

Business Confidential Information Redacted

Before the World Trade Organization

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(DS381)



**MEXICO'S COMMENTS ON THE UNITED STATES' RESPONSES TO PANELS' QUESTIONS
FOLLOWING THE PANELS' SUBSTANTIVE MEETING WITH THE PARTIES**

Geneva

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TABLE OF EXHIBITS

Number	Title
MEX-122	NOAA Fisheries, CA Thresher Shark/Swordfish Drift Gillnet Fishery, available at http://www.nmfs.noaa.gov/pr/interactions/fisheries/table1/wcr/ca_thresher_sword_dgn.html
MEX-123	Letter from M. Levine et al. to NOAA Fisheries (December 22, 2014)
MEX-124	National Marine Fisheries Service, Biological Opinion on the U.S. WCPO Purse Seine Fishery (November 1, 2006)
MEX-125	NOAA Fisheries, Programmatic Environmental Assessment for the Implementation of Decisions of the Western and Central Pacific Fisheries Commission on Management of Tropical Tunas in the Western and Central Pacific Ocean from 2015-2020 (July 2015)
MEX-126	NOAA Fisheries, Marine Mammal Authorization Program, available at http://www.nmfs.noaa.gov/pr/interactions/mmap/
MEX-127	ISSF, RFMO Catch Documentation Schemes: a summary (WCPFC-2016-CDSIWG03-OP01 (14 September 2016)
MEX-128	ISSF, Participating Companies, available at http://iss-foundation.org/who-we-are/participantscommittees/participating-companies/

1 TO THE UNITED STATES:

1.1 Risks to Dolphins

1. With reference to Exhibits USA-13 and USA-179, the Panels note the explanation provided in the asterisk at the bottom of Table 1. The Panels would appreciate further explanation regarding the meaning of the headings of the different columns in this Table. To this end, please provide further clarity by using the data in the first row as an example.

1. Mexico has previously explained that the United States defines "interaction" differently for the ETP large purse seine fishery than it does for other fisheries, that there is no usable data on interactions and dolphin mortalities from other fisheries, and that therefore the United States' comparison is speculative, unscientific and biased.¹

2. With reference to paragraphs 50 and 51 of United States' first written submission, please clarify why Table 2 lists "Intentional Sets on Dolphins" in the ETP, while Table 3 lists only "Sets with Dolphin Interactions". Is there any difference between these two terms, or do they mean the same thing?

2. Mexico has presented evidence refuting the United States' assertion that dolphin sets are "generally only possible" in the ETP, that the association of dolphins with tuna in the ETP is "unique", and that all interactions with dolphins in other fisheries are "accidental."² Mexico has also shown that the United States lacks data on interactions outside the ETP, such as dolphins that are attracted to the fish on longline hooks.³ Moreover, the data from the PNG shows that as many as 180 dolphins have been killed in a single purse seine set outside the ETP, which contradicts the United States' argument that outside the ETP purse seine sets involve "only a few" dolphins.

3. The use by the United States of adjectives such as "accidental" and "extremely rare" is concerning, as the United States has presented no evidence that it surveyed captains involved in capturing dolphins outside the ETP, nor do any of its sources contain such information. In other words, there is no evidence that confirms that fishing vessels that kill dolphin do so "accidentally." This is emblematic of the United States' insistence on relying on favourable assumptions about fishing activities outside the ETP, while relying on negative assumptions about the AIDCP-compliant dolphin encirclement fishing method within the ETP.

3. With respect to the revised table presented in Exhibit USA-179, which provides information on dolphin mortalities in various fisheries and in relation to various fishing methods, please explain whether similar information is available with respect to serious injury caused to dolphins in the same fisheries and by the same fishing methods covered in that Exhibit.

4. The United States again avoids dealing with the fact that there is no evidence available on total interactions with dolphins outside the ETP. The United States attempts to equate (i) the release of dolphins from nets unharmed with (ii) injuries caused by hooks and being pulled onboard vessels by nets and longlines, where the dolphins are seen to swim away afterwards. However, the United States' argument has not been

¹ See Mexico's responses to the Panels' questions, paras. 1-4, 6-7, 173-175, 206-209, 233-238.

² Mexico's responses to the Panels' questions, paras. 8-11, 154-155, 158, 176-177; Mexico's first written submission, paras. 21, 83, 110-111, 230; Mexico's second written submission, paras. 76-78, 79.

³ Mexico's responses to the Panels' questions, paras. 1-3, 7-11, 17, 46, 162, 173-175, 206-209; Mexico's first written submission, paras. 69-73, 76-87, 91-105; Mexico's second written submission, paras. 68-69, 71-73, 79-85, 91, 108-111.

based on the numbers of *observable* serious injuries caused by fishing methods, but rather on *unobservable* harms. To make the type of comparison proposed by the United States, therefore, it is necessary to have data on the total numbers of dolphins in the vicinity of a fishing vessel, including those that are not "caught or hooked." That must include, for example, the dolphins that feed off bait on longline hooks, and the dolphin herds that are used by handline fishers in the Indian Ocean to locate tuna.

5. It is also noteworthy that in its response, the United States omits to mention gillnet fishing. According to the United States itself, there are more than 60,000 dolphin mortalities annually in the Indian Ocean gillnet fisheries.⁴ The United States has not provided an estimate of serious injuries and other "interactions" in those fisheries.

4. The Panels note that the tables provided in Exhibit USA-179 do not contain any information on gillnet, pole and line, and handline fishing. Please provide information for these three fishing methods, in the same format used in presenting the information regarding the other fishing methods in the mentioned Exhibit.

6. With regard to the United States' comments on handline fishing, Mexico again emphasizes that if the act of small motorized boats in the ETP interacting with dolphin herds is harmful to dolphins – as the United States has repeatedly argued – then the interactions of handline boats with dolphin herds in the Indian Ocean must also be treated as harmful. By ignoring this aspect of the handline fishing method, the United States applies a different standard for evaluating fishing methods outside the ETP than it does for the dolphin encirclement method within the ETP. Alternatively, if chasing dolphins by handline boats is not harmful to dolphins, then this is evidence that, when viewed in isolation, the simple act of chasing dolphins is not harmful to dolphins in any fishery.

7. With regard to the United States' comments relating to gillnet fishing, Mexico observes that the United States offers as a "dolphin-safe fishery" the California Drift-Gillnet Fishery, which happens to be rated as a Category I fishery by the U.S. Commerce Department because of its impact on sperm whales. According to the U.S. Commerce Department, the gear used in this fishery is as follows:

Gear consists of a 1,000 fathom (1,829 m) gillnet with stretched mesh size from 18-22 in (45.7-56 cm), with a 14 in (35.6 cm) minimum. The net is set at dusk and allowed to drift during the night, with the fishing vessel typically attached at one end of the net. The soak duration is typically 12-14 hours depending on length of the night.⁵

8. This gear and method are very similar to the large-scale driftnet method that is ineligible for the dolphin-safe label when use in the high seas – the main differences being that (i) the nets in the California fishery are just under 2 kilometers compared to the 2.5 kilometer length with which "large scale" driftnets are defined and (ii) the fishery is in U.S. territorial waters rather than the high seas. In 2014, members of the California state legislation urged the U.S. Commerce Department to require the phasing out of this fishery, stating:

Consequently, this letter is to express our continued concerns and to request that the Pacific Fishery Management Council and the National Marine Fisheries Service provide a written swordfish fishery transition plan. The plan should include a timeline for the eventual prohibition of drift

⁴ United States' second written submission, para. 171.

⁵ NOAA Fisheries, CA Thresher Shark/Swordfish Drift Gillnet Fishery, available at http://www.nmfs.noaa.gov/pr/interactions/fisheries/table1/wcr/ca_thresher_sword_dgn.html (Exhibit MEX-122). It is unclear how an observer could monitor interactions between dolphins and the gillnet that take place underwater and at night. Presumably the observer can only monitor animals that are pulled up with the net.

gillnet gear, immediate implementation of hard caps, and a goal of 100% catch and bycatch monitoring.

Much of the bycatch is wasted. Additionally, large-mesh drift gill nets catch endangered and protected species that are of great significance to the people of California and are an important part of the ocean ecosystem. The California drift gillnet swordfish fishery kills more marine mammals than all other West Coast and Alaska fisheries combined. Due to the indiscriminate nature of drift gillnets, they are banned on the high seas, prohibited throughout the Mediterranean Sea, not permitted by Oregon or Washington states, and are prohibited by the National Marine Fisheries Service in the North Atlantic swordfish fishery off the U.S. East Coast.⁶

9. Even accepting the United States' data about this fishery at face value, the United States has failed to explain why a mortality rate of 35.4 per 100 sets should be considered not harmful to dolphins.

10. The failure of the United States to disqualify tuna caught in this fishery and other gillnet fisheries from being dolphin-safe is arbitrary and not even-handed.

5. With reference to footnote 99 to paragraph 51 of the United States' first written submission, please provide page 64 of the document presented in Exhibit USA-60, which is referred to in the submission but not included in the Exhibit.

11. The document provided by the United States in Exhibit US-200 highlights that although extrapolations are used, they require stratification – which the United States has not done with its data. The report states:

The issues of sampling units to utilize (trips, sets, etc.) and of alternative sampling designs require significant consideration in order to optimize the use of resources [citations omitted], although practical reasons make the trip the most common unit for observer programmes. Potential biases to consider in observer programmes include non-representative practices in the presence of the observer (an "observer effect"), and pressures on the observer to affect reports [citations omitted]. These issues must be added to the usual precision and reliability problems arising from observer coverages, which are frequently very limited, or not distributed in an effective way [citations omitted]. Fonteneau et al. (2008, 2009), and Lawson (2008) provide a list of potential biases affecting the sampling of catches by observers or port samplers, and many of these may apply also to bycatch. The variability of bycatch of the tuna species that are the object of the fishery is influenced by even more factors [citations omitted].

* * *

To obtain bycatch estimates of a given precision for a species would require a level of coverage that would depend on its statistical distribution [citations omitted], assuming that a series of assumptions are valid (Rochet and Trenkel, 2005). Some species are present in many sets in small numbers; others show a large number of zeroes, and some very large figures in a few sets [citations omitted]. In other cases, it is not possible to differentiate missing record of zeroes when relying on logbooks (Andrade, 2007). To obtain good estimates for all species would require a level of observer coverage determined by the rare species, with the "worst" distributions, and this would be very costly.⁷

⁶ Letter from M. Levine et al. to NOAA Fisheries (December 22, 2014) (Exhibit MEX-123).

⁷ Exhibit US-200, pp. 63-64.

12. The article goes on to discuss the different types of variables that should be evaluated to appropriately stratify the sampling and the data. For example, the report discusses that there are a number of different types of FAD sets, with some types favored in some ocean regions.⁸

13. The article then discusses other stratification variables, including season and areas, flag of the vessel, vessel capacity, gear characteristics (e.g., net depth, acoustic equipment), and vessel characteristics (e.g., brailer size, method to handle discards).⁹

14. The U.S. data reflect no analysis accounting for the above-referenced factors. Rather, the United States simply takes raw data – in most cases from extremely limited samples – and extrapolates it across all fishing efforts. That is not a scientifically or statistically valid methodology.

15. Exhibit US-200 also states:

Coverages of the order of 10–33 percent have been estimated as adequate to reduce some biases, and to provide a reasonable level of precision for some species (Lawson, 1997; Hall, 1999; Lennert-Cody, 2001; Babcock et al., 2003; Lawson, 2006a; Sánchez et al., 2007; Amandè et al., 2010a) based on simulations, or on the characteristics of the statistical distributions.¹⁰

Most of the U.S. data relies on data from analyses with lower observer coverage.

6. With reference to paragraph 52 of the United States' first written submission, please provide evidence for the assertion that "it is likely that there will be more tuna under a bigger herd of dolphins than under a smaller one". Please also provide more information, and evidence, regarding the activities described in footnote 108.

16. Mexico has previously noted that the use of helicopters to locate tuna schools is common for large purse seine vessels in all ocean regions, including the Western and Central Pacific.¹¹ The practice of using helicopters is not unique to the ETP.

7. (A) With reference, *inter alia*, to paragraph 57 of the United States' first written submission, could the United States elaborate on (a) how it calculates the levels of dolphin interaction and harm on a "per set basis"; (b) how it "controls for the size of the fishery"; and (c) why controlling for the size of the fishery enables comparisons to be made across fisheries?

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

(C) With reference, *inter alia*, to paragraph 75 of the United States' second written submission, could the United States please explain (a) what it means by the expression "[c]ontrolling for the level of effort"; and (b) the purpose of such controlling?

17. With regard to the United States' answers to Questions 7(a), (b) and (c), Mexico has previously explained that the United States lacks reliable data sufficient to calculate per-set rates outside the ETP, and that there is no basis for using per-set rates to compare different fisheries. Mexico has also explained that the per-set metric cannot

⁸ Ibid., p. 65.

⁹ Ibid. pp. 65-66.

¹⁰ Ibid. p. 64.

¹¹ Mexico's second written submission, paras. 4 and 82.

reasonably be applied to compare fishing with different types of gear (purse seine, longlines, gillnets, etc.).¹²

18. The United States relies on the per-set metric in order to justify its continued allowance of the dolphin-safe label for tuna caught in fisheries – such as the Hawaii longline fishery – where dolphin stocks are being threatened with extinction. It is self-evident that a fishery that threatens extinction of a dolphin stock is “harmful to dolphins.”

8. With reference to paragraph 61 of Mexico's first written submission, does the United States agree that "the only objective scientific evidence of the magnitude of any unobservable harms caused by AIDCP-compliant dolphin encirclement is the evidence related to the growth of dolphin stocks"? Does the United States agree that unobservable harms "would most certainly be reflected in dolphin stocks"? In which other ways could unobservable harms be reflected or quantified?

19. In its response to this question, the United States recycles its prior assertions regarding the studies on which it has selectively relied since the original proceedings. Mexico has already shown that these reports only contain hypotheses based on speculation by the authors about why two dolphin stocks might not be growing at expected rates – all of which were written prior to the identification of errors in the population assessment surveys that showed that the populations were likely seriously underestimated.¹³

20. The 2015 letter of the World Wildlife Fund quoted by the United States provides no evidence of unobserved mortalities; it simply makes an allegation without support. The United States itself seems to back away from the arbitrary number of 15,000 it highlights from the World Wildlife Fund letter, and instead suggests that unobserved mortalities could be “thousands”, while under 5,000, and not adversely affect population growth.¹⁴

21. As Mexico explained in its first written submission, under the AIDCP highly conservative and precautionary “stock mortality limits” (SMLs) are established for individual dolphin stocks,¹⁵ which in total may not exceed 5,000.¹⁶ Thus, there are separate SMLs for the northeastern spotted dolphin stock, the Western/Southern spotted dolphin stock, the eastern spinner dolphin stock, the whitebelly spinner dolphin stock, and each of the northern, central and southern common dolphin stocks.¹⁷ Mexico also showed that in 2009, based on updated population estimates, the United States agreed to a decision of the AIDCP Parties, on the advice of the Scientific Advisory Committee, to increase the SMLs for the two dolphin stocks that are most involved in the tuna fishery and which the United States has designated as depleted – from 648 to 793 for the northeastern spotted dolphin, and from 518 to 655 for the eastern spinner dolphin.¹⁸ (The SMLs for other stocks were decreased to offset these increases.) The action of the U.S. Commerce Department in agreeing to increase the SMLs for the two depleted stocks

¹² See Mexico's responses to the Panels' questions, paras. 1-4, 37-42, 163-164, 186-189.

¹³ Mexico's first written submission, para. 62.

¹⁴ United States' responses to the Panels' questions, para. 38.

¹⁵ Mexico's first written submission, para. 42.

¹⁶ See AIDCP, “Report on the International Dolphin Conservation Program”, Document MOP-28-05 (Oct. 18, 2013), pp. 2 (“The overall dolphin mortality limit (DML) for the international fleet in 2012 was 5,000 animals”) and 18 (Table 7) (Exhibit MEX-8).

¹⁷ AIDCP, “Updated Estimates of NMin and Stock Mortality Limits,” Document SAB-07-05 (30 Oct. 2009), p. 1 (Table 1) (Exhibit MEX-11).

¹⁸ Mexico's first written submission, para. 42, citing International Dolphin Conservation Program (IDCP), 22nd Meeting of the Parties, Minutes (30 Oct. 2009), item 8 on p. 4, Appendix 8 on p. 10 (Exhibit MEX-12).

contradicts the United States' assertion that there is a reasonable basis to presume that there "could be" thousands of unobserved mortalities.¹⁹

22. Finally, in the notification of the new MMPA regulations published on August 15, 2016, the U.S. Commerce Department stated: "[w]ith the exception of the eastern tropical Pacific Ocean, accurate abundance and bycatch estimates for marine mammals are lacking in areas where marine mammal distribution overlaps tuna fisheries, making quantitative analysis of bycatch extremely difficult" (emphasis added).²⁰ This statement is also inconsistent with the arguments presented by the United States in this proceeding.

9. With reference to paragraph 63 of Mexico's first written submission, please respond to Mexico's assertion that the United States' evidence of unobservable harms is "based on the incorrect assumption that two particular dolphin stocks were not growing at the expected rates".

23. In responding to this question, the United States again repeats its characterization of the reports it submitted presenting hypothetical reasons why the populations might not be growing at their expected rates. Mexico addressed the United States' interpretation of these papers in its first written submission and will not repeat those issues here.²¹

24. Regarding the population studies, Mexico has previously explained that the prior population estimates were found to have been erroneous because (i) the observers consistently underestimated the number of dolphins they saw, (ii) some of the dolphins that were seen were accidentally left out of the data, and (iii) there were problems with the computer code used to run projections.²² The United States has not addressed that aspect of the 2008 report. The United States also chose not to address the newest report submitted by Mexico with its first written submission as Exhibit MEX-53, in which one of the Commerce Department authors of the prior dolphin population assessments concluded that there is a high likelihood that the northeastern spotted dolphin stock has been underestimated by more than 60 percent, and that the eastern spinner dolphin stock has been underestimated by 73 percent due to flaws in the design and execution of the population surveys.²³

10. With reference to paragraph 64 of Mexico's first written submission, does the United States agree with Mexico that the extent of unobserved harms can be represented numerically, e.g. as an additional percentage of dolphin mortalities?

25. In its response to this question, the United States asserts that unobservable harms are not quantifiable. In doing so, it confirms that its application of the tuna measure is based on subjective judgments. The United States' response confirms Mexico's position that, for the tuna measure to be even-handed and not arbitrary, presumptions of harms to dolphins must be applied in a consistent manner. Instead,

¹⁹ United States' responses to the Panels' questions, para. 39.

²⁰ Department of Commerce, Fish and Fish Product Import Provisions of the Marine Mammal Protection Act; Final Rule, 81 Fed. Reg. 54390 (Aug. 15, 2016), pp. 54410 (Exhibit MEX-49).

²¹ Mexico's first written submission, para. 62.

²² NOAA Technical Memorandum NMFS, "Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates From 1986-2003" (April 2008), pp. 11-12 (Exhibit MEX-13).

²³ Mexico's first written submission, para. 60, citing J. Barlow, "Inferring trackline detection probabilities, $g(0)$, for cetaceans from apparent densities in different survey conditions," *Marine Mammal Science* (2015) (Exhibit MEX-53). The United States appears to propose, as a standard, whether it is statistically possible that the populations are not growing. If that is the standard, it must be applied to all other fisheries in which there are dolphin populations – not just the ETP.

presumptions under the tuna measure are applied inconsistently – the United States assumes that there must be significant unobserved harms to dolphins in the ETP, and assumes that there are no unobservable harms to dolphins outside the ETP. Based on the available evidence, applying inconsistent presumptions is not even-handed.

11. With reference to paragraph 230 of Mexico's first written submission, please comment on Mexico's assertion that "[t]here is no practical difference between intentionally encircling dolphins with the knowledge that there is a chance of causing harm and being wilfully blind to the extremely high probability, if not certainty, that a fishing set or gear deployment will result in harm to dolphins".

26. The United States' response seeks to avoid answering the question by asserting that there are no instances in which sets or gear deployments are made outside the ETP with the knowledge that there will be harmful interactions with dolphins. Mexico has already shown that longline deployments are made with the knowledge that dolphins will be attracted to bait and/or fish on the hooks,²⁴ that there are sets involving purse seine nets outside the ETP that kill many dolphins simultaneously,²⁵ and that where gillnets interact with dolphins there is a high probability of mortality.²⁶

12. With reference to paragraph 238 of Mexico's first written submission, please comment on Mexico's request that the "Panels carefully reconsider statements made by the first compliance panel that suggest that encircling in an AIDCP-compliant manner is "particularly harmful"".

27. As discussed in Mexico's response to question 106 and its comments on the United States' response to question 106, considerable evidence has been presented by the United States and Mexico on the various fishing methods and ocean areas over the course of this dispute. It would not be inappropriate for the Panels to reconsider or elaborate upon earlier factual findings should developments in the evidence merit it. There is an additional dimension concerning reconsideration of the statement "particularly harmful". This statement lacks the objectivity and precision required to compare AIDCP-compliant fishing in the ETP with other fishing methods in other ocean areas. A comparison must be based on objective measurements related to dolphin mortalities and serious injuries, both observed and unobserved. Thus, at the very least, in order to rule on the calibration issue, the Panels must elaborate upon what is meant by the phrase "particularly harmful" in relation to other fishing methods in other ocean areas and the factual basis for the use of the phrase.

28. The United States' response to this question also identifies a fundamental flaw in how it is justifying calibration. Paragraph 65 of its response reads as follows (footnotes omitted):

with respect to the Hawaii deep-set longline fishery, which Mexico has raised several times, the evidence shows that it causes very few dolphin mortalities and, indeed, *hardly ever* interacts with dolphins. The most recent estimate is that the fishery causes about 40 dolphin mortalities per year, compared to the *hundreds* caused by dolphin sets in the ETP. Further, over 99 percent of sets interact with *no dolphins* at all. On a per set basis, the fishery has caused 0.31 dolphin mortalities per 1,000 observed sets over the past seven years, compared to 91.15 dolphin mortalities per 1,000 dolphin sets in the ETP. From the perspective of *harm to dolphins*, there is no comparison between these fisheries – ETP dolphin sets are exponentially more dangerous. Nor does any of Mexico's

²⁴ See Mexico's first written submission, paras. 91-95.

²⁵ Mexico's opening statement, para. 36.

²⁶ Mexico's responses to the Panels' questions, para. 178.

other evidence suggest that any fishery causes levels of direct dolphin mortality close to that caused by dolphin sets in the ETP.

29. This is a fishery in which dolphin stocks are at unsustainably low and endangered levels and the small number of mortalities and serious injuries is substantially adversely affecting those stocks. Under any reasonable measurement, the fishing practice which the United States describes as causing less harm to dolphins than AIDCP-compliant fishing in the ETP is, in fact, causing more harm.

30. Mexico also notes that, in the original proceedings, the Panel made the following determination:

... we are not persuaded, based on the evidence presented to us, that at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP under AIDCP monitoring.²⁷

The Appellate Body specifically affirmed this finding.²⁸

31. The United States has not presented evidence that would justify the Panels in abandoning this original factual determination.

13. With reference to paragraph 69 of Mexico's second written submission, please respond to Mexico's assertion that "[a]bsent comprehensive evidence demonstrating that gillnets can be used in tuna fisheries without harming dolphins, there is no reasonable explanation for the United States not to have made gillnet fishing ineligible for the dolphin-safe label".

32. In answering this question, the United States seeks to defend gillnet fishing as generally safe for dolphins. Paragraph 69 of Mexico's second written submission pointed out that the report on U.S. fisheries on which the United States relies identifies 26 gillnet fisheries that it has designated as posing risks to marine mammals. Mexico also submitted evidence that the total number of cetaceans killed by gillnet fishers annually in the eastern waters of Chinese Taipei is between 27,000 and 41,000.²⁹ Mexico also submitted a paper prepared in connection with the "Kobe II Bycatch Workshop" (held with participation of representatives of the five RFMOs), which stated: "[i]t is generally accepted that, wherever gillnets are deployed, there is likely some degree of marine mammal bycatch..."³⁰

33. Mexico reaffirms that the United States has not shown that gillnets can be used in tuna fisheries without harming dolphins.

14. With reference to paragraph 87 of the United States' third written submission, please explain what the word "representative" means or refers to in the first sentence of the paragraph.

34. Mexico has shown that the observer coverage for longline fisheries is insufficient to draw conclusions about dolphin mortalities and serious injuries caused by that

²⁷ Panel Report, *US – Tuna II (Mexico)*, para. 7.617.

²⁸ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 259-281 and 288.

²⁹ Mexico's first written submission, paras. 70-71, citing Convention on Migratory Species, Report of the Second Workshop on The Biology and Conservation of Small Cetaceans and Dugongs of South-East Asia, CMS Technical Series Publication No. 9 (July 2002) (Exhibit MEX-19).

³⁰ Kobe II Bycatch Workshop Background Paper, available at http://www.tuna-org.org/Documents/Aus/Kobe_II_Bycatch_Workshop_Marine%20Mammal_FINAL_ENG.pdf, p. 2 (Exhibit MEX-113), p. 2.

method.³¹ As discussed in relation to Question 34, below, it is contradictory that in the context of the tuna measure, the United States refuses to seek further information regarding dolphin mortalities and dolphin populations in these other fisheries and declares them safe for dolphins, while in the context of the MMPA regulations the United States will ban imports from these fisheries entirely absent the submission of such data from the nations of those fisheries.

15. With reference to Mexico's arguments, presented in paragraphs 54-57 of Mexico's first written submission, regarding the USDOC report contained in Exhibit MEX-13, please explain whether you agree with Mexico's interpretation of that report.

35. Mexico addressed this issue in relation to its comments on the United States' response to Question 9, above. In short, the United States asserts that there might be a *possibility* that the populations of the two dolphin stocks at issue are not growing at the rates the United States expects, and that there may be a *possibility* that such lack of growth is attributable to the tuna fishery, and not to other factors identified in the Commerce Department's 2002 evaluation, such as changes in the ecosystem caused by warming water temperatures and competition from growing populations of other dolphin stocks.³² This amounts to an extreme application of the precautionary principle to the ETP. Yet for fisheries outside the ETP, the United States applies a different standard, under which dolphins are presumed to be not at risk – notwithstanding substantial evidence to the contrary – unless there is comprehensive evidence of harms. The application of different presumptions and standards of proof to different fisheries is not even-handed.

16. Exhibits USA-13 and USA-17 show that there is a higher level of interaction and mortality of dolphins in the Western and Central Pacific when compared to other ocean areas. For instance, there was an estimated mortality of 1,195 toothed cetaceans in the WCPFC tropical purse seine fishery in 2009 alone (USA-17), whereas in the Eastern Tropical Atlantic and Indian Ocean Tropical there was none (USA-13)). Therefore, are the Panels correct in understanding that there is a higher risk of dolphin interactions and mortalities in the Western and Central Pacific purse seine fishery when compared to other ocean areas outside the ETP, such as in the Eastern Tropical Atlantic and Indian Ocean Tropical? What significance, if any, does this have for the Panels' calibration analysis? Would it be the basis on which a determination could be made under the determination provisions?

36. The United States cites the observer data from the WCPFC as though it were complete and relevant to achieving the objectives of the measure. As Mexico has previously explained, however, the primary responsibility of observers in the WCPFC is to monitor the fish being harvested, and not to watch for interactions with marine mammals.³³ Importantly, the observers do not work for or report to the WCPFC, but to the individual Island nations' program authorities. The U.S. Commerce Department has stated:

A common concern raised in the bycatch summary reports [from the WCOP fishery] is that the purpose of the observer program is to document operational compliance and record tuna catch composition data.

³¹ See Mexico's responses to the Panels' questions, para. 43; Mexico's first written submission, para. 90. To be clear, and in reply to the suggestion in footnote 187 of the United States' responses to the Panels' questions, Mexico does indeed include the Atlantic longline fisheries among those for which there are insufficient data.

³² National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals; Decision Regarding the Impact of Purse Seine Fishing on Depleted Dolphin Stocks" 68 Fed. Reg. 2010 (Jan. 15, 2003) (Final Finding), p. 2014 (Exhibit MEX-10).

³³ See Mexico's second written submission, paras. 81; Mexico's responses to the Panels' questions, para. 10.

Information on protected species interactions, such as turtle and whale species listed under the U.S. ESA [Endangered Species Act] have been collected ancillary to other objectives of the program. In recent years, increasing emphasis has been placed on documenting interactions with marine mammals, turtles and sharks, however, the reliability and accuracy of the data have not been assessed.³⁴

37. The same Commerce Department document states:

The observer data provided for this analysis lack key variables and details to confidently extrapolate the observed interaction rates to the fleet-wide total.... Interactions with marine mammals and sea turtles are disproportionately higher in sets associated with floating objects (associated sets) than in free swimming schools (unassociated sets). These reports have also indicated that the portion of set types observed is highly variable among years. To extrapolate the observed proportion to the fleet-wide total it is important to know the interaction rate by set type and the proportion of observed set types.³⁵

The United States has made no effort to adjust the data it submitted to take into account these types of factors.

38. The Commerce Department has also more recently cast doubt on observer data from the WCPO, stating:

*Based on incomplete and unverified observer data from FFA, the U.S. purse seine fishery has had limited interactions with marine mammals in recent years. The number of these interactions and whether the marine mammals were ESA-listed species is unknown at this time.*³⁶ (emphasis added)

39. The fact that WCPFC data is incomplete is verified by Exhibit MEX-116, a WCPFC report that shows that there is a significant time lag in providing data, and very uneven performance by nations in providing information.³⁷

40. Note that there is an inconsistency between the data reported in the 2014 and 2015 WCPFC reports and the individual country reports listed in the U.S. chart. For example, Exhibit US-79 lists 31 mortalities in the WCPFC purse seine fishery in 2014, but the individual country reports to the WCPFC for 2014 that the United States shows in a separate part of the table total to 317 mortalities.

41. The available data from the WCPFC purse seine fishery indicates that dolphins are at significant risk, and that there is no reasonable basis to presume that they are not.

17. With reference to Exhibit USA-19, page 354, does the following statement mean that the numbers reported in such study underestimate the actual bycatches?

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

³⁴ National Marine Fisheries Service, Biological Opinion on the U.S. WCPO Purse Seine Fishery (November 1, 2006), p. 124 (Exhibit MEX-124).

³⁵ Ibid., p. 124.

³⁶ NOAA Fisheries, Programmatic Environmental Assessment for the Implementation of Decisions of the Western and Central Pacific Fisheries Commission on Management of Tropical Tunas in the Western and Central Pacific Ocean from 2015-2020 (July 2015), p. 117 (Exhibit MEX-125).

³⁷ WCPFC, Status of ROP Data Management, WCPFC-TCC11-2015-IP05_rev1 (10 September 2015), p. 7 (Exhibit MEX-116).

42. The United States cites the figures in Exhibits US-19 and US-21 as authoritative. The two papers were prepared by largely the same team of researchers, and they themselves did not consider that the data provided a basis for accurate estimates.

43. Exhibit US-21 contains the following statement with regard to observer coverage:

At the scale of the taxonomic groups and overall pelagic community, very large coverage rates (i.e. 90%) are required to reach relative root mean square errors of about 20%. *Overall, our results indicate that the current European fishery observer programme provides some information on bycatch of marine predators in the Indian Ocean, but is insufficient to accurately monitor the effects of fishing on pelagic communities associated with tuna schools.* It is the role of managers and stakeholders to (i) better define management objectives with regard to bycatch (e.g. identify priority target species, set levels of precision in estimates and/or magnitude of authorized discards), and (ii) define the observer coverage rates required to fulfill such management objectives. This would certainly lead to increasing observer coverage rates and associated costs for the EU, and this is also necessary for the current observer programme to become fully useful in addressing the questions of biodiversity conservation and sustainable management of pelagic predators within an ecosystem perspective. However, the efficiency of any observer programme in open-sea ecosystems will ultimately depend on the involvement and compliance of all types of fishing vessels from contracting and non-contracting parties of T-RFMOs whose vessels targeting tropical tunas also affect populations of non-targeted pelagic predators.³⁸ (emphasis added)

44. The paper also states: "[s]ampling coverage during the study period was about 4.6% of trips, i.e. less than half of the target rate of 10%."³⁹ Exhibit US-19 states that [t]he overall average [observer] coverage rate reached 2.9% of the total number of trips.⁴⁰

45. Neither report provides a reliable basis for determining the effects on dolphins of purse seine fishing in the East Atlantic or Indian Oceans.

18. With reference to paragraph 237 of Mexico's first written submission, should the risk profile of "AIDCP-compliant dolphin encirclement fishing method" include historical data from prior to the adoption of the AIDCP Agreement?

46. The United States' response to this question reflects its inconsistent and arbitrary approach to comparing fisheries. According to the United States, mortalities primarily caused by the U.S. fleet in the ETP large purse seine fishery from the 1960s to 1980s are relevant to evaluating the fishery today, but the estimated mortalities in the Western and Central Pacific of over 1,000 in 2010 are irrelevant because the United States believes mortalities in that fishery have since been lower. Mexico reiterates that the historic ETP mortalities related to a different fishing method, namely unregulated setting on dolphins, and not to the fishing method currently at issue in this dispute, namely AIDCP-compliant dolphin-encirclement fishing. Moreover, according to the United States, the over 60,000 mortalities per year in the Indian Ocean gillnet fishery should not be interpreted to mean that gillnets are dangerous to dolphins, although the use of high

³⁸ Monin J. Amande et al., "Precision in Bycatch Estimates: The Case of Tuna Purse Seine Fisheries in the Indian Ocean," ICES J. Mar. Sci. (2012), p. 7 (Exhibit US-21).

³⁹ Ibid., p. 7.

⁴⁰ Monin J. Amande et al., "Bycatch of the European Purse Seine Tuna Fishery in the Atlantic Ocean for the 2003-2007 Period," 23 Aquat. Living Resour. 353 (2010), p. 355 (Table 1 and Part 2.2 (Data)) (Exhibit US-19).

seas driftnets – a form of gillnet – is always ineligible for the dolphin-safe label even though there are no statistics available on dolphin mortalities from that method.

47. Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 require the United States to apply a consistent, even-handed approach to evaluating fisheries and fishing methods. The United States has been unable to provide a coherent explanation of why fishing methods other than dolphin encirclement and high seas driftnets are not ineligible, and why fisheries other than the ETP (and now the Indian Ocean gillnet fishery) are allowed to have loose requirements for certification and tracking and verification that do not assure the accuracy of the dolphin-safe label.

19. With reference to paragraph 55 of the United States' first written submission, please explain how the United States extracted the following information from Exhibits USA-19 and USA-20:

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

48. Mexico has previously explained that the observer data used in the reports cited by the United States are not suitably reliable for the purpose for which the United States seeks to use them.⁴¹

20. With reference to paragraph 26 of Mexico's opening oral statement, please comment on Mexico's arguments regarding the ways in which the Tuna Measure and the United States' method of assessing adverse effects on dolphins have evolved over time.

49. The United States is incorrect that the U.S.-flagged vessels ceased using the dolphin set method immediately when the tuna measure was adopted in 1990. As the first compliance panel explained:

With respect to the US fleet, the United States has indicated that US vessels used to set on dolphins to catch tuna at the time the US dolphin-safe labelling provisions were enacted. The United States explains that there were, at the time, 46 US purse seine vessels along with 52 Mexican vessels that fished for tuna in the ETP, most of which were authorized to set on dolphins to catch tuna. The United States further indicates that US vessels did not fully discontinue the practice until years later, in the mid-1990s.⁴²

50. Originally, the United States placed restrictions on the use of the dolphin-safe label for dolphin sets because of the high numbers of dolphins known to be harmed by unregulated sets on dolphins. After the measures adopted under the AIDCP and predecessor agreements were proven successful, the United States, through the amendments adopted in 1997, shifted to an approach based on whether dolphin sets were having a significant impact on the growth of the ETP dolphin stocks designated as depleted. The Commerce Department made a determination that it could not find a significant impact, and the Department revised the definition of dolphin-safe for several weeks, but then changed it back because of the Hogarth lawsuit. Later, the Court of Appeals for the Ninth Circuit ruled that the definition could never be changed. In the original proceeding, the United States initially argued that dolphin sets were harmful to the depleted stocks because "dolphin populations have not yet demonstrated the recovery that would be expected if adverse effects of setting on dolphins to catch tuna

⁴¹ See e.g., Mexico's responses to the Panels' questions, paras. 1-4 and 6-11.

⁴² Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.315.

had been completely alleviated."⁴³ Later, faced with updated data showing that the populations were growing (and that the U.S. government agreed to increase the SMLs for two depleted stocks in 2009, as discussed above in Mexico's comment on the United States' response to Question 8), the United States shifted to arguing that the tuna measure is intended to protect dolphins on an individual basis, without regard to population effects.

21. With reference to paragraph 50 of Mexico's opening oral statement and paragraphs 21-22 of the United States' opening oral statement, does the United States agree that FAD fishing and handline fishing sometimes involve intentional targeting of dolphins? If so, would tuna caught by these methods be eligible for the dolphin-safe label?

51. The United States refuses to engage with Mexico's evidence that handline fishers use dolphin herds to locate tuna and set their lines while operating speed boats within the herds. Mexico is not aware that any analysis has been published regarding harms to dolphins that may arise from their interactions with the motorboats while traveling at high speeds. But if the interaction between dolphin herds and the small motorboats used in dolphin sets in the ETP are deemed harmful to dolphins, to be consistent it must be assumed that handline vessels are also harmful to dolphins.

22. With reference to paragraph 57 of Mexico's opening oral statement, please respond to Mexico's suggestion that the United States has applied for a DML for one of its vessels for 2017.

52. Mexico has no comments on the United States' response, except to note that if the U.S. fleet is again threatened with losing access to the WCPO fishery as it was in 2016, it should be expected that more U.S.-flagged vessels will apply for DMLs.

23. With reference to paragraph 56 of Mexico's opening oral statement, does the United States agree that the assessment of overall risks to dolphins requires, *inter alia*, an estimate of unobserved mortalities and serious injuries in the different fishing areas supplying the US market?

53. In its response, the United States argues that the measure protects individual dolphins and that there is no need to quantify or estimate the magnitude of unobserved mortalities and serious injuries. The foundation of these arguments is what Mexico has referred to in these proceedings as a "zero tolerance" benchmark. If just a single dolphin is killed or seriously injured, or if a single unobserved mortality or serious injury occurs, the fishing method in the ocean area in question should be ineligible. Applying this zero tolerance benchmark, the United States argues that only AIDCP-compliant dolphin encirclement in the ETP should be ineligible, while all other fishing methods (aside from deep-sea driftnet fishing) in all other ocean regions should remain provisionally eligible. This is factually erroneous. The evidence is clear that other fishing methods in other ocean areas are observed killing and seriously injuring dolphins and that they also cause unobserved dolphin mortalities and serious injury. Thus, on the body evidence presented in these compliance proceedings, if the Panels accept the United States' arguments, then it immediately follows that the 2016 tuna measure is not calibrated because only ADICP-complaint dolphin encirclement has been declared ineligible.

54. The United States rejects quantification of adverse effects on dolphins and the comparison of the relative quantifications of different fishing methods and fisheries as a solution to this fundamental flaw in its arguments. Instead, the United States focuses on the characteristics of the activities that define the fishing methods to distinguish between them. Thus, it argues that the measure is calibrated to the fact that the observed and

⁴³ United States' first written submission in *US – Tuna II (Mexico)* (April 16, 2010), para. 9.

allegedly unobserved mortalities and serious injuries caused by AIDCP-compliant fishing in the ETP arise because of the chasing and encirclement of dolphins. It follows that, under the United States' argument, the observed and unobserved mortalities caused by other fishing methods in other ocean areas do not matter because they are caused by different fishing activities. Under the United States' argument, it does not matter that dolphins are being killed and seriously injured outside a single fishing method. This is completely at odds with the objectives of the measure and must be rejected.

24. With reference to paragraphs 25 and 35 of the United States' opening oral statement, could the United States please explain the difference in the direct dolphin mortality figures it has provided (69-227 and 95 per 1,000 dolphin sets)?

55. Mexico has no comments on the United States' response.

1.2 The 2016 Tuna Measure

25. With reference to footnote 93 of the United States' first written submission, please explain what the terms "harass" and "hunt" mean in 16 USC 1362(13).

56. To supplement the United States' response to this question, the U.S. Commerce Department also maintains a program known as the Marine Mammal Authorization Program, under which commercial fishers are automatically authorized to "incidentally take" marine mammals in U.S. domestic fisheries when they obtain a federal or state fishery license. For fishers without a license, an application can be made with a USD\$25 processing fee.⁴⁴

26. With reference to paragraph 85 of the United States' first written submission, please explain:

(a) What is meant by a "government certificate validating"? In particular, what does "validation" entail, and how would a government "validate" the relevant documents or facts (for example, how could a government verify whether "chain of custody information is correct")?

(b) What is the relevant "catch documentation"; and

(c) What is the relevant "chain of custody information"?

57. Paragraph 85 of the United States' first written submission, and this question, relate to the government certificate to be required from a fishery that has been designated under the determination provisions.

58. As discussed below in relation to Question 46, the U.S. industry itself (through its organization, the International Sustainable Seafood Foundation) recently confirmed that none of the regional fisheries management organizations (RFMOs) has implemented a catch documentation scheme (CDS) to validate the chain of custody of sea food products, with the exception of the AIDCP dolphin-safe tracking system, which is tied to Tuna Tracking Forms supervised by independent observers and governmental authorities.

59. The only functioning example cited by the United States, not surprisingly, is the AIDCP system. The United States also cites to the High Seas Driftnet Enforcement Act, but adds in a footnote that no countries are currently designated under that program, and it did not submit evidence that any governmental certificate was ever received under that program.

⁴⁴ NOAA Fisheries, Marine Mammal Authorization Program, available at <http://www.nmfs.noaa.gov/pr/interactions/mmap/> (Exhibit MEX-126).

27. Please respond to the allegations contained in paragraph 140 of Mexico's first written submission.

60. As discussed in Mexico's comments on the United States' responses to Questions 26 and 46, none of the RFMOs has implemented a CDS with the exception of the AIDCP system, and the United States has not provided any example of a functioning international government certification program for chain of custody other than the AIDCP. Mexico reaffirms that some type of new treaty appears necessary to extend chain of custody verification beyond the AIDCP program.

28. With reference to paragraph 132 of Mexico's first written submission, please elaborate on your response to Mexico's assertion that "[t]his interpretation of 'intentional' is vague and leaves considerable discretion to the captain to decide when he has acted intentionally".

61. A problem that the United States does not address is that, under the tuna measure, outside the ETP the judgment on whether a set was made intentionally on dolphins is made by the captain, and not by an independent observer. In the example of the Freitas case, the captains argued that their setting on dolphins was not intentional, but the adjudicator favoured the testimony of observers.⁴⁵ In fact, the United States has produced no example of a captain that has ever voluntarily disclosed that his vessel made an intentional set or gear deployment on dolphins.

62. Mexico reaffirms its point that captains are left with very broad discretion to claim that all interactions with dolphins are "accidental."

29. With reference to paragraph 136 of Mexico's first written submission, please respond to Mexico's assertion that the Tuna Measure's requirements concerning the separation of dolphin-safe and non-dolphin-safe tuna from outside the ETP are "unenforceable and meaningless".

63. The United States' response to this question presents no new evidence or arguments. Mexico has previously demonstrated that, outside the ETP, there is no evidence of segregation of dolphin-safe tuna from non-dolphin-safe tuna in storage wells or during transshipment or processing.⁴⁶ More detail is provided in Mexico's comments on the United States' response to Question 46, below.

30. With reference to paragraph 141 of Mexico's first written submission, please comment on Mexico's assertion that "there are no procedures for making" a determination of "regular and significant dolphin mortality".

64. In response to the United States' request for clarification of the legal significance of not having procedures for the determination provisions, Mexico explains that the absence of a procedure is an indication of arbitrary action.

65. Under the MMPA regulations, the Commerce Department established a detailed, formal procedure for evaluating risks to marine mammals in fisheries, which includes publication of both proposed and final actions and opportunities for public comment.⁴⁷ In contrast, under the tuna measure, the United States made the determination about

⁴⁵ See Mexico's responses to the Panels' questions, para. 10, citing U.S. Department of Commerce, In the Matter of Matthew Freitas, et al., Initial Decision and Order (August 23, 2013) (Exhibit MEX-115).

⁴⁶ See Mexico's responses to the Panels' questions, paras. 64-70 and Exhibit MEX-93; Mexico's first written submission, para. 295.

⁴⁷ Department of Commerce, Fish and Fish Product Import Provisions of the Marine Mammal Protection Act; Final Rule, 81 Fed. Reg. 54390 (Aug. 15, 2016), pp. 54414-54419 (Exhibit MEX-49).

the Indian Ocean gillnet fisheries in secret, using an ad hoc process, and only for the purpose of constructing an argument for use in this proceeding.

31. With reference to paragraph 108 of Mexico's second written submission:

- a. **Please comment on Mexico's assertion that there is no established "methodology for deciding when to consider evidence of dolphin mortalities in a fishery deserving of investigation".**
- b. **Please elaborate on the methodology on the basis of which the September 2016 determination was made. Was that determination made on the basis of a pre-established mechanism that would apply to determinations in general?**
- c. **Please respond to Mexico's argument that there are other fisheries and country fleets in respect of which Mexico submitted evidence indicating the existence of "regular and significant mortality", but about which the United States did not make a determination.**
- d. **Please explain why the United States made a determination in respect of a fishery from which it does not currently import tuna?**
- e. **Does the United States' reliance on tonnage in the September 2016 determination undermine its claim that the Panels should assess risk on a per-set basis?**

66. With regard to the United States' responses to parts (a) and (b), Mexico refers to its response to Question 82 and its explanation in its second written submission regarding the arbitrariness of the application of the determination provisions.⁴⁸ Also, Mexico has previously observed that the decision of the United States to use as its comparator a twenty-year average for the ETP – with the apparent goal of incorporating higher mortalities from 20 years ago to give a higher average figure – is completely arbitrary.⁴⁹ It is also inconsistent and arbitrary that the United States does not acknowledge that there is a "regular and significant" association between dolphins and tuna in the Indian Ocean gillnet fishery, as there would have to be to generate over 60,000 mortalities annually.⁵⁰

67. With regard to part (c), the United States still has not explained why it has never undertaken to investigate the evidence of dolphin mortalities occurring in the fisheries identified by Mexico, such as by making requests to the nations whose fleets are involved – just as it did for the Indian Ocean gillnet fisheries and as it will be doing under the MMPA regulations (discussed in relation to Question 34 below). A willful avoidance of the facts is inconsistent with the objectives of the tuna measure.

68. With regard to part (d), Mexico has no comments on the U.S. response.

69. With regard to part (e), Mexico reaffirms its position that the decision of the United States to abandon the per-set metric in its evaluation of the Indian Ocean gillnet fishery is inconsistent with its argument that use of the per-set metric is somehow required by the tuna measure.

32. Please respond to Mexico's argument, in paragraph 149 of its first written submission, regarding commitments by retailers not to purchase Mexican tuna products.

70. This issue already has been discussed at length. Mexico has no comments on the United States' response.

⁴⁸ Mexico's responses to the Panels' questions, paras. 119-120; Mexico's second written submission, paras. 105-113.

⁴⁹ Mexico's responses to the Panels' questions, para. 119; Mexico's second written submission, para. 107.

⁵⁰ Mexico's responses to the Panels' questions, para. 182.

33. With reference to paragraph 243 of Mexico's first written submission, does the United States agree that a fishery should be considered as being "high risk" if dolphin mortalities in that fishery are above the applicable PBR level?

71. Mexico has understood the United States' previously-stated position to be that, even if dolphin mortalities in a fishery are not having a material effect on dolphin populations, the tuna caught in such fisheries can still be considered not dolphin-safe because the measure is aimed at mortalities and serious injuries to any individual dolphin. Mexico has explained that this implies a very high and restrictive standard, amounting to zero tolerance, and the United States is required to apply that same high and restrictive standard to other fisheries. But the United States' answer to this question highlights that the United States considers that tuna caught in a fishery that is threatening dolphin populations *with extinction* is treated as dolphin-safe under the tuna measure. Mexico cannot see any way in which the United States' interpretation of the measure can be reconciled to its objectives.

72. The United States further complains that PBR data is unreliable. But the United States regularly relies on PBR to evaluate marine mammal bycatch in its domestic fisheries,⁵¹ and it relied on PBR to evaluate the ETP fishery in its last formal evaluation of the fishery in 2002.⁵² Moreover, under its new MMPA regulations, the United States is requiring foreign countries to determine PBRs or implement a PBR-comparable measure for their fisheries that export sea food to the United States. The regulations establish a presumption that fisheries will be deemed harmful to marine mammals if foreign countries do not provide the data; in turn, that data (or absence of data) will be used as the basis for imposing embargoes on sea food from those countries.⁵³ It is arbitrary for the United States to use PBR for all these other purposes, but then to deny its relevance to the tuna measure.

73. It is also relevant that the United States, in connection with its application of the determination provisions to the Indian Ocean gillnet fisheries, sent letters asking the affected countries to report further information on dolphin mortalities in their fisheries, and then, when it received no responses, proceeded to determine that the mortalities in those fisheries were too high. The United States has not explained why it cannot make similar inquiries to other countries, such as Chinese Taipei, China, the Philippines and Vietnam.

74. Mexico further observes that nothing prevents the United States from conducting an updated dolphin abundance study in the ETP, other than a budget allocation for that purpose. But even if such a study clearly reaffirmed strong growth in the populations of the eastern spinner and northeast spotted dolphin stocks, *the tuna measure would not allow the U.S. Commerce Department to restore the dolphin-safe label* for tuna caught by the dolphin encirclement method. As established by the Hogarth ruling, the tuna measure permanently precludes any consideration of new data relating to the ETP large purse seine fishery.⁵⁴

34. With reference to paragraph 246 of Mexico's first written submission, please comment on Mexico's assertion that "the United States itself considers that dolphins are at severe risk in fisheries other than the ETP".

⁵¹ See Mexico's first written submission, para. 41.

⁵² National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals; Decision Regarding the Impact of Purse Seine Fishing on Depleted Dolphin Stocks" 68 Fed. Reg. 2010 (Jan. 15, 2003) (Final Finding), p. 2015 (Exhibit MEX-10).

⁵³ See Mexico's comments on the United States' response to Question 34.

⁵⁴ See Mexico's first written submission, paras. 146-147.

75. Mexico's statement was based on the MMPA regulations, which will impose a burden of proof on foreign nations to establish that their fishers protect marine mammals to the same extent as the United States protects its own, and will require the U.S. Commerce Department to embargo the importation of fish and fish products not meeting U.S. standards for marine mammal protection:

With respect to foreign fisheries, section 101(a)(2) of the MMPA states that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary of Commerce shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.⁵⁵

As Mexico has explained, these regulations expressly exclude application to the ETP large purse seine fishery, because the same legal requirements have already been applied to that fishery.⁵⁶

76. Under the MMPA regulations:

... NMFS will notify each harvesting nation having fisheries that export to the United States and request that within 90 days of notification the harvesting nation submit reliable information about the commercial fishing operations identified, including the number of participants, number of vessels, gear type, target species, area of operation, fishing season, and any information regarding the frequency of marine mammal incidental mortality and serious injury, including programs to assess marine mammal populations. Harvesting nations will also be requested to submit copies of any laws, decrees, regulations, or measures to reduce incidental mortality and serious injury of marine mammals in those fisheries or prohibit the intentional killing or injury of marine mammals. NMFS will evaluate each harvesting nation's submission, any readily available information, request additional information from the harvesting nations, as necessary, and use this information to classify the fisheries. Where no information or analogous fishery or fishery information exists, NMFS will classify the commercial fishing operation as an export fishery until such time as the harvesting nation provides reliable information to properly classify the fishery or such information is readily available to the Assistant Administrator in the course of preparing the List of Foreign Fisheries.⁵⁷

77. The U.S. Commerce Department also stated: "this rule places the burden of proof on the harvesting nation to supply the information to classify its fisheries."⁵⁸

⁵⁵ Department of Commerce, Fish and Fish Product Import Provisions of the Marine Mammal Protection Act; Final Rule, 81 Fed. Reg. 54390 (Aug. 15, 2016), p. 54390 (Exhibit MEX-49).

⁵⁶ *Ibid.*, p. 54414 ("Paragraph (h) of this section [the new regulations] shall not apply to a commercial fishing operation subject to section 101(a)(2)(B) of the MMPA and its implementing regulations set out in the relevant provisions of paragraph (f) of this section which govern the incidental take of delphinids in course of commercial purse seine fishing operations for yellowfin tuna in the eastern tropical Pacific Ocean and restrictions on importation and sale of fish and fish products caught or harvested in that commercial fishing operation.") (emphasis added).

⁵⁷ *Ibid.*, p. 54391.

⁵⁸ *Ibid.*, p. 54399.

78. The MMPA rules apply to any non-U.S. fishery that the United States considers to be an "Export Fishery," which is defined as follows:

Export fishery means a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and to have more than a remote likelihood of incidental mortality and serious injury of marine mammals (as defined in the definition of an "exempt fishery") in the course of its commercial fishing operations.⁵⁹

The MMPA regulations do not mention the concept of "unobservable harms."

79. In this dispute, the United States has asserted that, for purposes of determining the level of dolphin protection in other fisheries, it is sufficient that a regional fisheries management organization (RFMO) such as the WCPFC or IOTC has banned dolphin sets.⁶⁰ But in responding to a comment on the MMPA regulations, the U.S. Commerce Department made clear that reliance on RFMO rules is insufficient:

Comment 42: A commenter noted the Western and Central Pacific Fisheries Commission, of which the United States is a member, has developed draft guidelines for the safe release of encircled animals in the purse seine fishery, and similar international guidelines are available for longline captured marine mammals. Given the role of the United States in developing and negotiating such arrangements, they recommended that the application of these guidelines should be considered sufficient under the proposed rule.

Response: NMFS acknowledges these guidelines but notes that RFMO conservation and management measures reflect multilateral agreements which may or may not meet U.S. standards for its domestic fisheries. The U.S. standard applicable to domestic fisheries under the MMPA prohibits the intentional encirclement of dolphins in the course of purse seine fishing; and there are additional regulatory requirements on longline fisheries to reduce the bycatch of false killer whales including longline gear requirements and longline prohibited areas⁶¹

⁵⁹ Ibid., p. 54413. The definition of "exempt fishery" includes the following explanation:

A commercial fishing operation that has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other foreign fisheries exporting fish and fish products to the United States causes the annual removal of:

- (1) Ten percent or less of any marine mammal stock's bycatch limit; or
- (2) More than 10 percent of any marine mammal stock's bycatch limit, yet that fishery by itself removes 1 percent or less of that stock's bycatch limit annually; or
- (3) Where reliable information has not been provided by the harvesting nation on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation, the Assistant Administrator may determine whether the likelihood of incidental mortality and serious injury is "remote" by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, the species and distribution of marine mammals in the area, or other factors at the discretion of the Assistant Administrator. A foreign fishery will not be classified as an exempt fishery unless the Assistant Administrator has reliable information from the harvesting nation, or other information to support such a finding.

Ibid., p. 54412-54413.

⁶⁰ United States' third written submission, paras. 67, 114; United States' second written submission, paras. 129, 143; United States' first written submission, paras. 47, 126, 177.

⁶¹ Department of Commerce, Fish and Fish Product Import Provisions of the Marine Mammal Protection Act; Final Rule, 81 Fed. Reg. 54390 (Aug. 15, 2016), p. 54402 (Exhibit MEX-49).

80. The United States asserts that it does not yet have the evidence to evaluate foreign fisheries, and that NOAA "has every intention of making decisions based on actual evidence."⁶² Yet in this dispute, the United States asserts that it is confident that dolphins are not at risk outside the ETP. Mexico submits that the MMPA regulations more accurately reflect the genuine views of the United States regarding risks to dolphins outside the ETP.

81. On the basis of the foregoing, Mexico reaffirms its statement that the United States considers that dolphins are at severe risk in tuna fisheries other than the ETP large purse seine fishery.

35. Please explain what is included in the concept of "serious injury". What is the difference between "serious injury" and other kinds of injury?

82. The United States' response to this question highlights that if dolphins are injured, but not "seriously," the tuna caught in the set or gear deployment that caused the injury can be treated as dolphin-safe. Yet the United States justifies the disqualification of the dolphinset method in the ETP on the basis of unobservable harms allegedly suffered by dolphins that are released completely unharmed. This is one of the fundamental inconsistencies in the application of the tuna measure.

36. With reference to paragraph 32 of United States' second written submission, regarding the "unobservable harms caused by 'the chase itself,' such as cow-calf separation, muscular damage, and immune and reproductive system failures", does the 2016 Tuna Measure cover such unobservable harms outside the ETP large purse seine fishery? How? Does the concept of "serious injury" cover such unobserved harms?

83. Mexico reaffirms its position that there is no conclusive evidence that the "chase" causes the unobservable harms alleged by the United States. The most relevant point in relation to this question, however, is that Mexico has submitted evidence that (i) scientists are evaluating similar potential unobservable harms caused by stress from other fishing methods, (ii) that any method in which there are mortalities, entanglements or dolphins pulled on board potentially can separate dolphins from their herds, and (iii) fishers in other ocean regions use dolphins to locate tuna, and therefore interact with large quantities of dolphins.⁶³ Moreover, it is illogical to deny that a fishery that kills 60,000 dolphins annually (i.e., the Indian Ocean gillnet fishery) does not cause cow-calf separation. In summary, the United States cannot show that the tuna measure takes into account potential unobservable harms.

37. Is there any data available on the share or quantity of tuna fish captured, or fishing sets executed, by non-ETP fisheries that are considered as non-dolphin safe by captains operating in those fisheries?

84. Mexico agrees with the United States that there is no data on non-dolphin-safe tuna captured outside the ETP. In fact, based on data previously submitted by the United States, it appears that no vessel or tuna processor from outside the ETP has ever voluntarily disclosed that its tuna or tuna products were not eligible for the dolphin-safe label.⁶⁴

⁶² United States' responses to the Panels' questions, para. 196.

⁶³ See, e.g., Mexico's responses to the Panel's questions, paras. 36 (discussing studies of stress in dolphins caused by temporary entanglements) and 174-180.

⁶⁴ See William Jacobson Witness Statement (May 26, 2014), Appendix 2 (from January 1, 2005 to December 31, 2013, only imports from Mexico were identified as non-dolphin-safe in submitted Forms 370) (Exhibit US-52).

38. With reference to paragraph 7 of Mexico's opening oral statement, does the United States agree that the 2016 Tuna Measure identifies only two types of adverse effects on dolphins, namely, dolphin mortalities and serious injuries? If not, which provision makes clear that the Measure is also concerned with other types of adverse effects on dolphins, including unobservable harm resulting from chasing of dolphins in the case of large purse sein fishing by setting on dolphins?

85. The United States' response to this question appears to conflict with its response to Question 33, where it stated that "the 'risk' the measure addresses is the risk to individual dolphins based on a per-set certification by a captain or observer" – i.e., mortalities and serious injuries. In its response to Question 38, however, the United States seems to claim that the tuna measure is intended to protect dolphins from harms that are *not* mortalities and serious injuries. The United States does not explain its argument clearly. In particular, under the tuna measure, injuries to dolphins that do not meet the U.S. definition of "serious injury" – such as being hooked in the lip – do not disqualify tuna from being dolphin-safe.⁶⁵ Yet according to the United States, releasing dolphins from nets in the ETP with no injuries disqualifies the tuna from being dolphin-safe. That is inconsistent and arbitrary.

86. The tuna measure itself conditioned changing the definition of "dolphin-safe" to eliminate the prohibition on dolphin sets based on an evaluation of the potential impact of dolphin sets on the populations of the dolphin stocks designated as "depleted" by the United States.⁶⁶ The tuna measure is unconcerned with other stocks that are involved in ETP dolphin sets, such as the stocks of common dolphins whose populations have exploded,⁶⁷ or even with the stock of whitebelly spinner dolphins, as they are not designated by the United States as depleted.⁶⁸ There is no support in the measure itself for the United States' claim that the measure is intended to incorporate speculative judgments about unobservable harms.

39. With reference to paragraph 7 of Brazil's third party statement, please respond to Brazil's assertion that "the United States is belatedly attempting to adapt the formulation of the objective of the measure to suit its own purposes".

87. Although the United States asserts that it "has always explained that what Mexico has challenged is an *environmental* measure in that it seeks to protect dolphins",⁶⁹ Mexico notes that, in the original proceedings, the United States itself described the objectives of the tuna measure as, first, "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that

⁶⁵ Mexico's responses to the Panels' questions, paras. 198-199. See also Mexico's first written submission, para. 270; Mexico's second written submission, para. 89; and Mexico's responses to the Panels' questions, para. 46.

⁶⁶ 16 U.S.C. § 1385(g)(2) ("Between July 1, 2001, and December 31, 2002, the Secretary shall, on the basis of the completed study conducted under section 1414a(a) of this title, information obtained under the International Dolphin Conservation Program, and any other relevant information, make a finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any *depleted dolphin stock* in the eastern tropical Pacific Ocean" (emphasis added) (Exhibit MEX-1). For this reason, the Commerce Department's Final Finding did not address the ETP stocks of common dolphins and whitebelly spotted dolphins, even though they are involved in the dolphin set fishery. See National Oceanic and Atmospheric Administration, "Taking and Importing of Marine Mammals; Decision Regarding the Impact of Purse Seine Fishing on Depleted Dolphin Stocks" 68 Fed. Reg. 2010 (Jan. 15, 2003) (Final Finding) (Exhibit MEX-10).

⁶⁷ See Mexico's first written submission, footnote 24 (explaining that the population of common dolphins in the ETP is estimated to have increased by over 750,000 during 1986-2000).

⁶⁸ The most recent statistics on mortalities to the stocks of whitebelly spinner dolphins, and the Northern, Central and Southern common dolphins are contained in Table 2 of Exhibit MEX-103.

⁶⁹ United States' responses to the Panels' questions, para. 206.

adversely affects dolphins" and, second, "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affect dolphins".⁷⁰ Moreover, the United States "later expressed the second objective in terms of contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna 'by setting on dolphins'",⁷¹ connecting the second, dolphin-protection objective to the wording of the first, consumer-information objective (albeit specifically with respect to Mexico's fishing method).

88. Where the United States asserts in its third written submission that "[d]olphin protection, including assuring consumers of dolphin protection, is the main substantive objective of the measure",⁷² this re-characterization constitutes a meaningful departure from its own description of the measure's objectives in the original proceedings, as well as from the description of the objectives considered by the Appellate Body in the first compliance proceedings.⁷³ The previous panels and the Appellate Body have not described one "central" objective in the way that the United States suggests the objectives should now be understood; rather, previous reports have described two inter-related and inter-dependent objectives.

89. Mexico has addressed in its oral statement the relevance and implications of this issue in the current proceedings.⁷⁴

1.3 Legal Issues

40. With reference to paragraph 23 of the United States' third written submission, please elaborate on how a calibration analysis that allowed for labelling to be less accurate in respect of some tuna products than others would be consistent with the objective of protecting dolphins from adverse effects arising in different fisheries (i.e. the use of different fishing methods in different areas of the ocean)?

90. The United States has failed to respond to the question asked by the Panels, and instead repeats a number of its arguments on other points. Mexico has already addressed those points in its written submissions and its responses to the Panels' questions.

91. As explained in Mexico's answer to question 104, the evidence of inaccuracy lies in the evidence of deficiencies and gaps in the eligibility criteria, the certification

⁷⁰ Panel Report, *US – Tuna II (Mexico)*, paras. 7.395 and 7.401. See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.16.

⁷¹ Panel Report, *US – Tuna II (Mexico)*, paras. 7.397 and 7.402.

⁷² United States' third written submission, para. 24, citing Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.16 (see below). Mexico notes that the United States adds that "label accuracy is a means of ensuring that end [i.e., of dolphin protection, including ensuring consumers of dolphin protection]". This phrase addresses the role of accuracy in the legal assessment of the measure, and it should not be interpreted as something that corrects the *ex post facto* re-framing and re-focusing of the measure's objectives.

⁷³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.16 ("We observe, for instance, that the original panel and the Appellate Body found that the objectives of the US dolphin-safe labelling regime are, first, 'ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins', and, second, 'contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins'. These are also the objectives of the amended tuna measure. Thus, like the original measure, the amended tuna measure establishes a labelling regime consisting of various elements that are aimed at fulfilling the same objectives").

⁷⁴ Mexico's opening statement, paras. 6-9.

requirements, and the tracking and verification requirements.⁷⁵ In *EC – Seal Products*, the Appellate Body found that the possibility that the measure at issue could be applied in a manner that might inaccurately characterize products with an advantageous market status was sufficient to establish a *prima facie* case of arbitrary or unjustifiable discrimination, thereby shifting the burden to the responding Member.⁷⁶ It is incorrect to argue that Mexico has not provided “any evidence” of the gaps and deficiencies in the measure that could result in inaccurate information being passed to consumers in contradiction with the objectives of the tuna measure,⁷⁷ or to otherwise suggest that Mexico has not met its burden in respect of this argument.

92. Rather than attempting to rebut Mexico's *prima facie* case with evidence showing how such instances of inaccuracy can be prevented in the application of the tuna measure, the United States takes the opposite approach, suggesting that AIDCP dolphin-safe certification must also be inaccurate on the alleged basis that certification is “much more difficult” in the ETP than in other fisheries, and relying upon the dissenting opinion of the minority panellist in the first compliance proceedings to justify a greater “margin of error” in the application of the measure to other fishing methods in other ocean areas.⁷⁸

93. Mexico has already adduced arguments rebutting the United States' speculative allegations that certification is “more difficult” in the ETP than elsewhere.⁷⁹ Moreover, as Mexico has explained, the United States' interpretation of calibration as allowing, on the facts of this dispute, for there to be a “margin of error” in the accuracy of the information provided to consumers on the dolphin-safe label is something that cannot be justified under a proper interpretation and application of the calibration analysis for the purposes of the assessment of even-handedness in the second step of the “treatment no less favourable” test under Article 2.1 of the TBT Agreement or for the assessment of arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994.⁸⁰

94. The United States also criticizes Mexico's argument that tuna product produced from purse seine fishing in the western and central Pacific Ocean should be subject to heightened certification and tracking and verification requirements based on a variety of factors – above *de minimis* mortality, “fishing from different fleets,” trans-shipment, and the structure of local industries. It argues that calibration based on such factors would

⁷⁵ Mexico's responses to the Panels' questions, paras. 200-205.

⁷⁶ Appellate Body Report, *EC – Seal Products*, paras. 2.326, 3.328, 3.338.

⁷⁷ See Mexico's first written submission, paras. 22-23, 112-117, 244, 264-284, 291-299; Mexico's second written submission, paras. 53-85, 86-93, 95-103; Mexico's opening statement, paras. 45, 60-72, 74-77, 83-84. Mexico also notes that the first compliance panel found that: “In the Panel's view, the United States has not rebutted Mexico's showing that captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured in a set or other gear deployment, and this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure”; “In particular, we see some merit in Mexico's argument that the system in place outside the ETP large purse seine fishery may contribute to inaccurate labelling of tuna caught in sets or other gear deployments in which dolphins were killed or seriously injured”; and “We also see some merit in Mexico's argument that the different tracking and verification requirements may make it more likely that tuna caught other than by large purse seine vessels in the ETP could be incorrectly labelled”. See Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.233, 7.368, 7.372, 7.454, 7.598, 7.463, 7.610. These findings were acknowledged by the Appellate Body. See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.252-7.253 and footnote 611 to para. 7.166.

⁷⁸ United States' responses to the Panels' questions, paras. 210-215.

⁷⁹ Mexico's responses to the Panels' questions, paras. 12-17.

⁸⁰ See Mexico's responses to the Panels' questions, paras. 84-93.

not be calibration based on "differences in risk to dolphins".⁸¹ This is incorrect. The above-referenced factors identified by Mexico establish that an ocean area fishery is high risk for inaccurate reporting, record-keeping, and information transmission relating to dolphin safety and therefore a high risk for inaccurate labelling on tuna products. The measure's dolphin-protection objective depends on U.S. consumers making informed purchasing choices based on accurate labelling information. If the dolphin-safe information regarding the tuna in tuna products is inaccurate, then consumers cannot make a properly informed or meaningful decision. As a consequence, their purchasing decisions could favour non-dolphin-safe tuna and thereby put dolphins at risk by encouraging fishing fleets to harvest tuna using fishing methods that actually adversely affect dolphins. In such circumstances, a high risk of inaccurate labelling equates to a high risk to dolphins, contrary to both of the interrelated objectives of the tuna measure.⁸²

41. With reference to paragraph 62 of the United States' first written submission, is the United States' assertion that "a fishery that relies on the intentional targeting of dolphins is [not] like a fishery where dolphin interactions are incidental" consistent with the Appellate Body's findings in the first compliance proceedings that the conditions prevailing between countries are the same? (See Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.308.)

95. Mexico agrees with the United States that the assertion in paragraph 62 of the United States' first written submission relates to the calibration assessment of the tuna measure's regulatory differences in the legal test for arbitrary and unjustifiable discrimination under the chapeau of Article XX and not to the requirement that the "same conditions prevail"⁸³ (see Mexico's response to Question 111).

96. With respect to the United States' other statements in response to this question, Mexico has already adduced evidence and arguments in its written submissions and its responses to the Panels' questions rebutting the United States' allegations that the overall relative risks to dolphins posed by the AIDCP-compliant dolphin encirclement fishing method in the ETP are "distinct" or greater in comparison to the overall relative risks posed by other fishing methods in other ocean areas, including "where dolphin interactions are accidental".⁸⁴ Moreover, while the United States continues to describe the risk profile of AIDCP dolphin-safe encirclement sets in the ETP large purse seine fishery as "distinct" based on the characteristics of the method itself and the corresponding presumption that they give rise to a unique category of unobservable harms, the calibration assessment described by the Appellate Body compares risk

⁸¹ United States' responses to the Panels' questions, para. 215.

⁸² Mexico's responses to the Panels' questions, paras. 96-107. See also, *ibid.*, para. 87.

⁸³ United States' responses to the Panels' questions, para. 219.

⁸⁴ See, *inter alia*, Mexico's table summarizing the data available regarding the relative overall risks of adverse effects on dolphins caused by different fishing methods in different ocean areas (Exhibit MEX-95); Mexico's responses to the Panels' questions, paras. 3-4, 18-22, 26-30, 31-34, 43-49, 161-162, 176-183; Mexico's second written submission, paras. 56-85, 86-94, 95-103; Mexico's first written submission, paras. 230, 239-261, 280-284, 291-300.

profiles that are determined on the basis of the overall relative levels of harm caused by different fishing methods in different ocean areas.⁸⁵

42. With reference to paragraph 141 of the United States' first written submission, how should the Panels assess whether a particular regulatory distinction represents a "fair response" to different risk profiles? Is "fair response" in this context coterminous with "calibrated"?

97. Mexico has no comment on the United States' response to this question, except to observe that a "fair response" is not equivalent in its ordinary meaning to the phrases "tailored to" or "commensurate with", especially in the context of the alleged "calibration" of a trade-restrictive measure (see Mexico's response to Question 107).

43. Please respond to the allegations made in paragraph 214 of Mexico's first written submission regarding the accuracy of the individual labelling conditions.

98. Mexico has fully addressed the issues raised in the United States' response to this question in Mexico's comments on the United States' responses to other questions, above and below⁸⁶ and in Mexico's responses to the Panels' questions.⁸⁷ There is no need to repeat these arguments again.

44. With reference to paragraph 219 of Mexico's first written submission, please respond to Mexico's assertion that, under the correct calibration analysis, "stronger certification and tracking and verification requirements will be necessary in ocean areas that have poor record-keeping and reporting reliability and significant illegal, unreported, and unregulated (IUU) fishing." How, if at all, should the Panels take the existence of IUU fishing into account in its analysis?

99. In its response to this question, the United States' mischaracterizes Mexico's legal arguments, using incorrect and misleading descriptions such as "different tests" and "Mexico's alternative test" to incorrectly describe the different factors or questions that Mexico has identified in this dispute as relevant to the assessment of even-handedness in the second step of the "treatment no less favourable" analysis under Article 2.1 of the TBT Agreement and the assessment of arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994.⁸⁸ In doing so, the

⁸⁵ Mexico's first written submission, para. 216. See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.161 ("By focusing solely on its understanding that the *unobserved* harms differed between setting on dolphins and other fishing methods, the Panel did not consider the relative risks posed by the relevant fishing methods in respect of *observed* mortality or serious injury, and therefore did not resolve the questions of the overall levels of risk in the different fisheries and how they compare to each other" (emphasis original)) and 7.252 ("for the reasons set out above, we do not see that the Panel in these proceedings set out to examine the extent of mortality or serious injury arising from fishing methods in different areas of the oceans so as to enable itself to gauge properly the overall relative risks or levels of harm to dolphins arising in those fisheries, which was needed in order to assess whether the differences in the dolphin-safe labelling conditions under the amended tuna measure are appropriately tailored to, and commensurate with, those respective risks"). See also Mexico's responses to the Panels' questions, paras. 170-172.

⁸⁶ See Mexico's comments on the United States' responses to Questions 40, 44, and 49.

⁸⁷ Mexico's responses to the Panels' questions, paras. 12-17, 70, 76-80, 84-93, 96-107, 117, 122-124, 141-144, 146-148, 200-205, 206-209.

⁸⁸ See Mexico's second written submission, paras. 20-24; Mexico's responses to the Panels' questions, paras. 76-80, 116-117.

United States crafts its response to address arguments (and alleged errors) that Mexico has not actually made and that should not be attributed to Mexico.⁸⁹

100. Moreover, the United States misinterprets and mischaracterizes the Appellate Body's reasoning and findings with respect to the errors that the Appellate Body identified in the first compliance panel's analytical approach, conflating a "segmented" analysis of isolated elements of the measure with a "sequential" analysis that carefully scrutinizes the design, architecture, revealing structure, operation, and application of the measure in the light of the particular circumstances of the case. Mexico notes that the Appellate Body's reasoning in paragraphs 7.10 through 7.21 of its report are essential to understanding how and why it found that the panel's "segmented analysis that isolated consideration of each element of the measure without accounting for the manner in which the elements are interrelated, and without aggregating or synthesizing its analyses or findings relating to those elements before reaching its ultimate conclusions as to the consistency or inconsistency of the amended tuna measure" was not the appropriate approach in the particular circumstances of this dispute.⁹⁰

101. In particular, the Appellate Body considered that "there are various 'connections' between the different elements of the amended tuna measure that are relevant to the regulatory distinctions examined by the Panel",⁹¹ but that the Panel had failed to take account of these interrelationships or address the manner in which they operate together in the course of its analyses.⁹² Having established this context, the Appellate Body made

⁸⁹ The Appellate Body has clearly found that neither of the legal analyses under the second step of "treatment no less favourable" test of Article 2.1 or the chapeau of Article XX is limited to a single factor or legal question. See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.94-7.95 ("one of the ways to determine whether the detrimental impacted caused by a technical regulation is even-handed and therefore stems exclusively from a legitimate regulatory distinction is by examining whether the regulatory distinction is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination", and "a panel does not err by assessing whether the detrimental impact can be reconciled with, or is rationally related to, the policy pursued by the measure at issue, so long as, in doing so, it does not preclude consideration of other factors that may also be relevant to the analysis") and 7.316 ("[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX. This factor is 'particularly relevant in assessing the merits of the explanations provided by the respondent as to the cause of the discrimination'. The Appellate Body has explained, however, that this is not the sole test, and that, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment. Prior Appellate Body jurisprudence therefore underscores the importance of examining the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure. In addition, however, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors could also be relevant to the analysis"). The Appellate Body's consideration that there is a "special relevance" in conducting a "calibration" assessment in the circumstances of this dispute should not be misunderstood as narrowing the legal analyses to this singular factor or question to the exclusion of other relevant considerations.

⁹⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.10-7.21.

⁹¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.31, 7.96, citing Appellate Body Report, *US – Clove Cigarettes*, para. 182.

⁹² Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.61 ("The various sets of requirements under the amended tuna measure may have varying degrees of significance for the question of whether Mexican tuna products are detrimentally affected, such that it may be appropriate to unbundle the different elements and examine them in a sequential manner. However, we do not consider that an examination of the detrimental impact of the amended tuna measure could be properly conducted without also taking account of the interrelationship among those elements and addressing the manner in which they operate together to modify the conditions of competition in the US market for tuna products").

the following findings: first, that the compliance panel had erred in making separate assessments and findings of detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market instead of making holistic findings with respect to the measure as a whole⁹³; in turn, that the panel had erred in its discrete assessments of the even-handedness of the different certification requirements and the different tracking and verification requirements, leading to separate findings under the second step of the 'treatment no less favourable' test under Article 2.1 of the TBT Agreement⁹⁴; and "because these criticisms concern aspects of the Panel's reasoning and findings that it also relied upon in the context of its analysis under the chapeau of Article XX, the Panel also erred in its assessment of the certification and tracking and verification requirements under the chapeau".⁹⁵

102. The United States incorrectly suggests that the Appellate Body's reasoning means that any question or factor relevant to the design or application of a particular element of the tuna measure must be disregarded unless it is equally relevant and applicable to every element of the tuna measure at the same time.⁹⁶ This is incorrect. The Appellate Body clearly found that the legal analysis requires a panel to "carefully scrutinize whether the technical regulation at issue is even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case".⁹⁷ This necessarily requires a detailed analysis of the design and application of the elements of the measure. Moreover, the Appellate Body considered that "we do not see that it is necessarily inappropriate for a panel, in analysing the conformity of a measure with obligations under the WTO covered agreements, to proceed by assessing different elements of the measure in a sequential manner".⁹⁸ Thus, the United States is incorrect when it states that "Mexico urges the Panels to conduct the same 'segmented analysis' that the Appellate Body disagreed with so strongly in the previous proceeding".⁹⁹ The United States is conflating a "segmented analysis" with a "sequential" assessment of the elements of a measure in the light of the particular circumstances of the case.

103. Contrary to the United States' assertions, the Appellate Body did not find that the legal analysis of the tuna measure's regulatory differences should be collapsed into a

⁹³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.63, 7.66, 7.75 (with respect to the first step of the 'treatment no less favourable' test under Article 2.1 of the TBT Agreement), and 7.280 (with respect to Articles I:1 and III:4 of the GATT 1994).

⁹⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.169 and 7.229. See also *ibid.*, para. 7.159 ("it is only when the conditions of access are viewed together that the nexus between the regulatory distinctions found in the measure and the measure's policy objectives can be understood. Assessing these discrete sets of requirements in isolation from the other elements of the measure may thus hinder a comprehensive analysis of the design and structure of the measure and how it pursues its objectives").

⁹⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.332.

⁹⁶ See e.g., United States' responses to the Panels' questions, para. 229 ("Mexico's argument is particularly wrong given that Mexico's alternative test, and thus the relevance of IUU fishing, arises only with regard to the certification and tracking and verification requirements, not the eligibility criteria. Applying different tests to different regulatory distinctions is exactly the type of 'segmented analysis' that the Appellate Body criticized in the previous proceeding"). See also United States' third written submission, paras. 26-29.

⁹⁷ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.31 and 7.96, citing Appellate Body Report, *US – Clove Cigarettes*, para. 182.

⁹⁸ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.14. See also *ibid.*, para. 7.61 ("The various sets of requirements under the amended tuna measure may have varying degrees of significance for the question of whether Mexican tuna products are detrimentally affected, such that it may be appropriate to unbundle the different elements and examine them in a sequential manner").

⁹⁹ United States' responses to the Panels' questions, para. 253.

simplified examination that ignores relevant factors, questions, or considerations particular to the design and application of certain labelling conditions. There is nothing in the Appellate Body's reasoning to suggest that the Panels must conduct their analysis on a simplified 'melting pot' of the different regulatory distinctions instead of carefully scrutinizing, in a sequential manner, the details of the design, architecture, revealing structure, operation, and application of the measure in the light of the particular circumstances of the case. Importantly, such a sequential analysis of the details of the measure at issue (involving a number of factors and legal questions) does not preclude the Panels from making a holistic assessment and rendering a single finding with respect to the WTO-consistency of the measure as a whole. (In this regard, Mexico notes that the Appellate Body's concern was with a series of compartmentalized analyses resulting in separate findings for each element of the measure at issue.)

104. With respect to Mexico's evidence and arguments regarding ocean areas that have poor record-keeping and reporting reliability and significant illegal, unreported, and unregulated (IUU) fishing, Mexico has established a *prima facie* case that the gaps and deficiencies in the tuna measure's labelling requirements could result in inaccurate information being passed to consumers. As Mexico has previously explained, the Appellate Body has found that the mere possibility that a measure could be applied in a manner that might inaccurately characterize products with an advantageous market status is sufficient to establish a *prima facie* case of arbitrary or unjustifiable discrimination, thereby shifting the burden to the responding Member¹⁰⁰ (see Mexico's comments on the United States' response to Question 40, above). Mexico has also previously explained the relevance of label accuracy to the assessment of whether or not the measure is calibrated to the overall relative risks posed to dolphins by different fishing methods in different ocean regions¹⁰¹ (see Mexico's comments on the United States' response to Question 40, above). By arguing that these considerations are irrelevant, the United States fails to show how the tuna measure is applied to address the above-referenced gaps and deficiencies or calibrated to address the corresponding risks.

45. With reference to paragraph 259 of Mexico's first written submission, please respond to Mexico's argument that "a comparative assessment between the dangers associated with different fishing methods cannot be based simply on the nature of the activities".

105. Mexico reiterates that it is important that the risks to dolphins not be double-counted in the determination of the overall relative risks of harm posed to dolphins by different fishing methods in different ocean areas. Ascribing risk to the features of the fishing activity and, at the same time, to the evidence of both observed and unobserved dolphin mortality and serious injury will double-count the risk.¹⁰²

106. Further, the argument made by the United States in its response to this question leads to the conclusion that what matters in designating a fishing method in an ocean area as ineligible is the nature of the activities that cause observed and unobserved dolphin mortalities and serious injuries rather than the fact that observed and unobserved mortalities and serious injuries are being caused. Under the United States' reasoning, dolphin mortalities and serious injuries are not problematic if they are caused by types of fishing activities other than intentionally encircling dolphins in an AIDCP-compliant manner in the ETP. This outcome clearly lacks even-handedness and constitutes an arbitrary means of discrimination.

¹⁰⁰ Mexico's responses to the Panels' questions, paras. 200-205, citing Appellate Body Report, *EC – Seal Products*, paras. 5.326, 5.328, 5.338.

¹⁰¹ See Mexico's responses to the Panels' questions, paras. 96-107.

¹⁰² See Mexico's opening statement, para. 50; Mexico's second written submission, paras. 60-62; Mexico's first written submission, paras. 228-230.

46. Please respond to the allegations made in paragraph 294 of Mexico's first written submission regarding the tracking requirements.

107. Mexico explained in detail the differences between the legal requirements and implementation of such requirements in the ETP and outside the ETP in its responses to Questions 69 and 70, including Exhibit MEX-93. The United States asserts that, under the 2016 tuna measure, tuna processors will keep more extensive records, but it has not submitted any examples showing such enhanced record-keeping, tracking and verification procedures. Nor has the United States shown that it can or has ever sought to audit the records of non-U.S. processors, fishing vessels or trading companies. Indeed, none of the documents submitted by the United States shows that even U.S. processors have requirements for vessels to have separate storage wells for dolphin-safe and non-dolphin-safe tuna.

108. Regarding Exhibit US-175, Mexico thanks the United States for validating the source of the documents. [[...]]

109. The United States cites to the digital traceability programs of Chicken of the Sea and Bumble Bee as evidence that they have systems to track tuna back to the vessels that caught it.¹⁰³ However, a paper recently submitted to the WCPFC by the International Seafood Sustainability Foundation (ISSF) on Catch Documentation Schemes (CDS) contradicts the United States:

[S]ome companies have also increased their product traceability systems in recent years through the use of online tracking systems, enabling consumers to track the product they are purchasing. For example Bumble Bee Seafood's online traceability system enables a consumer to enter the relevant details on the purchased product (albacore tuna) and see a range of information about the product, including the date of the fishing trip and *the possible vessels* that caught the fish in real time. The mass balance and the product tracking systems implemented by processors demonstrates the ability to implement a CDS scheme for bulk tuna products. However, it is important to note that the processor systems are *not currently able to provide verification of the catch to the individual vessel and throughout the supply chain* and so there is still a need to implement the CDS scheme with the processor systems being integral to the overarching scheme.¹⁰⁴ (emphasis added)

110. The same document states: "To date, there has been no progress in implementing a full CDS scheme for bulk fish products such as skipjack tuna."¹⁰⁵ The paper also states:

- "WCPFC has not yet implemented a CDS for any species under its mandate, despite work commencing as early as 2005 to develop a CDS for bigeye tuna."¹⁰⁶
- "There is no CDS in the IOTC; the IOTC Bigeye Statistical Documentation Programme (Resolution 01/06) is the only related measure."¹⁰⁷

111. Regarding the AIDCP program, the ISSF paper explains:

¹⁰³ United States' responses to the Panels' questions, para. 239.

¹⁰⁴ ISSF, RFMO Catch Documentation Schemes: a summary (WCPFC-2016-CDSIWG03-OP01 (14 September 2016), para. 9 (Exhibit MEX-127).

¹⁰⁵ Ibid., para. 8.

¹⁰⁶ Ibid., para. 37.

¹⁰⁷ Ibid., para. 34.

Parties to the Agreement on the International Dolphin Conservation Program (AIDCP) have implemented a System for Tracking and Verifying Tuna to enable dolphin safe tuna caught by purse seine vessels to be distinguished from non-dolphin safe tuna. This system was implemented to track 'dolphin safe yellowfin tuna' from the time of capture to the time the product is ready for retail sale. Under this system 'dolphin safe' tuna shall, from the time of capture, during unloading, storage, transfer, and processing, be kept separate from non-dolphin safe tuna. The system is based on a Tuna Tracking Form (TTF) and additional verification procedures outlined by the program or developed by the parties for use in their jurisdiction and to implement the program.¹⁰⁸

After noting that the AIDCP tracking program only applies to the purse seine fishery and to AIDCP members, the paper concludes "[the AIDCP regime] does demonstrate the potential for implementing a full CDS traceability program for bulk tuna products from capture to sale."¹⁰⁹

112. This paper is deserving of great weight because Bumble Bee, Chicken of the Sea, Starkist and Tri Marine are among the founding members of the ISSF and fund its operations.¹¹⁰

113. The ISSF paper submitted to the WCPFC also contradicts the attempt of the United States to use ISSF audits to prove the companies have adequate product traceability measures. As with the sample documents the United States has previously submitted, the fact that a processor has associated a captain's certificate with a production lot of tuna at the processing facility does not establish that the tuna was actually sourced from the vessel identified in the certificate.

47. With reference to paragraph 42 of Mexico's second written submission, please respond to Mexico's assertion that "the accuracy of the dolphin-safe label, as a consumer information measure, is essential to "the objective of protecting dolphins from adverse effects arising in different fisheries"."

114. Mexico has fully addressed the issues raised in the United States' response to this question in Mexico's comments on the United States' responses to other questions, above and below,¹¹¹ and in Mexico's responses to the Panels' questions.¹¹²

48. With reference to paragraph 44 of Mexico's second written submission, does the United States agree that paragraphs 7.166 and 7.253 of the Appellate Body's report in the first compliance proceedings require the Panels to assess the "accuracy" of the different tracking and verification requirements as part of its calibration analysis?

115. As Mexico has stated throughout its submissions, in its opening statement, in its responses to the Panels' questions, and in these comments, the United States' position that calibration can justify "margins of error" in the accuracy of the dolphin-safe label

¹⁰⁸ Ibid., para. 21.

¹⁰⁹ Ibid., para. 22.

¹¹⁰ ISSF, Participating Companies, available at <http://iss-foundation.org/who-we-are/participantscommittees/participating-companies/> (Exhibit MEX-128).

¹¹¹ See Mexico's comments on the United States' responses to Questions 40, 44, 48, 49, and 117.

¹¹² See Mexico's responses to the Panels' questions, paras. 76-80, 84-93, 96-107, 122-124, 146-148. See also *ibid.*, paras. 96-107, 117, 141-144, 200-205, 206-209.

among different fishing methods and fisheries is legally incorrect.¹¹³ Such an interpretation ignores the large body of jurisprudence on the meaning of arbitrary or unjustifiable discrimination, which involves the question of whether or not a rational connection exists between the detrimental impact caused by the measure and the objectives of the measure.¹¹⁴ This is a crucial element of the legal analyses for both even-handedness under Article 2.1 of the TBT Agreement and arbitrary or unjustifiable discrimination under the chapeau to Article XX of the GATT 1994 because it ensures symmetry in the calibration tests conducted under each of these provisions.

49. With reference to paragraph 48 of Mexico's second written submission, does the United States agree that "[t]he relevant factors that must be considered in assessing whether the differences in labelling conditions are designed and applied in an even-handed manner will vary depending upon the particular circumstances of a regulatory distinction"?

116. Mexico has fully addressed the issues raised in the United States' response to this question in Mexico's comments on the United States' responses to Questions 44 and 40, above. Again, the United States' mischaracterizes Mexico's submissions and crafts its response to address arguments that Mexico has not made. As explained above, the United States conflates a "segmented" analysis of isolated elements of the measure with the approach advocated by Mexico, i.e., careful scrutiny, in a sequential manner, of the design, architecture, revealing structure, operation, and application of the tuna measure in the light of the particular circumstances of the case. Such a sequential analysis of the details of the measure at issue (involving a number of factors and legal questions) does not preclude the Panels from making a holistic assessment and rendering a single finding with respect to the WTO-consistency of the measure as a whole. Further, as Mexico has previously explained, the question of accuracy is central to the assessment of even-handedness in the second step of the "treatment no less favourable" test under Article 2.1 of the TBT Agreement and the assessment of arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994.¹¹⁵

50. With reference to paragraph 92 of Mexico's second written submission, please respond to Mexico's assertion that "the use of any fishing method that poses more than a *de minimis* risk to dolphins requires reliable certifications. Otherwise, the entire purpose of the tuna measure would be undermined".

117. Mexico has fully addressed the issues raised in the United States' response to this question in Mexico's comments on the United States' responses to other questions,¹¹⁶ in

¹¹³ See Mexico's comments on the United States' responses to Questions 40, 44, 49, and 117; Mexico's responses to the Panels' questions, paras. 84-93, 96-107, 122-124, 146-148; Mexico's opening statement, paras. 42-46.

¹¹⁴ Stated another way, "[t]he Appellate Body has explained that such an analysis 'should be made in the light of the objective of the measure', and that discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination 'bear no rational connection to the objective' or 'would go against that objective'. Thus, '[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective" of the measure. Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.314.

¹¹⁵ See Mexico's comments on the United States' responses to Questions 40, 44, 48, and 117; Mexico's responses to the Panels' questions, paras. 84-93, 96-107, 116-117, 122-124, 146-148; Mexico's opening statement, paras. 42-46.

¹¹⁶ See Mexico's comments on the United States' responses to Questions 40, 44, and 49.

Mexico's responses to the Panels' questions,¹¹⁷ and in Mexico's written submissions and opening statement.¹¹⁸

51. With reference to paragraph 101 of Mexico's second written submission, in the view of the United States, is the evidence cited in this paragraph relevant to the Panels' calibration analysis? If so, how should it be factored into the Panels' analysis? If not, why not?

118. In paragraph 101 of Mexico's second written submission, Mexico refers to evidence of the unreliability of reporting, tracking and verification in certain fisheries. For the reasons previously discussed in Mexico's comments on the United States' responses, above, and Mexico's response to Question 85,¹¹⁹ this evidence is clearly relevant to the calibration analysis.

52. Please respond to the allegations contained in paragraph 107 of Mexico's second written submission regarding the United States' use of averages of dolphin mortalities.

119. The United States' response to this question relies on U.S. domestic law rather than the context of the pending dispute to avoid dealing with the WTO obligations requiring that the tuna measure *currently* be even-handed and not arbitrary. It is inexplicable that a fishery with a higher per-set metric than the current ETP purse seine fishery could be viewed as less harmful to dolphins because its metric was lower than an average of the ETP's metric over the past twenty years, reaching back to a period when mortalities were higher in the ETP than currently.

53. With reference to paragraph 52 of the United States' third written submission, please clarify why, in the United States' view, "Mexico's proposed 'overall absolute effects' metric is inconsistent with the Appellate Body's guidance". Please explain what the United States means when it argues that such a metric "does not address the 'relative harms to dolphins' of different fishing methods".

120. The United States misunderstands Mexico's position on overall adverse effects. Mexico relies on absolute observed adverse effects because, outside of the ETP, these are the only adverse effects that have been estimated by magnitude (e.g., the number of mortalities and serious injuries). Mexico is not ignoring unobserved adverse effects in the ETP or other fisheries. To the contrary, Mexico has presented evidence that unobserved adverse effects occur from other fishing methods in other fisheries.¹²⁰ Therefore, the absolute adverse effects demonstrated in the data understate the actual adverse effects.

121. The United States is also incorrect in arguing that "Mexico's approach ignores the unobservable harms caused by dolphin sets". Mexico's position on unobserved adverse effects from AIDCP-compliant fishing in the ETP is that such adverse effects are unproven or based on presumptions and, to the extent they exist, are insignificant.¹²¹ To

¹¹⁷ See Mexico's responses to the Panels' questions, paras. 12-17, 84-93, 96-107, 116-117, 122-124, 146-148, 194-199, 200-205.

¹¹⁸ See Mexico's first written submission, paras. 265-275, 280-284; Mexico's second written submission, paras. 86-94; Mexico's opening statement, paras. 73-77.

¹¹⁹ See Mexico's comments on the United States' responses to questions 40, 44, 46, 48, and 49; Mexico's responses to the Panels' questions, paras. 140-145.

¹²⁰ Mexico's first written submission, paras. 72-73, 88, 103, 110-111, 252; Mexico's responses to the Panels' questions, paras. 22, 43-48, 161-162.

¹²¹ Mexico's first written submission, paras. 53, 61-62, 64-65; Mexico's second written submission, paras. 5-7; Mexico's responses to the Panels' questions, paras. 22, 27.

the extent that such adverse effects are based on presumptions, the same presumptions must be applied to other fishing methods that cause unobserved adverse effects.¹²²

122. Finally, the United States criticizes Mexico's position on overall adverse effects on the basis that Mexico "compares the mortalities caused by 80-90 vessels using one fishing method with the mortalities allegedly caused by thousands of vessels using other fishing methods". If a fishing method in a particular ocean area is causing thousands to tens of thousands of dolphin mortalities, that method in that fishery should be discouraged by designating it as ineligible notwithstanding that in some sets dolphins are not observed being killed or seriously injured. To do otherwise goes against the second objective of the measure, i.e., "ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins". The same logic applies to fishing methods in fishing areas where dolphin mortalities and serious injuries might be numerically low but nonetheless above sustainable levels.

54. With reference to paragraph 45 of the United States' opening oral statement, is it the United States' position that, as long as there are greater risks in the ETP large purse seine fishery, any difference in certification requirements should always be accepted as being calibrated to the differences in risk? Or is it that the permissible rate of inaccuracy in each fishery should be set in such a way that the estimated number of unobserved mortalities in each fishery would be the roughly the same?

123. With respect to the United States' argument that "the difference in certification requirements is commensurate with the differences in risk among fisheries because any difference in the 'margin of error' resulting from the different requirements has a rational connection to the difference in risk", Mexico has already explained that, on the facts of this dispute, the dolphin-safe labels must be accurate and there is no basis for calibrating a "margin of error" into the label.¹²³

55. With reference to paragraph 15 of Brazil's third party statement, please respond to Brazil's assertion that the Appellate Body "has never suggested that differences in risk profiles in different fisheries would justify diminishing the accuracy of the measure".

124. Mexico agrees with the above-noted assertion of Brazil. The United States' only response is that Mexico has not proven that there is a difference in accuracy. This response is incorrect. Mexico explains this in its response to question 104.

56. In the view of the United States, if it were proven that a fishing method other than ETP large purse sein fishing by setting on dolphins also causes unobservable harms to dolphins, would the calibration test require that such fishing method also be ineligible for the dolphin-safe label?

125. In responding to this question, the United States raises a number of points that are legally incorrect.

126. First, Mexico has already addressed the United States' conflation of a "segmented" analysis of isolated elements of the measure with a "sequential" analysis that carefully scrutinizes the design, architecture, revealing structure, operation, and application of the measure in the light of the particular circumstances of the case.¹²⁴

¹²² Mexico's first written submission, paras. 63, 72, 88, 111, 250, 254; Mexico's second written submission, paras. 8, 33, 65-66; Mexico's responses to the Panels' questions, paras. 22, 43, 112, 209.

¹²³ See Mexico's comments on the United States' responses to Questions 40, 44, 48, 49, and 117. Mexico's responses to the Panels' questions, paras. 84-93, 96-107, 122-124, 146-148; Mexico's opening statement, paras. 42-46.

¹²⁴ See Mexico's comment on the United States' response to Question 44, above.

127. In its response to this question, the United States again misunderstands the Appellate Body's reasoning and findings in the first compliance proceedings. Mexico does not disagree that the Panels' assessment of even-handedness in the second step of the "treatment no less favourable" test under Article 2.2 of the TBT Agreement and its assessment of arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994 will need to include steps "accounting for the manner in which the elements are interrelated" and "aggregating or synthesizing its analyses or findings relating to those elements before reaching its ultimate conclusions as to the consistency or inconsistency of the amended tuna measure".¹²⁵ In this regard, Mexico notes that the Appellate Body's concern was with a series of compartmentalized analyses resulting in separate findings for each element of the measure at issue, but not with a detailed analysis of each element in a sequential manner.

128. Contrary to the United States' assertion, the Appellate Body did not suggest that an element or aspect of the tuna measure cannot give rise to a finding of inconsistency with the covered agreements; rather, the Appellate Body simply required that the analysis of such an element must necessarily take into account the implications of its interactions and combined operation with the other elements of the measure, as it cannot be properly scrutinized in isolation from the rest of the measure. Thus, it is not necessary for the Panel to determine that all elements of the tuna measure are designed or applied in a manner that lacks even-handedness or constitutes a means of arbitrary discrimination in order to find that the measure is inconsistent with the covered agreements. Taking into consideration the integrated operation and interrelationships of the measure's elements, it is difficult to imagine how the measure "as a whole" could be saved if the design or application of a particular element evidences a lack of even-handedness or results in arbitrary or unjustifiable discrimination. In this regard, Mexico notes that the Appellate Body's findings in the first compliance proceedings were based on an analysis of the determination provisions alone;¹²⁶ the Appellate Body was unable to complete the analysis with respect to the eligibility criteria, the certification requirements, or the tracking and verification requirements.¹²⁷

129. Second, although Mexico and the United States agree that the comparative risk assessment must take into account the "overall relative harms", which include both observable and unobservable harms, the United States appears to narrow the meaning of "unobservable harms" to those resulting "from the chase itself" in AIDCP-compliant dolphin encirclement sets in the ETP.¹²⁸ If this is the case, it is an incorrect interpretation of the "overall relative harms". As previously noted, Mexico has demonstrated that other fishing methods cause unobservable, indirect harms.¹²⁹ There is nothing in the Appellate Body's reasoning or findings that would support a narrow and restrictive interpretation of "overall relative harms" that excludes all unobserved harms that are not of "the same type" as those presumed to be caused by Mexico's fishing method in the ETP large purse

¹²⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.21.

¹²⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.266 ("we have been able to examine the even-handedness of the labelling conditions applied under the amended tuna measure in certain scenarios that would present comparably high risks to dolphins inside and outside the ETP large purse-seine fishery. We found, in this respect, that aspects of the design of the amended tuna measure reflect a lack of even-handedness. ... For this reason, it has not been demonstrated that the differences in the dolphin-safe labelling conditions under the amended tuna measure are calibrated to, or commensurate with, the risks to dolphins arising from different fishing methods in different areas of the oceans. Since it therefore follows that the detrimental impact of the amended tuna measure cannot be said to stem exclusively from a legitimate regulatory distinction, we find that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement") and 7.359.

¹²⁷ *Ibid.*

¹²⁸ United States' responses to the Panels' questions, para. 283.

¹²⁹ See Mexico's responses to the Panels' questions, paras. 43-49.

seine fishery. Moreover, such an exclusive interpretation would fail to accurately gauge the "overall relative risks or levels of harm" arising in other fisheries.¹³⁰ Given the different activities that make up the different fishing methods, the unobserved harms from other fishing methods result from factors other than "the chase itself". With respect to the "chase", the United States' response misunderstands Mexico's argument regarding handline fishing, which involves vessels chasing dolphins. Mexico's point is simply that chasing dolphins in the course of handline fishing is either evidence that "the chase itself" does not cause unobserved adverse effects or, if it does, then handline fishing should be designated as ineligible in order for the measure to be applied in an even-handed manner.

3 TO THE PARTIES:

3.1 Risks to Dolphins

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

130. Mexico obviously disagrees with the United States that depredation has no harmful effects on dolphins, in light of the evidence that dolphins are regularly injured by hooks.¹³¹

131. Mexico has also explained that the dolphin encirclement method does not harm dolphins in any manner in over 96 percent of sets.¹³² Mexico's point has been that if the interaction with dolphins resulting from dolphin sets is treated as harmful even when no dolphins are killed or seriously injured, all interactions between dolphins, nets, longlines and motorboats in other fisheries must be treated as harmful.

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

132. Mexico has no comment on the United States' response.

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

133. The United States, in an effort to dramatize the dolphin encirclement fishing method, uses colorful language (e.g., "divers who may handle the dolphins roughly") and exaggerates every aspect of the method. It also refers not only to the "chase" phase, but rather to the entire harvesting procedure.

134. The United States and Mexico disagree on how to interpret figure 2 in Exhibit MEX-63, but the figure clearly illustrates that the greatest number of chases are in the range of 11 to 35 minutes, with a significant portion lasting less than five minutes. It is unclear how all of the aggressive maneuvers the United States describes could occur during such short chases. The United States also ignores that this scientific study found

¹³⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.353.

¹³¹ Mexico's first written submission, paras. 72-73, 92-93, 100-101; Mexico's second written submission, para. 77; Mexico's responses to the Panels' questions, paras. 17, 43-44, 46, 180.

¹³² Mexico's responses to the Panels' questions, para. 27 ("With respect to the AIDCP dolphin encirclement method, in 2015, 96.4 percent of dolphin sets were made without a dolphin mortality or serious injury"), citing AIDCP, "Report on the International Dolphin Conservation Program", Document MOP-34-05 (10 October 2016), p. 17 (Table 5, first column) (Exhibit MEX-103).

that "no evidence is available that indicates that cows and calves separate during chase."¹³³

135. There is no new information or argument in the United States' response.

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

136. The United States is incorrect to state that only spinner and spotted dolphins are involved in dolphin sets. Common dolphins are also involved, and the three stocks of common dolphins each have their own SMLs, as discussed above in Mexico's comments on the United States' responses to Questions 8 and 38.

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

137. Mexico addressed this issue in its responses to this question and to Question 68.

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

138. In its own response to this question, Mexico has already explained why it disagrees with the United States' assertion that a per-set/deployment metric can be compared across different types of fishing sets and gear deployments.

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

139. Mexico notes that Exhibit MEX-64 does not address mortalities in non-tuna fisheries.

140. It is unclear why the United States alleges that Mexico relied on data from non-tuna fisheries. The report cited in paragraph 99 of Mexico's first written submission discusses estimates based on data from the Hawaii longline fishery for tuna and swordfish, and the report quoted in paragraph 100 discusses mortalities in the Taiwanese longline fishery for tuna and billfish. Because the same vessels may catch more than one type of fish, separate data just for catches of tuna were not available in these reports, just as separate data was not available for some of the gillnet fishery data that the United States cited.

141. Mexico nonetheless reaffirms that in analyzing whether a fishing method is dangerous to dolphins, evidence that there are significant mortalities and serious injuries caused by particular fishing methods when catching other types of fish are relevant to determining whether the same fishing method is harmful to dolphins when fishing for tuna. Such information creates a presumption that should not be disregarded without comprehensive evidence to the contrary.

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

142. As discussed in Mexico's comments on the United States' responses to Questions 5 and 17, above, the key sources on which the United States relies state that observer coverage of less than 10 percent is too low to produce reliable results.

¹³³ International Dolphin Conservation Program, Document IRP-32-12 (2003), p. 1 (Exhibit MEX-63).

143. It remains inconsistent for the United States to apply an extreme precautionary principle to dolphin encirclement sets in the ETP while concluding that other fisheries are not harmful to dolphins on the basis of observer coverage at levels of 2 to 7 percent, or on the basis of coverage by observers not suitably trained to record dolphin interactions.

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

144. Mexico and the United States agree that the expression "overall relative harms", as used by the Appellate Body, pertains to a comparison across fishing methods and fisheries of the overall relative risks of harms to dolphins, including both observed harms and unobserved harms.

145. However, as discussed in Mexico's comment on the United States' response to Question 56, above, Mexico disagrees with the United States' assertion that unobserved harms are those "that result from 'the chase itself'".¹³⁴ Unobserved adverse effects on dolphins are dolphin mortalities and serious injuries that cannot be observed during a fishing set or gear deployment. They result from different activities depending on the fishing method and the ocean area in question. Mexico has presented evidence that other fishing methods, such as longlining and gillnetting, have unobserved adverse effects on dolphins.¹³⁵ Further, the fact that dolphins are chased in the course of handline fishing is evidence that either: (i) the "chase itself" in AIDCP-compliant dolphin encirclement sets should not be presumed to cause unobserved harms; or (ii) handline fishing should also be declared ineligible because it involves intentionally chasing dolphins in order to harvest the associated tuna.¹³⁶

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

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

146. Mexico has previously explained that the authors of Exhibit US-19 and Exhibit US-21 stated that the observer coverage was too low to produce useful results.

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

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

147. Mexico reaffirms the evidence it provided in its response to this question. Mexico in particular emphasizes that (i) it cannot be contested that dolphins and tuna associate in ocean regions other than the ETP, and (ii) under the tuna measure, if a vessel

¹³⁴ United States' responses to the Panels' questions, para. 327.

¹³⁵ Mexico's first written submission, paras. 72-73, 103; Mexico's responses to the Panels' questions, paras. 22, 43-49, 161-162.

¹³⁶ Mexico's first written submission, paras. 110-111, 260; Mexico's second written submission, paras. 61, 76-78; Mexico's responses to the Panels' questions, paras. 30, 154, 157, 179.

opportunistically made one intentional set or gear deployment on dolphins, none of the tuna caught during that voyage (which in the case of purse seine vessels can be as long as two months) would be eligible to be labelled as dolphin-safe.¹³⁷

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

148. The United States asserts that when dolphins are not encircled during a dolphin set, the set is always abandoned and no tuna is caught. This is incorrect. Seven percent of sets during the period 2000-2016 were completed sets in which, after a chase, tuna schools were harvested without encircling dolphins.

149. The United States' response highlights that the tuna caught in those sets is disqualified on the basis of only the chase phase. In fact, as discussed in Mexico's comments on the United States' response to Question 98, all tuna caught by any method during a trip in which such a chase was made is disqualified.

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

150. Mexico has explained that there is no accepted practice of using per-set metrics to compare different fisheries. The list of reports cited by the United States do not contradict Mexico's argument.

151. This question asks about the scientific validity of using per set metrics to compare the risk profiles across different ocean regions and different fishing methods. The United States has responded, however, by mostly listing reports that used per-set data to evaluate changes over time or varying performance in a single ocean region using one fishing method. These include Exhibits MEX-8, US-15, US-14, MEX-6, US-17, US-228, US-229, US-9, US-160, and MEX-72.

152. The United States also cited some reports that presented per-set data from more than one fishery, such as in the form of a table, but which *did not make comparisons across fisheries on bycatch rates* using such data. These are Exhibits US-229, US-200, US-118, MEX-28 and US-145.

153. Mexico reaffirms its view that it is not scientifically valid to use per-set or per-deployment data to make conclusions regarding the overall level of dolphin bycatch in different ocean regions or resulting from different fishing methods.

3.2 The 2016 Tuna Measure

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

154. Mexico has no comment on the United States' response. Mexico's response to this question addresses the pertinent issues.

¹³⁷ See Form 370, section 5(b)(4) ("no purse seine net or other fishing gear was intentionally deployed on or used to encircle dolphins *during the fishing trip...*" (emphasis added) (Exhibit US-4).

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

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

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

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

156. Mexico addressed the issues raised by the United States in its own response to this question. With regard to the threat of enforcement measures, the United States has not disputed that it lacks jurisdiction to audit non-U.S. companies and vessels, and there is not a single example of it conducting such an audit.

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

- (a) To Mexico: Please react to the United States' argument.**
- (b) To both parties: Which party bears the burden of proof in respect of this particular issue?**

157. Mexico has fully addressed the issues raised in the United States' response to this question in Mexico's comments on the United States' responses to Questions 40, 44, and 49, above, as well as in Mexico's own response to this question.¹³⁸

3.3 Legal Issues

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

158. Mexico's response to this question addresses the legal issue of how, methodologically, the Panels should address differences in the extensiveness and reliability of reporting dolphin interactions in the different fisheries. The United States' response to this question focuses on assertions of adverse effects and reporting in the ETP without addressing the deficiencies in reporting in other fisheries. The response underscores the fact that the United States has not accounted for these deficiencies, and confirms Mexico's view that a proper calibration exercise has not been undertaken.

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

159. Contrary to the arguments of the United States, Mexico is not re-litigating factual issues in this proceeding. In a complex dispute such as this, involving a number of proceedings over the course of nine years, it can be expected that the parties will adduce new and additional evidence before the panels at each stage, and that such evidence may facilitate a progressively more comprehensive, more precise, and more accurate record of factual findings. This might require reconsideration or clarification by a panel.

¹³⁸ Mexico's responses to the Panels' questions, paras. 200-205.

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

160. Mexico and the United States generally agree on the meaning of these terms. However, they disagree on how to apply these terms to the relevant facts.

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

161. Although elaborated upon differently, Mexico and the United States appear to agree on the meaning and relevance of the Appellate Body's reference to "proportionality".

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

162. Mexico and the United States agree on this point.

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

163. Mexico and the United States agree on this point.

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

164. Although elaborated upon differently, Mexico and the United States agree on this point.

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

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

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

165. The United States' response to this question narrows the evaluation of other fisheries to the application of the determination provisions. Mexico's position is not narrowed to the application of the determination provisions. Mexico's position is that, in order to undertake a proper calibration analysis, the United States had to evaluate all other fisheries from the broad perspective of overall adverse effects on dolphins. This analysis has not been undertaken, and therefore it cannot be argued that the distinctions in the measure are calibrated to the overall relative risks to dolphins.

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

166. Mexico and the United States agree, albeit for different reasons, that evidence from all tuna fisheries should be considered.

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

167. The Panels' question refers to paragraph 81 of Mexico's first written submission when it should refer to paragraph 81 in Mexico's second written submission. Possibly as a reflection of this incorrect reference, the United States' response misunderstands Mexico's position on the precautionary principle, which is concisely set out in Mexico's response to this question.

115. The Panels note that the objectives of the original as well as the 2013 Tuna Measure were found by the panels and the Appellate Body in the original and first compliance proceedings in this dispute to be "first, "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins", and, second, "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".

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

168. Mexico and the United States agree on this point.

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

169. Mexico and the United States agree that "the entire point of providing this information to U.S. consumers is for the U.S. consumers to make an informed purchasing choice with regard to the protection of dolphins" (United States' response, para. 402). Mexico's position is that in order for consumers to "make an informed purchasing choice", the information on the label must be accurate.

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

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

170. Mexico and the United States agree that any indicators or variables that are relevant to the overall risk profile of a fishing method and fishery should be taken into account and that none should be excluded. Mexico cautions the Panels not to "double

count" the risk factors. For example, the risks to dolphins associated with the intentional targeting of dolphins using the AIDCP-compliant fishing method in the ETP is reflected in the overall observed mortalities and serious injuries caused by that method in the ETP. To attribute additional risk to the physical activities comprising the fishing method would double count the risk.

171. With respect to determining the risk profiles of fisheries, which is an important consideration in assessing whether or not the tuna measure's regulatory differences are calibrated to the relative overall risks posed by different fishing methods in different ocean areas, Mexico reiterates that the relevant indicators or variables include reliability of reporting in the fishery, and the prevalence of tuna transshipment and of IUU fishing.

172. The United States' response to this question ignores the unobservable harms caused by other fishing methods and focuses solely on the unobservable harms that are presumed to result from AIDCP-compliant fishing in the ETP.

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

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

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

173. Under the United States' interpretation of the calibration test, the Appellate Body's reference to "taking account of the objectives of the Measure" is rendered meaningless. As explained by Mexico, this reference integrates into the calibration analysis the large body of jurisprudence on the meaning of arbitrary or unjustifiable discrimination to ensure that the calibration test is conducted in a manner that ensures symmetry between Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994. A key component of this symmetry is the rational connection between the different regulatory distinctions and the objectives of the measure.

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

174. The United States' explanation of the relationship between the tuna measure's two objectives ignores the fact that dolphin protection is achieved through a consumer information measure. In order for dolphin protection to be achieved, both of the two objectives of the measure must be fulfilled. This necessarily requires the dolphin-safe label to be accurate.

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

175. In its response to this question, the United States argues that Mexico's position is that the Panels can find the measure inconsistent with Article 2.1 and not justified under Article XX based on factors other than risk to dolphins.¹³⁹ This is incorrect. As explained in Mexico's first written submission, on the facts of this dispute, calibration is part of the even-handedness test and the key issues before the Panels in these proceedings will ultimately turn on the question of "calibration".¹⁴⁰

176. The United States' sole area of disagreement with Mexico appears to be with respect to the relevance of the "rational connection" between the regulatory distinctions and the objectives of the measure, and the consequential necessity for accuracy in the label, in the calibration assessments to resolve the question of even-handedness in the second step of the "treatment no less favourable" test under Article 2.1 of the TBT Agreement and the question of arbitrary and unjustifiable discrimination under the chapeau of Article XX. Mexico believes it is relevant and that the label must be accurate. The United States incorrectly believes it is irrelevant and that the label can be inaccurate (i.e., the margin of error can be calibrated, such that some fisheries can have a higher margin of error than others).

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

177. Mexico's response to this question addresses the issues raised in the United States' response.

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

178. The United States' response maintains the position that regulatory distinctions can render the label inaccurate. In Mexico's view, that would not be even-handed, given that the measure at issue is a consumer information measure.

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

179. Mexico's response to this question addresses the issues raised in the United States' response.

¹³⁹ United States' responses to the Panels' questions, para. 431.

¹⁴⁰ Mexico's first written submission, paras. 210-212.