

BEFORE THE WORLD TRADE ORGANIZATION

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

RE COURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(WT/DS381)



Comments of the United Mexican States on Responses of United States

Geneva

26 September 2014

LIST OF EXHIBITS

Number	Title
MEX-139	IOTC, A summary of the IOTC Regional Observer Program During 2013
MEX-140	5 U.S.C §551
MEX-141	5 U.S.C. §553
MEX-142	IAATTC, Los atunes y peces picudos en el Océano Pacífico Oriental en 2013, Documento IAATTC-87-03a (Revisado), 87 ^a Reunión. Lima (Perú) (14-18 de julio de 2014)
MEX-143	NOAA Fish Watch: Inspecting Seafood
MEX-144	U.S. Food and Drug Administration, Chapter 2: Conducting a Hazard Analysis and Development a HACCP Plan
MEX-145	U.S. Food and Drug Administration, FDA's Seafood HACCP Programs: Mid-Course Correction
MEX-146	U.S. Food and Drug Administration, APPENDIX 8: Procedures for Safe and Sanitary Processing and Importing of Fish and Fishery Products
MEX-147	U.S. Food and Drug Administration, FDA's Evaluation of the Seafood HACCP Program for Fiscal Years 2004/2005
MEX-148	NOAA Fisheries, "Seafood Inspection Program"
MEX-149	Indonesia Log Book Template
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MEX-152	NOAA Fisheries, Office of Protected Resources, "List of U.S. Canners Participating"
MEX-153	WCPFC, Vessel Registry
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MEX-156	IOTC, Record of Currently Authorized Vessels
MEX-157	WCPFC, Vessel Registry
MEX-158	IAATTC, Resolution on the Establishment of a Vessel Monitoring System (VMS), Resolution C-04-06. 72 ^a Reunión. Lima (Perú) (14-18 de julio de 2014)
MEX-159	IAATTC, Resolution (Amended) on the Establishment of a Vessel Monitoring System (VMS), Resolution C-14-02. 87th Meeting. Lima (Peru) (14-18 July 2014)
MEX-160	Norma Oficial Mexicana NOM-062-PESC-2007, Para la utilización del sistema de localización y monitoreo satelital de embarcaciones pesqueras
MEX-161	Anderson, R. C. (2014), Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean. IPNLF Technical Report 2, International Pole and Line Foundation, London
MEX-162	IPNLF, New Report Reveals Extent of Cetacean Bycatch in Western and Central Indian Ocean

MEX-163	WCPFC, Scientific Committee, Fifth Regular Session, Implications For Scientific Data Collection by Observers of New Requirements for 1005 Observer Coverage of Purse Seiners. (10-21 August 2009)
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I. INTRODUCTION

1. As a general comment in relation with the United States' responses to the Panel's questions, Mexico considers useful, at this last stage of the Article 21.5 proceeding, to provide an overview of the Parties' positions. It will be recalled that in the original proceedings, it was determined that the U.S. definition of "dolphin-safe" was different for ETP tuna products (and therefore Mexican tuna products) than for the rest of the world. Specifically, the U.S. Tuna Measure only allowed the dolphin-safe label for ETP tuna products if no sets were made on dolphins during the entire voyage during which the tuna was caught and no dolphins were killed or seriously injured during the set in which the tuna was harvested. But non-ETP tuna was allowed to be labelled dolphin-safe even when dolphins had been killed or seriously injured while the tuna was harvested. During the original proceedings, the United States argued that it was unnecessary to require that no dolphins were killed or seriously injured outside the ETP because the risk of such harm was *de minimis*. The Panel disagreed and the Appellate Body affirmed the Panel's factual findings on the risks to dolphins outside the ETP.

2. Consistent with the operation of the WTO dispute settlement system, the United States was left with the discretion to decide how to bring the measure into compliance with the covered agreements. The United States had the option of changing the definition of dolphin-safe for ETP tuna products to comply with the AIDCP definition, as the United States committed to do in the Panama Declaration in order to convince the other member nations to create a binding treaty, and as the Commerce Department actually did for a short time in 2002 until its action was blocked by a court. Such an action would have removed the detrimental impact on the competitive opportunities for Mexican tuna products compared to like tuna products from the United States and other countries. There may have been other options that the United States could have pursued. Instead, however, it chose to maintain the strict definition it imposed on ETP tuna products and to apply that same definition to non-ETP tuna products. This had the effect of continuing the detrimental impact on Mexican tuna products. Having made that decision, it became incumbent on the United States to bring the measure into conformity with the covered agreements, specifically Article 2.1 of the TBT Agreement and Articles I, III and XX of the GATT 1994. This required, among other things, that the United States implement the definition for non-ETP tuna products in a manner that ensures the accuracy of the label, so that it is genuinely equivalent to the definition applied to ETP tuna products. Such action is necessary for the measure to be even-handed under Article 2.1 of the TBT Agreement and for it to meet the requirements of the chapeau of Article XX of the GATT 1994. The United States has refused to do so, leaving the dolphin-safe label meaningless for non-ETP tuna products, just as it was previously. Such inaction also means that the Amended Tuna Measure is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. In the case of the GATT 1994, it also means that the measure cannot be saved by the general exceptions in Article XX.

3. Put another way, in order to comply with the above TBT and GATT 1994 provisions, the more specific requirements of the "no dolphins killed or seriously injured" standard mandate the use of observers and a comprehensive tracking and verification system to be meaningful. These requirements also mandate that other fishing methods that kill or seriously injure dolphins also be disqualified from being used to catch dolphin-safe tuna.

4. The United States' position in this Article 21.5 proceeding has been largely the same as in the original proceedings – the United States says that it is justifiable to impose less stringent requirements on non-ETP tuna products because, according to the United States, the risk of harms to dolphins outside the ETP is lower than in the ETP. Meanwhile, the United States has agreed – as it must – that dolphins are killed and injured in tuna fisheries outside the ETP by fishing methods other than dolphin sets, and even that there are intentional sets on dolphins outside the ETP. The United States refuses to acknowledge – indeed it has not even commented on – the fundamental incompatibility between its purportedly risk-based theory and the precise, zero tolerance standard of the Amended Tuna Measure. The United States has clearly stated, both in its written submissions and at the hearing, that it is not relying on “calibration” as a justification for the different treatment of ETP tuna products yet, in its responses to the Panel’s questions, it makes submissions that inherently incorporate some form of calibration. Mexico’s response to Question 11 of the Panel provides a comprehensive framework for assessing the United States’ arguments that involve some form of calibration.

5. Ultimately, the United States’ position in this dispute is incoherent. The United States seems to be defending the original Tuna Measure rather than the Amended Tuna Measure.

6. Following are the specific comments of Mexico on the United States’ responses to the Panel’s questions.

1. *To the United States: Please respond to Mexico's arguments at paras. 52 and 58 of Mexico's first written submission.*

7. In paragraph 2 of its responses, the United States argues that the Dolphin Protection Consumer Information Act (DPCIA) is outside the terms of reference. To the contrary, Mexico has been consistent in defining the Amended Tuna Measure as including the statute. In fact, the United States explicitly agreed that the statute was part of the measure at issue.¹

8. In the original proceeding the Panel analysed three legal instruments as a single measure. As the Panel recognized:

... together and collectively, the various provisions in the different legal instruments identified by Mexico, including the *Hogarth* ruling, set out the terms of the US “dolphin-safe” labelling scheme, as currently applied by the United States. We also note that the United States does not object to Mexico’s request to consider the various instruments together and that it has articulated its defence in these proceedings on the basis of the measures taken together. In light of these elements, we see merit in considering these closely related instruments together as a single measure for the purposes of this dispute.²

¹ United States’ first written submission, para. 10.

² Panel Report, *US – Tuna II (Mexico)*, para. 7.24.

9. The Panel went on to make findings on the U.S. “dolphin-safe” labelling scheme. As Mexico noted in its first written submission in this proceeding, the DPCIA and the *Hogarth* ruling continue to maintain a close legal and substantive link with the 2013 Final Rule and remain integral parts of the Amended Tuna Measure.³

10. The Panel’s findings and recommendations considered that the statute, as part of the main measure, was inconsistent with Article 2.1 of the TBT Agreement. As the Appellate Body stated:

In particular, Mexico identified the following legal instruments as the object of its challenge: the United States Code, Title 16, Section 1385 (the “Dolphin Protection Consumer Information Act” or “DPCIA”); the United States Code of Federal Regulations, Title 50, Section 216.91 and Section 216.92 (the “implementing regulations”); and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth* (the “Hogarth ruling”). Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling set out the requirements for when tuna products sold in the United States may be labelled as “dolphin-safe”. ... We refer to the legal instruments challenged by Mexico collectively as the “measure at issue”, the “US measure”, or “the US ‘dolphin-safe’ labelling provisions” for ease of reference and uniformity with the Panel.⁴

11. The Appellate Body concluded in its analysis of Article 2.1 of the TBT Agreement that “the US ‘dolphin-safe’ labelling provisions provide ‘less favourable treatment’ to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries, and are therefore inconsistent with Article 2.1 of the TBT Agreement”.⁵

12. Moreover, the Panel’s terms of reference are set out in Mexico’s Request for the Establishment of a Panel, which expressly include the DPCIA as part of the Amended Tuna Measure.⁶

13. Finally, the United States’ arguments on the jurisdiction of the Panel to consider Mexico’s Article 2.1 claim are grounded in an incorrect interpretation of Article 21.5 of the DSU. The United States repeatedly refers to the recommendations and rulings of the DSB in this dispute and argues that this Panel’s jurisdiction is limited to the United States’ response to these recommendations and rulings. The United States omits the key language in Article 21.5 which refers to a disagreement as to the conformity of the measure taken to comply with the covered

³ Mexico’s first written submission, para. 17.

⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.

⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 299.

⁶ Request for the Establishment of a Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/20, Recourse to Article 21.5 of the DSU Mexico – Request for the Establishment of a Panel, 15 November 2013, p. 2 (“the following measures comprise the ‘Amended Tuna Measure’: i) Section 1385 (‘Dolphin Protection Consumer Information Act’), as contained in Subchapter II (‘Conservation and Protection of Marine Mammals’) of Chapter 31 (‘Marine Mammal Protection’), in Title 16 of the U.S. Code;”).

agreements. The inquiry into this question is necessarily broader than the recommendations and rulings of the DSB in this dispute.

14. For these reasons, Mexico does not agree with the United States that the DPCIA is not part of a “measure taken to comply” in terms of an Article 21.5 proceeding.

3. *To the United States: How does the United States define the "ETP" for the purpose of its legislation and regulation? Does it adopt the definition in Annex I of the AIDCP?*

15. Mexico agrees with the U.S. description of the definition of the ETP in the IATTC and U.S. law.

16. Mexico notes that a historic record of where sets were made in the ETP does not indicate where dolphins associate with tuna. Mexican vessels normally do not fish west of 130° because the cost of traveling west of 130° is an important factor for the fleet. Moreover, if a Mexican vessel were to pass 150° west, it would be in an area subject to the WCPFC rules. Because Mexico is not a full member of the WCPFC (Mexico is a “cooperating non-member”), the vessel would be listed as an IUU ship. These factors have no relation to whether tuna associate with dolphins to the west of 130°.⁷

17. As can be seen in the below map, the IATTC’s data indicates that in 2013 dolphin sets were made by vessels beyond 140° west, close to the western limit of the IATTC area. The U.S. comment that no dolphin sets were made below 20° south is meaningless, as virtually no sets of any kind were made south of 20°.

⁷ In footnote 13 of the United States’ responses to the Panel’s questions, the United States provides a selective quote from a WCPFC document in an apparent attempt to suggest that Mexico refused to pay a valid assessment from the WCPFC. In fact, Mexico is the only country that participates in meetings of the WCPFC without having any fishing activity within the WCPFC area. (Mexico participates in the meetings because of its strong interest in tuna conservation measures.) As stated elsewhere in the document quoted by the United States: “Mexico explained that because it does not fish in the WCPF Convention Area its domestic legal constraints prevent it from obtaining funds to pay its assessed financial contribution. Furthermore, Mexico considered that because it has no vessels operating in the WCPF Convention Area (including the overlap area) there should be no need for it to agree [to] high seas boarding and inspection procedures” (emphasis added). WCPFC, 2013 Summary Report, para. 47 (Exhibit US-124). The members of the WCPFC approved Mexico’s continued status as a cooperating non-member without the payment of an assessment.

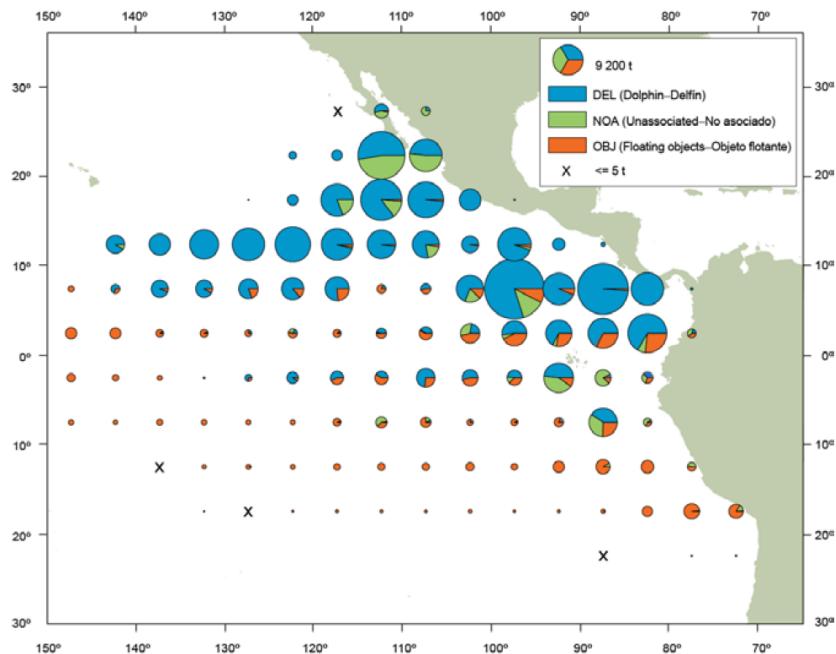


FIGURE A-1b. Annual distributions of the purse-seine catches of yellowfin, by set type, 2013. The sizes of the circles are proportional to the amounts of yellowfin caught in those 5° by 5° areas.

FIGURA A-1b. Distribución anual de las capturas cerqueras de aleta amarilla, por tipo de lance, 2013. El tamaño de cada círculo es proporcional a la cantidad de aleta amarilla capturado en la cuadriculara de 5° x 5° correspondiente.

4. **To the United States: Could the United States develop its argument in para. 17 of its oral statement, that the requirements relating to record-keeping, verification and observer coverage for large purse seine vessels in the ETP are "clearly "separable" from the 2013 Final Rule"?**

18. As a preliminary matter, Mexico notes that the response provided by the United States is not consistent with, and entirely fails to respond to, the question that is asked by the Panel. The United States' response sets out arguments that "Mexico's claim ... is 'separable' from the 2013 Final Rule."⁸ This is not, however, what the Panel has asked. The Panel's question asks the United States to explain its argument that "the requirements relating to record keeping, verification and observer coverage for large purse seine vessels in the ETP are 'clearly separable' from the 2013 Final Rule" (emphasis added). This question is based on the argument advanced

⁸ See United States' responses to the Panel's Questions, paras. 14, 15 and 16 (emphasis added). Specifically, the United States argues that: "First, Mexico's claim as it pertains to the setting-on-dolphins eligibility condition is 'separable' from the 2013 Final Rule" (para. 14); "Second, Mexico's claim as it pertains to AIDCP-mandated record-keeping and verification requirements for tuna harvested by large purse seine vessels operating inside the ETP is 'separable' from the 2013 Final Rule" (para. 15); and "Third, Mexico's claim as it pertains to the AIDCP-mandated observer coverage for large purse seine vessels operating inside the ETP is 'separable' from the 2013 Final Rule" (para. 16).

by the United States at paragraph 17 of its opening oral statement,⁹ which is similar to an argument advanced by the United States in its second written submission.¹⁰ With respect to these arguments, Mexico has already demonstrated that the United States is wrong to argue that the tracking, verification and observer requirements are “separable” from the 2013 Final Rule on the basis that they are requirements under the AIDCP and not requirements under the Amended Tuna Measure.¹¹ The Amended Tuna Measure clearly provides the dolphin-safe labelling conditions and requirements identified by Mexico.

19. Further, Mexico notes that the United States inaccurately states that “[i]t is uncontested by Mexico that all aspects of the amended measure implicated by its Article 2.1 claim are unchanged from the original measure.”¹² This statement is completely false and misleading. Mexico has expressly disagreed in its second written submission¹³ and in its opening oral statement¹⁴ with the United States’ position that the labelling conditions and requirements of the Amended Tuna Measure are “unchanged”. While Mexico has clearly contested this point, Mexico has demonstrated that it makes no difference to the Panel’s Article 2.1 analysis in the present compliance proceedings whether the labelling conditions and requirements of the Amended Tuna Measure are “unchanged” or not. The Panel is clearly free to consider whether any “unchanged” or “changed” labelling conditions and requirements under the Amended Tuna Measure – that is, the measure “taken to comply” – are inconsistent with Article 2.1 of the TBT Agreement.¹⁵

20. With respect to the United States’ response, Mexico does not agree that the three labelling conditions and requirements are “clearly separable” from the 2013 Final Rule. In its response to the Panel’s questions, Mexico highlighted that the three labelling requirements and conditions – i.e., (i) the disqualification of setting of dolphins and the qualification of other fishing methods to catch tuna; (ii) the record-keeping, tracking and verification requirements; and (iii) the mandatory independent observer requirement – operating together, account for the detrimental impact on Mexican imports. Each requirement and condition is intrinsically linked with the three legal instruments of the Amended Tuna Measure.¹⁶ In fact, the United States in its first written submission conceded that these requirements are part of the 2013 Final Rule:

⁹ United States’ opening statement, para. 17 (“One would expect that any aspect of a measure is ‘inseparable’ from the measure containing that aspect. Here, the requirements relating to record-keeping, verification, and observer coverage mandated for large purse seine vessels operating in the ETP by the Agreement on the International Dolphin Conservation Program (AIDCP) are clearly ‘separable’ from the 2013 Final Rule”).

¹⁰ See United States’ second written submission, para. 56.

¹¹ See Mexico’s opening statement, para. 57; Mexico’s second written statement, paras. 157-158.

¹² United States’ responses to the Panel’s questions, para. 13.

¹³ Mexico’s second written submission, paras. 94-95.

¹⁴ Mexico’s opening statement, para. 47.

¹⁵ See Mexico’s opening statement, paras. 43-48.

¹⁶ Mexico’s responses to Panel’s questions, paras. 32-33.

The amended dolphin safe labeling measure places three types of conditions on use of the dolphin safe label for tuna products: 1) conditions relating to fishing methods, 2) conditions relating to certifications, and 3) conditions relating to record-keeping (tracking and verification).¹⁷

21. Third Parties agree that all aspects of the Amended Tuna Measure are relevant in the analysis of Mexico's claims. For example, the European Union in its third party submission "considers that the various elements of the amended tuna measure can only meaningfully and reasonably be considered as a whole, and are inseparable from each other".¹⁸

22. As Mexico has made clear, Mexico is raising a claim under Article 2.1 in respect of the Amended Tuna Measure as a whole. Accordingly, nothing precludes the Panel in the present Article 21.5 proceedings from considering and deciding Mexico's claims in respect of the Amended Tuna Measure in its entirety.¹⁹

23. Mexico has also explained that it is well established that compliance proceedings under Article 21.5 cannot be confined to the claims, arguments and factual circumstances of the original proceedings.²⁰ As the Appellate Body ruled in *Canada – Aircraft (Article 21.5 – Brazil)*:

In carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the “measures taken to comply” from the perspective of the claims, arguments and factual circumstances that related to the measure that was subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel.²¹ (emphasis added)

24. As explained in Mexico's second written submission and its opening statement, the Amended Tuna Measure is, “in principle, a new and different measure” that was not before the Panel and the Appellate Body in the original proceedings,²² and the Panel's mandate under

¹⁷ United States' first written submission, para. 20. The United States alleges that the 2013 Final Rule enhances documentation requirements of the original measure and also revised the regulations pertaining to the NMFS Tuna Tracking and Verification Program (TTVP). It is therefore difficult to reconcile its argument that the three labelling conditions and requirements are “clearly separable” from the 2013 Final Rule. See also United States' first written submission, paras. 16-17.

¹⁸ European Union's third-party written submission, para. 46.

¹⁹ Mexico's second written submission, para. 98.

²⁰ Mexico's opening statement, para. 45.

²¹ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41. See also Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, paras. 206 (“Article 21.5 also requires the compliance panel to examine, in the light of the claims raised, whether the measures taken to comply are consistent with the relevant covered agreement, as the word ‘consistency’ in Article 21.5 ‘implies that panels acting pursuant to Article 21.5 must objectively assess whether new measures are, in fact, consistent with relevant obligations under the covered agreements’”), 432; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79.

²² Mexico's second written submission, para. 89, citing Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 432; Mexico's opening statement, para. 45.

Article 21.5 of the DSU requires it to assess whether the amended measure “taken to comply” achieves full or partial compliance with the covered agreements.²³

25. Finally, in its response to this question, the United States refers to Mexico’s claims as they pertain to “AIDCP-mandated” record-keeping and verification requirements and observer coverage. To clarify, Mexico’s arguments do not relate to requirements imposed by the AIDCP. Rather, they relate to the unverifiable record-keeping and verification requirements and the lack of observer coverage of the U.S. dolphin safe labelling scheme for tuna caught outside the ETP that is used in tuna products allowed to be labelled dolphin-safe. In this sense, Mexico’s arguments relate to the lack of even-handedness (Article 2.1) and arbitrary and unjustifiable discrimination (Article XX) created by the regulatory differences in the Amended Tuna Measure’s labelling conditions and requirements for tuna caught in the ETP, on one hand, and tuna caught outside the ETP, on the other hand.

Claims under Article 2.1 of the TBT Agreement and the GATT 1994

5. *To both Parties:*

- a. What factors should the panel take into account in assessing whether the amended tuna measure is "even-handed"? Does the "even-handedness" test require the Panel to engage in a quantitative cost-benefit analysis?**

26. In its response to this question, the United States argues that Mexico cannot succeed in its argument unless it proves that setting on dolphins is so similar to other fishing methods that all methods must be treated in the same manner and that all other fishing methods “have adverse effects on dolphins that are equal to or greater” than setting on dolphins.²⁴ This is incorrect. Mexico only needs to establish that other fishing methods also cause mortalities and serious injuries to dolphins. Not only has Mexico established that this is the case,²⁵ but the United States has conceded the point.²⁶ As Mexico has explained in its responses to the Panel’s questions, a comparison of the relative magnitudes of harm that each fishing method causes to dolphins is not relevant to the analysis.²⁷ The attempts of the United States to mischaracterize Mexico’s

²³ See Mexico’s second written submission, para. 88, citing Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 206; Mexico’s opening statement, para. 45.

²⁴ United States’ responses to the Panel’s questions, para. 25.

²⁵ Mexico’s first written submission, paras. 105-156; Mexico’s second written submission, paras. 32, 43, 46, 48-55.

²⁶ See, e.g., United States’ first written submission, para. 236; United States’ second written submission, para. 92. While the United States acknowledges that fishing methods other than setting on dolphins result in observed dolphin mortalities and serious injuries, it argues that the magnitude of dolphin mortalities and serious injuries associated with these other fishing methods is distinguishable from setting on dolphins.

²⁷ See Mexico’s responses to the Panel’s questions, paras. 10 (“the comparison of the magnitude of dolphin mortalities and serious injuries in different fisheries (e.g., ‘calibration’) is not relevant to, and does not affect, Mexico’s arguments regarding the lack of even-handedness in the design and application of the Amended Tuna Measure’s different labelling conditions and requirements for record-keeping, tracking, verification and observer coverage”), 52 (“a comparison of the magnitude of dolphin mortalities and serious injuries in different fisheries is

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arguments as based on a “central factual contention” that all other fishing methods cause equal or greater harms to dolphins²⁸ is wrong and misleading.

27. The United States also argues that the circumstances of the ETP and the AIDCP justify the imposition of unique requirements regarding record-keeping, tracking and verification and observer coverage.²⁹ This is incorrect. It is the implementation of the unique U.S. dolphin-safe label that necessitates the imposition of the differing labelling conditions and requirements under the Amended Tuna Measure for tuna caught within the ETP in comparison to tuna caught outside the ETP. The AIDCP requirements are simply one example of how dolphin-safe labelling can be accomplished.³⁰

b. Are the terms "calibrated" and "even-handed" synonymous?

28. Mexico agrees with the United States that these two terms should not be considered synonymous.

29. The United States acknowledges that it used the term “calibrated” with respect to the original Tuna Measure in the context of Article 2.2 of the TBT Agreement during the original proceedings. In the context of Article 2.1 in the present compliance proceedings, however, the United States expressly denies that it is making an argument that the Amended Tuna Measure is “even-handed” on the basis that it is “calibrated”.³¹ Specifically, the United States explains that it “considers this [i.e., “calibration”] to be a somewhat different concept from ‘even-handedness’, which the United States understands involves an inquiry into whether there is a legitimate basis for regulatory distinctions.”³² Thus, the United States does not consider “calibration” to be “a

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not relevant to, and does not affect, Mexico’s arguments regarding the lack of even-handedness in the design and application of the different labelling conditions and requirements for record-keeping, tracking and verification and for observer coverage”) and 56 (“a comparison of the quantity of dolphins that are killed or seriously injured in “raw numbers” or “as a percentage of the known species population” is irrelevant”).

²⁸ United States’ responses to the Panel’s questions, para. 25.

²⁹ United States’ responses to the Panel’s questions, para. 26.

³⁰ In paragraph 26 of its responses to the Panel’s questions, the United States asserts that “different historical harms caused by setting on dolphins in the ETP” were the basis of the record-keeping and verification requirements for large purse seine vessels. This is incorrect. To address the harms caused by setting on dolphins in the AIDCP framework, the Parties adopted improvements in the fishing gear and methods to considerably reduce the risks arising from setting on dolphins in the ETP. This was recognized by the Panel in the original proceeding. These improvements include: (i) backing down the edges of the nets to create a channel through which the dolphins may escape, (ii) using divers and personnel in small boats to assist the dolphins, (iii) covering the top portion of the purse seine with a skirt of mesh that prevents dolphins from catching their beaks or heads in the net in the event of a net “canopy”, and (iv) prohibiting fishing after sundown to ensure that dolphins within the net can be seen. These requirements are different from those related to ensure that tuna products from tuna caught in the ETP is dolphin-safe within the meaning of the AIDCP labelling regime (i.e., the requirement to have a verifiable recordkeeping, tracking and system). See Panel Report, *US – Tuna II (Mexico)*, para. 7.610 and footnote 854.

³¹ This was clarified by the United States during the meeting with the Panel.

³² United States’ responses to the Panel’s questions, para. 32.

legitimate basis for regulatory distinctions".³³ Mexico does not disagree that, in the present compliance proceedings, the concept of "calibration" is not relevant to the determination of whether the Amended Tuna Measure is designed and applied in a manner that lacks "even-handedness" under Article 2.1 of the TBT Agreement. Mexico addresses this concept in detail in its response to Question 11 of the Panel.

c. **In light of the Appellate Body's rulings in *EC – Seal Products*, what (if any) is the relationship between "even-handedness" in TBT Article 2.1 and "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994?**

30. Mexico disagrees with the United States' response to this question. Mexico has responded in detail in its response to this question.³⁴ Mexico adds that "arbitrary and unjustifiable discrimination" is a fundamental concept in the WTO Agreements and there is no contextual basis to interpret the meaning of this term differently in different agreements.

6. **To both Parties:** New Zealand at para. 6 of its oral statement posits that "Specifically in this dispute, the even-handedness assessment would involve consideration of the United States' rationale for distinguishing between tuna products containing tuna caught by setting on dolphins in the Eastern Tropical Pacific and tuna harvested by other methods in other areas of the ocean. New Zealand submits that the Panel should consider whether this rationale is consistent with the overall objective of the amended dolphin-safety measure. For instance, does the distinction assist or hinder the dolphin-safety objective? Is eligibility for the label tailored to the different levels of dolphin-safety risks arising from the different fishing methods? In other words, is the rationale for the distinction consistent with the measure's overall objective?" Please comment on this statement.

31. Mexico disagrees with the United States' response to this question, and refers the Panel to the analysis it has provided in its response to the Panel's questions.³⁵

32. Specifically, Mexico does not agree with the United States that an inquiry into the consistency of the rationale underlying the different labeling conditions and requirements imposed by the Amended Tuna Measure with the measure's overall objective is not relevant to the even-handedness analysis pursuant to Article 2.1 of the TBT Agreement.

33. In its response to the Panel's questions, Mexico has explained that the concept of "even-handedness" incorporates, *inter alia*, the concept of arbitrary discrimination.³⁶ In doing so, Mexico refers to the Appellate Body's analysis in *EC – Seal Products*, in which it found that the

³³ United States' response to the Panel's questions, para. 32.

³⁴ See Mexico's responses to the Panel's questions, paras. 12-14.

³⁵ Mexico's responses to the Panel's questions, para. 15.

³⁶ Mexico's responses to the Panel's questions, paras. 3-5.

chapeau to Article XX provides relevant context for the analysis under Article 2.1.³⁷ On the basis of this authority, Mexico has demonstrated that it is appropriate to look to the meaning of “arbitrary discrimination” developed under the chapeau to Article XX when interpreting “even-handedness” for the purposes of Article 2.1 of the TBT Agreement.³⁸ An inquiry into whether the United States’ rationale for applying differing labeling conditions and requirements to tuna products containing tuna caught by setting on dolphins in the ETP and tuna harvested by other methods in other areas of the ocean is consistent with the policy objectives of the Amended Tuna Measure is central to the analysis of arbitrary discrimination pursuant to the chapeau to Article XX. Accordingly, this same inquiry provides relevant context for an assessment of even-handedness within the meaning of Article 2.1 of the TBT Agreement.

34. In its response to this question, the United States appears to imply that Mexico takes the position that the analyses to be conducted under Article 2.1 of the TBT Agreement and the chapeau to Article XX of the GATT 1994 are the same.³⁹ This is a misrepresentation of Mexico’s arguments – one that Mexico has already corrected on multiple occasions in its second written submissions, its opening statement and in its responses to the Panel’s questions.⁴⁰

7. To both Parties: Mexico has made broad claims of discrimination and argued specific instances of discrimination.

35. At paragraph 42 of the United States’ response to this question, the United States incorrectly describes Mexico’s claims under Articles I:1 and III:4 of the GATT 1994. The violations of those provisions arise from the Amended Tuna Measure “as a whole”, including the three labelling requirements and conditions identified by Mexico. Nowhere in the presentation of its case has Mexico limited these claims to the discriminatory effect of the labelling requirement and condition related to the disqualification/qualification of fishing methods.

36. As Mexico has explained repeatedly in its written submissions⁴¹ and its opening statement,⁴² the differences in all three labeling conditions and requirements imposed by the Amended Tuna Measure, taken together, have a detrimental impact on competitive opportunities for Mexican tuna products. It is this detrimental impact which results in the Amended Tuna Measure’s inconsistency with Articles I:1 and III:4 of the GATT.

37. Similarly, Mexico has already explained in detail that its Article 2.1 claim, as articulated in the request for the establishment of a panel, challenges the consistency of the Amended Tuna

³⁷ Appellate Body Report, *EC – Seal Products*, para. 5.310, citing Appellate Body Report, *US – Clove Cigarettes*, para. 173; Appellate Body Report, *US – Tuna II (Mexico)*, para. 213.

³⁸ Mexico’s second written submission, para. 132; Mexico’s responses to the Panel’s questions, paras. 12-14.

³⁹ United States’ responses to the Panel’s questions, para. 40.

⁴⁰ Mexico’s second written submission, paras. 132; 332-335; Mexico’s opening statement, paras. 56 and 88; Mexico’s responses to the Panel’s questions, para. 12.

⁴¹ Mexico’s first written submission, paras. 222-242; Mexico’s second written submission, paras. 202-203.

⁴² Mexico’s opening statement, para. 80.

Measure “in its totality.”⁴³ Consequently, Mexico’s arguments with respect to each of the measure’s three labeling conditions and requirements fall squarely within the Panel’s terms of reference. The United States’ assertions to the contrary have no merit.

- a. **Do the parties believe that there is discrimination in the situation reflected in Sections 216.91(a)(1), 216.92(a), and 216.92(b), and as described in Section B(5) of form 370 on the one hand and Section 216.91(a)(2)(iii)(B) on the other hand, i.e. because large purse seine vessels not setting on dolphins in the ETP are required to have observers whereas the large purse seine vessel not setting on dolphins outside the ETP are not subject to such a requirement?**
- b. **Do the parties believe that there is discrimination in the situation reflected in Sections 216.91(a)(1), 216.92(a), and 216.92(b) and as described in Section B(5) of form 370 on the one hand and Sections 216.91(a)(4) and 216.91(a)(2)(iii)(B) on the other hand, i.e. because large purse seine vessels not setting on dolphins in the ETP are required to have observers whereas small purse seine vessel inside and outside of the ETP are not subject to such a requirement?**

38. Mexico observes that in responding to these questions, the United States once again argues that the situation in the ETP is “unique” and that large purse seine vessels in the ETP are the only vessels that are capable of harming dolphins.⁴⁴ In making that argument, the United States – as it has done repeatedly throughout this dispute – takes inconsistent positions, demonstrating the arbitrary nature of its approach to the meaning of “dolphin-safe”.

39. First, Mexico renews its point that the U.S. dolphin-safe standard is a “zero-tolerance” standard – it represents to consumers that no dolphins were killed or seriously injured during the specific set or gear deployment in which the specific tuna in the can was harvested, and that not a single set was made on dolphins during the entire fishing voyage during which the tuna was caught.⁴⁵ The United States has not disputed this fact. Moreover, the United States has not disputed that dolphins are killed and seriously injured by tuna fishing outside the ETP.⁴⁶ But according to the United States, it is acceptable for the dolphin-safe standard to be imprecise – i.e., to be based on probabilities – for non-ETP tuna products. Meanwhile, the definition of dolphin-safe for ETP tuna products requires absolute precision, provided by trained observers and a tuna tracking and verification system that follows the tuna from the moment of capture to the retail shelf. In other words, the United States’ argument concedes that the definition of dolphin-safe is different for ETP tuna products than for non-ETP tuna products.

40. Second, the United States’ proposed interpretation of the evidence is arbitrary and contradictory. The United States does not dispute that there is not 100 percent observer coverage

⁴³ Mexico’s second written submission, paras. 89-92; Mexico’s opening statement, para. 44.

⁴⁴ United States’ responses to the Panel’s questions, paras. 51-53.

⁴⁵ Mexico’s responses to the Panel’s questions, paras. 50-52.

⁴⁶ See, e.g., United States’ second written submission, paras. 23 and 26.

in the Indian Ocean, East Atlantic and Western Pacific. More importantly, the United States has expressly agreed that observers in those regions are not qualified or authorized to report on marine mammal mortalities.⁴⁷ The United States also agrees that the IATTC is the only RFMO with comprehensive data on the impact of the fishery on dolphins.⁴⁸ Yet the United States pronounces, with complete certitude, that it knows how many dolphins are being killed in the other RFMOs, based upon projections from extremely limited reports.⁴⁹ This again reflects the biased nature of the U.S. approach to the evidence. Where evidence relates to the ETP – regardless of how speculative or dated – the United States draws dramatic negative conclusions, but where evidence relates to any other fishery – regardless of the strength of the evidence – the United States dismisses it as irrelevant. To be clear, Mexico disputes the United States' claim that the ETP fishery is causing more dolphin deaths than any other fishery; rather, the evidence is that hundreds of thousands of dolphins (if not more) are currently dying in other fisheries.⁵⁰ That the United States seeks to make a virtue of the fact that nothing is being done to comprehensively monitor harms to dolphins outside the ETP, or to protect dolphins in those other fisheries, is disappointing. For the purposes of this dispute, it is yet another indication of the arbitrariness of the Amended Tuna Measure.

Comments on U.S. Evidence

a. Western and Central Pacific

41. The United States relies heavily on the WCPFC paper in Exhibit US-58 to support its claim that dolphin mortality in the Western and Central Pacific is minor. Mexico notes that the study validates that dolphins are killed by purse seine nets in the Western and Central Pacific, with a very high rate (65 percent) when there is an interaction, which demonstrates that the vessels do not proactively seek to protect dolphins.⁵¹ Mexico has pointed out that the study itself states that no data from the domestic fisheries or Indonesia and the Philippines was included, and that the study only covers the area between 20° south and 20° north.⁵² The regions outside 20° south and 20° north have only five percent observer coverage.⁵³ According to the study, the fishery between 20° south and 20° north had 41,871 purse seine sets in 2010. That is less than one half of the 90,000 to 100,000 purse seine sets per year made in the entirety of the WCPFC

⁴⁷ United States' responses to the Panel's questions, para. 103.

⁴⁸ Mexico adds that such comprehensive information is also not available for tuna caught in U.S. domestic waters, as the United States agrees that it does not require 100 percent observer coverage in its own fisheries.

⁴⁹ United States' responses to the Panel's questions, para. 55.

⁵⁰ See, e.g., Mexico's responses to the Panel's questions, para. 77.

⁵¹ WCPFC, Summary Information on Whale Shark and Cetacean Interactions in the Tropical WCPFC Purse Seine Fishery, p. 3 (Exhibit US-58).

⁵² *Ibid.*, p. 1.

⁵³ WCPFC, Conservation and Management Measure for Implementing the Regional Observer Programme by Vessels Fishing for Fresh Fish North of 20°N (2–6 December 2012) (Exhibit MEX-120).

region.⁵⁴ Accordingly, a projection for the fishery limited to within 20° south and 20° north significantly underestimates the total.

42. The United States seeks to focus on the lower mortality reported for 2010, but does not explain why the higher number for the 2007 to 2009 period should be disregarded. (Using the U.S. figures for 2007 to 2009, there were 26.98 animals killed per 1,000 sets,⁵⁵ which for 100,000 sets implies about 2,700 mortalities.) A careful examination of Figures 3a and 3b indicates that sample observations were more focused in coastal areas during 2007 to 2009, while in 2010 the samples were concentrated farther away from land, which may explain the different results.⁵⁶ In any event, no explanation has been provided as to why the WCPFC has not updated its study with more recent and comprehensive data. As a full member of the WCPFC, the United States has the ability to request preparation of that data in order to analyze the actual risks to dolphins in that region.

b. Indian Ocean

43. The article on which the United States relies for its assertion that there are no dolphin mortalities or tuna-dolphin association in the Indian Ocean was limited to a small sampling of French and Spanish purse seine vessels. The study includes the following statements:

“A target sampling coverage rate of 10% of the fishing trips has been recommended to estimate the magnitude of bycatch by tuna RFMOs (T-RFMOs), namely by the ICCAT (International Commission for the Conservation of Atlantic Tunas) and IOTC (Indian Ocean Tuna Commission), on the basis of previous work showing that a minimum of 20% is needed to obtain acceptable levels of bycatch estimation (Lennert-Cody, 2001).”⁵⁷

“Sampling coverage during the study period was about 4.6% of trips, i.e. less than half of the target rate of 10%. This coverage level is very low compared to the equivalent observer programmes in the eastern and western parts of the Pacific Ocean, which have been reaching almost 100 and 20% coverage, respectively (Hall, 1999; Lennert-Cody et al., 2004). Consequently, almost all bycatch species are even more poorly estimated than expected.”⁵⁸

⁵⁴ Secretariat of the Pacific Community, “Status of Tuna Stocks and Management Challenges in the WCPO, slide 21 (Exhibit MEX-42).

⁵⁵ United States’ first written submission, para. 132.

⁵⁶ WCPFC, Summary Information on Whale Shark and Cetacean Interactions in the Tropical WCPFC Purse Seine Fishery, p. 10 (Exhibit US-58).

⁵⁷ Monin J. Amande et al., “Precision in Bycatch Estimates: The Case of Tuna Purse Seine Fisheries in the Indian Ocean,” ICES J. Mar. Sci., at 6 (2012) (Exh. US-131). p. 2 (Exhibit US-131).

⁵⁸ Ibid., p. 8.

“Overall, our results indicate that the current European fishery observer programme provides some information on bycatch of marine predators in the Indian Ocean, but is insufficient to accurately monitor the effects of fishing on pelagic communities associated with tuna schools.”⁵⁹

44. The United States also cites an “earlier” study that asserted that there is no “dolphin bycatch problem.”⁶⁰ That study was based on data collected by observers on several Soviet purse seine vessels during 1986 to 1992, involving only 492 sets. Among other things, that study says:

“In the western Indian Ocean (WIO), tuna-dolphin associations are well known in coastal pelagic zones, e.g. Gulf of Aden (Demidov) and Sri-Lanka (de Silva and Boniface).”

“Bycatches are not recorded for tuna seiners operating in the WIO, except bycatches of nontarget tuna species.”⁶¹

45. A new comprehensive and scientific analysis of dolphin mortalities in the Indian Ocean tuna fishery was released to the public on September 17, 2014.⁶² The report, entitled “Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean,” was authored by a marine biologist who lives in the Maldives, and who recently served as the chair of the IOTC’s Working Party on Ecosystems and Bycatch. The report reviews data on dolphin mortalities in the Indian Ocean caused by all methods, including gillnet fishing, purse seine fishing, and longlines.

46. Among key points addressed by the study are the following:

“A feature of almost all of this literature is that it emphasises the supposed location-specific nature of the tuna-dolphin association and of the tuna-dolphin fishery: it is a problem of the ETP. This idea has been so widely repeated that it has become entrenched (e.g. Blackman, 2003; Clover, 2004). But it is not true. Dolphins and yellowfin tuna do associate elsewhere, and certainly within the Indian Ocean.

Another feature of the tuna-dolphin issue in the ETP is that it was (and is) so divisive and costly that there is a definite reluctance to engage with the issue in other areas, including the Indian Ocean. It is against this background that the any [sic] cetacean-tuna interactions in our region should be considered.”⁶³

⁵⁹ Ibid., p. 7.

⁶⁰ United States’ responses to Panel’s questions, footnote 72.

⁶¹ E. Romanov, Bycatch in the Tuna Fisheries of the Western Indian Ocean, 100 Fisheries Bulletin 91 (2002) (Exhibit US-132).

⁶² International Pole & Line Foundation, Press Release (September 17, 2014) (Exhibit MEX-162).

⁶³ Dr. R. Charles Anderson, Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean, IPNLF Technical Report No. 2, p. 39 (Exhibit MEX-161).

“... [I]t is possible that current bycatch from the western and central Indian Ocean tuna gillnet fisheries is of the order of 60,000 small cetaceans per year.”⁶⁴

“... [I]t is emphasised again that the figures presented here are not intended as precise estimates of current cetacean bycatch. They are intended to be indications of the potential scale of the issue. But what is clear is that these gillnet fisheries together must catch tens of thousands of cetaceans every year. Over the last four decades this could have amounted to millions of dead cetaceans, which is of the same order of magnitude as the cumulative dolphin catch from the ETP purse seine fishery. What is remarkable is how little interest this has raised.”⁶⁵

“This simple picture of tuna associating with dolphins in northern coastal waters (Sri Lanka, Maldives, Oman, Yemen and probably others) but not on the southern offshore purse seine grounds has remained the general understanding to date (e.g. IOTC, 2008: 16-17). However, it is not correct:

(1) Yellowfin tuna do associate with dolphins around the Maldives, which are oceanic islands, not coastal in any biogeographical sense. ... At this time, Maldivian fishermen regularly catch yellowfin tuna from dolphin-associated schools far off the western side of the atolls (Adam and Jauharee, 2009; RCA, pers. obs.). In other words, the suggestion that there is some major difference between the oceanography of the waters exploited by the purse seine fleet and those fished by the coastal countries may not apply in this case.

(2) Yellowfin tuna do associate with dolphins around the Seychelles, at the very heart of the purse seine fishery area (David Ardill, Julien Million, pers. comm., Appendix 1). I personally saw yellowfin tuna with spotted and/or spinner dolphins on five occasions during five days at sea off the northern edge of the Seychelles shelf in October 2005 (Appendix 3).

(3) Yellowfin tuna do associate with dolphins in the wider Arabian Sea and in the main purse seine fishing area east of Seychelles ... I personally saw seven groups of spotted and/or spinner dolphins with seabirds (and another three groups of unidentified dolphins with seabirds) during four crossings from Maldives to Seychelles during January-February 2003-2010 (Appendix 3).... I recorded two sightings of spotted and spinner dolphins with tuna, and eight other sightings of dolphins with flocks of seabirds that indicated the likely presence of yellowfin tuna. That equates to 1.4 sightings per 12h day – hardly a rare occurrence.

⁶⁴ Ibid., p. 48.

⁶⁵ Ibid., p. 50.

In summary, dolphins and tuna do associate in the WIO. They commonly associate in several coastal and islands areas, where the presence of dolphins is essential for the successful prosecution of handline fisheries for yellowfin tuna. They also regularly associate in the high seas, contrary to previous reports from the purse seine fishery.”⁶⁶

“In summary, it is possible that there has been more setting on dolphins in the WIO than has been reported. This does not imply that the tuna-dolphin fishery in the WIO is of the same scale as that in the ETP. Indeed, the only comparative study of the cetaceans from the western Indian Ocean and the ETP (Ballance and Pitman, 1998) suggested that tuna-dolphin schools were seen less frequently in the WIO than in the ETP. Nevertheless it is clear that the occurrence of the tuna-dolphin association in the WIO purse seine fishing area has been consistently under-reported. The true scale of purse seine fishing on dolphin-associated schools in the WIO is therefore open to question.

The absence of independent data is one key issue here. The lack of a single trip by any experienced cetacean scientist on any European purse seiner in the WIO, despite the fact that the fishery has been operating for 30 years and is known to have interactions with cetaceans, is striking. The widespread adoption of electronic monitoring and 100% observer coverage of purse seine trips are clearly desirable.”⁶⁷

“It has been reported from elsewhere that false killer whales may be ‘deliberately persecuted because of their depredations on the longlines’ (Perrin et al., 2005). From tuna or tuna-related fisheries within the Indian Ocean there are reports of cetaceans being shot by fishermen from Thailand and Australia (Kemper and Gibbs, 2001; Saughnessy et al., 2003), while from the SWIO Rabearisoa et al. (2009) noted that ‘there are increased risks of injury or mortality of cetaceans … in a deliberate way due to fishermen who can’t stand losing fish anymore.’… There is strong possibility that false killer whales, and possibly also other small cetacean

⁶⁶ Ibid., pp. 62-63.

⁶⁷ Ibid., p. 67. The study also addresses the need for observers:

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

Ibid., p. 77.

species, are being shot by tuna longline fishermen within the Indian Ocean.”⁶⁸

47. Based on its response to Mexico’s other evidence, the United States likely would respond that this report should be disregarded because the IOTC does not already have 100 percent observer coverage and precise statistics on dolphin mortalities are not available. The study comments on this type of attitude to cetacean bycatch problems:

However, a more pernicious problem is that cetacean bycatch issues are perceived by many as potentially damaging (as demonstrated by the additional costs, operational difficulties and external pressures associated with the tuna-dolphin fishery in the ETP) and are therefore better ignored. This appears to be one factor in the consistent failure of national fisheries institutes to address the issue of small cetacean bycatch in any fisheries, but especially tuna fisheries. Where scientific monitoring has indicated that there are issues requiring mitigation, the official response has been to terminate monitoring. Intergovernmental organisations, which are guided by national priorities, follow suit.⁶⁹

c. *Eastern Atlantic*

48. For the Eastern Atlantic, the United States relies on another study limited to a small sampling of French and Spanish vessels. That report includes the following statements:

“Bycatch and associated discarding are difficult to estimate on the basis of logbook information, as they are generally poorly or not reported by fishing masters.”⁷⁰

“Data were collected by observers over the course of 27 trips, corresponding to 598 sets in the Atlantic Ocean (latitude between 10°S and 15°N and longitude from 35°W to the African coast) over the 2003–2007 period. The overall coverage rate reached 2.9% of the total number of trips and increased from 1.5% in 2003 to 6.5% in 2007.”⁷¹

49. The update of this study also cited by the United States was based on observer data “collected during 13 trips and 19 trips in 2008 and 2009, respectively corresponding to 6.7% and 8.5% of total trips, respectively.”⁷² Those are percentages for the French and Spanish fleets, not the other countries that fish in the Atlantic.

⁶⁸ Ibid., p. 69.

⁶⁹ Ibid., pp. 74-75.

⁷⁰ Monin J. Amande et al., “Bycatch of the European Purse Seine Tuna Fishery in the Atlantic Ocean for the 2003-2007 Period,” 23 *Aquat. Living Resour.* 353, 354 (2010) (Exhibit US-133).

⁷¹ Ibid., p. 355.

⁷² Monin J. Amande et al., “Bycatch and Discards of the European Purse Seine Tuna Fishery in the Atlantic Ocean: Estimation and Characteristics for 2008 and 2009,” 66 *ICCAT Collect. Vol. Sci. Papers* 2113 (2011), p. 2114 (Exhibit US-134).

50. Thus, the study on which the United States relies for the Atlantic Ocean, similar to the study by the same authors of the Indian Ocean, relies on a statistically invalid percentage of Spanish and French vessel fishing trips, and does not include any information at all on the vessels of other countries.

51. For the United States to cite the studies it describes as establishing that there are no or *de minimis* dolphin mortalities in the Western Pacific, Indian Ocean and Eastern Atlantic oceans is scientifically unjustifiable and another demonstration of arbitrariness. These studies do not refute Mexico's evidence of serious dolphin mortality in those oceans.

52. The United States' responses to Questions 17, 19, 20, and 55 all rely heavily on these same reports and assumptions.

53. Finally, throughout its response to this question the United States makes bald statements that fail to engage with Mexico's arguments demonstrating that the absence of a mandatory independent observer requirement for tuna fishing outside the ETP constitutes a means of arbitrary or unjustifiable discrimination within the meaning of Article 2.1.

54. As Mexico has explained, this particular regulatory difference in the labeling conditions and requirements imposed by the Amended Tuna Measure mandates the provision of independently verified and accurate information regarding the dolphin-safe status of tuna caught within the ETP, while permitting the provision of inherently unreliable and inaccurate information regarding the dolphin-safe status of tuna caught outside the ETP, which has the effect of modifying the conditions of competition in the U.S. market to the detriment of imported Mexican tuna products.⁷³ Once again, the United States has provided no meaningful response to Mexico's arguments.

55. Contrary to the United States' assertion at paragraph 53 of its response, Mexico has shown that there is a clear basis upon which to require the presence of an independent observer on board tuna fishing vessels outside the ETP. In light of the evidence that Mexico has presented establishing that dolphins are killed and seriously injured by all tuna fishing methods (with the exception of pole-and-line fishing) and in all ocean regions, the presence of an independent observer is required in order to ensure the accuracy of the designation of tuna as dolphin-safe at the time of capture. Further, Mexico has demonstrated that the Amended Tuna Measure establishes a zero tolerance threshold with respect to dolphin mortalities and serious injuries.⁷⁴ Consequently, the relative "levels of harm" referred to by the United States in its response to this question are irrelevant, and underscore the arbitrary nature of the Amended Tuna Measure's differing labeling conditions and requirements.

8. *To both Parties: Under Article XX(b), what must be "necessary to protect human, animal or plant life or health": the challenged measure considered in its entirety (i.e. as a whole), or only the discrimination or detrimental impact giving rise to the*

⁷³ Mexico's second written submission, paras. 172 and 176-195.

⁷⁴ Mexico's responses to the Panel's questions, paras. 50-52.

relevant GATT violation? Similarly, under Article XX(g), is it the measure as a whole or only the discrimination or detrimental impact that must "relate to the conservation of exhaustible natural resources"?

56. Mexico limits its comments with respect to the United States' response to this question to a clarification of the Appellate Body's decision in *EC – Seal Products*, in which it confirmed that where the combined operation of multiple aspects of a challenged measure gives rise to the relevant GATT violation, all such aspects will need to be considered together for the purposes of the Article XX analyses.⁷⁵ As Mexico has explained in its response to this question,⁷⁶ in the context of the present proceedings it is the combined operation of all of the aspects of the Amended Tuna Measure that leads to the relevant GATT violations. Accordingly, it is all aspects of the measure, “taken together,” that the United States must justify under the subparagraphs to Article XX. Mexico notes that the Appellate Body arrived at a similar conclusion in its decision in *EC – Seal Products*.⁷⁷

11. To both Parties: In assessing the risks posed to dolphins outside of the ETP by fishing methods other than setting on dolphins, should the concerned party simply compare the raw number of dolphins killed in different fisheries, or should it also take into account the number of dolphins killed as a percentage of the known species population in the particular fishery?

57. The United States has failed respond to this question in a clear manner, and provides no factual or legal reasoning in support of its assertion that it is appropriate to assess the risks posed to dolphins outside of the ETP in terms of raw dolphin mortality figures presented in the context of the size of the fishery in terms of vessels, or on a per set basis. The lack of clarity and substance in the United States' response at paragraphs 60, 61 and 62 provides further confirmation that, to the extent that the United States has attempted to explain the benchmark that is used for assessing “risks posed to dolphins” under the Amended Tuna Measure, those explanations have been inconsistent and contradictory.

58. In its response to this question, Mexico established that the Amended Tuna Measure pursues a “zero tolerance” benchmark with respect to observed and unobservable dolphin mortalities and serious injuries: tuna caught in a fishing set or gear deployment cannot be labelled dolphin-safe if only a single dolphin mortality or serious injury occurs during the set or deployment.⁷⁸ The Amended Tuna Measure is designed in such a way that it is not concerned with the relative magnitude of dolphin mortalities and serious injuries; it is concerned with

⁷⁵ Appellate Body Report, *EC – Seal Products*, para. 5.193.

⁷⁶ Mexico's responses to the Panel's questions, paras. 32-34.

⁷⁷ Appellate Body Report, *EC – Seal Products*, paras. 5.184-5.193.

⁷⁸ Mexico's responses to the Panel's questions, paras. 50-52 and 58-59.

whether or not such adverse effects merely exist in relation to specific fishing methods.⁷⁹ Consequently, the United States is wrong to state that a comparison of the raw numbers of dolphin mortalities and serious injuries (whether assessed in the context of the size of the fishery in terms of the number of vessels, or on a per set basis) is in any way relevant or “meaningful”.

12. *To both Parties: What is the relevance, if any, of evidence showing dolphin mortality in non-tuna fisheries (e.g. swordfish fisheries)? How does this compare to dolphin mortality in tuna fisheries?*

59. As Mexico commented in its response to this question, there is no reason to believe that longlines and gillnets that kill and injure dolphins when used to capture fish that are not tuna do not do the same when they are used to catch tuna.⁸⁰ The insistence of the United States on disregarding relevant evidence reflects its non-scientific approach to the issues.

13. *To both Parties: The Panel notes that there are organizations (e.g. the Indian Ocean Tuna Commission (IOTC) and the Western and Central Pacific Fisheries Commission (WCPFC)) whose observer programs require a report on by-catch, which could therefore provide records of dolphin mortality.*

- a. Please comment on whether information from these organizations should be taken into account for the purpose of granting tuna catch access to the dolphin safe label?**
- b. Could the United States, if possible, provide the Panel with a template of an observer's report under the WCPFC program?**

60. The United States did not directly answer question 13.a, but the substance of its response indicates that it agrees with Mexico that information from these other RFMOs cannot be relied upon in making a decision on whether to grant tuna access to the dolphin-safe label. These other RFMOs have limited observer coverage, do not train observers to monitor harm to dolphins, and do not consistently share information at a centralized location.

61. Nonetheless, the United States has argued that the fact that these same RFMOs do not have comprehensive information about dolphin mortalities indicates that there is no problem with dolphin mortalities in those fisheries. That argument is nonsensical.

62. Mexico notes that the United States (a full member of the WCPFC) has declined to respond to the Panel's request in question 13.b to see a template for an observer's report under the WCPFC program.

⁷⁹ See Mexico's responses to the Panel's questions, para. 56.

⁸⁰ Mexico's responses to the Panel's questions, para. 76.

14. **To both Parties:** Mexico argues that dolphin mortality in the ETP has significantly decreased between 2011 and 2012. This decrease could be a consequence of the AIDCP requirements, including the fact that the treaty regime prohibits the importation of tuna that is not "dolphin safe" within the meaning of the treaty (as distinct from the meaning of "dolphin safe" under the US amended tuna measure). Do the parties agree with this? To what extent is the reduced dolphin mortality a consequence of new, more effective dolphin protection methods developed since the original proceedings?

63. The United States – during the hearing and in its written response – sought to argue that there has been a linear relationship between the number of dolphin sets and dolphin mortalities in the ETP.⁸¹ The United States prepared a customized chart that focuses on a few years and omits years that do not support its claim – for example, the year 2013, even though data for that year is in the Exhibit US-26 cited by the United States as support for its chart. The United States also attempts to obfuscate its own data, which show, for example, that (i) mortalities from 2009 to 2010 went down even though the number of dolphin sets went up, (ii) from 2004 to 2005, dolphin sets increased again while mortalities declined, and (iii) from 2001 to 2002, dolphin sets rose significantly while mortalities declined significantly.

64. Mexico provided data for 2013 and prior years in a graph in its responses to this question at paragraph 84 of its responses to the Panel's questions. Mexico is reproducing the full data below, so that the Panel can draw its own conclusions for the period beginning in 1998.⁸²

⁸¹ United States' responses to the Panel's questions, paras. 79-80.

⁸² Table A-7 is from AIDCP, Los atunes y peces picudos en el Océano Pacífico Oriental en 2013, Documento IATTC-87-03a (revisado) (Exhibit MEX-142); Table 3 is from AIDCP, Report on the International Dolphin Conservation Program, Document MOP-28-05 (18 October 2013), p. 15 (Exhibit MEX-3).

TABLE A-7. Estimated numbers of sets, by set type and vessel capacity category, and estimated retained catches, in metric tons, of yellowfin, skipjack, and bigeye tuna in the EPO, by purse-seine vessels. The data for 2013 are preliminary. The data for yellowfin, skipjack, and bigeye tunas have been adjusted to the species composition estimate and are preliminary.

TABLA A-7. Números estimados de lances, por tipo de lance y categoría de capacidad de buque, y capturas retenidas estimadas, en toneladas métricas, de atunes aleta amarilla, barrilete, y patudo en el OPO. Los datos de 2013 son preliminares. Los datos de los atunes aleta amarilla, barrilete, y patudo fueron ajustados a la estimación de composición por especie, y son preliminares.

DEL	Number of sets—Número de lances		Retained catch—Captura retenida		
	Vessel capacity—Capacidad del buque		Total	YFT	SKJ
	≤363 t	>363 t			
Sets on fish associated with dolphins Lances sobre peces asociados con delfines					
1998	0	10,645	10,645	154,200	4,992
1999	0	8,648	8,648	143,128	1,705
2000	0	9,235	9,235	146,533	540
2001	0	9,876	9,876	238,629	1,802
2002	0	12,290	12,290	301,099	3,180
2003	0	13,760	13,760	265,512	13,332
2004	0	11,783	11,783	177,460	10,730
2005	0	12,173	12,173	166,211	12,127
2006	0	8,923	8,923	91,978	4,787
2007	0	8,871	8,871	97,032	3,277
2008	0	9,246	9,246	122,105	8,382
2009	0	10,910	10,910	178,436	2,719
2010	0	11,645	11,645	168,984	1,627
2011	0	9,604	9,604	134,839	4,372
2012	0	9,220	9,220	133,716	2,120
2013	0	10,736	10,736	155,424	4,283

TABLE 3. Annual estimates of dolphin mortality, by species and stock, 1979-2012. The estimates for 1979-1992 are based on a mortality-per-set ratio. The mortalities for 1993-2011 represent the sums of the observed species and stock tallies recorded by the IATTC and national programs. Mortalities for 2001-2003 have been adjusted for unobserved trips of vessels over 363 t carrying capacity.

TABLA 3. Estimaciones anuales de la mortalidad de delfines, por especie y población, 1979-2012. Las estimaciones de 1979-1992 se basan en una razón de mortalidad por lance. Las mortalidades de 1993-2011 son las sumas de las mortalidades por especie y población registradas por los programas de la CIAT y nacionales. La mortalidad de 2001-2003 fue ajustada para viajes no observados de buques de más de 363 t de capacidad de acarreo.

	Offshore spotted ¹		Spinner		Common			Others	Total		
	North-eastern	Western-southern	Eastern	White belly	Northern	Central	Southern				
	Manchado de altamar ¹		Tornillo		Común						
	nor-oriental	Occidental y sureño	Oriental	Panza blanca	Norteño	Central	Sureño				
1979	4,828	6,254	1,460	1,312	4,161	2,342	94	880	21,331		
1980	6,468	11,200	1,108	8,132	1,060	963	188	633	29,752		
1981	8,096	12,512	2,261	6,412	2,629	372	348	367	32,997		
1982	9,254	9,869	2,606	3,716	989	487	28	1,347	28,296		
1983	2,430	4,587	745	4,337	845	191	0	353	13,488		
1984	7,836	10,018	6,033	7,132	0	7,403	6	156	38,584		
1985	25,975	8,089	8,853	6,979	0	6,839	304	1,777	58,816		
1986	52,035	20,074	19,526	11,042	13,289	10,884	134	5,185	132,169		
1987	35,366	19,298	10,358	6,026	8,216	9,659	6,759	3,200	98,882		
1988	26,625	13,916	18,793	3,545	4,829	7,128	4,219	2,074	81,129		
1989	28,898	28,530	15,245	8,302	1,066	12,711	576	3,123	98,451		
1990	22,616	12,578	5,378	6,952	704	4,053	272	1,321	53,874		
1991	9,005	4,821	5,879	2,974	161	3,182	115	990	27,127		
1992	4,657	1,874	2,794	2,044	1,773	1,815	64	518	15,539		
1993	1,112	773	725	437	139	230	0	185	3,601		
1994	847	1,228	828	640	85	170	0	298	4,096		
1995	952	859	654	445	9	192	0	163	3,274		
1996	818	545	450	447	77	51	30	129	2,547		
1997	721	1,044	391	498	9	114	58	170	3,005		
1998	298	341	422	249	261	172	33	100	1,876		
1999	358	253	363	192	85	34	1	62	1,348		
2000	295	435	275	262	54	223	10	82	1,636		
2001	592	315	470	374	94	205	46	44	2,140		
2002	435	203	403	182	69	155	3	49	1,499		
2003	288	335	290	170	133	140	97	39	1,492		
2004	261	256	223	214	156	97	225	37	1,469		
2005	273	100	275	108	114	57	154	70	1,151		
2006	147	135	160	144	129	86	40	45	886		
2007	189	116	175	113	55	69	95	26	838		
2008	184	167	349	171	104	14	137	43	1,169		
2009	266	254	288	222	109	30	49	21	1,239		
2010	170	135	510	92	124	116	8	15	1,170		
2011	172	124	467	139	35	12	9	28	986		
2012	151	187	324	107	49	4	30	18	870		

¹ Estimates for offshore spotted dolphins include mortalities of coastal spotted dolphins.

¹ Las estimaciones de delfines manchados de altamar incluyen mortalidades de delfines manchados costeros.

65. The IATTC has explained why mortalities continue to decline. It reflects increasing skill of vessels in following the required procedures:

The decrease in the mortality per set is the result of actions by the fishermen to better manage the factors that bring about incidental mortalities of dolphins. Indicative of this effort is the number of sets without mortalities, which has risen from 38% in 1986 to 94.5% in 2012, and the average number of animals left in the net after backdown, which has decreased from 6.0 in 1986 to 0.1 or less since 2001 (Table 5). The

factors under the control of the fishermen which are likely to affect the mortality of dolphins per set include the occurrence of malfunctions, especially those which lead to net canopies and net collapses, and the time it takes to complete the backdown maneuver (Table 5). The percentage of sets with major mechanical malfunctions has decreased from an average of approximately 11% during the late 1980s to less than 6% during 1998-2012; in the same period the percentage of sets with net collapses decreased from about 30% to less than 5% on average, and that of net canopies from about 20% to less than 5% on average. Although the chance of dolphin mortality increases with the duration of the backdown maneuver, the average backdown time has changed little since 1986. Also, the mortality of dolphins per set increases with the number of animals in the encircled herd, in part because the backdown maneuver takes longer to complete when larger herds are encircled. The fishermen can reduce the mortalities per set by encircling schools of fish associated with fewer dolphins.⁸³

66. In this regard, it is relevant to highlight evidence Mexico previously submitted regarding the training and qualification of fisherman in the ETP:

7.2. Training and certification of fishing captains

The IATTC has conducted dolphin mortality reduction seminars for tuna fishermen since 1980. Article V of the AIDCP calls for the establishment, within the framework of the IATTC, of a system of technical training and certification of fishing captains. Under the system, the IATTC staff is responsible for maintaining a list of all captains qualified to fish for tunas associated with dolphins in the EPO. The names of the captains who meet the requirements are to be supplied to the IRP for approval and circulation to the Parties to the AIDCP.

The requirements for new captains are (1) attending a training seminar organized by the IATTC staff or by the pertinent national program in coordination with the IATTC staff, and (2) having practical experience relevant to making sets on tunas associated with dolphins, including a letter of reference from a captain currently on the List, the owner or manager of a vessel with a DML, or a pertinent industry association. These seminars are intended not only for captains, who are directly in charge of fishing operations, but also for other crew members and for administrative personnel responsible for vessel equipment and maintenance. The fishermen and others who attend the seminars are presented with certificates of attendance.

⁸³ AIDCP Report on the International Dolphin Conservation Program, Document MOP-28-05 (October 18, 2013), p. 3 (Exhibit MEX-3).

During 2012, seven training seminars were held, which were attended by 73 fishermen.⁸⁴

67. It is noteworthy that in the large purse seine fishery in the ETP, not only captains, but also crew, are trained to protect dolphins. No other fisheries program, including for fisheries within U.S. territory, has such training. It is not surprising that performance in protecting dolphins within the ETP continues to improve.

15. *To both Parties: Do fishing methods other than setting on dolphins cause "unobserved" harms? Please provide evidence supporting your position*

68. In its response to this question, the United States again agrees that other fishing methods “have the potential to harm marine mammals, including dolphins, and that these direct harms can have indirect (and unobserved) effects.”⁸⁵ Accordingly, if the U.S. dolphin-safe standard is to have the same meaning for tuna products made with tuna caught outside the ETP as it has for tuna products made with tuna caught inside the ETP, there must be equivalent monitoring, tracking and verification requirements to assure consumers that no dolphins were killed or seriously injured during the capture of the specific tuna contained in the can being purchased. It is uncontested that the monitoring, tracking and verification requirements for non-ETP tuna products are less rigorous, and therefore that the standard being applied to non-ETP tuna products is different and more liberal than the standard applied to ETP tuna products.

69. The United States then says that it is “not aware of any evidence, and certainly Mexico has presented none,” that other types of fishing methods cause the types of unobserved harms caused by dolphin sets in the ETP.⁸⁶ In making this statement, the United States cites to paragraphs 126 to 151 of Mexico’s first written submission, and paragraphs 50 to 55 of Mexico’s second written submission. In those paragraphs, Mexico presented evidence such as the following:

- Studies estimating that (i) at least 10,000 dolphins per year are being killed in a gillnet fishery off the coast of India; (ii) 25 to 35 per month in a gillnet fishery in Pakistan; and (iii) in the past, thousands killed by an Irish drift gillnet fishery;
- A report on dolphins being strangled after swallowing loose gillnet parts;
- A report estimating that 18,000 dolphins are being killed annually by longline fishing in the Western Pacific;
- A report on landings of dead dolphins by Taiwanese longline vessels that concluded that “the level of cetacean mortality in longline fisheries is considerably higher than generally assumed”;

⁸⁴ Ibid., p. 5.

⁸⁵ United States’ responses to the Panel’s questions, para. 81.

⁸⁶ United States’ responses to the Panel’s questions, para. 83.

- Reports from several sources on the types of harm done to dolphins' lips, dorsal fins and tails by longline hooks; and
- Eyewitness reports (from U.S. observers) of dolphins being killed and injured by longlines, and of dolphins congregating around the vessel before the lines were set.

The United States may not like this evidence, but to characterize it as "none" does not assist in the resolution of this dispute. Alternatively, the United States may be arguing that the killing and mutilation of dolphins by other fishing methods is of no interest to it simply because those methods are not dolphin sets made by large purse seine vessels in the ETP. That further ratifies Mexico's point that the Amended Tuna Measure is not even-handed, because the measure remains directed exclusively at ETP tuna products, without regard to harms to dolphins in other fisheries.

16. *To the United States: What is the United States doing to address the unobserved harms to dolphins caused by fishing methods outside the ETP?*

70. The Panel's question is about the unobserved harms to dolphins caused by fishing methods outside the ETP. Rather than answering that question, the United States focuses exclusively on purse seine dolphin sets, apparently based on the assumption that longlines, gillnets, other types of purse seine sets such as FAD fishing, trawls, etc. do not cause any harm to dolphins. But Mexico has already demonstrated that these other fishing methods cause direct and indirect – including unobserved – harms to dolphins.

71. The United States' response to this question apparently seeks to claim that the Appellate Body found that the original Tuna Measure "fully" addressed unobserved harm outside the ETP.⁸⁷ The paragraph cited by the United States, however, says the opposite:

In the light of the above, we conclude that the United States has not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. It follows from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. We note, in particular, that the US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does "not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP" [citing Panel report].⁸⁸

⁸⁷ United States' responses to the Panel's questions, para. 84.

⁸⁸ Appellate Body Report, *US – Tuna (II) (Mexico)*, para. 297.

72. Significantly, the United States now agrees that there are dolphin sets outside the ETP.⁸⁹ It is inexplicable why the United States believes that vessels outside the ETP that are capable of setting on dolphins can be trusted to disclose when they have made dolphin sets without observers onboard.

73. The Dolphin Protection Consumer Information Act was enacted in 1990. In the past twenty four years, the United States has done nothing under that law to address dolphin mortalities outside the ETP. Although not mentioned by the United States, it has in fact occasionally taken steps to protect dolphins from observed and unobserved harm within its territorial waters pursuant to other laws (not the DPCIA), after it has been compelled to do so by lawsuits initiated by environmental NGOs.⁹⁰

17. *To the United States: Please explain why tuna caught by setting on dolphins is never eligible to receive the US dolphin safe label even where there is a statement by an independent observer that no dolphin was killed or injured.*

74. In paragraph 88 of its response, the United States claims that there are no risks outside the ETP, as it did in its response to Question 7, on the same questionable basis. Mexico has addressed those purported statistics in its comments on Question 7, above.

75. The United States also repeats its arguments about unobserved harm to dolphins in the ETP, which Mexico has previously demonstrated are based on speculation and presumptions of harm that the United States arbitrarily declines to apply to other fisheries.⁹¹

18. *To the United States:*

a. *Regarding United States and non-United States vessels fishing inside and outside the ETP, what are the legal consequences for a captain/observer who makes a false statement/certificate about the dolphin safe status of tuna caught during the fishery?*

76. As it did at the hearing, the United States presented a “laundry list” of potential penalties. But as it admits elsewhere, in the twenty four year history of the dolphin-safe labelling law, there has never been a criminal or administrative penalty imposed for a violation of the DPCIA.⁹² The United States lacks interest and resources to enforce the rules. Most importantly, there is no way

⁸⁹ United States' responses to the Panel's questions, para. 123.

⁹⁰ See, e.g., Mexico's first written submission, para. 139 (Hawaii longline fishery); NOAA Fisheries, “Office of Protected Resources, Atlantic Pelagic Longline Take Reduction Team” (“NMFS settled a lawsuit with several environmental organizations in 2003, which resulted in an agreement to convene the Team [pdf] in June 2005”) (Exhibit MEX-61).

⁹¹ See, e.g., Mexico's opening statement, para. 21.

⁹² United States' responses to the Panel's questions, para. 249.

to investigate or otherwise validate the accuracy of certifications in the absence of supervision by independent observers.

77. As Mexico pointed out at the hearing, in the Freitas case there was a finding that U.S.-flagged vessels had intentionally set nets on dolphins, which disqualified all of the tuna caught during the entire voyage of those vessels from being certified as dolphin-safe. Yet the U.S. government made no effort to penalize the captains or vessel owner for violating the dolphin-safe measure.

78. In summary, as a practical matter, there are no legal consequences in the United States for making false statements about the dolphin-safe status of tuna, except as discussed below, for ETP tuna products.

**b. Please comment on paras. 162 – 170 of Mexico's first written submission.
What instruments enable the United States to identify and respond to the risk of "tuna laundering" (Mexico's first written submission, para. 166)?**

79. In its response to this question, the United States asserts that there are no problems of traceability arising from transshipments of tuna.⁹³ This claim, of course, has been contradicted by President Obama, who in June 2014 created a new initiative to focus U.S. resources on combating IUU fishing.⁹⁴ The United States has avoided responding to this point.

80. Also significantly, the United States has never directly responded to the evidence on the unreliability of transshipments that Mexico submitted in paragraphs 162-170 of its first written submission. In those paragraphs, Mexico described the various exceptions to and problems with enforcement of rules on transshipment. In fact, the United States cites repeatedly to an exhibit submitted by Mexico on transshipment practices (Exhibit MEX-75), without mentioning the following information from that report, which Mexico discussed in its first written submission as follows:

164. For both longline and purse seine fishing, an important role is played by refrigerated fish carriers, who consolidate the catch of multiple fishing vessels. Some of these are believed to be engaged in transshipment at sea. One study has reported:

The beneficial ownership of refrigerated fish carriers is not easy to determine. Vessels are often registered under offshore shell companies or through other means that mask the identity of actual owners, a common practice in the utilization of flags of convenience in the international shipping business.* [*M. McCoy, "A Survey of Tuna Transshipment in Pacific Island Countries", Gillet, Preston and Associates, Inc. (June 2012), p. 18 (Exhibit MEX-75) (hereinafter "Survey of Tuna Transshipment").]

⁹³ United States' responses to the Panel's questions, paras. 103-106.

⁹⁴ Mexico's second written submission, para. 62.

165. Transfers to carriers involve transshipments. The term “transshipment” is defined in the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean as “the unloading of all or any of the fish on board a fishing vessel to another fishing vessel at sea or in port.”* [*Ibid., p. 12.] There are Conservation and Management Measures (CMM) which provide conditions under which activities such as transshipment are to be conducted.

166. For longline fishing, transshipment at sea is permitted. It is viewed as commercially beneficial because it saves the fleets the time of having to return to port to unload the catch and obtain supplies, thus increasing available fishing days and resulting in greater capacity.* [*Survey of Tuna Transshipment, p. 27 (Exhibit MEX-75).] For example, some Pacific Island countries allow a vessel to provide “catch consolidation,” by coming to port with the catch of multiple vessels. Such a carrier may serve seven or eight longliners during one catch consolidation trip.* [*Ibid., p. 16.] Transshipment at sea can be particularly vulnerable to “tuna laundering,” where “black boats” may conduct illegal, unauthorized and unrestricted (IUU) fishing and then transfer their catch to licensed vessels to transship.* [*Ibid., p. 55.]

167. For purse seiners in the Western and Central Pacific Ocean, transshipment at sea is generally prohibited subject to certain exceptions.* [*Ibid., p. 12.] For example, Papa New Guinea’s (PNG) license conditions generally provide that all transshipment must be done at a PNG’s designated port under the supervision of an observer or Fisheries Officer and that an unloading carrier is required to fill out a catch unloading form.* [*Ibid, p. 15.] However, that there are exceptions; for example, “group seine operations” from PNG and the Philippines are eligible for exemption.* [*Ibid, p. 13.] Also, the term “Port” includes offshore locations such as certain terminals and installations.* [*Ibid, p. 13.]

168. Some reporting is required for unloading vessels and carriers, including a transshipment declaration* [*Ibid, p. 13.] The level of scrutiny port officials apply to such documentation plays a role in determining which port purse seiners desire to use.* [*Ibid, p. 23.]

169. At times there are not enough observers to carry out these tasks, or they are not trained in monitoring transshipment.* [*Ibid, pp. 47-48.] For example, to effectively monitor transshipment amounts and reconcile any discrepancies would require a monitor on both the purse seiner and the carrier, which is rare.* [*Ibid, p. 48.] Also, even the Western and Central Pacific Ocean Fisheries Convention does not impose a requirement on port states to report on the transshipment activities in their ports.* [*Ibid, p.

45.] In any event, it has been indicated that observers likely cannot detect IUU fishing and fish laundering.* [Ibid., pp. 54-55.]

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

81. The United States cites this same document, but only selectively, and has declined to comment on the parts of the report that indicate transshipment controls are weak. The following conclusion from the report is important to emphasize:

The legal framework for the regulation of transshipment is still evolving, particularly at the WCPFC level where contentious issues still surround high seas longline transshipment. The results from the past two years or so of monitoring high seas transshipment and the resultant reporting by flag states is likely to have a large impact on how this issue is handled in the near term.

If, as some expect, detailed reporting of high seas longline transshipment by flag states is poor and observer coverage does not result in significantly better understanding of the catches in the fishery, efforts will likely be made to ban high seas longline transshipment and require all transshipping to be done in EEZs or in port.⁹⁵

82. There are further reasons to question the United States' claim that there is comprehensive monitoring of transshipments. For example, the United States submitted as Exhibit US-137 a 2013 report on the IOTC's Regional Observer Programme activities in 2012. The 2014 version of that report for 2013 (not submitted by the United States) includes the following statement:

Of the 852 vessels that transhipped in 2013, observers managed to board 626 of them, on those vessels that weren't boarded the majority (183) passed over their logbooks and ATF for inspection. Most vessels were only checked once, however three vessels were checked seven times during 2013, the number of times individual vessels were checked in 2013 is shown in Figure 6.⁹⁶

In other words, 226 transhipment vessels (over 26 percent of the total) had no observers.

83. The 2013 version of the report submitted by the United States included the following comment:

⁹⁵ Survey of Tuna Transhipment, p. 60 (Exhibit MEX-75).

⁹⁶ IOTC, Summary of Regional Observer Program During 2013, IOTC-2014-CoC11-04b[E], p. 8 (Exhibit MEX-139).

5. Verify whether any of the catch on board resulted from transfers from other vessels, and check on documentation on such transfers.

This has proved difficult to ascertain and other than asking the fishing master directly, there appears to be no other way to determine if transfers have taken place, as detailed examination of the logbooks are not possible in the time allocated. This would require a more detailed analysis of the data to determine the average catch rates of vessels, the frequency a vessel tranships and the amount transhipped each time. This may indicate that LSTLVs transshipping large amounts, often, over and above their normal catch rates, may be getting fish from other vessels.⁹⁷

84. The 2014 report states that (i) observers get all their information from talking to captains, and do not inspect vessel holds, and (ii) the vessel monitoring systems (VMS) of a number of vessels were without power or power sources, or that the VMS type and serial number did not match with the VMS authorized on the vessel's license.⁹⁸ Of special interest is that the 2013 report states that the observers' estimates of the quantity of tuna transferred were lower than the weights declared by the vessels for about 50 percent of the observed operations, and over 20 percent lower in approximately 18 percent of the observed operations.⁹⁹ The report explains:

Discrepancies between observed and declared weights can be attributed to a few specific points, these include:

- The majority of discrepancies occurred when LSTLVs transshipped fish in nets, particularly when oilfish ... are transferred, this makes it difficult to estimate both weight and numbers;
 - The number of smaller YFT [yellowfin tuna] and BET [bigeye tuna] are not always recorded in the vessel statistics;
 - LSTLVs sometimes use a combination of processing methods on multiple species;
- * * *
- Sometimes the LSTLV will change their plans to tranship a species during the transhipment. If this occurs during transhipment and the declaration form has already been completed, portions of the transhipment may be either declared and not transhipped or included but not declared.¹⁰⁰

⁹⁷ IOTC, Summary of Regional Observer Program During 2012 (March 2013), p. 10 (Exhibit US-137).

⁹⁸ IOTC, Summary of Regional Observer Program During 2013, p. 9 (Exhibit MEX-139).

⁹⁹ IOTC, Summary of Regional Observer Program During 2012 (March 2013), p. 6 (Exhibit US-137).

¹⁰⁰ Ibid., p. 7.

85. Finally, the report indicates that the IOTC has special, more extensive monitoring rules for Southern Bluefin tuna, for which the transshipment observer must counter-sign a “catch monitoring form.”¹⁰¹ By implication, there is no such verification system for yellowfin, albacore, or skipjack tuna; the observer does not verify individual transfers of those species of tuna.

86. Mexico has submitted additional evidence regarding IUU fishing and transshipments in its own response to Question 42.¹⁰²

87. Importantly, the evidence submitted by both the United States and Mexico confirms that, even when transshipments are properly monitored, the observers have no responsibility to keep track of dolphin-safe and non-dolphin-safe tuna, and there are no procedures for carriers to maintain records regarding from which well of a fishing vessel tuna was transferred. Tuna of any particular species is fungible and can be mingled for storage and shipment. Mexico has submitted uncontradicted evidence that tuna used in Mexican tuna products must be, and in fact is, subject to procedural requirements and government oversight that tracks tuna from specific wells on fishing vessels through unloading, storage, and processing.¹⁰³ Non-AIDCP countries and their fleets and processors do not have such procedures. Putting aside whether a particular captain’s certification is accurate, for non-ETP tuna products there is no way to verify or validate that a captain’s certificate actually matches to the tuna with which it has been associated.

19. *To both parties: Please provide data on dolphin mortality and injury in the ETP caused by fishing methods other than setting on dolphins. Could this data, if available, be extrapolated to reflect dolphin mortality and injury outside the ETP?*

88. Mexico does not understand why the United States, in paragraph 114 of its responses, asserts that non-dolphin set mortalities are caused by small purse seine vessels, when the sources state that the data is all for large purse seine vessels.

89. The United States itself has argued that the dolphin mortalities caused by purse seine vessels in the Western and Central Pacific mostly result from non-dolphin sets, indicating that they are caused by FAD fishing and setting nets on unassociated schools of tuna. For the Western Pacific, the United States again focuses on the statistics for 2010, ignores the much higher numbers for 2007 to 2009, and also ignores that the statistics are nowhere close to comprehensive.

90. Mexico’s view is that the IATTC statistics for fishing on FADs and non-associated sets are not easily extrapolated for two main reasons. First, fishing conditions, dolphin and tuna species, and other factors are different in other ocean regions. Second, and probably more importantly, fishers may change their behavior when observers are onboard monitoring their interactions with dolphins. Thus, vessels in the ETP fishing on FADs and unassociated schools will be much more careful to avoid dolphins than vessels using those methods fishing elsewhere.

¹⁰¹ Ibid., p. 8.

¹⁰² Mexico’s responses to the Panel’s questions, paras. 121-133.

¹⁰³ Mexico’s first written submission, paras. 159-160.

91. Mexico has already commented in relation to Question 7 on the data the United States repeats regarding other ocean regions, which in any event is not pertinent to the Panel's question.

**20. *To the United States:* At para. 251 of its report, the Appellate Body found that there is evidence of tuna-dolphin association outside of the ETP, albeit less "frequent[]"
than in the ETP. Has the United States put forward any evidence showing how
much less frequently this association occurs outside the ETP? What steps has the
US taken to address the issue of dolphin mortality in such cases?**

92. In response to this question, the United States again relies on the same limited studies on which Mexico has already commented in relation to Question 7, while criticizing Mexico's evidence for not being as comprehensive as the data available from the AIDCP.

93. The new report on the Indian Ocean, discussed above in relation to Question 7, further validates that there is tuna-dolphin association outside the ETP.

94. The United States has taken no steps to address dolphin mortality in such cases because it refuses to consider even investigating dolphin mortalities if they do not occur in the ETP.

Form 370

21. *To both parties:* The United States appears to recognize that there is dolphin mortality and serious injury outside the ETP. Has the United States Assistant Administrator made any determination to this effect as provided in Section 216.91(a)(4)(iii) and as described in Section B(1) of Form 370? If not, why not? What is the meaning of "regular and significant" in the context of making this determination? Should the Assistant Administrator have made any such determination?

95. In Mexico's view, the United States has missed the main point of this question. When a U.S. government agency makes an interpretative ruling or administrative determination, it is required by the U.S. Administrative Procedure Act to follow the procedures for a "rulemaking". A "rule" is:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy¹⁰⁴

A "rule making" means "agency process for formulating, amending or repealing a rule."¹⁰⁵

96. The Administrative Procedure Act requires an agency to publish a notice of a proposed rule making in the Federal Register which includes, among other things, "the terms or substance of the proposed rule or a description of the subjects and issues involved." After notice has been

¹⁰⁴ 5 U.S.C. § 551(4) (Exhibit MEX-140).

¹⁰⁵ 5 U.S.C. § 551(5) (Exhibit MEX-140).

given, the agency must give interested persons an opportunity to participate through submission of written data, views or arguments. After consideration, the agency must incorporate in the rules a general statement of their basis and purpose.¹⁰⁶

97. The Commerce Department of course followed these requirements in the adoption and implementation of its new rules on designating tuna fisheries that have qualified and authorized observers available to certify captains' statements. The Commerce Department announced that new rules as part of its publication of the 2013 Final Rule, solicited public comments, and then published its determination on July 14, 2014 with a careful explanation of its decision.¹⁰⁷

98. The Commerce Department has initiated no such procedure in relation to either Section 216.91(a)(4)(iii) or Section 216.91(a)(2)(i), which actually are simply copies of statutory requirements established by the U.S. Congress at 16 U.S.C. § 1385(d)(1)(B) (addressing determination of association between dolphins and tuna) and 16 U.S.C. § 1385(1)(D) (addressing determination of mortality or serious injury).¹⁰⁸ Accordingly, the Commerce Department is interpreting the statute, not its own regulations. The Commerce Department has not solicited public comment or in any manner explained its policy on the meaning of the statutory language "regular and significant".

99. Evaluations of dolphin mortality and tuna-dolphin association require research and analysis by scientific experts. The Commerce Department has never asked its own experts to analyze dolphin mortality in the context of the DPCIA outside the ETP. The Commerce Department also has not engaged outside experts to analyze these subjects, except for the study submitted by Mexico as Exhibit MEX-18, which concluded that there are significant dolphin mortalities in fisheries outside the ETP and that the Commerce Department is not fulfilling its mandate under U.S. law to protect dolphins and other marine mammals.¹⁰⁹ The Commerce Department has not sought the views of other interested parties, especially the numerous environmental NGOs that devoted significant resources to studying this issue.

100. There are no circumstances under which a single sentence¹¹⁰ inserted into the publication of an unrelated rule could constitute an agency "determination" within the meaning of U.S. law. Putting aside U.S. legal requirements, where the sentence is published to help defend the U.S. position in a WTO dispute settlement proceeding – indicating that the statement is not objective – the alleged "determination" lacks credibility in any event. As Mexico has previously

¹⁰⁶ 5 U.S.C. § 553(b) and (c) (Exhibit MEX-141).

¹⁰⁷ Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, 79 Fed. Reg. 40,718 (July 14, 2014) (Exhibit US-113).

¹⁰⁸ 16 U.S.C. § 1385 (Exhibit MEX-8).

¹⁰⁹ Young and Iudicello, "Worldwide Bycatch of Cetaceans," U.S. Department of Commerce (NOAA Technical Memorandum NMFS-OPR-36) July 2007, p. 38 (Exhibit MEX-18).

¹¹⁰ "NMFS has no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP, where dolphins are systematically and routinely chased and encircled each year in significant numbers by tuna fishing vessels, or any tuna fishery that has regular and significant mortality or serious injury of dolphins." 2013 Final Rule, 78 Fed. Reg. at 41,000 (Exhibit MEX-7).

highlighted, during the twenty four years of the DPCIA the only context in which the United States has purported to examine dolphin mortalities or tuna-dolphin association is in connection with this dispute settlement proceeding, in which it has presented and characterized evidence only in the role of an advocate.

101. The United States is correct that Mexico has not argued that the failure to designate any fishery under Sections 216.91(a)(4)(iii) or Section 216.91(a)(2)(i) is inconsistent with the covered agreements. What Mexico argues is that the failure – indeed, refusal – of the Commerce Department to even consider analyzing dolphin mortalities under those provisions in an objective manner, as it is mandated to do under the Amended Tuna Measure, is strong evidence of arbitrariness.¹¹¹

102. The United States' attempt to re-argue the evidence of dolphin mortalities and tuna-dolphin association is unavailing. The Commerce Department itself has designated the Hawaii longline fishery as threatening the population of false killer whales (a species of dolphin), which are classified as both “endangered” and “depleted.”¹¹² The Commerce Department also designated the Atlantic Pelagic Longline fishery as a “Category I” fishery due to frequently documented interactions with marine mammals.¹¹³ The effort of the United States to dismiss those fisheries as not having any significant problems with dolphin association and mortalities is contradicted by those designations.

103. Mexico has already responded to the United States' argument that some of Mexico's evidence is “old”, and will not repeat it here.¹¹⁴

104. Mexico has previously presented evidence of why the Commerce Department has not undertaken any analysis of dolphin mortality and tuna-dolphin association outside of the ETP:

With the exception of the provisions related to the Inter-American Tropical Tuna Commission, these provisions [of the Marine Mammal Protection Act] have gone largely unused by either the Department of Commerce or Department of State. Congressional oversight has focused on the incidental capture of dolphins in tuna purse-seine nets and not on other forms of international bycatch. Therefore, with limited resources provided to both agencies, the priority has been action to reduce the bycatch of dolphins in the yellowfin tuna fishery and very little effort has been expended to initiate bilateral discussion, modify existing international treaties, or initiate a new international convention to address other forms of global bycatch.¹¹⁵

¹¹¹ Mexico's first written submission, paras. 255 and 263.

¹¹² Mexico's first written submission, para. 139.

¹¹³ Mexico's second written submission, para. 50.

¹¹⁴ Mexico's opening statement, paras. 22 and 23; Mexico's responses to the Panel's questions, para. 89.

¹¹⁵ Young and Iudicello, “Worldwide Bycatch of Cetaceans,” U.S. Department of Commerce (NOAA Technical Memorandum NMFS-OPR-36) July 2007, p. 38 (Exhibit MEX-18).

The United States has not responded to this evidence.

22. ***To both parties:*** Has the United States Assistant Administrator made any determination of tuna-dolphin association in fisheries other than the ETP as provided in Section 216.91(a)(2)(i) and as described in Section B(3) of Form 370? If not, why not? What is the meaning of "regular and significant" in the context of making this determination? Should the Assistant Administrator have made any such determination?

105. Mexico's comments on the United States' response to Question 21 also apply to the United States' response to this question.

106. Mexico notes that the United States has agreed that fishers set nets on dolphins outside the ETP.¹¹⁶ It would be logical, therefore, that the government agency responsible for administering the DPCIA would investigate, in an objective manner, the fisheries where such sets are taking place. The refusal of the Commerce Department to do so is arbitrary.

23. ***To both parties:*** What is meant by the term "where applicable" in paras. B(1), B(2) and B(4) of Form 370?

107. Mexico has no comment on the United States' response to this question.

24. ***To both parties:*** In the seven fisheries referred to in para. 128 of the United States' second written submission, to which para. in form 370, if applicable, do these fisheries fall under?

108. Mexico disagrees with the U.S. statement that there are boxes in Form 370 that apply to tuna caught by U.S. vessels, as Form 370 is required only for imports of frozen tuna and canned tuna products, and tuna caught by U.S. vessels is considered U.S. origin and not "imported". Elsewhere in its submission, the United States agreed with Mexico.¹¹⁷

25. ***To both parties:*** Form 370 does not appear to have a check box for a situation where a fishing vessel fishes in an area that the Assistant Administrator has determined as having regular and significant dolphin mortality or serious injury. What is the requirement under such a circumstance in the context of filling out the form?

¹¹⁶ See, e.g., United States' responses to the Panel's questions, paras. 123 and 130.

¹¹⁷ United States' responses to the Panel's questions, footnote 364. It would be unusual for tuna caught in one of the seven U.S. domestic fisheries at issue to be exported to Asia for processing into a tuna product, and then returned to the United States. The United States has not presented any evidence of such practice. Potentially, tuna caught by U.S. vessels within the jurisdiction of the WCPFC could be used in foreign-made tuna products.

109. The United States has agreed with Mexico that Form 370 does not contemplate the possibility that, as established by the statute, the Commerce Department would determine that any fishery other than the ETP has regular and significant dolphin mortality or serious injury.¹¹⁸ In Mexico's view, this fact reinforces that the Commerce Department has no intention of ever undertaking such an analysis or considering making such a determination.

27. *To the United States: Other than in the fisheries mentioned in para. 128 of the United States' second written submission, has the United States engaged in training and qualifying observers, or assisting other countries and organizations to train and qualify observers, outside the ETP so that observers are able to certify that no dolphins were killed or seriously injured?*

110. The response of the United States confirms that it has not provided any training or assistance to other countries specifically related to certifying compliance with the U.S. dolphin-safe requirements.

28. *To the United States: How and why has the United States chosen the fisheries mentioned in para. 128 of the United States' second written submission? Could the United States explain what are the criteria taken into account for choosing one specific fishery over another?*

111. Mexico has already addressed this question. As Mexico stated in its response to Question 26 and during the hearing, the recent announcement by the Commerce Department that it will require observers only applies to certain tuna fisheries in U.S. domestic waters, and does not increase the level of observer coverage in any of those fisheries. Moreover, it is Mexico's view that there is an inherent conflict between the U.S. argument that observers are unnecessary and the fact that the United States is now requiring observer certifications in some circumstances in its own domestic tuna fisheries.¹¹⁹

29. *To the United States: What is the relationship between a United States determination regarding the qualification of observers and the presence of such observers on fishing boats? How does the United States determine which fishing trips (i.e. in which fishery/ies and using which fishing method(s)) will require independent observer certification?*

112. Mexico has no comment on the United States' response to this question.

30. *To the United States: Why does the United States regulation impose observer certification within the ETP but not outside the ETP?*

¹¹⁸ United States' responses to the Panel's questions, paras. 155 and 156.

¹¹⁹ Mexico's responses to the Panel's questions, paras. 102-105. See also Mexico's opening statement, para. 36.

113. Mexico has previously commented on the lack of scientific basis for the United States' arguments about fishing under the AIDCP procedures.¹²⁰

114. The assertions by the United States that intentional sets on dolphins outside the ETP are made without chasing the dolphins, or that the "intentional" sets are "accidents", are both unsupported and contrary to logic.

115. The United States' explanation is also contradicted by the Commerce Department's requirement for observers (at least in limited circumstances) in the following U.S. fisheries: the American Samoa Pelagic Fishery, the Atlantic Bluefin Tuna Purse Seine Fishery, the Atlantic Highly Migratory Species Pelagic Longline Fishery, the California Deep-set Pelagic Longline Fishery, the California Large-mesh Drift Gillnet Fishery, the Hawaii Deep set Longline Fishery, and the Hawaii Shallow-set Longline Fishery.¹²¹ None of those are large purse seine fisheries subject to the AIDCP's observer requirements.

116. Elsewhere, the United States has explained that having observers "strengthens" the dolphin-safe certification process.¹²² Mexico agrees.

31. *To the United States: Please provide further explanation to help the Panel better understand how the decision to require observer certification is made. In answering, please discuss also how the United States decides on the extent (geographical and numerical) of required observer coverage. Is risk to dolphins taken into account in making such a determination?*

117. Mexico has no comment on the United States' response to this question.

32. *To the United States: In its oral answer to panel question no. 12, the United States explained that a determination that observers are qualified to make a dolphin-safe certification has no consequence to or impact on the extent of coverage of observers on board fishing vessels. In light of this fact, what is the purpose of making such a determination?*

118. Mexico agrees with the United States that having an independent observer confirm a captain's statement that tuna was caught in a dolphin-safe manner strengthens the dolphin-safe labelling requirements.

33. *To the United States: Please explain what is meant by the reference to observers being "on board" in section 216.91(a)(2)(B) of the 2013 Final Rule.*

119. Mexico has no comment on the United States' response to this question.

¹²⁰ See, e.g., Mexico's opening statement, para. 21.

¹²¹ United States' second written submission, footnote 244.

¹²² United States' response to the Panel's questions, para. 175.

34. To the United States: During the oral hearing, the United States explained that it only requires observer certification where such observers are already "available". Please explain what this means. Also, where is this condition indicated in the amended tuna measure?

120. Mexico has no comment on the United States' response to this question.

35. To the United States: the Panel is aware of the United States' Hazard Analysis and Critical Control Points (HACCP) program. As the United States already conducts spot-checks and inspections in this context, could the United States also conduct those spot-checks and inspections to determine compliance with the dolphin-safety measure?

121. The United States declined to answer this question from the Panel, so Mexico will provide the requested information.

122. The U.S. Food and Drug Administration (FDA) has adopted regulations to ensure the safe and sanitary processing of fish and fishery products, including imported seafood.¹²³ The regulations require the application of Hazard Analysis Critical Control Point (HACCP) principles to the processing of seafood. The HACCP system focuses on identifying and preventing hazards that could cause foodborne illnesses rather than relying on spot-checks of manufacturing processes of finished seafood products to ensure safety.¹²⁴ Processors are required to maintain monitoring procedures for each stage of the manufacturing process.¹²⁵

123. U.S. importers are allowed to import fish and fishery products either from a country that has an active Memorandum of Understanding with the FDA, or from foreign processors that comply with the HACCP regulations.¹²⁶ In the latter case, the importer is required to maintain written verification procedures that ensure that the product is not adulterated or processed under unsanitary conditions. The importer is also required to take any of the following affirmative steps: (i) obtain from the foreign processor its HACCP and sanitation monitoring records; (ii) obtain on a continuing basis a certification from a foreign government authority that the fish or fishery products were processed in accordance with the HACCP regulations; (iii) inspect the foreign processor's facilities; (iv) maintain on file the foreign processor's HACCP plan and a guarantee from the processor that imported fish and fishery products are processed in accordance

¹²³ FDA, "Fish and Fishery Products Hazards and Control Guidelines", Chapter 2 ("Conducting a Hazard Analysis and Developing a HACCP Plan"), p. 21, available at <http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM252380.pdf> (hereinafter "HACCP Plan") (Exhibit MEX-144).

¹²⁴ FDA, FDA's Seafood HACCP Programs: Mid-Course Correction, available at <http://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm114930.htm> (Exhibit MEX-145).

¹²⁵ HACCP Plan, p. 26.

¹²⁶ FDA, "Fish and Fishery Products Hazards and Control Guidelines", Appendix 8 ("Procedures for Safe and Sanitary Processing and Importing of Fish and Fishery Products"), p. 464, available at <http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM252451.pdf> (Exhibit MEX-146).

with the HACCP regulations; and (v) periodically test the imported fish or fishery product.¹²⁷ Significantly, the foreign government's involvement is not required.

124. The FDA conducts HACCP compliance inspections of domestic and foreign fish and fishery products processing facilities as well as those of importers.¹²⁸ NOAA's Seafood Inspection Program also provides HACCP inspection services for fish, shellfish, and fishery products to the industry, on a fee-for-service basis.¹²⁹ The NOAA Program offers sanitation inspection as well as system and process auditing in facilities, on vessels, and other processing establishments to allow them to be designated as participating establishments.¹³⁰ To ensure that they are meeting or exceeding the HACCP requirements, businesses can voluntarily request help from NOAA to develop, implement, and verify a plan that shows they are following the requirements.¹³¹

125. As discussed at the hearing, to bring itself into compliance the United States is not necessarily required to implement an exact copy of the AIDCP for all other ocean regions. The United States might be able to HACCP regulations provide a model for a system that could be implemented by private industry, by introducing appropriate controls over the supply chain that would be periodically audited and tested by the U.S. government. It is noteworthy that for the Seafood Inspection Program, the Commerce Department (NOAA) is authorized to provide inspection services in foreign countries.¹³² This could be done only by invitation of the foreign companies, but that is an entirely reasonable condition for being allowed to have tuna products designated dolphin-safe.

126. This solution would of course only deal with the need for an adequate tracking and verification program. Nonetheless, it is possible that the large companies that trade and process tuna could also provide for observers on the vessels that supply them.

127. In paragraph 189 of its response, the United States notes that it does not conduct in-person inspection of Mexican canneries. Under the AIDCP, Mexico has agreed to enforce tuna tracking and verification requirements, Mexico has implemented those requirements, and the United States has formally certified that Mexico is in compliance with the treaty.¹³³ The United States has no such treaties with countries that are members of the AIDCP.

128. Finally, Mexico rejects the United States' suggestion that Mexico does not allow its vessels to operate in the WCPFC Convention Area because it is concerned about high seas

¹²⁷ Ibid, pp. 464-465.

¹²⁸ “FDA’s Evaluation of the Seafood HACCP Program for Fiscal Years 2004/2005”, available at <http://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm111059.htm> (Exhibit MEX- 147).

¹²⁹ NOAA, Seafood Inspection Program, available at <http://www.seafood.nmfs.noaa.gov/> (Exhibit MEX- 148).

¹³⁰ Ibid.

¹³¹ NOAA, Fishwatch, available at http://www.fishwatch.gov/buying_seafood/inspecting_seafood.htm (Exhibit MEX-143).

¹³² Ibid.

¹³³ Mexico’s first written submission, paras. 67, 73-74, and 91-93.

inspections by the Coast Guard. As Mexico explained in relation to the United States' response to Question 3, because the Mexican fleet is not authorized by the WCPFC to fish in the WCPFC Convention Area and does not fish there, there is no reason for Mexico to pay an assessment to the WCPFC or agree to high seas inspections in the WCPFC Convention Area.

Captains' certification

36. *To both Parties:* What, if anything, is the relationship between, on the one hand, the number and/or dolphin-safe status of tuna caught, and, on the other hand, a captain's remuneration and/or other incentives?

129. The key difference between the responses of the United States and Mexico to this question is that the United States theorizes that captains are more worried about being caught making a false certification than they are about making their entire catch of tuna worthless. Mexico notes the following:

- As the United States admits, no captain – either U.S. or non-U.S. – has ever been penalized for making a false dolphin-safe certification.¹³⁴
- Captains on non-U.S. flag vessels are completely outside of U.S. enforcement jurisdiction,¹³⁵ and the United States has no agreements with non-AIDCP countries to cooperate in enforcing dolphin-safe requirements.
- There is widespread agreement, including from U.S. government sources, that captains cannot be trusted to self-report violations.¹³⁶

Mexico submits that the weight of evidence supports Mexico's position.

37. *To the United States:* Please provide more information on the log-book kept by captains. What kind of information is kept in this log-book? Does it include the number of tuna caught and the number, if any, of dolphins killed or seriously injured? And how does the captain obtain the information s/he enters into the log-book? Does the captain personally observe all tuna sets, or does s/he receive information from subordinates on-board? Could the United States provide a sample log-book entry to the Panel?

130. The samples of logbook forms submitted by the United States indicate the United States and Australia have fields where captains are asked to record interactions with marine mammals. However, according to the United States the Australian fleet does not catch tuna that is used in tuna products for the U.S. market. The samples from South Korea and Japan provided by the United States do not mention marine mammals or dolphins at all. The Chinese logbook sample includes a vague reference to "dolphin and whale status" within a category called "remarks."

¹³⁴ United States' responses to the Panel's questions, para. 249.

¹³⁵ United States' responses to the Panel's questions, para. 100.

¹³⁶ Mexico's responses to the Panel's questions, paras. 115-119.

131. Mexico has obtained additional sample logbooks from the same IOTC website from which the United States apparently obtained the forms (other than the U.S. forms) that it submitted: <http://www.iotc.org/compliance/fishing-logbooks-templates-samples>. They show as follows:

- Indonesia: no mention of marine mammals or dolphins on the logbooks for longline and purse seine vessels.¹³⁷
- Philippines: no mention of marine mammals or dolphins.¹³⁸
- Vanuatu: no mention of marine mammals or dolphins.¹³⁹

132. Indonesia, the Philippines, China, Vanuatu and South Korea were all identified by the United States as major suppliers of tuna used in tuna products for the U.S. market.¹⁴⁰

133. Obviously, therefore, logbooks are not relevant as a source of enforcement, “spot check” or other verification measures relating to the Amended Tuna Measure for these major suppliers of tuna for the U.S. tuna products market.

134. Moreover, as the Freitas case shows, captains are not involved in fishing operations, and therefore they would not have “first hand knowledge” of dolphin interactions, as the United States claims.¹⁴¹

38. *To both parties: Are United States and non-United States captains subject to any kind of independent oversight? How, if at all, are captains' certifications that tuna is dolphin-safe independently verified? For example, are there any kind of "spot checks" on captains? If captains do not observe the sets themselves but receive information on dolphin-safe status from their staff, how is such information verified?*

135. Mexico understood this question to be asking about verifications and spot checks relating to the dolphin-safe status of tuna. The United States’ response to this question provided information on dockside and on-water inspections that are conducted to check compliance with unrelated laws. The United States cites two enforcement cases arising from dockside inspections: one from 2003 that involved a vessel that landed with illegal shark fins, and the other from 2010 that involved a vessel that was found to have been fishing for two years without a permit. (The 2010 case is noteworthy for the fact that the vessel was able to operate without a permit for two years, indicating that there had been no inspections during that period.)

¹³⁷ Indonesia logbook templates (Exhibit MEX-149).

¹³⁸ Philippines logbook template (Exhibit MEX-150).

¹³⁹ Vanuatu logbook template (Exhibit MEX-151).

¹⁴⁰ United States’ second written submission, para. 34.

¹⁴¹ Mexico’s first written submission, para. 285.

136. The occasional dockside inspections and on-water inspections described by the United States can only be effective in checking for evidence that is onboard the vessel at the time of inspection, such as illicit bycatch and fishing permits. The fact that a set was made on dolphins, or that dolphins were killed or seriously injured during a set or gear deployment, cannot be detected unless a trained observer is present on the vessel during the set or gear deployment. That is why the United States has not identified any instance, during the twenty four year history of the law, in which a vessel inspection has discovered a violation of the dolphin-safe labelling rules.

137. As discussed above, many major suppliers of tuna for the U.S. tuna products market do not require vessel captains to report on interactions with marine mammals, including dolphins. So the logbooks of vessels of those countries are obviously useless for oversight of dolphin-safe fishing practices for those countries.

138. The United States, of course, generally lacks jurisdiction to inspect or board non-U.S.-flagged vessels outside U.S. territorial waters. The United States has identified one instance where, in cooperation with Indonesia, the U.S. Coast Guard boarded a vessel in international waters and found it was carrying drift nets, shark carcasses, and shark fins, and that it was fishing without a license (i.e., it was engaged in IUU fishing).¹⁴² This instance has nothing to do with the dolphin-safe labelling measure.

139. The United States asserts that U.S. canneries and importers somehow are able to monitor the association between a certificate and a shipment of tuna. But the United States has submitted no evidence in support of this assertion. There is no evidence that U.S. canneries are in direct contact with fishing vessel captains, carrier vessel captains, or loin processors regarding dolphin-safe certification tracking systems. There is no evidence that U.S. importers have engaged with foreign tuna products manufacturers on this subject, or even that the Commerce Department has audited any importers. There is no evidence that the Commerce Department has had any contacts with non-U.S. canneries, captains, fishing vessel owners, carrier vessels, or loining plants regarding dolphin-safe tracking procedures. In fact, the United States has submitted no affidavits from any participant in any of these industries, either U.S. or non-U.S. This is a fundamental issue in this proceeding, and the failure of the United States to provide evidence backing its claim is highly significant.

140. The document cited by the United States, Exhibit US-189, is unexplained and unverified, but purportedly is a set of slides prepared by a U.S. cannery explaining its tuna product tracking procedure. The slides support Mexico's position. They confirm that tuna passes through a number of non-U.S. parties before reaching the cannery, that the cannery has no procedures for monitoring the tracking of its foreign business partners, that there are no procedures for monitoring the fishing vessel well in which the tuna was originally placed, and that there are no procedures for distinguishing between dolphin-safe and non-dolphin safe tuna. For non-ETP tuna products, the U.S. requirements are simply that a captain's certificate must be "associated" with a tuna product at the time of importation or delivery of the tuna to United States territory,

¹⁴² United States' responses to the Panel's questions, footnote 309.

but there is no procedure or requirement to check the validity of the certificate, or whether it actually matches with the tuna, prior to its arrival in the United States.

141. Mexico addresses the evidence of U.S. cannery tracking programs submitted by the United States in more detail in its comments on the U.S. response to Question 43.

39. To both Parties: In both of its written submissions and in its oral statement to the Panel, the United States emphasizes that captain certifications are regularly relied upon by national and international regulators, and that such statements are generally accepted as being reliable. Is it international practice to accept captains' certifications to prove compliance with regulatory requirements? In other RFMOs, are captain certifications sufficient to establish compliance with relevant regulatory requirements?

142. The first example provided by the United States in its response to this question strongly confirms Mexico's position that it is well-accepted that captains' certifications are not inherently reliable. The United States cites a decision by the WCPFC to close certain areas to FAD fishing during certain months, under CMM-2008-1, and claims that the closures were implemented with logbook requirements.¹⁴³ In fact, the WCPFC's requirement of 100 percent observer coverage of purse seine vessels operating within 20° south and 20° north is to enforce the closure:

WCPFC recently decided, as part of the Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean (CMM 2008-01), to implement 100% observer coverage (with ROP-accredited observers) of purse seine vessels (except vessels fishing exclusively in one EEZ) from 1 January 2010. This decision was motivated mainly by a need to monitor compliance of purse seine operations with two important provisions of CMM 2008-01: (i) the closure of the purse seine fishery to fishing on fish aggregation devices (FADS) for two months in 2009 and for three months from 2010; (ii) the requirement from 2010 for purse seiners to retain all catch of bigeye, skipjack and yellowfin tuna on board for subsequent landing or transshipment (subject to certain specific exceptions); and (iii) the closure of the high-seas pockets from 2010.¹⁴⁴

The WCPFC document submitted by the United States says the same:

13. The purse seine fishery on the high seas in the area bounded by 20°N and 20°S shall be closed to fishing on FADs between 0000 hours on 1 August and 2400 hours on 30 September. During this period all purse seine vessels without an observer from the Regional Observer Program on board will cease fishing and return directly to port. During this period, a

¹⁴³ United States' responses to the Panel's questions, para. 206.

¹⁴⁴ WCPFC, Implications for Scientific Data Collection by Observers of New Requirements for 100% Observer Coverage of Purse Seiners, WCPFC-SC5-2009/ST-WP-6 (August 2009), p. 1 (Exhibit MEX-163).

vessel may only engage in fishing operations if the vessel carries on board an observer from the Regional Observer Program to monitor that at no time does the vessel deploy or service any FAD or associated electronic devices or fish on schools in association with FADs.¹⁴⁵

In other words, the WCPFC does not believe that reliance on captains' certifications is sufficient to enforce the closures. That the United States is able to avoid requiring observers for U.S. vessels operating exclusively within its own EEZ does not indicate that captains are reliable, it simply reflects that the WCPFC lacks jurisdiction to impose requirements within territorial waters.

143. Mexico reaffirms its point that where a regulatory obligation is important, potentially contrary to the economic interests of a vessel operator, and not readily capable of monitoring because violations are not physically visible except during the violations, it is well-established that reliance on self-reporting by captains is insufficient.¹⁴⁶ Dolphin-safe fishing and restrictions on using FADs are both types of regulatory obligations that meet these criteria.

40. *To the United States:* According to the United States' own case, individuals require significant training before they can be authorized to certify that no dolphins were killed or seriously injured in a fishing set. In light of this fact, why does the United States believe that captains are qualified to make such certifications? Do captains undergo any kind of training that would enable them to certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught?

144. The United States agrees that the United States only requires such training for captains of large purse seine vessels authorized to fish in the ETP, and that the WCPFC, IOTC and ICCAT do not provide such training.

145. With regard to the U.S. comment that the IATTC does not provide such training for captains of non-purse-seine vessels, Mexico notes that the AIDCP dolphin-safe certification system does not cover tuna caught by such vessels.

146. The United States therefore has confirmed that captains operating outside the ETP are not qualified to make the dolphin-safe certifications required by the Amended Tuna Measure.

41. *To the United States:* If captains' certifications are reliable and sufficient, why does the United States require independent observers in the ETP? And why does the amended tuna measure make provision for the United States administration to require independent observer certifications in other fisheries?

147. The United States avoided answering the second part of the Panel's question, which Mexico understands to relate to the provision in the Amended Tuna Measure that authorizes the

¹⁴⁵ WCPFC, CMM No. 2008-01, Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean (December 2008), p. 4 (Exhibit US-139).

¹⁴⁶ Mexico's responses to the Panel's questions, paras. 113-119.

Commerce Department to require independent observer certifications in non-ETP fisheries, even when there has been no determination of tuna-dolphin associations or mortalities.

148. In its response to Question 31, the United States stated: “the determination in the Qualified and Authorized Notice [to designate seven U.S. tuna fisheries as requiring observer certifications when observers are onboard for other reasons] reflects [a] decision to strengthen the dolphin safe labeling requirements....”¹⁴⁷ Thus, the United States agrees that requiring observer validation “strengthens” the dolphin-safe labelling requirements.

149. The Panel’s question identifies a key inconsistency in the Amended Tuna Measure. On the one hand, the United States argues that captains’ certifications are totally reliable without observer verification, but on the other it requires observer verification for ETP vessels and a number of fisheries within U.S. territory. The United States says it is not relying on “calibration” as a justification for differential treatment of fisheries.¹⁴⁸ Accordingly, the only conclusion that can be drawn is that the decision whether or not to require observer verification is arbitrary.

42. *To both Parties: Is there a parallel market for dolphin-safe certifications? In other words, do dolphin-safe certifications always follow or stay with the tuna catch that they describe, or can such certifications be assigned at a later point (i.e. sometime after catch) to other batches of tuna that may not have been caught in a dolphin-safe manner?*

150. The United States’ claim that “canneries collect from the vessels from which they purchase tuna, various pieces of information, including dolphin safe documentation, concerning each lot of tuna purchased”¹⁴⁹ is misleading. Only a U.S. cannery that receives tuna directly from a fishing vessel – i.e., potentially a cannery in Samoa – would be able to receive a dolphin-safe certification from a vessel. U.S. canneries located elsewhere import tuna loins from non-U.S. plants and are several steps removed from the vessels. This is verified by the evidence submitted by the United States, which Mexico discusses in more detail in its comments on the U.S. response to Question 43.

151. With regard to the sample captain’s statements cited by the United States in Exhibits US-169 and 217, there is no way in which to determine or validate how many different companies they passed through before they reached the Commerce Department, or whether they are for U.S.-canned or foreign-canned tuna. Accordingly, they do not support the United States’ claim that they were collected by any canneries directly from vessels.

43. *To the United States: How, if at all, is the United States able to verify that outside the ETP dolphin-safe and non-dolphin safe tuna has been kept separately, from the point of catch to the point of retail, as required under the amended tuna measure?*

¹⁴⁷ United States’ responses to the Panel’s questions, para. 175.

¹⁴⁸ This position was clarified by the United States during the meeting with the Panel.

¹⁴⁹ United States’ responses to the Panel’s questions, para. 228.

152. The United States' responses to Questions 43 and 44 are disingenuous. Mexico will review the U.S. evidence in detail.

153. With regard to dockside and on-water inspection, Mexico has already discussed in commenting on the United States' response to Question 38 above, that such inspections are incapable of detecting whether nets were set on dolphins or whether dolphins were killed or seriously injured during a set or gear deployment. Moreover, the United States does not conduct such inspections on vessels outside its jurisdiction. Further, the United States has submitted no evidence to show that any fishing vessel outside the ETP has a procedure for tracking tuna by the well in which it was stored. Mexico submitted evidence that a major U.S. fishing vessel operator testified that it does not track tuna by storage well, but rather sells all the tuna caught during a fishing trip in one lot.¹⁵⁰ The United States has not submitted any evidence in response.

154. The United States' evidence of the Commerce Department's audits of canneries reveals significant flaws in the U.S. system, and confirms Mexico's arguments.

155. First, the Commerce Department only conducts dolphin-safe compliance audits of U.S. canneries.¹⁵¹ It does not audit foreign canneries, foreign loining processors, foreign carrier companies, or foreign fishing vessel operators. Moreover, the United States uses very careful language in stating “the NOAA TTVP periodically audits U.S. canneries and has the authority to audit importers, transshippers, processors, or distributors of tuna product as well”¹⁵² (emphasis added). In other words, the Commerce Department does not periodically audit importers, transshippers, processors, or distributors. In fact, the United States submitted no evidence that it has ever audited any company in one of those categories, and therefore it must be presumed that it has not.

156. The United States has now submitted what appear to be documents collected during audits of two U.S. canneries. The United States provided no explanation of these documents to verify their source, when they were prepared, and by whom. Mexico is nonetheless able to draw important conclusions from them.

157. Mexico notes that the United States presented these documents and generally discussed them in its submission as BCI. Although Mexico does not believe there is any information in the following paragraphs that reveals confidential information, it has bracketed the relevant paragraphs in cooperation with the U.S. designation.

158. [I] ...^{153 154}

159. ...¹⁵⁵

150 Mexico's first written submission, para. 179.

151 Commerce Department, List of U.S. Canners Participating, available at <http://www.nmfs.noaa.gov/pr/dolphinsafe/canners.htm> (Exhibit MEX-152).

152 United States' responses to the Panel's questions, para. 232.

153 [I] ...

154 ...

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- 161. ... ^{156 157 158}
- 162. ... ^{159 160}
- 163. ... ¹⁶¹]]

164. The “retail spot market checks” described by the United States can only trace a can from a U.S. retail store to a U.S. cannery or U.S. importer. Such checks can provide no additional information on the source and dolphin-safe status of tuna than the superficial audits of U.S. canneries described by the United States.

165. The category of “Industry Oversight” asserted by the United States lacks content, and simply cites to the same evidence already reviewed above.¹⁶² The key point is the following statement by the United States: “it is possible that canneries themselves could and would verify whether vessels have maintained the segregation required by the U.S. measure, and that they might refuse to purchase tuna from vessels that had not complied with the amended measure” (emphasis added).¹⁶³ The United States therefore admits that it does not know whether canneries perform such verifications or purchase non-dolphin safe tuna.

166. In summary, the evidence establishes that the U.S. tracking and verification system for non-ETP tuna is meaningless. U.S. canneries can trace tuna once it arrives at their plants in the United States, but they have no method to verify that the information they receive from foreign exporters is accurate – both with regard to the truthfulness of the captain’s statement, and with regard to whether a statement matches to a particular shipment of tuna.

167. This conclusion is unsurprising. The U.S. tuna tracking and verification system originally was designed to implement U.S. obligations under the AIDCP for ETP tuna products. Without independent observer verification and a government-monitored tracking and verification system that applies from the moment the tuna is captured and stored in a fishing vessel’s well, the system is limited to checking whether U.S. canneries have the correct paperwork in their

Footnote continued from previous page

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¹⁶² In footnote 364, the United States indicates that Exhibit US-217 contains a Form 370 from a U.S. vessel even though Form 370 is not required for U.S. vessels; that exhibit in fact only contains a standard captain’s statement, with all identifying information redacted.

¹⁶³ United States’ responses to the Panel’s questions, para. 234.

files. That does not provide any assurance to consumers that the labels on non-ETP tuna products are accurate.

Monitoring under United States domestic law

44. *To the United States: How can the United States determine whether an importer, processor, or captain has made a false dolphin-safe declaration?*

168. Mexico has already commented above on the lack of serious oversight by the Commerce Department over canneries.

169. The United States asserts that it carefully monitors Form 370s to look for errors. Mexico notes that, in the examples provided by the United States, the U.S. cannery received tuna that had been transferred from fishing vessels to carrier vessels. Form 370 does not require identification of carrier vessels.

170. The United States identifies four instances in which enforcement actions were taken in relation to Form 370s. The case involving Di Mare Holdings in 2003 concerned an importation of Mexican tuna products, and the investigation was based on information from AIDCP tuna tracking forms.¹⁶⁴ The case *United States v. Sandoval* involved imports of Mexican tuna products by a U.S. grocery store, whose owner filled out a Form 370 with the name of a vessel that did not exist. Interestingly, the plea agreement states that the prosecutor was able to determine that the tuna was not dolphin-safe, indicating that the U.S. government must have obtained information from the IATTC/AIDCP to verify the source of the tuna in the products.¹⁶⁵ The other two cases involved late filings or other types of errors on Form 370, for which the importers were penalized only \$3,000 (Exhibit US-220) and \$8,000 (Exhibit 221), and did not raise issues involving the dolphin-safe status of tuna. This evidence further confirms that the United States' monitoring of the dolphin-safe status of tuna products can only be effective for ETP tuna products.

171. The United States discusses its review of U.S. cannery receipts reports, but does not explain how the aggregated data in such reports could reveal violations of the dolphin-safe labelling rules.

172. The United States also repeats the information from the U.S. cannery documents that Mexico has discussed above in relation to Question 43. As Mexico has explained, the procedures described in the documents contain major gaps in coverage. The Commerce Department itself states on its website that the audits involve “examination of documents and records of internal flows of specific shipments from receipt to cold storage to production and to finished goods at a U.S. tuna cannery” (emphasis added).¹⁶⁶ In other words, the audit can only cover tracking of tuna after it is received at the U.S. cannery, not before.

¹⁶⁴ Exhibit US-225. Exhibit US-226 indicates that the sole proprietor of this company was the same individual that signed the Seafood Emporium letter. He told the investigator he had made five importations in a year.

¹⁶⁵ Plea Agreement, p. 3 (Exhibit US-218).

¹⁶⁶ NMFS, “TTVP Verification Components”, (Mar. 20, 2014) Exhibit US-222.

173. The United States then repeats its claim that retail market spot checks are useful in determining whether there has been a false declaration, but the only case it identifies in which such a spot check found a violation – the Di Mare Holdings case – involved Mexican tuna products and information from AIDCP tuna tracking forms. As the United States later explains, a corrected Form 370 was later submitted by the importer showing a different vessel, and accordingly the tuna product was found to be appropriately labelled dolphin-safe.¹⁶⁷

174. In summary, except for ETP tuna products, the United States cannot determine whether an importer, processor or captain has made a false dolphin-safe declaration.

45. *To both parties: Has there has never been any prosecution or fine imposed on an importer, processor, or captain for making a false dolphin-safe declaration in the United States (or elsewhere). If not so, please explain why.*

175. The United States confirms that there has never been a prosecution or fine imposed for making a false dolphin-safe declaration in the United States.¹⁶⁸ The United States argues that several enforcement actions involving incorrect or late-filed Form 370s show a serious intent to enforce, but those cases did not involve the veracity of dolphin-safe statements, and the three matters identified by the United States, involving payment of minor penalties, do not constitute “numerous” examples as the United States asserts.

ETP

46. *To the United States: How can the United States determine whether a vessel has been fishing in the ETP?*

176. Although not mentioned by the United States, the IATTC adopted a resolution in 2004 requiring its national government members to require their tuna fishing vessels greater than 24 meters to install a satellite-based vessel monitoring system (VMS) and national governments can use the VMS data to determine where vessels have travelled.¹⁶⁹ As noted by the United States, the IATTC receives data from observers on large purse seine vessels.

177. Mexico has adopted a *Norma Oficial Mexicana* (NOM) that requires all Mexican-flagged vessels fishing in the ETP to have a VMS system installed, regardless of size or fishing method.¹⁷⁰

¹⁶⁷ United States' responses to the Panel's questions, para. 247.

¹⁶⁸ United States' responses to the Panel's questions, para. 249.

¹⁶⁹ IATTC, Resolution C-04-06, Resolution on the Establishment of a Vessel Monitoring System (VMS) (Junio de 2004) (Exhibit MEX-158). The Resolution was recently updated. IATTC, Resolution C-14-02 (July 2014) (Exhibit MEX-159).

¹⁷⁰ NOM-062-PESC-2007 (24 de abril de 2008) (Exhibit MEX-160).

47. *To the United States:* If, as the United States argues, association of tuna and dolphins occurs only in a limited area of the ETP, why does the US apply its observer and tracking/verification requirements to the entire ETP?

178. The United States appears to assert in paragraph 257 of its response to this question that the compliance by Mexican vessels and Mexican producers with the observer and tracking and verification requirements of the Amended Tuna Measure creates no burdens for the Mexican industry. If that is the case, it should be a simple matter for the United States to adopt the same conditions for non-ETP tuna products.

Costs

48. *To both Parties:* Who pays the costs associated with observers and tracking and verification? Do these costs fall on governments, or is it rather the industry and, ultimately, consumers who pay?

179. It is important to note, as Mexico did during the hearing, that the U.S. tuna products market is dominated by three multinational corporations: Starkist (owned by the Korean conglomerate Dongwon), Chicken of the Sea (owned by the Thai conglomerate Thai Union), and Bumblebee (owned by the European private equity firm Lion Capital), while the global tuna trading market is dominated by three other multinational corporations: FCF, Tri-Marine and Itochu.¹⁷¹ The United States' suggestion that these companies cannot afford to pay for observers and tracking and verification systems necessary to accurately label their tuna as dolphin-safe is not credible.

180. In paragraph 262 of its responses to the Panel's questions, the United States claims that "[t]he industry also bears costs associated with the requirement to segregate dolphin safe and non-dolphin-safe tuna". As discussed above, the United States has submitted no evidence that any non-ETP vessel or processor has ever segregated dolphin safe and non-dolphin-safe tuna, and in fact its evidence shows that no such vessels or processors even have a procedure to segregate dolphin safe and non-dolphin-safe tuna.

49. *To the United States:* If observers are already on board vessels, are the costs of authorizing such observers to certify the dolphin-safety of tuna really that high?

181. Mexico notes that the United States agrees that there would not be additional costs where there are already observers.

182. The United States again presents exaggerated cost estimates for new observer programs. Mexico has already commented on the defects in the U.S. estimates.¹⁷²

50. *To the United States:* Why does the US believe that in the ETP the relevant industry is able to bear such costs for an observers but this is not the case outside the ETP?

183. In its response to Question 54, the United States stated:

¹⁷¹ Mexico's first written submission, para. 163.

¹⁷² Mexico's opening statement, paras. 37 and 38.

Neither a determination under Section 216.91(a)(2)(i) nor under Section 216.91(a)(4)(iii) would, strictly speaking, require a certain level of observer coverage to be applied in that fishery generally. If NOAA determined pursuant to Section 216.91(a)(2)(i) that a regular and significant association is occurring between dolphins and tuna (similar to the association between dolphins and tuna in the ETP) in a particular non-ETP purse seine fishery, the consequence would be that NOAA would require an observer statement for all tuna from that fishery sold in the U.S. tuna product market. Similarly, if NOAA determined pursuant to Section 216.91(a)(4)(iii) that an observer statement is necessary for a particular fishery in light of evidence that the fishery is “having a regular and significant mortality or serious injury of dolphins,” the consequence would be that NOAA would require an observer statement for all tuna from that fishery sold in the U.S. tuna product market.¹⁷³

Mexico notes that the United States is incorrect to say that an observer statement would be required for all tuna from a designated fishery in the U.S. tuna product market; rather, the observer statement only would be required to support a claim of dolphin-safe status, and would not be needed if there was no dolphin-safe label. Nonetheless, Mexico completely agrees with the U.S. statement that a requirement for observer statements would not require any particular “level of observer coverage to be applied in that fishery generally.” Only when tuna is destined for use in the U.S. market, and the producer wishes to use the dolphin-safe label, would an observer be needed.

184. In discussing the potential costs of observer programs in response to Question 50 and other questions, however, the United States contradicts its own above statement by basing its calculations on an assumption that every tuna fishing vessel would have to have an observer. That assertion is illogical. When a product is not destined for the U.S. market, there is no need for the producer to comply with U.S. labelling laws, U.S. food safety laws, or other U.S. requirements, including the Amended Tuna Measure.

51. **To the United States:** Does the provision in the Implementing US regulation entitled 'Other Fisheries' (§216.91(a)(4)(iii)) apply to large purse seine vessels not setting on dolphins outside the ETP?
185. Mexico has no comment on the United States' response to this question.
52. **To both Parties:** Assume a situation whereby the United States made a determination under §216.91(a)(4)(iii) that there was regular and significant mortalities or serious injury to dolphins in a fishery other than the ETP. In such circumstances, would it possible that non-purse seine vessels and small purse seine vessels operating outside the ETP in the fishery for which the above determination was made (i.e. that there was regular and significant mortalities or serious injury to

¹⁷³ United States' responses to the Panel's questions, para. 278.

dolphins) would be subject to an observer requirement while the same boats within the ETP would not?

186. Mexico has no comment on the United States' response to this question.
53. ***To the United States:*** Is there any provision in US legislation that would enable the United States to require independent observers for small purse seine vessels and non-purse seine vessels inside the ETP if, for example, the United States determined that those fishing methods were causing regular and significant mortality or serious injury to dolphins?
187. Mexico has no comment on the United States' response to this question.
54. ***To the United States:*** If the United States makes a determination of regular and significant mortality under section 216.91(a)(4)(iii) or of regular and significant association under section 216.91(a)(2)(i) of the implementing regulation, what would the required observer coverage be for the areas concerning which a determination was made?
188. Mexico agrees with the United States that the fact that tuna products must be supported by an observer validation to be labelled dolphin-safe does not imply any particular level of observer coverage. Only tuna destined for use in tuna products intended for sale in the United States with a dolphin-safe label would require an observer certification.
189. As Mexico has explained, this supports Mexico's view that the United States' estimates of the costs of observers – which assume that every fishing vessel would have to have an observer – are grossly exaggerated.
55. ***To the United States:*** Is the Panel correct in understanding that, if the United States makes a determination of regular and significant association under section 216.91(a)(2)(i), only purse seine vessels would be required to have an observer certificate/statement, and that vessels using other fishing methods, such as longline, would not need to have such certificate/statement?
190. Mexico has previously responded to the United States' arguments in its response to this question and will not comment further here.¹⁷⁴
56. ***To the United States:*** Section 216.91(a)(2) of the implementing regulation refers to “purse seine vessels” irrespective of their size/carrying capacity. Does this mean that small purse seine vessels outside the ETP also have to certify that no nets were intentionally deployed on or used to encircle dolphins?
191. Mexico has no comment on the United States' response to this question.
58. ***To both Parties:*** At paragraph 216 of its report in the original proceedings, the Appellate Body made the following statement:

¹⁷⁴ Mexico's responses to the Panel's questions, paras. 93-97.

In the context of Article 2.1 of the TBT Agreement, the complainant must prove its claim by showing that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1

And at para. 272 of its report in US – COOL, the Appellate Body again states that where

"the complainant adduces evidence and arguments showing that the measure is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1".

What are the implications of this statement for the allocation of the burden of proof under Article 2.1 of the TBT Agreement? Does the complainant bear the burden of showing, at least *prima facie*, both that the technical regulation at issue has a detrimental impact and that such impact does not stem exclusively from a legitimate regulatory distinction? Or, alternatively, does the complainant bear the burden only of showing the existence of detrimental impact, after which showing the burden shifts to the respondent to positively demonstrate that such impact does not stem exclusively from a legitimate regulatory distinction?

192. Mexico and the United States appear to be in agreement that Mexico bears the initial burden of establishing a *prima facie* case in respect of all elements of its claim under Article 2.1 of the TBT Agreement. There is no disagreement that Mexico must adduce evidence and arguments sufficient to raise a presumption that, first, the Amended Tuna Measure modifies the conditions of competition in the U.S. market to the detriment of imported tuna products from Mexico *vis-à-vis* like tuna products of U.S. origin or like tuna products originating in any other country, and, second, this detrimental impact reflects arbitrary or unjustifiable discrimination because, for example, the measure at issue is designed or applied in a manner that lacks even-handedness. Further, the parties seem to agree that the burden then shifts to the United States to adduce sufficient evidence and arguments to rebut the *prima facie* case established by Mexico.

193. The Appellate Body has explained that “[t]he nature and scope of arguments and evidence required to establish a *prima facie* case will necessarily vary according to the facts of

the case.”¹⁷⁵ While the United States is correct that the allocation of the burden of proof will not vary or adjust, regardless of how difficult it is for the complainant to establish its case, the concept of the “allocation of the burden of proof” should not be conflated with the “nature and scope of the evidence required to establish a *prima facie* case”. Although the former does not change, the latter “will necessarily vary according to the facts of the case”.

194. Thus, Mexico is required to establish a *prima facie* case regardless of how difficult it is to adduce evidence of harms to dolphins outside the ETP, including “unobservable” harms, due to the profound lack of bycatch data, population data, and observer coverage in fisheries outside the ETP. That said, Mexico has adduced significant evidence of harms caused to dolphins by fishing methods other than setting on dolphins in fisheries outside the ETP.¹⁷⁶ Considering that the “nature and scope of the evidence required to establish a *prima facie* case” will be commensurate with “the facts of the case”, Mexico has adduced sufficient evidence and arguments to establish a *prima facie* case – that is, to raise a presumption that what is claimed is true. While the United States makes a number of bald, incorrect statements that “Mexico puts forward *zero* evidence”, the record itself demonstrates otherwise. At the same time, the nature and scope of the evidence and arguments adduced by the United States in this dispute demonstrate that it is the United States that has failed to adduce sufficient evidence and arguments to rebut the *prima facie* case established by Mexico.

195. Mexico notes that the United States, while making additional statements and arguments outside the scope of the response necessary to answer the Panel’s question, again raises the incorrect allegation that Mexico is attempting to “fundamentally alter” or “greatly expand” its claim under Article 2.1 of the TBT Agreement.¹⁷⁷ In doing so, the United States continues to conflate the concept of a claim with the concept of the arguments advanced in support of a claim, wrongly referring to Mexico’s arguments as “all three of its claims”.¹⁷⁸ As Mexico has previously explained, the United States is incorrect.¹⁷⁹ Mexico has neither altered nor expanded its claim under Article 2.1 of the TBT Agreement, which has consistently contemplated the discriminatory effects of the relevant regulatory distinction resulting from the Amended Tuna Measure’s different dolphin-safe labelling conditions and requirements for tuna caught by setting on dolphins within the ETP, on the one hand, and tuna caught using other fishing methods outside the ETP on the other hand.¹⁸⁰ The United States’ attempt to mischaracterize arguments in support of a claim, and the development thereof, as improper expansions of a claim is misleading and wrong.

¹⁷⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 216 (emphasis added).

¹⁷⁶ Mexico’s first written submission, paras. 105-156; Mexico’s second written submission, paras. 32, 43, 46, 48-55.

¹⁷⁷ United States’ responses to the Panel’s questions, para. 288.

¹⁷⁸ United States’ responses to the Panel’s questions, para. 288.

¹⁷⁹ See Mexico’s second written submission, para. 91 and footnote 131.

¹⁸⁰ See, e.g., Mexico’s first written submission, paras. 235-237.

196. Most importantly, however, the United States demonstrates in this response its fundamental mistake in apprehending the circumstances that give rise to the “detrimental impact” on imported Mexican tuna products in the U.S. market and, thus, the evidence and arguments that Mexico is required to adduce in order to establish a *prima facie* case. Specifically, the United States complains that: “Mexico submits no evidence that either the presence of an AIDCP-approved observer on board its large purse seine vessels or the provision to the United States of the already-created AIDCP-mandated observer certificate (or proof thereof) has any impact at all on Mexican tuna product (non “dolphin safe” or otherwise) sold in the United States”; and “Mexico puts forward zero evidence that the fact that Mexico’s industry must abide by the record-keeping/verification rules of the AIDCP [...] and provide the associated TTF number along with From 370s again, has any impact at all on Mexican tuna product (non “dolphin safe” or otherwise) sold in the United States”.¹⁸¹

197. The essential point that the United States either fails to understand or chooses to ignore is that it is not only the dolphin-safe labelling conditions and requirements for tuna products containing tuna caught by setting on dolphins in the ETP, taken in isolation, that give rise to the detrimental impact on imported Mexican tuna products. Rather, as the Appellate Body ruled in *EC – Seal Products*,¹⁸² it is only the “combined operation” of such “prohibitive” aspects of the challenged measure “together with” the “permissive” aspects that grant a relative advantage to like products originating in other countries – i.e., the different labelling conditions and requirements for tuna products containing tuna caught using other fishing methods outside the ETP – that gives rise to the regulatory distinction leading to the detrimental impact. Thus, Mexico has correctly adduced evidence and arguments demonstrating the “differential treatment” under the different labelling conditions and requirements of the Amended Tuna Measure that, “taken together”, result in a violation of Article 2.1 of the TBT Agreement.

59. To both Parties: Please comment on the attached table (Table 1/Rev.2), in light of the various requests for clarifications as reflected in the earlier batches of questions from the Panel.

198. With regard to the United States’ comments on the Panel’s table:

¹⁸¹ United States’ responses to the Panel’s questions, para. 288.

¹⁸² See Appellate Body Report, *EC – Seal Products*, paras. 5.188 (“As we see it, the existence of the permissive component in the form of the IC exception alone cannot confer an advantage to seal products of Greenlandic origin, unless it is compared to the treatment of seal products of Canadian and Norwegian origin. It is only the combined operation of the permissive aspect of the EU Seal Regime ... together with the prohibitive aspect of the EU Seal Regime... that leads to a finding of *de facto* discrimination under Article I:1” [emphasis added]), 5.189 (“we note that the Panel’s finding that the measure accords treatment to Canadian and Norwegian seal products that is less favourable than the treatment accorded to EU seal products was based on an examination of the combined operation of the permissive component of the EU Seal Regime ... together with the prohibitive component As with the Panel’s analysis of the IC exception under Article I:1, the permissive aspect of the MRM exception and the requirements thereunder would not have led to a finding of violation under Article III:4 in the absence of the ‘ban’” [emphasis added]), and 5.192-5.193.

- Slide One, Column 1: Mexico has no comment on the U.S. response.
- Slide One, Column 2: Mexico notes that by the terms of the Amended Tuna Measure, if a large purse seine fishery killed thousands of dolphins in an area that does not have an association between tuna and dolphins similar to that of the ETP, it could never be subject to the additional requirements that can be imposed on, for example, gillnet and longline fisheries. That reinforces the arbitrary nature of the Amended Tuna Measure.
- Slide One, Column 3: Mexico has no comment on the U.S. response.
- Slide Two, Columns 1, 2 and 3: Mexico has the same comment on the U.S. request to delete column 2 as for the slide one for large purse seine vessels.
- Slide Two Column 3: Mexico has no comment, except that the IATTC and AIDCP have no plans to require observers on small purse seine vessels operating in the ETP.
- “Missing column”: Mexico understands that the United States interprets the statute to authorize small purse seine vessels in the ETP to be made subject to mandatory observer requirements with a determination that they are causing regular and significant mortality (unrelated to tuna-dolphin association), while both large and small purse seine vessels outside the ETP are not subject to such a possibility.
- Slide Three, Column 1: The U.S. response highlights that the Amended Tuna Measure is unconcerned with tuna-dolphin associations in any fisheries other than purse seine fisheries. Especially in light of the association of dolphins with longline fisheries, that is yet another indication of arbitrariness.
- The remaining U.S. responses to the chart repeat the issues discussed above.

II. COMMENTS ON THIRD PARTIES’ RESPONSES TO THE PANEL’S QUESTIONS

1. **To Third Parties:** New Zealand at para. 6 of its opening statement posits that "Specifically in this dispute, the even-handedness assessment would involve consideration of the United States' rationale for distinguishing between tuna products containing tuna caught by setting on dolphins in the Eastern Tropical Pacific and tuna harvested by other methods in other areas of the ocean. New Zealand submits that the Panel should consider whether this rationale is consistent with the overall objective of the amended dolphin-safety measure. For instance, does the distinction assist or hinder the dolphin-safety objective? Is eligibility for the label tailored to the different levels of dolphin-safety risks arising from the different fishing methods? In other words, is the rationale for the distinction consistent with the measure's overall objective?" Please comment on this statement by New Zealand.

199. The United States addressed this issue in its response to Question 6 above, and Mexico provided its comments in relation to that question.

2. ***To Third Parties: Please provide examples, as applicable, of national observer programmes, or international observer programmes that you are participating in, and provide in as much detail as practicable, the cost of running or participating in such observer programmes.***

200. In its comments on the responses of New Zealand and the European Union to this question, the United States again grossly exaggerates the costs of observer programs to ensure the validity of dolphin-safe certifications.

201. In projecting costs to cover longline vessels in the WCPFC area, the United States has assumed that New Zealand would provide observers for every vessel of every country. It has also assumed that all the tuna caught by every vessel in the WCPFC area is destined for the U.S. market. Further, New Zealand did not say that the costs for its observers were always \$450 per day, it said the cost can be “up to” \$450 per day. It also stated that the costs of observers across the Pacific can range from \$35 to \$65 per day.¹⁸³

202. Moreover, New Zealand did not say that smaller, wider-ranging longline vessels could not carry observers; rather, it said that the WCPFC only required 5 percent observer coverage for longline vessels.¹⁸⁴ Mexico has previously submitted uncontested evidence that Mexican longline vessels operating in the Gulf of Mexico are required to carry observers on 100 percent of their voyages.¹⁸⁵

203. The United States similarly manipulates and mischaracterizes the European Union’s response to this question. Obviously the Spanish government would not provide observers for all the longline vessels in the Western Pacific, and not all longline vessels would need observers – just those catching tuna intended for the U.S. market and intending to use the dolphin-safe label. The United States also continues to avoid explaining how the existing observer programs in the ETP and elsewhere have been implemented without the extraordinary costs projected by the United States. The U.S. claim that all fleets with AIDCP observers have incurred deficits is flatly contradicted by Exhibit MEX-117, which states that the current deficit results from delayed payment of assessments by four vessels (none from Mexico).¹⁸⁶

¹⁸³ New Zealand’s responses to third party questions by the Panel, para. 9 as modified on 24 September 2014. Mexico cannot determine how the United States calculated the number of days at sea spent by all vessels in the Western and Central Pacific. It seems to have extrapolated based on an estimated fraction of the projected days at sea of 142 vessels operating in U.S. waters, and assumed that all of the vessels of other countries, of whatever size, would have the same length of voyages.

¹⁸⁴ New Zealand’s responses to third party questions by the Panel, para. 8.

¹⁸⁵ Mexico’s first written submission, para. 150.

¹⁸⁶ AIDCP, Document MOP-29-06, p. 4 (Exhibit MEX-117) (“As of 31 May 2014, four vessels have outstanding assessments from 2011-2014, totaling US\$ 315,469. If these are paid before the end of the year, the result would be a net surplus of US\$ 77,526, rather than a cumulative deficit of US\$ 237,943.”)

3. *To Third Parties:* In your experience, if any, are captain's statements inherently reliable?

204. In its comments on the responses of New Zealand and the European Union to this question, the United States strains to characterize their responses as endorsing captain's statements as reliable.

205. New Zealand simply stated that it requires its captains to sign "catch documents" when they operate in fisheries that require them. New Zealand noted that the WCPFC and SPRFMO (South Pacific Regional Fisheries Management Organization) do not have catch documentation schemes, which indicates that New Zealand captains do not sign such documents when fishing for tuna in the WCPFC.¹⁸⁷ New Zealand made no comment on whether captains' statements were "reliable."

206. The European Union's response to this question focused on the AIDCP system. The United States selectively quotes the European Union's response. The sentence omitted by the United States is underlined below:

... the inherent reliability of the captain is one of the pillars of the system, including under the EU Control Regulation (Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy). Reporting from the captain has to be confirmed in all cases by the observers as established under the AIDCP.¹⁸⁸

The European Union's response therefore also does not support the U.S. claim that captains' statements on whether tuna meets the requirements of the U.S. dolphin-safe rules are inherently reliable without confirmation from an observer.

¹⁸⁷ New Zealand's responses to third party questions by the Panel, para. 14.

¹⁸⁸ European Union's responses to questions from the Panel, para. 10.