BEFORE THE WORLD TRADE ORGANIZATION

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

(DS381)

MEXICO'S RESPONSES TO THE PANEL'S QUESTIONS

FROM THE FIRST SUBSTANTIVE MEETING

Geneva
8 November 2010

United States – Measures Concerning the Importation, Marketing and sale of Tuna and Tuna Products

(WT/DS381)

Questions of the Panel to the Parties Following the First Substantive Meeting with the Panel

A. GENERAL

1. To both parties: You have presented your arguments relating to GATT 1994 before those relating to the *TBT Agreement.* In light of the Appellate Body's rulings suggesting that the provisions of the agreement "that deals specifically, and in detail" (see Report of the Appellate Body in *EC - Bananas III*, para. 204), with a question should be examined first, please clarify whether you consider that the Panel should, in this case, consider first Mexico's claims under GATT 1994, and if so, why?

1. As Mexico stated in its oral presentation during the first substantive meeting with the Panel, Mexico's principal claims concern the discriminatory nature of the U.S. measures.

2. In this light, it is logical for the Panel to first address Mexico's claims of discrimination under GATT Articles I:1 and III:4 and Article 2.1 of the TBT Agreement. An examination of Mexico's other claims under Articles 2.2 and 2.4 of the TBT Agreement can follow.

3. Mexico acknowledges that an accepted practice when addressing claims under both the GATT 1994 and the TBT Agreement is to address the claims under the TBT Agreement first. However, the order of examination of a complaining Member's claims is important in situations where a Panel exercises judicial economy in respect of one or more of the claims. This is made clear in the above-referenced passage from the Appellate Body Report in *EC – Bananas III*:

> Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. **If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a)** of the GATT 1994. (Emphasis added).[1]

[1] Appellate Body Report, *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, paragraph 204.

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

5. Accordingly, the order of examination of Mexico's claims is not important in this dispute and therefore each claim should be examined in logical order as noted above.

2. <u>Mexico:</u> You have identified four separate measures (i.e. the Dolphin Protection Consumer Information Act or "DPCIA", two sections of the Code of Federal Regulations and the court ruling in Earth Island Institute vs Hogarth) as a basis for your claims in these proceedings. Please clarify whether you consider that each measure individually leads to each of the violations that you identify, or whether you consider that the violations arise from the measures in combination. In responding to this question, please clarify whether you are seeking from the Panel separate determinations in relation to each measure or not.

6. Mexico has identified three separate legal instruments under this dispute:

- United States Code, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act - DPCIA").

- Code of Federal Regulations, Title 50, Section 216.91 ("Dolphin-safe labeling standards") and Section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels").

- The judicial ruling Earth Island Institute v. Hogarth, 494 F. 3d 757 (9th Cir. 2007).

7. Each instrument is part of to the same measure: the U.S. dolphin safe labeling regime. The statute (16 U.S.C. § 1385) is a law enacted by the U.S. Congress which contains the requirements to obtain a dolphin safe label. The regulations codified under 50 CFR § 216.91 and 216.92 provide regulatory conditions imposed by the U.S. Department of

Commerce for the use of dolphin safe label on tuna and tuna products in accordance with the DPCIA. Finally, as the United States has recognized, the judicial ruling in Earth Island v. Hogarth "vacated the Secretary of Commerce's final finding under Section 1385(g) that would have permitted tuna products that contained tuna that was caught by setting on dolphins to be labeled dolphins safe".[2] As a consequence of this interpretation by the U.S. Court, the U.S. measure prohibits the use of a dolphin safe label if the tuna was caught in association with dolphins, it does not matter that no dolphins were killed or injured in the set in which the tuna was caught.

8. A measure can be made of up more than one instrument. It is common in the domestic legal systems of many WTO Members for a measure to comprise legislative provisions, regulatory provisions and other kind of legal instruments.

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

10. Mexico is not asking for separate rulings for each measure, neither is it suggesting that the Panel undertake an independent analysis of each measure.

B. FACTUAL QUESTIONS

1. Functioning of the labelling scheme

(a) Tuna caught outside the ETP

14. <u>To Mexico</u>: In your first written submission, you acknowledge that no other fishery in the world has implemented a program remotely comparable to the AIDCP (paragraph 52) and that none of the international regional fisheries management organizations overseeing tuna fishing have a dolphin mortality monitoring program (paragraph 55). In light of this circumstance, do you consider it legitimate that the United States has chosen to regulate purse seine net fishing in the ETP distinctly from seine purse net fishing in other fisheries?

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[2] As Mexico noted in its First Written Submission, the United States as part of its international obligations under the Panama Declaration was committed to change its "dolphin safe" definition from "no encirclement of dolphins" to "no dolphin mortality or serious injury". The United States amended the DPCIA in 1997 with the purpose to modify its "dolphin safe" standard. This amendment was contingent on the outcome of certain scientific studies performed by the Department of Commerce. The results of these studies were challenged in U.S. courts, and the final decision was issued by the Court of Appeals for the Ninth Circuit in *Earth Island v. Hogarth*.

11. Mexico does not consider it legitimate that the United States regulates fishing in the ETP differently than fishing in other regions.

12. Mexico acknowledges the general principle that underlies this statement—i.e., that regulatory measures can take into account the specific circumstances of the regulated subject matter. This general principle includes fisheries measures so that fishery measures can take into account circumstances specific to the fishery in question. However, this is not what is at issue in this dispute. The different treatment between ETP and non-ETP fisheries, especially the declaration relating to no dolphins being killed or seriously injured, cannot be justified on the basis of different circumstances between the ETP and other fisheries. Dolphins are being killed and seriously injured in fisheries outside the ETP and the U.S. measures do not account for such adverse effects.

13. As discussed in Mexico's response to Question 64 of the Panel, the first stated objective of the United States is informing consumers that tuna products contain tuna that was caught by a method that did not adversely affect dolphins. The objective identified by Mexico, which is reflected in the design, structure and character of the measures, is the protection of dolphins.

14. Mexico raises the difference in fisheries regulation in the ETP and non-ETP fisheries to demonstrate that the U.S. measures do not fulfil either the first objective stated by the United States or the objective that is reflected in the design, structure and character of the measures. It also raises this difference as secondary evidence of the additional costs imposed on Mexican tuna compared to tuna caught by the U.S. fleet and other fleets operating in non-ETP fisheries.

15. As a result of the AIDCP, the ETP has not only a comprehensive monitoring and verification system to ensure accurate reporting of dolphin mortalities and injuries, but also mandatory procedures to safely release dolphins from the nets. This not only protects dolphins and assures the sustainability of the tuna stocks, but ensures that tuna to which the AIDCP dolphin safe label is affixed is, in fact, "dolphin safe" and, therefore, that consumers receive accurate information on that tuna. This system does not exist outside the ETP.

16. The absence of comprehensive monitoring programs in other fisheries does not mean that there are no dolphin mortalities or serious injuries in those fisheries. Rather, the evidence introduced by Mexico proves that there are dolphin mortalities and serious injuries in those fisheries. If anything, Mexico's evidence understates the problems in the other fisheries because the other fisheries have not independently monitored or researched dolphin mortalities, its effects on the species, or undertaken to estimate scientifically dolphin populations' abundance in such other fisheries outside the ETP. If the United States were truly concerned about consumer information and harm to dolphins from tuna fishing (and fishing for other target species) worldwide, it would have adopted measures similar to the ones adopted for the ETP to accurately provide consumer information and encourage dolphin protection in those other fisheries. Instead, the United States allows tuna products produced from tuna in those other fisheries to be labelled dolphin safe even if dolphins were killed or seriously injured in the same set in which the tuna were caught. The only requirement is that the fishing method does not involve the intentional setting upon dolphins, even if interaction with dolphins occurs for any other reasons. Moreover, the United States does not require that

fishing vessels in those other fisheries pay to have independent observers on every fishing trip to ensure that the captain's certification that nets were not set on dolphins is accurate. Absent an independent observer, the captain and crew have a direct and significant economic interest in certifying that no such interaction with dolphins occurred, given the market access consideration and large price differential in the market for so-called "dolphin safe" versus non-dolphin safe tuna products.

17. Thus, the current U.S. system for non-ETP fisheries does not provide for accurate information on the occurrence of dolphin mortalities or serious injuries nor does it protect dolphins. Essentially it is based on the principle "see no evil, hear no evil". The reluctance to establish or require independent observer programs in other oceans clearly illustrates this and explains the limitation of available and reliable scientific and statistical data. This has the effect of rewarding non-ETP fisheries for not adopting comprehensive monitoring programs for dolphin mortalities. It also reduces the costs and enhances the competitiveness of fishing fleets operating in those fisheries such as the U.S. tuna fleet. At the same time, it gives tuna caught by the fishing fleets a competitive advantage in the U.S. market because such tuna can display the dolphin safe label.

18. In stark contrast, notwithstanding the stringent AIDCP requirements, the U.S. system for the ETP fishery presumes that the Mexican fleet causes unacceptable harm to dolphins without basing that presumption on positive scientific evidence and contains no mechanism for overcoming that presumption. The United States' justification for the position that dolphin sets may be affecting certain dolphin populations lacks scientific support, is speculative and disregards scientific and empirical evidence to the contrary. Indeed, the United States disregards that the AIDCP was created with the goal of protecting dolphins.

19. The contrast between the U.S. measures applied to the ETP and non-ETP fisheries is striking in the way it is both arbitrary and unjustifiable.

15. <u>To both parties</u>: In paragraph 91 of its first written submission, Mexico notes that the United States applies different standards to its own commercial fisheries than those it applies to the Mexican fleet in the ETP and that, despite the observed bycatch mortalities of dolphins and other marine mammals in these fisheries.

(a) Can Mexico specify what it understands to be the United States' own fisheries, whether it sees the ETP as part or not of these fisheries, and how the standards applied by the United States would differ for its own fisheries?

20. Mexico's reference to the fisheries of the United States was to fisheries subject to U.S. jurisdiction, and did not include the ETP.

21. As Mexico explained at paragraphs 92 and 93 of its First Written Submission, Section 118 of the U.S. Marine Mammal Protection Act allows marine mammal mortalities caused by commercial fishing operations subject to U.S. regulation – that is, "the incidental taking of

marine mammals in the course of commercial fishing operations by persons using vessels of the United States or vessels which have valid fishing permits . . . ."[3] The law also requires the National Marine Fisheries Service (NMFS) to establish a "take reduction team" to manage incidental takings when a "strategic" stock interacts with a commercial fishery designated as Category 1 or 2.

22. A list of U.S. commercial fisheries is published annually in the Federal Register and classifies fisheries into one of three categories based on the level of serious injury and mortality of marine mammals that occur in each fishery, reported in annual stock assessment reports.[4] "Category 1" fisheries are defined as those in which the incidental killing of marine mammals is greater than 50% of the Potential Biological Removal ("PBR") threshold.[5] The PBR is intended to be an estimate of the maximum level of takings that may be removed from a stock without affecting the ability of the stock to reach or maintain its optimum sustainable population. The United States develops PBRs for individual fisheries and stocks.

23. As described in a 2008 report by the U.S. Government Accountability Office ("GAO"), the PBR is calculated as follows:

> The maximum removal level—technically known as the potential biological removal level—is calculated for each marine mammal stock by multiplying three factors:
>
> • The minimum population estimate … for the specific stock of marine mammals.
>
> • Two adjustments designed to (1) factor in the expected rate of natural growth for a stock and (2) reduce the risks associated with data uncertainties, especially for stocks listed as endangered or threatened or designated as depleted. By altering the values of these adjustments, NMFS can make the maximum removal level more conservative — meaning that fewer incidental takes will be allowed — in cases of uncertain data, and therefore make it less likely that they will identify a stock as nonstrategic.[6]

24. Thus, the governing principle established by the United States for regulation of its own fishing is that the percentage of the population that is observed to be harmed is used to determine whether the marine mammal populations are at risk from commercial fishing operations.

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3 16 U.S.C. § 1387(a)(1). Exhibit MEX-37.

4 74 Fed. Reg. 58859 (Nov. 16, 2009). Exhibit MEX-38.

5 See Exhibit MEX-38.

6 Government Accountability Office, "National Marine Fisheries Service: Improvements Are Needed in the Federal Process Used to Protect Marine Mammals from Commercial Fishing," GAO 09-78 (December 2008) ("GAO Report"), p. 11. Exhibit MEX-66.

25. There is no question that marine mammals are being killed on a regular basis by commercial fisheries in U.S. jurisdictional waters. For example, the "U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments -2009" published by the NMFS includes the following description relating to harbour porpoises in the Gulf of Maine fishery:

> **ANNUAL HUMAN-CAUSED MORTALITY**
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> Data to estimate the mortality and serious injury of harbor porpoise come from U.S. and Canadian Sea Sampling Programs, from records of strandings in U.S. and Canadian waters, and from records in the Marine Mammal Authorization Program (MMAP). See Appendix III for details on U.S. fisheries and data sources. Estimates using Sea Sampling Program and MMAP data are discussed by fishery under the Fishery Information section (Table 2). Strandings records are discussed under the Unknown Fishery in the Fishery Information section (Table 3) and under the Other Mortality section (Table 4).
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> The total annual estimated average human-caused mortality is 860+ (CV=0.12) harbor porpoises per year. This is derived from four components: 807 harbor porpoise per year (CV=0.12) from most U.S. fisheries using observer and MMAP data, an unknown number for the Northeast bottom trawl fishery, 45 per year (unknown CV) from Canadian fisheries using observer data, and 7.5 per year from unknown U.S. fisheries using strandings data.
>
> **Fishery Information**
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> Recently, Gulf of Maine/Bay of Fundy harbor porpoise takes have been documented in the U.S. Northeast sink gillnet, mid-Atlantic gillnet, Northeast bottom trawl and in the Canadian Bay of Fundy groundfish sink gillnet and herring weir fisheries (Table 2).[7]

26. The approximately 800 porpoise deaths per year are for a fishery and a "threatened" marine mammal population that are much smaller than the ETP. The figure assists in putting into context the U.S. complaint in this dispute about 1,000 dolphin deaths per year in the ETP. It is also noteworthy that, notwithstanding the substantial interaction between this fishery and porpoises, the United States has not suggested that there are unobserved adverse effects on dolphins in the form of additional thousands of animals being killed indirectly because of such factors as separation of mothers from their calves, stress caused by the fishery, etc.

27. The GAO report referenced above included the following conclusions regarding U.S. management of its program to protect marine mammals in U.S. waters:

> GAO identified 30 marine mammal stocks that have met the MMPA's requirements for establishing a take reduction team, and NMFS has

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[7] NMFS, "U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments - 2009", p. 188. Exhibit MEX-84.

> established six teams that cover 16 of them. For the other 14 stocks, the agency has not complied with the MMPA's requirements. For example, false killer whales, found off the Hawaiian Islands, have met the statutory requirements since 2004, but NMFS has not established a team for them because, according to NMFS officials, the agency lacks sufficient funds. NMFS officials told GAO that the agency has not established teams for the other stocks that meet the MMPA's requirements for reasons such as the following: (1) data on these stocks are outdated or incomplete, and the agency lacks funds to obtain better information and (2) causes other than fishery-related incidental take, such as sonar used by the U.S. Navy, may contribute to their injury or death, therefore changes to fishing practices would not solve the problem.
>
> For the five take reduction teams subject to the MMPA's deadlines, the agency has had limited success in meeting the deadlines for establishing teams, developing draft take reduction plans, and publishing proposed and final plans and regulations to implement them. For example, NMFS established three of the five teams—the Atlantic Large Whale, Pelagic Longline, and Bottlenose Dolphin—from 3 months to over 5 years past the deadline. NMFS officials attributed the delays in establishing one of the teams to a lack of information about stock population size and mortality, which teams need to consider before developing draft take reduction plans.[8]

28. Any tuna caught in these fisheries tuna can be labelled dolphin safe under the U.S. unilateral standard simply because the tuna was not harvested by intentionally setting nets on dolphins.

29. In 2002, the Southwest Fisheries Science Center (SWFSC) of the National Marine Fisheries Service (NMFS) submitted a copy of its "Report of the Scientific Research Program under the International Dolphin Conservation Program Act" (SWFSC report) to the IATTC for its comments. In a report submitted to the U.S. Secretary of Commerce commenting on the SWFSC report, the IATTC noted:

> The SWFSC calculations of PBR shows that the observed mortality is 36% of PBR for eastern spinner dolphins and 28% of PBR for northeastern spotted dolphins. Thus, 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 uses in every

[8] GAO Report, "Highlights", p. 1. Exhibit MEX-66.

other case in which there is an interaction between a commercial fishery and marine mammal populations.[9]

30. Thus, under the test the United States applies to its own domestic fisheries, the level of dolphin mortalities in the ETP reported by the SWFSC would not qualify for Category 1 status because it is less than 50% of the PBR. It should be noted that the Department of Commerce's 2008 update on the ETP dolphin populations made corrections that significantly increased the size of the relevant dolphin populations, meaning that the mortality as a percentage of PBR is actually much lower than reported in 2002.

31. In summary, the United States applies a standard for sustainability of marine mammal stocks to its own fisheries that tolerates levels of mortalities, as a percentage of PBR, equivalent to or greater than those of dolphins in the ETP. This reveals a contradictory and discriminatory policy, given that the United States by its measures demands zero dolphin mortality in the ETP but tolerates dolphin mortalities in its own fisheries.

19. <u>To both parties</u>: Please provide any studies conducted prior the enactment of the measures analyzing the expected economic impact of such enactment on the US fishing fleet.

32. Mexico is not aware of any studies prepared that evaluated the specific effect of the original labelling measure on the U.S. fleet.

33. It is important to note that Mexico's claim is based on the measure as it exists under current circumstances. The *de facto* nature of the discrimination caused by the U.S. measure must be evaluated by comparing the treatment presently accorded to Mexican tuna products with the treatment presently accorded to U.S. tuna products and tuna products produced by other countries that are subject to different and lower standards of both mortalities to dolphins and verifiable proof of no harm to dolphins.

34. With regard to the circumstances at the time of enactment of the Dolphin Protection Consumer Information Act of 1990 as an amendment to the Marine Mammal Protection Act, the United States had already imposed restrictions on the U.S. fleet and embargoes on foreign fleets that the United States deemed did not have dolphin mortality rates "comparable" to those of the U.S. fleet. In fact, the U.S. fleet had largely already abandoned the ETP when the labelling restrictions were being enacted.

35. On the other hand, the express goal of the U.S. International Dolphin Conservation Act enacted in 1997 was to implement the U.S. obligations under the Declaration of Panama,

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[9] 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.

including by giving access to the U.S. market to the signatories to the Declaration.[10] Thus, Mexico and other signatories to the Panama Convention had an expectation based directly on the negotiations with the United States that the United States would fulfil its commitment to amend its dolphin safe standard.

20. <u>To Mexico</u>: Is there any indication that the introduction of the labelling scheme was motivated by an objective of disturbing the competition between imported and non-imported tuna or by a protectionist motivation?

36. Mexico's *de facto* discrimination and trade restriction claims are not dependent on "why" the U.S. measures were enacted and maintained but, rather, are dependent on "what" the U.S. measures do to the balance of competitive opportunities between imported Mexican tuna products and like products from the United States and other countries as well as what they do to the competitive opportunities otherwise available to Mexican tuna.

37. As discussed in Mexico's response to Question 43 of the Panel, the circumstances that prompted the introduction of the labelling scheme have been remedied by the AIDCP and no longer exist.

38. Mexico's challenge focuses on the maintenance of the labelling scheme, not on its introduction.

2. Mexican exports of tuna to the United States

23. <u>To Mexico</u>: From the information provided by the United States, it would seem that Mexico is able to sell some tuna in the United States, including tuna that is eligible for the dolphin safe label. In particular, the United States contends that:

(a) Some Mexican vessels fish for tuna in the ETP using a technique that does not involve setting on dolphins;

(b) One third of the Mexican fleet registered to fish for tuna in the ETP is composed of vessels under 363 metric tons of carrying capacity which are

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[10] See Section 2 of the International Dolphin Conservation Program Act:

"The purposes of this Act are – (1) to give effect to the Declaration of Panama …; (2) to recognize that nations fishing for tuna in the Eastern Tropical Pacific Ocean have achieved significant reductions in dolphin mortality …; and (3) to eliminate the ban on imports of tuna from those nations that are in compliance with the International Dolphin Conservation Program."

Exhibit MEX-21.

considered unable to set on dolphins (US first written submission, paragraphs 44-45 and 68-69);

(c) Imports of tuna and tuna products from Mexico totalled US$ 13 millions for the year 2009 (US first written submission, paragraph 90).

Please clarify whether you agree with these statements, and whether this suggests that Mexican tuna has in fact had access to the US market.

39. From the perspective of the legal and factual thresholds for Mexico's claims, the volume of trade in tuna products between Mexico and the United States is not relevant. Imports of Mexican tuna products have been denied competitive opportunities that are available to like tuna from the United States and other countries and such imports have been restricted from the levels that would otherwise prevail in the absence of the U.S. measures.

40. Mexico has five active vessels below 363 metric tons carrying capacity and whose tuna therefore would be considered "dolphin safe" under the U.S. unilateral standard. That tuna amounted to less than 4 percent of the total catch for the Mexican fleet and, as discussed below, is not necessarily suitable for export to the U.S. market. In addition, some larger Class 6 vessels made opportunistic sets on unassociated schools or FADs on their way to or from the main fishing grounds where they concentrate their effort on catching mature yellowfin caught in sets in association with dolphins. Under the U.S. measures, the making of even one set on dolphins during an entire voyage disqualifies all tuna caught during the trip from being labeled "dolphin safe."

41. The United States acknowledged that of the $13 million in imports of Mexican tuna and tuna products, only $7.5 million was for tuna products – i.e., tuna in cans or pouches.[11] Tuna products are the relevant like product in this dispute. Mexico's market access for tuna products has been virtually de minimis. Mexico understands that these imports are of the major Mexican tuna brands, which are not allowed to use the dolphin safe label, and which therefore cannot be sold in the major retail grocery chains. The only market available to Mexican canned tuna at the present time is composed of small, Latin groceries and other ethnic food stores.

42. Access for Mexican tuna to the major distribution channels remains restricted because of the U.S. measures.

24. <u>To Mexico</u>: In light of the elements above, is it possible for at least some of the tuna caught by Mexican vessels fishing in the ETP to obtain the official dolphin safe label? Has the label been used for such tuna? If not, why not?

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[11] U.S. First Written Submission, paragraph 90.

43. The five smaller vessels identified above are fishing mostly for lower value skipjack for sale in the Mexican market as well as some fish not suitable for human consumption (i.e. black skipjack for processing into fish meal). Their catch and type of operation is not of a size that economically justifies production for export markets. Vessels of size Class 5 and below are not economically viable nor environmentally sustainable if undertaken in the fishing grounds of Mexico on a larger scale.

25. <u>To Mexico</u>: The United States argues that tuna caught by setting on dolphins is also sold in the United States despite the consumers' preference for tuna caught not setting on dolphins (US first written submission, paragraph 95); and that, although most tuna products contain tuna caught in a manner that meets the conditions to be labelled dolphin safe, producers and retailers have chosen to omit the dolphin safe label and use the packaging space to include other information (US first written submission, paragraph 94). Do you confirm this? If access to the "dolphin safe" label is so important for access to the US market, how do you explain it?

44. As Mexico explained in its response to Question 23, tuna products produced from fish caught by setting on dolphins are not sold in the major U.S. grocery store chains. The only market available for these products is composed of small, Latin groceries and other ethnic food stores.

45. With respect to the U.S. claim that producers and retailers haven chosen to omit the dolphin safe label from products that qualify as dolphin safe, Mexico observes that the United States did not submit evidence in support of this assertion. Mexico is not aware of any producer or retailer that has voluntarily chosen to omit the dolphin safe label when the tuna product was eligible for it.

46. Mexico notes that the three producers Starkist, Bumblebee and Chicken of the Sea – all of which operate canneries within U.S. territory – control over 80% of the U.S. market for tuna products.[12] Those producers label all of their products as dolphin safe.

47. As Mexico has previously explained and supported with evidence, having a label that displays the words or a symbol signifying "dolphin safe" is required to have access to the major distribution channels in the U.S. market.

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[12] See U.S. Department of Labor Employment Standards Administration Wage and Hour Division, "Economic Report: The Minimum Wage in American Samoa, 2007", Section III, p. 17, available at http://www.dol.gov/whd/AS/EconomicReport-2007.pdf, Exhibit MEX-78; Pittsburgh Tribune Review, "Pittsburgh's Starkist has eye on international markets" (September 5, 2010), available at http://www.pittsburghlive.com/x/pittsburghtrib/business/s_698041.html, Exhibit MEX-81.

3. The AIDCP - Impact of setting on dolphins in the ETP

26. <u>To both parties</u>: Do you consider that the application of the AIDCP, in particular the "Procedures for AIDCP Dolphin Safe Certification System" and the "AIDCP dolphin-safe certification", is capable of achieving the objectives set forth in Article II of the AIDCP, namely the progressive reduction of incidental dolphin mortalities and the elimination of dolphin mortality in the AIDCP "agreement area"?

48. Yes.

49. The objectives set forth in Article II of the AIDCP are as follows:

> 1. To progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery in the Agreement Area to levels approaching zero, through the setting of annual limits;
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> 2. With the goal of eliminating dolphin mortality in this fishery, to seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins; and
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> 3. To ensure the long-term sustainability of the tuna stocks in the Agreement Area, as well as that of the marine resources related to this fishery, taking into consideration the interrelationship among species in the ecosystem, with special emphasis on, *inter alia*, avoiding, reducing and minimizing bycatch and discards of juvenile tunas and non-target species.

50. The AIDCP regulations on fishing techniques and enforcement mechanisms, in conjunction with the AIDCP dolphin safe certification system, are responsible for the full achievement of the first and third objectives. Regarding the second objective, Mexico notes that it refers to continuing to seek an ecologically sound means for the capture of large (i.e. mature) yellowfin tuna without the need of setting on dolphins. To date, no such alternative has been developed.

51. As noted in the presentation of Mexico's case, the first and third objectives are an important concern of Mexico and are why the Mexican fleet sets upon dolphins in accordance with the requirements of the AIDCP. The United States of course is a founding member of the AIDCP and participated fully in the creation of these objectives.

52. Please see response to Question 28 below.

28. <u>To Mexico</u>: Please elaborate on the sources that support your assertion in paragraph 29 of your first written submission that "using certain procedures recommended or required by the Inter-American Tropical Tuna Commission (IATTC) and AIDCP, it has been possible to virtually eliminate dolphin mortalities".

53. In support of its statement, Mexico cited directly to statistics published by the IATTC, of which the United States is a fully participating member.[13] Those statistics are based on having 100% independent scientific observer coverage on all large purse seine vessels fishing for tuna in the ETP.

54. The IATTC as well as the AIDCP establish the aforementioned mandatory fishing procedures, including the prohibition on night sets and requirements for safety and rescue procedures to maximize safe release of dolphins from the nets. Vessels outside the ETP that may intentionally or incidentally trap dolphins in their nets do not possess the training, the gear or the nets to safely release those dolphins.

55. The United States has not contested the IATTC figures. Indeed, the following statement is published on the U.S. Department of Commerce's dolphinsafe.gov website:

> Between 1959 and 1976 it is estimated that over 6 million dolphin mortalities occurred in association with the ETP tuna purse seine fishery. However, since that time the numbers have dropped dramatically. For example, according to IATTC estimates, the total annual mortality of dolphins in the fishery has been reduced from about 132,000 in 1986 to less than 1,200 in 2008 -- about 0.01% of the population.[14]

56. In 2000, the then U.S. Secretary of Commerce issued a press release after the initial U.S. court ruling that halted U.S. implementation of the AIDCP dolphin safe standard. The Secretary stated, among other things:

> The new labelling standard allowed fisherman to use the dolphin-safe label on tuna they caught using techniques that reduce dolphin deaths by 99 percent. There's a consensus among many environmental groups, including World Wildlife Fund, the Center for Marine Conservation, and the Environmental Defense Fund, that our actions are the right thing to do to protect dolphins during tuna fishing operations."[15]

57. Mexico has previously noted that the FAO awarded the AIDCP the Margarita Lizárraga Medal that serves with distinction in the application of the Code of Conduct for Responsible Fisheries. In announcing the award, the FAO stated:

> The AIDCP has been an unqualified success and has diligently applied the relevant principles set forth in the Code, in particular those aspects relating to the precautionary approach and to the utilization of fishing gear and

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13 See paragraph 50 of Mexico's First Written Submission. See also Exhibit MEX-13.

14 NOAA, Tuna Tracking and Verification Frequently Asked Questions, available at http://dolphinsafe.gov/faq.htm/. Exhibit MEX- 79.

15 "Commerce Secretary Disappointed at Federal Court Ruling" (April 12, 2000). Exhibit MEX-68.

> techniques which minimize the catch of non-target species. The enormous reduction in dolphin mortality attributable to the Agreement, while maintaining sustainable fisheries, is a practical, hands-on contribution. The results are tangible and measurable. The process established by the Agreement is continuous and not a one-off phenomenon. And the success of the AIDCP has the potential to be catalytic.[16]

58. The source of this quote is a press release issued by the U.S. Department of State in 2005.

29. <u>To Mexico</u>: The United States asserts that the data provided by Mexico in its first written submission (paragraph 35 and following) highlights that setting on dolphins to catch tuna is almost solely responsible for observed dolphin mortality of all purse seine fishing method in the ETP. Do you agree with this statement?

59. It is correct that in the ETP, fewer dolphins are associated with FAD fishing than with dolphin sets. Importantly, there are independent observers aboard every large purse seine vessel to verify whether dolphins were killed or seriously injured in any set, so even vessels that fish exclusively on FADs have a strong incentive to ensure that dolphins that are ensnared in a FAD set are released unharmed.

60. Mexico notes that the only way to assess properly dolphin mortalities is by having independent observers aboard. The AIDCP's successful reduction of dolphin mortalities results from the presence of independent observers for 100% of the trips and 100% of the sets by large purse seine vessels, regardless the fishing method used. In this way, there can be complete certainty of the statistics reported on the on the actual level of mortality.

61. Other fisheries do not have 100% observer coverage, and in fact have no rules requiring that no dolphins be killed or seriously injured. Accordingly, the fact that dolphin mortalities from FAD fishing have been avoided in recent years in the ETP does not imply that there are no dolphin interactions with FAD sets in other fisheries, particularly when the intensity of the settings over FADs outside of the ETP is much higher within the ETP.

30. <u>To Mexico</u>: The United States considers that the question of protection of other species than dolphins is not relevant to this dispute. What are your views?

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

62. The protection of other oceanic species is relevant to this dispute, albeit indirectly in that it demonstrates the environmentally responsible fishing method that Mexico has employed and explains, in part, why Mexico must continue using that method.

63. As discussed in Mexico's response to Question 64 of the Panel, the second stated objective of the U.S. measures is "discouraging fishing techniques that affect dolphins", in particular to "ensure that the U.S. market is not used to encourage fishing fleets to set on dolphins". In simple terms, the U.S. measures make access to the major distribution channels for tuna contingent upon the use of fishing methods other than setting upon dolphins.

64. A measure that makes access to a market contingent upon certain actions by the exporting WTO Member is exactly the type of measure that is prohibited by the WTO Agreements.[17] In this dispute, it amounts to a unilateral assertion by the United States of its view on appropriate fishing methods onto another WTO Member, specifically a developing country Member.

65. It is important to Mexico that the Panel and other WTO Members understand that Mexico's choice of fishing methods is dictated by both commercial considerations (i.e., fishing for mature yellowfin tuna by setting upon dolphins is the most commercially efficient method of tuna fishing from a revenue per trip perspective and a sustainable tuna fishing stock perspective) and environmental considerations (i.e., setting upon dolphins eliminates or substantially reduces bycatch including juvenile tuna and other species). Mexico's fishing method protects dolphins as well as all other species and the overall aquatic ecosystem in the ETP.

66. In this light, the United States is not only prohibited by WTO rules from unilaterally asserting its view on appropriate fishing methods as a condition for access to major distribution channels in its market, its choice of fishing methods is inconsistent with general principles of environmental sustainability in the oceanic ecosystem.

67. The protection of other species demonstrates that Mexico's claims are supported not only by the provisions of the WTO Agreements, but also by the principles of environmental sustainability. On the facts of this dispute, the WTO and the environment are *ad idem*.

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[17] This principle was established under the GATT 1947 and is illustrated in the widely cited *Belgium - Family Allowances* Panel report. That dispute concerned the application of a Belgian law on the levy of a charge on foreign goods purchased by public bodies when these goods originated in a country whose system of family allowances did not meet specific requirements. The GATT 1947 Panel found that "the consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant [to the requirement to grant any advantage unconditionally to all contracting parties under Article I:1], and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions. See Panel Report, *Belgian Family Allowances (Allocations Familiales)*, adopted 7 November 1952, BISD 1S/59, at paragraphs 1 and 3.

31. <u>To Mexico</u>: The United States has argued that data on bycatch of other species presented by Mexico is inflated, insofar as the tables actually reflect the number of *captures*, which is a broader concept that includes catches of non-targeted fish, bycatches and releases of animals alive (US first written submission, paragraph 64). In light of this argument, please clarify the meaning of the term "bycatch" as used in the tables presented in your first written submission.

68. Mexico's tables were copied from the IATTC's 2007 annual report, which use the word "bycatch". Starting with the 2008 report, which was published in 2010 after Mexico submitted its first written submission, the IATTC relabelled some of its tables with the word "captures." The term "bycatch" traditionally has been used to refer to catches of non-target species and of target species that are not commercially useful (e.g., small animals). The IATTC now uses the word "captures" to refer to catches of non-target species that potentially might be retained for commercial reasons or returned to the ocean alive.

69. Unlike dolphins in dolphin sets, which are carefully encouraged to leave nets before the nets are raised, other non-target species captured in purse seine nets are hauled aboard mixed with tons of tuna, dumped on the ship's deck, sorted, and then counted by the observer, before being thrown dead back into the ocean. Mexico acknowledges that some small portion of the bycatch/captures is returned to the sea alive, but notes that there is no information available on how many of those animals actually survive.

70. It is well-established that fishing with FADs and on unassociated sets results in far greater bycatch of juvenile tuna and non-target species than dolphin sets. Mexico has previously cited the statement by former Vice President Gore that these alternative fishing methods are "environmentally unsound."[18] Greenpeace International recently called for a complete ban on FAD fishing in the Western and Central Pacific Fishery, stating:

> "Retailers must stop the sales of all tuna caught using this wasteful fishing method, otherwise we will see the end of bigeye tuna in the Pacific. There simply is no other immediate way to reduce the high catches of juvenile tunas and other marine life, but to ban purse-seine fishing using fish aggregation devices,"
>
> "An enormous ecological, social and economic disaster is looming and the Pacific Island countries must ban purse-seine fishing using FADs and cut the number of fishing vessels licensed in their waters before it is too late".[19]

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[18] Exhibit MEX-62.

[19] "Greenpeace Calls for Urgent Ban on Fish Aggregation Devices to Save Pacific Tuna" (August 20, 2010). Exhibit MEX- 69.

71. In Mexico's view, any minor distinction between the words "bycatch" and "capture" cannot change the fact that FAD fishing is environmentally destructive.

32. <u>To Mexico</u>: Please comment on the US assertion, in its first written submission and in its oral statement, that dolphin populations in the ETP remain depleted (see paragraph 7 of the US oral statement).

72. The concept of "depleted" populations is a unique U.S. concept established by the Marine Mammal Protection Act. According to that law, "Depleted" means that the Secretary of Commerce has determined that a species or population stock is below its "optimum sustainable population."[20] In the case of dolphin populations in the ETP, the United States asserts that the populations of certain species are "depleted" on the theory that their abundance is far below what the United States estimates their populations were before the U.S. fleet began using dolphin sets. However, there are no reliable sources of information on dolphin populations in the ETP from that time period. The National Research Council (which is part of the National Academy of Sciences) has explained as follows:

> In summary, the mortality estimates for the period before 1973 (peak values of up to 350,000–653,751 in a year by Perrin, 1968, 1969; Smith, 1979, 1983; Lo and Smith, 1986) have little or no statistical value, and the only conclusion that can be based on the data available is that mortality was very high. After a long hearing, the administrative law judge, Hugh Dolan, concluded that many errors had caused dolphin mortality to be seriously overestimated and dolphin abundance to be seriously underestimated by NMFS in the 1960s and 1970s (Dolan, 1980).
>
> Nonetheless, these mortality data were used to calculate estimates of dolphin abundance for 1959–1970; these estimates were used later to conclude that some stocks were depleted or were at a given proportion of their original abundance.[21]

37. <u>To both parties</u>: Please clarify what parameters are used to determine whether dolphin populations are depleted or recovering, and how the impact of mortality or injury arising from setting on dolphins is assessed in this context.

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20 16 U.S.C. § 1362(1). Exhibit MEX-17.

21 National Research Council, *Dolphins and the Tuna Industry* (National Academy Press: Washington, D.C., 1992), p. 54-55. Exhibit MEX-2.

73. Determining the history and size of populations of animals such as dolphins is difficult and relies on estimates that must be made in a statistically and scientifically meaningful way.

74. It is useful to examine the United States' own official evaluations of the performance of dolphin populations in the ETP. As has been previously explained, the DPCIA required the U.S. Department of Commerce to make initial and final findings of "whether the intentional deployment on or encirclement of dolphin with purse-seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean."[22]

75. The study required by the legislation consisted of two projects: (i) population abundance surveys of dolphin stocks, and (ii) stress studies that included a review of relevant stress-related research and a three-year series of necropsy samples from dolphins obtained by commercial vessels, a one-year review of relevant historical demographic and biological data related to dolphins and dolphin stocks in the ETP, and an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement

76. In both the initial and final findings, the Secretary of Commerce determined that dolphin sets were not having a significant adverse impact on any depleted dolphin stock in the ETP. The final determination, issued on December 31, 2002, included the following conclusion:

> The Dolphin Protection Consumer Information Act (DPCIA) requires the Secretary of Commerce (Secretary) to make a final finding by December 31, 2002 on whether the intentional deployment on or the encirclement of dolphin with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the Eastern Tropical Pacific (ETP) region. 16 U.S.C. 1385(g)(2) The authority to make the finding has been delegated to the NOAA Assistant Administrator for Fisheries. Based on the information reviewed, I hereby find the intentional deployment on or encirclement of dolphin with purse seine nets in not having a significant adverse effect on any depleted dolphin stock in the ETP.[23]

77. This determination was supported with a detailed report of the procedures followed and the evidence reviewed.

78. The report explained the mortality levels for the three depleted stocks in relation to the U.S.-calculated PBR levels those stocks. After increasing those mortality level to account for the speculated impact of cow-calf separation, the report stated:

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22 See 16 U.S.C. § 1385(g)(2). Mexico's First Written Submission, Appendix A.

23 68 Fed. Reg. 2010 (January 15, 2003). Exhibit MEX-80.

> Reported mortality for 2001, when combined with cow-calf separation estimates, is approximately: 31% of PBR for northeastern offshore spotted dolphin and 39% of PBR for eastern spinner dolphin. There is currently no way to quantify indirect mortality for coastal spotted dolphins. Therefore, direct mortality is based on that reported by the on-board observer programs and is only 0.2% of PBR for coastal spotted dolphin. When reported mortality for 2001 is combined with the estimate of cow-calf separation, quantifiable direct mortality is well below the PBR level for each stock.

79. Regarding potential indirect effects of the fishery, the report stated:

> Experts noted that there is inadequate information to make a determination on the existence or extent of indirect effects, as they relate to dolphin recovery. To assist the Secretary in answering this difficult question, a panel of five experts was asked to address the issue of indirect mortality. All five expert panelists indicated that indirect fishery effects, especially cowcalf separation and increased likelihood of predation, may account for the lack of expected dolphin recovery. The strength of their opinions varied greatly, however, noting the large amounts of uncertainty in the data. The IATTC noted that indirect effects (such as cowcalf separation, elevated stress hormones and enzymes, and heart damage) are speculative, given the absence of adequate data. The MMC [Marine Mammal Commission] provided no additional studies, but agreed that, ''* * * existing information does not provide a sufficient basis for quantifying any increased levels of mortality that occur during chase operations, reproductive failure resulting from stress, facilitated predation, post-release capture myopathy, or disruption of the tuna dolphin bond.''
>
> In sum the available information on indirect effects, including much of the information regarding cow-calf separation, is limited, and therefore bars population-level inferences of the effects of stress on dolphin stocks.

80. The 2002 report also discussed theories that dolphin populations could be affected by environmental changes in the ETP, such as warming of the ocean. The report explains:

> According to these experts, the extent to which these PDO and ENSO warming cycles have affected depleted marine mammal stocks is unknown, but potentially significant. One expert concluded that it is unlikely that the ecological structure of the ETP has changed substantially in a way that could significantly impede or promote the population growth of depleted stocks. (Report of Andrew Read). Others, expressed a different view. In Landry's view, ''such changes provide a credible explanation for at least part of the observed slow recovery of dolphin stocks * * *.'' In the view of Stewart, ''the argument is persuasive that the carrying capacity of the ETP, relative to the ecologies and life histories of northern offshore spotted dolphins and eastern spinner dolphins, is lower now (and the past several or more years), that [sic] it was prior to and during the early phase of the fishery.'' Moreover, Stewart concludes that depleted stocks had begun to recover after direct mortality declined below the replacement rate in the 1980s, but that this recovery may

> have been interrupted by warm water events in the 1990s. Barber notes that, ''There are indications that the biological productivity of the ETP has changed in response to the low frequency physical variability known as PDO. These indications, while speculative, require that we not rule out the possibility that the carrying capacity of the ETP for dolphins has declined and that this decline has affected recovery of the population. * * * We also cannot rule out the possibility that the ecological structure of the ETP has changed substantially in a way that could impede the recovery of the dolphin stocks.'' Panel experts agree with NOAA's view that there is insufficient information to adequately assess the existence or magnitude of ecosystem changes, or the extent to which these changes have impacted depleted dolphins. As one expert noted, ''* * * we do not have a sufficient understanding of the structure or function of the ETP ecosystem to answer this question. Our knowledge of the ecological interactions of dolphins and other ecosystem components, including yellowfin tuna, is so rudimentary that in most cases, we cannot predict whether a particular environmental change might promote or impede the population growth of dolphins."[24]

81. Comments submitted by the IATTC to the Commerce Department noted, among other factors, that over 200,000 more pilot whales, over 750,000 more common dolphins, over 7,000 more Bryde's whales, and more than 70% more yellowfin tuna were added to the ETP ecosystem from 1986-2000, and that the increases of these populations of large predators could increase competition for fish and squid that the spotted and spinner dolphins feed upon.[25]

82. The 2002 Commerce Department report also said that NOAA Fisheries had reported that the two depleted dolphin stocks were growing at rates between 1% and 2%. As explained in Mexico's First Written Submission at paragraphs 87 and 88, the Commerce Department issued an updated report on dolphin populations in the ETP in 2008, in which it concluded that its earlier reports were in error and that the growth rates of the two dolphins stocks were actually 4% to 8% -- the maximum amount that could be expected.

83. In summary, the best evidence available indicates that the populations of spotted and spinner dolphins are growing and that the population of common dolphins has greatly expanded. With regard to the spotted and spinner dolphin populations, during this proceeding the United States has challenged the language of the Commerce Department's

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[24] *Ibid*. at p. 2014.

[25] Letter from IATTC to Secretary of Commerce enclosing Scientific Report On The Status Of Dolphin Stocks In The Eastern Pacific Ocean (October 30, 2002), Executive Summary p. 3, paragraph 9. Exhibit MEX-67. Dolphin sets are made on common dolphins as well as on the other species. Because the common dolphin stock is not deemed "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 – spotted and spinner dolphins.

2008 report, arguing that the "confidence intervals" include a range of possibilities, one of which is that the dolphin populations might not be growing. Such speculation is inconsistent with the methodologies the United States applies to its own fisheries and to international fisheries other than the ETP, with respect to which the United States appears to presume that no marine mammals are being harmed unless there is conclusive evidence otherwise. It is also inconsistent with the determinations made by the United States itself in 2002 on the basis of an extensive evaluation.

38. <u>To Mexico</u>: You explain, in your first written submission, that the Mexican fleet has incurred important costs in order to be able to continue fishing for tuna in the ETP by setting on dolphins in accordance with the AIDCP. The United States argues that fishing techniques other than setting on dolphins are available to all purse seine nets boats and that hence the changing of fishing technique do not imply additional costs for the Mexican fleet (US first written submission, paragraph 66). Please clarify whether other fishing techniques than setting on dolphins are available to the Mexican fleet fishing in the ETP and what costs the use of such techniques would have.

84. The fishing efforts of the Mexican fleet primarily concentrate in the waters adjacent to Mexico's coast (EEZ), where mature yellowfin tuna can be found in association with dolphins. In that area the yellowfin tuna not associated with dolphins in found in lesser quantities and at a juvenile stage of development. Targeting juvenile yellowfin tuna not associated with dolphins would be neither commercially viable nor sustainable, because it would result in significantly smaller catches that would have a negative impact on the tuna stocks, which over time would reduce and exhaust the tuna stocks.

85. During the one to two months the large purse seine vessels are at sea, they may use several different fishing methods. If a vessel happens to come upon an unassociated school of tuna or a FAD, it may set its net on them. Primarily, however, the vessels need to rely on the dolphin set method, because that is the most reliable and efficient method in the part of the ocean in which the Mexican fleet fishes. Under the U.S. measures, tuna cannot be labeled dolphin safe unless the dolphin set method was not used even once during voyage.

86. The Mexican vessels cannot fish exclusively with FADs and unassociated sets in the area off the Mexican coastline and farther west, because yellowfin in that area cannot regularly be found that way. Moreover, those methods capture smaller, immature tuna. Even if the fleet stayed within the limits on total catch set by the IATTC, by focusing on immature tuna the fishers would reduce the number of yellowfin that reproduce. To avoid destroying the yellowfin fishery close to Mexico, the fleet would have to cut production dramatically or move to another region to fish for a different species of tuna, skipjack, which is more commonly found in association with FADs.

87. There would be substantial costs associated with fishing for tuna in a different region of the ETP. The vessels would have to travel greater distances – 12 to 15 days – before they could even begin to fish. That implies unreasonable costs per voyage.

88. Moving down to the south of the ETP would imply making significantly longer fishing trips. The vessels would not be able to fish until they reach the fishing grounds in the south and would have to focus on skipjack, which is less valuable.[26] This means higher producing costs for a less valuable resource. In this regard, Mexico would have a disadvantage with respect to other fleets that fish is their adjacent waters. Further, increasing fishing efforts on skipjack would impact the condition of the skipjack stocks. In any event, it is not assured that the nations south of Mexico would allow the Mexican fleet to fish in their EEZs.

89. The other alternative to fish tuna that can be labelled as dolphin safe in accordance with the U.S. measures would be to move to the Central and Western Pacific area[27]. That area is regulated by the Western and Central Pacific Commission (WCPFC). That organization has established regulations that prohibit fishing in the international waters. Therefore, in order to fish in that area it is necessary to fish in the EEZ's of the member nations of the Commission, which requires requesting licenses and paying fees. Despite the high cost of the licenses, such licenses are very difficult to obtain from the relevant Island States. In fact, Mexican vessels have tried for 3 consecutive years to obtain a license with no success. Moreover, Mexico has not been accepted as a Party in the WCPFC; the current status of Mexico is "cooperating non member".

90. For the above reasons fishing not in association with dolphins is not a viable option for the Mexican fleet.

4. Consumer preferences

40. <u>To both parties</u>: You both seem to acknowledge that consumers in the US market have a preference for tuna labelled dolphin safe. Please clarify the exact nature of consumer preferences in relation specifically to tuna caught in association with dolphins:

(a) Do you consider that the consumers' preference is determined by the fishing method and that the label accurately reflects such method?

91. As Mexico explained in its Opening Statement, a recent poll conducted by a highly regarded polling firm[28] indicated that 48% of the public believe that the term dolphin safe means no dolphins were injured or killed in the course of capturing tuna (AIDCP standard),

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26 Skipjack tuna, even when mature, is smaller than yellowfin, and the market considers it to be of lower quality. The value of skipjack is approximately 30% lower than yellowfin, per ton.

27 The ETP area ends at the150°W meridian. The United States suggests through its measures that there is no tuna-dolphin association even just beyond the 150°W meridian. That suggestion is unsubstantiated.

28 See Exhibit MEX-64.

22% believe it means there is no dolphin meat in the can, and only 12% believe it means dolphins were not encircled and then released in the capture of tuna (U.S. standard).[29] Therefore, the consumers' preference is not determined by the fishing method. Rather, final consumers of tuna expect that the dolphin safe label means that no dolphins were killed or injured in harvesting the tuna, a standard that is clearly not supported by the U.S. policy and law. Importantly, these numbers from the 2010 poll mirror the results of an identical poll conducted in 2003.[30]

(b) Are consumer preferences identical in all segments of the market, that is, do canners processors for example, display the same preferences as final consumers? Do retailers (shops owner) display the same preferences as final consumers? Do consumers of different kinds of tuna in the different price segments of the tuna market display the same preferences with regard to "dolphin safety"?

92. Not necessarily. Canneries are directly driven by the market distinctions mandated by the U.S. measures. They have chosen not to buy any tuna that was caught in the ETP using the dolphin set method because such tuna cannot be labelled as dolphin safe under the U.S. measures. In other words, the preferences of the canneries are created by the U.S. measures and are an effect of those measures. This effect is an example of how the U.S. measures modify the conditions of competition to the detriment of tuna imported from Mexico.

93. The final consumers' and retailers' preferences are identical in the sense that both look for tuna products that are labelled as dolphin safe.[31] The retailers require a dolphin safe label to avoid problems, criticism and potentially boycotts by certain NGOs. Their interest is to sell tuna products. Therefore, without a dolphin safe label, Mexican tuna products are excluded from the major distribution channels.

94. Regarding the final consumers, Mexico has already explained the meaning they attribute to the label dolphin safe, which is that no dolphins were killed or seriously injured during the capture of the tuna being sold.

95. Mexico is not aware of any distinctions in preferences based on different types of tuna or price levels.

96. In Mexico's view, but for the regulatory distinction that is at the core of this dispute (i.e. dolphin safe labelling provisions), consumers' tastes and habits respecting Mexican tuna products and tuna are identical to U.S. tuna products and tuna and to tuna products and tuna originating in other countries.

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29 *Ibid*.

30 See Exhibit MEX-64.

31 *Ibid*. See also Exhibit MEX-48.

41. <u>To both parties</u>: Please explain what the understanding of the "term dolphin safe" is for US consumers at each consumption stage (canners, retailers and final consumers) and how the dolphin safe label may influence each category of consumers.

97. Because canneries are directly regulated by the U.S. government in respect of their compliance with the dolphin safe measure, canneries must follow the precise meaning of the U.S. unilateral dolphin safe standards (both the one for the ETP and the one for other fisheries) as defined by U.S. law.

98. Retailers do not label tuna products themselves, but rather receive tuna products already labelled by the canneries. They do not have a legal need to know precisely what the label means; rather, their concern is to have tuna products that can be lawfully labelled as dolphin safe.

99. Mexico has already explained what the dolphin safe label means to consumers.

100. A similar situation arose in *EC – Sardines*. The analysis of the panel in that case confirms that WTO members are not allowed to adjust internal measures with the aim to create consumer expectations and in that manner justify a trade restrictive measure. In particular the panel in *EC- Sardines* stated as follows:

> The European Communities acknowledged that it is the Regulation which in certain member States "created" the consumer expectations which it now considers require the maintenance of that same Regulation. Thus, through regulatory intervention, the European Communities consciously would have "created" consumer expectations which now are claimed to affect the competitive conditions of imports. If we were to accept that a WTO Member can "create" consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of "self-justifying" regulatory trade barriers. Indeed, the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations. Mindful of this concern, we will proceed to examine whether the evidence and legal arguments before us demonstrate that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "sardines" in conjunction with "Pacific", "Peruvian" or "*Sardinops sagax*" would therefore

> not enable European consumers to distinguish between products made from *Sardinops sagax* and *Sardina pilchardus*.[32]

101. It is important to note that, as explained in Mexico's First Written Submission, in 1997 the U.S. Congress enacted the International Dolphin Conservation Program Act ("IDCPA")[33] to give effect to the Panama Declaration, and that the IDCPA provided for changing the U.S. definition of dolphin safe to the AIDCP standard. From January 1 to January 23, 2003 the United States implemented the change, so that Mexican 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 that dolphin sets were not having a having a significant adverse impact on any depleted dolphin stock in the ETP. A description of how the change was implemented – through an amendment to Form 370 – was explained in an affidavit submitted by a National Marine Services official in the court proceeding in which certain NGOs challenged the change in the standard under U.S. law. The official explained:

> Attached as Exhibit A, is a copy of NOAA Form 370. This form is the FCO importers are required to file with the United States Customs Service at the time of import. This version of the form was in use prior to January 1, 2003, before the Secretary made a final finding pursuant to 16 U.S.C. section 1385(g), and after January 23, 2003, when the Final Finding was stayed. For tuna harvested from the Eastern Tropical Pacific (ETP) by vessels in excess of 400 short tons, importers who designate their product as dolphin safe must check box 5(B)(5), which states in part that, "[N]o purse seine net was intentionally deployed on or to encircle marine mammals during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught."
>
> Attached as Exhibit B, is a second copy of NOAA Form 370. This form was in effect from January 1, 2003 through January 23, 2003, the short period of time between the Secretary's Final Finding and the stay. For tuna harvested from the Eastern Tropical Pacific (ETP) by vessels in excess of 400 short tons, importers who designate their product as dolphin safe must check box 15 5(B)(5), which states in part that, "[N]o dolphins were killed or seriously injured in the sets in which the tuna were caught."
>
> Aside from the language differences identified in paragraphs *5* and 6, both versions of NOAA Form 370 are identical.

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[32] Panel Report, *European Communities- Trade Description of Sardines,* WT/DS231/R and Corr.1, adopted 23 October 2002, paragraph 7.127.

[33] Pub. L. No. 105-42, 111 Stat. 1122 (1997). Exhibit MEX-21.

> Changing the form to accommodate either certification requirement is simply a matter of posting the appropriate electronic form on the NOAA Fisheries Southwest Regional website. This can be accomplished by NOAA Fisheries within about five minutes.[34]

102. The court litigation resulted in the issuance of a stay that required the change to be withdrawn.[35] Nonetheless, the legislation and executive action in implementing it demonstrate that the United States has had the ability to alter the definition, and that the United States previously agreed that the AIDCP standard met the expectations of producers, retailers and consumers. By allowing a regulatory distinction through the dolphin safe label scheme, the U.S. created an expectation among the consumers at each consumption stage. Now, the consumers demand this label on every tuna product. Thus, the United States has adversely affected competitive conditions on Mexican imports of tuna products by denial of the dolphin safe label.

43. <u>To Mexico</u>: Please comment on the US arguments to the effect that the canneries' policies of not purchasing tuna caught by setting on dolphins were put in place before the entry into force of the measures that they would remain independently of the legislative changes and that the canneries lobbied against the relaxation of the dolphin safe standard.

103. According to the evidence filed by the United States, the three major U.S. brands announced that they would stop buying tuna caught in nets that were set upon dolphins in April 1990.[36] The DPCIA was enacted in November 1990.[37] However, legislation of this nature had been proposed earlier, in 1989, and therefore was already pending when the canneries made their announcements.[38]

104. At the time the announcement was made an estimated 80,000-100,000 dolphins were being killed annually in the ETP.[39] Also at the time, the United States placed a ceiling of 20,500 on the number of dolphins that could be killed by U.S. tuna vessels.[40]

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34 Declaration of P. Donley, Civ. No. CO3-0007 (March 7, 2003), p. 3. Exhibit MEX-70.

35 68 Fed. Reg. 4449 (January 29, 2003). Exhibit MEX-82.

36 Exhibit US-38.

37 U.S. First Written Submission, footnote 17.

38 Exhibit MEX-71

39 Exhibit US-38.

40 *Ibid*.

105. The situation that prompted the purchasing policies of the canneries and the large grocers was that 80,000-100,000 dolphins that were being killed annually in the ETP.[41] That situation no longer exists because it was long remedied by the international AIDCP regime. Moreover, the damaging environmental effects of the alternative fishing methods (promoted by the U.S. measures) later became more apparent.

106. This raises the question of why would these U.S. canneries and their successor companies want to continue their policies? The answer may be found in the facts relating to the cannery industry. The U.S. tuna fleet had already been aggressively transitioning away from the ETP in the wake of the U.S. Southern Pacific Tuna Treaty that entered into force in 1988 and gave the fleet access to fishing permits in the EEZs of countries in the Central and Western Pacific, and the U.S. fleet effectively abandoned the ETP after the DPCIA.[42] The major U.S. producers of tuna products previously had their own fishing fleets, but subsequently sold off their vessels and structured their operations to purchase tuna from unaffiliated tuna brokers or otherwise from foreign fleets.[43]

107. U.S. canneries – which are the producers of U.S. tuna products – use very little tuna from the ETP fishery. The United States requires its domestic canneries to submit reports on the fisheries from which they source tuna. The latest U.S. statistics indicate that in 2009 tuna from the ETP constituted less than 1% of the tuna used to make U.S. origin tuna products.[44] Indeed, a very large share of U.S. cannery production is in American Samoa, which is supplied from fleets operating in the Western Pacific. Thus, U.S. canneries have structured their supplier arrangements operations in a manner that avoids ETP sources.

108. In contrast, the major Mexican producers of tuna products have canneries only in Mexico and operate their own fleets in the ETP, and it is clear that tuna products from Mexico would constitute a significant factor of competition in the U.S. market place. The effect of the U.S. measure, therefore, is to limit the ability of Mexican brands of tuna products from competing with the brands produced by U.S. canneries and canneries of third countries.

109. In summary, it is in the economic interest of the canneries that currently dominate the U.S. market to maintain the current special dolphin safe standard for the ETP, because (i) the standard excludes Mexican brands of tuna products from competing in the U.S. market and

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41 Exhibit US-38.

42 Mexico's First Written Submission, paragraph 25.

43 The current owners of Starkist (the South Korean company Dongwon Enterprise Co.) and Chicken of the Sea (the Thai company Thai Union) may have separate ownership interests in fleets in the West Pacific, but if so, to the best of Mexico's knowledge those vessels are not U.S. flagged vessels.

44 The U.S. report shows that out of a total of 62,587 tons, only 477 tons were sourced from the ETP. The rest was from the Western Tropical Pacific. Department of Commerce, "United States Tuna Cannery Receipts January - December 2009 and Comparison". Exhibit MEX-72.

(ii) the lower (relaxed) standard applied outside the ETP allows those canneries to avoid having to ensure that tuna they purchase from non-ETP sources was captured without killing or seriously injuring dolphins (for example by imposing requirements on all vessels to have independent observers). Thus, those canneries benefit commercially from the U.S. "no sets upon dolphins" labelling standard, which gives them a significant competitive advantage over Mexican producers of tuna products.

110. In addition to the foregoing, the U.S. argument is irrelevant. Mexico's focus is on the treatment accorded by the U.S. measure to Mexican tuna products, which are for sale to consumers and not to the canneries who announced their policies in 1990. Mexico seeks to have effective market access for its tuna products, which is only possible if those products are eligible to have a dolphin safe label in accordance with the AIDCP standard.

111. With respect to the U.S. market for tuna products, the key facts are as follows: (i) according to an independent survey, 48% of U.S. final consumers believe that "dolphin safe" means the international AIDCP standard under which the Mexican tuna fleet operates;[45] and (ii) it is of commercial value to Mexican tuna exporters and distributors to be able to use the AIDCP dolphin safe label in the U.S. market should the prohibition be lifted.[46]

112. It is clear is that a significant portion of final consumers and at least some major retailers would be willing to accept the AIDCP standard, which would open up commercial opportunities for Mexican tuna in the major U.S. distribution channels.

C. CLAIMS UNDER THE TBT AGREEMENT

1. Order of analysis of TBT claims

45. <u>To both parties</u>: You have addressed your TBT claims in a different order. Could you clarify the order of analysis that should be followed?

113. As Mexico mentioned during the first substantive meeting with the Panel and in its response to Question 1 of the Panel, Mexico's principal claims concern the discriminatory nature of the U.S. measures. Therefore it is logical to address Mexico's claim under Article 2.1 first, followed by its other claims under the TBT Agreement.

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45 Exhibit MEX-64.

46 *Ibid*.

114. The order established by Mexico on its TBT Agreement claims (Article 2.1, 2.2, and 2.4)[47] does not contradict the order set out in the First Written Submission of the U.S.[48] and position of the U.S. during the First Substantive Meeting with the panel.

2. Definition of a "technical regulation"

46. <u>To both parties</u>: In your view, for a document to constitute a technical regulation under Annex 1.1 of the *TBT Agreement*, should the *document* as a whole be mandatory or only the *product characteristics* and their related processes and production methods as laid down in the document?

115. A technical regulation is defined in Annex 1.1 of the TBT Agreement as follows:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

116. Mexico interprets this question as follows:

> Does the phrase "with which compliance is mandatory" relate to the term "document" or to what the document lays down (e.g., product characteristics)?

117. There seems to be little practical difference whether the phrase "with which compliance is mandatory" relates to the term "document" or to what the document lays down. The substantive content of the technical regulation is what matters and the main distinguishing characteristic of a technical regulation is that the substantive content is mandatory. Whether that substantive content is made mandatory on the basis of the "document as a whole" or more precisely within the text of the document appears to be immaterial. Moreover, if a component of a document is mandatory (e.g., the product characteristics laid out in the document), it can be fairly be said that the document is mandatory. There is no basis in the text of the definition to read in a requirement that the document "as a whole" (i.e., every provision in the document) is mandatory. Only that compliance is mandatory in some manner, which can be accomplished either in whole or in part. Thus, in Mexico's view, what is important is to determine if the substantive content of the document contains mandatory provisions. Any other approach would enable a WTO Member to circumvent the TBT obligations applicable to technical regulations simply by including some voluntary elements in the document.

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47 See Oral Presentation of Mexico during the First Substantive Meeting with the Panel, paragraphs 30, 36, 38, 47 and 57.

48 See U.S. First Written Submission, paragraphs 97-98.

(i) Position of Mexico and the Appellate Body

118. In presenting its claims under the TBT Agreement, Mexico has applied the interpretation of "technical regulation" that is set out in the Appellate Body Report in *EC – Asbestos* and subsequently followed in the Appellate Body Report in *EC – Sardines*.[49] The Appellate Body ruled that the heart of this definition is that a "document" must lay down "product characteristics" which include "labelling requirements".[50] It stated that "compliance with the product characteristics laid down in the document must be mandatory" and that a "technical regulation must, in other words, regulate the characteristics of products in a binding or compulsory fashion".[51] Finally, it stated that:

> "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products must possess certain "characteristics", or the document may require, negatively, that products must not possess certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.[52]

119. Applying the Appellate Body's interpretation to the question posed above, the mandatory compliance relates to what the document lays down (e.g, the product characteristics) rather than the document. It is the document itself that lays down the compulsory product characteristics in either a positive or negative form.

120. In this dispute, the "document" is the statutory and regulatory provisions that make up the labelling provisions as interpreted by a court decision which are found primarily in the DPCIA.[53] The mandatory language is found in the document in the form of the DPCIA language that specifies it is unlawful to include on the label of any tuna product offered for sale in the United States the term "dolphin safe" or any analogous term or symbol if the product contains tuna harvested in the ETP by a large purse-seine vessel using a purse-seine net intentionally deployed on or to encircle dolphins. It is also found in the enforcement provisions in the DPCIA.[54]

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49 Mexico's First Written Submission, paragraphs 193-203.

50 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraph 67; Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, paragraphs 176-195.

51 *EC – Asbestos*, paragraph 68.

52 *Ibid*., paragraph 69.

53 Mexico's First Written Submission, paragraph 195.

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

(ii) Position of the United States and Canada

121. The United States and Canada offer a different interpretation of the definition of "technical regulation" that departs from the interpretation of the Appellate Body in *EC – Asbestos* and *EC – Sardines*.[55] Rather than interpreting the second sentence as giving "certain examples of product characteristics" as the Appellate Body did in *EC – Asbestos*,[56] the United States and Canada interpret the second sentence to specify that, in addition to laying down product characteristics a technical regulation can lay down terminology, symbols, packaging, marking or labelling requirements.[57] In the words of the United States, "the second sentence specifies alternative aspects with which a document meeting the definition of a technical regulation might deal".[58] In the words of Canada, the "second sentence […] sets out categories of subject matter that are not examples of 'product characteristics'". Under the U.S. interpretation, it appears to be the "document" with which compliance is mandatory and not what the document lays down.[59]

122. Although Canada agrees with the U.S. interpretation, it appears to depart from that interpretation on the specific point raised in this question. It states that "the 'document' may set out mandatory requirements governing the use of terminology, symbols, packaging, marking or labelling". [60] Canada's position appears to be that it is not the document that is mandatory but, rather, the document itself is laying down the compulsory subject matter. This position is very similar to Mexico's position on the point raised in this question with the exception that instead of referring to "product characteristics", Canada refers to the subject matter included in the second sentence.

(iii) Reconciling the Interpretations

123. In Mexico's view, irrespective of how this interpretative issue is resolved, the conclusion is the same—the U.S. measures constitute a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement.

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55 U.S. First Written Submission, paragraphs 126-138; Canada's Third-Party Oral Statement, paragraphs 3-14.

56 Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraph 67.

57 U.S. First Written Submission, paragraph 126 and footnote 141; Canada, Third-Party Oral Statement, paragraphs 3-14.

58 U.S. First Written Submission, footnote 140.

59 U.S. First Written Submission, paragraphs 126-127 and footnotes 140-141.

60 Canada's Third-Party Oral Statement, paragraph 11.

124. If the Panel applies the interpretation of the Appellate Body in the two reports referred to above, the U.S. measures constitute a technical regulation as per the argument set out in Mexico's First Written Submission.[61]

125. The United States and Canada have raised some valid interpretative points regarding the relationship between the two sentences of the definition of technical regulation. If the Panel departs from the Appellate Body's interpretation and interprets the second sentence of the definition as suggested by the United States and Canada, the same reasoning of the Appellate Body that applies to "product characteristics" in the first sentence of the definition applies to the subject matter in the second sentence. Specifically, the compulsory subject matter referred to in the second sentence can be laid down in either a positive or negative form. In this dispute, the subject matter (i.e., labelling requirement) is being laid down in negative form. Thus, the "mandatory" element of the definition is met and the conclusion is the same—i.e., the U.S. measures constitute a technical regulation.

126. Finally, if the Panel interprets the definition of technical regulation to require that the "document" is mandatory, the same reasoning applies and it can be made mandatory in either a positive or negative form. For the same reasons as above, the document would be mandatory and, therefore, the U.S. measures would constitute a technical regulation.

47. <u>To Mexico</u>: In paragraph 4 of your first written submission you suggest that the United States' measures establish "a prohibition of the use of a US dolphin safe label on imports of tuna products from Mexico". Please clarify whether your position is that such prohibition should be considered a "product characteristic", a "process and production method", a "labelling requirement" or a combination of two or more of these elements for the purpose of Annex 1.1 of the *TBT Agreement.*

127. As explained in Mexico's response to Question 46 of the Panel, Mexico has applied the interpretation of "technical regulation" that is set out in the Appellate Body Report in *EC – Asbestos* and subsequently followed in the Appellate Body Report in *EC – Sardines*. The Appellate Body ruled that the heart of this definition is that a "document" must lay down "product characteristics" which include "labelling requirements". Thus, the prohibition relates to a labelling requirement that is a product characteristic.

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61 Mexico's First Written Submission, paragraphs 193-203.

48. <u>To both parties</u>: Considering that the definitions of both a "technical regulation" and a "standard" in Annex 1.1 and 1.2 of the *TBT Agreement* include "labelling requirements", please comment on the possible differences in meaning of this term in these two provisions. In particular, please comment on whether the object and purpose of the *TBT Agreement* may shed some light on establishing such distinctions.

128. The same term "labelling requirements" is used in the definition of "technical regulation" and "standard" in Annex 1.1 and 1.2. Identical wording gives rise to a strong presumption of the same meaning.[62] However, the same term can have different meanings in the context of different provisions.[63] In Mexico's view, this term has the same meaning in both definitions and there is no basis in the different contexts of the term (i.e., definition of "technical regulation" versus definition of "standard") to give the term a different meaning.

129. That the term has the same meaning in both contexts is confirmed in the fifth paragraph of the Preamble of the TBT Agreement which refers to "labelling requirements" for both technical regulations and standards.[64]

130. The Panel must distinguish between the "labelling requirements" and the "mandatory" or "not mandatory" use of the label.

131. The "requirements" in "labelling requirements" refer to the criteria for the application of the label. Whether the label is a technical regulation or a standard, those criteria must be met before the label can be used. These "requirements" do not make the label "mandatory" or "not mandatory" within the meaning of the definitions of "technical regulation" and "standard".

132. An important objective of the TBT Agreement, namely standardization or harmonization, sheds light on this issue. The TBT Agreement contemplates the harmonization of technical regulations, in part, through the adoption of international standards (Article 2.6). Thus, it contemplates the conversion of a "standard" for a "labelling requirement" into a "technical regulation" for a "labelling requirement". With respect to the

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62 Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, paragraph 268.

63 Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, paragraph 74 and footnote 107; Appellate Body Report, Japan – Countervailing Duties on Dynamic Random Access Memories from Korea, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, paragraph 272.

64 The Preamble of the TBT Agreement stated in paragraph fifth the following: "Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade". (Emphasis added)

former, "compliance is not mandatory" and with respect to the latter "compliance is mandatory". In both cases the subject matter is a "labelling requirement".

133. Mexico is arguing that compliance is mandatory and, therefore, the U.S. measures amount to a technical regulation rather than a standard.

3. The alleged mandatory nature of the dolphin safe labelling provisions

51. <u>To both parties</u>: Please clarify whether label designations, different from the United States' official dolphin safe label, suggesting that dolphins were not harmed during the tuna harvesting operations are allowed under the United States' laws and regulations? Would a label based on "meeting the protection standard of AIDCP" or "no juvenile tuna caught" be permitted in the US? If so, why is Mexico not using such a label?

134. Any label suggesting that dolphins were not harmed that applies any standard other than the U.S. official standard is expressly prohibited by the U.S. measure. Both the statute (section 1385(d)) and the regulation (50 CFR 216.91(a)) state that it is a violation of section 5 of the Federal Trade Commission Act for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "dolphin safe" or any other term or symbol that "falsely" claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested in a method not approved under the law. 50 CFR 216.24(f)(12) further states:

> (ii) It is unlawful for any exporter, transshipper, importer, processor, or wholesaler/distributor to possess, sell, purchase, offer for sale, transport, or ship in the United States, any tuna or tuna products bearing a label or mark that refers to dolphins, porpoises, or marine mammals unless the label or mark complies with the requirements of 16 U.S.C. 1385(d).

135. The requirement of the U.S. statute that the tuna must not be caught using the dolphin set method disqualifies Mexican tuna products from using the term "dolphin safe" even though the tuna is caught in full compliance with the requirements of the AIDCP and is "dolphin safe" under that Agreement. Accordingly, a label based on "meeting the protection standard of AIDCP" would be prohibited under the U.S. law as "falsely" suggesting that tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins.

136. A label that stated "no juvenile tuna caught" would not be meaningful to consumers and would not have value in the market.

52. <u>To both parties</u>: Please express your views on whether a labelling scheme should be considered mandatory if failure to comply with it would result in preventing the products in question from accessing the market?

137. Yes.

138. The U.S. measures make it unlawful to include on the label of any tuna product offered for sale the term "dolphin safe" or any analogous term or symbol if the product contains tuna harvested in the ETP by a vessel fishing with the dolphin set method. This prohibition against the use of the "dolphin safe" label remains in force even when the international standards of the AIDCP have been met.

139. In *EC - Asbestos*, the Appellate Body determined that product characteristics may be prescribed or imposed in either a positive or a negative form[65]. The U.S. statute prohibits tuna products offered for sale in the U.S. to possess certain characteristics (i.e. the dolphin safe label or any analogous label or symbol) unless the prescribed requirements are met. Thus, the dolphin safe labeling rules meet the criterion to be mandatory.

140. In Mexico's view, the U.S. measures exclusively allow the application of the dolphin safe label on tuna products when certain requirements are met (i.e., that large purse seine vessels inside the ETP do not fish using the dolphin set method). Therefore, compliance with those requirements is the only way to be able to use a dolphin safe label.

141. Accordingly, there are no alternative means to certify that a tuna product is dolphin safe. Even if the U.S. argues that compliance with its measures is voluntary, this lack of alternative means to certify makes such voluntary nature mandatory.

142. Mexico has stated that by using the international standard (i.e., the AIDCP label) Mexican tuna products can provide the assurances consumers demand: that no dolphins were killed or injured in harvesting the tuna. The fact that the U.S. measures prohibit the utilization of any other standards to certify that a tuna product is dolphin safe gives these measures a *de jure* mandatory distinction. Thus, Mexico is prevented from selling Mexican tuna products as dolphin safe without complying with the U.S. measures, even if the tuna products are dolphin safe under the international standard.

143. An additional point that supports Mexico's view in asserting that the U.S. measures are *de jure* mandatory are the fact that these measures established surveillance and enforcement procedures if an importer tries to import tuna products bearing the dolphin safe label when such products do not met the requirements set out in the U.S. measures.

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65 Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraph 69.

144. Importers of tuna are required to submit to the U.S. Customs and Border Protection a properly completed Fisheries Certificate of Origin (NOAA Form 370)[66] at the time of importation of any tuna product. This certificate has a section on "Dolphin Safe Status" in order to check if the tuna or tuna product described therein are or are not certified to be dolphin safe under the U.S. measures. The NOAA Fisheries Service conducts audits of canneries and "spot checks" at retailers to verify the sources of tuna labeled as dolphin safe.[67]

145. In addition, both the statutory and regulatory provisions specify it is a violation of Section 5 of the Federal trade Commission Act for any producer, importer, exporter, distributor or seller of any tuna product that is exported from or offered for sale in the U.S. to include on the label of that product the term "dolphin safe" or any analogous term or symbol if the product contains tuna harvested in the ETP by a large purse-seine vessel using a purse-seine net intentionally deployed on or to encircle dolphins.

146. These points reaffirm Mexico's arguments that the challenge measures are a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.

147. Even if the labeling scheme were not to be considered *a priori* mandatory, it is *de facto* mandatory because the market conditions in the U.S. are such that it is impossible to effectively market and sell tuna products without the dolphin safe label. The *de facto* application of the provisions of the WTO Agreements is important because it prevents WTO Members from doing indirectly what they are prohibited from doing directly. In this way, it maintains the integrity of the WTO Agreements.

148. As Mexico has explained, the application of a dolphin safe label to tuna products has significant commercial value in the U.S. market given that consumers at each consumption stage demand this label in order to sell or buy tuna products.

149. Therefore, the prohibition of having the dolphin safe label on Mexican tuna products has the effect of excluding Mexican tuna products from the major distribution channels in the U.S. market and creating new barriers to trade. In this respect, compliance with the requirements imposed by the United States becomes mandatory for the Mexican tuna industry in order to access the U.S. market.

150. Although the United States argues that its measures are "voluntary", compliance with these measures is "mandatory" in order to effectively market and sell tuna products in the U.S. market. Its own representatives have recognized that without the dolphin safe label, the ability of fishermen to sell tuna in the U.S. market is severely curtailed[68].

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66 See Exhibit MEX-63.

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

68 See Exhibit MEX -34.

151. The situation is similar to that addressed by the Appellate Body in *EC – Sardines* in that exporters of the subject product are not prohibited from exporting the product to the U.S. and the challenged measure does not compel the exporters to use the label. Rather, exporters are prohibited from using the label except in narrow circumstances. However, the situation in this dispute is more extreme than in *EC –Sardines* because if the label is not used, tuna products are largely excluded from the U.S. market. For these reasons, Mexico's approach is consistent with that of the Appellate Body in *Asbestos* and *Sardines*.

152. The aim of the TBT Agreement is to ensure that technical regulations or standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

153. Mexico has demonstrated that the U.S. measures do not fulfill a legitimate objective and are more trade-restrictive than necessary to fulfill that legitimate objective taking into account the risks non-fulfillment would create.

154. In Mexico's view, the dolphin safe labeling scheme is being misused by the United States, creating an unnecessary obstacle to trade by denying competitive opportunities to imports of Mexican tuna products.

53. <u>To Mexico</u>: Do you consider all the measures identified in paragraph 121 of your first written submission to be technical regulations within the meaning of Annex 1.1 of the *TBT Agreement*? If this is so, should each of them be considered mandatory? Are there any differences, relevant to this dispute, in relation to their binding character?

155. The measures in combination constitute a technical regulation within the meaning of Annex 1.1. of the TBT agreement.

156. As explained in Mexico's First Written Submission, the U.S. dolphin safe labelling provisions are contained in (i) a document (the statute and regulations) which is applicable to a identifiable product and group of products (tuna products)[69]; (ii) this document lays down one or more product characteristics (a dolphin safe labelling requirement);[70] and (iii) its compliance is mandatory (as explained in more detailed below).

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69 The United States has already conceded that "…the U.S. dolphin safe labeling provisions apply to an identifiable group of products (tuna products)". U.S. First Written Submission, paragraph 128.

70 Apparently the U.S. does not concede that U.S. dolphin safe labeling provisions set out "product characteristics" for tuna products, but rather asserts that they constitute "a document that deals exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, processes or production method". See paragraph 40 of the Oral Statement of the United States at the First Panel Meeting. See also U.S. First Written Submission, paragraphs 129-131.

157. The statute and regulations originally provided a certain degree of discretion to the U.S. Executive Branch to modify the dolphin safe labeling standard, but the court ruling in *Earth Island vs. Hogarth* removed that discretion. This court ruling should be analyzed in the context of and in relation to the statute and regulations. Mexico is not seeking that the panel analyze the measures independently in terms of its TBT claims. The United States also has not suggested that there be an independent analysis of each measure.

54. To Mexico: If all measures identified in paragraph 121 of your first written submission are mandatory, how do you reconcile this position with your suggestion in paragraph 203 of your first written submission that the United States' dolphin safe labelling scheme established by these measures may be considered only *de facto* mandatory?

158. The position expressed in paragraph 203 of Mexico's First Written Submission is an alterative position. As stated in paragraphs 199-202 of Mexico's Submission, the U.S. dolphin safe labeling provisions are *a priori* mandatory. If the Panel disagrees, it is Mexico's alternative position that these measures are *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 label.[71]

55. To Mexico: What is the legal basis for your contention that the definition of a "technical regulation" established by Annex 1.1 of the *TBT Agreement* covers *de jure* and *de facto* mandatory technical regulations?

159. As noted in Mexico's response to Question 52, above, the *de facto* application of the provisions of the WTO Agreements is important because it prevents WTO Members from doing indirectly what they are prohibited from doing directly. In this way, it maintains the integrity of the WTO Agreements. In Mexico's view, the *de facto* application of WTO provisions extends to all provisions that could potentially be undermined if they are restricted to a *de jure* interpretation and application including the definitions in the TBT Agreement.

160. The *de facto* application of the provisions of the WTO Agreements is most developed in the context of *de facto* discrimination which underlies the principles upon which the WTO Agreements are based. The applicable provisions have been interpreted so as to prevent facially-origin-neutral measures from undermining core non-discrimination obligations. In the history of the GATT 1947 and the WTO, there have been several disputes that have

[71] See Mexico's First Written Submission, paragraph 203.

addressed measures that *de facto* discriminate against imported of foreign products.[72] In the case of GATT Articles III:4 and I:1, the provisions have been interpreted so that they can apply to measures which (i) explicitly prohibit discrimination with regard to the origin of the products; and (ii) implicitly prohibit facially-neutral-origin measures that *de facto* discriminate against imports.

161. The issue of the "mandatory" or a "voluntary" nature of "technical regulations" and "standards" should be closely analyzed as a whole on a case-by-case basis, considering the relevant facts and circumstances in each case.

162. As mentioned above, Mexico's position is that the U.S. dolphin safe labeling measures constitute a technical regulation which is mandatory. However, if the panel considers that these measures are not mandatory on their face, it is Mexico's position that they are mandatory in fact.

163. It has been well recognized by WTO members that technical regulations are mandatory and standards are voluntary, however there will be instances in practice that a standard may be voluntary in nature but mandatory in practice. In 19 June 2001, the Delegation of Switzerland presented a paper at the WTO Committee on Trade and Environment and the WTO Committee on Technical Barriers to Trade. On this particular point, the communication stated the following:

> 18. According to the TBT Agreement, there are two categories of marking and labelling requirements, depending on whether compliance with the requirements is mandatory (technical regulation) or voluntary (standard). As clear as this distinction may be in theory, it undoubtedly raises great difficulties in practice, since it is not always clear-cut.
>
> 19. For instance, a specific marking or labelling requirement, enacted by a central government body, may be voluntary in nature and therefore be considered to be a standard as defined in Annex 1. However, <u>if this standard has the effect of market segregation, compliance with the standard becomes factually mandatory for a producer wishing to access the newly created segment of the market</u>. For example, access for an organically produced cheese to an "organic" ecolabel and thus to the market for organic food is

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[72] See Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, paragraph 12: "In addition, the text of paragraph 4 [of GATT article III] referred both in English and French to laws and regulations and requirements *affecting* internal sale, purchase, etc., and not to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word 'affecting' would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market."

> denied unless the producer proves that his product is in conformity with the voluntary standard.[73] (Emphasis added)

164. Moreover, a FAO study prepared in 2003 by Ms. Cora Dankers named "Environmental and Social Standards, Certification and Labelling for Cash Crops", analyzed the same concerns raised years before among some WTO members relating to the "*de facto mandatory*" nature of some labelling schemes, particularly the labeling regime in organic food. On this point, the study concluded:

> The de facto mandatory nature of some voluntary labelling schemes raises doubts. Voluntary labelling schemes are considered not to be trade restrictive, as imports of non-labelled products are not hampered. However, as several delegations have noted in TBT and CTE, some voluntary schemes do have an impact on market access. With the growing market for organic products, the differences in organic regulations between countries may develop into de facto trade barriers.[74]

165. These statements of the Swiss delegation and the FAO underscore the importance of including in the *de facto* application of the provisions of the WTO Agreements the definition of technical regulation in Annex 1.1 of the TBT Agreement.

56. <u>To Mexico</u>: Please comment on the United States' suggestion, in paragraph 135 of its first written submission, that admitting that the definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* covers both *de jure* and *de facto* mandatory product characteristics, would result in rendering the definition of a "standard" in the second paragraph of that instrument "inutile".

166. Mexico does not agree with this assertion.

167. The United States conflates the concept of "requirement" in "labelling requirement" with the concept of "with which compliance is mandatory". This distinction is explained in Mexico's response to Question 48, above.

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[73] Exhibit MEX-74. In respect of this particular point of the paper presented by the delegation of Switzerland, Mexico's delegate expressed in the TBT Committee of 29 June 2001 that in "[h]e agreed that in some cases, voluntary schemes could be dubious in their voluntary or mandatory nature. He understood that mandatory laws were requirements which had to be conformed with, although certain voluntary schemes might contain obligations. It depended on how the schemes were implemented, and whether they linked to specific regulations." See Minutes, G/TBT/M24, paragraph 81. Exhibit MEX-85.

[74] C. Dankers, "Environmental and Social Standards, Certification and Labelling for Cash Crops," (FAO Study), p. 88. Exhibit MEX-75.

168. Mexico's *de jure* and *de facto* interpretation of the phrase "with which compliance is mandatory" in the definition of "technical regulation" does not render the definition of "standard" inutile. To the contrary, if the measure is not *de jure* or *de facto* mandatory, it is a standard. Mexico's interpretation preserves the integrity of the legal distinction between a technical regulation and a standard as described in its response to Question 55, above.

169. Nothing in the TBT Agreement prevents Members from coverting a standard into a technical regulation.

57. <u>To both parties</u>: What would make a *de facto* mandatory provision a technical regulation? What kind of governmental activity would be needed to make a *de jure* non mandatory labelling provision *de facto* mandatory?

170. As explained in Mexico's response to Question 56, it has been discussed in the WTO TBT Committee and in other international fora that there will be particular instances when a *de jure* non-mandatory labelling provision will be *de facto* mandatory. One example provided in Mexico's response is the communication of the Swiss delegation at the TBT Committee in 19 June 2001 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 the newly created segment of the market.

4. "Likeness" and "no less favourable treatment" under Article 2.1 of the *TBT Agreement*

58. <u>To both parties</u>: Both parties suggest that the analysis under Article 2.1 of the *TBT Agreement* is similar to the analysis under Article I:1 and Article III:4 of GATT. Please elaborate on:

(a) Whether an analysis of "likeness" and "less favourable treatment" under Article 2.1 of the *TBT Agreement* should be assumed to have exactly the same contours as the same analysis under Article III:4 of GATT 1994? If so, does this imply that all interpretations developed by panels and the Appellate Body in the context of Article III:4 of GATT 1994 are entirely transposable to Article 2.1? If so, why?

(b) Whether and how your arguments presented under Article I:1 of GATT 1994, which is based on different wording than the terms of Article 2.1 of the *TBT Agreement,* should be applied to the claims under Article 2.1.

171. Article 2.1 provides as follows:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

172. This provision contains two non-discrimination obligations applicable to technical regulations, one that is similar to the national treatment obligation in Article III:4 and the other that is similar to the most-favoured-nation obligation in Article I:1. Although the language used in Article 2.1 is different from that used in Articles III:4 and I:1,[75] both of these GATT 1994 provisions offer guidance on how to interpret Article 2.1.

173. The non-discrimination provisions in the WTO Agreements are important to all WTO Members. The essence of the non-discrimination obligations in the GATT 1994 and other covered agreements is that like products should be treated equally, irrespective of their origin.[76] In the context of non-tariff barriers such as the U.S. measure at issue in this dispute, these provisions are particularly important to developing country Members. Accordingly, it is essential that the elements of these provisions, including the definitions of "like products" and "less favourable treatment" be carefully interpreted and applied. There is a long history of interpreting and applying these terms in the context of Article III:4 and other provisions of the GATT 1994 so that the non-discrimination obligations are not undermined. This history should be relied upon when interpreting Article 2.1 of the TBT Agreement in order to maintain the integrity of the non-discrimination obligations contained in that provision.

(i) "Like Products"

174. The term "like products" is used in Articles 2.1and III:4. This term appears in many different provisions of the covered agreements. As observed by the Appellate Body, in each of the provisions where the term "like products" is used, the term must be interpreted in light of the context and of the object and purpose of the provision at issue and of the object and purpose of the covered agreement in which the provision appears.[77] The Appellate Body has further noted that:

> The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and

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75 The relevant part of GATT Article III:4 reads "[t]he products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin...". The relevant part of GATT Article I:1 reads "[...] any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members]".

76 Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Banana*s, WT/DS27/AB/R, adopted 25 September 1997, paragraph 190.

77 Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraphs 88-89.

> the circumstances that prevail in any given case to which that provision may apply[78]

175. Both Article III:4 and Article 2.1 apply to technical regulations so, at a general level, their context is similar. Given that the specific language used in both Articles when referring to the term "like products"—i.e., "shall be accorded treatment no less favourable than that accorded to like products of national origin"—is identical, the immediate context of the term when used in the two provisions is also identical. Accordingly, it is appropriate to give the term the same meaning under both provisions. Thus, as stated in Mexico's First Written Submission, the four criteria used to determine likeness under Article III:4 should be used to determine likeness under Article 2.1.[79]

(ii) "Treatment no less favourable"

176. As in the case of the term "like products", the immediate context of the term "treatment no less favourable" is identical in Articles III:4 and 2.1. Accordingly, it is appropriate to give the term the same meaning under both provisions.

177. It is crucial that the term "treatment no less favourable" in Article 2.1 is interpreted and applied with reference to the equality of competitive opportunities for imported products as compared to like domestic products. Such competitive opportunities can be affected in a variety of ways, not only by measures directly regulating products and restricting imports but by those that indirectly affect imports. The concept of the equality of competitive opportunities is flexible and protects the integrity of the non-discrimination obligations in a broad range of factual circumstances. It has withstood the test of time since it was first introduced when interpreting the GATT 1947.[80]

178. In Mexico's view, the assessment for "treatment no less favourable" in Article 2.1 of the TBT Agreement should be the same as under Article III:4 of the GATT 1994 – i.e., whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.[81]

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78 *Ibid*., citing from the Appellate Body's decision in *Japan – Alcoholic Beverages*, at paragraph 114.

79 See also Mexico's First Written Submission, paragraph 259.

80 For example, see Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23-October-1958, BISD-7S/60, paragraphs 11-12.

81 Appellate Body Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, paragraphs 91, 93 and 96; Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paragraphs 135, 137 and 144.

(iii) Article I:1 of the GATT 1994

179. The language of Article I:1 of the GATT 1994 is different from that used in Article 2.1 of the TBT Agreement. Article I:1 refers to "[...] any advantage, favour, privilege or immunity granted by any [Member] to any product originating in […] any other country shall be accorded immediately and unconditionally to the like product originating in […] the territories of all other [Members]." In contrast, Article 2.1 refers to , "products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded […] to like products originating in any other country".

180. While the language in the two provisions differs, both set out most-favoured-nation (MFN) treatment obligations. The MFN principle embodied in Article I:1 is a cornerstone of the GATT and one of the pillars of the WTO trading system.[82] The Appellate Body has observed that "[a]part from Article I:1, several 'MFN-type' clauses dealing with varied matters are contained in the GATT 1994" and "[t]he very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination".[83] The provisions of the GATT 1994 referred to by the Appellate Body when making this statement use very different language to express the MFN obligation including language similar to Article 2.1 of the TBT Agreement as illustrated in GATT Article IX:1—i.e., "treatment […] no less favourable than the treatment accorded to like products of any third country".

181. As discussed in Mexico's First Written Submission, Article I:1 protects the competitive opportunities of imported products, not trade flows and it imposes upon WTO Members the obligation to treat like foreign products equally, irrespective of their origin.[84]

182. It is in the sense of the protection of competitive opportunities for imported products from one WTO Member vis-à-vis like products from other WTO Members that the jurisprudence interpreting the obligation in Article I:1 of the GATT 1994 is relevant to the interpretation of Article 2.1 of the TBT Agreement. This is consistent with the interpretation of the term "treatment no less favourable" in Article III:4, discussed above.

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82 Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paragraph 69.

83 Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paragraph 82 and footnote 72. The Appellate Body referred to the following provisions of the GATT 1994: internal mixing requirements (Article III:7); cinema films (Article IV(b)); transit of goods (Article V:2, 5, 6); marks of origin (Article IX:1); quantitative restrictions (Article XIII:1); measures to assist economic development (Article XVIII:20); and measures for goods in short supply (Article XX(j)).

84 Mexico, First Written Submission, paragraph 171.

183. In this light, the facts evidencing the less favourable treatment accorded to Mexican tuna that are described under its Article I:1 claim demonstrate a violation of the MFN obligation in Article 2.1 of the TBT Agreement.[85]

5. Existence of an "international standard" under Article 2.4 of the *TBT Agreement*

59. <u>To both parties</u>: Since the *TBT Agreement* provides no definition of "international standard", please explain what, in your view, an international standard is for the purposes of Article 2.4 of the *TBT Agreement.*

184. Annex I of the TBT Agreement, captioned "Terms and Their Definitions for the Purpose of this Agreement, states that:

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

185. The 1991 Guide defines "international standard" as a "Standard that is adopted by an international standardizing/standards organization and made available to the public."

186. The 1991 Guide defines "international standardizing organization" as a "Standardizing organization whose membership is open to the relevant national body from every country." A "standardizing body" is a "Body that has recognized activities in standardization."

187. Mexico submits that the concept of "international standard" should be applied flexibly to suit the circumstances of a particular situation. Thus, for example, it is well accepted that the Institute of Electrical and Electronics Engineers and SAE International are engaged in setting international standards, yet those organizations have as members individuals and not governments. It is not clear that the TBT Agreement was intended to exclude the standards of those organizations from being treated as "international standards" even though those entities are not open to WTO "members" as such.

188. The use of national standards by developed countries to create non-tariff barriers to imports from developing countries is a growing source of concern for the WTO system. Article 2.4 is an important tool for ensuring that standards are adopted and applied in a trade-neutral manner.

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85 *Ibid*., paragraphs 185-189 and 260.

189. Mexico elaborates its views on scope of Article 2.4 in its answers to Questions 60 through 63 below.

60. <u>To Mexico</u>: Please comment on the United States' contention in paragraphs 184 and 185 of its first written submission that the AIDCP should not be considered as a "recognized body" for the purpose of Annex 1.2 of the *TBT Agreement* because "it does not have recognized activities in standardization".

190. The United States did not explain what it considers to be "recognized activities" in standardization. In fact, the AIDCP's main role is to establish rules and procedures – i.e., standards – governing the interaction between fishing and dolphins. Thus, the members of the AIDCP have issued the Procedures for AIDCP Dolphin Safe Tuna Certification submitted as Exhibit MEX-56, which is directly applicable to the subject of this dispute. The AIDCP has issued a number of 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.[86] Indeed, the core function of the AIDCP is to establish procedures to be followed by the commercial fleets of the individual nations that are members of the AIDCP.

191. Clearly the AIDCP not only is *a* recognized body, but *the* recognized body for the setting of standards relating to the protection of dolphins in the ETP.

61. <u>To both parties</u>: What are, in your view, the characteristics that a body must fulfil in order to produce "international standards" within the meaning of Article 2.4 of the *TBT Agreement*?

192. Annex 1 of the TBT Agreement defines an "international body or system" to be a "[b]ody or system whose membership is open to the relevant bodies of at least all Members".

193. Annex 1 also defines "regional body", "central government body", "local government body" and "non-governmental body." Accordingly, participation in the "body or system" by central governments – as is the case for the AIDCP – is sufficient to meet the qualification test for "relevant bodies."

194. "Body" is not defined in the TBT Agreement. 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."

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86 Exhibit MEX-83.

195. 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 of course 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.[87]

196. It is relevant to note that the AIDCP system operates in conformity with the principles of the *Decision of the Committee on Principles for the Development of International Standards, Guides, and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement*. For example, AIDCP Article IX provides that all decisions must be made by consensus. Article XVII provides for transparency, and states:

> 1. The Parties shall promote transparency in the implementation of this Agreement, including through public participation, as appropriate.
>
> 2. Representatives from intergovernmental organizations and representatives from non-governmental organizations concerned with matters relevant to the implementation of this Agreement shall be afforded the opportunity to take part in meetings of the Parties convened pursuant to Article VIII as observers or otherwise, as appropriate, in accordance with the guidelines and criteria set forth in Annex X. Such intergovernmental organizations and non-governmental organizations shall have timely access to relevant information, subject to procedural rules on access to such information that the Parties may adopt.

197. Plainly the AIDCP has the characteristics appropriate for a body to produce international standards.

198. Mexico believes that the main issue facing the Panel in the interpretation of Article 2.4 is the one identified in Question 63, which is what it means for a "body" to be open "to at least all Members." Mexico addresses that issue below in its response to Question 63.

62. <u>To both parties</u>: Should the fact that the definition of a "standard" in Annex 1.2 of the *TBT Agreement* uses the term "recognized body" instead of the term "standardizing body", which is defined by ISO/IEC Guide 2: 1991, have any bearing on the Panel's interpretation of such definition and the applicability of Article 2.4 of the *TBT Agreement*?

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[87] 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.

199. Yes. If the negotiators of the TBT Agreement had intended that "recognized body" have the exact same meaning as "standardizing body" as defined in the ISO/IEC Guide 2: 1991, they would have used the same term.

63. <u>To both parties</u>: May the definition of "international body" contained in Annex 1.4 of the *TBT Agreement*, under which an international body is a "[b]ody or system whose membership is open to the relevant bodies of at least all Members" be interpreted as meaning that such body or system should be open to all those WTO Members who bear an interest, in relation to the subject matter of the regulation in question or to all WTO Members?

200. In Mexico's view, the definition should be interpreted to mean that membership is open to those WTO Members who bear an interest in relation to the subject matter of the regulation. There are four points to keep in mind in this regard.

201. First, the AIDCP is not closed to additional members. Article XXVI provides:

> This Agreement shall remain open to accession by any State or regional economic integration organization that meets the requirements in Article XXIV, or <u>is otherwise invited to accede to the Agreement on the basis of a decision by the Parties</u>. (Emphasis added.)

202. No additional countries or regional economic integration organizations have expressed interest in joining the AIDCP.[88] Further 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.

203. Second, unlike the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), which specifically identifies three specific sources of international standards,[89] 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.

204. Third, the entire point of the requirement that international standards bodies and systems be open to those who wish to participate is to ensure that countries – especially developing countries – are not required to accept standards to which they have not agreed. Thus, a paper submitted to the TBT Committee by the EU in 1999 on the "conditions for the

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[88] Mexico notes that the EU is a full member of the AIDCP. Although the EU joined on the basis of the fact that there are Spanish vessels that fish in the ETP, there are 26 other EU member countries that do not have vessels fishing there.

[89] Article 3 (Harmonization), paragraph 4 of the SPS Agreement lists "the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention".

acceptance and use of international standards" highlighted that international bodies should be international, impartial, open, transparent and effective, and also commented:

> Constraints on developing countries should be taken into consideration in the standards development process. The impartiality and openness of any international standardization process requires that developing countries are not excluded *de facto* from the process.[90]

205. This is not a case in which a developing country that does not participate in the AIDCP is resisting the applicability of the AIDCP dolphin safe standard. In this case, the United States – which is a founding member of the AIDCP – has asserted that it can ignore an international standard that it created, to the disadvantage of Mexico, a developing country that expressly agreed to the international standard. Such an interpretation would turn the obligations of Article 2.4 on their head.

206. Fourth, the U.S. measure at issue is a standard specially designed to have an impact only on the ETP, where Mexico fishes. This is reflected in the fact that the United States applies a different, less restrictive standard to other fisheries. It cannot reasonably be expected that countries that are unaffected would be interested in participating.

6. Existence of a legitimate objective

64. To both parties: The United States asserts that the DPCIA was enacted to fulfil two legitimate objectives: (i) ensure that consumers are not mislead or deceived about whether the product contains tuna that was caught un a manner that adversely affects dolphins and (ii) contribute to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to set on dolphins (US written submission, paragraph 28) whilst Mexico identifies the objective of the US measures as preserving dolphin stocks in the course of tuna fishing operations in the ETP. Please respond to each other's assertion and clarify how the "legitimate objectives" relevant to the measures at issue should be ascertained, including in relation to the US Congress findings referred to in DPCIA, 16 U.S.C 1385(b)?

(i) The Objectives Asserted by the United States

207. As to the United States' assertion of the legitimate objectives of the DPCIA, the way in which the United States has represented the objectives has created a moving target or

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90 G/TBT/W/87/Rev.1 (30 September 1999). Exhibit MEX-76.

evolving objectives. Importantly and significantly, the U.S. representation of the objectives confuses the objectives with the methods necessary to achieve them.

208. By making reference to the design, structure and characteristics of the U.S. measures, in paragraph 208 of its First Written Submission (FWS) Mexico has asserted the objective of the measures as follows:

> 208. The objective of the U.S. measures is narrower than the protection of animal life or health or the environment. It is to preserve dolphin stocks in the course of tuna fishing operations in the ETP. This objective is confirmed by the nature of the measures (i.e., dolphin safe labeling and special rules for the ETP tuna fishery) and in Section 1385(b) of the DPCIA, which sets out certain findings by the Congress.[134]
>
> > [134] The legislation stated the following findings: "(1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world; (2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and (3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins." See Appendix A, First Written Submission of Mexico.

209. On the other hand, without any reference to the design, structure or characteristics of the measures, the United States has stated in various paragraphs of its FWS and oral statements that the measures have two objectives.

210. The first of these objectives is related to "informing consumers":

- ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught by a method that adversely affects dolphins (U.S. First Written Submission, paragraph 6, similar to paragraphs 7 and 172).

- ensure that when a dolphin safe label appears on tuna products in the United States it accurately conveys to consumers that the product does not contain tuna that was caught in a manner that adversely affects dolphins (U.S. First Written Submission, paragraph 18, similar to paragraph 195).

- ensuring that labels on tuna products contain accurate information about the dolphin safe status of those products (U.S. First Written Submission, paragraph 195).

- ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins (U.S. First Written Submission, paragraph 47, similar to

paragraph 152, and U.S. closing statement at the first substantive meeting with the panel, paragraph 11).

– ensuring that consumers are not misled or deceived about whether the tuna products they may purchase contain tuna caught by a method that adversely affects dolphins. (U.S. First Written Submission, paragraph 99, similar to paragraphs146 and 147).

– The U.S. dolphin safe labeling provisions, however, seek to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, which includes not only whether the tuna was caught in a set in which dolphins were observed killed or seriously injured but whether dolphins were otherwise adversely affected (U.S. First Written Submission, paragraph 190)

211. The United States argues that Mexico has overlooked the objective of the U.S. provisions to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphin (U.S. First Written Submission, paragraph 147), and refers to the U.S. provisions contained in 16 USC § 1385(d)(1).

212. The second of these objectives relates to "discouraging fishing techniques that affect dolphins":

– to the extent that consumers choose not to purchase tuna without the dolphin safe label, it fulfils an additional objective of ensuring that the U.S. market is not used to encourage fishing fleets to use fishing techniques that adversely affect dolphins and in this way contributes to protecting dolphins (U.S. First Written Submission, paragraphs 6, 99, 146).

– ensuring that the U.S. market is not used to encourage fishing fleets to use techniques that adversely affect dolphins (U.S. First Written Submission, paragraph 7 and similar to 170).

– ensure that the U.S. market is not used to encourage fishing fleets to set on dolphins (U.S. First Written Submission, paragraph 18, similar to US closing statement, paragraph 11).

– The U.S. dolphin safe labeling provisions further contribute to protecting dolphins by ensuring that the U.S. market is not an incentive for fishing fleets to set on dolphins to catch tuna – a technique that adversely affects dolphins (U.S. First Written Submission, paragraph 170).

213. In Mexico's view, the starting point for ascertaining the legitimate objectives of a measure should be the design, structure and characteristics of the measure. The United States has not explicitly linked its stated objectives to design, structure and characteristics of the measure.

214. Although the United States focuses on these two objectives, it appears to Mexico that these two objectives encompass a third incidental objective which relates to "protecting dolphins":

- The U.S. dolphin safe labeling provisions, however, seek to protect dolphins (U.S. First Written Submission, paragraph 150).

- These provisions thus contribute to dolphin protection (U.S. First Written Submission, paragraph 18, similar to paragraph 99).

- As explained above, in addition to protecting dolphins, the U.S. dolphin safe labeling provisions have as their objective ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. (U.S. First Written Submission, paragraph 152).

- The U.S. dolphin safe labeling provisions further contribute to protecting dolphins by ensuring that the U.S. market is not an incentive for fishing fleets to set on dolphins to catch tuna – a technique that adversely affects dolphins. (U.S. First Written Submission, paragraph 170).

- In particular, use of those definitions would not be effective or appropriate to ensure that consumers are not misled or deceived about whether the tuna products contain tuna that was caught in a manner that adversely affects dolphins. It would also not be effective at protecting dolphins at the level the United States considers appropriate. (U.S. First Written Submission, paragraph 191).

- The U.S. dolphin safe labeling provisions, however, seek not only to reduce observed dolphin mortality and serious injury, but also to address other adverse effects of setting on dolphins to catch tuna. (U.S. First Written Submission, paragraph 194).

- The U.S. provisions, in other words, have as their objective to protect dolphins in ways that go beyond the protections provided for under the AIDCP. Thus, relying solely on the AIDCP or its resolutions would not be an effective means of fulling the objective of the U.S. dolphin safe labeling provisions to protect dolphins above and beyond minimizing observed

> mortalities and serious injuries as a consequence of setting on dolphins to catch tuna. (U.S. First Written Submission, paragraph 194).
>
> – TBT Agreement, preamble. This position, however, should not be understood to mean that the United States does not support the AIDCP or that it does not recognize the important contribution it has made to protecting dolphins in the ETP. It simply means that, in the U.S. view, more can be done, and the U.S. dolphin safe labeling provisions seek to do so. (U.S. First Written Submission, footnote 213 to paragraph 194).

215. The United States has not directly argued that "protecting dolphins" is also an objective of the U.S. measures. It is identified only to illustrate the confusion associated with the objectives related to the measures.

216. Under Mexico's interpretation of the objectives, they encompass one of the objectives of the AIDCP which is to minimize to the greatest extent possible dolphin mortality in the Eastern Tropical Pacific (ETP). However, the second stated objective of the United States (i.e., "discouraging fishing techniques that affect dolphins") is inconsistent with another important objective of the AIDCP which is to ensure the sustainability of tuna stocks and associated species in the ETP pelagic ecosystem. This objective is also not achieved outside of the ETP, since no measures or monitoring system is required to prevent or assure that fishing techniques that affect dolphins do not take place.

(ii) Ascertaining the Objectives of the Measures

217. As to how should the U.S. legitimates objectives be ascertained including in relation to the U.S. Congress findings referred to in DPCIA 16 U.S.C. § 1385(b), Mexico is of the view that if the determination of the "objective" of a technical regulation was completely self judging, a Member could establish an objective in a manner that completely circumvents the obligation in Article 2.2 and renders it a nullity. For example, assume that it can be argued that a technical regulation is capable of two objectives—i.e., consumer information and the protection of domestic industry. If the true objective is the protection of the domestic industry but the claimed objective is consumer information, the measure could be insulated from challenge under Article 2.2 simply by the responding Member formally acknowledging the consumer information objective without acknowledging (or even denying) the objective to protect the domestic industry. It may be that a technical regulation has more than one objective. Determining that the technical regulation has more than one objective could have a material bearing on the analysis of the other elements of Article 2.2 in particular the determination of the legitimacy of the objectives.

218. Article 11 of the DSU requires a Panel to make an objective assessment of the facts of the case. In this dispute, part of that objective assessment includes the facts pertaining to the

objectives of the U.S. measures. Nothing in the TBT Agreement removes this important factual determination from the scope of the Panel's assessment of facts.

219. Mexico acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations but this does not mean that another Member cannot question the "stated" or "acknowledged" objectives and cannot challenge those stated or acknowledged objectives before a Panel and request an objective assessment of the relevant facts.

220. Ascertaining the true objectives of a technical regulation rather than just the stated or acknowledged objectives is an important part of the interpretation and application of Article 2.2.

221. When examined in this manner, the U.S. Congress findings referred to in the DPCIA, 16 U.S.C. § 1385(b), support Mexico's interpretation of the objectives of the measures as set out above.

7. Existence of less-trade restrictive alternative measures under Article 2.2

66. <u>To both parties</u>: What are the scientific, environmental, financial or other type of criteria that served as the basis for the establishment of the dolphin mortality limits (DMLs) under the AIDCP?

222. The La Jolla Agreement, negotiated in 1992, established that dolphin mortalities be reduced to levels below 5,000 by 1999. This goal was achieved in 1993 and has been sustained in every year since then. The Declaration of Panama had as its primary objective/purpose to strengthen and improve upon the successes of the La Jolla Agreement, and to do so in a manner that was legally binding on the Parties.

223. The Declaration of Panama, which envisioned the negotiation of the AIDCP following the U.S. fulfillment of its obligations in Annex I to change its labelling law, included very specific provisions related to the establishment of dolphin mortality limits and per-stock per-year mortality limits for the so-called "depleted" stocks:

> Establish a per-stock per-year cap of between 0.2% of the Minimun Estimated Abundance (Nmin) (as calculated by the U.S. National Marine Fisheries Service or equivalent calculation standard) and 0.1% of the Nmin, but in no event shall the total annual mortality exceed 5000 consistent with the commitments and objectives stated in the preamble above. In the year 2001, the per-stock, per-year cap shall be 0.1% of the Nmin.[91]

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91 See Exhibit MEX-20, p. 2.

224. The DMLs have remained at 5,000 since La Jolla to Panama and then to the AIDCP. The individual DMLs are a function of a mathematical formula that reserves a certain number of the 5,000 for mid-year adjustments, new entrants, etc., and the rest are allocated by dividing the number of eligible vessels requesting DMLs into the number remaining after subtracting the aforementioned reserve.

225. The DML system established under the AIDCP is very closely monitored throughout the fishing year through observer reports wired in from sea. Actions are taken by the international program and national programs to ensure limits are not exceeded by individual vessels, which in turn ensure that overall limits are never even close to being approached or exceeded.

67. To Mexico: Please specify whether you agree with the United States' claim in paragraph 169 of its first written submission that "Mexico must establish that there is a reasonably available alternative measure that fulfils the objectives of the safe dolphin labelling provisions that is significantly less trade-restrictive". If not, how should this burden be allocated and on what legal basis?

(i) "Significantly" less Trade Restrictive

226. At paragraphs 167-169 of its First Written Submission which refer *inter alia* to Article 5.6 and footnote 3 of the SPS Agreement, the United States interprets the phrase "shall not be more trade-restrictive than necessary" in Article 2.2 of the TBT Agreement to mean "shall not be *significantly* more trade restrictive than necessary". The reference to "*significantly* less trade restrictive in this question uses the United States' interpretation of this phrase.

227. Although Article 5.6 and footnote 3 of the SPS Agreement provide guidance for the interpretation of the phrase "shall not be more trade restrictive than necessary to fulfil a legitimate objective" in Article 2.2 of the TBT Agreement, there is no legal basis for suggesting that the qualifying term "significantly" from footnote 3 should form part of the interpretation of Article 2.2.

228. The first two sentences of Article 2.2 of the TBT Agreement read as follows:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create…

229. The relevant phrase "shall not be more trade-restrictive" is not qualified by the term "significantly" or any other term relating to the magnitude of the trade-restrictive effect.

230. Although instructive in the interpretation of Article 2.2, the language of Article 5.6 and footnote 3 of the SPS Agreement uses different terminology and wording. The Appellate Body has made it clear that the use of different terms in the texts of the WTO Agreements implies a difference in meaning.[92] The fact that a particular treaty provision is silent on a specific issue (in the case the magnitude of the trade-restrictive effect) must be given some meaning.[93]

231. There is no indication in the text of Article 2.2 of the TBT Agreement or other provisions of that Agreement that a "significance" qualification was intended to be included in Article 2.2 by implication.

232. Accordingly, there is no legal basis to suggest that the word "significantly" should form part of the interpretation of this phrase in Article 2.2.

233. This being said, the alternative measure identified by Mexico in its First Written Submission is significantly less trade restrictive than the challenged U.S. measures and therefore would still meet the threshold under this provision if the qualifying word "significantly" was added.

(ii) Burden of Proof

234. Mexico acknowledges that it bears the initial burden to present *prima facie* evidence that there is a reasonably available less trade-restrictive measure. It has met this burden.

235. Mexico has already established a reasonably available alternative measure that fulfills the objectives of the dolphin labeling provisions that is significantly less trade-restrictive.

236. As Mexico has stated a less restrictive measure that completely fulfills the objectives pursued by the U.S. is to allow Mexican tuna products to bear the AIDCP dolphin safe label.

237. The U.S. has stated that its measures pursue the following objectives: (i) informing the consumers on the effects of the harvesting of the tuna on dolphins; (ii) discouraging fishing techniques that affect dolphins, and indirectly (iii) protecting dolphins.

238. The objective of informing the consumers can be accomplished by the AIDCP. The monitoring, tracking, verification and certification system under the AIDCP would allow the consumers to have the assurances that no dolphins were injured or killed during the capturing of tuna. Yet, the U.S. misinform the consumers by allowing that tuna caught in any other fishery by large vessels with purse seine nets, bear the dolphin safe label if the captain of the

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92 Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 164.

93 Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paragraph 65.

vessel has signed a certification that "no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested" without the need of certification regarding whether dolphins were killed or injured.

239. The objective of discouraging fishing techniques that affect dolphins can also be accomplished by the AIDCP. The dolphin set method administered by the AIDCP provides the most comprehensive and tightly regulated protections for dolphins and other bycatch of any fleet in the world, including the U.S. fleet. Yet, the U. S. encourages fishing methods that are more environmentally damaging not only for dolphins but for other species. As discussed in Mexico's response to Question 15 of the Panel, the alternative fishing methods kill and seriously injury dolphins and will also likely have unobserved adverse effects on dolphins.

240. If the objective involves also the protection of dolphins, Mexico notes that this goal has long since been accomplished in the ETP by means of the AIDCP – the most successful multilateral regarding effective dolphin protection. Therefore, the U.S. measures are no longer needed for that purpose because dolphins are now protected under this treaty to which both, Mexico and the U.S., are Parties.

68. To Mexico: How should the negative environmental consequences, such as bycatch of other marine species, resulting from the application of tuna harvesting setting on floating objects such as Fish Aggregating Devices (FADs) be taken into account, if at all, when considering the existence of less trade restrictive alternatives to the dolphin safe labelling provisions under Article 2.2 of the *TBT Agreement*?

241. Mexico has never stated that a less trade-restrictive alternative would be FAD fishing. Rather, the U.S. is the one suggesting that to be eligible for a dolphin safe label the Mexican fleet could use this fishing method.

242. Despite the financial cost for the Mexican fleet in switching to this method, Mexico is aware of the negative effects of FAD fishing in any fishery and has presented evidence on this.

243. Mexico has stated that there would be significant adverse environmental implications from increasing the intensity of FAD fishing in the ETP or other proximate areas, including destroying the sustainability of the fishery.

244. In Mexico's view and for the reasons stated in question 67, a less trade-restrictive alternative would be for the U.S. to simply allow the application of the AIDCP dolphin safe label on tuna products.

69. To both parties: Would the Appellate Body's and other panels' interpretations of the term "necessary" used in paragraphs a, b and d of Article XX of GATT be relevant in interpreting the same term in Article 2.2 of the *TBT Agreement*? Would any other aspects of past interpretations of Article XX by panels and the Appellate Body be of any relevance in interpreting the terms of Article 2.2 of the *TBT Agreement*? Please explain.

245. Yes. In Mexico's view the interpretations of the term "necessary" used in paragraphs a), b) and d) of Article XX of the GATT are relevant when interpreting the same term in Article 2.2 of the TBT Agreement and should be taken into account by the Panel. The interpretation of this term in the context of Article XIV of the GATS would also be relevant.

246. In paragraph 218 and 219 of Mexico's First Written Submission, Mexico has presented relevant statements that have been made about the meaning of the term "necessary" and the factors that must be examined in order for a measure to be "necessary".

247. Mexico notes that the U.S. adopted a similar position in previous disputes. In particular, the U.S. stated as a third party in *EC – Asbestos:*

> …The test to be applied under Article 2.2 of the *TBT Agreement* is very similar to the test to be applied under Article XX(b) and the introductory clause to Article XX ….[94]

248. Mexico agrees with this position.

249. Nonetheless, the United States argues in this dispute that Article 5.6 and footnote 3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) provide relevant context for the interpretation of Article 2.2 of the TBT Agreement within the meaning of Article 31.2 of the Vienna Convention. According to the U.S. the provisions of Article 5.6 of the SPS Agreement and Article 2.2 of the TBT Agreement are similar.[95] In Mexico's view the language of Article 5.6 and footnote 3 of the SPS Agreement uses different terminology and wording. The Appellate Body has made it clear that the use of different terms in the texts of the WTO Agreements implies a difference in meaning.[96] The fact that a particular treaty provision is silent on a specific issue must be given some meaning.[97]

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94 Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraph 47.

95 U.S. First Written Submission, paragraph 167.

96 Appellate Body Report, *EC- Measures Concerning Meat and Meat Products* (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 164.

97 Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paragraph 65.

D. CLAIMS UNDER GATT 1994

1. Article III:4

70. To Mexico: You seem to argue that the consumers preference for "dolphin safe" is so strong that there is no real competition between labelled and not labelled tuna and that you therefore want access to the *de facto* precluded labelled market. If the consumer preference is so strong, why do you consider that "dolphin safe" labelled and not labelled tuna are like products?

250. It is a condition of competition for sales of tuna products to the major distribution channels in the U.S. market that a "dolphin safe" label be affixed to the tuna products. The prohibition against the use of a dolphin safe label on Mexican tuna products denies this important competitive opportunity and keeps Mexican tuna out of these channels.

251. But for the prohibition in the U.S. measures against the use of the international dolphin safe label, Mexican tuna and like tuna from the United States and other countries would compete in the major distribution channels.

252. It is important to recognize that it is the U.S. measures and not U.S. consumers' preferences that are upsetting the balance of competitive opportunities. The U.S. measures impose a dolphin safe standard for the U.S. market that does not account for the international standard nor does it reflect the understanding of most U.S. final consumers of the term "dolphin safe".

253. Tuna labelled "dolphin safe" and tuna not labelled "dolphin safe" are like products. The application of the label in the circumstances of this dispute goes to "conditions of competition" or "competitive opportunities", not to "likeness". Those products that can use the label are favoured in the major distribution channels and those that cannot use the label are disfavoured.

(i) The Four General Criteria for Analyzing Likeness

254. In its First Written Submission, Mexico presents the four general criteria for determining likeness set out in the Appellate Body report in *EC – Asbestos* and applies those criteria to the facts of this dispute.[98] The criteria overwhelmingly demonstrate that Mexican tuna products and tuna products of the United States and other countries are "like products".

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98 *Ibid*., paragraphs 146-154.

255. With respect to the consumer perception criterion, but for the regulatory distinction introduced by the challenged U.S. measures, consumers' tastes and habits respecting Mexican tuna products and tuna are identical to U.S. tuna products and tuna.[99]

256. The situation in this dispute must be distinguished from the facts in *EC – Asbsestos*. In that dispute the products at issue were physically very different and the Appellate Body found that "where the fibres are physically very different, a panel cannot conclude that they are 'like products' if it does not examine evidence relating to consumers' tastes and habits".[100] It further stated that "[i]n such a situation, if there is no inquiry into this aspect of the nature and extent of the competitive relationship between the competitive relationship between the products, there is no basis for overcoming the inference, drawn from the different physical properties of the products, that the products are not 'like'".[101]

257. In this dispute, the tuna products of Mexico, the United States and other countries are physically the same, have the same end use and have the same tariff classification. In such circumstances the evidence of consumer perception would have to be extremely clear and compelling to overcome the conclusion of likeness that flows from these criteria. It is not. On the contrary, U.S. consumers want tuna that is "dolphin safe" as defined in the AIDCP standard. Mexican tuna is dolphin safe when measured against that standard as is therefore consistent with U.S. consumer preferences.

258. On the facts in this dispute, there are several reasons why factors that might at first glance be related to consumer preference should not over-ride the other three criteria of likeness.

(ii) The Competitive Relationship between Products

259. A determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.[102]

260. The fact that Mexican tuna products and tuna products from the United States and other countries compete in the U.S. market outside of the major distribution channels and that the application of a dolphin safe label would enable Mexican tuna products to compete in the

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99 *Ibid*., paragraph 151.

100 Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraph 121.

101 *Ibid*.

102 Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraphs 99 and 103.

major distribution channels is evidence of the competitive relationship between and among the products and, therefore, of their likeness.[103]

(iii) Latent Demand

261. In examining the competitive relationship between products it is important to take into account latent demand or *potential* competitiveness. In *EC – Asbestos*, the Appellate Body stated:

> Finally, we note that, although we consider consumers' tastes and habits significant in determining "likeness" in this dispute, at the oral hearing, Canada indicated that it considers this criterion to be irrelevant, in this dispute, because the existence of the measure has disturbed normal conditions of competition between the products. In our Report in *Korea – Alcoholic Beverages*, we observed that, "[p]articularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand" for a product. We noted that, in such situations, "it may be highly relevant to examine latent demand" that is suppressed by regulatory barriers. In addition, we said that "evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition".[104]

262. In this dispute, there is clearly latent demand for Mexican tuna products labeled as dolphin safe in accordance with the international AIDCP standard.

263. This is evidenced in the consumer survey filed by Mexico which demonstrates that 48% of U.S. consumers believe that the term "dolphin safe" means "no dolphins were injured or killed in the course of capturing tuna", which is the international AIDCP standard with which Mexico tuna complies.[105] This dolphin safe characteristic of Mexican tuna products cannot be marketed in the United States to this group of consumers because of the U.S. measures.

264. The latent demand for Mexican tuna is also evidenced in statements by U.S. retailers to distributors of Mexican tuna.[106]

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103 See Exhibit MEX-58.

104 Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraph 123.

105 Question T2, POS National Survey, October 9-13, 2010, Exhibit MEX-64.

106 Exhibit MEX-58.

(iv) Regulatory Distinction

265. It is important to understand that whether or not a label can be applied to a tuna product depends upon a *regulatory distinction* and not what is understood by the U.S. consumer to mean "dolphin safe". In this dispute, two standards for dolphin safe are being discussed. The U.S. standard is based on no setting upon dolphins and the AIDCP standard is based upon the requirements set out in an international agreement. As demonstrated in the public survey filed by Mexico, most U.S. end consumers believe that the term "dolphin safe" means "no dolphins were injured or killed in the course of capturing tuna" (i.e., the AIDCP standard) and not "dolphins were not encircled and then released in the capture of the tuna" (i.e., the U.S. standard).

266. Thus, the distinction that is currently being created in the market between dolphin safe and non-dolphin safe tuna is a regulatory distinction created by the challenged measure. This regulatory distinction cannot support a conclusion that the tuna products are not "like" one another. Such an approach to like products would render the concept of *de facto* discrimination meaningless and would lead to the easy circumvention of many non-discrimination disciplines in the WTO Agreements.

(v) Basing the "Like Product" Determination on Unincorporated PPMs

267. The criteria for the dolphin safe label relate to the fishing methods used for capturing the tuna and not to the physical tuna. They fall within the general category of unincorporated process and production methods (PPMs) also referred to as non-product related PPMs. Unincorporated PPMs leave no trace in the final product and are not reflected in the physical attributes of the product.

268. To allow distinctions to be made between products based on unincorporated PPMs so that products that are otherwise the same will not be "like" will substantially undermine the effectiveness of the non-discrimination obligations in the WTO Agreements. Developing country Members would be particularly prejudiced by such an approach.

71. To Mexico: The United States' written submission refers to the rulings of the GATT 1947 panel report on *US – Tuna (Mexico)*. Please explain whether and how this report, which you also mention in your own written submission, is relevant to this Panel's examination of Mexico's claims under GATT 1994?

269. The report is relevant only to the extent that it is part of the history of the measures implemented by the United States with respect to imports of Mexican tuna.

270. The legal findings in the report are not relevant to this dispute because the facts before the GATT 1947 panel were very different from those in this dispute. At the time of that panel, the United States had a trade embargo in place against Mexican tuna. As a consequence, Mexican tuna imports were blocked and there was no factual basis upon which to assess the effects of the dolphin safe labelling provisions in the U.S. market. In other words, there was no evidence of the *de facto* discrimination and trade restrictive effect of the challenged measures.

271. It was only after the embargo was removed against Mexican tuna that the adverse effects of the dolphin safe labelling measures became apparent. It is those effects that are being challenged in this dispute.

74. <u>To both parties</u>: Please clarify what domestic and imported products are to be compared, in the context of the "like products" analysis and in the context of the analysis of "less favourable treatment" under Article III:4. Is it US and Mexican tuna in general, or Mexican tuna caught in the ETP by setting on dolphins and US tuna caught otherwise or US dolphin safe tuna and Mexican dolphin safe tuna?

272. The relevant like products are Mexican and U.S. tuna products in general.

273. The method of fishing and geographic region in which the tuna are caught are unincorporated PPMs that are not relevant to the like products determination (discussed in Mexico's response to Question 70 of the Panel).

78. <u>To Mexico</u>: Please respond to the US argument, in its oral statement, that a number of other importers face the same requirements and constraints under the US measures as Mexico does.

274. It will depend on the facts and circumstances related to the imports in question. To the extent that the imports are in the same situation as Mexican imports they will face the same *de facto* discrimination. However, if they are in a different situation (e.g., an embargo still applies to the imports or if a different fishing method is used) they may not face the same discrimination.

275. In particular, only Mexico, Spain, Ecuador and El Salvador have obtained "affirmative findings" allowing them to export yellowfin tuna products to the United States. Belize, Bolivia, Colombia, Guatemala, Honduras, Nicaragua, Panama, Peru, Vanuatu, and Venezuela have not sought affirmative findings and are embargoed. Therefore, the labelling standard does not currently affect the latter countries.[107]

276. Whether other WTO Members choose to assert their rights in WTO dispute settlement should have no bearing on the question of upholding Mexico's WTO rights in this dispute.

277. The fact that other imports may also be discriminated against does not eliminate the *de facto* discrimination that occurs in the case of Mexican tuna products.

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[107] NMFS, "Tuna / Dolphin Embargo Status Update September 1, 2010", available at swr.nmfs.noaa.gov/psd/embargo2.htm. Exhibit MEX-77.

80. <u>To Mexico</u>: The United States has argued that considerations relating to the environmental impact of fishing methods are not relevant in assessing whether "less favourable treatment" exists, within the meaning of GATT Article III:4. Do you agree?

278. The fact that the U.S. measures are intended to pressure the Mexican tuna fleet to fish using a method that is more destructive to the ecosystem is evidence of additional lost competitive opportunities for Mexican tuna should the Mexican fleet abide by the U.S. measures.

279. The Mexican fishing fleet uses the method of setting upon dolphins which, when used consistently with the AIDCP, is superior from the perspective of catching mature tuna and from the environmental impact on the oceanic ecosystem and its species. These factors reduce the costs to the Mexican tuna fleet and make Mexican tuna products more competitive vis-a-vis like U.S. tuna products.

280. If the Mexican fleet acquiesces to the U.S. pressure and uses the alternative fishing methods, it will lose this competitive advantage. However, since the Mexican fleet has not acquiesced, this aspect of lost competitive opportunities has not occurred.

281. The different environmental impact of fishing methods also illustrates the fact that the U.S. measures are *de facto* aimed at the origin of the tuna, namely the origins of countries that do not accede to the United States` view of the appropriate fishing method for tuna.

81. <u>To Mexico</u>: In your view, in light of the consumer preference for "dolphin-safe" tuna, to what extent are any difficulties in marketing tuna caught in the ETP by setting on dolphins attributable to the measures themselves, as opposed to consumer preferences? How relevant is this consideration, in your view, in assessing the existence of a "less favourable treatment" under Article III:4 of GATT 1994?

282. As discussed in Mexico`s response to Question 70, only a small portion of U.S. final consumers (12%) believe that the term "dolphin safe" means "dolphins were not encircled and then released in the capture of the tuna" (i.e., the U.S. standard). In the absence of the U.S. measures, a large portion of U.S. final consumers (48%) who believe that the term means "no dolphins were injured or killed in the course of capturing tuna" would be accepting of the ADICP international standard. The fact that the views of these consumers are being suppressed by the U.S. measures is evidence of the adverse effects of the U.S. measures.

283. There is also evidence that the U.S. measures are suppressing the preferences of consumers at the retail level.[108] Finally, as explained in Mexico's response to Question 40 of

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[108] Exhibit MEX-58.

the Panel, canneries are directly driven by the market distinctions mandated by the U.S. measures.

284. Thus, the difficulties facing imports of Mexican tuna products are directly attributable to the U.S. measures.

List of Exhibits

Number	Title
MEX-66	Government Accountability Office, "National Marine Fisheries Service: Improvements Are Needed in the Federal Process Used to Protect Marine Mammals from Commercial Fishing", GAO 09-78 (December 2008).
MEX-67	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
MEX-68	U.S. Secretary of Commerce, Press Release, "Commerce Secretary Disappointed at Federal Court Ruling", April 12, 2000.
MEX-69	Greenpeace Calls for Urgent Ban on Fish Aggregation Devices to Save Pacific Tuna
MEX-70	Declaration of P. Donley, Civ. No. CO3-0007 (March 7, 2003)
MEX-71	H.R. 2926, 19 July 1989
MEX-72	Department of Commerce, "United States Tuna Cannery Receipts January - December 2009 and Comparison".
MEX-73	U.S. Tuna Tracking & Verification Program Program Summary Document.
MEX-74	WTO Committee on Trade and Environment and the WTO Committee on Technical Barriers to Trade, Submission by the Delegation of Switzerland, WT/CTE/W/192G/TBT/W/162 (19 June 2001)
MEX-75	"Environmental and Social Standards, Certification and Labelling for Cash Crops", FAO, 2003 prepared by C. Dankers.
MEX-76	G/TBT/W/87/Rev.1 (30 September 1999).
MEX-77	NMFS, "Tuna / Dolphin Embargo Status Update September 1, 2010", available at swr.nmfs.noaa.gov/psd/embargo2.htm
MEX-78	U.S. Department of Labor Employment Standards Administration Wage and Hour Division, "Economic Report: The Minimum Wage in American Samoa, 2007"
MEX-79	NOAA, Tuna Tracking and Verification Frequently Asked Questions.
MEX-80	Final Determination, Department of Commerce, 68 Fed. Reg. 2010 (January 15, 2003)

Number	**Title**
MEX-81	Pittsburgh Tribune Review, "Pittsburgh's Starkist has eye on international markets" (September 5, 2010).
MEX-82	NOAA Notice of Stay Order, 68 Fed. Reg. 4449 (January 29, 2003).
MEX-83	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.
MEX-84	NMFS, "U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments - 2009"
MEX-85	Minutes G/TBT/M24