAA tracking and verification regimes.

66. The first compliance Panel already found that the documents obtained by the Department of Commerce during its verification visits to U.S. producers were insufficient to demonstrate precise tracing back to the vessel that caught the fish.⁶⁰ Thus, to the extent that the new regulations appear to contemplate that producers and importers can satisfy the tracking requirements with documents *they already have received in the normal course of business*, there continues to be a lack of accurate information with respect the NOAA tracking and verification system vis-à-vis the AIDCP system.

67. Another difference between both systems is that for all tuna caught under the AIDCP in the ETP large purse seine fishery, the fishing harvest, the segregation of tuna, the off-loading of tuna at port, and the processing of the tuna is carefully observed and certified, either by a trained scientific observer or the national authority. Trained independent observers monitor the harvesting of the tuna, whether in an intentional dolphin encirclement set, a FAD set, or an unassociated set; any interactions of any kind with marine mammals must be recorded in detail and reported. These observers also ensure that certified and non-certified dolphin-safe tuna are fully segregated and stored in separate wells aboard the vessel. As discussed in the response to Question 69, when the tuna is off-loaded at a port in Mexico, government officials monitor the process to ensure that there is no co-mingling of certified and non-certified tuna. As the tuna is processed into tuna products, PNAAPD officials monitor the lines to ensure that only certified tuna is used to make tuna products bearing the AIDCP dolphin-safe label.⁶¹ The U.S. system for tuna from outside the ETP does not have equivalent monitoring and enforcement mechanisms.

68. Outside the ETP there is no evidence of any practice of segregating dolphin-safe tuna from non-dolphin-safe tuna in storage wells or during transshipment. Nor is there

⁶⁰ Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.356-7.359 (BCI) and 7.361; see also *ibid.*, paras. 6.15-6.19.

⁶¹ See response to Question 69 above.

any evidence of legal requirements for such segregation imposed by any nation that is not a member of the AIDCP.

69. Furthermore, the Department of Commerce lacks jurisdiction to audit foreign fishing vessels, carrier vessels and foreign processors, and the new regulations do not impose any obligation on U.S. processors or importers to validate the documentation they receive.

70. Finally, by arguing that there is no practical difference between both tracking and verification systems, the United States overlooks the evidence that many of the largest suppliers of tuna and tuna products are significantly deficient in their systems to control and monitor fishing activities, on-board storage activities, transshipment activities, and processing activities, particularly in comparison to the comprehensive and verifiable systems required under the AIDCP for every stage from harvest to retail sale.⁶² These gaps in the U.S. system greatly increase the risks of inaccurate information being transmitted to consumers, who are being assured in absolute terms that tuna bearing the dolphin-safe label was caught without harm to dolphins.

71. With reference to paragraph 135 of Mexico's first written submission, please elaborate on the significance of the fact that "importers can satisfy the tracking requirements with documents they already have received in the normal course of business".

71. The significance of the guidance given by the U.S. Commerce Department that industry participants can satisfy the "chain of custody" documentary requirements with records they keep in the ordinary course of business is that, in the first compliance proceeding, the Panel determined that the "ordinary course of business" documents submitted by the United States were insufficient to establish that tuna processed into a can could be traced back to the well of a vessel in which it was stored.⁶³ Indeed, the Panel found that the tuna was associated with a dolphin-safe certification only after arrival at a processing facility.⁶⁴

72. In its opening statement, Mexico showed that the new (unsigned) statement submitted as evidence by the United States with its third written submission did not demonstrate that even the one company whose documents were enclosed could establish that a particular lot of tuna could actually be matched to a specific dolphin-safe captain's certification.⁶⁵

73. By advising industry participants that the 2016 tuna measure does not impose any new or additional requirements beyond what participants were already doing under the past regulations, the U.S. Commerce Department has, in effect, indicated its acceptance that industry participants will be unable to maintain reliable chain-of-custody documentation.

72. With reference to paragraph 149 of Mexico's first written submission, is Mexico seeking findings from the Panels in respect of the alleged "action of the United States in pressuring retailers not to distribute Mexican tuna products"? Is such alleged action within the Panels' terms of reference? If so, how could the Panels incorporate it into their analysis of calibration?

⁶² See response to Question 85 below.

⁶³ Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.356-7.359 (BCI) and 7.361; see also *ibid.*, paras. 6.15-6.19.

⁶⁴ Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.361-7.363, 7.365; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.55.

⁶⁵ Mexico's opening statement, paras. 80-82.

74. Mexico is not seeking isolated findings from the Panels in respect of the alleged "action of the United States in pressuring retailers not to distribute Mexican tuna products". As in the previous proceedings, Mexico challenges the consistency of the amended tuna measure, as a whole, with Article 2.1 of the TBT Agreement and with Articles I:1 and III:4 of the GATT 1994. The action of the United States in pressuring retailers not to distribute Mexican tuna products is itself a measure implemented under and in relation to the 2016 tuna measure with the specific intent to impede the marketing of Mexican tuna products in the U.S. market. Thus, this new element identified in Mexico's arguments is relevant for the analysis of the measure. However, it is the 2016 tuna measure as a whole that violates the covered WTO agreements, and not this individual element of the measure considered in isolation.

75. The letters are further evidence of the detrimental effect that the 2016 tuna measure is having on the competitive opportunities of Mexican tuna products. Because the United States acknowledges that the measure continues to deny competitive opportunities to Mexican tuna products under Articles I:1 and III:4 and continues to have a detrimental impact on Mexican tuna products under the first part of the discrimination test under Article 2.1 of the TBT Agreement, it is not necessary for the Panels to consider this evidence to rule on the issues before them.

2.3 Legal Issues

73. Is Mexico's proposed "multi-factor" calibration test consistent with the Appellate Body's statement in the first compliance proceedings that "the Appellate Body accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean" (para. 7.155)?

76. Yes, Mexico's proposed legal analysis for even-handedness under Article 2.1 of the TBT Agreement is consistent with the Appellate Body's statements and guidance in the first compliance proceedings. As explained in Mexico's first written submission at paragraphs 210-222, Mexico's statement of the calibration test is directly derived from the findings and reasoning of the Appellate Body including in paragraph 7.155 of its compliance report (see the references in footnotes 257 and 268-270 of in that section of Mexico's first written submission).

77. As explained in paragraphs 20-24 of Mexico's second written submission, the test for even-handedness is necessarily a multi-factor test, contrary to the effort of the United States to narrow the test to a single-factor test, i.e., the question of whether or not the tuna measure is "calibrated" to (a narrow interpretation of) the relative risks to dolphins in different fisheries, to the exclusion of all other relevant questions or factors.

78. In paragraph 7.155 of its compliance report, the Appellate Body made it clear that a violation of Article 2.1 would not occur if the measure is "properly" calibrated. In the same paragraph, the Appellate Body went further to state:

This, in turn, indicates that, in the context of the original proceedings, the Appellate Body considered appropriate an analysis involving: first, an identification of whether different tuna fishing methods in different areas of the oceans pose different risks to dolphins; and, second, examination of whether, in the light of these risks, the different treatment created by the relevant regulatory distinction shows that, as between different groups, the treatment accorded to each group is commensurate with the relevant risks, taking account of the objectives of the measure. (emphasis added)

79. Thus, "proper" calibration requires, among other things, that the the calibration test must be undertaken "taking account of the objectives of the measure". As explained in Mexico's written submissions (see above references) and opening statement (paragraphs 41-46), this requires taking account of the rational connection between the

regulatory distinctions and the objectives of the 2016 tuna measure. Calibration can and must occur within the constraints of the rational connection test for arbitrary and unjustifiable discrimination in order to ensure coherence between Articles 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994 and with long established WTO jurisprudence governing arbitrary and unjustifiable discrimination.

80. Importantly, the Appellate Body found that "a panel does not err by assessing whether the detrimental impact can be reconciled with, or is rationally related to, the policy pursued by the measure at issue, so long as, in doing so, it does not preclude consideration of other factors that may also be relevant to the analysis".⁶⁶ At the same time, the Appellate Body found that the first compliance panel had erred to the extent that its analysis had not encompassed, in response to the United States' arguments, an assessment of whether the regulatory distinctions drawn by the tuna measure were "calibrated" to the relative risks of harm to dolphins posed by different fishing techniques in different oceans⁶⁷ (considering the term "calibration" to be "nomenclature from the original proceedings that was used by the United States, and employed by the Appellate Body, to test whether the original tuna measure was even-handed"⁶⁸).

74. With reference to paragraph 9 of the United States' second written submission, please respond to the United States' assertion that the guidance Mexico seeks "would be an advisory opinion that would not contribute to resolving this dispute and so would be outside the role of panels".

81. At paragraph 29 of its first written submission, Mexico requests that the Panel in *US – Tuna II (Mexico) (Recourse to Article 21.5 – United States)* "set forth guidance for future cases" where there have not been consultations in an Article 21.5 compliance proceeding and the parties have not agreed to dispense with consultations. Although in the circumstances of this dispute the holding of consultations in the parallel proceeding mitigates the failure of the United States to consult, there is nothing in the DSU or in the jurisprudence that prevents the Panels from providing the requested guidance on this important systemic issue.

75. With reference to paragraph 12 of the United States' second written submission, please comment on the United States' request that "the Panels refer to the DSB recommendations and rulings on these issues, rather than to Mexico's descriptions".

82. In this paragraph of its submission, the United States acknowledges that the issues identified by Mexico that are "not in dispute" have already been addressed and do not have to be revisited by the Panels in this proceeding. The United States has not described in what way it believes that Mexico's description of the issues in dispute diverge from the prior findings and determinations. By not presenting its actual arguments in this regard, the United States should be deemed to have abandoned this point.

83. If the United States were to provide those arguments for the first time in its comments on Mexico's response to this question, Mexico must be given an opportunity to respond to avoid a denial of due process.

76. With reference to paragraph 137 of the United States' first written submission, does Mexico agree that, as a general matter, the required "calibration" analysis is one that would tolerate a higher margin of error where the relevant risks are lower and a lower margin of error where the relevant risks are higher?

⁶⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.95.

⁶⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.157, 7.160, 7.167, and 7.169.

⁶⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.154.

84. No, Mexico does not agree. In light of the very measure at issue, whose main objective is to provide consumers with accurate information, a margin of error (i.e., inaccuracy) must not be tolerated. Thus, the measure must be implemented in a manner that provides the necessary assurances to achieve its objectives with regard to any fishing method that is used to catch tuna in any ocean area. This does not prevent the measure from being calibrated to the different relative risks that dolphins will be adversely affected in the course of tuna fishing operations by different fishing methods in different ocean areas, taking account of the objectives of the measure.

85. As explained in Mexico's response to question 73 (above), the requirement that the calibration test must be undertaken "taking account of the objectives of the measure" means that calibration must take place within the constraints of the rational connection test for arbitrary and unjustifiable discrimination. This is the only interpretation that gives meaning to arbitrary discrimination in both Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994 and ensures symmetry between these two provisions.

86. Mexico explained the test in paragraphs 15-18 of its first written submission.

87. With respect to the eligibility criteria, the calibration involves declaring fishing methods ineligible where dolphins are being adversely affected (i.e., dolphins are still "at risk") even if on a per set or per gear deployment no adverse effects on dolphins are being observed and the dolphin-safe and non-dolphin-safe tuna caught by the fishing methods are being segregated. The 2016 tuna measure declares AIDCP-compliant dolphin encirclement and high seas driftnet fishing as ineligible, but does not declare other fishing methods ineligible notwithstanding that they cause tremendous adverse effects on dolphins. The mere fact that no dolphins are observed being killed or seriously injured in a portion of the gear deployments under these other methods does not ameliorate the adverse effects on dolphins that do occur. Mexico is not requesting nor is it necessary for the Panels to draw a clear line for eligibility based on the precise amount of dolphin mortalities or serious injuries from a fishing method. The United States must demonstrate that the 2016 tuna measure is drawing this line in an even-handed manner that is not arbitrary. It is clear that this is not the case. The evidence establishes that some of the fishing methods being used in particular fisheries are having such horrendous adverse effects on dolphins that those fishing methods in those fisheries should be ineligible. The failure of the 2016 tuna measure to treat such methods in such fisheries as ineligible is not even-handed and is arbitrary. Moreover, allowing tuna products containing such tuna to bear the dolphin-safe label is inaccurate and, because of this inaccuracy, the measure will encourage fishing fleets to catch tuna in a manner that adversely affects dolphins, an outcome that directly contradicts both the objectives of the measure. This type of inaccuracy cannot be justified by calibration.

88. During the meeting with the Panels, the United States argued that the eligibility criteria apply to fishing methods across-the-board, implying that a fishing method should either be ineligible or eligible without regard to its application in specific fisheries. The United States further argued that the fact a fishing method (e.g., gillnets) can be used in some fisheries without causing mass dolphin mortalities justifies its eligibility notwithstanding that in other fisheries that method is causing mass dolphin mortalities. Such an interpretation is inconsistent with the calibration test articulated by the Appellate Body which refers to calibration to the overall levels of risks to dolphins associated with tuna fishing using different fishing methods in different ocean areas (see paragraph 217 of Mexico's first written submission). Although the 2016 tuna measure does not link fishing method eligibility to fishing areas, on the evidence before the Panels, the application of the calibration test requires this for other fishing methods in other fisheries. Thus, for example, the use of gillnets in the Indian Ocean and the West Pacific and the use of longlines in Hawaii should clearly be ineligible.

89. With respect to the certification and tracking and verification requirements, the calibration involves the addition or subtraction of elements of the information trail between the capture of the tuna and the sale of tuna products on the grocery shelf. At all times the information trail must assure the accuracy of the label. However, depending on the nature of the relative overall risks to dolphins (i.e., the risk profile of the fishery in question, comprising both fishing method and fishing area), specific elements can be removed from the information trail. In the original proceedings, calibration was raised in the context of whether independent trained observers were always required. The Appellate Body's reasoning would have accommodated situations in which such observers were not required. Mexico presented a hypothetical situation where they were not required in paragraph 45 of its opening statement.

90. Mexico's submissions present extensive argument on why label accuracy is a fundamental feature of the label.

91. Mexico also has extensively explained that the objectives of the measure refer to "tuna that was caught in a manner that adversely affects dolphins" and "catch tuna in a manner that adversely affects dolphins", and these objectives remain unchanged. Thus, what it is important is whether or not a particular fishing method "adversely affects dolphins". There is no indication in the design, structure or architecture of the tuna measure that any margin of error should be permitted or tolerated.

92. Tolerating a margin of error could have very important consequences that "adversely affect[s] dolphins". For example, Exhibit US-179 (page 3) shows that, for the Hawaii deep-set longline fishery, the number of observed mortality seems low as does the mortality per 1,000 sets. However, 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 dolphins) in that region with extinction, which are classified as 'endangered' and 'depleted'".⁶⁹ In this sense, a low margin of error will mask the adverse effects on this species of dolphins and the depletion of their populations, thereby contributing to the further depletion of the stocks.

93. Even if it were possible to justify a difference in accuracy (i.e., a margin of error) based on calibration to the relative overall risks posed to dolphins by different fishing methods in different ocean areas, such justification cannot be demonstrated in this case. The evidence establishes that the relative overall risks to dolphins are the same or higher in respect of other fishing methods in other fisheries than AIDCP-compliant fishing in the ETP, yet the 2016 tuna measure applies labelling conditions to these other methods and fisheries which are less accurate than those applied to the AIDCP dolphin-safe fishing method, and do not assure the accuracy of the resulting labels.

77. With reference to paragraph 22 of Mexico's first written submission, please explain why, in Mexico's view, a properly calibrated measure would result in the lowest risk profile of the relevant fishing methods being designated as eligible, and the others designated as ineligible? Please explain the interpretation of the "calibration" test that gives rise to or underpins this conclusion.

94. Calibration in the context of the eligibility criteria involves declaring fishing methods as eligible or ineligible based on the different relative risks that dolphins will be adversely affected in the course of tuna fishing operations by using different fishing methods in different ocean areas, taking account of the objectives of the measure. Mexico's response to the previous question elaborates upon this approach. Logically, eligible fishing methods and areas would be low risk and ineligible fishing methods and areas would be high risk. It follows from this that the lowest risk fishing methods and areas should be eligible and the highest risk fishing methods and areas ineligible.

95. When fishing methods are measured on the basis of relative dolphin mortalities and serious injuries, the evidence establishes that there are fishing methods in fishing

⁶⁹ Mexico's first written submission, para. 96.

areas that have higher relative risks than ineligible AIDCP-compliant dolphin encirclement in the ETP yet are eligible. An example is the Hawaii deep-set longline tuna fishery which is threatening the endangered population of a species of dolphins (see paragraph 96 of Mexico's first written submission). This fishing method in this ocean area is a high-risk fishing method that would be expected to be ineligible because, by any measure, the depletion of an endangered dolphin population is a substantial adverse effect on dolphins. Yet this fishing method in this ocean area is not declared ineligible. At the same time, AIDCP-compliant dolphin encirclement in the ETP is not causing the depletion of any dolphin population let alone an endangered population. From this perspective, this fishing method in this ocean area is a low risk fishing method yet is declared ineligible. Such outcomes are not what would be expected under the measure.

78. With reference, *inter alia*, to paragraph 23 of Mexico's first written submission, is there support in the Appellate Body's reports in this dispute for Mexico's view that the Tuna Measure must be calibrated "to the relative risks of inaccurate dolphin-safe information being passed on to US consumers"? Similarly, do those reports support Mexico's view (at paragraph 114 of its first written submission) that "the reliability of the applicable systems for certification, tracking and verification are integral elements of the 'risk profile' of different fisheries"?

96. The Appellate Body reports in the original proceeding and the first compliance proceeding do not directly address these points. However, the maintenance of label accuracy is part of the Appellate Body's reasoning and the two points referred to in the question are based on the need for label accuracy. With respect to the first point, as discussed in paragraphs 44-46 of Mexico's opening statement, the certification, tracking and verification requirements can differ between different fishing methods and fisheries based on the risk profiles of those methods and fisheries without creating a risk of inaccurate information being passed on to consumers. However, if the requirements are improperly calibrated to the different risk profiles, inaccurate information will be passed on. With respect to the second point, the reliability of a fisheries' fishing fleets' compliance with the certification, tracking and verification requirements is integral to accuracy. The less reliable the compliance, the greater risk for inaccurate information and therefore the greater the need to calibrate by adding rigorous certification, tracking and verification requirements.

97. To understand the Appellate Body's reasoning related to label accuracy, it is necessary to also examine the findings and reasoning of the previous panels.

98. In the original proceeding, the Panel found the dolphin protection objective of the measure to be dependent upon the consumer information objective of the measure. At paragraph 7.427, the Panel stated as follows:

To the extent that, as described, the US dolphin-safe provisions operate on the basis of incentives created by consumer choice, achievement of the second objective seems to be dependant in large part on the achievement of the first objective. Only if consumers can and do accurately distinguish, under the measures at issue, tuna caught in conditions that are harmful to dolphins from tuna caught in conditions that are *not* harmful to dolphins, can the use of such harmful fishing techniques be discouraged on the US market through the use of the label.

99. Similarly, at paragraph 7.590, the Panel found that: "[o]nly if consumers are correctly guided by the dolphin-safe label towards products that contain tuna not caught using a fishing method that adversely affects dolphins, can the US measures successfully avoid encouraging those fishing techniques".

100. Therefore, the accuracy or "correctness" of the dolphin-safe information provided to consumers through the label is essential to not only the consumer information objective, but also the objective of ensuring, through consumer information, that the

U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.

101. Importantly, the accuracy of the dolphin-safe information provided to consumers has a direct relationship with the relative overall risks of harm to dolphins posed by a fishing method or an ocean area. If inaccurate information is provided to consumers, then consumer purchasing will encourage fishing methods or fishing fleets in ocean areas that adversely affect dolphins, which will increase or maintain the risks to dolphins in the affected fisheries, contrary to the objectives of the measure. Assuming that tuna are caught using an eligible fishing method, the accuracy of the label is dependent upon the effectiveness of the certification requirements and the tracking and verification requirements. This is why the "reliability of the applicable systems for certification, tracking and verification are integral elements of the 'risk profile' of different fisheries". Therefore, any calibration of the tuna measure to the relative overall risks to dolphins must take into account the risks associated with inaccurate 'dolphin-safe' certification and/or inaccurate tracking and verification", such as those in the examples discussed by Mexico in its first written submission at paragraphs 114-117.

102. In the first compliance proceeding, the Appellate Body observed:

In our view, there are various "connections" between the different elements of the amended tuna measure that are relevant to the regulatory distinctions examined by the Panel. We observe, for instance, that the original panel and the Appellate Body found that the objectives of the US dolphin-safe labelling regime are, first, "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, second, "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". These are also the objectives of the amended tuna measure. Thus, like the original measure, the amended tuna measure establishes a labelling regime consisting of various elements that are aimed at fulfilling the same objectives.⁷⁰

103. Thus, the Appellate Body viewed the measure as having the same attributes as the previous Panels and the above statements of the Panels were not diminished in their relevance to the analysis of the measure.

104. As Mexico explained at paragraphs 44-45 of its second written submission, the Appellate Body found fault with the first compliance Panel because its approach did not "comport with its own reasoning that the accuracy of the US dolphin-safe label can be compromised at any stage of the tuna production stage [*sic*], in contradiction with the objectives of the amended tuna measure" (para. 7.166).

105. In this regard, the Appellate Body considered, in footnote 611 to paragraph 7.166 of its report, the impact of the gaps in the certification and tracking and verification requirements on the accuracy of the label, as follows:

We recall that, in the context of the certification requirements, the Panel found that the United States had not rebutted Mexico's showing that captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured, and that this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure. (Panel Report, para. 7.233) Similarly, in the context of the tracking and verification requirements, the Panel indicated that the different tracking

⁷⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.16 (footnotes omitted).

and verification requirements have a detrimental impact on Mexican tuna and tuna products, including because they may make it more likely that tuna caught other than by large purse-seine vessels will be incorrectly labelled as dolphin safe. (*Ibid.*, para. 7.391).

106. The Appellate Body also indicated the importance of conducting the calibration analysis in the light of the consumer information objective in addition to the objective of ensuring, through consumer information, that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins:

Nor did the Panel compare the different tracking and verification requirements in the light of those risks [to dolphins] and the amended tuna measure's objectives concerning the protection of dolphins and providing accurate consumer information.⁷¹

107. Thus, label accuracy is a fundamental attribute of the measure and the two points raised in the above question are grounded in that attribute.

79. With reference to paragraph 239 of Mexico's first written submission, what, in Mexico's view, would be a "consistent method of comparison"? Also, with reference to paragraph 248 of Mexico's first written submission, what, in Mexico's view, would be a "consistent method of estimating those effects"?

108. The above-noted reference pertains to Mexico's submissions that the eligibility criteria are not "calibrated" and therefore are not even-handed and arbitrarily discriminate. Calibration requires a relative assessment of risks to dolphins by different fishing methods in different fishing areas. By its very character, a relative assessment requires that a standardized benchmark – i.e., a consistent method of comparison – be used to assess relative risks. The fact that under the 2016 tuna measure the United States did not undertake a relative assessment of risks, let alone one that is based on a consistent method of comparison, is *prima facie* evidence that a calibration assessment was not undertaken.

109. Mexico is not arguing that the Panels need to undertake such a comparison. Rather, it is the United States that must demonstrate that such a comparison was undertaken. The evidentiary burden is on the United States to demonstrate that the different labelling conditions and requirements are "calibrated" and therefore not arbitrary under the chapeau of Article XX and, in the light of the *prima facie* case put forward by Mexico, are "calibrated" and therefore even-handed under the second part of the test under Article 2.1 of the TBT Agreement. The Panels need only find that there is evidence of one example where there is no calibration for the United States to be found not to have satisfied this burden.

110. Given that calibration needs to be undertaken on a fishing method and fishing area basis, Mexico presented PBR as an objective and consistent method of comparison between fishing methods and areas. Mexico presented evidence of at least one situation (longline fishing in Hawaii) where the evidence directly contradicts the United States' argument that the measure is calibrated when a PBR method of comparison is used.

111. The absolute levels of overall adverse effects on dolphins for different fishing methods and in different fishing areas is less objective and does not take into account dolphin stock populations. However, even if this less accurate method of comparison is used, Mexico has presented evidence of situations (e.g., gillnet fishing in the Indian and West Pacific Oceans, purse seine fishing in the Western and Central Pacific Ocean, longline fishing wherever practiced) where the evidence directly contradicts the United States' argument that the measure is calibrated. Only one example is needed.

⁷¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.167.

112. Finally, if the Panels find that there is imperfect evidence and that it is not possible for the United States to use a consistent method of comparison, this will necessarily require the United States to apply consistent presumptions regarding the level of risks to dolphins. Where such presumptions are used (e.g., there is "sufficient evidence ... to raise a presumption that genuine concerns exist" using the words of the original Panel) those same presumptions must be applied to all fishing methods in all fishing areas for the measure to be administered in an even-handed and non-arbitrary manner.

80. With reference to paragraph 52 of the United States' third written submission, please respond to the United States' assertion that "[t]he PBR metric Mexico has proposed is inconsistent with the fishing method approach of the eligibility criteria, cannot be applied based on available information, has no basis in the previous reports in this dispute, and is not consistent with the purpose of the label being to protect dolphins not dolphin populations".

113. In accordance with the reasoning of the Appellate Body, calibration must be undertaken in reference to the risks to dolphins from different fishing methods in different ocean areas. Thus, for the purpose of calibration, the United States is incorrect in arguing that Mexico's approach is "inconsistent with the fishing method approach of the eligibility criteria". Moreover, the US is factually incorrect when it characterizes the eligibility criteria under the measure as having a "fishing method approach". The designation of driftnet fishing as ineligible applies only to "high seas" driftnet fishing. Thus, the measure's eligibility criteria apply to both fishing method and ocean area and the analysis of calibration must take into account both method and area.

114. PBR is an objective scientific measurement that accommodates both fishing method and ocean area. Mexico explained in its first written submission (para. 41 and Exhibit MEX-7) that "[t]he United States applies a Potential Biological Removal (PBR) methodology to its own fisheries to determine whether dolphin bycatch is problematic". Mexico has also shown that the United States, in the context of its new MMPA regulations, is requiring foreign countries to create assessments that estimate population abundance for marine mammal stocks that are killed or seriously injured in their territorial waters, to estimate the cumulative mortality resulting from each of their export fisheries, and to also calculate bycatch limits. For countries that do not comply, the United States is supposed to ban imports of the fish and fish products. These rules, however, will not be implemented for another five years.⁷²

115. In the first compliance proceedings, the Appellate Body stated "[w]e do not exclude that reference to such objective indicators [such as the PBR] might assist in an assessment of whether regulatory differences in the treatment of different fisheries can be explained on the basis that such treatment is calibrated to, or commensurate with, the relative risks to dolphins arising from different fishing methods in different areas of the oceans".⁷³ Hence the United States is wrong to argue that there is no basis in previous reports in this dispute for use of the PBR.

81. With reference to paragraph 39 of the United States' second written submission, does Mexico agree that, under its proposed multi-factor calibration analysis, in respect of the certification and tracking and verification requirements, "the risks to dolphins are irrelevant"?

116. Mexico disagrees with the United States' characterization that the risks to dolphins are irrelevant for the certification and tracking and verification requirements.

⁷² Department of Commerce, Fish and Fish Product Import Provisions of the Marine Mammal Protection Act; Final Rule, 81 Fed. Reg. 54390 (Aug. 15, 2016) (Exhibit MEX-49).

⁷³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, footnote 827 to para. 7.251.

117. Mexico explained the relationship between the risks to dolphins and these requirements in paragraphs 44-46 of its opening statement as follows:

The eligibility, certification, tracking and verification requirements are labelling conditions that operate together to create the information trail that ensures that accurate information is given to consumers regarding the actual dolphin-safe status of a tuna product. The calibration analysis must take into account the regulatory distinctions, the impact of the distinctions on the information trail that ensures label accuracy, and the differences in risks to dolphins that allegedly justify the distinctions.

The risk profile of a particular fishing method and fishing area will dictate what requirements are necessary for the information trail. For some fishing methods and areas, a comprehensive information trail is required starting from trained independent observers and separate holds on board vessels for dolphin-safe and non-dolphin-safe tuna to detailed tracking and verification procedures throughout the production chain. An example of such a fishery is FAD fishing in the Western and Central Pacific Ocean, where there are considerable dolphin mortalities, fishing by many different fleets, extensive third party transshipment of tuna, and supply to non-integrated processors. In contrast, other fishing methods and areas such as the Papua New Guinea pole-and-line fishery do not require independent observers and separate holds in order to maintain label accuracy because the fishing method is safe for dolphins, although reliable tracking and verification procedures are necessary to ensure this tuna is not mixed with tuna from other fisheries when it is to be marketed as dolphin-safe. These hypothetical regulatory distinctions between these two example fisheries – independent observers and separate holds in one but not the other – are calibrated to the differences in risks to dolphins in these two fisheries.

This is how label accuracy fits into the calibration analysis. In this particular dispute and taking account of the objectives of the measure, calibration cannot justify inaccurate dolphin-safe labels. This is also an example of how regulatory distinctions are “tailored to” and “commensurate with” differences in risks to dolphins.

82. With reference to paragraph 155 of the United States' second written submission, please comment on the United States' assertion that "Mexico does not appear to disagree with this conclusion" that the design of the determination provisions is now WTO-consistent.

118. As explained in response to Question 102 below, it remains unclear whether the U.S. Commerce Department has the legal authority to revise the meaning and scope of the determination provisions as set out in the governing statute, and therefore whether the purported changes in those provisions can be maintained. In any event, as described in the 2016 regulations the determination mechanism eliminates the gap identified in the first compliance proceeding.

119. Mexico explained in its second written submission that the application of the determination provisions continues to be arbitrary. Mexico pointed out that the United States, after arguing for use of a mortality per set metric, abandoned that metric for the Indian Ocean gillnet fisheries in favour of a measurement based on mortality-per-ton-of-tuna-caught. As a “benchmark”, the United States used a twenty-year average of mortalities in the ETP, with the obvious goal of making the benchmark as high as

possible, and creating the possibility that a fishery with a higher "bycatch rate" in 2015 than the ETP fishery has in 2015 would not be designated.⁷⁴

120. Most importantly, however, the United States has no methodology for deciding when to investigate mortalities. According to the United States, its determination on the Indian Ocean gillnet fisheries was based exclusively on publicly-available reports submitted by Mexico during the first compliance proceeding. The United States meanwhile refuses to investigate any other fishery, notwithstanding the evidence of substantial harms to dolphins.

83. With reference to paragraph 22 of Mexico's second written submission, would it be possible for the two "questions" that form part of Mexico's proposed legal test to result in or point to different and even contradictory answers? What would be the implications of such different or contradictory answers for the Panels' analysis?

121. No. It is not possible that the answers to the two questions would contradict each other. The interpretation and application of the test must give full meaning to both questions. The questions do not create independent or discrete tests; rather, they are elements of an overall analysis and must be addressed cumulatively (see paragraph 23 of Mexico's second written submission).

122. As explained in Mexico's response to question 73 (above), proper calibration requires, among other things, that the the calibration test must be undertaken "taking account of the objectives of the measure". As explained in Mexico's written submissions (see above references) and opening statement (paragraphs 41-46), this requires taking account of the rational connection between the regulatory distinctions and the objectives of the 2016 tuna measure. Calibration can and must occur within the constraints of the rational connection test for arbitrary and unjustifiable discrimination in order to ensure consistency in the interpretation and application of Article 2.1 and the chapeau to Article XX and to ensure coherence with long established WTO jurisprudence governing arbitrary and unjustifiable discrimination.

123. The application of the calibration test to the certification and tracking and verification requirements illustrates this point. When calibrating these requirements to the different risks to dolphins from different fishing methods in different fisheries, elements of these requirements can be added or subtracted depending on the risks (first question) *provided that* the addition or subtraction does not adversely affect the accuracy of the information provided on the label (second question). "Calibration" within the meaning of the Appellate Body's test cannot occur in the circumstances of this dispute if the label is rendered inaccurate.

124. For example, in the context of certification requirements, whether or not an independent observer is required in a particular fishing method and fishery will be dictated by all dolphin-risk factors related to that fishing method and fishery including dolphin mortalities and serious injury but also the reliability of the fishing fleets in their compliance with the requirements. The more reliable the fishery, the less need for an independent observer, and the less reliable, the greater the need for an independent observer. In both cases, the accuracy of the label is preserved.

84. With reference to paragraph 32 of Mexico's second written submission, please elaborate on the legal basis for Mexico's assertion that "Members are of course free to choose their own objectives. But if the means they use to achieve those ends are inconsistent with the objectives of sustainable development, then they are likewise inconsistent with their WTO obligations".

125. The obligations in Article 2.1 of the TBT Agreement, including the test for even-handedness, and the obligations in the chapeau of Article XX, including the test for

⁷⁴ Mexico's second written submission, paras. 105–107.

arbitrary and unjustifiable discrimination, must be interpreted in the light of their context within the WTO Agreements. This context includes the sustainable development objective in the preamble to the WTO Agreement. Measures that discriminate in a manner that goes against the objective of sustainable development are inconsistent with this important context and, therefore, can be found to be inconsistent with the obligations and requirements in Article 2.1 and the chapeau to Article XX. Even if the Panels do not make such findings, as elaborated upon at paragraph 33 of Mexico's second written submission, at the very least the Panels should take this into account when conducting comparisons of the relative risks to dolphins from different fishing methods in different ocean areas.

126. The following elaborates on the contextual interpretation of Article 2.1 and the chapeau of Article XX.

127. The statement by the Appellate Body in paragraphs 152 and 153 of the first appellate report in the *US – Shrimp* dispute notes the significance of the contrasting language in the preambles to the GATT 1947 and to the WTO Agreement. The GATT 1947 spoke of "developing the full use of the resources of the world" and made no mention of sustainable development. In contrast, the WTO Agreement proclaims that "trade and economic endeavor" should be conducted "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so...."

128. The Appellate Body saw this as a textual distinction making a difference in how WTO obligations must be viewed. Because of this textual contrast, the Appellate Body expressed the view that the negotiators of the WTO Agreement "evidently believed that the 'full use of the resources of the world' set forth in the preamble to the GATT 1947 was no longer appropriate to the world trading system of the 1990s. As a result, the negotiators decided to alter and qualify the original objectives of the GATT 1947" with new and different wording that "demonstrates a recognition by negotiators that optimal use of the world's resources should be made in accordance with sustainable development".⁷⁵

129. The Appellate Body then went on to state in that dispute that, accordingly the changed wording in the preamble to the WTO agreement "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement...".⁷⁶ The Appellate Body did not refer in this statement to the measures that may be at issue in a dispute, or to their objectives, or to the methods that may be employed to assess measures, such as the "calibration" method discussed in this dispute. Rather, the Appellate Body referred to the interpretation of the agreements annexed to the WTO Agreement, which include the GATT 1994 and the TBT Agreement, which are both at issue here. This statement refers to the interpretation of the obligations themselves.

130. Mexico's reading of this systemic statement by the Appellate Body is not that the preamble in and of itself creates any obligations. It does not. Rather, Mexico's view is that, in clarifying the existing provisions of the WTO covered agreements in accordance with the customary rules of interpretation of public international law, as mandated by Article 3.2 of the DSU, which find reflection in Article 31(1) of the Vienna Convention, the text of all WTO obligations that in any way relate to the objective of sustainable development must be interpreted and clarified within this textual context, and consistently with the object and purpose of those obligations as evidence in this part of the text of the WTO agreement.

⁷⁵ Appellate Body Report, *US – Shrimp*, paras. 152-153. See Mexico's first written submission, paras. 233-235.

⁷⁶ Appellate Body Report, *US – Shrimp*, para. 153.

131. This consideration on sustainable development will, of course, not apply to all WTO obligations or to all circumstances involving any WTO obligations. It may not apply, for example, to a rule of origin or to a pre-shipment inspection or to a particular anti-dumping proceeding. But it clearly applies to those obligations that can relate to the nexus between trade and environment, such as the GATT and TBT obligations at issue here.

132. Furthermore, as finds reflection in Article 31(3)(c) of the Vienna Convention, the context for interpretation of a treaty must include “[a]ny relevant rules of international law applicable in the relations between the parties.” Mexico submits that sustainable development has risen over the past several decades to the status of a principle of international law applicable in the relations, not only between the United States and Mexico, but all countries. On this, please see, as an example and as a subsidiary means for determination of the rules of law, the work of one publicist and source of international law under Article 38(1)(d) of the Statute of the International Court of Justice, Professor Christina Voigt of the University of Oslo, in Norway, in particular.⁷⁷

133. In addition, as in para. 234 of Mexico's Second Written Submission, Mexico refers the Panels to the 17 global goals and the 169 global targets of the Sustainable Development Goals approved by the United Nations in September of 2015 – with the support of both Mexico and the United States. The UN SDGs are not binding as public international law. Nor are they binding on the compliance Panels. But Mexico submits that the Sustainable Development Goals do provide helpful guidance as context from broader public international law in this dispute for the purposes of interpreting and clarifying the relevant obligations in the WTO covered agreements in a manner that is consistent with the objective of sustainable development.

134. Specifically, as useful context in this dispute, Mexico calls the attention of the Panels to SDG Goal 14 and to the relevant targets of that goal. Goal 14 is to “conserve and sustainably use the oceans, seas and marine resources.” Target 14.2 is to, “[b]y 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans.” Target 14.4 is to, “[b]y 2020, effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics.”

135. In this dispute, Mexico contends that these considerations of sustainable development relate to the interpretation of the WTO obligations in the following way: First, they relate to that part of the chapeau of Article XX of the GATT 1994 stating that a measure will not qualify for one of the general exceptions to what would otherwise be GATT obligations if it is “applied in a manner which constitutes ... unjustifiable discrimination.” Second, they relate to the final legal element the Appellate Body has identified for determining whether a measure is consistent with Article 2.1 of the TBT Agreement – the requirement that a measure must “stem exclusively from a legitimate regulatory distinction.”

136. The 2016 tuna measure is not only inconsistent with the objective of sustainable development; it undermines that objective. The 2016 tuna measure undermines the objective of sustainable development because, as shown by the evidence, the measure rejects a demonstrated environmentally sustainable fishing practice and promotes the use of one that has been proven to be environmentally damaging. Fishing methods within the ETP are consistent with the objective of sustainable development. In contrast,

⁷⁷ Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Leiden and Boston: Martinus Nijhoff, 2009), Chapter 6, pp. 145-188.

by encouraging FAD and other destructive forms of fishing outside the ETP as alternatives to setting on dolphins, the tuna measure does grievous harm to fisheries and to the overall marine ecosystem.

137. Accordingly, with respect to the chapeau of GATT Article XX, Mexico submits that the tuna measure is an "unjustifiable" form of discrimination. Likewise, with respect to Article 2.1 of the TBT Agreement, Mexico submits that the even-handedness test encompasses both arbitrary discrimination and unjustifiable discrimination. Since the regulatory distinctions at issue are inconsistent with, and undermine the objective of sustainable development, they do not "stem exclusively" from a legitimate regulatory distinction. Thus, the tuna measure is inconsistent with both the GATT 1994 and the TBT Agreement.

138. The United States rightly says that "it is clear that it is not the role of the WTO to decide for its Members which legitimate objectives they should pursue with a particular measure."⁷⁸ Mexico agrees with this point, but it has no relevance to Mexico's sustainability argument. Mexico's point is that in pursuing even legitimate objectives, the WTO agreements do not permit Members to apply measures that result in "unjustifiable" discrimination, which exists here because of the tuna measure's harmful effects on sustainability and the proven availability of an alternative approach which does not.

139. Canada, as a third party, contends that Mexico "seems to be positioning environmental sustainability as an over-riding obligation with which all measures subject to the WTO Agreement must comply, regardless of what policy objectives they may be pursuing."⁷⁹ Canada goes so far as to say that Mexico "is requesting the Panel to add another requirement" to the relevant legal test. This is not so. Mexico is not suggesting the need for an additional legal requirement under the chapeau of GATT Article XX or under Article 2.1 of the TBT Agreement. Mexico is simply explaining what Mexico sees as the correct interpretive approach to determine whether the existing legal requirements for both obligations have been met.

85. Please respond to the argument contained in paragraph 34 of the United States' third written submission regarding municipal fishery regulation.

140. In paragraph 34 of its third written submission, the United States argues that national laws are irrelevant because "the requirements of the U.S. measure are imposed directly on producers and importers of tuna product marketed in the United States as dolphin safe."

141. The United States, however, did not address the fact that Mexico's evidence showed that private participants in the tuna industry themselves lack adequate tracking systems. For example, Mexico cited to the European Commission's report on Thailand, which states:

National documentation schemes developed by the authorities for the purpose of traceability *are used incorrectly by operators, who were found to inaccurately record incoming quantities of fish*. This exposes the system to potential abuse by allowing operators to over declare incoming quantities from erroneous catch certificates and to launder fish through these overestimations.⁸⁰ (emphasis added)

142. Similarly, the European Commission's report on the Philippines states:

⁷⁸ United States' third written submission, para. 38.

⁷⁹ Canada's third party submission, para. 14.

⁸⁰ Thailand: Commission Decision of 21 April 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing (2015/C 142/06), para. 46 (Exhibit MEX-43).

the lack of control and monitoring of fishing activities in particular of landing, the dearth of inspections at sea and in port, the lack of checks on the logbooks entail that IUU fishing products may have easy access to the Philippines⁸¹

143. The European Commission's report on Taiwan states:

The Commission established that *the trading companies* are not incorporating in their accounting systems information concerning traceability of fishing transactions and there is no certainty that what is recorded in the authorities' systems corresponds with what is recorded in the companies' accounting and production systems. This situation undermines the reliability of the traceability chain at company level.⁸² (emphasis added)

144. The United States' current position seems to be that private systems for tracking the source of tuna and its dolphin-safe status are more reliable than the national systems of Thailand, Taiwan and the Philippines. But the United States has provided no evidence that any vessel, trader or processor of those countries – or of any other country – has implemented a certification, tracking or verification system that would provide reliable chain of custody information tracing back to the well of the vessel from which the tuna was caught.

145. Also in this regard, the single new example of "tracking" documentation the United States provided for one company in Exhibit US-175 (BCI) contains no reference to any storage well of a vessel.

86. With reference to paragraph 27 of the United States' second written submission and paragraph 24 of the United States' third written submission, please elaborate on the assertion that "if the Measure is appropriately calibrated to the risk to dolphins in different ocean areas, then the regulatory distinctions of the Measure, including any differences in accuracy, are consistent with the Measure's objectives".

a. What is Mexico's response to this assertion?

b. In Mexico's view, would it be possible for a regulatory distinction to be "calibrated" to the risks to dolphins in different fisheries, but nevertheless inconsistent with the objectives of the Measure, e.g. because it led to less accurate labelling in some fisheries?

146. Mexico has addressed this question, in part, in its responses to questions 73 and 83 and in its opening statement at paragraphs 44-46.

147. Label accuracy is a constant element of the measure and this does not change when the labeling conditions and requirements in the measure are calibrated to the differences in the risks to dolphins from different fishing methods in different ocean areas. Accuracy cannot be calibrated. What can be calibrated are the many elements that make up the labeling conditions and requirements. If the label becomes less accurate because of a difference in labelling conditions, that renders the measure not evenhanded and arbitrary.

⁸¹ Philippines: Commission Decision of 10 June 2014 on notifying a Third Country that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/C 185/03), para. 45 (Exhibit MEX-44).

⁸² Taiwan: Commission Decision of 1 October 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing (2015/C 324/10), para. 50 (Exhibit MEX-46).

148. To interpret this otherwise would create a conflict with the well-established body of WTO jurisprudence on the meaning of arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994.

87. Please respond to the United States' argument at the Panels' meeting with the parties that WTO Members are entitled to design and implement policies on the basis of the "best available information", and are not required to carry out comprehensive studies before regulating.

149. Allowing Members to implement complex measures such as the 2016 Tuna Measure without undertaking investigation of relevant facts will undermine the effectiveness of WTO obligations. It is particularly important for WTO Members to investigate factual matters that are directly relevant to the regulation in question where the available information indicates that the factual situation could affect the application of the regulation. In this dispute, the available information strongly indicates that fishing methods in other ocean areas should not be eligible for the dolphin-safe label. In such circumstances, it is incumbent on the WTO Member to investigate fully the facts before granting eligibility.

150. This is not a new measure. It has been in place for many years. Allowing a Member to avoid any responsibility to investigate the particular factual circumstances that it is regulating would encourage countries not to investigate, allowing them to adopt discriminatory measures based on "calibration" to incomplete information (or "best information available").

151. To the extent that under certain circumstances reliance on best available information available can be justified, such reliance must be done in an even-handed manner. In this dispute, it means that all fishing methods and fishing areas must be treated using the same best available information.

3 TO THE PARTIES:

3.1 Risks to Dolphins

88. Is all interaction between dolphins and tuna fishing boats harmful to dolphins? Does the length of interaction affect the risks involved? How?

152. No. Not every interaction between dolphins and tuna fishing boats is harmful to dolphins. As explained in Mexico's response to question 64, all fishing methods are capable of being carried out without causing any adverse effects to dolphins or without putting any dolphins at risk on a per fishing set or a per gear deployment basis, including the AIDCP dolphin encirclement fishing method.

153. The length of the interaction does not affect the risks involved. For example, where a dolphin is hooked or entangled in a manner in which it drowns, the length of the interaction may be relatively short. Where a dolphin breaks a line and swims away impaled or cut by a hook, or swims away having bitten off a piece of a gillnet, the interaction may be even shorter.

89. Is "handline" fishing the same as "pole and line" fishing? If not, what is the difference in the activities involved in terms of the risks that these methods pose to dolphins?

154. As explained by the FAO:

Tuna handline is a fishing gear composed of a single vertical line with one barbed hook at the distal point. If several barbed hooks are used, branchlines are connected along the mainline at regular intervals.

Specification of the gear varies according to the ideas and traditions of fishermen in different areas of the world. Most fishermen use nylon (polyamide) for their handlines. Line must be strong enough to hold the fish and withstand the combined force of its weight, swimming power and determination to escape. Handlines can be set and hauled either manually or by mechanized reel. It is operated by simply dropping the baited hook into the level of the sea where tuna are found abundant. Handliners generally use natural baits such as squid, chopped pieces of scad mackerel, hairtail and tuna.⁸³

As Mexico's evidence showed, handline fishers in the Indian Ocean routinely fish for tuna in association with dolphins.⁸⁴ There does not appear to have been a study made of the extent to which dolphins are attracted to the bait fish on the handline hooks.

155. With regard to pole and line fishing, the FAO explains:

Overview A pole and line consists of a hooked line attached to a pole. This method is common to sport fisheries (angling) but it is also used in commercial fisheries. Fishing rods/poles are made of wood (including bamboo, also constructed of split cane) and increasingly of fiberglass.

Handline Equipment Pole and lines may be hand operated or mechanized, e.g., for tuna catching, with the pole movement being entirely automatic.

* * *

Fish Operation Fish are attracted by the bait. In small-scale professional or sport fisheries the pole is swung so to reach the line, a moulinet has to be used when the line is much longer than the pole; the small fish is, then, taken from the hook by hand. On board tuna pole and lines vessels, the hooked fish tuna are swung on board, by hands (by two to three fishermen if the tuna is very big) or with an automatic swinging system; the tuna normally release themselves from the barbless hook when they touch the deck of the vessel.⁸⁵

Therefore, the two methods use different types of equipment, and also different types of vessels. Mexico has accepted that pole and line fishing is relatively safe for dolphins.

90. When can the pursuit of dolphins in tuna fishing operations be considered a "chase"? Is there a difference between "chasing" and other kinds of pursuit of dolphins?

156. Although the word "chase" is used to describe the fishing procedure, the manoeuvre actually has the objective to reduce the speed of the dolphin herds (and therefore of the tuna underneath) until they stop. This is done to allow the tuna boat to catch up and to deploy its net. The manoeuvre is accomplished with the assistance of several small boats that get in front of the dolphin group and reduce its speed. This is why some "chases" last only five minutes.⁸⁶ These "chases" are not a pursuit to exhaustion, as the United States has suggested.

⁸³ FOA, Tuna Handlining, available at <http://www.fao.org/fishery/fishtech/1012/en> (Exhibit MEX-38), p. 2.

⁸⁴ See Mexico's first written submission, paras. 110-111.

⁸⁵ FAO, Pole and Line, available at <http://www.fao.org/fishery/geartype/314/en> (Exhibit MEX-111).

⁸⁶ See Mexico's second written submission, para. 4, citing Exhibits MEX-63, MEX-64, and MEX-65.

157. When handline fishers use dolphins to fish for tuna in the Indian Ocean, the evidence confirms that motorized vessels operate within and around dolphin pods, seeking to catch tuna that swim below with the dolphin herd.⁸⁷

158. Although it is known that tuna associate with dolphins elsewhere, and that intentional sets on dolphins have been made, for example, in the Western Pacific, no data have been collected on how long a purse seine fishing vessel may pursue dolphins outside the ETP.

159. Mexico has also established that dolphins are attracted to fish on longlines, which is known as depredation.⁸⁸ Sets or gear deployments that are made knowing that they will attract dolphins are analogous to a "pursuit" of dolphins.

91. Do all dolphin species react in the same way to being chased?

160. The dolphin family is the most diverse of the cetacean group. It encompasses 36 different species that taxonomically are grouped into six families. Because of their diversity, dolphins also encompass different adaptations to different environments, with different forms and sizes and highly diverse behaviours. In the ETP, the genus of dolphins are: Stenella attenuata (spotted); S. longirostris (spinners); S. coerulealba (striped); Delphinus delphis and Delphinus capensis (common dolphins); Lagenorhynchus obliquidens (Pacific white sided dolphins) and Tursiops truncatus (bottlenose dolphins). In general, spotted dolphins tend to be calmer than spinner dolphins, although spinner dolphins are calmer when in mixed herds with spotted dolphins than when they are not. Accordingly, the behavior of one species cannot be extrapolated to other species.

92. Do dolphin interactions other than chasing cause "unobservable" effects? Please indicate the exhibits that support your answer.

161. As previously explained, it has not been scientifically proved that the "chase" causes unobservable effects; rather, there has been speculation.

162. Mexico has discussed the unobservable effects caused by other fishing methods in its response to Question 68. Among the relevant exhibits are the following:

- R. Baird & A. Gogone, "False Killer Whale Dorsal Fin Disfigurements as a Possible Indicator of Long-Line Fishery Interactions in Hawaiian Waters" Exhibit MEX-36).
- Gomericic, et al., "Bottlenose dolphin (*Tursiops truncatus*) depredation resulting in larynx strangulation with gill-net parts," *Marine Mammal Science*, 25(2) (Exhibit MEX-20).
- U.S. National Oceanic and Atmospheric Administration, *Impact of "Ghost Fishing" via Derelict Fishing Gear* (March 2015) (Exhibit MEX-104).
- U.S. Department of Commerce, *Differentiating Serious and Non-Serious Injury of Marine Mammals Taken Incidental to Commercial Fishing Operations: Report of the Serious Injury Workshop 2 April 1997*, Silver Spring, Maryland (January 1998) (Exhibit MEX-105) (discussing stress to dolphins caused by interactions with gillnets and longlines).

⁸⁷ Mexico's second written submission, paras. 76-77.

⁸⁸ Mexico's first written submission, paras. 92-95; Mexico's second written submission, para. 72.

93. Are "sets" or "gear deployments" comparable as between different fishing methods? How is a set defined for each fishing method? Are there factors, such as the duration of a set, which could undermine the possibility or usefulness of such comparison?

163. Fishing sets or gear deployments are not comparable as between different fishing methods. Rather, the differences arising from different fishing gear and techniques in different fishing methods are significant. For example, a longline fishing set can take as long as 10-12 hours or more; moreover, the lengths of the lines and the number of hooks can vary greatly. Other fishing methods, such as pole-and-line fishing, have a shorter duration. A gillnet deployment can last anywhere between a few hours and several days, again with varying sizes of nets. There is also variability in purse seine sets.

164. A comparison of the relative overall risks of harm to individual dolphins posed by different fishing methods on a "per set" basis is further complicated by the reality that dolphins exist in all tuna fisheries, and that there is a recognized absence of reliable data on fishery interactions with dolphins.

94. What is the relevance of the fact that some exhibits (e.g. Exhibits MEX-64 and USA-118) on the record concern dolphin mortalities in non-tuna fisheries, e.g. swordfish fisheries? Are such exhibits relevant to the Panels' analysis?

165. Yes, they are relevant. Mexico is not aware of any difference between the longline fishing procedures used for harvesting swordfish than those used for tuna, for example. If longlines attract and kill and injure dolphins when a vessel is fishing for swordfish, there is no reason to believe that the same mortalities and injuries do not occur when fishing for tuna.

95. With reference to paragraph 19 of the United States' second written submission, and in particular to the United States' assertion that "pointing to the particular data with regard to one fishery does not inform as to the risk to dolphins by that fishing method in general", to what extent, if at all, can data from one fishery be extrapolated to other fisheries? Similarly, to what extent, if at all, can data from one fishery based on limited samples be extrapolated to give a picture of that same fishery on an overall or general basis?

166. Mexico disagrees with the statement that "pointing to the particular data with regard to one fishery does not inform as to the risk to dolphins by that fishing method in general". Mexico is of the view that a fishing method that is harmful to dolphins in one fishery is harmful to dolphins in general.

167. However, the gaps in data regarding the adverse effects of fishing methods on dolphins in virtually every fishery outside the ETP large purse seine fishery means that there is limited information available for most fisheries. This limited data should not be mistaken as evidence that the fishing methods applied in those fisheries are not having adverse effects.

168. The evidence demonstrates that relatively high levels of incidental dolphin mortality are being caused by other fishing methods in other ocean areas, for example, – the gillnet fishing method. In the words of the original Panel, there is "sufficient evidence ... to raise a presumption that genuine concerns exist" about these adverse effects.

169. If the precautionary principle is to be applied in an even-handed manner, then it is appropriate to assume that fishing methods that are known to be harmful to dolphins are in fact causing adverse effects in all of the fisheries in which they are used.

96. With reference to paragraph 137 of the United States' first written submission, what is the meaning of the expression "overall relative harms", as used by the Appellate Body in the first compliance proceedings?

170. The meaning of "overall relative harms", as used by the Appellate Body in the first compliance proceedings, is the aggregate of the direct and observed dolphin mortality and serious injury together with the indirect and unobserved harms to dolphins caused by a particular fishing method. It appears on its own only once, at paragraph 7.246. A form of this term, "overall relative levels of harm", also appears twice with a very closely related term, "overall relative risks" (at paragraphs 7.252 and 7.353).

171. Paragraph 7.252 of the Appellate Body report in the first compliance proceeding assists in understanding the meaning of "overall relative levels of harm", its relationship with "overall relative risks", and its importance to the calibration analysis:

... we do not see that the Panel in these proceedings set out to examine the extent of mortality or serious injury arising from fishing methods in different areas of the oceans so as to enable itself to gauge properly the overall relative risks or levels of harm to dolphins arising in those fisheries, which was needed in order to assess whether the differences in the dolphin-safe labelling conditions under the amended tuna measure are appropriately tailored to, and commensurate with, those respective risks.

172. This means that the "overall relative levels of harm" – which are determined from the "extent of mortality or serious injury arising from fishing methods in different areas of the oceans" – are the basis for determining the "overall relative risks", which must encompass "both observed *and* unobserved harms" (para. 7.249).

97. Please comment on the relevance of the following excerpt from Exhibit USA-21 to the Panel's assessment of the figures reported therein and other figures on the record:

"One may distinguish between several types of biases. The 'purely statistical' biases are a result of the statistical distributions of bycatch and of the survey schemes. These biases are the focus of the present paper. But there are other sources of potential biases not considered in this paper, because they are more difficult to handle quantitatively. For example, biases could be introduced by changes in fishing practices of vessels when an observer is on board and/or by the inexperience, negligence, or intentional actions of some observers. Many of these biases result from the difficulty or impossibility of following a solid statistical design, so the observer programmes 'adapt' to the deficiencies."

173. As Mexico discussed during the meeting with the Panels, when the information collected by observers will be used for determining compliance, or when the information will impact the marketability or price of the fish, there is a phenomenon known as the "observer effect," where fishermen will behave differently depending on whether an observer is or is not aboard. This problem is avoided in the ETP large purse seine fishery, where there are trained observers on 100 percent of the fishing trips. But outside the ETP, where observer coverage can be very low (for example, an average of 5 percent in the WCPFC longline fishery),⁸⁹ the fact that observers recorded few dolphin interactions cannot reliably be projected to mean that the circumstances were the same for the vessels without observers.

174. As also previously discussed, there are no observer programs outside the ETP and the United States that are qualified to provide reliable data on dolphin interactions.⁹⁰ Mexico does not presume that observers in other programs are negligent or intentionally misreport data; the relevant point is that, unlike the AIDCP program and the U.S.

⁸⁹ WCPFC, Status of ROP Data Management, WCPFC-TCC11-2015-IP05_rev1 (10 September 2015), p. 18, Table 5 (Exhibit MEX-116).

⁹⁰ See Mexico's opening statement, paras. 21-23.

program for its domestic fisheries, they are not specifically trained to observe and report on interactions with dolphins.

175. The key conclusion of Exhibit US-21, as previously noted by Mexico, is the authors' statement that "our results indicated that the current European fishery observer programme provides some information on bycatch of marine predators in the Indian Ocean, but is insufficient to accurately monitor the effects of fishing on pelagic communities associated with tuna schools."⁹¹

98. Please comment on the following statement in Exhibit USA-60:

"Tunas also associate with dolphin herds, but this phenomenon is only common in the EPO. It has been observed in many other locations (Donahue and Edwards, 1996), but not as a frequent and consistent practice, utilized routinely as in the EPO."

176. This comment cites the Donahue and Edwards paper and states simply that association between dolphins and tuna is more common in the ETP than elsewhere. The paper cited itself states:

However, this lack of information should not be mistaken for conclusive evidence that such large-scale directed efforts [outside the ETP] do not exist. While it seems unlikely that a large-scale fishing effort would entirely escape notice for long periods of time, the existing available data were collected during at most only a very few percent of the sets made by purse-seiners in any of the fisheries, and thus represent only a very tiny fraction of the total effort being expended worldwide on tuna purse seining.

The question cannot be resolved with only the information currently available. Conclusive answers will depend upon securing valid data comprising a much larger fraction of fishing effort by each tuna fleet operating outside the ETP. This would likely require a substantial investment in scientific observer programs, but the results would then be unequivocal. Existing reports could be used to provide a basis for directing such programs first to specific geographic areas with the largest existing number of data collected, e.g., off the western coast of Africa near Cape Palmas, or near the Seychelles in the Indian Ocean. At present, the best that can be said is that the few data available do not indicate a large-scale practice of setting on cetaceans for the purpose of catch tuna outside the ETP.⁹²

177. The Donahue and Edwards paper is limited to a review of purse seine fishing and no other methods, such as longline and gillnets. The paper itself lists a number of reports, such as the following:

"Mr. Salvatore Di Palma, Regional Fisheries Attaché in Abidjan, had talked with Mr. A. Lassarat, Director of the Fisheries Service in Abidjan [Ivory Coast], who wanted information on how to handle porpoise during tuna purse seining operations. Di Palma states, "In the main, this is the problem. The French vessels are taking too many porpoise; they try to follow the American technique but many of the porpoises are getting their

⁹¹ M. Amade et al., "Precision in bycatch estimates: the case of tuna purse seine fisheries in the Indian Ocean," *ICES J. Mar. Sci.*, p. 7 (2012) (Exhibit US-21).

⁹² M. Donahue and E. Edwards, *An Annotated Bibliography of Available Literature regarding Cetacean Interactions with Tuna Purse Seine Fisheries Outside of the Eastern Tropical Pacific* (November 1996), pp. 2-3 (Exhibit MEX-112).

long noses caught in the mesh and drowning. The Biscaya, the large Marco-designed French seiner, had 35 tons of porpoise and 30 tons of tuna when it pulled into Abidjan recently."⁹³

"After a visit to Abidjan, Ivory Coast, van Bree learned that purse seining by encircling dolphins was "commonly" used in west African waters by vessels of "all nations." He cites one example of a set made off the Liberian-Ivory Coast border in February 1970 that caught 60 tons of tuna and 40 tons of dolphins (*Stenella frontalis* and *Stenella coeruleoalba*). According to fishery biologists at the Institut Français de Recherche Scientifique pour le Développement en Coopération (ORSTROM), the Food and Agriculture Organization of the United Nations (FAO) and the State Service (in Abidjan), "fewer and smaller" schools of dolphins were seen in the Spring of 1970 in Ivory Coast's waters. van Bree heard purse seining is also used off Mauritania and in the Indian Ocean near Somalia. Talks with captains of fishing boats unloading at Abidjan convinced van Bree that they do "little or nothing" to keep the dolphins alive."⁹⁴

"During fisheries enhancement research surveys off the Maldives and Sri Lanka, spinner dolphins in schools of approximately 500 animals were sighted "often". Off southwestern Sri Lanka, spinner dolphins were seen "frequently" around FADs and other fishing activity usually in waters deeper than 500 m. Sightings of spotted dolphins also occurred during these surveys."⁹⁵

"Sudara reports that local fisherman [in Thailand] using small boats equipped with purse seines said they use dolphins to locate fish schools such as skipjack. Apparently, the dolphins usually cause the fishermen trouble because they get entangled in the net and drown. Sudara reports that some fishermen shoot the trapped dolphins to prevent them from damaging the nets. Previously, fishermen would attempt to release captured dolphins because they believed dolphins helped save the lives of fishermen who fell overboard. However, the fishermen now resort to shooting dolphins who approach the net or are entangled in the net. The dolphins reported to occur in Thai waters, both in the Gulf of Thailand and in the Andaman Sea, include *Stenella malayana*, *Delphinus delphis*, *Tursiops aduncus* and *Orcaella brevirostris*."⁹⁶

"While aboard the vessel [in the Philippines], the author did not witness any cetacean kills, although interviews indicated that 'sizable numbers' of dolphins are caught by purse seiners in the area. Two days before the author boarded the vessel, it apparently had caught 60 dolphins in a single set and another 20 dolphins in a set two weeks earlier. From this information, the author suggests one seiner catches an average of five dolphins per trip/day/set, or (assuming 15 days of fishing a month) 300-450 dolphins during the four to six month season. This extrapolates to 1,500 to 2,250 dolphins per season for this five vessel fleet, or one dolphin for every two tons of tuna caught. Both commercial and municipal purse seining may or may not involve the use of FADs. Information on the total number of purse seiners in the Philippines or on the proportion of sets made on FADs is not available. It is also not clear from the text if the dolphins kills described were incidental kills from intentional encircling of

⁹³ Ibid., p. 6.

⁹⁴ Ibid. pp. 7-8.

⁹⁵ Ibid., p. 21.

⁹⁶ Ibid., p. 25.

the dolphins, incidental kills from FAD sets or if the mortality occurred accidentally when an apparently non-associated tuna school was being encircled.

The ten municipal purse seiners, specifications of which are found in the text, operating out of Basay catch about three dolphins per boat per week which consists of five fishing days. Thus, these ten boats from Basay may account for 480-720 dolphins killed during the principal fishing season (four months). The ten boats together catch "about ten dolphins" during the remaining months raising the total to 490-730 dolphins killed per year. A photograph of three spinner dolphins killed in a purse seine net accompanies the text."⁹⁷

178. The United State likely will argue that these reports are "old." But it has submitted no evidence that environmental conditions have changed in these ocean regions, such that tuna no longer associate with dolphins.

179. Of course, there is much more recent evidence that there are strong associations between tuna and dolphins in the Indian Ocean. For example, a report of the Republic of Maldives on handline fishing stated that more than 90 percent of yellowfin schools are located with the use of dolphins, while another report, published in 2014, and specifically refuted prior claims that there are no tuna-dolphin associations in the high seas area of the Western Indian Ocean where purse seine vessels operate.⁹⁸

180. The five major intergovernmental regional fishery management organizations (RFMOs) for tuna – the Commission for the Conservation of Southern Bluefin Tuna, the Inter-American Tropical Tuna Commission (IATTC), International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), and the Western and Central Pacific Fisheries Commission (WCPFC) periodically hold joint meetings to exchange information, which are known as the "Kobe" conferences (named after the location of the first such meeting). In 2010, the "Kobe II Bycatch Workshop" was held with participation of representatives of the five RFMOs. The "Background Paper" published in connection with this meeting stated, among other things, that:

- The association of tuna and dolphins has been observed and documented in ocean regions other than the ETP.⁹⁹
- "Tens to hundreds of thousands of [marine mammals] are killed each year through entanglement in fishing gear."¹⁰⁰
- Nearly all of the RFMOs have reports of marine mammals interactions with longline fishing, and "[b]ycatch can occur as a result of depredation events in longline fisheries via hooking and/or entangling of marine mammals (including mouth-hooking, ingestion of hooks, and entanglement of flippers or flukes)." Further, "RFMO members have reported the bycatch (including mortality and serious injury) of whales and dolphins in longline gear in fisheries for tuna and swordfish in both the western Atlantic and central Pacific Oceans."¹⁰¹

⁹⁷ Ibid. pp. 33-34.

⁹⁸ Mexico's first written submission, para. 110.

⁹⁹ Kobe II Bycatch Workshop Background Paper, *available at* http://www.tuna-org.org/Documents/Aus/Kobe_II_Bycatch_Workshop_Marine%20Mammal_FINAL_ENG.pdf, p. 2 (Exhibit MEX-113) (Exhibit MEX-39 in first compliance proceeding).

¹⁰⁰ Ibid., p. 1.

¹⁰¹ Ibid., p. 2.

- "It is generally accepted that, wherever gillnets are deployed, there is likely some degree of marine mammal bycatch..."¹⁰²

181. Further, the reports of the PNG for 2014 and 2015 indicate that individual purse seine sets killed as many as 180, 45, 21, and 10 dolphins.¹⁰³ It strains credulity to argue that there is no association between tuna and dolphins in the Western and Central Pacific, or that fishers are completely unaware of the presence of dolphins until they pull up the nets.

182. Finally, where over 60,000 dolphins are being killed annually in tuna gillnet fisheries, as in the Indian Ocean, it is obvious that dolphins are strongly associated with the tuna being harvested.

183. The fact that dolphins and tuna associate in fisheries outside the ETP is especially important in assessing risk profiles, because under the tuna measure all the tuna caught during a voyage in which there is a *single* intentional set or gear deployment disqualifies *all* of the tuna caught during the voyage, even if all the other sets and gear deployments during the voyage did not intentionally involve dolphins. In other words, if a purse seine vessel opportunistically sets on dolphins in the Western Pacific or Indian Ocean, all of the tuna it catches during what may be a two-month voyage should not be labelled as dolphin-safe. The tuna measure is not calibrated to this risk, because the United States presumes that there are no intentional sets or gear deployments on dolphins outside the ETP. The evidence to the contrary is overwhelming.

99. With reference to paragraph 59 of Mexico's opening oral statement, where Mexico argues that 7 per cent of dolphin sets by the Mexican fleet do not result in any encirclement of dolphins, would tuna caught during such dolphin sets qualify for the dolphin-safe label under the 2016 Tuna Measure? If not, why not?

184. Because such fishing sets start out with the intent to encircle dolphins, they are still categorized as intentional setting on dolphins.

185. It is important also to recall that under the 2016 tuna measure, *all tuna caught during a voyage* during which a dolphin set was made even one time is disqualified. In other words, if a fishing vessel, during a two-month voyage, made one dolphin sets and all of its other sets were on FADs or unassociated, and no dolphins were killed or seriously injured during any of the sets, all of the tuna caught by the vessel would be disqualified from the dolphin-safe label. Conversely, in the case where a vessel fishing in the West Pacific killed 180 dolphins in a single FAD set, all of the tuna that vessel catches in other sets was eligible to have the dolphin-safe label.

100. The parties have expressed diverging views concerning the scientific validity of "per set" comparisons in assessing risk levels in various fisheries. Both parties have argued that practice supports their respective view. Please provide evidence to justify your view that "per set" comparison is or is not a scientifically-recognized methodology.

186. If information is collected from within the same fishery in a consistent manner on a year-by-year basis, per-set or per gear deployment data can be used to evaluate whether fishery conditions (such as population abundance or level of interactions) or the performance of vessels has changed over time.

187. But as Mexico has previously discussed, there is no precedent for using per-set/per gear deployment metrics to compare the dolphin mortality rates of different fisheries, using different equipment and/or methods in different ocean regions.

¹⁰² Ibid., p. 2.

¹⁰³ Papua New Guinea, Annual Report to the Commission (August 2015), p. 29 (Exhibit MEX-23); Papua New Guinea, Annual Report to the Commission (August 2016), p. 20 (Exhibit US-107).

Comprehensive data is not collected for any fishery except the large purse seine fishery in the ETP. Moreover, purse seine sets are different in nature and length than longline, gillnet and trawl deployments. Further, only the ETP prohibits sets at night, to ensure that observers can clearly see any dolphins, while other ocean areas have no such restriction.

188. Moreover, as Mexico has also discussed, the United States itself declined to use its own per-set methodology in evaluating the Indian Ocean gillnet fisheries.

189. To apply the United States' per-set comparison based on the severely inadequate data available would be unscientific and arbitrary.

3.2 The 2016 Tuna Measure

101. Given that, during the appeal in the first compliance proceedings, "neither Mexico nor the United States consider[ed] that the panel's analyses of the detrimental impact of the certification requirements and the tracking and verification requirements were warranted or necessary" (Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.68), should the Panels even consider those aspects of the Measure in the present proceedings?

190. The legal relevance of "detrimental impact" is to the first part of the test under Article 2.1 of the TBT Agreement and the discrimination tests in Articles I:1 and III:4 of the GATT 1994. This detrimental impact arises from the 2016 tuna measure as a whole and is reflected in the fact that most Mexican tuna products continue to be denied the label while most like tuna products from the United States and other countries continue to be able to use the label. There is no need for the Panels to examine the issue of detrimental impact in relation to specific labelling conditions or requirements as contemplated in this question (including the eligibility requirement). Moreover, since Mexico and the United States acknowledge that the detrimental impact of the 2016 tuna measure as a whole continues, there is no need for the Panels to examine this impact in the context of the measure as a whole.

191. Nonetheless, the certification and tracking and verification requirements are integral elements of the regulatory distinctions drawn by the tuna measure. They remain key factors in the evaluation of the measure as a whole and must be considered by the Panels.

102. With reference to paragraph 139 of Mexico's first written submission, what is the relevance in these proceedings, if any, of the facts alleged in that paragraph with respect to the eligibility criteria?

192. That paragraph explains that the U.S. Commerce Department itself seemed to acknowledge that it is unclear whether it has the legal authority to alter the statutory determination provisions to allow additional requirements to be imposed on purse seine fisheries outside the ETP in the absence of a finding of regular and significant association with dolphins, claiming, without support, that "the DPCIA [the statute] affords NMFS more discretion to impose an observer requirement ... when evaluating all ... fisheries under the mortality or serious injury prong ...", and adding that "NMFS will also take U.S. WTO obligations into account in any exercise of such discretion." If the change in the regulations on determinations were found to be in excess of the applicable statutory authority, the determination provisions in the statute would remain unchanged.

193. At this point, because the U.S. Commerce Department has not applied the determination provisions to any purse seine fishery, the issue has not further arisen and Mexico is not seeking a ruling based on this issue.

103. With reference to paragraph 88 of Mexico's second written submission, and in particular to Mexico's assertion that the United States "apparently has accepted that the training requirement is meaningless":

- a. To Mexico: What is the basis for this assertion?**
- b. To the United States: Please respond to this assertion.**

194. The basis for Mexico's assertion was that the United States, in its second written submission, did not respond at all to Mexico's evidence submitted with its first written submission that the "training" purportedly provided under the 2016 tuna measure was meaningless. The United States first sought to answer Mexico's arguments regarding the training requirement only in its third written submission.

195. Mexico answered the United States' arguments in its opening statement at the hearing, addressing the three main elements of the United States' assertions. First, Mexico noted that the United States appears to claim that identifying dolphin mortalities and injuries actually does not require special training, and therefore rejects the Panel's finding in the first compliance proceedings that the skills needed are highly complex and must be acquired through training.¹⁰⁴ Second, the United States seeks to compare its training materials to the slide decks used for training captains in the AIDCP.¹⁰⁵ Putting aside that under the AIDCP captains must attend in person training and are not just asked to read the slides, the United States' argument fails to recognize that in the ETP, captains do not make dolphin-safe certifications; rather, that is done by trained independent scientific observers. Finally, the United States misrepresented the nature of AIDCP observer training by citing a two-page summary of the guidelines for training, rather than the training itself. Mexico provided a sample of an observer training schedule, which lasts for 16 days, during which dolphin-related issues are discussed on 11 of the days.¹⁰⁶ Mexico also provided the 236-page AIDCP observer field manual to illustrate the extent of observers' responsibilities and training.¹⁰⁷ Observers are trained in all aspects of the fishing process, about dolphins and the protection of dolphins, and on the detailed recordkeeping requirements.

196. The information for captains posted on the Commerce Department's website is in no way comparable to the training given to AIDCP observers or even U.S. observers in the few domestic fisheries where they have been required by the Commerce Department to make such certifications. Mexico reaffirms its view that the 2016 tuna measure does not provide meaningful training to captains outside the ETP, who remain unequipped to monitor for harms to dolphins.

197. Moreover, in its third written submission, the United States still did not address Mexico's evidence, submitted with its first written submission, that Bumble Bee and Tri-Marine complained that it will be impossible to implement the training requirements.¹⁰⁸

198. Finally, it is important to emphasize that the determination of when a dolphin has experienced a "serious injury" is a very complex evaluation. The official guidelines published by the U.S. Commerce Department for its scientists on determining serious

¹⁰⁴ Panel Report, *US-Tuna II (Mexico) (Article 21.5-Mexico)*, paras.7.216-7.218, 7.224-7.227, and 7.232.

¹⁰⁵ United States' third written submission, para. 120.

¹⁰⁶ Agenda de trabajo para el curso de observadores a bordo de barcos atuneros de la Comisión Interamericana del Atún Tropical), Manta - Ecuador, mayo 23 al 9 de junio de 2016 (Exhibit MEX-86).

¹⁰⁷ Programa de Investigación Atún – Delfín, Manual De Campo (Exhibit MEX-87).

¹⁰⁸ Mexico's first written submission, paras. 272-273.

injury to dolphins discuss this issue in detail and provide the following chart to summarize the relevant factors:¹⁰⁹

¹⁰⁹ National Marine Fisheries Service Instruction 02-038-01 (effective Date January 27, 2012), Guidelines for Distinguishing Serious from Non-Serious Injury of Marine Mammals Pursuant to the Marine Mammal Protection Act, pp. 28-30 (Exhibit MEX-114).

TABLE 2: Summary of Small Cetacean¹ Injury Categories and Criteria

Instructions: Each small cetacean injury event is recorded to the appropriate injury/information category using all available information and scientific judgment, as described in the Procedural Directive. For a single injury event to which several categories apply, the injury determination with the highest level of severity is assigned. More detailed information or extended observation on an individual case/animal may justify a determination differing from the guidance of this table. Any injury leading to apparent significant health decline (e.g., skin discoloration, fat loss) is a serious injury.			
Category	Injury/Information	Injury Determination ²	Additional factors for evaluating whether “case specific” injuries are serious or non-serious (additional factors at end of table) *
S1	A free-swimming animal observed at a date later than its human interaction, exhibiting signs of declining health believed to be resulting from initial injury (e.g., a marked skin discoloration, fat loss)	SI ³	
S2	Ingested gear ⁴ or hook(s)	SI	
S3	Visible blood loss	Case specific ⁵	Amount of blood, location of the bleeding injury, duration of bleeding
S4	Animal brought on vessel deck following entanglement/entrapment (excluding scientific research targeting marine mammals and authorized as such under a NMFS scientific research permit, where the animal is brought on and placed on the vessel deck in a controlled manner)	SI	
S5a	Hook(s) in head (excluding criterion S5b), regardless of the presence of gear	SI	
S5b	Hook(s) confirmed in lip only, external tissue outside of teeth, no trailing gear	Case specific	Prolonged restraint or struggle that could lead to capture myopathy, size of hook, depth of hooking, impairing ability to feed, presence of other injuries
S5c	Hook(s) in any body part, but hook(s) is removed or pulls out	Case specific	Prolonged restraint or struggle that could lead to capture myopathy, depth of hook, hook pulls out cleanly vs. causes further injury during dehooking, method used to remove hook, length of time hooked
S5d	Hook(s) in appendage or body (excluding criterion S5a), without trailing gear or with trailing gear that does not have the potential ⁶ to: 1) become a constricting wrap on animal; 2) be ingested; 3) accumulate drag; or 4) become snagged on something in the environment, anchoring the animal	Case specific	Prolonged restraint or struggle that could lead to capture myopathy, depth and location of hook, type and amount of gear attached

¹ For the purposes of this table, small cetaceans include all odontocetes except sperm whales.

² This table includes only those criteria determined to be serious injuries or case specific based on expert opinion at the 2007 Workshop (Andersen *et al.*, 2008) and by small cetacean experts on the NMFS Determination Staff working group. For the purposes of streamlining the information for the reader, criteria determined to be non-serious injuries are not included in this table.

³ SI = serious injury.

⁴ For the purposes of this table, gear is defined as any portion of fishing gear excluding the hook, which is considered separately. Lures are considered gear. Gear also generally refers to any type of debris entangling or attached to the animal.

⁵ Case specific = Could be a serious or non-serious injury, but either 1) there is insufficient information about the impact of a particular injury, or 2) additional factors must be considered on a case-by-case basis to determine the severity

⁶ For the purposes of this table, “potential” as it relates criterion S5d indicates that the trailing gear IS NOT capable of leading to any of the situations listed.

S6	Gear attached to free-swimming animal with potential ⁷ to: 1) become a constricting wrap on animal; 2) be ingested; 3) accumulate drag; or 4) become snagged on something in the environment, anchoring the animal	SI	
S7a	Anchored, immobilized, or entrapped and not freed	SI	
S7b	Anchored, immobilized, entangled, or entrapped before being freed without gear attached	Case specific	Duration of entanglement/entrapment, prolonged restraint or struggle that could lead to capture myopathy, gear type, where/how gear is attached to animal, associated injury (i.e., where directly or indirectly caused by initial entanglement), response of individual animal, method used by human to remove gear from animal
S8a	Gear wrapped and constricting on any body part or is likely to become constricting as the animal moves or grows	SI	
S8b	Gear wrapped and loose on any body part	Case specific	Gear type, amount of gear, potential for snag, potential to lead to criterion S8a, animal body size relative to gear (e.g., because of species or age), effect on animal movement, species sensitivity (e.g., frightens easily)
S9	Body trauma ⁸ not covered by any other criteria	Case specific	Location of wound, depth (e.g., superficial or to the bone, penetrating muscle or organs), length, number of lacerations, cleanliness (i.e., compression vs. tearing)
S10	Visible fracture(s), excluding pectoral fins (see criterion S13d for pectoral fin fractures)	SI	
S11	Vertebral transection, including fully severed flukes	SI	
S12	Body cavity penetration ⁹ by foreign object or body cavity exposure	SI	
S13a	Loss or disfigurement of dorsal fin	Case specific	Cleanliness (i.e., compression vs. tearing), nature of injury causing the loss, extent of fin loss (i.e., full or partial), amount and duration of blood loss
S13b	Partially severed flukes, transecting midline	SI	

⁷ For the purposes of this table, potential as it relates criterion S6 indicates that the trailing gear IS capable of leading to any of the situations listed.

⁸ For the purposes of this table, "trauma" is defined as a wound or bodily harm caused by an extrinsic agent. Blunt trauma is an injury (abrasion, laceration, contusion or skeletal fracture) produced by a blunt object striking the body or impact of the body against a blunt object or surface. Sharp force trauma is an injury caused by a sharp or pointed object creating a penetrating (stab, chop or incision) wound. Laceration is defined as a ragged incision or a tearing of the skin. Lacerations are caused by blunt trauma that results in stretching, tearing, crushing, shearing, or avulsion of the tissue.

⁹ For the purposes of this table, "penetration" is defined as a wound occurring when a foreign object punctures the body. Penetrating wounds can be characterized as one of three types: stab (small external wound that is greater in length into the body than is apparent on the skin surface), incised (clean cuts into the skin which are longer on the skin surface than they are deep), or chop wounds (incised wounds that penetrate deep to the bone, leaving a groove or cut in the bone).

S13c	Partially severed flukes, not transecting midline	Case specific	Cleanliness (i.e., compression vs. tearing), nature of injury causing the loss, amount and duration of blood loss
S13d	Partially or completely severed or fractured pectoral fin(s)	Case specific	Cleanliness (i.e., compression vs. tearing), nature of injury causing the loss, extent of fin loss (i.e., full or partial), amount and duration of blood loss, opened or closed fracture
S14	Social animal separated from group and/or released alone post-interaction (excluding criterion S15)	Case specific	Species (e.g., sensitivity, offshore vs. inshore), location of release (e.g., likelihood of animal locating its conspecifics)
S15	Dependent animal (i.e., calf, juvenile) released alone post-interaction or dependent animal left with a seriously injured or dead mother	SI	
S16	Observed or reported collision with vessel	Case specific	Speed of vessel, size of vessel, hull shape, part of vessel to strike the animal, size of animal compared to size of vessel, behavior of animal after collision, extent and location of wound(s) on animal

* Factors listed in the far right column of Table 2 are unique to the associated injury type. In addition to those listed in this column, the factors that should be considered, if available, when reviewing all case specific injury events in Table 2 include, but are not limited to:

- Species
- Age or age class (e.g., calf, juvenile, adult)
- Sex
- Size of animal
- Overall health (e.g., nutritional status, body condition, pre-existing disease state, pre-existing injuries)
- Behavior during and/or after injury-causing interaction (e.g., dorsal arching, listlessness)
- Reproductive status (e.g., pregnant, lactating, has dependant calf)
- Natural history (e.g., indigenous, migratory)
- Location of injury (e.g., mouth, head, body, fin, tail, internal)
- Size of injury
- Duration of injury (e.g., single event, repeated, chronic)
- Depth of injury (e.g., superficial or to the bone, penetrating muscle or organs)
- Cleanliness of injury (e.g., compression, tearing)
- Environmental condition (e.g., individuals out of their normal habitat, climate stressors)
- Social stressors (e.g., social structure of species, separation of social individuals from the group, cow/calf separation)
- Cumulative effects of repeated exposures
- Compounding effects of multiple injuries obtained during a single event
- Availability of data on multiple sequential events involving the same individual over time
- Susceptibility of the species to capture myopathy (spinner dolphins and porpoises notoriously sensitive; bottlenose dolphins robust; many others fall in between, with some unknown)
- Ability of rehabilitated animal to be released
- Relative effect of blood loss on different species

In addition to those factors listed above, the factors that apply to all fishery-interaction related case specific injuries include, but are not limited to:

- Entanglement type (e.g., hooked, anchored, entrapment)
- Amount and size of gear (e.g., size, length and number of branches of line; number of buoys, traps or anchors; volume of netting)
- Entanglement constriction (e.g., tight, loose, multiple wraps)
- Habitat where animal is located (e.g., an animal with trailing gear areas of dense gear or an area with vegetation is more likely to risk snagging the gear and becoming anchored)
- Entanglement duration
- Existence, type and amount of any trailing gear
- Method of handling the animal during disentanglement

199. It is readily apparent that the superficial summary published on the Commerce Department's website is insufficient to provide the training that the Commerce Department itself believes is necessary to recognize and appropriately record serious injuries.

104. The Panels note Mexico's argument that the regulatory distinctions with respect to tracking and verification result in different levels of accuracy in the information provided to consumers regarding tuna caught in different fisheries. The Panels also note the United States' argument that Mexico has adduced no evidence indicating that any tuna has been inaccurately labelled in the US tuna market.

(a) To Mexico: Please react to the United States' argument.

(b) To both parties: Which party bears the burden of proof in respect of this particular issue?

200. Mexico is not required to adduce evidence that proves actual instances where tuna products containing non-dolphin-safe tuna caught outside the ETP have been inaccurately labelled as dolphin-safe. For the purposes of establishing a lack of even-handedness under the second part of the legal test in Article 2.1 of the TBT Agreement and arbitrary discrimination under the chapeau of Article XX of the GATT 1994, Mexico is only required to establish a *prima facie* case that, under the circumstances related to the

design and application of the Tuna Measure's labelling conditions and requirements, tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe. The burden then shifts to the United States to sufficiently explain how such instances can be prevented in the application of the Amended Tuna Measure's labelling conditions and requirements.

201. In *EC – Seal Products*, the Appellate Body indicated, in the context of the chapeau of Article XX of the GATT 1994, that where the circumstances related to the application of the measure at issue "could allow for instances of abuse" (paras. 5.326 and 5.328), whereby the products in question "could potentially" (para. 5.338) enter the market inaccurately characterized with a designation which constitutes an advantage in that market, it will fall to the responding Member to "sufficiently explain ... how such instances can be prevented in the application" of the measure at issue. (paras. 5.326, 5.328 and 5.338). Specifically, the Appellate Body held that inherent ambiguities in the requirements of the exception for Inuit or other indigenous communities to the ban on the placing of seal products on the EU market, together with the particular circumstances related to the application of these requirements could potentially allow for abuse of the Exception, such that it could potentially be applied inaccurately" (paras. 5.326 and 5.338).

202. The Appellate Body considered the mere possibility that the measure at issue could be applied in a manner that might inaccurately characterize products with an advantageous market status to be sufficient to establish a *prima facie* case of arbitrary or unjustifiable discrimination, thereby shifting the burden to the responding Member. In this respect, the Appellate Body indicated that it fell to the European Union to sufficiently explain how instances of such inaccurate characterization could be prevented in the application of the Exception. Where the European Union failed to provide a sufficient explanation, the Appellate Body concluded that:

[W]e consider that seal products derived from what should in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC exception. Thus, pursuant to its design, the EU Seal Regime could be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.¹¹⁰

203. Mexico established a *prima facie* case that, due to gaps and deficiencies in the certification requirements and the tracking and verification requirements, tuna products derived from tuna caught outside the ETP under non-dolphin-safe circumstances – which are therefore not properly eligible for the dolphin-safe label – could potentially enter the U.S. market inaccurately labelled as dolphin-safe. Mexico showed not only that there are gaps, but also that major suppliers of tuna for the U.S. market – Thailand, the Philippines and Taiwan – were found by the European Commission to have significantly deficient regulation of their fishing fleets and processing industries, meaning that they could not provide assurances of the sources of their sea food products. That is, in fisheries other than the ETP large purse seine fishery, factors such practices of not segregating the tuna, multiple trades, transshipment, IUU fishing, lead to dramatic deficiencies in reports. Moreover, the United States lacks jurisdiction to audit foreign fishing vessels, carrier vessels, and foreign processors. The US processors and importers are only required to collect the documentation but not to validate the information.

204. It therefore falls to the United States to meet its burden under Article XX of the GATT 1994 of rebutting this *prima facie* case by sufficiently explaining how such instances can be prevented in the application of the tuna measure's labelling conditions and requirements related to certification and tracking and verification.

¹¹⁰ Appellate Body Report, *EC – Seal Products*, para. 5.328.

205. With respect to the burden of proof under Article 2.1 of the TBT Agreement, the Appellate Body found in the first compliance proceeding that:

While the complaining party bears the burden of making its *prima facie* case, the responding party must prove the case it seeks to make in response, and each party bears the burden of substantiating the assertions that it makes. In our view, having promulgated the technical regulation containing the regulatory distinctions that result in the detrimental impact, the responding Member will be best situated to adduce the arguments and evidence needed to explain why, contrary to the complainant's assertions, the technical regulation is even-handed and thus why the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. Thus, the Appellate Body noted in the original proceedings that, although the burden of proof to show that the US dolphin-safe labelling provisions were inconsistent with Article 2.1 was on Mexico as the complainant, it was for the United States to support its assertion that its regime was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.¹¹¹ (emphasis added)

3.3 Legal Issues

105. Methodologically, how should the Panels respond to the fact that reporting of dolphin interactions and mortalities and injuries is less extensive, and perhaps less reliable, in some fisheries than in others?

206. Reporting of dolphin interactions, mortalities and injuries clearly is less extensive and much less reliable outside the ETP. The substantive provisions at issue dictate how this issue is addressed. The evidentiary burden is on the United States to demonstrate that the different labelling conditions and requirements are not arbitrary under the chapeau of Article XX and, in the light of the *prima facie* case put forward by Mexico, are even-handed under the second part of the test under Article 2.1 of the TBT Agreement. By virtue of the 2016 tuna measure, the United States has chosen to permit tuna products to be labelled as dolphin-safe where the tuna are caught pursuant to a specific definition of "dolphin-safe" which, in turn, has divided the US tuna product market into two segments thereby fundamentally shaping its competitive landscape. In such circumstances, it is incumbent upon the United States to ensure that for all tuna products entering the US market with the dolphin-safe label, the tuna in the products are in fact dolphin-safe.

207. The Panels should take note of the fact that, 27 years after the initial enactment of the measure, the United States has never conducted its own evaluation of the risks to dolphins in any fishery other than the ETP. In relation to the recent U.S. determination relating to gillnet fishing in the Indian Ocean, the United States relied on publicly-available reports submitted by Mexico in the first compliance proceeding, but made no effort itself to investigate, other than to send short letters to the governments of the fleets participating in the Indian Ocean gillnet fisheries.

208. The Panels have more than sufficient evidence to conclude that the burden is on the United States to undertake an evaluation of the risks to dolphins in other tuna fisheries using the same analytical techniques and presumptions it has applied to the ETP, or to ask other countries to provide the data as the United States has committed to do under its MMPA regulations.

¹¹¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.33.

209. Alternatively, the Panels should take note that the United States has relied on presumptions, rather than clear evidence, regarding the alleged indirect effects of dolphin sets in the ETP, and require that the United States apply the same types of presumptions to adverse effects on harms to dolphins in other fisheries, in the absence of conclusive evidence proving no harm to dolphins.

106. Under what circumstances, if any, would it be appropriate for the Panels to revise or even re-make factual findings on issues dealt with in the previous stages of this dispute?

210. The Appellate Body has stated that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events", such that a panel's assessment on a specific issue should not "deviate from the reasoning' in the original report 'in the absence of any change in the underlying evidence in the record".¹¹² Based on this authority, the key consideration when determining whether it would be appropriate for the Panels to revise or re-make factual findings from the previous stages of this dispute is whether there has been a change in the underlying evidence on the record.

107. What is the meaning of the terms "calibrated", "tailored to" and "commensurate with" as used by the Appellate Body in the first compliance proceedings? How can a panel determine whether regulatory distinctions are "calibrated to", "tailored to", or "commensurate with" different risk situations?

211. Mexico notes that when the Appellate Body uses these terms, it qualifies them with the words "appropriately" or "properly". This is demonstrated in the following paragraphs of the Appellate Body's report in the first compliance proceedings:

- Paragraph 7.163: "The Panel's reasoning includes only limited references to the risks to dolphins in the relevant fisheries, and does not address whether, in the light of the risk profiles, the different treatment created by the relevant regulatory distinctions show that, as between different groups, the treatment accorded to each group is explained by, and appropriately tailored to, the relevant risks." (emphasis added)
- Paragraph 7.252: "However, for the reasons set out above, we do not see that the Panel in these proceedings set out to examine the extent of mortality or serious injury arising from fishing methods in different areas of the oceans so as to enable itself to gauge properly the overall relative risks or levels of harm to dolphins arising in those fisheries, which was needed in order to assess whether the differences in the dolphin-safe labelling conditions under the amended tuna measure are appropriately tailored to, and commensurate with, those respective risks. " (emphasis added)
- Paragraph 7.253: "in the absence of a proper assessment by the Panel of the relative risks existing inside and outside the ETP large purse-seine fishery, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries." (emphasis added)

¹¹² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.9, citing Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103, and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 386.

212. Mexico does not understand these phrases to indicate an additional legal test or standard; rather, these terms are another way to refer to the concept of "calibration". In this regard, these phrases are equivalent to describing the calibration of a measure in an even-handed manner.

213. In the context of this dispute, the terms "calibration", "appropriately tailored to", "properly tailored to", and "commensurate with" each indicate a deliberate process of designing the aspects of a measure to specifically address different circumstances, in the light of the objectives of the measure. Further to Mexico's opening statement, "tailoring" would involve adding or subtracting elements in the trail of information between harvest and retail sale in accordance with the risks associated with the fishing method and fishing area.

214. The United States defends its measure on the basis that it has been designed to address the different risks to dolphins posed by different fishing methods in different ocean areas. However, there is no evidence on the record that the United States has sought out the data necessary to assess the relative overall risks to dolphins in different fisheries indicates that "tailoring", i.e., "calibration", has not been undertaken. For this reason alone, the United States has not met its burden to establish a *prima facie* case.

215. Further, it is notable that the United States has not even undertaken further study of dolphin populations in the ETP large purse seine fishery. This omission is important because the DPCIA originally conditioned the disqualification or eligibility of Mexico's fishing method on the results of scientific studies regarding the impact of AIDCP-compliant dolphin encirclement on the population sustainability of dolphin stocks in the ETP. This omission is further evidence of the arbitrariness of the measure.

108. With reference to paragraph 7.153 of the Appellate Body's report in the first compliance proceedings, what, if anything, is the relevance of the concept of "proportionality" in these proceedings?

216. The above noted reference does not incorporate into the tests under Article 2.1 and the chapeau of Article XX the concept of "proportionality". The use of "disproportionate" is another way of stating "appropriately tailored to", "properly tailored to", and "commensurate with". A subjective proportionality test would be untenable in the WTO context.

109. With reference to paragraph 69 of the United States' first written submission, do the parties agree that, for the purposes of this proceeding, the only relevant detrimental impact is that "most Mexican tuna products are still being excluded from access to the dolphin-safe label, whereas most like products from the United States and other Members are still eligible for such label"?

217. Mexico agrees and clarifies that this detrimental impact is relevant to the first part of the test under Article 2.1 and the discrimination under Articles I:1 and III:4.

110. Do the parties agree that, for the purposes of the Panels' analysis under the chapeau of Article XX, the same conditions prevail in respect of the ETP large purse seine fishery and other fisheries?

218. Mexico agrees.

111. With reference to paragraph 7.308 of the Appellate Body's report in the first compliance proceedings, please assist the Panels to understand whether, and if so how, the Appellate Body's finding that "the conditions prevailing between countries are the same for the purposes of the chapeau" is consistent with the notion that the Tuna Measure may accord different regulatory treatment to tuna from different fisheries based on the different risk profiles of those fisheries? If the Panels were to

accept that different fisheries do pose different risks to dolphins, can they also accept that the "same conditions prevail" for the purposes of the chapeau?

219. In Mexico's view, there is nothing inconsistent in the Appellate Body's finding that the conditions prevailing between countries are the same for the purposes of the chapeau and the notion that the tuna measure's regulatory differences could, in principle, be calibrated to the different overall relative risks of harm to dolphins in different fisheries.

220. The reason for this is that the "prevailing conditions" for the purposes of the chapeau are not the same as the different factual circumstances targeted by the regulatory distinction of the measure at issue. If they were one and the same, then the chapeau would be rendered inutile for the purposes of assessing any measure applying a regulatory distinction to like products produced under different factual circumstances.

221. Following the guidance provided by the Appellate Body in *EC – Seals* at paragraphs 5.299-5.300, pertinent context for identifying the relevant "prevailing conditions" is provided by the policy objective in subparagraph (g), where the tuna measure relates to the conservation of dolphins as an "exhaustible natural resource". Useful guidance is also provided by reference to the violations of the most-favoured-nation obligation under Article I:1 and the national treatment obligation under Article III:4. Considering the nature of these violations, it is appropriate to take into account not only the United States but also all countries that could produce tuna products for export to the U.S. market in determining which of the "conditions" prevailing in different countries are relevant in the context of the chapeau. What conditions prevail throughout these countries in relation to the policy objective of conserving dolphins?

222. As Mexico has demonstrated, almost all commercial tuna fishing operations (with the exception of pole and line fishing) pose risks of adverse effects to dolphins. While the particular level of overall relative risks may vary on a fishery by fishery basis (not necessarily on a country-by-country basis), the risk is general when considered across the different fishing methods and the different ocean areas.

223. Therefore, the Appellate Body was correct in its determination that the relevant prevailing conditions between countries are the risks, in general, of adverse effects on dolphins caused by tuna fishing practices. This general risk affects all countries that are engaged in commercial tuna fishing and, as a consequence, for all countries that use the tuna harvested by such commercial tuna fishing in the production of finished tuna products.

224. Thus, the Panels can determine different levels of relative overall risk in different fisheries at the same time as finding that the same "conditions prevail" for the purposes of the chapeau.

112. With reference to paragraph 112 of Mexico's second written submission:

(a) To Mexico: Is Mexico seeking a finding from the Panels that the United States should have evaluated other fisheries?

(b) To the United States: Please respond to the allegation in this paragraph.

225. The fact that the United States did not evaluate other fisheries is further evidence that the distinctions in the measure are not calibrated to the risks to dolphins.

113. In the view of the parties, should the Panels consider evidence from fisheries that do not produce tuna products that are exported to the United States?

226. Yes. Given the international trade in tuna including transshipment and given the gaps in verification and tracking requirements which make it impossible to determine

with certainty the origin of the tuna in tuna products that are imported into the US, the conditions in all fisheries are relevant.

114. With reference to paragraph 81 of Mexico's first written submission, should the "precautionary principle" be part of the analysis by the Panels when determining whether the regulatory treatment of a given fishery is calibrated?

227. Mexico refers to the precautionary principle at paragraph 246 of its first written submission and paragraphs 65 and 81 of its second written submission. The precautionary principle is relevant insofar as if the United States disregards scientific measurements and justifies disqualification of Mexico's AIDCP-compliant fishing method on the basis of precautionary presumptions and speculation, the same type of precautionary presumptions and speculation must be applied to other fishing methods and other ocean regions.

115. The Panels note that the objectives of the original as well as the 2013 Tuna Measure were found by the panels and the Appellate Body in the original and first compliance proceedings in this dispute to be "first, "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, second, "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".

a. In your view, do these continue to be the objectives of the 2016 Tuna Measure?

228. Yes. There have been no changes in the measure relating to its objectives, so there has been no change in its objectives.

b. If yes, what, in your view, is the conceptual link between the two objectives? Specifically, do you see an order of priority between the objective of the protection of dolphins and the objective of providing US consumers with accurate information about dolphin-safe status of tuna products sold in the US market?

229. The Panel found in the original proceedings as follows:

- "Finally, we note that there is a direct correlation between the two objectives identified by the United States...."¹¹³
- "To the extent that, as described, the US dolphin-safe provisions operate on the basis of incentives created by consumer choice, achievement of the second objective seems to be dependant in large part on the achievement of the first objective. Only if consumers can and do accurately distinguish, under the measures at issue, tuna caught in conditions that are harmful to dolphins from tuna caught in conditions that are not harmful to dolphins, can the use of such harmful fishing techniques be discouraged on the US market through the use of the label."¹¹⁴

230. The tuna measure is a consumer information measure, and its main objective is to provide U.S. consumers with accurate information about the "dolphin-safe" status of tuna products.

231. The United States originally presented these as the two objectives of the measure. It would be an error to attempt to modify the objectives by characterizing the accuracy objective as subservient to the dolphin protection objective, therefore implying

¹¹³ Panel Report, *US – Tuna II (Mexico)*, para. 7.426.

¹¹⁴ Panel Report, *US – Tuna II (Mexico)*, para. 7.427.

that a lesser degree of accuracy could be accepted. The 2016 tuna measure is a labelling measure which, by its nature and design, is primarily focused on conveying accurate information to consumers. Otherwise, for example, there would have been no need for the measure to incorporate certification, tracking and verification requirements

232. The statute itself is entitled the "Dolphin Protection Consumer Information Act". It reflects the goal of the AIDCP dolphin-safe program to provide a high level of accuracy. As Mexico has previously emphasized, the definition of "dolphin-safe" is not a vague assurance that a fishing method is generally less harmful to dolphins; it is a guarantee that no dolphins were killed or seriously injured in the capture of the tuna that is contained in the can on which the label is displayed.

116. Regarding the methodology that the Panels should use in assessing and comparing the overall relative risks to dolphins from different fishing methods in different areas of the ocean:

- a. Which precise methodology should be used by the Panels?
- b. Should the Panels' assessment be qualitative, quantitative, or mix of the two?
- c. Which relevant indicators or variables should be taken into account when comparing risk levels as between different fisheries?
- d. How should unobservable harms be taken into account in this assessment?
- e. Could the parties please define the different potential risks or harms to dolphins that should be identified for each fishery? What do the parties understand by the terms "direct", "indirect", "observed", "observable", "unobserved" and "unobservable" harms or risks? How should the Panels weight these different risks?

233. As Mexico has explained, the absence of comprehensive data in other fisheries makes the application of a quantitative evaluation very challenging. At the same time, a purely qualitative analysis may be overly subjective and itself arbitrary. With regard to the quantitative analysis proposed by the United States, Mexico sees problems beyond the lack of quality data outside the ETP. First, the US approach lacks any scientifically-based measuring stick. What is the per-set or per-volume number that makes a fishery have adverse effects on dolphins? And what is the basis for that number?

234. Second, the quantitative approach proposed by the United States seems inconsistent with its claim that the measure is not intended to protect dolphin populations, but rather discourage harms to dolphins on an individual basis. Gillnets, longlines, purse seine nets and trawls have all been shown to harm dolphins. Pole and line has not. That should be sufficient to draw the necessary distinctions.

235. By definition, indirect (unobservable) harms cannot be measured. The Panels can only speculate, but if it does so, presumptions must be made in a consistent manner. Direct harms are at least potentially measurable, but only if there is data available of a sufficient quality.

236. The main risks of harms in gillnet and trawl fisheries are that dolphins are captured or drowned in the nets. In longline fisheries, the risk is that dolphins will be hooked, maimed, or tangled in the lines and drown. In purse seine fisheries, the risk is that dolphins will be pulled up in the nets, or injured or stressed while being released.

237. The use of PBR would capture all of these factors and provide a common benchmark against which to measure. There is enough information on the record to rule that the measure is not calibrated. Long lines used in Hawaii and gillnets are extreme examples that manifestly cross the line and should be designated as ineligible.

238. As indicated in Mexico's responses to Questions 76 and 79, Mexico is not arguing that the Panels need to draw a bright line for eligibility based on the precise amount of dolphin mortalities or serious injuries and based on a consistent method of comparison.

Rather, it is the United States that must demonstrate that such a comparison is undertaken and that it is consistent. The evidentiary burden is on the United States to demonstrate that the different labelling conditions and requirements are “calibrated” and therefore not arbitrary under the chapeau of Article XX and, in the light of the *prima facie* case put forward by Mexico, are “calibrated” and therefore even-handed under the second part of the test under Article 2.1 of the TBT Agreement. The Panels need only find that there is evidence of one example where there is no calibration for the United States to be found not to have satisfied this burden. Mexico has presented considerable evidence to demonstrate this.

117. The Panels note the following statement by the Appellate Body in para. 7.155 in the first compliance proceedings:

This, in turn, indicates that, in the context of the original proceedings, the Appellate Body considered appropriate an analysis involving: first, an identification of whether different tuna fishing methods in different areas of the oceans pose different risks to dolphins; and, second, examination of whether, in the light of these risks, the different treatment created by the relevant regulatory distinction shows that, as between different groups, the treatment accorded to each group is commensurate with the relevant risks, taking account of the objectives of the Measure. (emphasis added)

- a. **Could the parties please assist the Panels in locating where in its report in the original proceedings the Appellate Body made the statement above, in particular the part that is underlined in the above excerpt?**
- b. **Regardless of your answer to question (a), in your view, should the Panels apply the legal test formulated in the above excerpt in assessing the consistency of the 2016 Tuna Measure with Article 2.1 of the TBT Agreement? Please elaborate.**
- c. **If your answer to question (b) is in the affirmative, please explain how the Panels should take the objectives of the Measure into account in applying this legal test.**

239. Yes, the Panels should apply the legal assessment articulated in the above excerpt. As explained in Mexico's opening statement, the reference to “taking account of the objectives of the measure” incorporates into the calibration assessment, and ensures coherence with, the long-established jurisprudence on arbitrary and unjustifiable discrimination, which itself is a recognized component of the tests under Article 2.1 and the chapeau of Article XX. Mexico has also explained in its opening statement how this should be accomplished.

240. At paragraphs 43 through 46 of its opening statement, Mexico explains that the calibration test must take into account the regulatory distinctions, the impact of the distinctions on the information trail that ensures label accuracy, and the differences in risks to dolphins that allegedly justify the distinctions. Mexico provided a hypothetical example to demonstrate this. Ultimately, there must be a rational connection between the calibrated regulatory distinctions and the objectives of the measure.

118. The Panels note the different views expressed by the parties at the Panels' meeting about the relationship between the Tuna Measure's two objectives. What legal consequences flow from these different views?

241. Both parties agree that the Tuna Measures pursues two objectives. While in Mexico's position both objectives have to be taken into account in evaluating Article 2.1 of the TBT Agreement and Article XX of the GATT 1994, the United States' approach seems to focus on only one of the objectives, compromising the other one, and disregarding the relation between both.

242. To the extent that both objectives are not considered equally under the analysis in the two provisions, there is a risk of arriving at different legal conclusions with respect to each of those provisions.

243. Even under the United States' approach, accurate information is required. Mexico's view is supported by the design, structure and architecture of the measure.

244. The legal consequence is that the objective of accuracy cannot be minimized or compromised. The definition of dolphin-safe is that no dolphins were killed or seriously injured during the set in which the tuna was caught, and there were no sets or gear deployments made on dolphins during the voyage during which the tuna was caught. Because the measure is designed and implemented in a manner that allows tuna to be labelled dolphin-safe even when these conditions are not met, its regulatory distinctions cannot be treated as even-handed.

119. With reference to paragraph 8 of Australia's third party statement, please comment on Australia's view that even-handedness "should only be used to inform an analysis of the core inquiry – which is whether a regulatory distinction is legitimate, or instead constitutes arbitrary or unjustifiable discrimination".

245. The concept of even-handedness was developed by the Appellate Body in the context of Article 2.1 as a broad concept that includes but is not limited to an enquiry as to whether a regulatory distinction constitutes arbitrary or unjustifiable discrimination. To date, the facts that have arisen in TBT disputes including in this proceeding have not required the Appellate Body to clarify the additional scope of even-handedness beyond arbitrary and unjustifiable discrimination.

120. With reference to paragraph 25 of Canada's third party statement, please comment on Canada's assertion that "the discrimination, or the regulatory distinction, [would be] legitimate [where] there is a close and genuine relationship of ends and means between the discrimination or distinction and the policy objective being pursued. The ideas of fairness or impartiality do not seem to enter the picture".

246. Canada's reference to the rational connection between the distinction and the policy objective appears to narrow the even-handedness inquiry into whether there is arbitrary discrimination. See response to question 119 above.

121. With reference to paragraph 25 of Canada's third party submission, please comment on Canada's assertion that, if the Tuna Measure resulted in tuna being labelled and sold in the US market as dolphin safe when it was not, this would "run contrary to the stated objectives of the measure and would therefore fail the rational connection test under the AUD legal standard".

247. Canada's statement is correct. It would also fail the even-handedness test under Article 2.1.

122. With reference to paragraph 8 of Norway's third party statement, please comment on Norway's assertion that the burden of proof "does not shift depending on who initiated Article 21.5 proceedings".

248. In both Article 21.5 proceedings, the burden of proof under the chapeau of Article XX is on the United States. In the case of Article 2.1, the initial burden is on the United States and Mexico respectively.