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

(AB-2012-2/ DS381)

Appellee Submission of Mexico

7 February 2012

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TABLE OF ACRONYMS USED IN THIS SUBMISSION

Acronym	**Full Name**
AIDCP	Agreement on the International Dolphin Conservation Program
DMLs	Dolphin Mortality Limits
DPCIA	Dolphin Protection Consumer Information Act
EPO	Eastern Pacific Ocean
ETP	Eastern Tropical Pacific
FAD	Fish Aggregating Device
IATTC	Inter-American Tropical Tuna Commission
IDCP	International Dolphin Conservation Program
IDCPA	International Dolphin Conservation Program Act
IRP	International Review Panel
MMPA	Marine Mammal Protection Act

I. INTRODUCTION

1. This appeal offers the Appellate Body the opportunity to clarify several important points of law related to the correct interpretation of the *TBT Agreement*.

2. The Panel correctly held that there is a less trade-restrictive alternative measure reasonably available to the United States that can achieve the objectives that it seeks, which is to allow Mexican tuna products to display the AIDCP dolphin safe label, and allow consumers to decide for themselves whether the AIDCP standard or domestic U.S. dolphin-safe label, or both, are meaningful to them. These findings of the Panel are based on the correct understanding of the relevant treaty obligations and are well-supported by the evidence. The findings are also consistent with the underlying character of the U.S. measures, which are intended to provide information to consumers to encourage protection of dolphins through the operation of consumer choice. The challenged measures intentionally shape the information that is made available to consumers and thereby interfere with the free operation of consumer choice. The less-trade restrictive alternative identified by Mexico would eliminate this interference as well as the challenged trade-restrictive and discriminatory effects. As the Panel found, the alternative would provide fuller and more accurate information and would place consumers in a better position to use their purchasing power to influence the way tuna fisheries and canneries operate.

3. The United States has appealed several aspects of the Panel Report. First, it claims that the Panel erred in holding that the U.S. dolphin safe measure is a technical regulation within the meaning of *TBT Agreement* Annex 1.1. Second, it argues that the Panel erred in holding that the measure is inconsistent with *TBT Agreement* Article 2.2, arguing both that the Panel acted contrary to Article 11 of the *DSU* by making allegedly incorrect factual findings, and also that the Panel erred in finding that the U.S. labelling measures (hereinafter referred also to as U.S. labeling provisions) do not fulfill their objectives and that Mexico's proposed alternative would constitute a less-trade restrictive alternative. Finally, the United States appeals the panel's findings that the AIDCP is an "international standardizing organization" and that the AIDCP definition of dolphin safe is a "relevant international standard" within the meaning of Article 2.4.

4. Mexico addresses each of the United States' claims of error. For the reasons set forth below, the Appellate Body should reject each of the claims of error contained in the United States' Appellant Submission and uphold the relevant findings of the Panel Report.

5. Mexico's Other Appellant Submission explained in detail the background and historical context of this important dispute. In this submission Mexico will not repeat again the circumstances in which the U.S. labelling measures were adopted and how these measures have prevented Mexican tuna products from having meaningful access to the U.S. market, notwithstanding Mexico's compliance with the stringent international regime for protection of dolphins.

II. BACKGROUND INFORMATION

6. In the "Factual Background" section of its Appellant Submission, the United States sets forth a partial description of the facts, with the same characterizations of the evidence it argued to the Panel, without referencing the Panel's own findings on those issues or acknowledging that many of its factual claims were vigorously disputed. The Appellate Body is, of course, bound by the factual findings of the Panel. The Parties cannot alter the facts as found by the Panel, or place new facts into the record, in this appeal.

7. Mexico reviews below certain relevant evidence in the Panel record regarding the success of the AIDCP, the lack of protections for dolphins outside the ETP, the U.S. labelling measures as they are applied, and the meaning of the U.S. dolphin-safe label promoted to U.S. consumers.

A. The AIDCP Has Been Highly Successful

8. The Preamble to the AIDCP states that Parties (including of course the United States, a principal creator of the treaty) are "[**c**]**onvinced** that scientific evidence demonstrates that the technique of fishing for tuna in association with dolphins, in compliance with the regulations and procedures established under the La Jolla Agreement and reflected in the Declaration of Panama, has provided an effective method for the protection of dolphins and rational use of tuna resources in the eastern Pacific Ocean".[1]

9. This statement is reflected in the success of the multilateral efforts to protect dolphins in the ETP. Through the comprehensive program of the AIDCP and its predecessor agreements involving monitoring, tracking, verification, and certification – with emphasis on having independent observers on board tuna fishing vessels – the participating countries have succeeded in dramatically reducing incidental dolphin mortality in the ETP. Dolphin mortalities in the ETP in 1986 were estimated at 133,000. Under the terms of the 1992 La Jolla Agreement, the maximum number of permitted dolphin deaths was to decline each year for seven years, with a goal of reducing dolphin deaths in the fishery to less than 5,000 by 1999. That target was actually achieved in 1993, the first year of the agreement's application, when mortality was reduced to 3,601. The level has remained below 5,000 in every year thereafter, and currently is approximately 1,200 per year.[2] The United States argues that there are additional, unseen mortalities, but it did not dispute these figures on reported mortalities as published by the AIDCP, of which it is a member.

10. The Panel's factual findings regarding the effectiveness of the AIDCP included the following:

- "We note in this respect that the United States itself acknowledges that the implementation of the AIDCP has made an important contribution to the

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1 Agreement on the International Dolphin Conservation Program (amended) (AIDCP), Exhibit MEX-11, p. 1 (emphasis original).

2 Mexico's First Written Submission, paras. 45, 49, and 50.

reduction in numbers of observed dolphin killings in the ETP. Moreover, the Panel recalls that the United States has acknowledged that '[s]ince the AIDCP's conclusion in 1998 and entry into force in 1999, all parties including Mexico have generally been abiding by their obligations under the AIDCP.' "[3] (footnotes omitted).

- "We also note that the evidence suggests that observed dolphin mortality in the ETP, by contrast, is low relative to population size. Indeed, the United States acknowledges that the observed annual dolphin mortality in the ETP 'is not believed to be significant from a population recovery perspective.' In addition, most of the studies submitted by the parties also suggest that the dolphin populations identified by the United States as depleted are recovering, although they disagree as to whether they are growing at sufficiently high rates. Nevertheless, the most recent estimates show that '[o]ver the 8-year period from 1998-2006 all 3 of the officially depleted dolphin stocks (coastal and northeastern offshore spotted dolphins and eastern spinner dolphins) were estimated to be growing at rates considered to be near the 4-8 per cent maximum possible for dolphins.' "[4] (footnotes omitted).

- "It is undisputed that the application of the AIDCP controls has played a decisive role in the considerable reduction of dolphin mortalities in the ETP in the last decades. Annual estimate of dolphin mortality in the ETP in 1986 was 132,169 marine mammals, whereas the estimate in 2008 was 1,169 individuals. As noted above, the United States recognizes that the observed dolphin mortalities as a result of setting on dolphins in the ETP are approximately 1,200 dolphins per year".[5] (footnotes omitted).

- "Moreover, the AIDCP establishes overall dolphin mortality limits (DMLs) for the fleets fishing for tuna in the ETP (5,000 individuals). In recent years, these limits have not been met. The Panel also notes that the AIDCP has established certain mechanisms to enforce these limits. Under the AIDCP observer program 100 per cent of the trips are monitored by an independent observer. The AIDCP has also established an International Review Panel (IRP) that monitors the compliance by the vessels operating in the ETP with requirements and controls established by the AIDCP. Finally, under the System for Tracking and Verifying Tuna of the AIDCP, each party establishes its own tracking and verification programme, implemented and operated by a designated national authority, which

3 Panel Report, para. 7.506.

4 Panel Report, para. 7.557.

5 Panel Report, para. 7.609.

includes periodic audits and spot checks for caught, landed, and processed tuna products."[6]

11. The success of the AIDCP is also reflected in recent actions in which the United States participated. Mexico's Exhibit MEX-91 contains a 2009 report of the AIDCP's Scientific Advisory Board on updated estimates of stock mortality limits. This report relied on the 2008 U.S. abundance estimate mentioned above for the two dolphin stocks that the United States has unilaterally declared to be "depleted" – the northeastern spotted dolphin and eastern spinner dolphin. Based on the fact that the populations of these stocks are significantly larger than previously believed, the report recommended increases in the dolphin mortality limits for those particular stocks.[7] *The United States agreed to those increases* – from 648 to 793 for the northeastern spotted dolphin, and from 518 to 655 for the eastern spinner dolphin.[8] These facts are uncontested.

12. In 2009 there were 1,239 reported dolphin mortalities. Of this amount virtually all were from the stocks of spotted, eastern spinner, and common dolphins (1,216) and 23 dolphins were from other stocks.[9] The total of the estimated stocks of these three species in the ETP is estimated at 6,844,400.[10] The combined reported mortality rate for these three species in 2009 therefore was 0.00018 (1,216/6,844,400) – i.e., a fraction of one tenth of one percent.[11] These figures, too, are uncontested.

13. Dolphin sets are made in relation to common dolphins as well as the other two species. Because the United States has not deemed the common dolphin stock in the ETP "depleted," the United States does not include common dolphins in its evaluations. Common dolphins are nonetheless protected under the AIDCP in the same manner as the two dolphin species in which the United States is most interested. During the period 1986 to 2000, the population of common dolphins in the ETP increased by approximately 750,000.[12] This likewise is uncontested.

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6 Panel Report, para. 7.611.

7 IDCP Scientific Advisory Board, Updated Estimates Of Nmin And Stock Mortality Limits, Exhibit MEX-91.

8 AIDCP, 22nd Meeting of the Parties, Minutes (30 October. 2009), item 8 on p. 4, Appendix 8 on p. 10, Exhibit MEX-117. See Panel Report, para. 7.503 and Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, para. 55.

9 IATTC, 81st Meeting (27 September - 1 October 2010), "IATTC-81-05 – Tunas and billfishes in the EPO in 2009", p. 98, Exhibit MEX-90.

10 IDCP Scientific Advisory Board, Updated Estimates Of Nmin And Stock Mortality Limits, p. 1, Exhibit MEX-91.

11 Mexico's Second Written Submission, para. 66.

12 Letter from IATTC to Secretary of Commerce enclosing Scientific Report On The Status Of Dolphin Stocks In The Eastern Pacific Ocean (October 30, 2002), para. 10, Exhibit MEX-67.

B. The Absence Of Protections For Dolphins Outside The ETP

14. During the Panel proceedings, Mexico presented evidence that the other major regional tuna fisheries management organizations – the Indian Ocean Tuna Commission, the International Commission for the Conservation of Atlantic Tunas, and the Western and Central Pacific Fisheries Commission – are all in the early stages of considering how to monitor the impact of fishing operations on marine mammals and other non-target species. They use independent observers to a very limited extent, and collect little or no data on bycatch.[13] This evidence is undisputed.[14]

15. There is considerable evidence that regardless of the fishing method used, thousands of dolphins are being killed in these other regions annually. The United States has challenged the Panel's findings on this evidence. Mexico will review the evidence before the Panel in detail in this submission. Two examples are as follows:

a) A 2007 report commissioned and published by the U.S. government states:

> "Additionally, since at least the late 1960s, it has been speculated that dolphins are involved in the tuna purse-seine fishery in the eastern tropical Atlantic Ocean. The tuna vessels are registered in several countries, including France, Spain, and the U.S. as well as several West African countries. The levels of mortality, stock sizes, and even exact species involved are not known with certainty, and there is conflicting information on the extent of the problem. It has been suggested that dolphin mortality in this fishery could be very high, as many as 30,000 or more animals per year. The species involved likely include several species of the genus *Stenella*, as well as common dolphins (*Delphinus* spp.) Tuna-whale interactions are also known to occur, and baleen whales are considered to be good indicators of tuna schools. Despite claims to the contrary, there is reason to suspect a serious problem that has been neglected for more than 30 years. Independent observer data on the composition and extent of the bycatch need to be obtained and published."[15]

b) A letter dated November 9, 2010 from a representative of Australia to the Western and Central Pacific Fisheries Commission states:

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13 See e.g. Mexico's Second Written Submission, paras. 89-110, and evidence cited therein.

14 Panel Report, para. 7.524 ("We note in this respect that the United States has not challenged Mexico's assertion that observer coverage outside of the ETP is not as comprehensive as it is in the ETP.")

15 Young and Iudicello, "Worldwide Bycatch Of Cetaceans," U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Tech. Memo. NMFS-OPR-36) July 2007, p. 103, Exhibit MEX-5 (hereinafter "Bycatch Report"); Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, para. 107.

> "The FAD closure report presented to the sixth session of the Technical and Compliance Committee … reveals several interactions with species of special interest including false killer whales, pilot whales and whale sharks. This could indicate that vessels are, intentionally or unintentionally, setting their nets around these species."[16] (footnotes omitted).

False killer whale and pilot whales are species of dolphins

16. Contrary to the U.S. assertion, the Panel found that based on the evidence before it, "certain tuna fishing methods other than setting on dolphins have the potential of adversely affecting dolphins, and that the use of these other techniques outside the ETP may produce and has produced significant levels of dolphin bycatch, during the period over which the US dolphin-safe provisions have been in force."[17]

C. Implementation And Administration Of The U.S. Labelling Measures

1. Requirement Of Form 370 For Imports

17. The key U.S. regulatory vehicle for enforcing its mandatory requirements for the dolphin-safe label on tuna products is the requirement that every import of tuna products be accompanied by a Fisheries Certificate of Origin, which has the designation "Form 370".[18]

18. Form 370 presents the importer with several options for certification of dolphin-safe status, but in practice only options B(2) and B(5) (highlighted below with rectangles) are relevant for tuna products made from tuna caught using large purse seine vessels:

> B(2): The dolphin safe status of tuna harvested outside the ETP is supported only with a "captain's statement" that "no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip."
>
> B(5): The dolphin safe status of tuna harvested in the ETP must be supported with documentation "signed by a representative of the appropriate IDCP-member nation certifying that: (1) there was an IDCP-approved observer on board the vessel during the entire trip; (2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught; (3) listing the numbers

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16 Proposed Conservation and Management Measure Mitigating Fishing Impacts on Cetaceans (15 November 2010), Exhibit MEX-105. See Opening Statement of Mexico at the Second Meeting with the Panel, para. 101; Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, para. 106.

17 Panel Report, para. 7.531.

18 Panel Report, para. 2.32.

for the associated Tuna Tracking Forms which contain the captain's and observer's certifications."[19]

5. DOLPHIN SAFE STATUS - check the statement that applies.	
A.	The tuna or tuna products described herein are not certified to be dolphin safe and contain no marks or labels that indicate otherwise.
B.	The tuna or tuna products described herein are certified to be dolphin safe:
(1)	Tuna not harvested with a purse seine net, and not harvested in any fishery that has been identified by the Assistant Administrator as causing a regular and significant mortality or serious injury to dolphins.
(2)	Tuna harvested using a purse seine net outside the Eastern Tropical Pacific Ocean (ETP), with valid documentation by the captain of the vessel certifying that no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip. **Captain's statement attached.**
(3)	Tuna harvested by purse seine vessel outside the ETP in a fishery in which there is a regular and significant association occurring between marine mammals and tuna, with valid documentation by an authorized observer and the captain of the vessel, certifying that no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught. **Observer's and captain's statements attached.**
(4)	Tuna harvested in the ETP by a purse seine vessel having a carrying capacity of 400 short tons (362.8mt) or less.
(5)	Tuna harvested in the ETP by a purse seine vessel of more than 400 short tons (362.8mt) carrying capacity with valid documentation signed by a representative of the appropriate IDCP-member nation certifying that: (1) there was an IDCP-approved observer on board the vessel during the entire trip; (2) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught; (3) listing the numbers for the associated Tuna Tracking Forms which contain the captain's and observer's certifications. **IDCP Member Nation Certification attached.**

19. The certification option B(1), which requires tuna not harvested with a purse seine net to have not been caught in a fishery designated by the United States as "causing a regular and significant mortality or serious injury to dolphins," is meaningless because the United States has never so designated any fishery.[20]

20. The certification option B(3), which requires a certification similar to that required for tuna products made from tuna from the ETP, would be applicable only if there were a fishery that the United States had designated as having a "regular and significant association between marine mammals and tuna." This certification option is also meaningless because the United States has never so designated any fishery.[21]

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19 U.S. Department of Commerce, "Fisheries Certificate of Origin", NOAA Form 370, Exhibit MEX-63.

20 Panel Report, para. 2.23

21 Panel Report, para. 2.23. It is undisputed that the term "regular and significant" is undefined in the U.S. measures, and that the United States has never conducted an investigation of whether any ocean region or fishery other than the ETP tuna fishery should be designated. See Panel Report, para. 7.534 (citing Answers of the United States of America to the First Set of Questions from the Panel to the Parties, para. 29 and Answers of the United States of America to the Second Set of Questions from the Panel to the Parties, para. 1).

2. Tracking Procedures For ETP Tuna Products

21. For tuna from the ETP, the U.S. labelling measures rely on the AIDCP's system for tuna tracking and verification. Specifically, under the AIDCP's Revised System For Tracking And Verifying Tuna, the Secretariat of the AIDCP issues a Tuna Tracking Form that is used by the independent observers onboard large purse seine vessels of all of the member nations fishing in the ETP.[22] A description of the U.S. tuna tracking system published by the United States explains further with regard to tuna caught by U.S. vessels:

> **Domestic Catch**
>
> Every tuna purse seine vessel greater than 400 short tons carrying capacity fishing in the ETP must have an Inter-American Tropical Tuna Commission (IATTC) approved observer onboard to oversee every fishing trip. In addition to other duties, the observer records information on one of two Tuna Tracking Forms (TTFs) every time the purse seine net is set on a school of tuna. The information recorded after each set includes: 1) date and time of the set; 2) well number; 3) status of whether dolphins were killed or seriously injured; 4) estimated weights of yellowfin, skipjack, bigeye, and other fish caught in the set; 5) comments if any; and 6) initials of the observer and the chief engineer of the vessel. At the end of the trip, the observer and the vessel captain sign the completed forms certifying that the TTFs are complete and accurate to the best of their knowledge.[23]

As described in the U.S. document, *this tracking procedure applies only to tuna harvested in the ETP*.

22. The same document also describes a tracking procedure for U.S. canneries:

> **Domestic Canners**
>
> -- To ensure the "dolphin-safe" label is accurate for tuna purchased by the public, NMFS has developed a plan for tracking and verifying the dolphin-safe or non-dolphin-safe condition of tuna caught in the eastern tropical Pacific Ocean (ETP). The tracking system is based on keeping dolphin-safe tuna separated from non-dolphin safe tuna from capture through processing.[24]

Again, importantly, *the tracking procedure for dolphin-safe tuna is for tuna caught in the ETP*.

23. There is no U.S. procedure for verifying the accuracy of dolphin-safe labels on tuna products made from tuna harvested *outside the ETP*, other than the Form 370 described above

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

23 U.S. Tuna Tracking & Verification Program Summary Document, Exhibit MEX-73.

24 Exhibit MEX-73.

with the "captain's statement" concerning the method of capture. Unlike for the ETP, outside the ETP there is no requirement for independent observers, no requirement for tuna tracking forms, no requirement to segregate into separate wells tuna caught in sets in which dolphins were killed or seriously injured, and no requirement at all for certifying that no dolphins were killed.[25] Indeed, the United States acknowledged that in the absence of independent observers, "captains are not in a position to certify that no dolphins were killed or seriously injured."[26] In addition, the United States has no procedure for auditing non-U.S. canneries.[27]

3. Penalties For Violations

24. The United States maintains strict penalties for violations of its rules. The Panel summarized the penalties as follows:

> According to the United States, if a product is found to be wrongfully labelled during a spot check, the product will most likely be seized as evidence. Later on the US authorities may decide to forfeit, destroy or in the case of imports, have the product re-exported, depending on the facts and circumstances of the case. Moreover, sanctions for offering for sale or export tuna products falsely labelled "dolphin-safe" may be assessed against any producer, importer, exporter, distributor or seller who is subject to the jurisdiction of the United States. Violators may also be prosecuted directly under the DPCIA provisions or under federal provisions establishing false statement or smuggling prohibitions or federal labelling standards.[28] (footnotes omitted).

D. Meaning Of The U.S. Label

25. The U.S. Department of Commerce publishes a webpage to explain the dolphin-safe label to the public. The webpage provides the following explanation of the dolphin safe standard:

> What does dolphin-safe mean?
>
> Dolphin-safe means no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught, as defined in 16 U.S.C. §1385(h)(2).[29]

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25 Panel Report, paras. 7.368, 7.488, and 7.508.

26 U.S. Second Written Submission, fn. 202.

27 See e.g. Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, para. 105.

28 Panel Report, para. 2.33.

29 NOAA, Tuna Tracking & Verification Program, "Frequently Asked Questions", available at http://dolphinsafe.gov/faq.htm/. Exhibit MEX-79.

26. The citation to 16 USC § 1385(h)(2) is to the statutory provision that establishes the definition of dolphin-safe *for the ETP only*. Indeed, the entire webpage only discusses fishing in the ETP, and it contains no information on what "dolphin-safe" means for tuna harvested outside the ETP (i.e. in any other fishery).[30] Consumers who are not experts on the statute would be led to believe that the requirement that no dolphins have been killed or seriously injured applies outside the ETP, when it does not.

27. As described above, Form 370's requirement for tuna caught with purse seine nets in "any other fishery" is a statement that "no purse seine net was intentionally deployed on or used to encircle dolphins"; it does not include the "no dolphins killed or seriously injured" requirement that is imposed for the ETP.[31]

28. Under the provisions of the U.S. statute, producers wishing to display "dolphin-safe" claims on their tuna products may choose between an official "dolphin-safe" mark developed by the Secretary of Commerce or an alternative label of their own design. According to the statute, however, an alternative label may not be used unless (i) no dolphins were killed or seriously injured in the sets in which the tuna were caught, and (ii) the label is "supported by a tracking and verification program which is comparable in effectiveness to the program" for tuna harvested in the ETP.[32]

29. Before the Panel, Mexico and the United States disagreed over the meaning of the provision on alternative labels. The Panel summarized the disagreement as follows:

> The text of [the statute] does not specify whether these requirements for the use of alternative labels are *additional* to the requirements for the use of the official mark as set forth in subparagraph (d)(1). In response to a question by the Panel, the United States asserted that tuna products carrying an alternative label must comply with the specific requirements for the use of alternative labels *in addition* to those set forth in subparagraph (d)(1), which are applicable to the use of the official mark or any alternative label. The United States has thus indicated that "section 1385(d)(3) provides that if tuna products are labeled with an alternative dolphin-safe label, those tuna products may not contain tuna that was caught in a set in which dolphins were killed or seriously injured (and this conditions [sic] applies regardless of whether the tuna was caught inside or outside the ETP)". Mexico disputed this description of the law, arguing that the United States in practice does not require that alternative labels be supported with a certification that dolphins were not killed or seriously injured for any fishery outside the ETP, that the United States has no tracking or verification program for this certification for tuna harvested outside the ETP, and that the major producers do not claim that their dolphin-safe labels mean anything other than that purse seine nets were not

30 Mexico's Second Written Submission, paras. 29-30.

31 NOAA Form 370, Exhibit MEX-63.

32 Panel Report, para. 2.27-2.29.

> set on dolphins during the voyage in which the tuna were caught.[33] (emphasis original).

30. The Panel found that, even if the statute were interpreted as the United States argued and use of the alternative label for non-ETP tuna products was supposed to mean that no dolphins were killed or seriously injured during the specific set in which the tuna was captured, there was no indication of enforcement of that requirement, since there was no option for making that certification for non-ETP tuna products on Form 370. The Panel also noted that having different meanings for the official and alternative labels would create confusion for consumers and that, in any event, the official label is available to tuna products made from tuna caught outside the ETP by methods other than setting on dolphins, regardless of whether dolphins have been killed or seriously injured in the sets.[34]

31. In its Appellant Submission, the United States quoted a statement by a single U.S. legislator in 1996 as evidence of "consumer sentiment." For its part, during the panel proceedings Mexico provided this statement, also made during 1996, by U.S. legislator Senator Ted Stevens, who was a co-sponsor of the legislation to change the U.S. definition of dolphin-safe:

> On November 17, 1995, Senator Breaux and I introduced S. 1420, the International Dolphin Conservation Program Act, to implement the Panama Declaration. Cosponsors include Senators Chafee, Johnston, Moseley-Braun, Murkowski, Thurmond, and Simpson. The Commerce Committee held a hearing on S. 1420 in April, and voted to approve the bill on June 6, 1996, without objection. At the hearing in April, we heard the testimony of Senators Boxer and Biden. The bill approved by the committee in June accommodated their concerns to the extent that we could. We've also tried to accommodate Senator Smith, who raised some concerns about the legislation.
>
> The bill passed by the House (H.R. 2823) addresses the concerns of the three Senators as much as possible too. If we make further changes, however, we will not fulfill the requirements of the Panama Declaration, and we may as well pass nothing. The new binding conservation measures under the Panama Declaration can only take effect with the specific changes to U.S. law in S. 1420 and H.R. 2823. The two key changes to U.S. law are: (1) a change to allow tuna caught in compliance with the Panama Declaration (including through the encirclement of dolphins) to be imported into the United States; and (2) a change so that "dolphin safe" in the U.S. will mean tuna caught in a set in which no dolphin mortality occurred (rather than through nonencirclement).

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[33] Panel Report, para. 2.30. On their websites, each of the three major U.S. brands of tuna products (Starkist, Bumblebee and Chicken of the Sea) define "dolphin safe" as not setting on dolphins, with no mention of dolphins not being killed or seriously injured. Exhibits US-32, US-36 and US-37.

[34] Panel Report, paras. 7.536-7.539.

> S. 1420 and H.R. 2823 would make these changes and would allow the new regime envisioned in the Panama Declaration to go forward. If the U.S. does not make the changes, other nations will move forward without adequate conservation measures--and progress in protecting dolphins in the ETP will be lost.
>
> Our legislation would guarantee U.S. consumers that no dolphin were killed during the harvest of tuna that is labeled as 'dolphin safe.' Under existing law, dolphins may have been killed, but as long as the tuna was not harvested by intentionally encircling dolphins, it can be labeled as 'dolphin safe'. Our legislation is supported by: (1) U.S. tuna boat owners; (2) the mainstream environmental community including Greenpeace, the Center for Marine Conservation, the Environmental Defense Fund, the National Wildlife Federation, and the World Wildlife Fund; (3) the American Sportfishing Association; (4) U.S. Labor, including the National Fishermen's Union, Seafarers International, and the United Industrial Workers; (5) the 12 nations who signed the Panama Declaration (Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela); and (6) the Administration.[35] (emphasis added).

Unfortunately, the court ruling in the Hogarth case prevented the United States from changing the definition as Senator Stevens had planned.[36]

III. LEGAL ARGUMENT

32. The Panel was correct in concluding that the U.S. measures are a technical regulation and are inconsistent with Article 2.2 of the *TBT Agreement*.

33. As found by the Panel, the U.S. measures are a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement* because (i) they apply to an identifiable product (tuna products), (ii) they lay down a characteristic of the product (its labelling), and (iii) compliance with the measures is mandatory, in that they prohibit the application of any standard promoting the conservation of dolphins, such as the AIDCP standard, other than the technical regulation set out by the U.S. measures.

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

[36] During the panel proceedings, Mexico presented the results of a professionally conducted poll on the meaning of "dolphin-safe." The poll showed that 48 per cent of the 800 individuals surveyed believe that "dolphin safe" means that "no dolphins were killed or injured" while 12 per cent believe that it means that "dolphins were not encircled and then released to capture the tuna". The United States contested the meaning of the results . Panel Report, para. 7.481, citing Exhibit MEX-64. The Panel made the following factual finding: "We note, in light of this poll, that it is not clear that US consumers understand the term 'dolphin-safe' to mean the same as what the US dolphin-safe provisions define it to mean." Panel Report, para. 7.482.

34. Also as found by the Panel, the measures are more trade restrictive than necessary, taking into account the risks that non-fulfilment would create. The Panel agreed with the original description of the objectives of the measures stated by the United States, which is (1) 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 (2) to the extent that consumers choose not to purchase tuna without the dolphin safe label, ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. The Panel assessed the extent to which the U.S. measures fulfil their objectives, and compared this with a less trade-restrictive alternative measure – allowing use of the AIDCP standard in the U.S. market *in addition* to the U.S. technical regulation – to determine whether that alternative approach would similarly fulfil the U.S. objectives. The Panel concluded that, with respect to tuna products made from tuna harvested outside the ETP, the U.S. measures do not convey accurate information to consumers or encourage fishing practices that protect dolphins. Moreover, the Panel concluded that the U.S. measures prevent consumers from knowing about the extensive measures taken by the Mexican fleet to protect dolphins pursuant to the AIDCP. Accordingly, the Panel concluded that allowing use of the AIDCP standard would be less trade restrictive while not leading to a lower level of protection than provided by the U.S. measures.

35. Finally, the Panel was correct in finding that the AIDCP definition of "dolphin safe" is a relevant international standard and that the U.S. measures are not based on that standard.

A. The U.S. Labelling Provisions Are A Technical Regulation

1. Overview

36. The United States argues that the Panel erred in finding that the U.S. labelling provisions are a technical regulation.[37]

37. To determine whether the U.S. labelling provisions constitute a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*, the Panel applied the three-tier test established by the Appellate Body in *EC– Asbestos*. Under that test, a measure is a "technical regulation" if:

a) the measure applies to an identifiable product or group of products;

b) it lays down one or more characteristics of the product; and

c) compliance with the product characteristics is mandatory.[38]

38. The United States does not dispute the use of the three-part test, nor the findings of the Panel in respect of the first two elements of the test. The United States appeal is limited to the

[37] Panel Report, paras. 7.50-7.145.

[38] Panel Report, paras. 7.53-7.55.

third element, that is, whether compliance with the product characteristics laid down by the U.S. labelling provisions is mandatory.[39]

39. The United States raises three arguments. First, it argues that the Panel erred in its interpretation of the term "mandatory", such that its meaning is indistinguishable from the term "requirement."[40] Second, it argues that the Panel incorrectly applied the distinction previously established by the Appellate Body between "positive" and "negative" distinctions in documents.[41] Finally, it challenges the Panel's "supplemental efforts to distinguish technical regulations from standards using its definition of 'mandatory.' "[42]

40. The foundation for the United States' arguments is the position that there is only one meaning for the phrase "with which compliance is mandatory" in the definition of "technical regulation" in Annex 1.1 of the *TBT Agreement*. In the context of a consumer information label, that meaning is that the label must be placed on a product in order for it to be sold on the market. Since there is no legal barrier to selling tuna products in the U.S. market without the dolphin-safe label, the United States is of the view that the U.S. dolphin-safe provisions are not a "[d]ocument… with which compliance is mandatory" within the meaning of Annex 1.1.

41. However, the meaning of the phrase put forward by the United States is not the only meaning. The phrase "with which compliance is mandatory" also encompasses a situation where the label is limited to a single exclusive standard. What makes the U.S. labelling provisions mandatory is not whether a label is *de jure* required in order to sell tuna products in the U.S. market. Rather, it is the fact that the U.S. labelling provisions restrict retailers, consumers and producers to a single choice for labelling tuna products as dolphin safe.[43] There is no available option for U.S. consumers to buy tuna products that have been produced from tuna caught in accordance with the AIDCP standard for the protection of dolphins and is labelled as dolphin

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39 Panel Report, paras. 7.100-7.145.

40 U.S. Appellant Submission, paras. 29-35.

41 U.S. Appellant Submission, paras. 41-47.

42 U.S. Appellant Submission, paras. 48-73.

43 This is expressed in the following findings of the Panel:

> "[T]he measures embody compliance with a specific standard as the exclusive means of asserting a 'dolphin-safe' status for tuna products. The measures leave no discretion to resort to any other standard to inform consumers about the 'dolphin-safety' of tuna than to meet the specific requirements of the measure. Effectively, the 'dolphin-safe' standard reflected in the measures at issue is, by virtue of these measures, the *only* standard available to address the issue. Through access to the label, the measures thus effectively regulate the "dolphin-safe" status of tuna products in a binding and exclusive manner and prescribe, both in a positive and in a negative manner, the requirements for 'dolphin-safe' claims to be made. This distinguishes this situation from one in which, for example, various competing standards may co-exist in relation to the same issue, with different but related claims, each of which may be protected in its own right".

Panel Report, para. 7.144 (emphasis original).

safe under that standard. By virtue of the U.S. labelling provisions, it is not possible to label tuna products as dolphin safe under more than one definition.

42. The following key facts illustrate Mexico's position:

AIDCP Dolphin-Safe Label[44]	**U.S. Dolphin-Safe Labelling Provisions**
	The U.S. labelling provisions set out the "labelling requirements" for the use of the dolphin-safe label in the U.S. market. In addition, they prohibit the importation and sale of tuna products that are labelled with the AIDCP dolphin-safe label or any other label, term or symbol that claims or suggests dolphin-safe unless the requirements of the U.S. labelling provisions are met. This creates a single exclusive standard for asserting the dolphin-safe status of tuna products.
The AIDCP and associated instruments set out the "labelling requirements" for the use of the AIDCP dolphin-safe label. Mexican tuna products comply with these strict requirements.	

43. The AIDCP dolphin-safe label, shown above in the first column, can be used where the AIDCP standard's "labelling requirements", are met. Mexican tuna products comply with the AIDCP labelling requirements and, therefore, can and do use the AIDCP dolphin-safe label.[45] As shown in the second column, by virtue of the U.S. labelling provisions, Mexican tuna products that are labelled with the AIDCP dolphin-safe label cannot be imported or sold in the U.S. market.[46] Moreover, no other label, term or symbol that claims or suggests dolphin-safe can be used on those Mexican products unless it meets the labelling requirements in the U.S. labelling provisions.[47] In fact, it is prohibited to label tuna products as dolphin-safe without complying with such requirements.

44. These facts also demonstrate the error in the United States' argument that the Panel's interpretation of the phrase "with which compliance is mandatory" renders the difference between technical regulations and standards meaningless because it conflates the meaning of "labelling requirements" with "mandatory". The "labelling requirements" of the AIDCP standard are referred to in the first column. Mexico fully complies with these requirements. The

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[44] AIDCP Dolphin-Safe Label, Exhibit MEX-121.

[45] Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, para. 62; AIDCP Dolphin-Safe Label, Exhibit MEX-121.

[46] Panel Report, para. 7.80; Opening Statement of Mexico at the First Meeting with the Panel, paras. 3, 5 and 23; Mexico's Second Written Submission, para. 195.

[47] Panel Report, paras. 7.143-7.144.

"labelling requirements" of the U.S. labelling provisions are referred to in the second column. If competing standards were permitted to co-exist in the U.S. market, the AIDCP standard and U.S. standard would each represent different claims but would be protected by their respective "labelling requirements". The prohibition against using a label based on any standard other than the U.S. standard is a measure that is separate from and in addition to the "labelling requirements". It is this measure (i.e., the prohibition) that transforms what would otherwise be a standard into a technical regulation.

45. Each of the three arguments of the United States is addressed in turn. Following Mexico's rebuttal of the three arguments, Mexico provides additional support for the finding of the Panel that the U.S. labelling provisions are a technical regulation.

2. The United States Is Incorrect That The Panel's Interpretation Of "Mandatory" Is Indistinguishable From The Term "Requirements"

46. The United States argues that the Panel's interpretation of "mandatory" is indistinguishable from the term "requirement".[48] This argument underlies its other arguments, examined below, and is fundamental to the United States' position that the U.S. labelling provisions are not a technical regulation. This argument is also the foundation for the reasoning of the dissenting member of the Panel.[49]

47. Mexico agrees with the United States that: (i) labelling requirements may be equally prescribed by technical regulations and standards; (ii) a conclusion that compliance with certain labelling requirements is mandatory within the meaning of Annex 1.1 must be based on considerations other than, or beyond, the mere fact that such documents establish criteria for the use of a certain label; and (iii) a labelling requirement sets out the conditions that a product is required to meet in order to use a label.[50]

48. As shown above in the table, both the AIDCP "standard" and the U.S. "technical regulation" have their own "labelling requirements" that must be met in order to use the AIDCP and U.S. dolphin-safe labels. Moreover, the consideration "other than or beyond" the U.S. labelling requirements that make compliance with those requirements "mandatory" is the separate and distinct prohibition that is included in the U.S. labelling provisions.

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48 U.S. Appellant Submission, paras. 29-35.

49 The dissent's interpretation depends solely on the strength of the proposition that the Panel's interpretation of "mandatory" renders the difference between technical regulations and standards meaningless and that the minority's narrow interpretation of "mandatory" is the only interpretation that resolves this inutility. There is no other textual basis for the minority's interpretation.

50 U.S. Appellant Submission, para. 30.

49. The Panel carefully explained how its interpretation distinguished "mandatory" from "requirements" both generally and on the facts of this dispute.[51] Mexico agrees with the Panel's reasoning. It is factually and legally sound and fully addresses the arguments made by the United States.

50. The United States also argues that the dissenter's interpretation was the only interpretation that gives space for voluntary labelling schemes as standards.[52] Mexico disagrees.

51. The Panel's interpretation clearly gives space for voluntary labelling schemes as standards. As explained by the Panel, the single and exclusive standard in the U.S. labelling provisions "distinguishes this situation from one in which, for example, various competing standards may co-exist in relation to the same issue, with different but related claims, each of which may be protected in its own right."[53] In the absence of the prohibition in the U.S. labelling provisions, both the AIDCP dolphin-safe standard and label and the U.S. dolphin-safe standard and label could co-exist, each subject to its own labelling requirements. This would implement a voluntary labelling scheme as "standards" (i.e., documents with which compliance is not mandatory) as opposed to the current scheme which is implemented through a "technical regulation" (i.e., document with which compliance is mandatory).

52. For these reasons, the United States' argument that the Panel's interpretation of "mandatory" is indistinguishable from "requirements" is without merit.

3. The Panel Correctly Applied Prior Appellate Body Reports And The "Positive" And "Negative" Distinction

a. The United States Misinterprets The Appellate Body Report In *EC - Asbestos*

53. The United States refers to paragraph 68 of the Appellate Body Report in *EC – Asbestos* which reads as follows:

> The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance* " with the "product characteristics" laid down in the "document" must be "*mandatory*". A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark". [54]

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51 Panel Report, paras. 7.141-7.144.

52 U.S. Appellant Submission, para. 32.

53 Panel Report, para. 7.144.

54 Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis original).

54. The United States argues that the dissenter's interpretation of "mandatory" more directly applied the Appellate Body's guidance in this passage while the Panel erred by failing to give effect to the statement that mandatory compliance is characterized by "binding" or "compulsory".[55]

55. This criticism is without merit. Moreover, it highlights a fundamental flaw in the interpretation of the dissenter and the United States.

56. The key passage from paragraph 7.117 of the Panel's reasoning is as follows:

> [C]ompliance with product characteristics or their related production methods or processes is "mandatory" within the meaning of Annex 1.1, if the document in which they are contained has the effect of regulating in a legally binding or compulsory fashion the characteristics at issue, and if it thus *prescribes* or *imposes* in a *binding* or *compulsory* fashion that certain product *must* or *must not* possess certain characteristics, terminology, symbols, packaging, marking or labels or that it *must* or *must not* be produced by using certain processes and production methods. In the context of a labelling requirement, therefore, the question we must consider is not only whether the document lays down certain conditions for the use of a label, or prescribes a certain content for a given label, but whether the document at issue regulates in a binding fashion these conditions or content. (emphasis original).

57. Both the Appellate Body in *EC – Asbestos* and the Panel in the above passage refer to the regulation of the "characteristics of products" in a binding or compulsory manner. The Panel correctly distinguishes between the conditions/content of the label (i.e., labelling requirements) and the regulation of the conditions/content in a binding manner (i.e., the product must or must not possess certain characteristics, marking, labels, etc.). This is fully consistent with the distinction between "mandatory" and "labelling requirements" referred to in the previous section.

58. Importantly, these statements of the Appellate Body and Panel also make it clear that the "regulation… in a binding and compulsory fashion" relates to the "product characteristics" (i.e., the label) and *not* to the sale, importation, distribution or marketing of the product. This exposes a fundamental flaw in the interpretation of the United States and the dissenter. Under their interpretation, whether or not the product is permitted to be sold in the U.S. market is pivotal to the meaning of "mandatory". However, what matters is not whether the "sale" is regulated but whether the "product characteristics" (i.e., the label) are regulated. Clearly, the U.S. labelling provisions regulate the dolphin-safe label in a binding and compulsory manner.

59. It is notable that in its Appellant Submission and in its response to a question from the Panel, the United States agrees with the Appellate Body's "description of technical regulations as regulating *product characteristics* in a binding and compulsory fashion" and that for a document to constitute a technical regulation "compliance *with the product characteristic*… set out in the

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[55] U.S. Appellant Submission, paras. 38-39.

document must be mandatory".[56] Thus, it appears that the United States is in agreement with the Panel on this fundamental interpretative point even though it undermines the U.S. argument that "mandatory" means that the labelling scheme must prohibit the sale, importation, distribution or marketing of a product.

b. The Panel Correctly Applied The Appellate Body's "Positive" And "Negative" Distinction

60. The United States argues that the Panel incorrectly applied the positive and negative distinction set out in paragraph 69 of the Appellate Body report in *EC – Asbestos*. It argues that the distinction relates to the determination of whether a document "lays down" product characteristics,[57] that it is a helpful device to explain that there is more than one way to set out product characteristics,[58] and that it is not a helpful tool for distinguishing a technical regulation from a standard.[59]

61. The United States misconstrues the findings of the Appellate Body. Paragraph 69 of the Appellate Body's report must be read in the light of paragraph 68 which addresses the definition of "technical regulation" and the mandatory criterion. It states that "a 'technical regulation' must regulate the "characteristics" of products in a *binding or compulsory* fashion" and "[i]t follows that, with respect to products, a 'technical regulation' has the effect of *prescribing or imposing* one or more "characteristics".

62. Thus, the Appellate Body's reference to "prescribing or imposing" characteristics relates to the mandatory criterion in the definition. Paragraph 69 then explains that it can prescribe or impose characteristics in a positive or negative form. Accordingly, the reference to "positive or negative form" in paragraph 68 is relevant to the mandatory criterion in the definition of "technical regulation and it is therefore directly relevant to distinguishing a technical from a standard.

4. The United State's Criticisms Of The Panel's Supplemental Reasons Are Without Merit

a. The United States Misrepresents The Panel's Reasons At Paragraph 7.141 Of The Panel Report

63. The United States argues that, at paragraph 7.141 of the Panel Report:

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[56] Answers of the United States to the First Set of Questions from the Panel to the Parties, paras. 114-115 (emphasis added).

[57] U.S. Appellant Submission, paras. 42-43.

[58] U.S. Appellant Submission, para. 44.

[59] U.S. Appellant Submission, para. 44.

> [T]he majority acknowledged that its analysis had a problem: applying its interpretation generated the conclusion that "any situation in which access to a label reflecting compliance with a particular standard is reserved for products that comply with the specific requirements of that standard would amount to a situation in which a mandatory technical regulation exists".[60]

64. This completely misrepresents the reasoning of the Panel as shown in the highlighted text in the cited paragraph of the Panel Report:

> In making this determination, **we are mindful**, as discussed in paragraph 7.109 above, that a proper interpretation of the expression "mandatory" compliance in Annex 1.1 of the TBT Agreement must preserve the conceptual and functional distinction between technical regulations and standards. In this respect, we find it useful to highlight that **we are not suggesting** that *any* situation in which access to a label reflecting compliance with a particular standard is reserved for products that comply with the specific requirements of that standard would amount to a situation in which a mandatory technical regulation exists. In our view, **the measures at issue in the present case go significantly beyond that**.[61] (emphasis added)

b. The United States Misreads The Panel's Reasoning Regarding Legal Enforceability

65. At paragraphs 50-64 of its Appellate Submission, the United States presents various arguments that the Panel misinterpreted the phrase "with which compliance is mandatory" by improperly assessing the "legal enforceability" of the U.S. labelling provisions. In summary, the United States argues that: (i) enforceability as such does not distinguish technical regulations and standards;[62] (ii) false claims regarding compliance with the conditions of a standard would be legally enforceable, just as false claims to have met the conditions of a technical regulation would be;[63] (iii) denying access to a label for failure to meet the standards required to use the label is inherent in the term "labelling requirement", and therefore "does not in itself make compliance with a labelling requirement 'mandatory' or 'not mandatory'";[64] (iv) a standard is not defined as a label that may be used without meeting the requirements for its use: such a result would read "requirements" out of Annex 1.2;[65] (v) if it is accepted that a specific enforcement measure can make a labelling requirement mandatory, it would still have to be a measure that

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60 U.S. Appellant Submission, para. 48.

61 Panel Report, para. 7.141.

62 U.S. Appellant Submission, para. 51.

63 U.S. Appellant Submission, para. 52.

64 U.S. Appellant Submission, para. 54.

65 U.S. Appellant Submission, para. 55.

goes beyond a general prohibition on using deceptive practices;[66] (vi) compliance enforced by a deceptive practices act or by a penalty provided for specifically in one of the documents at issue is not enough to find that compliance is mandatory;[67] (vii) measures against deceptive practices are compatible with the concept of a labelling requirement as a standard;[68] and (viii) it would not make sense to adopt an interpretation of "labelling requirement" that does not require a producer who chooses to use the label to meet the requirements for that label.[69]

66. Based on these arguments, the United States concludes that "the majority failed to provide an explanation of why the manner in which the U.S. measure is enforced led it to conclude that compliance is mandatory – and yet, nevertheless, the majority decided the U.S. measure is 'legally enforceable' such that it is a technical regulation".[70]

67. Mexico agrees with the propositions summarized above in (i)-(viii) and they are fully consistent with the reasoning and conclusions of the Panel. The United States' argument simply restates, in the context of enforcement, its argument that the Panel's interpretation of "mandatory" is indistinguishable from "requirement". As explained above, the argument has no merit.

68. The United States misses a key point in the Panel's reasoning. The enforcement that is the focus of the Panel's analysis is the enforcement of the single definition of dolphin-safe to the exclusion of all others (i.e. the enforcement of the prohibition against, *inter alia*, the AIDCP dolphin-safe label).[71] It is *not* the enforcement of the "labelling requirements". As noted above, the consideration "other than or beyond" the labelling requirements that make compliance with those requirements mandatory is the separate and distinct prohibition that is included in the U.S. labelling provisions. It is that separate and distinct prohibition that is the focus of the Panel's "legally enforceable" analysis.

c. Exclusivity

69. The creation of a single exclusive definition of dolphin-safe is at the centre of the Panel's determination that the U.S. labelling provisions are a technical regulation.[72] In its Appellant Submission, the United States refers to this key finding as "exclusivity".[73]

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66 U.S. Appellant Submission, para. 58.

67 U.S. Appellant Submission, para. 59.

68 U.S. Appellant Submission, para. 60.

69 U.S. Appellant Submission, para. 63.

70 U.S. Appellant Submission, para. 64.

71 Panel Report, paras. 7.128, 7.131, 7.137, and 7.142-7.145.

72 Panel Report, paras. 7.128, 7.131, 7.137, and 7.142-7.145.

73 U.S. Appellant Submission, paras. 65-71.

70. It argues that the Panel's exclusivity test is not based on the text of the *TBT Agreement*.[74] It dismisses the Panel's reference to the definitions in the ISO/IEC Guide 2 on the bases that they are "irrelevant", that the "ISO/IEC Guide 2 is not a covered agreement" and that "the majority did not state what *TBT Agreement* term it was seeking to define by use of the ISO/IEC Guide 2", and that the term "mandatory standard" in the Guide "does not appear in the *TBT Agreement* and so the ISO/IEC Guide 2 definition of 'mandatory standard' is irrelevant".[75]

71. The United States is incorrect. There is a clear textual basis for the Panel's finding of "exclusivity" and for its reference to "mandatory standard" in the ISO/IEC Guide 2.

72. The chapeau to Annex 1 of the *TBT Agreement* states that the terms presented in the ISO/IEC Guide 2 shall, when used in the *TBT Agreement*, have the same meaning as given in the definitions in the Guide taking into account that services are excluded from the coverage of the *TBT Agreement*.

73. The relevant terms in the Guide are as follows:

> **7.5.1 exclusive requirement** (deprecated: mandatory requirement):
>
> Requirement of a normative document that must necessarily be fulfilled in order to comply with that document.
>
> NOTE - The term "mandatory requirement" should be used to mean only a requirement made compulsory by law or regulation.
>
> **11.3 Strength of reference**
>
> **11.3.1 exclusive reference (to standards)**: Reference to standards that states that the only way to meet the relevant requirements of a technical regulation is to comply with the standard(s) referred to.
>
> **11.3.2 indicative reference (to standards)**: Reference to standards that states that one way to meet the relevant requirements of a technical regulation is to comply with the standard(s) referred to.
>
> NOTE - An indicative reference to standards is a form of deemed-to-satisfy provision.
>
> **11.4 mandatory standard**: Standard the application of which is made compulsory by virtue of a general law or exclusive reference in a regulation.

74. Under these definitions, a "mandatory standard" is one which is made compulsory by, *inter alia*, an "exclusive reference" in a regulation. An "exclusive reference (to standards)" is a reference that states that the only way to meet the relevant requirements of a technical regulation

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74 U.S. Appellant Submission, para. 66.

75 U.S. Appellant Submission, fn. 97.

is to comply with the standard(s) referred to. An ISO/IEC document provides the following examples of exclusive/mandatory/voluntary references:

> Regulators will need to decide if they want the use of the ISO or IEC standard to be mandatory (providing the only solution) or voluntary (providing a solution). [76]
>
> Manufacturers can then choose to use standards from these lists (they remain voluntary). Those who do can be confident that they will be meeting their legal obligations.[77]

Thus, a "mandatory standard" is one where a regulation references a specified standard to the exclusion of others, and a "voluntary standard" is one where the referenced standard is only one solution, but other standards are available (e.g., they can be chosen from a list).[78]

75. The Explanatory Note to Annex 1.2 of the *TBT Agreement* provides the relevant textual link between the ISO/IEC Guide 2 and the *TBT Agreement* that the United States incorrectly argues is absent. It states that:

> Standards as defined by *ISO/IEC Guide 2* may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents.

Thus, according to this Explanatory Note, a "mandatory standard" under the ISO/IEC Guide 2 definitions is a "technical regulation" under the *TBT Agreement*.

76. Applying these definitions to the facts of this dispute, the "standard" set out in the U.S. labelling provisions is a "mandatory standard" within the meaning of ISO/IEC Guide 2 because it references a specified standard to the exclusion of others. It does not permit other standards such as the AIDCP standard. By virtue of the Explanatory Note in Annex 1.2, it is, therefore, a "technical regulation" within the meaning of the *TBT Agreement*.

77. At paragraphs 68-69 of its Appellant Submission, the United States provides additional arguments concerning exclusivity. These arguments appear to misconstrue paragraph 7.143 of the Panel Report. At that paragraph the Panel is simply underscoring the broad scope of the prohibition and, therefore, the exclusive nature of the U.S. labelling provisions. The U.S. arguments also confuse "labelling requirements" with "mandatory". The Panel's reasons and findings fully support the enforcement of labelling requirements so that all statements associated with a label are true and consistent with the associated requirements to avoid consumer deception.

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[76] ISO/IEC, *Using and Referencing ISO and IEC standards for Technical Regulations*, September 2007, p. 7 (Section 6.1), available at: http://www.iso.org/iso/standards_for_technical_regulations.pdf.

[77] *Ibid*., p. 27 (Section C.2.3).

[78] Panel Report, para. 7.144 and fn 314.

d. Object And Purpose

78. The United States argues that the Panel's interpretation is inconsistent with the object and purpose of the *TBT Agreement* because it undermines the distinction between the three categories of TBT measures (i.e., technical regulations, standards and conformity assessment measures).[79] As explained above, this is clearly not the case. The Panel's reasoning fully respects the distinction between these measures.

5. Additional Support For The Findings And Conclusions Of The Panel

79. For the foregoing reasons, the United States' appeal of the Panel's finding that the U.S. measures constitute a "technical regulation" within the meaning of Annex 1.1 are without merit. The following points provide further support for the Panel's finding.

a. Appellate Body Rulings

80. The Appellate Body reports in *EC – Asbestos*, *EC – Sardines*, and *EC – Trademarks and Geographical Indications (Australia)* support the Panel's interpretation of the phrase "with which compliance is mandatory".

81. The Panel acknowledged that the situation in this dispute closely resembles that addressed by the Appellate Body in *EC – Sardines* and *EC – Trademarks and Geographical Indications (Australia)*. Those rulings indicate that the mere fact that it is legally permissible to place the product on the market without using the designation that is regulated by the measures at issue does not compel the conclusion that the measures are not "mandatory" within the meaning of Annex 1.1, where the measures effectively regulate in a binding manner the use of the appellation.[80]

82. The criticism of the dissenter is without merit. The dissenter sought to distinguish the facts in *EC – Asbestos* and *EC – Sardines* from those of this dispute.

83. With respect to *EC – Asbestos*, the dissenter was of the view that the measure at issue in that case involved a ban and did not contain any voluntary aspect and there was no alternative for producers or importers to market their products in the EU. Moreover, in the view of the dissenter, the requirement not to include asbestos in their products was imposed directly by the regulations at issue, and not by the producers' or importers' own decision to become bound by such prohibition.[81] The dissenter was correct in that these facts do distinguish *EC – Asbestos* from the facts in this dispute because *EC - Asbestos* did not concern a labelling requirement. However, Mexico and the Panel did not rely on *EC – Asbestos* for fact-specific findings. Rather,

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79 U.S. Appellant Submission, paras. 71-73.

80 Panel Report, paras. 7.133-7.137.

81 Panel Report, para. 7.163.

the Appellate Body report is relied upon for general principles that are applicable to all technical regulations including labelling requirements.

84. With respect to *EC – Sardines*, the dissenter raised three points. First, it observed that the mandatory nature of the measures challenged in that case was not in question and that the Appellate Body was, therefore, not called upon to make a determination concerning the interaction between mandatory and voluntary requirements. Second, it was of the view that the measure at issue in *EC – Sardines* was a "naming requirement" and not a "labelling requirement". Third, it was of the view that by not allowing Peru to market certain preserved sardines as sardines, these products were prohibited to enter the sardine market at all whereas, under the U.S. labelling provisions, Mexico was not prohibited from selling its tuna products in the United States.[82]

85. With respect to the first point, the Appellate Body specifically found that the EC Regulation at issue was mandatory.[83] With respect to the second point, as noted by the Panel and by the Appellate Body, the distinction between a "naming requirement" and a "labelling requirement" is meaningless because there is no difference between the two notions, both being essentially a means of identification of a product.[84] Finally, the dissenting member misunderstands the facts with respect to the third point. In *EC – Sardines*, the small fish at issue could be marketed as "sardines" if they were a certain species but could be sold in the EU market although not as "sardines" if they were of another species. In this way, as acknowledged by the Panel, the facts are similar to this dispute. The tuna products at issue could be marketed as "dolphin safe" if they comply with the requirements of the U.S. labelling provisions. If they do not comply with the requirements, they can be sold in the U.S. market but not as "dolphin safe".

86. The Panel observed that tuna products containing tuna caught in a manner not complying with the specific conditions identified in the regulation are, by virtue of the measures at issue, prohibited from being identified and marketed under an appellation including the term "dolphin safe" or other related designations.[85] It further observed that this situation closely resembles that addressed by the Panels in *EC – Sardines* and *EC – Trademarks and Geographical Indications (Australia)*.[86] In the Panel's view, these rulings suggest that the mere fact that it is legally permissible to place the product on the market without using the designation that is regulated by the measures at issue does not compel the conclusion that these measures are not "mandatory"

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82 Panel Report, para. 7.164.

83 Appellate Body Report, *EC – Asbestos*, para. 194.

84 Panel Report, para. 7.138; Appellate Body Report, *EC – Sardines*, paras. 118 ("The United States also rejects the European Communities' attempt to distinguish between labels and names, and states that the Panel correctly noted that both labelling and naming requirements are means of identifying a product") and 190-191.

85 Panel Report, paras. 7.143-7.144.

86 Panel Report, paras. 7.134-7.137.

within the meaning of Annex 1.1, where the measures effectively regulate in a binding manner the use of the appellation.[87]

87. Further, the Panel also found a parallel between this dispute and *EC – Sardines* with respect to the role of measures in providing consumer information. It found that the U.S. labelling provisions regulate in a binding fashion the information that may be conveyed to consumers about the manner in which the tuna was caught as well as the manner in which it may be conveyed.[88]

88. For these reasons, the Appellate Body reports in *EC – Sardines* and *EC – Trademarks and Geographical Indications (Australia)* support the finding of the Panel that the U.S. labelling provisions are a technical regulation.

b. Meaning Of "Voluntary"

89. Consistent with its narrow interpretation of "mandatory", the dissenter presented a narrow interpretation of "voluntary" or "non-mandatory" in the following statement:

> [T]he measures do not impose a general requirement to label or not to label tuna products as "dolphin-safe". It remains a voluntary and discretionary decision of operators on the market to fulfil or not fulfil the conditions that give access to the label, and whether to make any claim in relation to the dolphin-safe status of the tuna contained in the product. If an operator wishes to make such claim, however, it must abide with the conditions laid down in the DPCIA and other related measures. In short, the measures at issue set out the requirements for dolphin-safe labelling, but **they impose no obligation to label (or not to label) tuna as "dolphin-safe"**. For this reason, compliance with the labelling requirements at issue is not "mandatory" within the meaning of Annex 1.1.[89] (emphasis added).

90. The dissenter equates the meaning of "voluntary" with whether there is an obligation to label. There is, however, another aspect that this term could apply to. That is the nature of the label and the conditions attached to it. Under this interpretation, "voluntary" means that the user can select between various labels and, provided it meets the conditions of the label it selects, it can choose to apply the label of its own choice.

91. This second interpretation is supported by the definitions in the ISO/IEC Guide 2 discussed above. As noted, a "voluntary standard" is one where the referenced standard is only one solution, but other standards are available (e.g., they can be chosen from a list).

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87 Panel Report, para. 7.137.

88 Panel Report, para. 7.139.

89 Panel Report, para. 7.153.

c. The Definition Of A "Standard" In The *TBT Agreement*

92. Although not explicitly addressed either in the Panel Report or the arguments of the parties, it appears that there is an underlying assumption that if the U.S. labelling provisions are not found to be "mandatory" they will be "voluntary" and therefore will be a "standard" rather than a technical regulation. If this assumption is incorrect (i.e., the U.S. labelling provisions do not meet the definition of a "standard"), it will provide additional contextual support for Mexico's interpretation and the interpretation of the Panel that the U.S. labelling provisions are a "technical regulation". It is not clear that the U.S. labelling provisions would meet the definition of a standard if they are found not to be mandatory.[90]

d. The U.S. Labelling Provisions Concern Regulation Not Standardization

93. Finally, general context supports the interpretation that the U.S. labelling provisions are technical regulations and not standards.

94. The act of regulation has an imperative or binding nature. The adoption of technical regulations is recognized as being necessary to achieve legitimate regulatory objectives including, *inter alia*, national security requirements, the prevention of deceptive practices, the protection of the environment or the protection of human health or safety, plan and animal life or health.[91]

95. In contrast, standardization is not imperative or binding in nature. Standardization is defined as the "[a]ctivity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at achievement of the optimum degree of order in a given

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[90] Other than "mandatory" and "not mandatory", the principal difference between the definition of "standard" and the definition of a "technical regulation" is that instead of a document which "lays down… product characteristics…", the definition of "standard" refers to a document that is "approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics…". The key issue is the difference in meaning of the term "lays down" and the phrase "common and repeated use". The term "lays down" has been interpreted to mean "set forth, stipulate or provide" (Appellate Body Report, *EC - Asbestos*, para. 67). The phrase "common and repeated use" has not yet been interpreted but its ordinary meaning is "recurring application by others". "Lays down" is more akin to regulating (i.e., specifying how something must be undertaken) while "approved… for common and repeated use" is more akin to facilitating (i.e., facilitating harmonization) (Oxford Concise, 9th Edition, pp. 266-267, 1165). There is no indication that the U.S. labelling provisions set out rules, guidelines or characteristics that are intended for repeated use by others (e.g., other WTO Members, organizations, entities). Rather, they appear to be aimed at regulating in the sense that they are specifying how dolphin safe labelling is to be undertaken in the United States. Thus, the U.S. labelling provisions may not meet the definition of a "standard" in Annex 1.1 of the *TBT Agreement*. If they do not meet that definition they either must be a "technical regulation" or they are outside the scope of the *TBT Agreement*. Given that the latter interpretation would be absurd, if they were found not to meet the definition of a standard it would provide contextual support for the view that they are a technical regulation.

[91] *TBT Agreement*, Article 2.2.

context."[92] This activity consists of the processes of formulating, issuing and implementing standards.[93] Standardizing bodies have knowledge and expertise in the relevant area of standardization. Once adopted, their standards serve as a reference, model or guide in measuring, *inter alia*, quantities or qualities of products or their related processes and production methods, including labelling requirements. Recognition of a standard is what leads to its subsequent repeated application. Market participant understand the benefits of standardization and, for that reason, apply standards. They are not compelled by a regulatory measure to use specific standards because, by their very nature, standards are optional and voluntary.

96. Through the U.S. labelling provisions, U.S. central government bodies have pursued certain policy objectives by adopting "dolphin-safe" labelling requirements with which market participants must comply if they are to use any form of dolphin safe designation. Through the establishment of "dolphin-safe" labelling requirements, the U.S. labelling provisions impose direct and legally binding obligations not to perform certain actions. Among other things, under the measures it is illegal to label and sell tuna products with an AIDCP dolphin safe label. Thus, the U.S. labelling provisions regulate. They do not standardize.

97. The regulatory character of the U.S. labelling provisions is confirmed by the stated purpose of the U.S. dolphin safe tuna labelling regulations:

> This subpart governs the requirements for using the official mark described in §216.95 or an alternative mark that refers to dolphins, porpoises, or marine mammals, to label tuna or tuna products offered for sale in or exported from the United States using the term dolphin-safe or suggesting the tuna were harvested in a manner not injurious to dolphins.[94]

6. In The Alternative, The Measures Are *De Facto* Mandatory

98. Mexico argued in the alternative that the U.S. labelling provisions are *de facto* mandatory. The Panel did not reach this issue, because it held that the measures were *de jure* mandatory. In the event that the Appellate Body were to disagree with the Panel's conclusions regarding the *de jure* mandatory nature of the measures, Mexico requests that the Appellate Body affirm the Panel's conclusion on the basis that the measures are *de facto* mandatory. The labelling scheme is *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin safe designation.[95]

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92 ISO/IEC Guide 2:1991, para. 1.1.

93 ISO/IEC Guide 2:1991, note 1 to para. 1.1.

94 50 CFR, Part 216, Subpart H- Dolphin Safe Tuna Labelling, § 216.90, Exhibit US-6.

95 Mexico's First Written Submission, para. 203; Mexico's Responses to the Panel's Questions from the First Substantive Meeting, para. 147. It has been recognized in other contexts that there can be particular instances when a *de jure* non-mandatory labelling provision can be *de facto* mandatory. One example is provided in a communication of the Swiss delegation to the TBT Committee on 19 June 2001

Footnote continued on next page

99. For the foregoing reasons, the Panel's finding that the U.S. labelling provisions are a technical regulation was correct.

B. The Panel Correctly Found That The U.S. Measures Are Inconsistent With Article 2.2 Of The *TBT Ageement*

100. The United States argues that the Panel erred in finding that the U.S. measures are inconsistent with Article 2.2 because the objectives of the U.S. measure can be fulfilled with a less trade-restrictive measure – namely, allowing the AIDCP dolphin safe standard to be used in the U.S. market in addition to the unilateral U.S. standard. Contrary to the arguments of the United States, the Panel's finding is factually and legally sound.

101. The Panel set out the general test for the application of Article 2.2 as follows:

> Thus, the Panel agrees with the United States that "the second sentence of Article 2.2 of the TBT Agreement explains what the first sentence of this provision means". In other words, the second sentence of Article 2.2 of the TBT Agreement establishes two requirements that technical regulations must comply with in order not to constitute unnecessary obstacles to international trade. A plain reading of the second sentence of Article 2.2 reveals that these requirements are:
>
> – Technical regulations must pursue a legitimate objective; and
>
> – They must not be more trade-restrictive than necessary to fulfil that legitimate objective, taking into account the risks non-fulfilment would create.
>
> Therefore, we agree with Mexico that the analysis of its claims under Article 2.2 of the TBT Agreement may be conducted in two steps. First, to determine whether the US dolphin-safe provisions fulfil a legitimate objective; and, second, if that is the case, to determine whether those provisions are more trade-restrictive than necessary to fulfil such objective, taking account of the risks non-fulfilment would create. We also note that the burden rests on Mexico, as the complainant, to demonstrate that the conditions are met, to conclude that a violation of Article 2.2 of the TBT Agreement exists.[96] (footnotes omitted).

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relating to *de jure* non-mandatory labelling program for organic food. The delegation observed that it is possible for certain labelling programs to have the effect of market segregation and that such standards become factually mandatory for a producer wishing to access a newly created segment of the market. (See Mexico's Responses to the Panel's Questions from the First Substantive Meeting, 8 November 2010, para. 170.)

[96] Panel Report, paras. 7.387-7.388.

102. The above two-part test, as described by the Panel, is the correct one and the United States has not disputed this point.

103. The United States does not challenge the analytical approach set forth by the Panel.[97] Rather, it argues that the Panel failed to properly assess the evidence before it in its analysis of: (i) the extent to which the U.S. measures fulfill their legitimate objectives; and (ii) whether the proposed alternative is a reasonably available, less trade-restrictive alternative that would fulfill the objectives at the same level as the U.S. measures.[98] As will be explained, the United States' criticisms of the factual analysis and findings of the Panel are without merit.

104. On the specific issue of whether the U.S. measures are more trade-restrictive than necessary, the United States accepts the Panel's ruling that it "must assess the manner in which and the extent to which the measures at issue fulfill their objectives, taking into account the Member's chosen level of protection".[99] However, it argues that the Panel did not correctly take into account the level at which the United States seeks to achieve its objectives.[100]

105. Essentially, the United States is arguing that the Panel incorrectly interpreted and applied the reference in the sixth recital of the preamble to the *TBT Agreement* to a Member not being prevented from taking measures necessary to protect animal life or health "at the level it considers appropriate". In making this argument, the United States omits the important qualification in the recital. This right of a WTO Member is "subject to the requirement that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade". In the light of the deference Article 2.2 confers on a WTO Member to define the objectives of its measures and take measures at the levels it considers appropriate, it is crucial that this qualifying language in the preamble be given meaning. Otherwise the discipline in Article 2.2 will be meaningless. Members could define their objectives and levels of protection in such a way that any trade-restrictive effects could not be challenged as "unnecessary" because the only measure that would fit the requirements of the provision is their own measure. There could not be an alternative less trade-restrictive measure.

106. The United States' arguments regarding the level at which it seeks to achieve its objectives suffers from another flaw. Under the guise of the phrase "at the level it considers appropriate", the United States is trying to change the two objectives of the measures which it identified and which the Panel accepted in making its factual findings.[101] Specific to the adverse effects that the U.S. measures have on Mexican tuna products, the United States is trying to change the objectives found by the Panel as follows:

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97 U.S. Appellant Submission, para. 77.

98 U.S. Appellant Submission, para. 77.

99 U.S. Appellant Submission, para. 86.

100 U.S. Appellant Submission, paras. 86-91.

101 U.S. Appellant Submission, para. 81.

> - ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught ~~in a manner that adversely affects dolphins~~ **by setting on dolphins**; and
>
> - contributing to the protection of dolphins, by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna ~~in a manner that adversely affects dolphins~~ **by setting on dolphins**.

As will be discussed below, in addition to being an impermissible attempt at altering a factual finding of the Panel, this underscores the "arbitrary" nature of the U.S. measures and the fact that they are a "disguised restriction on international trade". The United States is attempting to do indirectly (i.e., blocking *de facto* Mexican tuna products from the principal distribution channels) what it cannot do directly (i.e., imposing an embargo on Mexican tuna products which was found to be inconsistent with GATT Article IX by GATT 1947 panel).

1. The Panel Complied With The Requirements Of *DSU* Article 11 In Making Its Findings Regarding Risks To Dolphins Outside And Inside The ETP

107. *DSU* Article 11 states:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

108. The Appellate Body has established a high legal threshold in order to successfully demonstrate a panel's breach of its duty under *DSU* Article 11. In *EC – Hormones*, the Appellate Body stated:

> The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather *an egregious error* that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental

> fairness, or what in many jurisdictions is known as due process of law or natural justice.[102] (emphasis added; footnote omitted).

109. More recently, in *US – Tyres (China)*, the Appellate Body confirmed the applicable criteria in relation with claims based on Article 11, stating:

> [P]anels enjoy a margin of discretion in their assessment of the facts. This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings, and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case. A panel does not commit a reversible error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it. In addition, as the Appellate Body has previously emphasized, a claim under Article 11 of the DSU must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement".[103] (footnotes omitted).

110. The Appellate Body has recognized that a claim under *DSU* Article 11 to succeed, a panel has to exceed its authority as the *trier of facts*.[104] In *China – Raw Materials*, China advanced two separate claims that the Panel failed to make an objective assessment of the matter pursuant to Article 11. First, China alleged that the Panel failed properly to assess evidence that China's export restriction is annually reviewed and renewed, and that the Panel's failure to consider this evidence had a bearing on the objectivity of the Panel's factual assessment. The Appellate Body concluded:

> China's argument appears to be directed mainly at the weight the Panel ascribed to evidence indicating that the export restriction is annually reviewed and renewed. The Appellate Body has consistently recognized that panels enjoy a margin of discretion in their assessment of the facts. This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings, and to determine how much weight to attach to the various items of evidence placed before it by the parties. A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it. A panel is entitled "to determine that certain elements of evidence should be accorded more weight than other elements— that is the essence of the task of appreciating the evidence". We therefore reject China's claim that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU.[105] (footnotes omitted).

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102 Appellate Body Report, *EC – Hormones*, para. 133.

103 Appellate Body Report, *US – Tyres (China*), para. 321.

104 Appellate Body Report, *EC- Large Civil Aircraft*, para 1006.

105 Appellate Body Report, *China – Raw Materials*, para. 341.

111. Also in, *EC — Fasteners (China),* the Appellate Body stated:

> Thus, not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. It is incumbent on a participant raising a claim under Article 11 on appeal to explain why the alleged error meets the standard of review under that provision. An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment. It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. Finally, a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.[106] (footnote omitted).

112. Similarly, in *Philippines – Distilled Spirits*, the Appellate Body held that:

> Panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties." In this regard, the Appellate Body will not "interfere lightly" with a panel's fact finding authority, and will not "base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding".[107] (footnotes omitted).

113. In summary, an Article 11 claim is limited by the following criteria:

- "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU… An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision."[108]

- "…a claim under Article 11 of the *DSU* must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim…"[109]

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106 Appellate Body Report, *EC – Fasteners (China)*, para. 442.

107 Appellate Body Report, *Philippines –Distilled Spirits*, para. 136.

108 Appellate Body Report, *EC – Fasteners (China)*, para. 442.

109 Appellate Body Report, *EC – Fasteners (China)*, para. 442.

- An Article 11 claim implies an "egregious error" involving "willful distortion or misrepresentation of the evidence" that "calls into question the good faith of a panel".[110]

- "A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it."[111]

- A panel is "entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements". In doing so, a panel "is not required to discuss, in its report, each and every piece of evidence…."[112]

- "… when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11."[113]

114. The United States claims that "while the analytical approach the Panel set forth appears to be sound, the Panel failed to properly assess the evidence before it as called for by Article 11 in its analysis of the extent to which the U.S. measure fulfills its legitimate objective."[114] More specifically, the United States claims that the Panel erred in its assessment of the relative harm to dolphins inside and outside the ETP. As explained below, however, the claims of error by the United States are incorrect and do not meet the standard established by the Appellate Body for establishing that a Panel failed to make an objective assessment.

115. The factual core of the U.S. appeal is its claim that there is a much greater risk to dolphins in the ETP tuna fishery than in any other ocean region. As explained above, in the ETP there are comprehensive protections for dolphins and there are independent observers on board every large purse seine vessel who are specifically charged with monitoring compliance with those protections and with carefully monitoring and recording any harm to a dolphin. As also explained above, and as evidenced in the factual findings in the Panel Report, there are no such protections and there is no monitoring in any ocean region other than the ETP, but there are consistent reports of substantial harm to dolphins and other marine mammals in those other regions.

116. The general U.S. approach to the evidence is to rely on presumptions that there must be unobserved harm to dolphins in the ETP, while also presuming that there must be not any harm to dolphins elsewhere. The U.S. approach is fundamentally illogical and unsupported by

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110 Appellate Body Report, *EC – Hormones*, para. 133.

111 Appellate Body Report, *China – Raw Materials*, para. 107.

112 Appellate Body Report, *Philippines – Distilled Spirits*, para. 108.

113 Appellate Body Report, *EC – Fasteners (China)*, para. 442.

114 U.S. Appellant Submission, para. 77.

evidence. Contrary to the U.S. claims, the Panel provided a reasoned and adequate explanation and coherent reasoning for its findings. After consideration of all the evidence presented to it, assessing its credibility and determining its weight, the Panel made finding regarding risks to dolphins inside and outside of the ETP on the basis of that evidence. The Panel made an objective assessment of facts, as required by Article 11 of the *DSU*, and, therefore, the Appellate Body should reject the United States' claims of error.

a. The Panel's Findings Regarding Relative Risks Are Not Inconsistent

117. The United States argues that "[t]he Panel's conclusion that the risks to dolphins from other fishing techniques is not lower than the risk from setting on dolphins contradicts the Panel's earlier finding in the context of determining the legitimacy of the U.S. measure."[115] In support of this argument, however, the United States relies on a selective quotation that omits important information. The United States quotes the Panel as saying:

> [i]t is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries.[116]

118. The Panel's actual full sentence is as follows:

> It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries, especially when used without applying certain fishing gear and procedures designed to reduce dolphin bycatch.[117] (emphasis added).

The United States omitted the underlined portion of the sentence. Mexico submitted substantial evidence demonstrating that the fishing methods established under the AIDCP have been extremely successful in limiting dolphin mortalities to levels considered acceptable in fisheries subject to U.S. territorial jurisdiction (that evidence is reviewed below). Mexico agrees that there remain high risks to dolphins in *other* ocean regions where nets are being set on dolphins.

b. The Panel Conducted An Objective Assessment Of The Evidence Regarding Risks To Dolphins Outside The ETP

119. The United States argues that the Panel was required to accept its assertion that the risks to dolphins in the ETP are much greater than to dolphins in other ocean regions. In this connection, the United States alleges that the Panel "simply dismisses the U.S. contention" and that it "fails to address" the evidence put forward by the United States.[118] In the same paragraph,

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115 U.S. Appellant Submission, para. 94.

116 U.S. Appellant Submission, para. 94.

117 Panel Report, para. 7.438.

118 U.S. Appellant Submission, para. 99.

however, the United States acknowledges that the Panel cited other evidence showing that there are "multiple examples of numerous dolphins being killed annually in other fisheries."[119] The U.S. argument itself, therefore, acknowledges that the Panel engaged in a weighing of evidence. Specific examples of the Panel's examination of the U.S. evidence and arguments are reviewed below.

120. In its Appellant Submission, the United States goes on to characterize the evidence supporting the fact that there are significant harmful interactions with dolphins and dolphin deaths outside the ETP as "minimal," and argues that the evidence did not support the Panel's conclusions.[120] However, the Panel itself did not say that the evidence was minimal, and the United States omits a number of the Panel's references to relevant evidence and takes comments of the Panel out of context in an attempt to support its theory.

121. In fact, the Panel considered the evidence presented by the United States and Mexico, determined its credibility and weight, made factual findings on the basis of that evidence, and explained its reasoning in a comprehensive and coherent manner. The Appellate Body has consistently recognized that Article 11 of the *DSU* affords panels a margin of discretion in their assessment of the facts. As Mexico has previously noted, the Appellate Body has found that "[t]his margin includes the discretion to identify which evidence the panel considers most relevant in making its findings, and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case. A panel does not commit error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it". [121]

(i) Tuna Harvested Outside the ETP in Coastal Driftnets Qualifies As Dolphin-Safe Under U.S. Law

122. In its Appellant Submission, the United States presents a new factual argument that it did not make in the panel proceedings. It claims that:

> … many if not most of the sources the Panel cites as evincing harm to dolphins outside the ETP refer to a fishing technique – driftnet fishing – that disqualifies tuna products caught on the high seas from being labeled dolphin safe under the U.S. measure. However, as the Panel found, the U.S. measures prohibit tuna products from being labeled dolphin safe if they contain tuna caught on the high seas by driftnet fishing. Therefore, the possibility that dolphins may be harmed in driftnet fishing does not support the conclusion that there is significant harm to

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119 U.S. Appellant Submission, para. 99.

120 See e.g. U.S. Appellant Submission, para. 100.

121 Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 229.

> dolphins outside the ETP that is unaddressed under the U.S. labeling provisions.[122] (footnotes omitted).

123. This claim is factually incorrect. Although this U.S. argument is new, Mexico is able to demonstrate using evidence already on the record that the United States has misrepresented the information in the "sources" and misdescribed the U.S. measures.

- The United States is correct that the U.S. law refers to fish caught with driftnets "on the high seas." A United Nations resolution called for an end to large scale driftnet fishing on the high seas by the end of 1992.[123] Nonetheless, virtually all, if not all, the examples cited by the Panel do not involve driftnet fishing on the high seas.[124] Rather, they involve driftnet fishing in coastal waters, which is not prohibited by the United Nations resolution.[125] Indeed, the United States itself allows fishing with driftnets in its coastal waters.[126]

- The U.S. restrictions on imports of fish caught with driftnets on the high seas do not apply automatically. To trigger the enforcement mechanism, a country must be designated by the Department of Commerce as a nation fishing with large scale driftnets.[127] The only country to have been so designated is Italy.[128]

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122 U.S. Appellant Submission, para. 104.

123 Bycatch Report, p. 69, Exhibit MEX-5.

124 See, e.g. Panel Report, para. 7.521 ("the use of driftnets to catch tuna in coastal areas *within Exclusive Economic Zones* is considered 'a highly destructive practice' and one of 'the greatest threats to populations of small cetaceans' in certain areas of the world.") (emphasis added); fn. 738 ("'The annual bycatch of small cetaceans in a single tuna driftnet fishery *in Negros Oriental* was estimated at about 400'") (emphasis added); fn. 738 ("'The recent revelation that a driftnet fishery has been operating *off Tristan da Cunha* for tuna, with concomitant incidental mortality of small whales and dolphins, suggests that there may also be considerable mortality to some as yet unidentified species. Incidental mortality to Heaviside's dolphin, *which is restricted to the coastal zone of South Africa and Namibia*, may also be an important interaction, but recent data on bycatch and population size are lacking'") (emphasis added; underlining original).

125 Bycatch Report, p. 60, Exhibit MEX-5 ("The December 31, 1992 deadline affects the high seas of the world's oceans and seas, including enclosed seas and semi enclosed seas. It should be noted, though, that much driftnetting continues, within EEZs, in many nations including the U.S.")

126 See National Oceanic and Atmospheric Administration, List of Fisheries for 2010, Exhibit MEX-38, references to Alaska Bristol Bay salmon drift gillnet fishery on page 58881, Alaska Cook Inlet salmon drift gillnet fishery on page 58882, and Washington Puget Sound Region salmon driftnet fishery on, page 58883.

127 50 CFR § 216.24(f)(7), Exhibit US-23b.

128 Mexico's Comments On The Responses Of The United States To The Panel's Questions From The Second Substantive Meeting, para. 27.

- None of Form 370's alternative certifications to support dolphin-safe status mention the word "driftnet." Form 370 has a distinct certification, unrelated to dolphin-safe status, as follows:

> 7. HIGH SEAS DRIFTNET CERTIFICATION - For fish or fish products harvested by, or exported from, a designated large-scale driftnet nation. I attest that the fish or fish products described herein were not harvested by a large-scale driftnet on the high seas.
>
> Name and title of Government Representative (Print or Type) Signature and Date:

As noted above, only imports of fish from Italy are subject to this certification. The "instructions" on the Form 370 explain:

> "7. HIGH SEAS DRIFTNET CERTIFICATION - If the shipment includes fish harvested by vessels of, or exported from a nation identified by NOAA in a Federal Register notice as a nation fishing with large-scale driftnets, a responsible government official of the large-scale driftnet nation must certify here.[129]

124. Thus, tuna products made from the tuna caught in the regions and with the methods in the examples cited by the Panel can be imported into the United States and labelled "dolphin-safe." Indeed, the Panel made a specific finding on this issue, stating:

> In relation to driftnets to catch tuna, the Panel observes that the US dolphin-safe provisions prohibit the use of the dolphin-safe label for tuna caught "on the high seas by a vessel engaged in driftnet fishing" (emphasis added), but they do not impose the same restriction in relation to driftnet fishing for tuna within EEZs. This implies that tuna caught by applying this method within territorial waters is eligible to be labelled dolphin-safe, see US dolphin-safe provisions subsection 1835(d)(1)(A), Exhibit US-05.[130]

125. For these reasons, the examples of driftnet fishing in coastal areas cited by the Panel are fully relevant and support its findings. The demand of the United States that the Appellate Body disregard the Panel's references to examples of dolphin mortality involving driftnet fishing is unsupportable.

(ii) The Panel Conducted An Objective Assessment Of The Evidence Regarding Reported Killings Of Dolphins Outside The ETP

129 Exhibit MEX-63.

130 Panel Report, fn. 735.

126. The United States complains that the Panel relied on a "paucity of evidence" regarding harm to dolphins from tuna fishing outside the ETP,[131] but the United States supports its position by ignoring much of the evidence or arguing that the Panel should have construed the evidence differently.

127. Among the evidence referenced by the Panel were a number of quotations from a 2007 report commissioned and published by the U.S. Department of Commerce entitled "Worldwide Bycatch Of Cetaceans" ("Bycatch Report").[132] A sampling of the Panel's citations, including the Panel's own underlining, is the following:

- "Spinner and Fraser's dolphins experience substantial bycatch in Philippine fisheries. In the Philippines, scientists estimated that about 2,000 dolphins—primarily spinner, pan-tropical spotted, and Fraser's—were being killed each year by a fleet of five tuna purse seiners using fish-aggregating devices" (emphasis added), Exhibit MEX-5, pages 26, 112, 131.[133]

- "Roughly 1,700 bottlenose dolphins and 1,000 spinner dolphins are incidentally caught in gillnet, driftnet, and purse-seine fisheries in the western central Pacific. Also at risk are Irrawaddy dolphins. This region's fisheries are diverse and poorly documented. Nevertheless, coastal gillnets, especially driftnets for tunas and mackerels, are widely used. After a closure in Australian waters, the Taiwanese driftnet fishery relocated and continued fishing in Indonesian waters in the Arafura Sea. With no reduction in effort, high cetacean bycatch rates are probable" (emphasis added), Exhibit MEX-5, p. 26.[134]

- "Few recent studies appear to have been made in this area. The recent revelation that a driftnet fishery has been operating off Tristan da Cunha for tuna, with concomitant incidental mortality of small whales and dolphins, suggests that there may also be considerable mortality to some as yet unidentified species. Incidental mortality to Heaviside's dolphin, which is restricted to the coastal zone of South Africa and Namibia, may also be an important interaction, but recent data on bycatch and population size are lacking" (emphasis added), Exhibit MEX-5, p. 18.[135]

131 U.S. Appellant Submission, para. 106.

132 Exhibit MEX-5.

133 Panel Report, fn. 738.

134 Panel Report, fn. 738.

135 Panel Report, fn. 738.

- "Bottlenose dolphins are one of the commonly caught dolphins in seerfish and tuna driftnet fisheries on the west coast of India, and in coastal gillnet fisheries for pomfrets and other species too."[136]

- "In 1997, the IWC Scientific Committee concluded that information on small cetaceans in Africa (outside southern Africa) is very sparse and that issues of cetacean fishery bycatch must be addressed. Projects that have sampled landing sites of small scale coastal fisheries in Ghana since 1998 show that bycatch and directed harvests of small cetaceans are commonplace and possibly increasing. The largest catches, by far, are the result of deployment of large meshed drift gillnets targeting tuna, sharks billfish, manta rays, and dolphins."[137]

128. The Panel relied on other sources of information as well. For example, it observed that:

> A report prepared by the Committee on Porpoise Mortality from Tuna Fishing established under auspices of the National Research Council thus observes that "[a]lthough purse seining for yellowfin tuna associated with dolphins in the ETP is the primary focus of this report, other methods, including additional purse-seining modes, are used for catching yellowfin. Some of these methods are known to kill dolphins, as are other techniques of fishing for other fish species (Northridge, 1984, 1991)." The report identifies longline, log and school fishing as the most important of the other fishing methods known to kill dolphins.[138]

129. The Panel also relied on a report published by the U.K. government:

> 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, pages 13, Ev 27. See also the information on European fisheries using pelagic trawl, Exhibit MEX-99, p. Ev 26.[139] (emphasis original).

130. With respect to the Western and Central Pacific Ocean (WCPO) region, Mexico and the United States disputed before the Panel the evidentiary significance of a report of the Secretariat of the Pacific Community in the framework of the Oceanic Fisheries Program, which was provided as evidence by Mexico. The report summarized data collected by observers during 33,319 sets over a period of 11 years. Although that number is a small proportion of the total

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136 Panel Report, fn. 738.

137 Panel Report, fn. 739.

138 Panel Report, para. 7.521, citing Exhibit MEX-2. The National Research Council is an arm of the U.S. National Academy of Sciences.

139 Panel Report, fn. 734, citing U.K. House of Commons, "Caught in the Net: By-catch of Dolphins and Porpoises Off the UK Coast," (Third Report of Session 2003–04), Exhibit 99, p. Ev-26.

sets during that period (there were approximately 100,000 purse seine sets in the WCPO in 2009 alone), Mexico noted that the figure represented about one third of the sets that would be made in one year.[140]

131. The report indicates that the total bycatch of marine mammals observed in purse seine sets was 1,315. Of those, 46 were reported killed, 36 were reported to have been released alive, and the fate of the remaining 1,233 was "unknown." It was also reported that the bycatch was mostly associated with sets being made on dolphins and whales. Mexico noted that without the special training, equipment, crew assistance to the dolphins, and strict procedures of the AIDCP, the marine mammals captured in these sets were at great risk of being killed or seriously injured. Because the number of sets observed was about one third of the total sets made in a year in the WCPO, Mexico argued that it was appropriate to multiply the bycatch figures by three (taking into account the ratio of marine mammals seen to have been killed to those seen to have escaped) to arrive at a projection of the marine mammal bycatch in the WCPO.[141] (These calculations do not account for the possibility that just a few vessels could generate thousands of additional dolphin deaths annually, as was the case for the above-referenced five purse seine vessels operating in Philippine waters setting nets on FADs.) The report also stated that there were observed interactions between marine mammals and the longline fishery in the WCPO.[142]

132. In response to a U.S. claim that the numbers of dolphin mortalities in the WCPO should be considered relatively small in relation to the ETP, the Panel carefully considered the U.S. argument and disagreed with it. It concluded:

> We are therefore not persuaded that these figures demonstrate, as the United States suggests, that there is no or only insignificant risk of dolphin mortality or injury arising from tuna fishing operations outside the ETP or call into question the other evidence referred to by Mexico and cited above. Rather, the observations reflected in this report confirm the existence of interaction outside the ETP between purse seine (and longline) tuna fisheries and marine mammals,

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140 Mexico's Second Written Submission, para. 104.

141 Mexico's Second Written Submission, paras. 98-105.

142 Secretariat of the Pacific Community, "The Western and Central Pacific Tuna Fishery: 2006 Overview and Status of Stocks" (2008), Exhibit MEX-98, p. 59. For an explanation of longline fishing, see General Accountability Office, "Improvements Are Needed in the Federal Process Used to Protect Marine Mammals from Commercial Fishing" (December 2008), Exhibit MEX-66, p. 53 ("Longline fishing is conducted by extending a central fishing line behind a fishing boat that ranges from 1 to more than 50 miles long. This central line is strung with smaller lines of baited hooks, which hang at spaced intervals. After leaving the line to soak for a time to attract fish, fishermen return to haul in their catch, such as tuna or swordfish."); ("Marine mammals are attracted to the baited hooks or the catch and become caught on the hooks or the catch on the hooks. They might also come into accidental contact with gear and become entangled in the fishing gear.").

> including dolphins, and the existence of some bycatch and mortality in this context in the WCPO.[143]

133. The Panel also extensively analyzed the U.S. claim that the ETP was "unique". It made the following factual finding:

> We first note that, even assuming that the United States' contention that certain environmental conditions in the ETP (such as the intensity of tuna-dolphin association) are unique, the evidence submitted to the Panel suggests that the *risks* faced by dolphin populations in the ETP are *not*. As discussed above, a study commissioned by NOAA entitled "*An evaluation of the most significant threats to cetaceans, the affected species and the geographic areas of high risk, and the recommended actions from various independent institutions*", contains multiple examples of numerous dolphins being killed annually in other fisheries as a result of tuna fishing activities and recommends further action being taken in this respect.[144] (emphasis original; footnotes omitted).

The Panel's footnote to this paragraph cited a number of different pages of the Bycatch Report ("E.g. Exhibit MEX-5 pp. 26, 27, 112, 131, AA-16, fn. 89, AA-40, AA-41".) For example, the following passage begins on page 131 of the Bycatch Report:

> For more than four decades scientists have speculated that dolphins are encircled and captured in tuna purse seine fisheries in the eastern tropical Atlantic Ocean, especially off the west coast of Africa. The levels of mortality, stock sizes, and even exact species involved are not known with certainty although the interactions most likely include several species of the genus Stenella, as well as common dolphins …. It has been suggested that dolphin mortality in this fishery could be up to 30,000 or more animals per year. Tuna/whale interactions are also known to occur, and baleen whales are considered to be good indicators of tuna schools. Independent observer data are needed to define the composition and extent of the bycatch. The Office of International Affairs should work through ICCAT to either request that ecosystem working group of the Standing Committee on Research and Statistics SCRS to investigate, undertake a pilot study to conduct the research, or request greater levels of observer coverage necessary to define the extent of this problem."[145]

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143 Panel Report, para. 7.529.

144 Panel Report, para. 7.552.

145 Bycatch Report, pp. 131-32, Exhibit MEX-5; Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, para. 107.

134. It is important to note that, before the Panel, the United States had argued that the risk to dolphins outside the ETP was not only less than in the ETP but extremely low.[146] On the basis of the foregoing and other evidence, the Panel concluded:

> Thus, based on the evidence, we are not persuaded that the US statement that "in the course of using other fishing methods for tuna outside the ETP, *a* dolphin may be killed or seriously injured", accurately represents the magnitude of the threat posed by tuna fishing to dolphins outside of the ETP.[147]

135. The Panel Report demonstrates that the Panel thoroughly considered the evidence put forward by the United States and evaluated it objectively.

c. The Panel Conducted An Objective Assessment Of The Evidence Regarding The Risks To Dolphins In The ETP

136. The United States also argues that the Panel disregarded evidence submitted by the United States regarding its claims that there are many thousands of "unobserved" dolphin mortalities and that the two particular "stocks" of dolphins are "depleted" because of dolphin set fishing. It attempts to support its argument by isolating particular references and phrases in the Panel Report, giving them interpretations clearly not intended by the Panel, and then making broad conclusions based upon the U.S. misinterpretations.

(i) The Panel Conducted An Objective Assessment Of Evidence Regarding The Status Of Recovery Of Dolphin Stocks

137. The United States objects to the Panel's conclusions about the evidence of the status of dolphin stocks in the ETP, and finds fault by criticizing a phrase taken out of context. The United States expresses concern about a clause in paragraph 7.557, arguing that the Panel acted inconsistently with Article 11 by stating "most of the studies submitted by the parties also suggest that the dolphin populations identified by the United States as depleted are recovering..."[148] The United States bases its complaint on a single footnote which cites two U.S. exhibits that stated that the two dolphin stock populations were not recovering at "expected" rates.[149] The actual full paragraph states as follows:

> We also note that the evidence suggests that observed dolphin mortality in the ETP, by contrast, is low relative to population size. Indeed, the United States

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146 See e.g. U.S. Second Written Submission, paras. 44 and 147; Opening Statement of the United States at the Second Substantive Meeting of the Panel, para. 15 ("to the extent there are any tuna-dolphin associations outside the ETP they are rare, ephemeral and irregular").

147 Panel Report, para. 7.555.

148 Panel Report, para. 7.557, cited in U.S. Appellant Submission, para. 112.

149 U.S. Appellant Submission, para. 112.

> acknowledges that the observed annual dolphin mortality in the ETP "is not believed to be significant from a population recovery perspective". In addition, most of the studies submitted by the parties also suggest that the dolphin populations identified by the United States as depleted are recovering, although they disagree as to whether they are growing at sufficiently high rates. Nevertheless, the most recent estimates show that "[o]ver the 8-year period from 1998-2006 all 3 of the officially depleted dolphin stocks (coastal and northeastern offshore spotted dolphins and eastern spinner dolphins) were estimated to be growing at rates considered to be near the 4-8 per cent maximum possible for dolphins". The United States, while suggesting the possibility that uncertainty in abundance estimates may mean that dolphin stocks are actually declining, notes that the most recent assessment model estimates median annual population growth rates of northeastern offshore spotted dolphins and eastern spinner dolphins of 1.7 per cent and 1.4 per cent per year, respectively. The United States also notes, however, that this estimate is 2.3 per cent and 2.6 per cent below the expected annual population growth rate, i.e. 4 per cent.[150] (footnote omitted).

As can be seen, this paragraph is an objective review of evidence presented by both parties. Viewing the phrase about which the United States complains in context, it is evident that the Panel stated that evidence submitted by the parties indicates that the dolphin stocks labeled by the United States as depleted are "increasing". The two U.S. exhibits the Panel cited in footnote 802 support that point. The United States argued that the populations are not increasing fast enough, and the Panel fully acknowledged that argument.

138. The United States also alleges that the Panel "neglected to consider" the evidence put forward by the United States in support of its argument that two dolphin stock populations are not growing at the expected rates because of unobserved harm resulting from dolphin sets.[151] However, the studies and evidence to which the United States refers are described and analyzed at length in paragraphs 7.495 to 7.499 of the Panel Report. The U.S. claim of "neglect" is really a complaint that the Panel did not agree with the United States. That is not an appropriate basis for a claim that the Panel failed to conduct an objective assessment of the facts under Article 11.

139. During the Panel proceedings, Mexico pointed out that the fundamental premise of the U.S. theory of unobserved mortalities is that the populations of two dolphin species that it has unilaterally determined as "depleted" are not growing at the rates that would be expected given the very low rates of observed mortalities. The United States repeatedly cited reports stating that the two stocks were growing at rates of 1.7% for northeastern offshore spotted dolphins, and 1.4% for eastern spinner dolphins. Those rates were based on estimates prepared by the Department of Commerce in 2002, to fulfill legal requirements imposed under the U.S. labelling measures.[152]

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150 Panel Report, para. 7.557.

151 U.S. Appellant Submission, para. 113.

152 Mexico's Second Written Submission, para. 46.

140. Mexico noted that the Department of Commerce had published a new report in 2008, entitled "Estimates of 2006 Dolphin Abundance In The Eastern Tropical Pacific, With Revised Estimates From 1986-2003", which was based on new research conducted in 2006, as well as a re-examination of the observation data collected in prior research voyages.[153] That report contained the following conclusion:

> Over the 8-year period from 1998-2006 when reported dolphin bycatch was at low levels relative to population sizes, all 3 of the officially depleted dolphin stocks (coastal and northeastern offshore spotted and eastern spinner dolphins) were estimated to be growing at rates considered to be near the 4-8% maximum possible for dolphins.[154]

This same report explained that it had made adjustments to data previously published (from the reports on which the United States relies for its claims of low growth) because (i) the observers consistently underestimated the number of dolphins they saw, (ii) some of the dolphins that were seen were accidentally left out of the data, and (iii) there were problems with the computer code used to run projections.[155] The United States nonetheless persists in relying on the prior, erroneous data in support of its arguments.

141. In fact, in 2009 the AIDCP's Scientific Advisory Board produced a report on adjustments to the individual dolphin stock mortality limits enforced by the AIDCP. This report relies on the 2008 U.S. abundance estimate (quoted above) for the two dolphin stocks at issue – the northeastern spotted dolphin and eastern spinner dolphin. Based on the fact that the populations of these stocks are significantly larger than previously believed, the report recommended increases in the dolphin mortality limits for those stocks.[156] In 2009, the AIDCP formally adopted the increases – from 648 to 793 for the northeastern spotted dolphin, and from 518 to 655 for the eastern spinner dolphin – by consensus, meaning that the United States agreed to the increases.[157]

142. Notwithstanding that, within the context of the AIDCP, the United States relied on the 2008 abundance estimate as the basis for an agreement to increase the limits on the number of dolphins from the two "depleted" stocks that could be killed, in the panel proceedings the United

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

154 Exhibit MEX-33, p. 12. See Mexico's Second Written Submission, paras. 50-61.

155 Mexico's Second Written Submission, para. 55.

156 IDCP Scientific Advisory Board, Updated Estimates Of Nmin And Stock Mortality Limits, Exhibit MEX-91.

157 AIDCP, 22nd Meeting of the Parties, Minutes (30 Oct. 2009), item 8 on p. 4, Appendix 8 on p. 10, Exhibit MEX-117.

States derided the report as meaningless. The Panel considered the arguments put forth by both parties and gave a careful explanation for rejecting the U.S. arguments.[158]

(ii) The Panel Conducted An Objective Assessment Of Evidence Indicating that the AIDCP Protects Dolphins

143. The evidence on dolphin populations discussed above is crucial in analyzing the U.S. criticisms of the Panel's factual findings on the "unobserved" effects on dolphins of fishing in the ETP. The United States argues that the Panel did not give sufficient weight to two reports from which it quotes in its Appellant Submission – a 2007 report in Exhibit US-21 and a 2005 report in Exhibit US-22.[159] In fact, however, the validity and reliability of these reports was a major topic of the panel proceedings.

144. For its part, Mexico pointed out that these reports started from the incorrect premise – based on earlier population estimates – that the two dolphin stock populations were growing at less than the expected rate, and then set out hypotheses for why that might be the case. For example, the abstract of the 2007 report states as follows:

> In 2002, using the definition of depletion stipulated in the USA Marine Mammal Protection Act, northeastern offshore spotted dolphins were almost certainly 'depleted'. There is, however, uncertainty in the degree to which the stock was depleted. Eastern spinner dolphins were most likely depleted in 2002, but there is a small probability that this was not the case. Uncertainty in the degree to which both stocks were depleted stems from uncertainties in maximum net productivity levels and carrying capacities. Based on abundance data from 1979 to 2000, both stocks were estimated to have had maximum growth rates of < 3 % yr…, lower than the accepted minimum default value for dolphin populations …. We fit models *that are intended to be indicative of hypotheses that explain why neither dolphin stock has recovered*. Our data and prior information provide equal

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158 The United States also complains about certain citations that the Panel made in relation to its finding that there are dolphin populations outside the ETP that may be threatened by depletion from fishing. U.S. Appellant Submission, para. 111. The United States does not explain why the errors it alleges would be relevant to the Panel's overall conclusions, especially in light of the Panel's finding that:

> "In these conditions, we are not persuaded that differences with respect to the depletion status of the stocks at issue would be sufficient to justify the absence of any requirement to certify that no dolphin has been killed or seriously injured, in situations where dolphins may in fact have been be killed or seriously injured."

Panel Report, para. 7.550. In other words, in light of the objectives and structure of the U.S. labelling measures, the Panel was not convinced that the depletion status of any particular dolphin stock was crucial to deciding whether consumers should be made aware that dolphins may have been killed or injured in the harvesting of tuna.

159 U.S. Appellant Report, para. 108.

> posterior support to hypotheses which attribute the lack of recovery to the fishery and changes in the ecosystem. We conclude that (1) the purse-seine fishery can impact dolphin stocks beyond the impacts of observed fishery mortality, (2) there is uncertainty about the degrees to which such cryptic impacts have population-level consequences, and (3) the existing dolphin-safe labeling standard is, from a conservation perspective, robust to this uncertainty.[160] (references omitted; emphasis added).

Mexico's point was that this report, and prior ones like it, were based on the estimates of population and population growth that the Department of Commerce's own 2008 abundance estimate said were wrong.[161] The fact that the two dolphin populations are now growing at what the United States itself states is the maximum possible rate – 4 to 8 percent – makes it illogical to suggest that there are massive unobserved mortalities.[162]

145. The Panel also took into account evidence that other factors could affect dolphin stocks in the ETP:

> We also note that it has been suggested that factors other than purse-seine fishery-related effects are hindering the growth rate of dolphins stocks in the ETP. Evidence submitted by the United States indicates that "it is unknown whether such low intrinsic growth rates are natural to these species or whether the low rates are due to other factors impeding the recovery of these stocks".[163]

The evidence cited by the Panel in this paragraph came from the same 2007 report that the United States claims that the Panel did not fully consider – Exhibit US-21 – as well as Exhibit US-19.

146. The United States also argues that the Panel acted inconsistently with Article 11 in suggesting that there was evidence that contradicted the U.S. claims that dolphin set fishing in the ETP was causing massive unobserved mortalities. The full paragraph about which the United States complains the most is set out below:

> The Panel also notes that other studies question these conclusions. We note that, for instance, it has been suggested that the cow-calf bond remained intact, even after repeated sets. It has also been suggested that there are no indications of compromised immune system, capture myopathy or adverse impacts due to heat

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160 Wade, Watters, Gerrodette and Reilly, "Depletion of spotted and spinner dolphins in the eastern tropical Pacific: modeling hypotheses for their lack of recovery" (August 7, 2007), Exhibit US-21, p. 1.

161 Mexico's Second Written Submission, paras. 43–60.

162 The illogic arises from the fact that, if there were a material level of unobserved mortalities, eliminating them would imply that the growth rates would be much higher than 8 percent per year, which is not considered possible.

163 Panel Report, para. 7.558.

> stress occurring as a result of dolphin chase and encirclement. One of the studies submitted by the United States, which in its opinion "represents the best information available at this time", concludes that "[w]hile the physiological and behavioral changes [resulting from the chase and encirclement of dolphins] may affect some individuals, they have not been shown to be common enough to have population-level consequences". The same study, citing a "summary of recent research" also concludes that "the purse-seine fishery has the capacity to affect dolphins beyond the direct mortality observed as bycatches".[164] (footnotes omitted).

Thus, the Panel fully acknowledged the U.S.-submitted evidence, while finding that it was not conclusive.

147. The United States argues that some of the evidence cited by the Panel is from reports that have dates earlier than some of the evidence submitted by the United States.[165] The United States does not explain, however, why it would be inconsistent with Article 11 not to always prefer a report published later in time over a report published earlier, regardless of the content of the reports. It also neglects to mention certain relevant facts, such as that Exhibit US-4, although published in 2007, does not contain any new field research and itself relies on reports published years earlier, and moreover as discussed above is based on the incorrect presumption that the two dolphin stocks at issue are not growing at their maximum rates.[166]

148. In summary, the Panel's Report indicates that it carefully weighed the evidence relating to this issue in reaching its factual conclusions.

2. The Panel Was Correct in Rejecting the U.S. Argument that the Labelling Measures Are "Calibrated" to Risks to Dolphins

149. The United States argues that the Panel erred based on the allegation that "the Panel consistently implies that the U.S. is required to fulfill its objectives to the same level inside and outside the ETP, regardless of the costs."[167] The United States supports its claim by stating as follows:

> The United States explained to the Panel that the measure reflects the fact that the lower likelihood that a dolphin may be killed or seriously injured in a fishery outside the ETP must be balanced against the additional burden that conditioning

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164 Panel Report, para. 7.500.

165 U.S. Appellant Submission, para. 109.

166 Exhibit US-4. The report itself states that it is not based on research on the dolphin stocks at issue. *Ibid*., p. 17 ("Although logistical constraints have limited collection of detailed physiological and behavioral data from spotted and spinner dolphins in the ETP, extensive data are available from other dolphin species ….").

167 U.S. Appellant Submission, para. 115.

> use of a dolphin safe label on a certification based on an independent observer's statement would impose. These costs would include the cost of carrying an observer on board all tuna fishing trips. The imposition of such a condition would have significant monetary and infrastructure implications for most nations whose vessels fish for tuna outside the ETP and export to the United States.[168]

In other words, the United States argues that it has not adopted procedures to implement the objectives of the U.S. labelling measures outside the ETP because they would impose an allegedly unnecessary "additional burden" on the U.S. tuna industry and the tuna industries of other countries.

150. The U.S. Appellant Submission does not clearly identify which are the paragraphs of the Panel Report about which the United States is complaining in this regard. Its objections seem to be focused on paragraphs 7.559 to 7.562.

151. As discussed below, (i) the Panel appropriately took into account the U.S. factual claims and (ii) the Panel's findings are further supported by the fact that the United States never conducted an evaluation of the risks to dolphins in other ocean regions or submitted evidence on the costs of having observers.

a. The Panel Appropriately Took Into Account the U.S. Factual Claims

152. In Mexico's view, the Panel appropriately evaluated the U.S. argument based on the actual language of the U.S. labelling measures and their objectives. In this regard, the Panel stated:

> We understand the United States' explanation to suggest that the US dolphin-safe provisions aim at establishing different requirements based on the likelihood that dolphins will be killed or seriously injured. Thus, the greater the risk, the stricter the certification requirements are for tuna products to be labelled dolphin-safe. We acknowledge that it may be legitimate to provide for a different degree of stringency or of tolerance to adverse impacts, depending on the extent of the threat. This is consistent, in our view, with the requirement to take into account the risks that nonfulfilment of the objective would create, as foreseen in Article 2.2. However, we are not persuaded that this is what the US dolphin-safe measures achieve, in respect of the different treatment of tuna caught within and outside of the ETP.
>
> We first observe that, as described by the United States itself, its measures seek to address a range of adverse effects of fishing techniques on dolphins. As established in paragraphs 7.483 to 7.486 above, this includes situations in which dolphins are killed or seriously injured. It is also clear, from the United States' own description of its objectives, that its intention to address adverse effects of

[168] U.S. Appellant Submission, para. 116.

> fishing techniques on dolphins in the form of observed or unobserved mortality is not subordinated to considerations relating to the conservation of depleted dolphin stocks. This is made clear by its clarification, in response to a question by the Panel, that addressing such impacts "might also be considered to seek to conserve dolphin populations". In these conditions, we are not persuaded that differences with respect to the depletion status of the stocks at issue would be sufficient to justify the absence of any requirement to certify that no dolphin has been killed or seriously injured, in situations where dolphins may in fact have been be killed or seriously injured.[169] (footnote omitted; emphasis original).

Evaluating the omissions of the U.S. labelling measures in relation to their objectives, as the Panel did here, is the correct legal approach.

153. The Panel fully took into account the U.S. claims that tuna and dolphins do not associate in other oceans as they do in the ETP, stating:

> … [A]ssuming for the sake of argument that the United States is correct in its assertion that tuna and dolphins do not associate in other oceans as they do in the ETP, the need for maintaining the requirement of absence of setting on dolphins would not be justified for fisheries other than the ETP on the basis of the risks for dolphins, since there would be no possibility of exploiting such interaction outside of the ETP on a commercial basis. To the extent that an incidental risk of death or injury remains, due to other fishing methods, such risk could only be monitored by imposing a different substantive requirement, i.e. that no dolphins were killed or seriously injured in the sets in which the tuna was caught. Yet, the measures impose, for fisheries other than the ETP, a requirement not to set on dolphins but no requirement that no dolphin have been killed or seriously injured, at least for access to the official label. In light of the above, we are not persuaded that the requirements applicable in different fisheries under the US dolphin safe measures are "calibrated", as the United States suggests, to the likelihood of dolphins being killed or seriously injured.[170]

It was appropriate for the Panel to identify and rely on the inconsistency it identified in the U.S. labelling measures as part of its analysis.

154. Finally, although not mentioned in the U.S. Appellant Submission, the Panel specifically addressed the U.S. argument that it was entitled to consider costs in light of their benefits, that the risks to dolphins outside the ETP were relatively low, and that it was not appropriate to require observer coverage outside the ETP. The Panel made the following findings:

> We note that this explanation is not consistent with the United States' own explanation that Subsection 1385(d)(3)(C)(i) imposes a requirement that no

169 Panel Report, paras. 7.549-7.550.

170 Panel Report, para. 7.561.

> dolphin be killed or seriously injured if an alternative label is used, as discussed in the preceding paragraphs. We understand the United States to suggest that the requirement that no dolphin has been killed or seriously injured is in fact not enforced through a certification requirement with respect to the alternative label, while a statement by an observer is required with respect to the same substantive requirement, for the use of the official label in the ETP. We fail to see, however, how the cost of demonstrating compliance with the same requirement (i.e. that no dolphin was killed or seriously injured) would justify that no such requirement be imposed with respect to the use of an official label, while it would be imposed for the same tuna caught in the same conditions in the same fisheries, in the case of use of an alternative label. It is also not clear to us what the imposition of this additional requirement means in practice in respect of the alternative label, if it is assumed that it cannot be verified and that this is a reason not to impose it for the use of the official label.
>
> In light of the above, we find that, to the extent that the US dolphin-safe measures grant access to the label to certain tuna products that may have been caught in a manner that adversely affects dolphins (i.e. tuna products containing tuna caught outside the ETP by methods other than setting on dolphins, regardless of whether dolphins may have been killed on the trip), they do not allow the consumer to accurately distinguish between tuna caught in a manner that adversely affects dolphins and other tuna. In addition, to the extent that, depending on whether such tuna is caught in the ETP or outside the ETP, the measures require or do not require a certification that no dolphin has been killed or seriously injured, we find that this also does not allow the consumer to accurately identify tuna caught in conditions that are similarly harmful to dolphins.[171]

The Panel correctly identified the inconsistencies between the manner in which the United States described its own measures and the objectives of those measures. There was no error in the Panel's approach to this issue.

b. The United States Has Never Conducted An Analysis of Risks or Submitted the Costs of Compliance for Tuna Fishing Operations Outside the ETP

155. As noted above, the United States argues that it has not adopted procedures to implement the objectives of the U.S. labelling measures because they would impose an allegedly unnecessary "additional burden" of costs on the U.S. tuna industry and the tuna industries of other countries.

156. However, it is undisputed that, in the more than twenty years since the statute was adopted, the Department of Commerce has never even conducted an inquiry into whether it should consider designating any ocean region as "causing a regular and significant mortality or

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171 Panel Report, paras. 7.541-7.542.

serious injury to dolphins" or has a "regular and significant association between marine mammals and tuna."[172] Accordingly, the Department of Commerce has never had the occasion to evaluate the risks to dolphins from tuna fishing in other ocean regions. The only report it has published on risks to dolphins in other ocean regions is the Bycatch Report it commissioned (submitted by both the United States and Mexico) on which the Panel extensively relied.[173]

157. In addition, the United States did not submit any information to the Panel about the costs that would be imposed on the tuna industry to carry independent observers and prevent deaths to dolphins – not even an estimate. Nor did it submit evidence showing that the Department of Commerce had conducted an investigation of those costs and relied on it in deciding not to consider designating other ocean regions under the statute. Nor has the United States submitted evidence showing it conducted a cost-benefit analysis of the costs imposed on the Mexican fleet.

158. In the absence of evidence that the Department of Commerce has actually considered relative risks of harm to dolphins or potential costs in deciding not to require non-ETP tuna to have been caught without harm to dolphins, it would not have been appropriate for the Panel to rely on those factors as a justification for the failure of the U.S. measures to fulfil their objectives outside the ETP.

3. The Panel Correctly Found That Allowing Use of the AIDCP Label is a Less-Trade Restrictive Alternative

159. The United States claims that the Panel erred in finding that Mexico's alternative measure – allowing use of the AIDCP label in addition to the unilateral U.S. label – would fulfill the U.S. objectives. The United States criticizes the Panel's findings that the U.S. label currently does not provide certainty to consumers and that the extent to which consumers would be misled would not be greater if the AIDCP label were allowed. The United States also complains about the Panel's finding that allowing compliance with the AIDCP labelling requirements to be advertised on the U.S. market would discourage dolphin mortality to the same extent as the existing U.S. labelling measures.[174]

160. To address these U.S. complaints, it is necessary to review the complete context of the Panel's findings on these issues, including their relationship to the two U.S. objectives. As found by the Panel, and not directly contested by the United States on appeal, those objectives are:

- 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

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172 Panel Report, para. 2.23.

173 Bycatch Report, Exhibit MEX-5.

174 U.S. Appellant Submission, para. 120.

– 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.[175]

a. The Consumer Information Objective

161. With regard to the first objective of the U.S. measures, the Panel highlighted that the title of the statute codifying the U.S. labelling provisions is "Dolphin Protection Consumer Information Act". The Panel noted that this title indicates that the "legislation is intended to protect consumers from being deceived by the information that is provided to them."[176] The Panel also observed that one of the "findings" of the U.S. Congress in enacting the legislation is that "consumers would like to know if tuna they purchase is falsely labelled as to the effect of the harvesting of the tuna on dolphins.[177] With reference to this Congressional finding, the Panel stated:

> The third finding clearly refers to the intention of protecting consumers against deceitful information. The legislator's goal seems to be to create the necessary controls to guarantee that the information displayed by the labels used on tuna products is truthful about the effects on dolphins of the fishing techniques applied to catch the tuna contained in those products. *We note that this finding does not make any express reference to any region or fishery in particular, nor does it refer to any specific fishing technique.*[178] (emphasis added).

Accordingly, the objective of the U.S. measures is to provide accurate information to consumers, regardless of the source of the tuna in the tuna products or the fishing method used. It is not limited to the ETP, nor is it limited to the dolphin set fishing method.

162. The Panel concluded that it was, in fact, misleading *not* to allow consumers to be aware that tuna was caught in compliance with the AIDCP. It stated:

> We also note, however, that, to the extent that the measures make no distinction between setting on dolphins in general and setting on dolphins under the controlled conditions developed in the context of the AIDCP, they would not allow the US consumer to be informed of any of the measures that have been taken in the context of this Programme. We note in this respect that the United States itself acknowledges that the implementation of the AIDCP has made an important contribution to the reduction in numbers of observed dolphin killings in the ETP. Moreover, the Panel recalls that the United States has acknowledged that "[s]ince the AIDCP's conclusion in 1998 and entry into force in 1999, all

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175 Panel Report, paras. 7.401 and 7.425.

176 Panel Report, para. 7.409.

177 Panel Report, para. 7.410.

178 Panel Report, para. 7.411.

> parties including Mexico have generally been abiding by their obligations under the AIDCP".[179] (footnote omitted).
>
> The Panel ultimately found as follows:
>
> [W]e are not persuaded that allowing consumers to be fully informed about the efforts made in the context of the AIDCP for the protection of dolphins in fishing for tuna and the monitoring of dolphin stocks in the ETP would be more misleading than allowing a dolphin-safe label to be applied to tuna caught outside the ETP in the absence of any monitoring of observed or unobserved killing or of dolphin populations.[180]

163. The United States disputes the Panel's conclusions, arguing that consumers would receive no additional information because the U.S. labelling measures already require compliance with the AIDCP if the tuna was caught in the ETP "along with ensuring the tuna was not caught by setting on dolphins."[181] This argument is specious. Mexican tuna products made from tuna harvested in accordance with the AIDCP are blocked from having the dolphin-safe label. The U.S. labelling measures, in intent and application, deceive consumers into believing that Mexican tuna products contain tuna harvested without protections for dolphins.

164. The United States also argues that it would be confusing to consumers to see both labels, expressing skepticism that consumers could understand the difference,[182] although it acknowledges that "a truly informed consumer would be able to choose between the level of fulfillment afforded by the AIDCP labeling scheme and the U.S. measures vis a vis discouraging fishing techniques that adversely affect dolphins, in particular the setting on dolphins with purse seine nets."[183]

165. The Panel did not share the U.S. skepticism about consumers. It stated:

> Moreover, the Panel notes that Mexico goes beyond simply suggesting that the use of the AIDCP dolphin-safe logo be allowed in the US market. Mexico submits that the coexistence of the US and the AIDCP dolphin-safe labels, would permit US consumers to be "fully informed of *all aspects* of dolphin-safe fishing methods" (emphasis added) so that "they [could] choose accordingly when purchasing tuna products from US retailers". The Panel understands Mexico's suggestion as advocating the inclusion of more information on the dolphin-safe labels allowed in the US market on the actual and potential fishery-related adverse effects on dolphins. The Panel considers that such addition would contribute to

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179 Panel Report, para. 7.506.

180 Panel Report, para. 7.574.

181 U.S. Appellant Submission, para. 123.

182 U.S. Appellant Submission, para. 124.

183 U.S. Appellant Submission, para. 125.

> informing consumers about the precise dolphin-safe characteristics of the various techniques used to harvest tuna. In our view, this would enhance the ability of the dolphin-safe labels to remedy market failures arising from asymmetries of information between tuna producers, retailers and final consumers in the US market. Well-informed consumers would be in a better position to use their purchasing power to influence the way tuna fisheries and canners operate.
>
> In such conditions, accepting the use of the AIDCP dolphin-safe label as a tool to provide more precise information to US consumers would not imply that the United States should forego its own dolphin-safe label. To the extent that the alternative suggested by Mexico implies conveying more complete information to consumers, such alternative may have the potential to reduce the possibilities of consumer deception *more* than the current US dolphin-safe label.[184] (footnotes omitted).

166. The evidence before the Panel showed that the United States makes little effort to provide consumers with accurate information. It is uncontested that the only information published by the Department of Commerce for consumers on the meaning of the dolphin-safe label is the website at www.dolphinsafe.gov. Mexico demonstrated that the website only provides information on what the dolphin-safe label means for tuna from the ETP, a fact which is also uncontested. The website says nothing about the meaning of the label for other ocean regions, and therefore gives the false impression that tuna caught in those other regions has been certified as not causing death or serious injury to dolphins.

167. Another relevant uncontested fact before the Panel was that from January 1 to January 23, 2003, the Department of Commerce implemented a change in the U.S. definition of dolphin-safe, so that tuna products caught in accordance with the AIDCP standard were able to be labelled dolphin safe when sold in the U.S. market. The change in the U.S. dolphin safe standard took place upon the issuance by the Department of Commerce of its final determination, pursuant to a procedure required by the U.S. legislation, that dolphin sets were not having a having a significant adverse impact on any depleted dolphin stock in the ETP.[185] The court litigation resulted in the issuance of a stay that required the change to be withdrawn.[186] Nonetheless, the U.S. legislation and executive action in implementing it demonstrate that the United States had the ability to alter the definition, and that the United States, prior to this dispute, agreed that the AIDCP standard met the expectations of producers, retailers and consumers.

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184 Panel Report, paras. 7.575-7.576.

185 Mexico's Responses to the Panel's Questions from the First Substantive Meeting, para. 101.

186 68 Fed. Reg. 4449 (January 29, 2003), Exhibit MEX-82.

b. The Objective to Discourage Fishing Methods That Adversely Affect Dolphins

168. The United States asserts that allowing the AIDCP label would not address the risks to dolphins outside the ETP.[187] In making this argument, the United States simply ignores the Panel's careful reasoning.

169. In analyzing the second objective of the U.S. measures – to discourage fishing methods that adversely affect dolphins – the Panel observed that the achievement of this second objective was dependent on the successful achievement of the first objective relating to providing accurate information to consumers.[188] Referring to its finding that the first objective was not fulfilled by the U.S. measures, the Panel noted that "to the extent that the measures fail to allow the consumer to accurately distinguish between tuna caught in conditions harmful to dolphins and other tuna, the related fishing techniques cannot be discouraged or encouraged in a manner that accurately reflects this distinction."[189]

170. In fact, the Panel found that the U.S. measures may actually be *harmful* to dolphin populations worldwide because they have the effect of encouraging fleets to fish outside the tightly regulated ETP and instead to fish in other ocean regions where dolphins are unprotected. The Panel explained:

> Moreover, the Panel notes that by granting access to the dolphin-safe label to tuna caught by using fishing techniques that adversely affect dolphins outside the ETP, while at the same time denying it to tuna caught in the controlled conditions of the AIDCP in the ETP, the US dolphin-safe provisions may not only fail to discourage such harmful fishing techniques, but may actually have the *opposite* effect. Indeed, it seems that under the current implementation of the US measures, virtually *all* tuna caught outside the ETP by using a method other than setting on dolphins may be labelled dolphin-safe. Fisheries using these other techniques, knowing that their tuna is granted virtually unrestricted access to the dolphin-safe label, have no incentive to adapt their fishing gear and practices to address dolphin protection concerns. As we established earlier, the application of some of these other techniques may result in the death of a considerable number of dolphins and other marine mammals around the world. This means that, in practice, fleets wishing to have access to the US market could be discouraged from setting on dolphins in the ETP under the regulated conditions of the AIDCP and encouraged to relocate instead to other fisheries in which dolphins populations are less closely monitored and where the incidental killing of dolphins is not monitored.[190] (emphasis original; footnotes omitted)

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187 U.S. Appellant Submission, para. 121.

188 Panel Report, paras. 7.426-7.427

189 Panel Report, paras. 7.591-7.592.

190 Panel Report, para. 7.598.

Thus, the Panel found that the U.S. measures are counter-productive and contrary to the stated objective of encouraging protection of dolphins outside the ETP.

171. In analyzing Mexico's proposed alternative less-restrictive measure – allowing use of the AIDCP standard in addition to the unilateral U.S. standard – the Panel observed that the AIDCP has played a decisive role in the reduction of dolphin mortalities in the ETP. The Panel cited to the fact that annual estimates of dolphin mortality in the ETP have been reduced from 132,169 in 1986 to 1,169 in 2008.[191] The Panel also emphasized that under the AIDCP, 100 percent of fishing trips are monitored by an independent observer; an International Review Panel monitors compliance with AIDCP requirements; and each member country has established its own tracking and verification programme, implemented by a designated national authority, which includes periodic audits and spot checks for caught, landed and proceeded fish and tuna products.[192]

172. The Panel's finding that the U.S. measures may actually be harmful to dolphins was the key factor in its decision that allowing use of the AIDCP standard in addition to the unilateral U.S. dolphin-safe label would not result in a lower level of protection. In its analysis of this issue, the Panel stated that, with respect to the U.S. measures:

> To the extent they may encourage relocation from the ETP to other areas where such adverse effects arise but where access to the label is not subjected to certification that no dolphin was killed or seriously injured in the course of the trip, the US measures as currently applied … may even have the effect of encouraging the development of such fishing techniques without seeking to monitor and reduce the level of incidental killings and other harmful effects on dolphins.[193]

173. These findings support the Panel's conclusion that:

> In these conditions, we are not persuaded that allowing compliance with the AIDCP requirements to be advertised in addition to the existing US standard would lead to a lower level of protection than is currently provided under the US dolphin-safe provisions. As established above, in some cases, the risks arising from setting on dolphins under controlled circumstances may be lower than the

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191 Panel Report, para. 7.609.

192 Panel Report, para. 7.611. The Panel also stated that a country's fleet would be banned from further fishing if the fleet exceeded its allocated DML, but in fact the AIDCP rules are more precise; each individual vessel is assigned its own DML, and will be banned from further fishing if it exceeds its individual DML. If the aggregated DML for a particular dolphin stock is exceeded, all fishing involving that stock by all countries' fleets must be terminated for the year. Exhibit MEX-11, Annexes 3 and 4.

193 Panel Report, para. 7.614.

> risks arising from other fishing techniques applied without controlling for dolphin mortality or other adverse impacts.[194]

174. The Panel's conclusion is also supported by the uncontroverted fact that the great achievements in protecting dolphins in the ETP have been accomplished through the multilateral AIDCP, and that the U.S. labelling provisions have played no role in that success.

175. The United States also argues that the AIDCP "contemplates" that even when its procedures are followed, some dolphins will be killed, and that for this reason any allowance for dolphin sets would be adverse to dolphins and therefore not fulfill the U.S. objective.[195] In making this argument, the United States appears to suggest that its goal is to eliminate the possibility of even a single dolphin mortality in all fishing operations. However, it has been established that dolphin mortalities occur in relation to all the major commercial tuna fishing methods, including FAD sets, unassociated sets, gillnet fishing, and longline fishing. The United States itself "contemplates" that dolphins and other marine mammals will be killed in fishing operations within U.S. jurisdictional waters, and authorizes such incidental killing pursuant to the Marine Mammal Protection Act.[196] Incidental mortalities of marine mammals are evaluated based on their relationship to marine mammal populations. In the ETP, the incidental mortalities to dolphins in relation to their populations is lower than the rate of incidental mortalities to marine mammals permitted by the United States in its domestic fisheries.[197] The absolute elimination of all risk is impossible in the context of commercial fishing operations, and is not an approach followed in the municipal law of the United States or other WTO Members, to the

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194 Panel Report, para. 7.615.

195 U.S. Appellant Submission, para. 122,

196 16 United States Code § 1387, Exhibit MEX-37.

197 The United States measures the degree of risk to marine mammals in its domestic waters by evaluating mortalities in relation to "potential biological removal" level. Panel Report, para. 7.510. Mexico explained that the United States applies a standard for sustainability to marine mammal stocks to its own fisheries that tolerates levels of mortalities, as a percentage of PBR, equivalent to or greater than those that occur in the ETP. *Ibid*. The United States disputed the relevance of any data about its domestic fisheries on the grounds that they do not all involve tuna fishing and that a different U.S. law applied. *Ibid*. However, the Department of Commerce calculated PBRs for dolphins in the ETP in its 2002 report (Exhibit US-19). In a letter to the Department of Commerce commenting on that report, the IATTC pointed out that "… even if the unobserved mortality increased the mortality by almost 300% relative to the observed mortality, the total mortality in the fishery would still be below the PBR for these stocks. In other words, the level would be acceptable in the risk-averse approach that the NMFS [Department of Commerce National Marine Fisheries Service] uses in every other case in which there is an interaction between a commercial fishery and marine mammal populations." Letter from IATTC to Secretary of Commerce enclosing Scientific Report On The Status Of Dolphin Stocks In The Eastern Pacific Ocean (October 30, 2002), Scientific Report, p. 2, Exhibit MEX-67; Mexico's Responses to the Panel's Questions from the First Substantive Meeting, paras. 29-31.

knowledge of Mexico. The application of a different risk tolerance to the ETP than to any other region is itself both discriminatory and arbitrary.[198]

176. The subheading title to this U.S. argument – "The AIDCP Labeling Scheme Does Not Discourage Setting On Dolphins" – reflects an attempt by the United States to change the second objective from "ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins" to "ensuring that the US market is not used to encourage fishing fleets to catch tuna by setting on dolphins". The United States tried to change the characterization of the second objective in this manner during the panel proceedings, and the Panel rejected the attempt, finding that the objective of the measure was to encourage protection of dolphins generally.[199] The United States did not appeal that determination, and therefore has accepted that the second objective is directed at all fishing methods that adversely affect dolphins, and not just the dolphin set method. Accordingly, the U.S. attempt to suggest that the objective should be adjusted to be narrower, and thereby to conform to the discriminatory and arbitrary manner in which the measures are implemented, should be rejected. It is not a legal issue raised in this appeal.

4. The U.S. Measures Are An Unnecessary Obstacle to International Trade Because They Are Applied In A Manner That Constitutes A Means of Arbitrary and Unjustifiable Discrimination

177. For the above reasons, there is no merit in United States' appeal of the Panel's reasoning and findings regarding Article 2.2.

178. If the Appellate Body disagrees and finds that the arguments raised by the United States do have merit, there is however an alternative basis for finding that the U.S. measures are inconsistent with Article 2.2.

179. Article 2.2 contains a necessity test which establishes the WTO consistency of a technical regulation based on whether it is necessary to fulfill a legitimate objective. Necessity tests exist in other WTO provisions and are a means of reflecting the balance between the freedom of Members to set and achieve their own regulatory objectives through measures of their own choosing and the goal of discouraging Members from adopting measures that unduly restrict trade.[200] An important part of this balance in Article 2.2 is the requirement set out in the preamble to avoid applying technical regulations in a manner which would constitute a means of

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198 A claim of a zero-risk level of protection should be subject to close scrutiny, especially with respect to subjects for which precise data are not available, such as in this case. Members otherwise could easily circumvent the obligations of Article 2.2.

199 Panel Report, paras. 7.421, 7.424, and 7.425.

200 Working Party on Domestic Regulation, *Necessity Tests in the WTO*, Note by the Secretariat, S/WPDR/W/27/Add.1, 18 January 2011, p.1.

arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

180. In this regard, the United States argues that Article 2.2 provides deference to WTO Members in the pursuit of their policy objectives and must be read in conjunction with the sixth recital in the preamble of the *TBT Agreement*.[201] That recital reads as follows:

> Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

181. In Mexico's view the U.S. labelling measures are "applied in a manner which … constitute[s] a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade".[202] As a result, either the measures are not "legitimate" (as addressed in Mexico's Other Appellant submission[203]) or they are an unnecessary obstacle to trade within the meaning of Article 2.2.

182. Detailed submissions are presented in Mexico's Other Appellant Submission. In particular, it is noted in that submission that *U.S – Shrimp* involved a closely similar factual situation, in that the United States was seeking to coerce other countries into adopting the U.S. approach to conservation of turtles. The Appellate Body commented:

> Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.[204]

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201 U.S. Appellant Submission, para. 115 ("The preamble to the TBT Agreement provides that Members should not be prevented from taking measures *inter alia* to protect human, animal or plant life or health or the environment or to prevent deceptive practices *at the levels* they consider appropriate.") (emphasis original).

202 See Other Appellant Submission of Mexico, paras. 114-134.

203 See Other Appellant Submission of Mexico, paras. 261-278.

204 Appellate Body Report, *U.S. – Shrimp*, para. 161.

Similarly, in this case the U.S. measures operate to exclude Mexican tuna products from the major U.S. marketing channels because Mexico has not adopted the policy on fishing methods that the United States has unilaterally mandated.

183. The Appellate Body further found in *U.S.-Shrimp* that:

> the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.[205]

Again similarly, in this case a rigid and unbending standard has been created by the U.S. labelling provisions. There is no possibility to consider the special circumstances of the ocean region in which the Mexican fleet operates (including the devastating effects on the ecosystem that would result from shifting to use of FADs), the extensive measures to protect dolphins that have been taken by Mexico and the Mexican fishing fleet, or other changing conditions. Significantly, even if the United States were to agree that the two dolphin stocks it has designated as depleted were fully recovered, the U.S. statute would not allow the U.S. dolphin-safe standard to be amended to conform to the AIDCP.

184. The U.S. labelling measures are, on their face, discriminatory. Imports of tuna products produced in the United States and other countries from tuna harvested outside the ETP – in other words, virtually all of the tuna products currently sold in the U.S. market – can be labelled as dolphin-safe under relaxed compliance standards even though there are no protections for dolphins outside the ETP, and no reporting obligation when dolphins have been killed or injured in the capture of the tuna. Meanwhile, tuna products from Mexico – where producers have taken extensive and demonstratively highly successful measures to protect dolphins – are prohibited from using the label. As stated by the Appellate Body, "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[206]

185. In *U.S. – Shrimp*, the Appellate Body held that the failure of the United States to engage the complaining Members in negotiations to find a multilateral solution for the protection of sea turtles was a key factor leading to the conclusion that the U.S. measure was an "unjustifiable discrimination". It stated:

> Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United

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205 Appellate Body Report, *U.S. – Shrimp*, para. 163.

206 Appellate Body Report, *US – Shrimp*, para. 165.

> States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.[207]

In the current case, the situation is even more aggravated because the United States entered into the AIDCP, which has been highly successful in protecting dolphins, and then disregarded the standard established by the AIDCP in applying and maintaining its own unilateral measure on labelling to discourage consumers from purchasing Mexican tuna products.

186. In summary, the purpose of the U.S. labelling provisions is to unilaterally and extraterritorially impose U.S. fishing method requirements as a condition for access to the principal distribution channels in the U.S. tuna products market, and in that manner to pressure foreign tuna fleets to change their fishing methods. The U.S. labeling provisions are maintained for the specific purpose of discouraging consumers from purchasing Mexican tuna products, even when those products are accurately labelled dolphin-safe in compliance with the AIDCP standard and the tuna products themselves are not embargoed under U.S. law. In this way, the United States has undermined its own commitment in the AIDCP to allow imports of tuna products from countries and fishers that protect dolphins. Using the labelling requirement as a discriminatory trade barrier in this manner should not be viewed as permitted by Article 2.2; rather, it represents an unjustifiable discrimination and therefore is an unnecessary obstacle to international trade.

187. Finally, the U.S. labeling provisions are an attempt to continue the trade-restrictive effect of the former GATT-inconsistent embargo on Mexico tuna products through a measure that *de facto* discriminates and restricts trade. The U.S. measures are carefully designed to capitalize on the special circumstances of the U.S. market in such a way as to keep Mexican tuna products out of the principal distribution channels so long as the Mexican fleet continues its legitimate practice of setting on dolphins under the AIDCP. Although the U.S. dolphin-safe label reads "dolphin safe", as found by the Panel the label does not certify that no dolphins were killed or injured during the tuna fishing process. From the perspective of Mexican tuna products, it simply indicates that no dolphins were set upon during tuna fishing. Thus, on their face, the U.S. measures have the same objective as the former embargo and are simply a continuation of that embargo under another guise.

188. For the foregoing reasons, the Panel's decision that the U.S. labeling provisions are an unnecessary obstacle to trade is well supported.

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[207] Appellate Body Report, *US – Shrimp*, para. 166. The Appellate Body did not reach the issue of whether the measure was a "disguised restriction on trade" because it had already found that it was an "unjustifiable discrimination."

5. The U.S. Article 11 Claim in Relation to the Existence of a Less-Trade Restrictive Alternative Measure is Without Merit

189. The U.S. claims that, when reaching its conclusion that there exists a less-trade restrictive alternative measure, the Panel failed to consider evidence before it and hence it failed to conduct an objective assessment of the facts as required by Article 11 of the DSU.

190. The United States makes several complaints in this regard. First, the United States claims that the Panel failed to consider evidence produced by the United States showing that retailers will sell and consumers will purchase tuna that comport with the U.S. dolphin safe definition, regardless of whether the tuna carries a dolphin safe label.[208] Second, the United States claims that the Panel misinterprets the "significance of evidence that U.S. consumers prefer tuna that is dolphin safe", and characterizes Mexico's evidence as suggesting that "consumers prefer tuna that is in fact dolphin safe, as currently defined by the U.S. measure, not merely tuna labeled dolphin safe".[209] Third, the United States contends that the Panel erred in evaluating the evidence in connection with its finding that consumers cannot distinguish between tuna caught in a manner that adversely affects dolphins and other tuna. Particularly, the U.S. alleges that the Panel failed to consider evidence that "at the time the U.S. provisions were adopted, there was strong consumer sentiment that setting on dolphins to catch tuna was unacceptable."[210]

191. Contrary to the U.S. assertion, the panel did not fail to make an objective assessment of the matter in accordance with *DSU* Article 11 for the reasons mentioned below.

192. The panel recognized that "US consumers have certain preferences with respect to tuna products, based on their dolphin safe status".[211] The United States claims that the Panel omitted the "ample evidence" that retailers will sell and consumers will purchase tuna that comport with the U.S. definition. In fact, most of the evidence related this issue was provided by Mexico.

193. For example, the evidence in Exhibit MEX-58 was assessed by the Panel in its analysis of Article 2.1 of the *TBT Agreement*. Contrary to Mexico's position, the Panel found that the statements in MEX-58 "…may therefore be understood to mean that the retailers at issue would be prepared offer the products for sale if they met the conditions for labelling under the existing US measures…".[212] This does not mean that the Panel fail to consider the evidence on this issue.

194. The Panel weights the evidence by differentiating the context of each provision under the *TBT Agreement*. In relation to panel analysis on whether an alternative measure proposed by Mexico provides a reasonable available less-trade restrictive means of achieving the same level of protection, the Panel based its conclusion on the consumers' understanding of the term

208 U.S. Appellant Submission, para. 128.

209 U.S. Appellant Submission, para. 129.

210 U.S. Appellant Submission, para. 130.

211 Panel Report, para. 7.249.

212 Panel Report, para. 7.365.

"dolphin safe". In this case, the Panel concluded correctly that "it is not clear that US consumers understand the term 'dolphin-safe' to mean the same as what the US dolphin-safe provisions define it to mean". Also the Panel found that the U.S. measures "… do not allow the consumer to be informed in any manner with respect to measures taken in the context of the AIDCP, to minimize the incidental taking and killing of dolphins when setting on them in the ETP."[213]

195. Contrary to the U.S. assertion, the Panel made an objective assessment on the evidence before it and provided sound and correct findings on this issue in terms of Article 11.

196. Finally, regarding to the U.S. argument that the Panel failed to examine evidence when finding that the poll was the only piece of evidence presented with regard to the U.S. consumers' understanding of dolphin-safe labeling, the Panel merely exercised its discretion as the trier of facts to decide which evidence it chooses to utilize in making findings. The U.S. argues that the poll was not the only relevant evidence as it submits that evidence was put forward expressing that at the time the U.S. provisions were adopted, there was strong consumer sentiment that setting on dolphins to catch tuna was unacceptable and that something should be done to ensure that consumers had a choice not to purchase a product that contained tuna caught in association with dolphins. This evidence refers to consumers' perception from more than 20 years ago. Circumstances from that time ago are substantially different. Therefore, such evidence seems irrelevant to the perception of consumers today. The Panel decided not to utilize this evidence to reach its finding and acted under its discretion granted by Article 11 of the *DSU*.

C. The AIDCP Standard Is A Relevant International Standard Within The Meaning Of Article 2.4 Of The *TBT Agreement*

197. The United States complains that the Panel erred in finding that the AIDCP standard is a relevant international standard within the meaning of Article 2.4. The United States claims that the Panel's finding "was in error because the AIDCP is not an international standardizing body capable of preparing and adopting international standards". Specifically, the United States argues that the Panel erred in finding that the AIDCP is (1) "international"; (2) is recognized as engaging in standardizing activities; and (3) is a body". The United States does not appeal the Panel's findings that the AIDCP standard is a "standard" and that it is "relevant."

198. Mexico stresses that the United States is a founding member of the AIDCP. It fully participated in the creation and establishment of the AIDCP's dolphin-safe standard. Indeed, the very purpose of that standard was to facilitate access of tuna products into the U.S. market. Mexico also notes that the United States enacted the International Dolphin Conservation Program Act in 1997 in order to implement its obligations under the AIDCP, including changing the U.S. dolphin safe definition to conform to the AIDCP standard, and in fact the United States did so in January 2003, before a court required that it go back to its old standard.[214]

199. Each of the complaints of the United States is addressed below.

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213 Panel Report, para. 7.544.

214 Panel Report, para. 7.686.

1. The AIDCP Definition of "Dolphin Safe" is a Standard

200. The Panel started by analyzing whether the "dolphin safe" definitions and labeling provisions contained in the AIDCP resolutions identified by Mexico constitute a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*. For that purpose the Panel first clarified the notion of "international standard"".[215]

201. The international standard identified by Mexico as the alternative to the unilateral U.S. technical regulation is the definition of "dolphin safe" established by the AIDCP's "Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification."[216] That document, in turn, incorporates by reference the definition of "dolphin safe" from the AIDCP's "Resolution To Adopt The Modified System For Tracking And Verification Of Tuna", which provides as follows:

> a. *Dolphin safe* tuna is tuna captured in sets in which there is no mortality or serious injury of dolphins;
>
> b. *Non-dolphin safe* tuna is tuna captured in sets in which mortality or serious injury of dolphins occurs ....[217]

202. Accordingly, the AIDCP's definitions of "dolphin safe" and "non-dolphin safe" apply in determining whether tuna is "dolphin safe" under the AIDCP. Mexico expressly defined "AIDCP standard" to mean this definition.[218]

203. The United States did not appeal the Panel's conclusion that the dolphin safe definition established by the AIDCP resolutions mentioned above constitute an "standard" for the purposes of Article 2.4 of the *TBT Agreement*. In this regard, the Panel concluded that: "…the dolphin safe definition in the AIDCP tuna tracking and verification resolution cross-referenced in the AIDCP dolphin safe certification resolution provides, for common and repeated use, rules, guidelines or characteristics for tuna fishing and tuna products, and thus constitutes a 'standard' for the purposes of Article 2.4 of the *TBT Agreement*."[219]

2. The AIDCP Standard Was Approved By An International Standards Organization

204. The United States claims that the Panel's conclusion that the AIDCP is an international standardizing/standards organization is flawed because: (1) the AIDCP is not "international"

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215 Panel Report, para. 7.659.

216 Exhibit MEX-56.

217 Exhibit MEX-55. See also Panel Report, para. 7.630.

218 Mexico's First Written Submission, fn. 149.

219 Panel Report, para. 7.677.

within the meaning of the *TBT Agreement* because its membership was not and is not open to all WTO Members; (2) the AIDCP does not have recognized activities in standardization; and (3) the parties to the AIDCP are parties to an international agreement, not a body or organization. These arguments were properly addressed by the Panel and rejected.

a. The AIDCP Is An "International Body" Within The Meaning Of The *TBT Agreement* And Its Membership Was And Is Open To All WTO Members

205. The U.S. argument that the AIDCP is not "international" within the meaning of Article 2.4 is without merit. As Mexico has explained, the 1991 Guide states in Article 4.1 that a "body" is defined as a:

> [l]egal or administrative entity that has specific tasks and composition. NOTE - Examples of bodies are organizations, authorities, companies and foundations.[220]

Article 4.2 states that an "organization" is defined as a "[b]ody that is based on the membership of other bodies or individuals and has an established constitution and its own administration." National governments are "bodies," and the AIDCP is based on their membership. The AIDCP has its own administration, which is implemented by the Secretariat of the IATTC.[221]

206. As the Panel correctly recognized the AIDCP membership is open to the relevant bodies of at least all WTO Members.[222] The Panel based its conclusion on the following key issues: (i) the text of the AIDCP, particularly Articles XXVI and XXIV, provides that the AIDCP is open to accession to new States or regional economic integration organization; (ii) AIDCP was also open for signature from 1998 to 1999; and (iii) remains open to accession to any States or regional economic integration organization that is invited to accede to the Agreement on the basis of the parties' decision.

207. In its appeal, the United States asserts that "…the AIDCP was not open when the dolphin safe definition was developed, and the AIDCP is not open today"[223] This assertion is not correct. First, the definition of dolphin safe under the AIDCP was based in the definition initially developed in the Panama Declaration in 1995, declaration which eventually evolves into the AIDCP, as the Panel recognized in its report.[224] When the AIDCP was enacted, the Members

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220 Mexico's First Written Submission, para. 237.

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

222 Panel Report, para. 7.691.

223 U.S. Appellant Submission, para. 138.

224 Panel Report, para. 2.36-2.40

were well aware of the dolphin safe definition agreed in the Panama Declaration. The dolphin safe definition established in the resolutions of the AIDCP was elaborated during the period of signature of the AIDCP as the United States well recognizes.[225] For these reasons, the AIDCP was open when the definition of dolphin safe was developed.

208. Second, the AIDCP remains open today to any State or regional economic integration organization that is invited to accede to the Agreement. The United States emphasizes that "a body in which Members may participate by invitation only is not a body that is 'open.'"[226] It is Mexico's view that considering the particular nature of the AIDCP regime that regulates tuna fishing in the ETP, it is presumably understandable that any State or regional organization that has interest in the AIDCP regulation of tuna fishing techniques can accede today by a simple invitation of the rest of members. Article XXXIV of the AIDCP allows that any Member could be invited to accede to the AIDCP. A Member that may want to accede usually will bear an interest in relation to the subject matter of the AIDCP regulation. Contrary to the U.S. position, today all Members have the ability to participate in the activities of the AIDCP, but perhaps not all Members have an interest to do it. The term "invitation" provided in Article XXXIV of the AIDCP is a formality that does not amount to an exclusive organization closed to other Members.

209. No additional countries or regional economic integration organizations have expressed interest in joining the AIDCP. However, it is common that during the AIDCP meetings, Parties to the Agreement invite observer countries that regularly attend such meetings with the intention in the future to become Parties.

210. The Panel concluded that the AIDCP was in accordance with the principle of openness provided in Section C of the TBT decision on *Principles and Procedures for the Development of International Standards, Guides and Recommendations*, as the AIDCP was open to signature on a non-discriminatory basis to the relevant bodies of a least all WTO Members and remains open to accession to any States or regional economic integration organization that is invited to accede to the Agreement.

211. Mexico noted at the Panel stage that, unlike the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), which specifically identifies three specific sources of international standards, the *TBT Agreement* does not. The *TBT Agreement* retains flexibility for determining what are relevant and applicable international standards on a case by case basis.[227]

b. The AIDCP Has Recognized Activities in Standardization

212. The United States appeals that the Panel erred in its interpretation of " a body that has recognized activities in standardization". Accordingly to the Panel, there are two ways in which the recognition of standardizing activities can occur: i) by participation by a country in a body's

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225 U.S. Appellant Submission, para. 142.

226 U.S. Appellant Submission, para. 143.

227 Mexico's Responses to the Panel's Questions from the First Substantive Meeting, para. 203.

standardization activities, or ii) by acknowledgment of the existence, legality and validity of the body's standards.[228]

213. Contrary to the arguments of the United States, Mexico has demonstrated the recognition of the AIDCP standardizing activities by the United States as it was a founding and fully participating member of the AIDCP. Therefore, the Panel correctly determined that it is clear that the participation in the development of the standards activities of the countries that are parties to the Agreement is sufficient evidence of their recognition.[229]

214. The recognition by the parties to the Agreement includes of course the United States, and it is reflected in the *Hogarth* court ruling that refers to the Panama Declaration.[230]

215. The core purpose of the AIDCP– which is composed of the member central governments acting collectively, and is administered by the Secretariat of the IATTC – is to establish standards for tuna fishing to protect marine mammals. There is no support for the U.S. claim that the AIDCP is not a "recognized" or "standardizing" body for establishing when tuna is dolphin safe. As the Panel found:

> … the AIDCP resolutions contain provisions, for common and repeated use, that concern tuna and tuna products and their related processes and production methods and that also deal with marking and labelling requirements. We therefore conclude that the parties of the AIDCP, within the institutional framework of the IATTC, develop and establish, with regard to dolphin mortality and tuna-stock sustainability problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of dolphin protection and rational use of tuna resources in the context of the ETP tuna purse-seine fishery. The AIDCP has *activities* in standardization.[231] (footnote omitted).

This finding is well supported.

216. The United States argues that the Panel "did not explain how, in the context of the AIDCP, acknowledgement of the existence, legality, and validity of the AIDCP definition in fact occurred".[232] In this case, based on the assessment of the Panel, the Panel properly found that Members of the AIDCP "appears to acknowledge the existence, legality, and validity of the AIDCP dolphin safe definition".[233] Indeed, it should be obvious that the elaboration of the dolphin-safe definition was one of the main reasons for many Members to participate in the

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228 U.S. Appellant Submission, para. 150.

229 Panel Report, para. 7.686.

230 Exhibit MEX-29.

231 Panel Report, para. 7.685.

232 U.S. Appellant Submission, para. 153.

233 Panel Report, para. 7.686.

AIDCP. This is a clear signal of acknowledgement. The United States argues that the *TBT Agreement* uses recognition in the sense of acceptance and use and bases its conclusions in Article 6.1 of the *TBT Agreement*. Mexico does not consider this argument to be relevant for the analysis of a body's "standardizing activities". The fact that the United States does not allow the use of the AIDCP dolphin-safe label does not mean that the AIDCP does not have "standardizing activities" or that the AIDCP dolphin-safe label is not currently being used.

217. Moreover, the Panel found in a sound and coherent manner the acknowledgement from the United States to the existence, legality and validity of the AIDCP dolphin safe definition on the basis of the court's findings referring to the Panama Declaration [234]

218. Finally, the United States claims that the Panel erred in taking the approach that recognition of a single standard equated to recognition of a body's "standardizing activities", where the plural activities would mean that the body has been involved in the development of more than one standard. In fact, as Mexico has explained, the AIDCP's main role is to establish rules and procedures related to the interaction between fishing and dolphins. Thus, its members have issued a number of other standards[235]. Indeed, with regard to the protection of dolphins in the ETP, the AIDCP is the exclusive organization with recognized activities in standardization, having as main function to establish procedures to be followed by the commercial fleets of the individual nations that are members of the AIDCP. Therefore, the AIDCP is the only recognized body, to develop the standards relating to the protection of dolphins in the ETP.

219. Therefore, the Panel made correct conclusions that the AIDCP has "recognized activities in standardization" and constitutes a "standardizing body".

3. The U.S. Claim That Parties To The AIDCP Are Parties To An International Agreement, Not A Body Or Organization

220. The United States claims that the Panel erred in analyzing "an entirely different organization in order to reverse course and assert that the parties to the AIDCP nonetheless may be deemed to constitute and organization".[236] The United States argues that the Panel's examination of the IATTC was irrelevant. The United States also claims that the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU concerning the specific links between the AIDCP and the IATTC. These arguments should be rejected.

221. The Panel correctly found that "[t]he institutional link between the AIDCP and the organization is strengthened by the fact that all the States that are parties to the AIDCP are members of the IATTC (with the exception of Honduras). The AIDCP is open for signature,

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234 Panel Report, para .7.686.

235 The AIDCP has issued other standards including: *Procedures For Maintaining The AIDCP List Of Qualified Captains, Technical Guidelines To Prevent High Mortality During Sets On Large Dolphin Herds, And Guidelines For Required Raft For The Observation And Rescue Of Dolphins*. Exhibit MEX-83.

236 U.S. Appellant Submission, para. 161.

inter alia by States or regional economic integration organizations that are members of the IATTC. As for the ordinary annual meeting of the Parties of the AIDCP where decisions related the implementation of the agreement are taken, the AIDCP provides that it should take place preferably in conjunction with the IATTC meeting. In light of these facts, we conclude that the parties of the AIDCP acting within the institutional framework of the IATTC constitute an "organization" for the purposes of the application of Article 2.4 of the *TBT Agreement*."[237] (footnote omitted).

222. The institutional link between the AIDCP and the IATTC is well established in the AIDCP itself. With respect to the role of the IATTC, Article XIV of the AIDCP states:

> Envisioning that the IATTC shall have an integral role in coordinating the implementation of this Agreement, the Parties shall, inter alia, request the IATTC to provide Secretariat support and to perform such other functions as are set forth in this Agreement or are agreed upon pursuant to this Agreement.[238]

223. Also, other provisions such as Articles V, VI and VII of the AIDCP demonstrate the integral role that the IATTC has in coordinating the implementation of this Agreement.

224. Finally, although the United States argues that the parties to the AIDCP are not in fact the same as the members of the IATTC, both the AIDCP and the IATTC remain open to accession by any State.

225. Thus, the Panel did not failed in making an objective assessment of the facts before it as required by Article 11 of the DSU, and its conclusion that the AIDCP constitutes an organization for the purposes of the application of Article 2.4 of the *TBT Agreement* should be affirmed.

IV. CONCLUSION

226. On the basis of the foregoing, Mexico respectfully requests that the Appellate Body reject the U.S. Appeal on its entirety and to uphold the Panel's findings that:

a) The U.S. labelling provisions are a technical regulation within the meaning of Article 1.1 of the TBT Agreement;

b) The U.S. labelling provisions are inconsistent with Article 2.2 of the TBT Agreement; and

c) The AIDCP standard is a relevant international standard within the meaning of Article 2.4.

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237 Panel Report, para. 7.684

238 Exhibit MEX-11.