

BEFORE THE WORLD TRADE ORGANIZATION

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(DS381)



MEXICO'S RESPONSES TO THE PANEL'S QUESTIONS

Geneva

17 September 2014

PRELIMINARY ISSUES AND PROCEDURAL MATTERS

The Amended Tuna Measure

2. To both Parties: Please consider the attached table (*Table 1/Rev.1*). In your opinion, does this table accurately reflect the current labelling requirements as provided for under the amended tuna measure?

1. In Mexico's understanding, this question has been superseded by Question 59 and the revised Table 1 sent by the Panel to the Parties on 3 September 2014.

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?**

2. Mexico's detailed position on the interpretation and application of the concept of “even-handedness” is set out in its written submissions.¹ Based on the two-step approach established by the Appellate Body in *US – Tuna II (Mexico)*, the Panel must analyze whether the detrimental impact on imports caused by the Amended Tuna Measure stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, the Panel must carefully scrutinize the particular circumstances of this dispute, that is, the design, architecture, revealing structure, operation, and application of the Amended Tuna Measure, and, in particular, whether the Amended Tuna Measure is “even-handed”, in order to determine whether it discriminates against the group of imported products.

3. The concept of “even-handedness” is necessarily broad. In *US – Clove Cigarettes*, the Appellate Body noted that an inquiry into the “even-handedness” of a measure can answer the question of whether the measure discriminates against a group of imported products (i.e., it is not even-handed and, thus, it is prohibited) or, alternatively, whether its detrimental impact on

¹ Mexico's first written submission, paras. 235-245 (especially paras. 239-242); Mexico's second written submission paras. 111-132 (especially paras. 120 and 126-132).

imports stems exclusively from a legitimate regulatory distinction (i.e., it is even-handed and, on this basis, it is permitted).² The Appellate Body did not define the meaning of “even-handedness”. However, “even-handedness” appears to be shorthand for the following terms used in the sixth recital of the TBT Agreement: (i) arbitrary discrimination; (ii) unjustifiable discrimination; and/or (iii) a disguised restriction.³ Mexico's view is that if a regulatory distinction constitutes a means of arbitrary discrimination, it is not even-handed. In such circumstances, the detrimental impact cannot be said to stem exclusively from a legitimate regulatory distinction.

4. As Mexico explained in its written submissions, a plain meaning of the term “even-handed”, supported by its context in Article 2.1 of the TBT Agreement and the meaning of “arbitrary discrimination”, indicates that a regulatory distinction must be designed and applied in an “impartial”, “unbiased” manner, “according to the rules”, in order to be considered even-handed. On the other hand, a regulatory distinction that is designed or applied in a manner that is biased, unfairly influenced, or not honest cannot be considered to be even-handed.⁴ Moreover, a lack of even-handedness can result where the measure in question exhibits an ambiguity that creates the potential for its abuse and misapplication, regardless of whether or not the body responsible for applying the measure is acting in good faith.⁵ Finally, one of the most important factors in the assessment of arbitrary or unjustifiable discrimination (and therefore relevant to considerations of even-handedness) is the question of “whether the discrimination can be reconciled with, or is rationally related to” the relevant policy objective of the measure.⁶

5. Thus, factors that the Panel should take into account in assessing the even-handedness of the Amended Tuna Measure – specifically the even-handedness of the differences in the three labeling conditions and requirements identified and considered by Mexico – include: partiality; bias; ambiguities that create the potential for abuse and misapplication; and whether the differences can be reconciled with, or are rationally related to the relevant policy objective of the Amended Tuna Measure. If any of these factors indicate that the differences amount to arbitrary discrimination, the Amended Tuna Measure is not even-handed.

6. The even-handedness requirement does not require the Panel to engage in a quantitative cost-benefit analysis. Given the broad scope of even-handedness, such an analysis could be relevant in certain circumstances. Such an analysis is not relevant, however, in this dispute and,

² Appellate Body Report, *US – Clove Cigarettes*, paras. 95, 182 and 215.

³ Appellate Body Report, *US – Clove Cigarettes*, para. 95; Appellate Body Report, *US – Tuna II (Mexico)*, paras. 212-213; and Appellate Body Report, *US – COOL*, paras. 271-272, 293, 340-341, 347 and 349.

⁴ Mexico's second written submission, paras. 123-124.

⁵ Mexico's second written submission, paras. 126-129.

⁶ Mexico's second written submission, para. 132.

even if it was, it would not override the arbitrary discrimination and lack of even-handedness demonstrated by Mexico.

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

7. No, Mexico does not see these concepts as synonymous. The term “calibration” was initially introduced by the United States in the original proceeding,⁷ by arguing that the original tuna measure was “calibrated” to the risk that dolphins may be killed or seriously injured when tuna was caught. The Appellate Body determined that the United States did not demonstrate that the original measure was “calibrated” to such risk and, therefore, the Appellate Body was not persuaded that the measure was “even-handed”.⁸ If calibration is used, it must result in an even-handed measure. In sum, there is no “calibration test”. The relevant legal test for the purposes of Article 2.1 of the TBT Agreement focuses on “even-handedness”.

8. Objective, scientifically-based benchmarks established on the basis of fishery-specific Potential Biological Removal (PBR) levels, as discussed in Mexico's response to Question 11, are an example of calibration in an even-handed manner. It is Mexico's position that the absolute benchmarks proposed by the United States do not involve “calibration”. Moreover, during the meeting with the Panel, the United States clarified that it was not making any form of “calibration” argument. However, to the extent that the Panel finds that the benchmarks proposed by the United States do involve some form of calibration, they are clear examples of calibration that do not result in an even-handed measure.

9. As Mexico has explained in its second written submission, the concept of “calibration” is totally inconsistent with the primary objective of the Amended Tuna Measure, which is concerned with the accuracy of information provided to consumers.⁹ The United States' calibration argument implies that it is acceptable and “even-handed” to provide consumers with inherently unreliable, unverified and inaccurate information regarding the dolphin-safe status of tuna products containing tuna caught in all ocean regions except the ETP, but to ensure that such information is independently certified and accurate in relation to tuna caught specifically within the ETP. Tuna is either dolphin-safe or it is not – eligibility for the dolphin-safe label cannot be viewed as a relative assessment.

10. As explained by Mexico at the hearing in response to Question 11, 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

⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 282.

⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.

⁹ Mexico's second written submission, para. 173.

requirements for record-keeping, tracking, verification and observer coverage. It is beyond question that the same conditions and requirements need to be applied to the tuna caught in all fisheries. There is no room for calibration because, in the context of record-keeping, tracking, verification and observer coverage, anything less than full implementation would mean that the provision of inaccurate information to consumers would be deemed acceptable in some circumstances. Such an outcome would not be even-handed.

11. As further explained in Mexico's response to Question 11, it is Mexico's position that the same logic applies to the disqualification of Mexico's fishing method and the qualification of other fishing methods as eligible to catch dolphin-safe tuna. However, in the alternative, if a benchmark for assessing the risk posed to dolphins other than zero tolerance is used to justify the disqualification of Mexico's fishing method, then such a benchmark must be based on objective, scientifically-established evidence, such as fishery-specific PBR levels. A benchmark based on PBR levels is not only objective, but also allows for a fair comparison between fishing methods. Thus, such a benchmark would "calibrate" the disqualification or qualification of fishing methods according to the particular circumstances relevant to the fishery and/or the fishing methods in question, thereby contributing to the prevention of dolphin mortalities and serious injuries in a manner that is even-handed, consistent, and more effective overall.

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?

12. Mexico's interpretation of even-handedness draws on the meaning of “arbitrary and unjustifiable discrimination” in the chapeau of Article XX. In *EC – Seal Products*, the Appellate Body found that the Panel erred because it did not conduct an independent analysis under the chapeau of Article XX. The Panel simply relied upon its “even-handed” analysis under Article 2.1.¹⁰ The Appellate Body considered that the Panel should have provided more explanation as to why and how its analysis under Article 2.1 of the TBT Agreement was "relevant and applicable" to the analysis under the chapeau of Article XX.¹¹ Thus, the Appellate Body did not find that the analysis under Article 2.1 was irrelevant to the analysis under the chapeau. Rather, the Appellate Body only indicated that an independent analysis must be done under the chapeau and, if the analysis under Article 2.1 is used, then an explanation must be provided as to why this analysis is relevant and applicable.¹²

¹⁰ Appellate Body Report, *EC – Seal Products*, para. 5.313.

¹¹ Appellate Body Report, *EC – Seal Products*, para. 5.310.

¹² Appellate Body Report, *EC – Seal Products*, para. 5.310.

13. More importantly, the Appellate Body also made clear that “arbitrary discrimination” is a common concept in Article 2.1 and the chapeau of Article XX, and the chapeau provides relevant context for Article 2.1.¹³ The Appellate Body recognized that “there are important parallels between the analyses under Article 2.1 of the TBT Agreement and the chapeau” and that the concept of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” is found in both.¹⁴ Thus, although the scope and application of the provisions differ, it is clearly appropriate to use the meaning of “arbitrary discrimination” developed under the chapeau of Article XX as context when interpreting the meaning of “even-handedness” for the purposes of Article 2.1 of the TBT Agreement.

14. One of the most important factors identified by the Appellate Body in the assessment of arbitrary or unjustifiable discrimination under the chapeau is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure. Clearly, this factor applies to the interpretation of arbitrary discrimination under both, Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement.

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.

15. New Zealand is correct. As explained in Mexico's response to Questions 5(a)-(c), above, the concept of “even-handedness” incorporates, *inter alia*, the concept of “arbitrary discrimination”. One of the most important factors in the assessment of arbitrary discrimination is the question of “whether the discrimination can be reconciled with, or is rationally related to” the relevant policy objective of the measure.¹⁵ Thus, the Panel must determine whether the differences in labelling conditions and requirements are consistent with the Amended Tuna Measure's overall objective. As explained in detail in Mexico's written submissions, they are not.

¹³ 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.

¹⁴ Appellate Body Report, *EC – Seal Products*, para. 5.310.

¹⁵ See Mexico's second written submission, para. 132.

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

- 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?**

16. Mexico raises the concept of discrimination in two different contexts. First, Mexico raises discrimination in the context of “detrimental impact” (Article 2.1 of the TBT Agreement) and “denial of competitive opportunities” under Articles I:1 and III:4 of the GATT 1994. Second, Mexico raises it in the context of “arbitrary discrimination” under Article 2.1 of the TBT Agreement (i.e., whether the measure is “even-handed”) and the chapeau to Article XX of the GATT 1994.

Mexico's Discrimination Claims and Arguments Generally

17. With respect to both contexts in which Mexico raises the concept of discrimination, it is important to recognize that Mexico is not complaining about the imposition of observer and tracking/verification requirements in the ETP and, by implication, on the Mexican fleet. To the contrary, it is Mexico's position that such requirements are absolutely necessary in a dolphin-safe labelling regime.

18. In the ETP, all large purse seine vessels must have observers and comply with the tuna tracking and verification system. These requirements reflect the judgment of the United States, Mexico and the other members of the AIDCP that (i) all large purse vessels are capable of harming dolphins regardless of their method of fishing, and (ii) having observers and a tracking and verification system is necessary to provide an assurance that tuna products are dolphin-safe — that is, that no dolphins were killed or seriously injured during the set in which the tuna was caught.

19. Mexico's complaint with regard to tracking/verification and observer requirements focuses on the fact that tuna caught outside the ETP (i.e., most U.S. tuna and tuna from other countries) is, in effect, given a “free pass” to use the dolphin-safe label without having similar requirements. Without such requirements, there are no assurances that a tuna product is in fact dolphin-safe.

“Detrimental Impact” and “Denial of Competitive Opportunities”

20. With respect to the first context in which Mexico raises discrimination, the discrimination arises because most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a dolphin-safe label, whereas most tuna products from the United States and other countries that are sold in the U.S. market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a dolphin-safe label.

21. This, in turn, is a consequence of the differences in the three labelling conditions and requirements identified by Mexico. With respect to the differences in the application of the independent observer requirement, discrimination in the form of “detrimental impact” and the “denial of competitive opportunities” arises because tuna products from the United States and other countries are not subject to such requirements. This contributes to the fact that *most* tuna products from the United States and other countries are eligible for the dolphin-safe label even if they should not be eligible because, for instance, the tuna was incorrectly classified as dolphin-safe at the time of capture. In this light, there is discrimination in the scenario posed in this question. It should be noted, however, that this is only one factual element of the discrimination identified by Mexico. As explained in Mexico's submissions, the discrimination arises from the combined effect of the qualification/disqualification of fishing methods, the tracking and verification requirements and the independent observer requirement.

“Arbitrary Discrimination” (and lack of even-handedness)

22. With respect to the second context in which Mexico demonstrates that the measure is not even-handed and therefore results in arbitrary discrimination, the discrimination derives from the fact that, where fishing methods are used that cause mortalities and serious injury to dolphins (which is the case for all commercial fishing methods examined by the Panel, with the exception of pole-and-line fishing), independent observers must be required. It does not matter which specific fishing methods are used. The fact that independent observers are not required under the Amended Tuna Measure for vessels operating outside the ETP amounts to arbitrary discrimination because, *inter alia*, this difference in treatment has no rational connection to the objective of the measure.

- 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?**

23. The explanation in response to Question 7(a), above, applies to all vessels in all fisheries. The Amended Tuna Measure permits tuna products containing tuna caught by any method outside the ETP to be labelled dolphin-safe without a tracking/verification system and without observers. It also allows tuna products caught by non-large purse seine nets within the ETP to be labelled dolphin-safe without a tracking/verification system and without observers.¹⁶

¹⁶ Panel Report, *US – Tuna II (Mexico)*, paras. 2.11 and 2.14.

24. As Mexico has previously explained, the AIDCP has its own dolphin-safe standard (no dolphins killed or seriously injured during the set in which the tuna was harvested) and certification procedures. The AIDCP dolphin safe label can be used only if there was an independent observer onboard the vessel and the tuna was tracked through the tracking and verification system which encompasses capture, transport, unloading and processing. For this reason, tuna caught by small purse seine vessels within the ETP is not eligible for the AIDCP dolphin-safe label.¹⁷ The Amended Tuna Measure, in contrast, permits such tuna products to be labelled dolphin-safe. This further illustrates the arbitrary nature of the Amended Tuna Measure.

25. Most tuna caught by purse seine vessels worldwide are caught by large purse seine vessels. Accordingly, Mexico's discrimination arguments focus on large purse seine vessels. The Amended Tuna Measure has the effect of singling out Mexican tuna products for denial of the dolphin-safe label while permitting use of the label for tuna products from other countries, even though Mexican tuna products are able to provide consumers with an assurance that no dolphins were killed or seriously injured during the set in which the tuna was caught, while the products of most other countries cannot.

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 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”?

26. As explained below, the Appellate Body's rulings and reasons in *US – Gasoline* and *EC – Seal Products* provide a complete response to this question, demonstrating that it is not “the discrimination or detrimental impact giving rise to the relevant GATT violation” that must be justified under the subparagraphs and the chapeau of Article XX, but rather all of the aspects of the challenged measure that, operating in combination, give rise to the relevant GATT violation. To the extent that the combined operation of a number of different aspects leads to the relevant GATT violation – including not only prohibitive aspects that unfairly disadvantage the complaining Member's goods, but also permissive aspects that unfairly advantage like goods of other countries relative to the complaining Member's goods – then all such aspects must be considered together and not in isolation from one another. Thus, if the aspects of the measure are

¹⁷ Only tuna caught by vessels with observers and tracked through the AIDCP “System for Tracking and Verifying Tuna” is eligible for the AIDCP dolphin-safe label. See AIDCP, Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification, para. 2 (requiring certificate to be issued based on AIDCP System for Tracking and Verification of Tuna) (Exhibit MEX-115) and AIDCP System for Tracking and Verification of Tuna (amended 11 October 2003) (requiring Tuna Tracking Form verified by independent observer, which are only available for large purse seine vessels) (Exhibit MEX-123). Thus, tuna caught by small purse seine vessels, longline vessels, etc., are not eligible for the AIDCP dolphin-safe certification.

inseparable from one another, such that it is their combined operation that leads to the relevant GATT violation, then all aspects of the measure must be justified “taken together” under the subparagraphs and the chapeau of Article XX. As the various aspects of the Amended Tuna Measure – including the “dolphin-safe” labelling conditions and requirements – are integrated together, operating in combination to control access to the exclusive dolphin-safe label for tuna products in the U.S. market, they must all be justified “taken together”.

27. This is not to say, however, that the discrimination or detrimental impact itself is never a factor to be considered in the Article XX analysis. To the contrary, the “necessity test” under Article XX(b) requires the Panel to weigh and balance the “trade restrictiveness” of the measure – that is, “the discrimination or detrimental impact giving rise to the relevant GATT violation” – together with the contribution of the challenged measure to the achievement of its objective, taking into account the importance of the interests or values at stake,¹⁸ in order to determine whether the measure is provisionally justified as “necessary to protect human, animal or plant life or health”.

28. The elements of Mexico's response are explained in turn below.

(a) ***It is Not “Only the Discrimination or Detrimental Impact” that Must be Justified under Article XX***

29. In *EC – Seal Products*, the Appellate Body noted that “the general exceptions of Article XX apply to ‘measures’ that are to be analysed under the subparagraphs and chapeau, not to any inconsistency with the GATT 1994 that might arise from such measures.”¹⁹ Similarly, in *US – Gasoline*, the Appellate Body concluded that “[t]he chapeau of Article XX makes it clear that it is the ‘measures’ which are to be examined under Article XX(g), and not the legal finding of ‘less favourable treatment’”.²⁰ Thus, it is clearly not “only the discrimination or detrimental impact giving rise to the relevant GATT violation” that must be justified under the subparagraphs and the chapeau of Article XX, but rather the measure giving rise to the finding of inconsistency. As discussed above, however, the “discrimination or detrimental impact” itself is relevant to the “necessity” analysis under Article XX(b).

¹⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 156 and 178. In formulating this approach, the Appellate Body took into account the “necessity” analysis that it had established for the purposes, respectively, of Article XX(d) in *Korea – Various Measures on Beef* and Article XIV of the GATS in *US – Gambling*. See paras. 141-143, citing Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161, 163 and 164, and Appellate Body Report, *US – Gambling*, para. 306.

¹⁹ Appellate Body Report, *EC – Seal Products*, para. 5.185.

²⁰ Appellate Body Report, *US – Gasoline*, para. 40. See also pp. 13-14 (“it is not a panel’s legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994”).

(b) ***It is the Aspects of the Measure whose combined operation leads to the Relevant GATT Violation that Must be Justified, “taken together”, under the subparagraphs and the chapeau of Article XX***

30. While the Appellate Body in *EC – Seal Products* stated that “the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994,”²¹ a careful analysis of the Appellate Body’s reasoning demonstrates that this does not necessarily mean that specific aspects of the measure should be considered in isolation from one another. Rather, the Appellate Body’s reasoning reveals that what needs to be justified under the subparagraphs and the chapeau of Article XX are the collective aspects of the measure which, through their combined operation, give rise to the relevant GATT violation. Considering the particular circumstances of that dispute, the Appellate Body therefore ruled that what must be justified under Article XX are both the prohibitive and permissive aspects of the *EU Seal Regime*, “taken together”.²²

31. The Appellate Body clarified, however, that “[a]t the same time, it might not be accurate to state that the analysis under Article XX(a) must focus on the EU Seal Regime ‘as a whole’ insofar as the measure consists of elements other than the prohibitive and permissive components of the EU Seal Regime.”²³ In other words, if the challenged measure includes separable aspects that do not give rise to the relevant GATT violation, such aspects should not be included in the analysis under the subparagraphs and the chapeau of Article XX. In such a case, the measure would not be considered “in its entirety (i.e., as a whole)”, as the separable aspects of the measure that are not relevant to the GATT violation would be excluded.

²¹ Appellate Body Report, *EC – Seal Products*, para. 5.185, citing Appellate Body Report, *US – Gasoline*, paras. 13-14, DSR 1996:I.

²² In *EC – Seal Products*, Norway claimed before the Appellate Body that the panel had erred in seeking to justify the EU Seal Regime “as a whole” under Article XX(a). In support of this claim, Norway argued that only the “particular aspect” of a measure that is inconsistent with the GATT 1994 must be justified under Article XX”, and not the measure “as a whole”. The Appellate Body rejected Norway’s claim and found that the Panel had not erred in concluding that, under the circumstances, the analysis under Article XX should examine all aspects of the EU Seal Regime. Specifically, Norway argued that since the Panel had found the IC and MRM Exceptions to be inconsistent with Articles I:1 and III:4 of the GATT 1994, it was these specific aspects of the EU Seal Regime that must be justified under Article XX(a), and not the EU Seal Regime as a whole. In response, the European Union argued that since the “less favourable treatment” under the EU Seal Regime results from the “interplay” between the general ban and the Exceptions, the Panel had been correct in not limiting its analysis under Article XX(a) to just the Exceptions on their own. The Appellate Body ruled that it is only the combined operation of the permissive aspect (i.e., the Exceptions) together with the prohibitive aspect (i.e., the general ban) that leads to the findings of violation under Articles I:1 and III:4 of the GATT 1994. On this basis, the Appellate Body decided that both aspects “taken together” must be justified under the subparagraphs and the chapeau of Article XX. See Appellate Body Report, *EU – Seal Products*, paras. 5.184-5.193.

²³ Appellate Body Report, *EU – Seal Products*, para. 5.190.

(c) ***Application of the Appellate Body's Approach in EC – Seal Products to the Present Article 21.5 Compliance Proceedings***

32. In the present case, it is Mexico's position that:

(a) The various prohibitive and permissive aspects of the Amended Tuna Measure – including the “dolphin-safe” labelling conditions and requirements – are integrated together, operating in combination to control access to the exclusive “dolphin-safe” label for tuna products in the U.S. market. Specifically, it is through the combined operation of the different labelling conditions and requirements that all or mostly all of the tuna products imported from Mexico are prohibited from using the U.S. dolphin-safe label, while all or almost all of the like tuna products of U.S.-origin and like tuna products imported from other countries are permitted access to the label.

(b) As the European Union assessed in its third-party written submission:

The European Union 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.²⁴

(c) Thus, it is “only the combined operation” of the various aspects of the Amended Tuna Measure that leads to the relevant GATT violations under Articles I:1 and III:4. That is, it is only the combined operation of the labelling conditions and requirements for tuna products containing tuna caught by setting on dolphins in the ETP, together with the labelling conditions and requirements for tuna products containing tuna caught outside the ETP, that gives rise to the regulatory distinction that affects the conditions of competition to the detriment of tuna products imported from Mexico *vis-à-vis* like tuna products of U.S. origin and like tuna products imported from other countries.

33. Therefore, in accordance with the Appellate Body's approach in *EC – Seal Products*, all of the aspects of the Amended Tuna Measure must be “taken together” in the analysis under the subparagraphs and the chapeau of Article XX.

34. The foregoing approach applies to the provisional justification analyses under each of the subparagraphs, including Article XX(b) and Article XX(g).

9. To Mexico: Do Mexico's Article I and III GATT 1994 claims relate to both the disqualification of tuna caught by setting on dolphins from accessing the dolphin safe label and the different tracking and observer requirements imposed in the ETP, or only the former?

²⁴ European Union's third-party written submission, para. 46.

35. In establishing a *prima facie* case under Article I and Article III of the GATT 1994, Mexico refers to the “differences in the labelling conditions and requirements”, which encompasses all three of the regulatory differences in the labelling conditions and requirements identified and considered by Mexico.²⁵ The United States argues that Mexico's claims under Articles I and III of the GATT 1994 relate only to the disqualification of tuna caught by setting on dolphins from access to the U.S. dolphin-safe label. This is incorrect. Nowhere in the presentation of its case does Mexico narrow its claims in this manner.

36. The Amended Tuna Measure in its totality (i.e., as a whole) is inconsistent with Articles I:1 and III:4 of the GATT 1994. The inconsistency arises from the detrimental impact on competitive opportunities for Mexican tuna products caused by the relevant regulatory distinction under the Amended Tuna Measure, which includes the regulatory differences in the three dolphin-safe labelling conditions and requirements examined and considered by Mexico, namely the disqualification of tuna caught by setting on dolphins in an AIDCP-compliant manner versus the qualification of other fishing methods, the different record-keeping, tracking and verification requirements, and the different observer coverage requirements. It is the combined operation of these regulatory differences in the labelling conditions and requirements applied to tuna products containing tuna caught by setting on dolphins within the ETP, on one hand, and tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, that leads to the discriminatory treatment. As a result of that treatment, all or almost all imported tuna products from Mexico are not eligible for the dolphin-safe label (the “prohibitive” aspect of the measure), while most tuna products from the United States or imported from other countries are eligible for the label (the “permissive” aspect of the measure). Specifically:

- Mexico's primary fishing method is permanently disqualified from being used to catch dolphin-safe tuna, while the fishing methods used by the United States and other countries are qualified to be used to catch dolphin-safe tuna;
- Mexican-origin tuna and tuna products are subject to comprehensive and strict record-keeping and verification requirements that prevent non-dolphin-safe tuna from being labelled as dolphin-safe. In contrast, tuna and tuna products from the United States and other countries are not subject to such comprehensive and strict requirements. As a consequence, tuna and tuna products from the United States and other countries can be mislabeled as dolphin-safe when, in fact, such tuna and tuna products are not dolphin-safe (that is, the tuna was caught in a manner that seriously injured or killed dolphins); and

²⁵ See Mexico's first written submission, paras. 313 and 326; Mexico's second written submission, paras. 203 and 221.

- In the case of Mexican tuna, the initial designation of dolphin-safe status is subject to mandatory independent observer requirements at the point when the tuna is harvested from the ocean, which prevents non-dolphin-safe tuna from being mislabeled as dolphin-safe. In the case of tuna from the United States and other countries, the initial designation of dolphin-safe status is not made by independent observers at the point when the tuna is harvested from the ocean, thereby allowing the tuna to be mislabeled as dolphin-safe when, in fact, it is not.

10. To Mexico: Is it Mexico's position that the different tracking, verification, and observer requirements imposed on tuna caught by large purse seine vessels in the ETP are "conditions" within the meaning of Article I:1 of the GATT 1994?

37. Yes. The granting of the advantage of the dolphin-safe label in the U.S. market²⁶ is conditioned on the labelling conditions and requirements set out under the Amended Tuna Measure. Specifically, the Amended Tuna Measure's different labelling conditions and requirements related to record-keeping, tracking, verification and observer coverage – not only for tuna caught by large purse seine vessels in the ETP, but also for tuna caught by other fishing methods outside the ETP – are "conditions" to the granting of the advantage of the U.S. dolphin-safe label within the meaning of Article I:1 of the GATT 1994, as it is their combined operation that causes detrimental impact to the competitive opportunities of like imported tuna products from Mexico.

38. As Mexico explained in its second written submission, the Appellate Body ruled in *EC – Seal Products* that Article I:1 of the GATT 1994 prohibits conditions to the granting of an advantage – including regulatory distinctions drawn between like imported products – that "have a detrimental impact on the competitive opportunities for like imported products from *any* Member"²⁷ (emphasis original).

39. Mexico has demonstrated that the regulatory distinction resulting from the Amended Tuna Measure's different labelling conditions and requirements for tuna caught by setting on dolphins within the ETP, on one hand, and tuna caught by other fishing methods outside the

²⁶ In the original proceedings, the Panel found that access to the "dolphin-safe" label constitutes an "advantage" on the U.S. market, and the Appellate Body noted that this finding was not appealed. See Appellate Body Report, *US – Tuna II (Mexico)*, para. 233, citing Panel Report, *US – Tuna II (Mexico)*, paras. 7.289, 7.290 and 7.291. In the present compliance proceedings under Article 21.5 of the DSU, Mexico has demonstrated that the dolphin-safe label continues to constitute an advantage in the U.S. market under the Amended Tuna Measure. See Mexico's second written submission, para. 198, citing the United States' first written submission, paras. 278-280.

²⁷ Appellate Body Report, *EC – Seal Products*, paras. 5.88 and 5.93 ("we consider that Article I:1 prohibits Members from conditioning the extension of an 'advantage', within the meaning of Article I:1, on criteria that have a detrimental impact on the competitive opportunities for like imported products from any Member") (emphasis added). See Mexico's second written submission, para. 200.

ETP, on the other hand, has a detrimental impact on the competitive opportunities for like imported products from *any* Member, i.e., Mexico.²⁸ As all or almost all of the tuna caught by the Mexican fishing fleet is harvested by large purse seine vessels in dolphin sets within the ETP, the regulatory distinction in the different labelling conditions and requirements operates to deny the advantage of the U.S. dolphin-safe label to all or almost all imported tuna products from Mexico, while granting the advantage of the label to all or almost all tuna products imported from other countries. Thus, these different labelling conditions and requirements, taken together, are “conditions” within the meaning of Article I:1 of the GATT 1994.

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?

40. The determination of which types of comparisons of dolphins killed in different fisheries could be used to assess risks to dolphins in the context of the Amended Tuna Measure raises complex issues that go to the core of this dispute. As a consequence, it is necessary to address the following issues in this response:

- (a) the relevance of a comparative assessment of risks to dolphins to the legal analysis under Article 2.1 (as discussed below, this is potentially relevant to the examination of “even-handedness”);
- (b) the relevance of a comparative assessment of risks to dolphins to the three labelling conditions and requirements identified by Mexico (as discussed below, this is potentially relevant only to the labelling condition and requirement related to the disqualification and qualification of fishing methods);
- (c) the potential benchmarks for a comparative assessment of risks to dolphins (as discussed below: (i) a “zero tolerance” benchmark; (ii) an objective, scientifically-established benchmark; and (iii) other benchmarks proposed by the United States);
- (d) the application of the potential benchmarks to the first two labelling conditions and requirements identified by Mexico, namely record-keeping, tracking and verification and observer coverage (as discussed below, it is not a question of the raw or relative numbers or percentages of dolphins killed or seriously injured, as all of these quantitative measurements are irrelevant. It is simply a question of

²⁸ See Mexico's first written submission, paras. 311-316; Mexico's second written submission, paras. 200-204.

whether or not such adverse effects to dolphins occur at all. In other words, a “zero tolerance” benchmark applies); and

- (e) the application of the potential benchmarks to the third labelling condition and requirement, namely the disqualification/qualification of fishing methods (as discussed below, it appears that a “zero tolerance” benchmark applies (see point (d), above). If it does not apply, however, then an objective, scientific benchmark should be applied. Under such a benchmark, relative rather than raw numbers of dolphins killed or seriously injured must be used).

41. Each of these issues is addressed in turn.

(a) ***The Relevance of a Comparative Assessment of Risks to Dolphins to the Legal Analysis under Article 2.1***

42. A comparative assessment of the “risks posed to dolphins” by different fishing methods in different fisheries could be relevant under Article 2.1 when assessing whether the detrimental impact caused by the Amended Tuna Measure reflects discrimination against the imported products. Specifically, it could be relevant to the examination of “even-handedness” in determining whether the detrimental impact of the measure stems exclusively from a legitimate regulatory distinction.

43. In undertaking an examination of even-handedness, the Panel must scrutinize the design, architecture, revealing structure, operation, and application of the technical regulation at issue.²⁹ This scrutiny will indicate whether or not a comparison of the risks posed to dolphins in different fisheries is relevant to the assessment of even-handedness and, if so, in what way.

44. This examination must start with the objectives of the Amended Tuna Measure.³⁰ These objectives indicate that the Amended Tuna Measure defines “risks” to dolphins in terms of “adverse effects” on dolphins. These adverse effects, in turn, are specifically defined in the measure as “dolphins killed or seriously injured”.³¹

²⁹ Appellate Body Report, *US – Clove Cigarettes*, paras. 182 and 215; Appellate Body Report, *US – Tuna II (Mexico)*, paras. 214-215 and 225; Appellate Body Reports, *US – COOL*, para. 271.

³⁰ United States' second written submission, paras. 151 and 152.

³¹ This was confirmed by the panel in the original proceeding. See Panel Report, *US – Tuna II (Mexico)*, paras. 7.485-7.486 (“[T]he adverse effects on dolphins targeted by the US dolphin-safe provisions, as described by the United States, relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations.”)

45. Accordingly, in the context of Article 2.1 and the facts of this dispute, “risks posed to dolphins” means the risk of dolphin mortalities or serious injuries in tuna fishing sets or gear deployments.

(b) ***The Relevance of Comparative Assessment of Risks to Dolphins to the Three Labelling Conditions and Requirements Identified by Mexico***

46. Mexico has identified three labelling conditions and requirements that must be considered in the Panel's assessment of even-handedness under Article 2.1. To the extent that it is relevant to the Panel's analysis of even-handedness, the comparative assessment of risks posed to dolphins in different fisheries would only be relevant to the first labelling condition and requirement that is examined by Mexico, i.e., the disqualification of AIDCP-compliant dolphin sets in the ETP and the qualification of other fishing methods. For the reasons set out below, it would not be relevant to the other two labelling conditions and requirements considered by Mexico, i.e., record-keeping, tracking and verification, and observer coverage.

(c) ***The Potential Benchmarks for a Comparative Assessment of Risks***

47. The responses to this question depend on the “benchmark” that is used for assessing “risks posed to dolphins” under the Amended Tuna Measure. To the extent that the United States has put forward positions on this benchmark, those positions are unclear. As a consequence, in each of sections (d) and (e) of this response, Mexico presents three different potential benchmarks for the purpose of assessing these risks: (i) a “zero tolerance” benchmark; (ii) an objective, scientifically-established benchmark; and (iii) other benchmarks proposed by the United States.

48. As explained below, in applying these potential benchmarks, this response distinguishes between “observed” and “unobserved” mortalities and serious injuries. The former are observed during a dolphin set or gear deployment, while the latter cannot be observed. (There is another category, “unobserved (but observable)” which encompasses dolphin mortalities and serious injury that could have been observed, but were not observed because of the absence of a trained observer. This category overlaps the other two categories).

(d) ***Application of the Potential Benchmarks to the Requirements for Record-Keeping, Tracking and Verification and for Observer Coverage***

49. The requirements for record-keeping, tracking and verification and for observer coverage relate to observed dolphin mortalities and serious injury.

Zero Tolerance Benchmark

50. Under the Amended Tuna Measure, the terms “dolphins ... killed or seriously injured” are clearly designed and applied in an absolute way in the context of observed adverse effects. Tuna caught in a fishing set or gear deployment cannot be labelled as dolphin-safe if only a single dolphin mortality or serious injury is observed during the set or deployment. It is not a question of the relative number of dolphins that are killed or seriously injured during fishing sets

or gear deployments. It is simply a question of whether or not such adverse effects merely exist. Mexico refers to this as a “zero tolerance” benchmark for risk.

51. This has important implications for the Panel's analysis of even-handedness in light of the labelling conditions and requirements related to record-keeping, tracking and verification and observer coverage. Mexico and the United States are in agreement that when there is an observed dolphin mortality or serious injury in a fishing set or gear deployment, the tuna caught in that set or deployment cannot be labelled as “dolphin-safe”. The parties are also in agreement that, with the exception of pole-and-line fishing, all fishing methods in all tuna fisheries result in observed dolphin mortalities and serious injuries.³² Thus, for all fishing methods and in all fisheries, there is always both dolphin-safe tuna and non-dolphin-safe tuna.

52. The guaranteed existence of these two categories of tuna, regardless of the fishery in which the tuna is caught or the fishing method that is used to catch it, makes record-keeping, tracking and verification requirements and observer coverage requirements in all tuna fisheries a necessity; otherwise there is no way to ensure that tuna products are being accurately labelled. Accordingly, a comparison of the magnitude of dolphin mortalities and serious injuries in different fisheries is 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. It is beyond question that these conditions and requirements need to be applied to the tuna caught in all fisheries. Under the Amended Tuna Measure, they are not so applied, and, for that reason, the relevant regulatory distinction is not even-handed.

Objective Scientific Benchmark

53. As the Amended Tuna Measure applies a zero tolerance benchmark to observed mortalities and serious injuries, and these adverse effects necessitate record-keeping, tracking and verification and observer coverage requirements in all fisheries, an objective, scientific benchmark that compares risks between fisheries is not relevant to these requirements.

Other Benchmarks Proposed by the United States

54. As the Amended Tuna Measure applies a zero tolerance benchmark to observed mortalities and serious injuries, and these adverse effects necessitate record-keeping, tracking and verification and observer coverage requirements in all fisheries, the other benchmarks proposed by the United States that compare risks between fisheries are not relevant to these requirements.

³² Throughout its first and second written submissions, the United States recognizes that fishing methods other than setting on dolphins result in observed dolphin mortalities and serious injuries, while arguing that the magnitude of dolphin mortalities and serious injuries associated with these other fishing methods is distinguishable from setting on dolphins. See e.g., United States' first written submission, para. 236; United States' second written submission, para. 92.

Conclusion & Answer to the Panel's Question

55. A zero tolerance benchmark is applicable to the record-keeping, tracking and verification and observer coverage requirements when assessing even-handedness under Article 2.1.

56. Since the relevant question under a zero tolerance benchmark is whether dolphin mortalities or serious injuries merely exist at all (i.e., is a single dolphin killed or seriously injured?), 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. The answer to the above question is, therefore, that the concerned party should not simply compare the raw number of dolphins killed in different fisheries, nor should it take into account the number of dolphins killed as a percentage of the known species population in the particular fishery because both comparisons are irrelevant for the purposes of a zero tolerance benchmark. The concerned party should simply determine whether any dolphin is killed or seriously injured in the fishery.

(e) ***Requirements for the Disqualification/Qualification of Fishing Methods***

57. The requirements for the disqualification and qualification of fishing methods appear to relate to both observed and unobservable mortalities and serious injuries. The United States, however, has not been clear on this point.

Zero Tolerance Benchmark

58. As noted above, a zero tolerance benchmark applies to observed dolphin mortality and serious injury. The zero tolerance benchmark also appears to be applied to unobservable mortality or serious injury, to the extent that the existence of such adverse effects appears to result in the total disqualification of two specific fishing methods: setting on dolphins with a purse seine net and driftnet fishing. Accordingly, it appears that it is not a question of the relative number of dolphins that are killed or seriously injured in a manner that cannot be observed. It is simply a question of whether or not such adverse effects merely exist in relation to these specific fishing methods.

59. The absolute prohibition against any unobservable dolphin mortalities or serious injuries imposed under the Amended Tuna Measure in respect of specific fishing methods is confirmed by the findings of the original Panel and by the United States' submissions in both the original proceedings and the present compliance proceedings. The original Panel found that “in response to a question by the Panel, the United States explained that its objective was not to achieve a specific number or rate of dolphin mortality, but rather generally to reduce the adverse effects of setting on dolphins to catch tuna by ensuring that the US market is not used to encourage setting on dolphins”.³³ In its first written submission in this proceeding, the United States submitted that

³³ Panel Report, *US – Tuna II (Mexico)*, paras. 7.420 and 7.485. See also United States' Response to Question 65(a) from the original Panel.

“[a]s the original panel found, the purpose of the US measure is to protect dolphins from the direct and indirect harms of setting on dolphins, which are intrinsic to this method of fishing, and only secondarily to conserve the dolphin populations in the ETP”, and “even if the dolphin populations were recovering, the United States would be under no obligation to re-visit the eligibility for the dolphin safe label of tuna caught by setting on dolphins”.³⁴ Thus, it appears that the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist.

60. If this is correct, such disqualification on the basis of an absolute prohibition against unobservable killing or serious injury of dolphins is not even-handed, because both Mexico and the United States agree³⁵ that other fishing methods result in such unobservable killing or serious injury, yet they are not subject to the same total disqualification.

61. In the alternative, if the Panel finds that a zero tolerance benchmark does not apply to the disqualification and qualification of fishing methods, the measure still lacks even-handedness for the following reasons.

An Objective Scientific Benchmark for Risk

62. If the Amended Tuna Measure is to disqualify fishing methods on a basis other than a zero tolerance benchmark, then it must employ an objective, scientifically-established benchmark. As discussed below, any other benchmark will be arbitrary.

63. An example of an objective, scientifically-established benchmark is one based on fishery-specific Potential Biological Removal (PBR) levels. The United States applies a PBR methodology to its own fisheries, but not to the ETP. The PBR level is the maximum number of animals, not including natural mortalities, that may be removed from an animal stock (such as dolphins) while allowing that stock to reach or maintain its optimum sustainable population. The observed mortality of dolphins in the ETP is substantially below the PBR level.³⁶ In 2002, the rate of mortality was determined to be 36 percent of the PBR level for eastern spinner dolphins and 28 percent of the PBR level for north eastern spotted dolphins.³⁷ Moreover, even if the

³⁴ United States' first written submission, footnotes 447 and 614. See also para. 103.

³⁵ The United States has explicitly conceded in this proceeding that fishing methods other than setting on dolphins result in unobserved harm to dolphins. See United States' second written submission, footnote 20 (“the United States does not suggest that fishing methods other than setting on dolphins do not cause *any* unobserved harm to dolphins. As we have said, many fishing techniques have the potential to harm marine mammals, including dolphins, and direct harms will have indirect (and unobserved) effects”).

³⁶ The PBR level is the product of: (i) the minimum population estimate of the stock; (ii) one-half of the maximum theoretical or estimated net reproductive rate of the stock at a small population size; and (iii) a recovery factor of between 0.1 and 1.0.

³⁷ Mexico's second written submission, para. 33.

unobservable mortality increased the mortality by almost 300% compared to the observed mortality, the total mortality in the fishery would still be below the PBR limit.³⁸ The United States submits that unobservable dolphin mortality results in actual dolphin mortality to be at least 14 percent higher than observed dolphin mortality.³⁹ This is substantially below 300 percent and, therefore, substantially below the PBR limit. Thus, there is no scientific basis to disqualify Mexico's fishing method.

64. Such a benchmark is not only objective and scientifically-established, but, importantly, it allows for a fair comparison between different fisheries. Different fisheries operate under different circumstances, and are home to dolphin populations of different sizes, comprised of different proportions of different dolphin species. Thus, it is not possible to compare the raw numbers of dolphins killed in different fisheries because the circumstances relating to their populations, reproductive rates, and the recovery of the dolphin stocks will differ. Comparing raw numbers is akin to comparing apples to oranges. It is not a proper comparison.

65. If the Amended Tuna Measure applied an objective, scientifically-established benchmark for assessing the risk posed to dolphins, the answer to the above question would be that the concerned party should not simply compare the raw numbers of dolphins killed in different fisheries, but, rather, should take the raw numbers into account in determining the quantity of dolphins killed as a percentage of the known species population in each relevant fishery. Establishing a sustainable level of risk based on fishery-specific PBR levels is an example of how this has been done by the United States.

66. However, such a benchmark is not applied under the Amended Tuna Measure. As noted above, the United States has taken the position that the Amended Tuna Measure is not based on dolphin population recovery. Moreover, the United States has not conducted a proper study of the status or the rate of dolphin population recovery in the ETP, and has made no attempt to properly study these characteristics in other tuna fisheries. Accordingly, this benchmark has no application in the Panel's analysis under Article 2.1. If this benchmark were to be applied, the fact that proper scientific studies have not been undertaken and such studies are not permitted for the ETP under the Amended Tuna Measure, demonstrates that the disqualification of Mexico's fishing method and the qualification of other fishing methods is not even-handed.

Other Benchmarks Raised by the United States

67. The United States argues in its written submissions that the observed and unobservable harms caused to dolphins by other fishing methods are lesser than those caused by setting on dolphins.⁴⁰ In advancing this argument, the United States refers to: the dolphin mortalities in the

³⁸ Ibid.

³⁹ United States' second written submission, para. 95.

⁴⁰ See United States' first written submission, para. 79; United States' second written submission, para. 18.

ETP prior to the implementation of the AIDCP;⁴¹ the actual dolphin mortalities observed in the ETP in recent years;⁴² and the maximum mortalities permitted under the AIDCP.⁴³

68. For the purposes of assessing the risks to dolphins using other fishing methods in other fisheries, all three of these benchmarks are completely arbitrary. As noted above, using an absolute number rather than a relative number determined by objective scientific study is entirely inappropriate given the differences between fisheries. In addition, the absolute number benchmarks proposed by the United States are in themselves fundamentally flawed.

69. The first benchmark – dolphin mortalities prior to the AIDCP – is completely irrelevant. The Mexican fishing fleet fishes in an AIDCP-compliant manner. Non-AIDCP-compliant fishing is not at issue in this dispute. Dolphin mortalities prior to the AIDCP show nothing more than how effective the AIDCP has been in protecting dolphins in the ETP.

70. The actual mortalities in the ETP referred to in the second benchmark are so small that the United States agrees that they are insignificant “from a population recovery perspective”.⁴⁴ As noted above, they are also significantly below the PBR level for the ETP.

71. Finally, with respect to the third benchmark, while the maximum level of mortality permitted in the ETP under the AIDCP is not arbitrary within its own context, i.e., population growth and sustainability based on the PBR within the ETP, it becomes arbitrary if it is used as a comparator against other fisheries for which an equivalent objective, scientifically-established benchmark has *not* been established. They are also significantly below the PBR level for the ETP.

72. Thus, there is no rational basis for disqualifying Mexico's fishing method on the basis of these benchmarks. Moreover, it is fundamentally arbitrary to use the “raw numbers” of dolphin mortalities associated with Mexico's fishing method as the basis for justifying the total disqualification of Mexico's fishing method. Under the absolute terms of the Amended Tuna Measure, Mexico's fishing method can never qualify.

⁴¹ See United States' first written submission, para. 79; United States' second written submission, paras. 15-16.

⁴² United States' first written submission, paras. 79 and footnote 158; United States' second written submission, footnote 40.

⁴³ United States' first written submission, paras. 61, 90, 109, 112, 141 and 145; United States' second written submission, paras. 17, 21, 23, and footnote 16.

⁴⁴ Panel Report, *US – Tuna II (Mexico)*, para. 7.557, citing the United States' response to Panel question No. 36, para. 89.

73. Thus, regardless of the benchmark(s) that are proposed by the United States, it is clear that the relevant regulatory distinction is not even-handed.

(f) *Other Justifications for Differential Treatment*

74. During the meeting with the Panel, the United States took the position that it was not trying to calibrate the Amended Tuna Measure to the different fisheries and fishing methods. To the extent that this means that the United States is not comparing the different fisheries and methods to different benchmarks, the above-noted references to other benchmarks raised by the United States may no longer be pertinent to its defence.

75. The United States raises other justifications for the differential treatment (e.g., setting on dolphins is intentional and inherently harmful to dolphins and other fishing methods are not). Those other justifications are addressed in Mexico's written submissions and oral statements and are not addressed here.

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?

76. Given the absence of comprehensive studies regarding the adverse effects of different fishing methods on dolphins in tuna fisheries outside the ETP, it is helpful to look at the information that is available in studies regarding the adverse effects of the same fishing methods on dolphins in other, non-tuna fisheries outside the ETP. Evidence from other, non-tuna fisheries shows that a number of different fishing methods inherently have both direct and indirect adverse effects on dolphins. For example, longlines are used to harvest swordfish as well as tuna – sometimes simultaneously. Thus, it is reasonable to infer that the same adverse effects on dolphins that occur when harvesting swordfish in longline sets will occur when harvesting tuna in longline sets. Gillnets are used to harvest sharks, catfish, cod, herring, gar, monkfish, salmon, pike, perch, flounder, seerfish, turbot, shrimp and other species, as well as tuna.⁴⁵ There is no reason to believe that harm to dolphins is any different when gillnets are used to catch tuna than when used to catch other species of sea life.

77. It has been estimated that 650,000 marine mammals are being killed as bycatch in commercial fisheries worldwide on an annual basis.⁴⁶ Even recognizing that this figure includes some non-dolphin species such as sea lions and whales, the implication is that there are hundreds of thousands of dolphin mortalities. The ETP remains the only major fishery of any kind – tuna

⁴⁵ See, e.g., Natural Resources Defense Council, "Net Loss: The Killing of Marine Mammals in Foreign Fisheries" (January 2014), pp. 20-21 (Exhibit MEX-103); Oceana, "Wasted Catch: Unsolved Problems in U.S. Fisheries" (March 2014), p. 26 (Exhibit MEX-109).

⁴⁶ Oceana, "Wasted Catch: Unsolved Problems in U.S. Fisheries" (March 2014), p. 9 (Exhibit MEX-109).

or non-tuna – that has comprehensive protections for dolphins and comprehensive data collection on bycatch. The fact that even non-tuna fisheries fail to protect dolphins, and kill many thousands of dolphins each year, further highlights the arbitrary nature of the Amended Tuna Measure, which allows (i) the use of fishing methods that are harmful to dolphins to catch tuna, and (ii) non-ETP tuna products to be labelled dolphin-safe without any type of verification and tracking system, and without certifications from independent observers.

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?**

78. It is important to highlight that no other Regional Management Fisheries Organization has adopted, or has plans to adopt, measures to protect dolphins that are remotely comparable to those of the AIDCP. None of them has even proposed a comprehensive program involving the use of special equipment, training, monitoring, tracking, verification, and certification of dolphin-safe status.⁴⁷

79. In particular, none of those organizations has established programs featuring the use of trained independent observers who are marine biologists onboard every large tuna fishing vessel fishing for tuna in their fishery regions. The goal for observer coverage in the IOTC is five percent.⁴⁸ In the ICCAT, observers from a regional program are required for vessels fishing for bigeye and yellowfin tuna two months a year in a limited region to enforce restrictions on FAD fishing,⁴⁹ while observers are required for bluefin tuna fishing in varying degrees,⁵⁰ again only to

⁴⁷ See Mexico's first written submission, para. 110; Mexico's second written submission, paras. 56-58.

⁴⁸ IOTC, Resolution 11/04 on a Regional Observer Scheme (Exhibit MEX-124).

⁴⁹ ICCAT, Recommendation by ICCAT on a Multi-Annual Conservation and Management Program for Bigeye and Yellowfin Tunas (11-01) (Exhibit MEX-125).

⁵⁰ For Bluefin tuna, the ICCAT requires observers from the regional observer program for all purse seine vessels. For other types of vessels, the individual member states are directed to do as follows:

Each CPC shall ensure observer coverage on vessels and traps active in the bluefin tuna fishery on at least:

- 20% of its active pelagic trawlers (over 15m),
- 20% of its active longline vessels (over 15m),
- 20% of its active baitboats (over 15m),

enforce limitations on the quantity of tuna caught. Observer coverage in the WCPFC is higher in fisheries located below 20 degrees north, but the goal is only five percent in the region above that line.⁵¹ Observers are not trained to monitor harm to dolphins (they are instead monitoring how much tuna is caught), and in many instances observer reports are not even shared by the national and regional observer organizations with the WCPFC.⁵²

80. The Commerce Department recently stated that observers outside the ETP are not qualified or authorized to report on marine mammal interactions. In publishing the Final Rule on July 9, 2013, NMFS responded to a comment that observers outside the ETP are not qualified or authorized to report on marine mammal interactions by stating “NMFS acknowledges that these skills are complex, and that many existing observer programs give little attention to marine mammal interactions.”⁵³

81. Thus, existing programs in regional fisheries organizations other than the AIDCP are not suitable for the certification of the dolphin-safe status of tuna or tuna products.

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?

82. Although dolphin mortalities in the ETP tuna fishery declined from 2011 to 2012 and again in 2013, Mexico has not argued that this is the result of any new methods developed since the original proceedings. Further, Mexico does not claim that these improvements are the result of any restriction on imports of tuna. To be clear, contrary to the implication of the question, the

Footnote continued from previous page

- 100% of towing vessels,
- 100% of harvesting operations from traps.

ICCAT, Recommendation By ICCAT Amending the Recommendation 12-03 by ICCAT to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean (13-07) p. 14 (Exhibit MEX-126).

⁵¹ 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).

⁵² See Mexico's first written submission, para. 110.

⁵³ See Mexico's second written submission, para. 58.

AIDCP does not contain or authorize restrictions on imports; rather, the United States long ago adopted a ban on imports of yellowfin tuna from the ETP from countries that have not been certified as complying with the AIDCP.⁵⁴ The United States certified Mexico in 2000. The AIDCP has its own dolphin-safe standard. The United States agreed to adopt the AIDCP dolphin-safe standard, but was later blocked from doing so by the U.S. Court of Appeals for the Ninth Circuit.⁵⁵

83. It is not contradicted that dolphin mortalities in the ETP plunged dramatically in 1992, the first year that the fishing fleets adopted dolphin protection methods on a voluntary basis. Later, the requirements were incorporated into a binding international treaty, the AIDCP. The number of mortalities has remained low ever since. The Amended Tuna Measure expressly incorporates the AIDCP requirements into the labelling conditions and requirements for tuna products containing tuna caught by large purse seine vessels within the ETP. The Amended Tuna Measure does not impose comparable requirements, either directly or indirectly, on tuna caught in any other tuna fishery.

84. During the hearing, in relation to this question, the United States asserted that dolphin mortalities in the ETP correlate to the quantity of dolphin sets that are made there. This claim is incorrect. For example, in 2012 there were 9,220 dolphin sets and the number of mortalities was 870; in 2013, there were 10,736 dolphin sets and the number of mortalities was 801.⁵⁶ Figure 3 from Exhibit MEX-3, copied below, shows the number of dolphin mortalities from 1979 through 2012. It is clear that the number of dolphin mortalities overall has been decreasing over time, without relation to the number of dolphin sets, and in fact that the number of mortalities per dolphin set continues to approach zero.

⁵⁴ Mexico's first written submission, paras. 63-67.

⁵⁵ Mexico's first written submission, paras. 30-35.

⁵⁶ For 2012 figures, see Report on the International Dolphin Conservation Program, Document MOP-28-05 (October 18, 2013), p. 3 (Exhibit MEX-3); for 2013 figures, see IAATC, Ecosystem Considerations, p. 3 (Exhibit MEX-110).

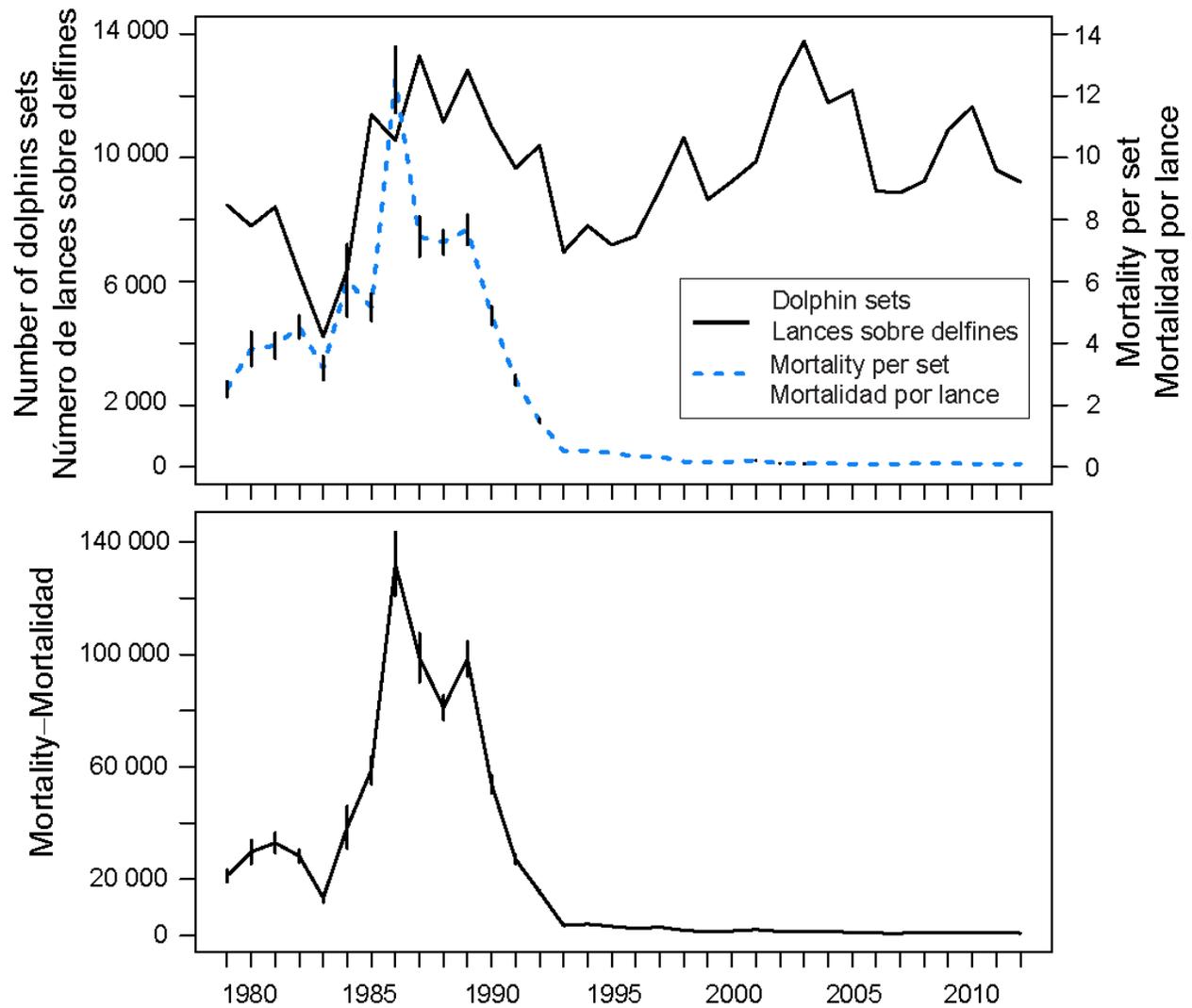


FIGURE 3. Total number of dolphin sets and average mortality per set (upper panel) and estimated total mortality (lower panel) for all dolphins in the EPO, 1979-2012. Each vertical line represents one positive and one negative standard error.

FIGURA 3. Número total de lances sobre delfines y mortalidad media por lance (panel superior) y mortalidad total estimada (panel inferior) para todas especies de delfines en el OPO, 1979-2012. Cada línea vertical representa un error estándar positivo y un error estándar negativo.⁵⁷

⁵⁷ Report on the International Dolphin Conservation Program, Document MOP-28-05 (October 18, 2013), p. 9 (Exhibit MEX-3).

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

85. It is important to clarify the use of the term “unobserved.” In the ETP, there are trained observers on all large purse seine vessels watching for harm to dolphins. The United States alleges, and Mexico denies, that some dolphins may be harmed in ways that cannot be seen by observers in the ETP – for example, that dolphins may be stressed by the experience and die sometime later, after the vessel has left.

86. In other fisheries outside the ETP, there is very limited observer coverage. Further, where there are observers onboard fishing vessels, they are not trained to watch for harm to dolphins and/or they have no responsibility for doing so. Thus, for example, a vessel in the Western Pacific Ocean fishing with longlines may cause harm to a number of dolphins as the lines are pulled in, but no one is specifically watching for such harm or making a record of it. That could be considered “unobserved” harm. If, however, there were an observer on the vessel with the specific responsibility to monitor dolphin bycatch, such harm would be capable of being “observed”.

87. There are also types of harm that could be considered “indirect” in the sense that they are not readily observable, even by an independent observer. Such “unobservable” harms are, by their very nature, “unobserved.” Evidence shows, for example, that dolphins maimed by longline hooks are able to swim away.⁵⁸ Moreover, longlines can be as long as 90 miles.⁵⁹ Even if there were a trained observer on a longline vessel, he or she may not be able to see dolphins harmed by the hooks that are not ultimately pulled onboard the vessel. Similarly, when dolphins are killed in gillnets or pulled up in purse seine nets purportedly set on FADs, captured mothers are separated from their uncaptured calves. These calves may later die as a result of the separation. Further, Mexico has submitted evidence demonstrating that dolphins swallow and choke to death on broken pieces of gillnet gear.⁶⁰

88. The United States has expressly agreed that fishing methods other than setting on dolphins cause “unobserved” harms.⁶¹

⁵⁸ Mexico's first written submission, paras. 132-149.

⁵⁹ Mexico's first written submission, para. 132.

⁶⁰ Mexico's first written submission, para. 131.

⁶¹ United States' second written submission, footnote 20.

89. The United States has criticized some of Mexico's evidence on the basis that it is old.⁶² There is no merit to this argument. The mortalities and serious injuries to dolphins are caused by the inherent nature of these other fishing methods. Nothing has changed in these methods to reduce the adverse effects that they have on dolphins. In any event, most of Mexico's comes from recent publications and studies, and all of Mexico's evidence is more recent than the evidence from the period 1959 to 1972 regarding the ETP on which the United States relies.⁶³

90. Mexico's evidence on dolphin mortalities outside the ETP includes the following:

Kobe II Bycatch Workshop

The 2010 "Kobe II Bycatch Workshop" Background Paper stated, among other things, that:

- The association of tuna and dolphins has been observed and documented in ocean regions other than the ETP.⁶⁴
- "In addition to tuna fishery interactions with dolphins, the ICCAT, the IOTC, and the IATTC have all documented purse seine fishers setting on tuna associated with large whales."⁶⁵
- "Tens to hundreds of thousands of [marine mammals] are killed each year through entanglement in fishing gear."⁶⁶
- Nearly all of the RFMOs have reports of marine mammals interactions with longline fishing, and "[b]ycatch can occur as a result of depredation events in longline fisheries via hooking and/or entangling of marine mammals (including mouth-hooking, ingestion of hooks, and entanglement of flippers or flukes)." Further, "RFMO members have reported the bycatch (including mortality and serious injury) of whales and dolphins in longline gear in fisheries for tuna and swordfish in both the western Atlantic and central Pacific Oceans."⁶⁷

⁶² United States' second written submission, paras. 38 and 39.

⁶³ United States' second written submission, para. 17.

⁶⁴ Kobe II Bycatch Workshop Background Paper, available at http://www.tuna-org.org/Documents/Aus/Kobe_II_Bycatch_Workshop_Marine%20Mammal_FINAL_ENG.pdf, p. 2 (Exhibit MEX-39).

⁶⁵ Ibid., p. 2.

⁶⁶ Ibid., p. 1.

⁶⁷ Ibid., p. 2.

- “It is generally accepted that, wherever gillnets are deployed, there is likely some degree of marine mammal bycatch In tuna gillnet fisheries off Sri Lanka, India, Yemen, Iran, and Pakistan, there is some indication that levels of marine mammal bycatch (e.g., spinner, spotted, common, Risso's, and bottlenose dolphins) may be substantial Coastal gillnets may also be used to catch tuna within the IATTC and ICCAT convention areas.”⁶⁸

U.S. National Marine Fisheries Service

An Administrative Report of the National Oceanic and Atmospheric Administration (NOAA) states that “[a]lthough several of the references in this bibliography suggest that tuna do not associate with dolphins in the Atlantic, Indian, and western Pacific Oceans as systematically as they do in the eastern tropical Pacific, tuna-dolphin associations have been sighted and deliberately set upon in these areas”. The Report recognizes that “the available data are difficult or impossible to standardize because of the inconsistency in methods which the data were collected and in the durations of such data collection efforts. It concludes that “an obvious problem with concluding ... that incidental mortality of dolphins in tuna purse-seines outside the ETP is minimal is that many of the existing reports have been produced by groups with vested interests in one or another viewpoint: groups related to commercial fishing interests will obviously hope to find little evidence of tuna-dolphin problems similar those occurring in the ETP...”⁶⁹

Young and Iudicello, “Worldwide Bycatch Of Cetaceans,” U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Tech. Memo. NMFS-OPR-36) July 2007 (“Bycatch Report”)

“Spinner and Fraser’s dolphins experience substantial bycatch in Philippine fisheries. In the Philippines, scientists estimated that about 2,000 dolphins—primarily spinner, pan-tropical spotted, and Fraser’s—were being killed each year, probably at unsustainable levels, by a fleet of five tuna purse-seiners using fish-aggregating devices.”⁷⁰

⁶⁸ Ibid., p. 2.

⁶⁹ U.S. National Marine Fisheries Service, An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of The Eastern Tropical Pacific Oceans (November 1996), pp. 2 and 38 (Exhibit MEX-40).

⁷⁰ Young and Iudicello, “Worldwide Bycatch Of Cetaceans,” U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Tech. Memo. NMFS-OPR-36) July 2007 (hereinafter “Bycatch Report”), p. 112 (Exhibit MEX-18).

“In 1996 and 1998 respectively, the Irish driftnet fishery for albacore caught 356 and 2,522 common dolphins.”⁷¹

K.S.S.M. Yousuf, et al., “Observations On Incidental Catch Of Cetaceans In Three Landing Centres Along The Indian Coast,” Marine Biodiversity Records, Vol. 2 (2009)

“According to a marine fisheries census, 14,183 motorized gillnetters are operating along the Indian coast (CMFRI, 2006). In recent years, the length of the gillnet has been increased and the fishing grounds have been extending to oceanic waters. The total number of dolphins killed by fishing operations in the Indian Seas must be quite substantial considering the extent of operation of these nets. Considering that 44 cetacean kills were recorded in 80 days by ~400 gillnetters, we could be looking at alarmingly high numbers of around 9000–10,000 cetaceans killed every year by 14,183 motorised gill-netters in about 240 days of operation in the Indian waters. This could still be an under-estimate, as our observations were restricted to only 3 hours per day. This estimate is considerably higher than the estimates (1000–1500) by Lal Mohan (1994). Increase in the number and efficiency of gillnetters has perhaps increased mortality in the last 15 years. To arrive at a better estimate of marine mammal mortality along the Indian coast, it is important to undertake surveys covering more fish landing centres for longer duration.”⁷²

M. Moazzam, “Status report on bycatch of tuna gillnet operations in Pakistan,” IOTC 8th Session of the Working Party on Ecosystems and Bycatch (2012)

Dolphins seem to be more frequent in getting entangled in tuna gillnets. Indo-pacific humpback dolphin are more frequently entangled in gillnets placed in coastal waters where rarely a few black finless porpoises are also reported to be entangled. Spinner dolphin, pantropical spotted dolphin and bottlenose dolphins seems to entangle in tuna gillnets deployed in offshore waters. Other species of dolphins occurring in Pakistan are also prone for entanglement in gillnets. According to fishermen, most of dolphins entangled in gillnet die immediately. Since dolphins are considered sacred by fishermen, therefore, live dolphins are immediately released and those dead are thrown back. Although it is not possible to accurately estimate the number of dolphins killed every year in tuna gillnet

⁷¹ See, e.g., Bycatch Report, p. AA-15 (“In 1996 and 1998 respectively, the Irish driftnet fishery for albacore caught 356 and 2,522 common dolphins.”) (Exhibit MEX-18).

⁷² K.S.S.M. Yousuf, et al., “Observations on Incidental Catch of Cetaceans in Three Landing Centres along The Indian Coast,” Marine Biodiversity Records, Vol. 2 (2009), p. 4 (Exhibit MEX-50).

fisheries of Pakistan but based on limited information collected recently (Moazzam, 2012) it is estimated that 25- 35 dolphins are killed every month.⁷³

*M. Gomercic, et al., "Bottlenose dolphin (*Tursiops truncatus*) depredation resulting in larynx strangulation with gill-net parts," Marine Mammal Science, 25(2)*



Figure 4. Gill-net part causing larynx strangulation and protruding from the mouth of a bottlenose dolphin.

D. Hamer, S. Childerhous & N. Gales, "Odontocete bycatch and depredation in longline fisheries: A review of available literature and of potential solutions"

"Operational interactions between odontocetes (*i.e.*, toothed whales) and longline gear are a global phenomenon that may threaten the conservation of odontocete populations and the economic viability of longline fisheries."⁷⁴

⁷³ M. Moazzam, "Status report on bycatch of tuna gillnet operations in Pakistan," IOTC 8th Session of the Working Party on Ecosystems and Bycatch (2012), available at <http://www.iotc.org/files/proceedings/2012/wpeb/IOTC-2012-WPEB08-13.pdf> (Exhibit MEX-51), p. 7.

⁷⁴ D. Hamer, S. Childerhous & N. Gales, "Odontocete bycatch and depredation in longline fisheries: A review of available literature and of potential solutions," *Marine Mammal Science*, 28(4): E345–E374 (October 2012), p. E345 (Exhibit MEX-55).

U.S. National Oceanic and Atmospheric Administration

“During Hawaii-based longline fishing operations, false killer whales can become hooked or entangled in fishing gear and, as a result, may become seriously injured or killed. These ‘takes’ often occur when false killer whales are preying on the longline catch or bait.

Currently, these takes are occurring at a level that is unsustainable for the Hawaii Pelagic and Main Hawaiian Islands Insular stocks (i.e., takes exceed a threshold called the ‘Potential Biological Removal’ level, or PBR, for each stock).”⁷⁵

“Though there has been no discernible trend in pilot whale abundance (20,396 animals based on the 2011 survey), there has been a recent increase in serious injuries and mortalities (up to 298 animals over the past year in all Atlantic areas).”⁷⁶

Sea Turtle Restoration Project

“The estimate in Figure 10 [estimating 18,000 killed annually by longline fishing in Pacific Ocean] is based on bycatch rates from observed Hawaiian tuna or swordfish vessels. However, it is important to note that the data does not include species that may have become entangled in the gear and broken free during the time the gear is employed. Marine mammals dragging broken longline gear is commonly observed and may severely impact individuals and species.”⁷⁷

Oak Foundation, the U.S. Marine Mammal Commission, and the New England Aquarium and the South Pacific Regional Environment Programme

“A survey of cetaceans landed at the Tungkang and Nanfang Ao fishing ports was conducted in 1994 and 1995. Seventy-six and 24 cetaceans observed at Tungkang and Nanfang Ao, respectively, came from longline vessels. Of these, 23 had been hooked in the mouth or throat region, 11 had been entangled, 53 had been harpooned, and the nature of the interactions with longline fishermen was unknown for 13 carcasses (due to their condition). Almost all of the common bottlenose dolphins (*Tursiops truncatus*) and rough-toothed dolphins (*Steno*

⁷⁵ NOAA, False Killer Whale, Take Reduction Process Frequently Asked Questions, pp. 1 and 2, available at www.fpir.noaa.gov/Library/PRD/FKW%20TRT/False%20Killer%20Whale%20TRT%20FAQ_2.10.pdf (Exhibit MEX-60).

⁷⁶ U.S. National Oceanic and Atmospheric Administration (NOAA), Pelagic Longline Take Reduction Team Key Outcomes Memorandum, August 21-23, 2012, available at www.nmfs.noaa.gov/pr/pdfs/interactions/pltrt_august2012_memo.pdf, pp. 4-5 (Exhibit MEX-62).

⁷⁷ Sea Turtle Restoration Project, “Pillaging the Pacific” (November 16, 2004), available at <http://www.seaturtles.org/pdf/Pillaging.5.final.pdf> (Exhibit MEX-64).

bredanensis) had been hooked, whereas most of the pantropical spotted (*Stenella attenuata*), spinner (*S. longirostris*) and striped (*S. coeruleoalba*) dolphins appeared to have died after becoming entangled in lines. A Risso's dolphin (*Grampus griseus*) had been hooked.

* * *

.... Most of the cetaceans taken are likely discarded at sea or consumed onboard because the legal protection of cetaceans in Taiwan under the Wildlife Conservation Law makes it risky to land them. Therefore, the number of carcasses recorded at the fishing ports should be considered an underestimate of the number killed.

It was concluded that the level of cetacean mortality in longline fisheries is considerably higher than generally assumed.”⁷⁸

R. Baird & A. Gogone, “False Killer Whale Dorsal Fin Disfigurements as a Possible Indicator of Long-Line Fishery Interactions in Hawaiian Waters,” Pacific Science (October 2005)

“Observer reports from the Hawai‘i long-line fishery have noted that false killer whales struggle vigorously when hooked (E. Forney, pers. comm.), and a photograph of one hooked false killer whale from this fishery shows a linear mark extending posteriorly from the mouth along the side of body (Figure 2), presumably an abrasion from struggling against the longline. All three of the animals we documented with completely or partially bent-over fins had injuries at the leading edge base of the fin. Such injuries are consistent with line or fishing gear injuries documented from other cetaceans (see, e.g., Norris 1992, Wells et al. 1998, Robbins and Mattila 2001). We suggest that the major dorsal fin disfigurements we have documented from Hawai‘i false killer whales are most likely a result of long-line interactions such as this, with an animal struggling against a longline rolling against the gear and injuring or severing the dorsal fin in such struggles.”⁷⁹

U.K. House of Commons, Environment, Food and Rural Affairs Committee

“... an Irish study of a trial pelagic pair trawl fishery for albacore tuna observed 30 dolphins being caught in a single haul, with 145 cetaceans caught by just four pairs of trawlers in a single season. During 2001 observers placed on UK pair

⁷⁸ Eds. M. Donoghue, R. Reeves & G. Stone, “Report of The Workshop on Interactions Between Cetaceans and Longline Fisheries,” New England Aquarium Aquatic Forum Series Report 03-1 (May 2003), pp. 3-4 (Exhibit MEX-65).

⁷⁹ R. Baird & A. Gogone, “False Killer Whale Dorsal Fin Disfigurements as a Possible Indicator of Long-Line Fishery Interactions in Hawaiian Waters,” *Pacific Science* (October 2005), available at http://www.nmfs.noaa.gov/pr/interactions/injury/pdfs/day2_1155_baird_gorgone.pdf, p. 597 (Exhibit MEX-66).

trawlers targeting the winter sea bass fishery recorded a catch of 53 dolphins in 116 hauls.”⁸⁰

Whale and Dolphin Conservation Society

“During 1993-1995 observer studies were conducted in pelagic trawl fisheries operating seasonally in the area from the Bay of Biscay north to south-west Ireland and in the western approaches to the English Channel. Dolphin catches were recorded in four of the 11 fisheries studied: the Dutch horse mackerel fishery, the French hake fishery, the French albacore tuna fishery and the French sea bass fishery, although it is emphasized that zero observed bycatch in the remaining fisheries does not imply there is no bycatch in them (Morizur et al. 1999). The species caught were common dolphin, Atlantic white-sided dolphin and a probable bottlenose dolphin. This study made no attempt to extrapolate from the observations to a total cetacean bycatch. However, the report notes that the size of the European fleet and the amount of fishing effort mean that the total number of animals caught may be significant.”⁸¹

“During the entire study period of the PETRACET project which looked at pelagic trawls in the western Channel, Celtic Sea and Bay of Biscay (ICES areas VII and VIII), 93 cetaceans were taken in 21 of 952 observed fishing operations. It is estimated that between 1900 and 1950 cetaceans are bycaught in fisheries operating in these areas each year. 96% of them are likely to be common dolphins. It is important to note that this study was focused on fisheries which have high levels of bycatch i.e. bass, tuna and anchovy and therefore estimates of bycatch may be biased upwards (Northridge et al., 2006).”⁸²

Natural Resources Defense Council:

“Taiwan maintains a massive distant-water fishing fleet, including tuna purse-seiners and longliners that are responsible for killing a large number of marine mammals in foreign fishing grounds. At more than 1,900 vessels, the country's fleet is currently the largest in the Western and Central Pacific and contributes

⁸⁰ U.K. House of Commons, Environment, Food and Rural Affairs Committee, “Caught in the net: by-catch of dolphins and porpoises off the UK coast”, printed January 21, 2004, Memorandum submitted by Whale and Dolphin Conservation Society, EV-26-27 (Exhibit MEX-70).

⁸¹ A. Ross and S. Isaac, “The Net Effect? A Review of Cetacean Bycatch in pelagic trawls and other fisheries in the north-east Atlantic” (Whale and Dolphin Conservation Society) (2004), p. 15, available at http://www.wdcs.org/submissions_bin/neteffect.pdf (Exhibit MEX-71).

⁸² L. Nunny, *The Price of Fish: A review of cetacean bycatch in fisheries in the north-east Atlantic* (Whale and Dolphin Conservation Society) (2011), p. 16, available at http://www.wdcs.org/submissions_bin/price_of_fish.pdf (Exhibit MEX-72).

significantly to the region's outsize tuna catch, which represents some 60 percent of the entire world's tuna.

Specific bycatch statistics for marine mammals killed in Taiwanese distant-water purse seines are not available. But the scale of the fishery, along with the lack of management, is cause for concern. NGOs have reported that observer numbers are insufficient and that observers are often unable to perform their jobs without interference from fishing operators; accordingly, any official bycatch figures for the fishery are likely to underestimate the impact.

The Taiwanese offshore and distant-water driftnet fleet was also identified in *Global Priorities for Reduction of Cetacean Bycatch* as a problem fishery and conservation priority. Taiwanese gillnetters targeting tuna previously operated in waters north of Australia, where they killed a variety of small cetaceans including spinner dolphins and Indo-Pacific humpback dolphins (*Sousa chinensis*). This fishery caught approximately 14,000 cetaceans in a span of only four and a half years. After the Taiwanese were expelled from Australian waters due to high levels of cetacean bycatch, the fishers are believed to have moved to Indonesian waters. Illegal, unreported, and unregulated Taiwanese vessels have also been identified as a particular problem in offshore waters of the Philippines, where enforcement measures are lacking.

Nearshore Taiwanese fisheries are also likely to represent a serious bycatch threat to cetaceans, as documented in the 2005 paper *Report of the Second Workshop on the Biology and Conservation of Small Cetaceans and Dugongs of South-East Asia* ("Workshop Report on Southeast Asia Bycatch"). The paper summarizes the findings of a 2002 Convention on Migratory Species workshop focusing intently on bycatch threats, conservation status, and relevant legislation applicable to marine mammals in Southeast Asia. According to the paper, between 27,000 and 41,000 cetaceans are incidentally killed each year by the fisheries in the eastern waters of Taiwan. The report notes that while these estimates are 'highly provisional because of the many assumptions involved and the relatively small sample sizes for the observations, they are indicative of large-scale mortality' taking place in the region.⁸³

- 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?**

⁸³ Natural Resources Defense Council, "Net Loss: The Killing of Marine Mammals in Foreign Fisheries" (January 2014), p. 29 (footnotes omitted) (Exhibit MEX-103).

91. The IATTC/AIDCP does not collect comprehensive data on the bycatch of vessels that are not large purse seine vessels. Only large purse seine vessels carry observers.

92. There are relatively few mortalities resulting from large purse seine vessels setting on FADs in the ETP, but that data cannot reasonably be extrapolated to project dolphin mortalities from purse seine fishing elsewhere, in particular because it is known that (i) purse seine vessels outside the ETP set nets on dolphins and (ii) depending on conditions, dolphin species, and other factors, dolphins in other regions may be caught and drowned in nets even when the fishers are actually setting on FADs. There is certainly evidence that large purse seine vessels in other ocean regions have caused substantial dolphin mortalities.⁸⁴ Absent evidence to the contrary, it would be unreasonable to assume that such mortalities have ceased.

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?

93. The U.S. Commerce Department has not made any determination whatsoever regarding whether any other fishery outside the ETP has regular and significant dolphin mortality and serious injury. In fact, as Mexico has explained,⁸⁵ during the period of more than twenty years that the statute has been in effect, the Commerce Department has not even undertaken to review that subject. The only evidence available regarding the absence of the United States' interest in determining whether or not there is regular and significant harm to dolphins occurring in fisheries outside the ETP is contained in a report on worldwide bycatch of cetaceans commissioned by the Commerce Department, which stated:

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.⁸⁶

⁸⁴ Mexico's first written submission, paras. 112-125.

⁸⁵ Mexico's opening statement at the meeting with the Panel, para. 19.

⁸⁶ Bycatch Report, p. 38 (Exhibit MEX-18).

In other words, because the U.S. Congress has focused exclusively on the incidental capture of dolphins in purse seine nets in the ETP, there is no interest or resources available to deal with dolphin mortalities caused by other fishing methods in other fisheries. There is no definition of “regular and significant” in the statute or regulations, or in any guidance issued by the Commerce Department.

94. Based on the substantial evidence of dolphin mortalities and serious injuries in other tuna fisheries, it is obvious that the U.S. Commerce Department should have made determinations on this subject. The failure to evaluate whether or not there is regular and significant harm to dolphins occurring in fisheries outside the ETP, or the decision not to do so under the provisions of the Amended Tuna Measure is itself an indication of arbitrariness.

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?

95. Similar to the failure of the U.S. Commerce Department to evaluate whether there is regular and significant mortality and serious injury of dolphins occurring in any other fishery outside the ETP (as discussed in response to question 21, above), the Commerce Department has also failed to make any determination regarding tuna-dolphin association outside the ETP, or even undertaken any evaluation of that subject.

96. As previously stated, there is no definition of “regular and significant” in the statute or regulations, or in any guidance issued by the Commerce Department.

97. In light of the evidence of purse seine sets on marine mammals in the Western and Central Pacific, the Indian Ocean, and the East Atlantic, and the close association between dolphins and longline fishing, it is clear that the Commerce Department should have made such determinations under Section 216.91(a)(2)(i).

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

98. The term “where applicable” is intended to encompass circumstances in which the Commerce Department has made a determination that observers in a particular fishery are “qualified and authorized” to endorse the captain’s certificate. The Commerce Department has made such a determination only with respect to the seven U.S. domestic fisheries identified in the July 2014 Federal Register notice, and such observer is only necessary when an observer is onboard the vessel for other reasons.

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?

99. Form 370 is not applicable to the seven fisheries referred in para. 128 of the United States' second written submission. This is because the seven fisheries are U.S. domestic fisheries in which only U.S. vessels fish. Form 370 is required only for imported tuna, and tuna caught by U.S. vessels is not treated as imported. Accordingly, Form 370 is not required for such tuna.

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?

100. Section 1385(d)(1)(D) of the Dolphin Protection Consumer Information Act prohibits the use of the dolphin-safe label on tuna products containing tuna caught:

by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary.⁸⁷

Thus, as Mexico noted during the hearing, the Amended Tuna Measure contemplates that observer statements may be required for tuna caught by vessels outside the ETP, without regard to the fishing method used.

101. The Panel has correctly noted that Form 370 does not provide for the option that a written statement from observers would be required for tuna caught by vessels operating outside the ETP in a fishery identified as having a regular and significant mortality or serious injury of dolphins.

Observers

26. To Mexico: Could Mexico please comment on para. 128 of the United States' second written submission regarding the new requirements for qualification of observers?

102. The new requirements apply only to certain tuna fisheries in U.S. domestic waters, and do not increase the level of observer coverage in any of those fisheries; rather, the regulation provides that if an observer is already going to be onboard for other reasons, then the observer can be required to support the captain's certificate. The United States summarized as follows:

⁸⁷ See 16 U.S.C. § 1385(d)(1)(D) (Exhibit MEX-8).

Each of these seven U.S. observer programs has a certain level of observer coverage (ranging from approximately 8 to 100 percent), although the exact coverage for any one of these fisheries can vary depending on the availability of funds and other considerations. This notice does not affect the level of observer coverage in any one of these seven fisheries.⁸⁸

103. Significantly, in publishing the announcement, the Commerce Department stated that it agreed with the comment of the American Tuna Boat Association that observers outside the scope of the AIDCP are not qualified to make dolphin-safe certifications, with the exception of observers trained by the Commerce Department itself.⁸⁹ In other words, the Commerce Department agreed that no non-U.S. observer programs, other than the ones operating under the auspices of the AIDCP, are qualified to make dolphin-safe certifications.

104. Mexico re-affirms that there is an inherent conflict between the U.S. argument that observers are unnecessary outside the ETP and the fact that the United States is now requiring observer certifications in some circumstances in its own domestic tuna fisheries.

105. Mexico noted during the hearing that the United States has identified in this regulatory action a U.S. domestic gillnet fishery that harvests tuna. In its first written submission, the United States stated: “Notably, the United States does not have a gillnet fishery targeting tuna.”⁹⁰ This statement by the United States obviously was incorrect. Mexico reaffirms its position that gillnet fishing is extremely harmful to dolphins, and that gillnets are used to harvest tuna for the U.S. market.⁹¹

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?

106. In its first written submission, the United States noted that a “typical” U.S.-flagged purse seine vessel captures 2 to 3 million pounds (equal to 900 to 1,360 metric tons) of tuna per

⁸⁸ United States' second written submission, footnote 245.

⁸⁹ NOAA, Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, 79 Fed. Reg. 41718 (July 14, 2014) (Exhibit MEX-116).

⁹⁰ United States' first written submission, footnote 52.

⁹¹ Mexico's first written submission, paras. 126-131.

voyage.⁹² As of June 10, 2014, the average price paid for frozen skipjack landed in Bangkok was US\$1,600 per ton, while the price for frozen yellowfin landed in the Seychelles was 2,170 euros (about US\$2,950).⁹³ Accordingly, as of that date, the value of tuna caught by a purse seine vessel would range from approximately US\$1.4 million to US\$2.2 million for skipjack tuna, and US\$2.7 million to US\$4 million for yellowfin tuna.

107. Under the Amended Tuna Measure, if the dolphin set method is used even once during a voyage, then none of the tuna caught during that voyage is eligible for the dolphin-safe label. During the hearing, the United States confirmed that canneries will not buy tuna that is not designated as dolphin-safe. Mexico agrees. There is an extremely strong disincentive for a captain to self-report a dolphin set. In Mexico's view, there is a natural economic interest for a captain and the company for which he works to designate tuna as dolphin-safe.

108. The Commerce Department judge in the Freitas case commented:

Given the incentives for making unlawful sets on marine mammals when the amount of potential economic gain associated with a catch of large tuna is so great, compliance with the mandates not to set on marine mammals is difficult to enforce. Here, Respondents knew not to intentionally set on whales and yet elected to do so anyway presumably because the economic benefits outweighed the potential cost under the MMPA.⁹⁴

109. Other evidence submitted by Mexico shows that captains will not voluntarily make adjustments to their operations in order to avoid dolphins during a fishing set. A report by a U.S. observer on a U.S. longline vessel operating in the Atlantic stated, in pertinent part:

When setting gear there were a group of dolphins all around the boat as [sic] the gear was being set. ... No adjustments were made to avoid the animals.⁹⁵

110. Whether captains are being paid based on the volume or value of the tuna that is caught by their vessels, or on a salary basis, is irrelevant. If tuna cannot be sold to canneries, or if the catch volume of the vessel is low because it tried to avoid dolphins, those outcomes would be contrary to the economic interests of the companies that own and operate the vessels. A captain would not long be employed under such circumstances.

⁹² United States' first written submission, footnote 242.

⁹³ Atuna, "Tuna Market Price Watch" (Exhibit MEX-112).

⁹⁴ Freitas case, p. 96 (Exhibit MEX-46).

⁹⁵ NMFS, Estimated Bycatch of Marine Mammals and Sea Turtles in the U.S. Atlantic Pelagic Longline Fleet During 2007 (August 2008) (NOAA Technical Memorandum NMFS-SEFSC-572), p. 56 (Exhibit MEX-106).

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?

111. Mexico is not aware of any regulatory or other program that involves independent oversight or "spot checks" on U.S. captains. Mexico notes that such "spot checks" would have to occur onboard a vessel at the time of the sets or gear deployments – effectively the same as having an independent observer onboard. Thus, the only reliable method of oversight is to have an independent observer onboard a vessel with the appropriate training and the mandate to monitor for harm to dolphins. The only fisheries where there are such independent observers are the ETP and the U.S. domestic fisheries recently designated by the United States. In the latter case, however, there is not 100 percent observer coverage.

112. U.S. and non-U.S. captains operating in the West and Central Pacific Ocean, the Atlantic Ocean, the Indian Ocean, and the domestic waters of other countries are not subject to any kind of independent oversight of the validity of their dolphin-safe certifications. In the Freitas case, one of the captains testified that he was unaware of what the vessels' fishing master was doing.⁹⁶ This highlights the fundamental gap between the self-certification requirement and the realities of commercial fishing. Again, without an independent observer, there is currently no reliable procedure for verifying that a set or gear deployment did not harm dolphins.

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?

113. While captain's self-certifications might be reliable for certain purposes (e.g., for matters that are verifiable by post-entry audit and/or that do not involve a substantial financial conflict of interest), they are not reliable for the purpose of certifying the dolphin-safe status of the tuna caught by the captain's own fishing vessel.

⁹⁶ Mexico's first written submission, para. 285.

114. As Mexico has previously explained,⁹⁷ it is well-recognized that observers are necessary in order to obtain accurate information regarding bycatch of dolphins and other sea animals. A report on global marine mammal bycatch prepared jointly by the Duke University Marine Laboratory and the University of St. Andrews included the following comment:

Few U.S. fishers report marine mammal bycatch voluntarily, although they are required to do so by the Marine Mammal Protection Act. For example, in 1990 fishers reported a bycatch of 74 harbor porpoises in the Gulf of Maine, whereas the total bycatch extrapolated from an observer program was 2900 (CV = 0.32) (Bisack & DiNardo 1992; Weber 2002:159). It is widely accepted that accurate estimation of bycatch rates in any fishery requires an independent observer scheme (Northridge 1996).⁹⁸

115. The Department of Commerce reached the same conclusion in a 2004 report on bycatch monitoring programs, in which it stated:

The MMPA's Marine Mammal Authorization Program has as its primary focus the self-reporting of marine mammal incidental mortality and serious injury. Under the MMPA, all fishermen participating in a state or federal fishery that operates in U.S. waters are required to report all injuries and mortalities of marine mammals associated with fishing operations to NMFS within 48 hours of returning to port. This requirement was enacted by the 1994 amendments to the MMPA, and replaced a marine mammal logbook reporting requirement that had been in place for all Category I and II fisheries since 1989 (the Marine Mammal Exemption Program). However, the Program has not succeeded in obtaining reliable marine mammal bycatch data. Despite fairly good outreach and the distribution of reporting forms to all state and Federally-permitted fishermen each year, compliance with the reporting requirement is thought to be very low (Patricia Lawson, NMFS Office of Protected Resources, pers. comm.). Compliance with the previous Marine Mammal Exemption Program logbook requirement varied from fishery to fishery, but overall was also very low (Credle 1993).⁹⁹

⁹⁷ Mexico's first written submission, paras. 176-78.

⁹⁸ Read, Drinker, & Northridge, "Bycatch of Marine Mammals in U.S. and Global Fisheries", 20 *Conservation Biology* (2006) 163, p. 167 (Exhibit MEX-6).

⁹⁹ Commerce Department, "Evaluating Bycatch", NOAA Technical Memorandum NMFS-F/SPO-66 (October 2004), p. 28 (Exhibit MEX-77).

116. The Freitas case, which involved the unreported setting of purse seine nets on dolphins by U.S. tuna fishing vessels and illegal FAD fishing, further demonstrates that, without independent observers, a captain's certificate is not reliable.

117. Exhibit US-58 contains a report of the WCPFC on whale shark and cetacean interactions in the tropical WCPFC purse seine fishery. Table 1a. on page 4 presents data on different types of fishing sets in the WCPFC that were collected from the following two sources during the period from 2007 to 2009: (i) logsheets; and (ii) observers. Data from the logsheets indicates that 0.1 percent of the fishing sets were made on marine mammals, while in contrast, data from the observers indicates that 2.5 percent of the fishing sets were made on marine mammals.¹⁰⁰ In other words, the percentage of marine mammal sets reported by observers was 25 times higher than the percentage of marine mammal sets recorded in the logsheets.

118. The FAO has published, as a template for use by all countries, an "Observer Program Operations Manual" created by Canada. The Introduction to the manual explains that:

One of the major concerns of managers of fisheries by foreigners has been the validity of reported catches. It is extremely doubtful that managers would receive accurate reports of catches from foreign nations from non-monitored fisheries. It has been our experience that under-reporting is common practice and that even now, after years of persistent enforcement, discrepancies between real and reported catch can be as high as 20 to 25% for directed species, and from two to ten times higher for regulated by-catch species.¹⁰¹

119. Thus, it is well-accepted that self-reporting by captains is unreliable, especially with regard to regulatory limitations.

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?

120. Mexico is not aware of specific instances of dolphin-safe certifications being sold, but agrees that the U.S. system allows for certifications to be assigned to batches of tuna that may not have been caught in a dolphin-safe manner.

¹⁰⁰ WCPFC, Summary Information on Whale Shark and Cetacean Interactions in the Tropical WCPFC Purse Seine Fishery, p. 4 (Exhibit US-58).

¹⁰¹ FAO, Observer Program Operations Manual (ISBN 92-5-102461-81) (1986), Introduction, available at <http://www.fao.org/docrep/003/s8480e/S8480E01.htm#chI> (Exhibit MEX-127).

121. Outside the ETP, the unreliability of captain's self-certifications, combined with insufficient record-keeping, tracking and verification procedures, make it simple to assign a captain's certificate to any shipment of tuna products. The substantial level of illegal, unreported and unregulated (IUU) fishing both confirms and exacerbates this problem.

122. For example, in 2012 Greenpeace presented incontrovertible photographic evidence of a large scale, illegal, at-sea transfer of fish in the West Pacific between a ship from Cambodia, a ship from the Philippines, and two ships from Indonesia. According to Greenpeace, none of the boats were authorized by the WCPFC to operate there. The activity was discovered only because the Greenpeace vessel happened upon it.¹⁰²

123. At the 10th Scientific Committee meeting of the WCPFC held in August 2014 in the Marshall Islands, members of the Pacific Islands Forum Fisheries Agency (FFA) presented strong statements against the use of loopholes by major fishing nations in order to evade properly reporting their fishing catches within the exclusive economic zones (EEZs) of Pacific island countries. According to press reports, the chair of the FFA Science Working Group stated: "here we are 10 years down the track, and there are still four Asian Co-operating Country Members that are hiding behind the temporary deferment that allowed them time to amend their domestic regulations – laws that might have technically prevented them from supplying this operational data at the time of agreement."¹⁰³ He went on to say that "Pacific Island nations cannot collect data for Asian distant water vessels operating on the high seas if they are not licensed to fish in Pacific Island EEZs. This is a particular problem with long-liners. Many long-liners only fish on the high seas and are not responsible to any FFA members – only to the Commission and their flag state."¹⁰⁴

124. Article 29 and Article 4 of Annex III of the WCPFC Convention requires the Commission to develop procedures for transshipment and to obtain and verify data on the quantity and species of fish transshipped both in port and at sea within the Convention Area.¹⁰⁵ But as Mexico has pointed out, a significant proportion of longline fishing is occurring outside of the Convention Area (which is bounded by the latitudinal lines at 20° S and 20° N), where there

¹⁰² Greenpeace, "Greenpeace uncovers illegal tuna laundering" (15 November 2012), available at <http://www.greenpeace.org/usa/en/media-center/news-releases/Greenpeace-Uncovers-Illegal-Tuna-Laundering-in-the-Pacific-Ocean/> (Exhibit MEX-128).

¹⁰³ Solomon Star News, "Pacific Call Out Big Fishing Nations on Catch Data" (Aug. 18, 2014), available at <http://www.solomonstarnews.com/news/national/3493-pacific-call-out-big-fishing-nations-on-catch-data> (Exhibit MEX-129).

¹⁰⁴ Ibid.

¹⁰⁵ WCPFC, "Transshipment," WCPFC/TCC1/17 Rev. 1 (Nov. 22, 2005) (Exhibit MEX-130).

is no more than five percent observer coverage on longline vessels and no mandatory coverage on transshipment and supply vessels.¹⁰⁶

125. Missing catch data, limited observer coverage and IUU fishing activities also are problems in other tuna RFMOs supplying a significant portion of for the U.S. tuna product market. Mexico has demonstrated that the United States is unable to accurately track the source of the tuna that enters the U.S. market, which itself strongly indicates that the dolphin-safe status of such tuna is also not traceable.¹⁰⁷ Additional information is available in a peer-reviewed study published online in April 2014 and due to be published in the *Journal of Marine Policy*. This analysis evaluated the amount of illegal and unreported fish being imported into the U.S. market, concluding that “[i]llegal and unreported catches represented 20–32% by weight of wild-caught seafood imported to the USA in 2011, as determined from robust estimates, including uncertainty, of illegal and unreported fishing activities in the source countries.”¹⁰⁸

126. The study states that “[a]ccording to personal communications with NOAA staff, no detailed examinations of the origin of imports to the USA have been conducted by NOAA, USDA or others” and that “illegal fish products are often mixed into supply chains at the processing stage....”¹⁰⁹

127. The study found:

[i]llegal tuna fishing in the Indian and Pacific Oceans is facilitated by the lack of seafood traceability when supplies are consolidated during trans-shipment at sea. In particular, the frozen tuna market tends to trans-ship and re-supply at sea. Strong demand for tuna encourages brokers to amalgamate supplies from different origins to make orders. Because there is scant transparency at sea, even products carrying a traceability claim on the package could well derive from mixed shipments with mixed species fished by a mix of licensed and blacklisted vessels. This appears to be the case for tuna processed in Thailand, the hub of tuna seafood processing in Southeast Asia. Illegal activity by small and medium scale longliners and falsification of tuna documentation is also a concern.¹¹⁰

128. The study added:

¹⁰⁶ WPCFC, 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).

¹⁰⁷ See, e.g., Mexico's first written submission, paras. 162-170.

¹⁰⁸ G. Pramod, K. Nakamura, T. Pitcher, L. Delagran, “Estimates of Illegal and Unreported Fish in Seafood Imports to the USA,” 48 *Journal of Marine Policy* (2014), p. 102 (abstract) (Exhibit MEX-131).

¹⁰⁹ *Ibid.*, p. 103.

¹¹⁰ *Ibid.*, p. 110.

Thailand imports about 85% of the raw material for its tuna canning industry, primarily frozen skipjack caught in the western central Pacific Ocean by fleets flagged to Taiwan, USA, South Korea and Vanuatu. Foreign interests own the large tuna trading companies that supply the Thai canneries, and tracking the routing of seafood products through these companies remains a challenge for chain of custody and traceability issues.¹¹¹

129. The study further states that “Thailand is the major port of landing for tuna fished in the Indian Ocean, where at least 50% of the tuna fishery is subsistence or small scale. Tuna vessels operating in small-scale fisheries in the developing world generate significant bycatch of sea turtles and marine mammals, where such tuna catches are also beset with under-reporting problems.”¹¹²

130. Also:

A report on the global tuna supply chain stated that in 2010 that about 30 percent of Thailand's imported tuna had “catch certificates” to comply with EU fishing regulations designed to exclude IUU fish from the supply chain. However, exports to the EU account for less than 20% of Thai canners' total production and Thai industry sources indicated that while “it would be ideal if all imports had EU catch documentation, market outlets still exist for canned tuna using fish supplies that do not have EU-compliant catch certificates,” suggesting that the USA may remain a major market for tuna that does not have catch certificates.¹¹³

131. The study also states:

The highly internationalized seafood supply chain feeding imports into the United States and other major markets is one of the most complex and opaque of all natural commodities. It involves many actors between the fisherman and the consumer, including brokers, traders, wholesalers and other middlemen, often distant from the consumer markets they supply. This complicated network is characterized by bulk shipments of seafood of mixed origin that include illegal fish. While some control mechanisms for the assurance of food safety are in place, there is a lack of monitoring, transparency and accountability as to the sources of the seafood. There are no trace-back procedures to help companies avoid handling the products of poaching and illegal fish products enter the supply chain at multiple points. Once hauled from the water, fish products take a multiplicity of routes to reach the USA: exported directly after harvest; exported

¹¹¹ Ibid., p. 110.

¹¹² Ibid., p. 110.

¹¹³ Ibid., p. 110 (footnote omitted).

after only primary processing; or exported as a store-ready product after both primary and secondary processing.¹¹⁴

132. The study further comments:

a significant amount of fish is imported to the USA by first passing through one or more intermediary countries for post-harvest processing and subsequent re-export. These additional steps introduce additional challenges to traceability and allow for the mixing of legally- and illegally-sourced fish, where illegal fish may be essentially 'laundered' in the processing countries, and subsequently enter international trade as a 'legal' product of the exporting nation.¹¹⁵

133. It would not be credible to suggest that fish caught illegally, and incapable of being traced to its source, can be trusted to have accurate dolphin-safe certifications.

Monitoring under United States domestic law

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?

134. To Mexico's knowledge, the U.S. government has never prosecuted or fined an importer, processor or captain for making a false dolphin-safe declaration. Even in the Freitas case, where the captains of two vessels were found to have intentionally set nets on dolphins in violation of the Marine Mammal Protection Act, no action was taken to penalize the captain or the corporation responsible for the vessels for making false dolphin-safe declarations. Mexico previously provided evidence that complaints have been made to the U.S. Federal Trade Commission to investigate false claims of dolphin-safe, but to date no action has been taken.¹¹⁶

135. The absence of enforcement can be explained by two factors. First, there is an apparent lack of interest by enforcement authorities. Second, in the absence of trained independent observers with responsibility and authority for monitoring fishing practices and dolphin bycatch, there is no reliable method to investigate what happened onboard a vessel fishing on the high seas or in foreign waters, outside U.S. jurisdiction.

136. The AIDCP has its own dolphin-safe standard. Under the AIDCP system, only tuna caught by large purse seine vessels, supported by certifications of independent observers and the AIDCP-mandated tracking and verification system, are eligible to be labelled dolphin-safe. For

¹¹⁴ Ibid., p. 106.

¹¹⁵ Ibid., pp. 106-07.

¹¹⁶ Mexico's first written submission, para. 187.

that reason, the possibility for a false label to be used is much less than under the Amended Tuna Measure, which allows for unverifiable self-certifications without any type of tracking and verification system.

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?

137. As Mexico has explained, under the AIDCP program, the IATTC pays for 30 percent of the costs of observers, while the vessels pay the other 70 percent through vessel assessments.¹¹⁷ As also demonstrated by Mexico, under Mexico's observer program for longline vessels fishing in the Gulf of Mexico, seventy percent of the costs are paid by the vessel operators, and the remaining 30 percent by the Mexican government.¹¹⁸

138. With regard to the tracking and verification program, the costs are borne primarily by Mexican vessels and the Mexican tuna products industry, which must maintain systems and procedures for segregating tuna into separate wells on vessels, and providing the tracking system described in paragraphs 158-160 of Mexico's first written submission.

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

139. In the terminology of the fishing industry, a "fishery" is:
a unit determined by an authority or other entity that is engaged in raising and/or harvesting fish. Typically, the unit is defined in terms of some or all of the following: people involved, species or type of fish, area of water or seabed, method of fishing, class of boats and purpose of the activities.¹¹⁹

¹¹⁷ AIDCP Budget, Document MOP-29-06 (8 July 2014), p. 2 (Exhibit MEX-117).

¹¹⁸ SAGARPA, Statement on Costs of Longline Observer Program (Exhibit MEX-118).

¹¹⁹ FAO, Fisheries Glossary, available at <http://www.fao.org/fi/glossary/> (Exhibit MEX-132).

140. Thus, a fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life. Accordingly, it is possible that a fishery outside the ETP could be designated as causing regular and significant mortalities or serious injury while other fisheries using the same gear and types of vessels would not. But that is an issue of U.S. domestic law.

141. Mexico's position is that, for the Amended Tuna Measure to be even-handed, it must require observers and a tracking/verification system for all tuna products to be eligible to be labelled dolphin-safe, without regard as to whether the tuna is sourced from within or without the ETP.

57. To Mexico: The Panel has received evidence suggesting that several Mexican companies process and export tuna that is eligible for the US dolphin safe label, and that “several tuna companies in Mexico ... are considering adopting dolphin safe policies, but are hesitant due to concern that the current US dolphin safe definition will be weakened”: Exhibit 5 submitted by the Amicus Curiae. The Panel invites Mexico to comment on this evidence. In particular, the Panel would like to know how many Mexican tuna companies have adapted to the US dolphin safe measure, the process by which Mexican companies are or may be able to adapt to the US dolphin safe measure, and the costs associated with such adaptation.

142. Exhibit 5 submitted by the Amicus Curiae is a copy of a document submitted in the original proceedings as Exhibit US-39, and is not new information.¹²⁰ As Mexico explained in the original proceedings, the letter is both undated and unverified. The content of the letter indicates that the author was opposed to amendment of the Dolphin Consumer Protection Act to implement the AIDCP. As that legislation was enacted in 1997,¹²¹ presumably the letter was prepared sometime during that year or the previous year. There is no verification that this letter was actually submitted to the U.S. Congress; if it had been, the United States would have submitted such verification.

143. The letter identifies three Mexican producers of tuna from which the author states he could import into the United States at that time. To the best of Mexico's knowledge:

- No information is available regarding whether Operadores y Asesores Marítimos, S.A. de C.V., ever produced tuna products, and that entity does not exist today.

¹²⁰ Panel Report, *US – Tuna II (Mexico)*, footnote 503.

¹²¹ The Dolphin Consumer Protection Act was last amended on August 15, 1997 through Public Law No. 105-42. See Exhibit MEX-8, p. 3.

- González, Pérez y Reyes, S.A. de C.V. had a small plant that produced tuna products, but closed that plant more than ten years ago.
- Productos Pesqueros de Bahía Tortugas at one time had a small purse seine vessel, the Toño I, which is believed to have ceased being used for tuna fishing in 2001. The vessel was switched to fishing for sardines and anchovies and sank in 2003.¹²²

144. The company on the letterhead, Seafood Emporium, Inc., registered as a company with the state of California in 1991 and California suspended its registration for nonpayment of fees.¹²³ The address of Seafood Emporium on the letterhead is the location of an unrelated company that leases “virtual, part-time” office space.¹²⁴ There is therefore reason to question whether Seafood Emporium was ever actually engaged in importing tuna products or any other type of business. In Mexico’s view, a letter of this nature, prepared at least 18 years ago, is not credible evidence of anything other than that the author believed that it was in his interest to make certain statements at that time.

145. Putting aside that the letter itself is irrelevant, Mexico will answer the Panel’s other questions.

146. Mexico is not aware that any Mexican tuna products manufacturers have exported any products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure. Mexico presented evidence in the original proceedings and in these proceedings demonstrating that it is neither economically or ecologically feasible for the Mexican tuna fleet to change its fishing methods or move to another ocean region.

147. More specifically, in 2013 the Mexican tuna fishing fleet operating in the ETP was comprised of 36 large purse seine vessels that applied for and were assigned vessel-specific Dolphin Mortality Limits (DMLs), and four small purse seine vessels (below 363 MT carrying capacity).¹²⁵ The small vessels represent less than five percent of the capacity of the Mexican fleet fishing for tuna in the ETP.

¹²² IATTC, Vessel details data, available at <https://www.iattc.org/VesselRegister/VesselDetails.aspx?VesNo=2398&Lang=en> (Exhibit MEX-138).

¹²³ California Secretary of State, Business Entity Detail, Seafood Emporium, Inc. (Exhibit MEX-133).

¹²⁴ The office space company states that it has been at this location since 1985. First Choice Executive Suites, available at <http://www.sdexexecutivesuites.com/locations/la-jolla/> (Exhibit MEX-134).

¹²⁵ IATTC, Los Atunes y Peces Picudos En El Océano Pacífico Oriental en 2013, Documento IATTC-87-03 (Revisado), tabla A-11b on p. 50 (Exhibit MEX-135). Vessels with a well volume below 401 cubic meters have less than 363 MT capacity. One of the four Mexican small vessels, although not identified as such in the table, is actually a larger vessel that has sealed some of its wells and therefore has a smaller capacity; it is nonetheless required to carry an observer because of its potential capabilities.

148. As explained by Mexico in the original proceedings, the fishing efforts of the Mexican fleet primarily concentrate in the waters adjacent to Mexico's coast (EEZ) and beyond to the west, where mature yellowfin tuna can be found in association with dolphins. In that area the yellowfin tuna that are not associated with dolphins are found in lesser quantities and at a juvenile stage of development. Targeting juvenile yellowfin tuna not associated with dolphins would be neither commercially viable nor sustainable, because it would have a negative impact on the tuna population, which over time would reduce and exhaust the stocks.¹²⁶

149. During the one to two months the large purse seine vessels are at sea, they may use several different fishing methods. If a vessel happens to come upon an unassociated school of tuna or a FAD, it may set its net on them. Primarily, however, the vessels need to rely on the dolphin set method, because that is the most reliable and efficient method in the part of the ocean in which the Mexican fleet fishes. Under the U.S. measures, tuna cannot be labeled dolphin safe unless the dolphin set method was not used even once during voyage.¹²⁷

150. The Mexican vessels cannot fish exclusively with FADs and unassociated sets in the area off the Mexican coastline and farther west, because yellowfin in that area cannot regularly be found that way. The Mexican vessels would have to move south, farther away, to concentrate on fishing for skipjack. Skipjack is a smaller, lower value fish.¹²⁸ Moreover, the Mexican vessels would have to travel for about a week without fishing (both leaving and returning), greatly reducing the efficiency of their trips. Longer trips would add hundreds of thousands of U.S. dollars in costs to each trip. Permission would be needed to fish within the EEZs of other nations, which may not be granted and if granted would further increase costs for licensing. Finally, the use of FADs would require substantial investments in new equipment.¹²⁹

151. The other alternative for enabling Mexican vessels to fish tuna that can be labelled as dolphin safe in accordance with the U.S. measures would be to move to the Central and Western Pacific area¹³⁰, which is regulated by the WCPFC. Mexico has not been accepted as a Party in the WCPFC; the current status of Mexico is "cooperating non-member".¹³¹ No Mexican vessels

¹²⁶ See Statements on Behalf of Mexican Producers, Exhibit MEX-89-B, p. 8 and Exhibit MEX-89-C, p. 2.

¹²⁷ See Statements on Behalf of Mexican Producers (Exhibits MEX-89(a), 89(b) and 89(c)).

¹²⁸ Skipjack tuna, even when mature, is smaller than yellowfin, and the market considers it to be of lower quality. The value of skipjack is approximately 30 percent lower than yellowfin, per ton. See, e.g, FAO Globefish, Tuna – October 2012 ("In September, the price of skipjack was EUR 1 730 per tonne/ex-vessel, Mahe, and EUR 2 450 for yellowfin"), available at <http://www.globefish.org/tuna-october-2012.html> (Exhibit MEX-137).

¹²⁹ See Statements on Behalf of Mexican Producers (Exhibits MEX-89(a), 89(b) and 89(c)).

¹³⁰ The ETP area ends at the 150°W meridian. The United States suggests through its measures that there is no tuna-dolphin association even just beyond the 150°W meridian. That suggestion is unsubstantiated.

¹³¹ WCPFC, "About WCPFC," available at <http://www.wcpfc.int/about-wcpfc> (Exhibit MEX-136).

are on the WCPFC list of registered vessels and therefore they cannot fish in the international waters regulated by the WCPFC. Moreover, no Mexican vessels have obtained licenses to fish within the EEZs of the member nations of the WCPFC. Further, unlike the United States, Mexico does not have a territory such as Samoa in the Western Pacific where its vessels could offload tuna to Mexican canneries.

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

153. Of course, whether or not and to what magnitude costs would be incurred by the Mexican tuna fleet to change fishing areas or methods is immaterial to Mexico's *de facto* discrimination claims under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. In light of the prevailing facts and circumstances, access to the principal U.S. distribution channels for Mexican tuna products is being denied by the Amended Tuna Measure. The fact that there may be theoretical alternative ways to obtain the dolphin safe label does not alter the fact that Mexican tuna products that are caught using the established fishing methods of the Mexican fleet are *de facto* treated less favourably.

154. The Appellate Body addressed this specific issue in the original proceedings. It rejected the approach taken by the Panel, stating:

In its analysis, the Panel appears to juxtapose factors that “are related to the nationality of the product” with other factors such as “fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices.” In so doing, the Panel seems to have assumed, incorrectly in our view, that regulatory distinctions that are based on different “fishing methods” or “geographical location” rather than national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the *TBT Agreement*. The Panel's approach is difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2.1 even when it is origin-neutral on its face. As the Appellate Body explained in *US – Clove Cigarettes*, in making a determination of whether a measure is *de facto* inconsistent with Article 2.1, “a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed.” The Panel failed to conduct such an analysis in the present case. Contrary to the Panel, we consider that in an analysis of “less favourable treatment” under Article 2.1, *any* adverse impact on competitive opportunities for imported products *vis-à-vis* like

domestic products that is caused by a particular measure may potentially be relevant.¹³² (footnotes omitted)

155. The Appellate Body found that the factual findings of the Panel established that the U.S. measure modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna products.¹³³ That conclusion was based on the following findings of the Panel:

(i) “the Mexican tuna industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP”; (ii) “at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins” and is “therefore fishing for tuna that would not be eligible to be contained in a ‘dolphin-safe’ tuna product under the US dolphin-safe labelling provisions” (iii) “the US fleet currently does not practice setting on dolphins in the ETP”; (iv) “as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions”, while “most tuna caught by US vessels is potentially eligible for the label”.¹³⁴ (footnotes omitted)

These facts remain unchanged, except that Mexico has established that virtually its entire purse seine fleet fishes in the ETP by setting on dolphins.

156. Accordingly, it is clear that the Amended Tuna Measure, like the original Tuna Measure, has an adverse impact on competitive opportunities for imported Mexican tuna products *vis-à-vis* like domestic products. The same reasoning applies to Mexico's MFN claims under Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994.

58. To both Parties: At paragraph 216 of its report in the original proceedings, the Appellate Body made the following statement:

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,

¹³² Appellate Body Report, *US – Tuna II (Mexico)*, para. 225.

¹³³ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 233–235.

¹³⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 234.

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 stem exclusively from a legitimate regulatory distinction?

157. It is Mexico's position that the complainant 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. This includes establishing a *prima facie* case that the challenged measure accords “less favourable treatment” within the meaning of Article 2.1. Considering the two-step approach for assessing whether a technical regulation accords “less favourable treatment” under Article 2.1, the complainant is required to establish a *prima facie* case that: (i) the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products *vis-à-vis* like domestic products and like products originating in any other Member; and (ii) that such detrimental impact reflects discrimination against the imported products and, thus, does not stem exclusively from a legitimate regulatory distinction.¹³⁵

158. Mexico has met its burden in both respects, having established a *prima facie* case that: (i) the Amended Tuna Measure's different labelling conditions and requirements *de facto* modify

¹³⁵ See e.g. Appellate Body Report, *US – COOL*, para. 271; Appellate Body Report, *Tuna II (Mexico)*, para. 215; Appellate Body Report, *US – Clove Cigarettes*, paras. 180, 182 and 215.

the conditions of competition in the U.S. market to the detriment of imported tuna products from Mexico as compared to like tuna products of U.S. origin and like tuna products originating in any other Member;¹³⁶ and (ii) the labelling conditions and requirements are designed and applied in a manner that lacks even-handedness, giving rise to a regulatory distinction that reflects discrimination and is therefore not legitimate.¹³⁷ Mexico notes that the United States does not contest that the labelling conditions and requirements of the Amended Tuna Measure result in detrimental impact.¹³⁸

159. Once the complainant has met its burden of establishing a *prima facie* case, it then falls to the respondent to rebut the complainant's evidence and arguments. If the respondent is able to demonstrate that the detrimental impact stems from a legitimate regulatory distinction, this should be sufficient to rebut the complainant's *prima facie* case of discriminatory treatment and, thus, of "less favourable treatment" under Article 2.1 of the TBT Agreement. There is therefore no initial burden placed on the respondent, but rather a burden to rebut the complainant's showing of a *prima facie* case. In the present proceeding, the United States has entirely failed demonstrate that the detrimental impact caused by the different labelling conditions and requirements stems exclusively from a legitimate regulatory distinction or to otherwise rebut the evidence and arguments adduced by Mexico.

160. Mexico notes that similar considerations arise in relation to the allocation of the burden of proof under Article XX of the GATT 1994, where the United States bears the initial burden of establishing all elements of its defence under the subparagraphs and the chapeau, after which it falls to Mexico to rebut the evidence and arguments adduced by the United States.

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

161. In Mexico's view, the table is generally accurate, but with the following clarifications.

162. Mexico assumes that the row labelled "Legal requirement to track" is intended to refer to the requirement in the Final Rule that tuna caught in sets or gear deployments designated as dolphin-safe must be stored separately from non-dolphin-safe tuna, and that tuna "offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe tuna as it left the fishing

¹³⁶ Mexico's first written submission, paras. 221-233; Mexico's second written submission, paras. 234-304.

¹³⁷ Mexico's first written submission, paras. 104-105; Mexico's second written submission, paras. 111-164.

¹³⁸ See United States' second written submission, paras. 66-78; United States' first written submission, para. 181.

vessel.”¹³⁹ Mexico emphasizes that this requirement is in no way comparable to the Tuna Tracking Form (TTF), including associated observer requirements, that are required for large purse seine vessels fishing for tuna in the ETP. There is no mechanism to implement or enforce the “tracking” requirement for non-ETP large purse seine vessels. The “legal requirement to track” is superficial and meaningless without a TTF system or an equivalent program.

163. Mexico observes that the Panel is correct that the Amended Tuna Measure does not require captains of small purse seine vessels in the ETP to certify that they have not set on dolphins. In fact, the AIDCP itself prohibits any vessel without a DML, including small purse seine vessels, from making dolphin sets.¹⁴⁰ As discussed above, small purse seine vessels in the ETP are not eligible to have their tuna certified as dolphin-safe under the rules of AIDCP because they do not carry observers and do not have tuna tracking forms for their tuna. This fact supports Mexico's position that these two requirements are fundamental requirements for a dolphin-safe regime and that dolphin-safe status cannot reasonably be assigned to tuna products without these (or equivalent) requirements in place.

¹³⁹ 2013 Final Rule, § 216.93(c)(2) and (3) (Exhibit MEX-7).

¹⁴⁰ See, e.g., Agreement on the International Dolphin Conservation Program, as amended October 2009, Annex VIII, para. 6 (“No vessel with a carrying capacity of 363 metric tons (400 short tons) or less may intentionally set on dolphins.”) (Exhibit MEX-30).

LIST OF EXHIBITS

Number	Title
MEX-123	AIDCP, System for Tracking and Verifying Tuna (amended), 11 October 2003
MEX-124	IOTC, Resolution 11/04 on a Regional Observer Scheme
MEX-125	ICCAT, Recommendation on a Multi-Annual Conservation and Management Program for Bigeye and Yellowfin Tunas, 2011
MEX-126	ICCAT, Recommendation amending the Recommendation 12-03 by ICCAT to establish a multi-annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean, 2013
MEX-127	FAO, Observer Program Operations Manual
MEX-128	Greenpeace, Uncovers Illegal Tuna Laundering in the Pacific Ocean, November 2012
MEX-129	Solomon Star, Pacific call out big fishing nations on catch data, August 2014
MEX-130	WCPFC, Transshipment, 22 November 2005
MEX-131	Ganapathiraju Pramod et al, Estimates of illegal and unreported fish in seafood imports to the USA, Marine Policy 48 (2014)
MEX-132	FAO, Definition of Fishery
MEX-133	California Secretary of State, Business Entity Details, Results of "Seafood Emporium, Inc.
MEX-134	The address of Seafood Emporium, First Choice Executive Suites, available at http://www.sdexecutivesuites.com/locations/la-jolla/
MEX-135	IATTC, Los atunes y peces picudos en el Océano Pacífico Oriental en 2013, Documento IATTC-87-03a (revisado)
MEX-136	WCPFC, Description, Members, Participating Territories and Cooperating Non-Members.

Number	Title
MEX-137	FAO Globefish, Tuna – October 2012
MEX-138	IATTC, Vessel details data (Toño I)