WORLD TRADE ORGANIZATION

WT/DS381/R
15 September 2011

(11-4239)

Original: English

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

Report of the Panel

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US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
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Border Tax Adjustments	*Report of the Working Party on Border Tax Adjustments*, L/3464, adopted 2 December 1970, BISD 18S/97
EEC – Imports of Beef	GATT Panel Report, *European Economic Community – Imports of Beef from Canada*, L/5099, adopted 10 March 1981, BISD 28S/92
Italy – Agricultural Machinery	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833, adopted 23 October 1958, BISD 7S/60
Japan – Alcoholic Beverages I	GATT Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216, adopted 10 November 1987, BISD 34S/83
Japan – Leather (US II)	GATT Panel Report, *Panel on Japanese Measures on Imports of Leather*, L/5623, adopted 15 May 1984, BISD 31S/94
Japan – Semi-Conductors	GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S/116
Japan – SPF Dimension Lumber	GATT Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, L/6470, adopted 19 July 1989, BISD 36S/167
Spain – Unroasted Coffee	GATT Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, L/5135, adopted 11 June 1981, BISD 28S/102
US – Tuna (Mexico)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155
US – Tuna (EEC)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted
US – Section 337 Tariff Act	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345

LIST OF ABBREVIATIONS

AIDCP	Agreement on International Dolphin Conservation Program
ASCOBANS	Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas
ASTM	American Society for Testing Materials
CHESS	Chase Encirclement Stress Studies
Codex	Codex Alimentarius Commission
DOC	Department of Commerce
DML	Dolphin Mortality Limit
DPCIA	Dolphin Protection Consumer Information Act of 1990
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EEZ	Exclusive economic zone
EII	Earth Island Institute
ETP	Eastern Tropical Pacific Ocean
FADs	Fish Aggregating Devices
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
IATTC	Inter-America Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IDCPA	International Dolphin Conversation Program Act
IEEE	Institute for Electrical and Electronics Engineers
IOTC	Indian Ocean Tuna Commission
ISO	International Organization for Standardization
ISO/IEC	ISO/International Electrotechnical Commission
MFN	Most favoured nation
MMPA	Marine Mammal Protection Act of 1972
NOAA	National Oceanic Atmospheric Administration
NGOs	Non-governmental organizations
NMFS	National Marine Fisheries Service
PBR	Potential biological removal
PPMs	Processes and production methods
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
SWFSC	Southwest Fisheries Science Center
TBT Agreement	Agreement on Technical Barriers to Trade
TTVP	Tuna Tracking Verification Program
USC	United States Code
Vienna Convention	Vienna Convention on the Law of the Treaties

WCPFC	Western and Central Pacific Fisheries Commission
WCPO	Western Central Pacific Ocean
WDCS	Whale and Dolphin Conservation Society

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US-1C	National Marine Fisheries Service, U.S. Imports of Tuna 2005-2010
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US-4	Noren, S.R., and E.F. Edwards. 2007. Physiological and behavioral development in Delphinid calves: implications for calf separation and mortality due to tuna purse-seine sets. Marine Mammal Science 23: 15-29
US-5(05)	Dolphin Protection Consumer Information Act, 16 USC 1385 et seq
US-10	Donahue, M.A. and E.F. Edwards. 1996. An annotated bibliography of available literature regarding cetacean interactions with tuna purse-seine fisheries outside of the eastern tropical Pacific Ocean. NOAA Administrative Report LJ-96-20.
US-11	Myrick, A.C., and P.C. Perkins. 1995. Adrenocortical color darkness and correlates as indicators of continuous acute premortem stress in chased and purse-seine captured male dolphins, Pathophysiology 2:191-204.
US-15	IATTC Purse Seine Vessel Register
US-19	Reilly et al. 2005. Report of the scientific research program under the International Dolphin Conservation Program Act. NOAA-TM-NMFS-SWFSC-372, p. 101
US-20	Gerrodette, T., G. Watters, W. Perryman, and L. Ballance. 2008. Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003. NOAA Tech. Memo. NMFS-SWFSC-422
US-21	Wade, P.R., G.M. Watters, T. Gerrodette, and S.B. Reilly, 2007. Depletion of spotted and spinner dolphins in the eastern tropical Pacific: modeling hypotheses for their lack of recovery. Marine Ecology Progress Series 343:1-14.
US-22	Gerrodette, T., and J. Forcada. 2005. Non-recovery of two spotted and spinner dolphin populations in the eastern tropical Pacific Ocean. Marine Ecology Progress Series 291:1-21
US-24	IATTC. 2010. 2008 IATTC Annual Report. La Jolla, CA.
US-27	Archer, F., T. Gerrodette, S. Chivers, and A. Jackson. 2004. Annual estimates of missing calves in the pantropical spotted dolphin bycatch of the eastern tropical Pacific tuna purse-seine fishery. Fishery Bulletin 102:233-244.
US-32	Starkist, Frequently Asked Questions
US-36	Bumble Bee, Frequently Asked Questions
US-37	Chicken of the Sea, Dolphin Safe Policy

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US-38	Three companies to stop selling tuna netted with dolphins. N.Y. Times, April 13, 1990.
US-39	Statement of Mr. Francisco Valdez, President of Seafood Emporium, Inc.
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US-59	Table of U.S. Dolphin Safe Labeling Conditions
US-61	Gosliner, M.L. 1999. The tuna-dolphin controversy. Pages 120-155 In Twiss and Reeves (eds.) Conservation and management of marine mammals. Smithsonian Institution Press: Washington, D.C.
US-62	Marti L. McCracken and Karin A. Forney, Preliminary Assessment of Incidental Interactions with Marine Mammals in the Hawaii Longline Deep and Shallow Set Fisheries
US-66	2009 Report on the International Dolphin Conservation Program (2009 AIDCP Report), Document Mop-23-05 (24 September 2010)
US-75	Excerpts of Tuna and Billfishes in the Eastern Pacific Ocean in 2009, IATTC-81-05

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MEX-3	Martin A. Hall, "An ecological view of the tuna-dolphin problem: impacts and trade-offs," Reviews in Fish Biology and Fisheries, 8, 1-34 (1998)
MEX-4	Eric Clua and Francois Grosvalet, "Mixed-species feeding aggregation of dolphins, large tunas and seabirds in the Azores," Aquatic Living Resources 14 (2001)
MEX-5	Young and Iudicello, "Worldwide Bycatch Of Cetaceans," U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Tech. Memo. NMFS-OPR-36) July 2007
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MEX-86(C)	Affidavit (contains BCI)
MEX-93	Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Longline Fishery
MEX-97	ICCAT bycatch species, website: www.iccat.int/en/bycatchspp.htm, accessed 25 November 2010
MEX-98	The Western and Central Pacific Tuna Fishery: 2006 Overview and Status of Stocks, Secretariat of the Pacific Community, Oceanic Fisheries Programme, Tuna Fisheries Assessment Report No. 8
MEX-99	House of Commons: Environment, Food and Rural Affairs Committee, Caught in the net: by-catch of dolphins and porpoises off the UK coast, 3rd Report of Session 2003-04
MEX-105	WCPFC, Proposed Conservation and Management Measure Mitigating Fishing Impacts on Cetaceans, Seventh Regular Session, Honolulu, Hawaii, USA, 6-10 December 2010 (doc. WCPFC7-2010-DP/17), 15 November 2010
MEX-109	Annual Report of the IATTC 1990. Table 5
MEX-110	Annual Report of the IATTC 1991. Table 5
MEX-111	Pacific Islands Forum Fisheries Agency, Pacific Islands Countries, The Global Tuna Industry and the International Trade Regime – A Guidebook

LIST OF AMICUS CURIAE EXHIBITS CITED IN THIS REPORT

EXHIBIT NO.	TITLE
1	*The Tuna Dolphin Issue*, Southwest Fisheries Science Center, NOAA Fisheries Service
2	*Collection of News Articles: A Filmmaker Crusades to Make Seas Safe for Gentle Dolphins*, PEOPLE MAGAZINE, Vol. 34, No. 5 (August 6, 1990); *Sam LaBudde*, recipient of the Goldman Environmental Prize, North America 1991; *A New Storm Erupts over Saving the Dolphins*, The New York Time (Dec. 8, 1990); *Epic Debate Led to Heinz Tuna Plan*, New York Times (Apr. 16, 1990)
3	Dolphin Safe Policy: StarKist, Bumblebee and Chicken of the Sea
4	*International Dolphin Conservation Program Act*, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Session (April 30, 1996) (Statement of Senator Barbara Boxer)
28	Materials from the Earth Island Institute (EII) Website

I. INTRODUCTION

1.1 On 24 October 2008, Mexico requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 14 of the Agreement on Technical Barriers to Trade (TBT Agreement), in relation to certain measures taken by the United States concerning the importation, marketing and sale of tuna and tuna products. Mexico held consultations with the United States on 17 December 2008. Unfortunately, these consultations failed to resolve the dispute.

1.2 On 9 March 2009, Mexico requested the establishment of a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 14 of the TBT Agreement.

1.3 At its meeting on 20 April 2009, the DSB established a panel pursuant to the request of Mexico in document WT/DS381/4, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Mexico in document WT/DS381/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 2 December 2009, Mexico requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU.

1.6 On 14 December 2009, the Director-General accordingly composed the Panel as follows:

Chairman: Mr Mario Matus

Members: Mr Franz Perrez
Mr Sivakant Tiwari

1.7 Argentina, Australia, Brazil, Canada, China, Ecuador, the European Communities[1], Guatemala, Japan, Korea, New Zealand, Chinese Taipei, Thailand, Turkey and Venezuela reserved their rights to participate in the Panel proceedings as third parties.

1.8 Following the death of Mr Sivakant Tiwari on 26 July 2010, the parties agreed on a new member of the Panel on 12 August 2010. Accordingly, the panel composition is now as follows:

Chairman: Mr Mario Matus

Members: Ms Elisabeth Chelliah
Mr Franz Perrez

[1] The European Communities reserved its third-party rights at the DSB meeting on 20 April 2009. On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

1.9 The Panel held its first substantive meeting with the parties on 18, 19 and 20 October 2010. The session with the third parties was held on 19 and 20 October 2010. The second substantive meeting was held on 16 and 17 December 2010.

1.10 On 2 February 2011, the Panel issued the descriptive part of its Panel Report to the parties. The Panel issued its interim report to the parties on 5 May 2011. The Panel issued its final report to the parties on 8 July 2011.

II. FACTUAL ASPECTS

A. THE MEASURES AT ISSUE

2.1 In its request for the establishment of a panel, Mexico identified the following measures adopted by the United States concerning the importation, marketing and sale of tuna and tuna products:

(a) *United States Code*, Title 16, Section 1385 ("Dolphin Protection Consumer Information Act");

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

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

2.2 This Section describes the main elements of these measures as the Panel understands them, in light of the explanations provided by the parties in their submissions and in response to questions by the Panel. It also briefly describes the "dolphin-safe" scheme established under the Agreement on the International Dolphin Conservation Program (AIDCP).

B. SCOPE OF APPLICATION OF THE DPCIA PROVISIONS

2.3 The Dolphin Protection Consumer Information Act (DPCIA) is codified in Title 16, Section 1385 of the United States Code (USC). Regulations promulgated in accordance with the DPCIA are codified in Title 50, Section 216 of the Federal Regulations. The core of the US "dolphin-safe" labelling scheme is contained in subsection 1385(d)(1)-(3) of the DPCIA. Paragraph (d) of Section 1385 of the DPCIA provisions regulates the use of the term "dolphin-safe" when it appears on tuna products.[2] This provision establishes, in relevant part, the following:

> "(1) It is a violation of section 5 of the Federal Trade Commission Act (15 USC 45) for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "dolphin-safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested--

[2] Paragraphs (e) through (h) of Section 1835 refer, respectively, to the enforcement of the DPCIA provisions (para. (e)), the issuance of regulations to implement the provisions contained in Section 1835 (para. (f)), the preparation of a study by the Secretary of Commerce on the effect of the fishing technique known as setting on dolphins (intentional deployment on or encirclement of dolphins with purse seine nets) (para. (g)), and the certification requirements for tuna products containing tuna caught in the ETP using a vessel with 363 metric tons or more carrying capacity (para. (h)).

(A) on the high seas by a vessel engaged in driftnet fishing;

(B) outside the eastern tropical Pacific Ocean by a vessel using purse seine nets--

(i) in a fishery in which the Secretary has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the eastern tropical Pacific Ocean), unless such product is accompanied by a written statement, executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught; or

(ii) in any other fishery (other than a fishery described in subparagraph (D)) unless the product is accompanied by a written statement executed by the captain of the vessel certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested;

(C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin-safe under paragraph (2);

or

(D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary."[3]

2.4 In turn, paragraph (h) of the DPCIA provisions establishes:

"(h) Certification by captain and observer

(1) Unless otherwise required by paragraph (2), the certification by the captain under subsection (d)(2)(B)(i) of this section and the certification provided by the observer as specified in subsection (d)(2)(B)(ii) of this section shall be that no dolphins were killed or seriously injured during the sets in which the tuna were caught.

(2) The certification by the captain under subsection (d)(2)(B)(i) of this section and the certification provided by the observer as specified under subsection (d)(2)(B)(ii) of this section shall be that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught, if the tuna were caught on a trip commencing—

[3] Mexico's first written submission, Appendix A, Exhibit US-5, para. (d)(1)(A)-(D).

(A) before the effective date of the initial finding by the Secretary under subsection (g)(1) of this section;

(B) after the effective date of such initial finding and before the effective date of the finding of the Secretary under subsection (g)(2) of this section, where the initial finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock; or

(C) after the effective date of the finding under subsection (g)(2) of this section, where such finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any such depleted stock."[4]

2.5 The DPCIA provisions apply to tuna products. Paragraph (c) of Section 1385 defines the term "tuna product" as "a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days".[5]

2.6 Subparagraph (d)(1) of Section 1385 of the DPCIA prohibits that tuna products carry the term "dolphin-safe" or "or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins", *unless* certain conditions establish by the DPCIA provisions themselves are met.[6] The conditions that must be fulfilled by tuna products in order to use the term "dolphin-safe" or make any analogous claims vary depending on the manner in which the tuna contained in those products was caught.[7]

2.7 The DPCIA provisions refer to *four* criteria to establish *five* basic categories of circumstances in which tuna may be caught.[8] These criteria are: location (*inside* or *outside* the eastern tropical Pacific Ocean or ETP); fishing gear (*with* or *without* the use of purse seine nets); type of interaction between tuna and dolphins schools (*there is* or *there is no* regular or significant association between tuna and dolphins schools) and the level of dolphin mortalities or injuries (*there is* or *there is no* regular and significant mortality or serious injury). The five categories that result from the combined application of these criteria are described in subparagraphs (A) to (D) of subsection 1385(d)(1) of the DPCIA provisions.

2.8 These subparagraphs refer to tuna caught:

A) On the high seas by a vessel engaged in *driftnet fishing*;

B) Outside the ETP by a vessel using purse seine nets:

(i) in a fishery in which the US Secretary of Commerce has determined that there is a regular and significant tuna-dolphin association similar to the association between dolphins and tuna in the ETP;

(ii) in any other fishery (other than a fishery described in subparagraph (D)).

C) In the ETP by a vessel using purse seine nets; and

[4] Mexico's first written submission, Appendix A, Exhibit US-5.
[5] Mexico's first written submission, Appendix A, Exhibit US-5.
[6] This prohibition is reproduced in Section 216.91(a) of the Federal Code of Regulations.
[7] Mexico's first written submission, Appendix A, Exhibit US-5.
[8] Mexico's first written submission, Appendix A, Exhibit US-5.

D) In a fishery other than the ones described in the previous categories that is identified by the US Secretary of Commerce as having a regular and significant mortality or serious injury of dolphins."[9]

C. CONDITIONS FOR THE USE OF THE TERM "DOLPHIN-SAFE" OR ANALOGOUS TERMS

2.9 Subsections 1385(d)(1)(2) and (h) of the DPCIA establish specific conditions for the use of the term "dolphin-safe" or any analogous claims for each one of the categories described in subparagraphs (B) through (D) of subsection 1385(d)(1) on tuna products. Tuna products containing tuna caught under the scenario described in subparagraph (A) of subsection 1385(d)(1), i.e. tuna caught on the high seas using driftnet fishing, may under no circumstances be labelled as "dolphin-safe" or display any analogous claims. The documentary evidence required under the DPCIA for the categories (B) through (D) is described below.

2.10 With respect to tuna products containing tuna caught outside the ETP by a vessel using purse seine nets in a fishery in which the US Secretary of Commerce has determined that a regular and significant dolphin-tuna association exists (subparagraph (B)(i)), the use of the term "dolphin-safe" or any analogous term is conditional upon a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary of Commerce, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught.

2.11 For tuna caught outside the ETP by a vessel using purse seine nets in any fishery, other than a fishery described in subparagraph (D) of subsection 1385(d)(1) of the DPCIA provisions, (subparagraph (B)(ii)), a written statement executed by the captain of the vessel is required, certifying that *no purse seine net was intentionally* deployed *on or used to encircle dolphins* during the particular voyage on which the tuna was harvested.

2.12 For tuna harvested *in the ETP* by a vessel using purse seine nets (subparagraph (C)), the conditions are:

- written statements executed by the *captain* and an *observer* approved by the International Dolphin Conservation Program (IDCP) certifying that *no dolphins were killed or seriously injured* during the sets in which the tuna were caught; and, if there is a previous determination by the Secretary of Commerce that the fishing technique of setting on dolphins is having a significant adverse impact on any depleted dolphin stock in the ETP, these statements must also certify that *no purse seine net was intentionally deployed on or used to encircle dolphins*;

- a written statement executed by either the Secretary of Commerce or the Secretary's designee, or a representative of the Inter-American Tropical Tuna Commission (IATTC), or an authorized representative of a participating nation whose national program meets the requirements of the International Dolphin Conservation Program (IDCP) stating that there was an observer approved by the IDCP on board the vessel during the entire trip and that such observer provided the corresponding certification;

- the written endorsement by each exporter, importer, and processor of the tuna; and

[9] Mexico's first written submission, Appendix A, Exhibit US-5.

- the above mentioned written statements and endorsements comply with regulations promulgated by the Secretary which provide for the verification of tuna products as dolphin-safe.

Vessels smaller than 363 metric tons carrying capacity fishing in the ETP using purse seine nets are not subjected to these requirements. [10] Therefore, tuna caught in the ETP by this type of vessels may be labelled "dolphin-safe" without the need to submit any documentary evidence.

2.13 Finally, for tuna caught in a fishery *other* than those described in subsection 1385(d)(1)(A)-(C) that is identified by the US Secretary of Commerce as having a *regular and significant mortality* or *serious injury* of dolphins (subparagraph (D)), the use of the term "dolphin-safe" or any analogous terms is subject to a written statement executed by the *captain* of the vessel and an *observer* participating in a national or international program acceptable to the Secretary of Commerce that *no dolphins were killed or seriously injured* in the sets or other gear deployments in which the tuna were caught, provided that the Secretary of Commerce determines that such an observer statement is necessary.

2.14 In response to a question by the Panel, the United States provided the table below[11], outlining the specific requirements for access to a "dolphin-safe" label, distinguishing between tuna caught inside and outside the ETP and between different fishing methods.[12]

[10] United States' first written submission, para. 16. Indeed, Section 216.24(a)(2)(i) of Title 50 of the US Code of Federal Regulations establishes:

(2)(1) It is unlawful for any person using a U.S. purse seine fishing vessel of 400 short tons (st) (362.8 metric tons (mt) carrying capacity or less to intentionally deploy a net on or to encircle dolphins, or to carry more than two speedboats, if any part of its fishing trip is in the ETP.

[11] Exhibit US-59.

[12] Question 9 from the Panel.

US Dolphin Safe Labelling Conditions

This table assumes the vessel is not on the high seas engaged in driftnet fishing for tuna. Tuna products containing tuna harvested in this manner cannot be labelled dolphin-safe under any circumstance.[i] In addition to the other requirements reflected in this table, a condition for carrying an alternative dolphin-safe label applicable to all tuna product, regardless of location or fishery/vessel type, is that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.[ii]

Location	Fishery/Vessel type	Tuna-Dolphin (T-D) association/Harm to dolphins	Dolphin Safe Labeling Condition	Authority
Inside the ETP	Large[iii] purse seine	*[ETP has a T-D association]*	Written statements executed by the captain and observer providing the certification [required under § 1385 (h)], and endorsed in writing by the exporter, importer, and processor of the product, that – no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that – no dolphins were killed or seriously injured during the sets in which the tuna were caught Written statement by Secretary or designee/IATTC representative/ authorized representative of nation whose nation program meets the requirements of the International Dolphin Conservation Program that – an IDCP-approved observer was on board the vessel during the entire trip and provided the certification required under § 1385 (h) above	§ 1385 (d)(1)(C); § 1385 (d)(2)(B); § 1385 (h)(2)(A)
	Small purse seine[iv]	*[ETP has a T-D association]*	None	§ 1385 (d)(1)(C); § 1385 (d)(2)(A)
	Non purse seine	Regular and significant mortality or serious injury to dolphins	Written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that – no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary	§ 1385 (d)(1)(D)
		No regular and significant mortality or serious injury to dolphins	None	

Location	Fishery/Vessel type	Tuna-Dolphin (T-D) association/Harm to dolphins	Dolphin Safe Labelling Condition	Authority
Outside the ETP	Purse seine	Regular and significant T-D association similar to association in the ETP	Written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that – no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and – no dolphins were killed or seriously injured in the sets in which the tuna were caught	§ 1385 (d)(1)(B)(i)
		No regular and significant T-D association	Written statement executed by the captain of the vessel certifying that – no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested	§ 1385 (d)(1)(B)(ii)
	Non purse seine	Regular and significant mortality or serious injury to dolphins	Written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary (provided that the Secretary determines that such an observer statement is necessary) that – no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught	§ 1385 (d)(1)(D)
		No regular and significant mortality or serious injury to dolphins	None	

[i] § 1385 (d)(1)(A).
[ii] § 1385 (d)(3)(C)(i).
[iii] Vessel greater than 400 short tons (362.8 metric tons) carrying capacity. US Code of Federal Regulations §216.91(a)(1).
[iv] These vessels are 400 short tons (362.8 metric tons) or less carrying capacity and are not permitted to set on dolphins to catch tuna. AIDCP, Annex VIII, Exhibit Mex-11; 50 CFR 216.24(a)(2)(i), Exhibit US-23B; *see also* United States' first written submission, para. 16, fn.10.

D. THE CERTIFICATION REQUIRED FOR TUNA CAUGHT IN THE ETP

2.15 As described above, subparagraph (h)(1) of the DPCIA provisions establishes that, unless otherwise required by paragraph (2), tuna harvested in the ETP by a vessel using purse seine nets may be labelled "dolphin-safe" if the captain of the vessel and an approved observer certify that no dolphins were killed or seriously injured during the sets in which the tuna were caught.

2.16 However, subparagraph (h)(2) establishes that tuna harvested in the ETP by a large vessel using purse seine nets may be labelled "dolphin-safe" if the captain of the vessel and an approved observer certify that (i) no purse-seine net were intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught, and (ii) no dolphins were killed or seriously injured during the sets in which the tuna were caught. Subparagraph (h)(2) of the DPCIA provisions conditions the applicability of subparagraph (h)(1) to the existence of a finding by the US Secretary of Commerce that the intentional deployment on or encirclement of dolphins with purse seine nets is *not* having a significant adverse impact on any depleted dolphin stock in the ETP. Subparagraph (g) required the Secretary of Commerce to conduct this task in two stages resulting in an initial and a final finding on the impact of setting on dolphins in the ETP.[13]

2.17 On 7 May 1999, the Secretary of Commerce published its initial finding pursuant to the DPCIA provisions. This initial finding concluded that "there [was] insufficient information to conclude that there has been a significant adverse impact on the depleted [dolphin] stocks" in the ETP and that "there [was] no solid evidence in any of the scientific studies to date that links the apparent failure of dolphin stocks to recover at the rate expected based on historical data to the current tuna purse seine fishery practices".[14]

2.18 On 31 December 2002, the Secretary of Commerce made its final finding that "the intentional deployment on or encirclement of dolphins with purse seine nets [was] not having a significant adverse effect on any depleted dolphin stock in the ETP".[15] As a result of this finding, subparagraph (h)(1) of the DPCIA provisions became momentarily applicable, having the effect of limiting the certification required for tuna caught in the ETP with large vessels using purse seine nets, to the corroboration that no dolphins were killed or seriously injured during the sets in which the tuna were caught, cancelling the requirement contained in subparagraph (h)(2) that the certification of tuna

[13] Paragraph (g) of the DPCIA provisions establish the characteristics of these findings as follows:

(1) Between March 1, 1999, and March 31, 1999, the Secretary shall, on the basis of the research conducted before March 1, 1999, under section 1414a (a) of this title, information obtained under the International Dolphin Conservation Program, and any other relevant information, make an initial 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. The initial finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

(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. The finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

[14] US Department of Commerce, National Oceanic and Atmospheric Administration, "Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), Initial Finding", Federal Register Vol. 64, No. 88, May 7, 1999, Exhibit MEX-26.

[15] Exhibit MEX-29, p. 4.

caught in the ETP by a large purse seine vessel include a statement that no purse seine net was intentionally deployed on or used to encircle dolphins.[16]

2.19 However, as a result of legal action by Earth Island Institute, a non-governmental organization, alleging that the Secretary of Commerce had abused its powers in reaching the conclusions reflected in the final findings, the US Court of Appeals for the Ninth Circuit vacated these findings on 9 August 2004, declaring them "arbitrary, capricious, and abuse of discretion and contrary to law".[17] The consequence of this judicial decision, in the view of the United States, is that "the findings necessary for the subsection 1385(h)(1) certification to apply do not exist, and therefore the applicable certification for tuna caught using purse seine nets in the ETP remains the one set out in subsection 1385(h)(2)" of the DPCIA provisions, including the requirement that no purse seine net was intentionally deployed on or used to encircle dolphins.[18] Mexico explained that "the U.S. law does not permit revision of the DOC's justification for its findings nor re-consideration by the courts of whether the change in the labeling standard can be implemented".[19]

2.20 Hence, under the DPCIA provisions that are currently applicable, tuna harvested in the ETP by a large vessel using purse-seine nets may be labelled dolphin-safe if the captain and an observer approved by the IDCP certify that *no dolphins were killed or seriously injured* during the sets in which the tuna were caught and that *no purse seine net was intentionally deployed on or used to encircle dolphins* during the same fishing trip. This certification must be accompanied by a written statement executed by the Secretary of Commerce (or designee), a representative of the Inter-American Tropical Tuna Commission or an authorized representative of a participating nation whose national program meets the requirements of the IDCP, and the endorsement by the exporters, importers and processors required in subparagraphs (d)(2)(B)-(C) of Section 1385 of the DPCIA provisions.[20]

E. THE CERTIFICATION REQUIRED FOR TUNA CAUGHT OUTSIDE THE ETP

2.21 As explained above, subparagraphs (d)(1)(B) and (D) of the DPCIA provisions establish different categories of tuna harvested *outside* the ETP. These categories are:

- Tuna caught using purse seine nets in a fishery in which the US Secretary of Commerce has determined that a *regular and significant tuna-dolphin association* exists similar to the association in the ETP (§1385 (d)(1)(B)(i));

- Tuna caught using purse seine nets in a fishery in which there is *no regular and significant association* between tuna and dolphins according to the US Secretary of Commerce (§1385 (d)(1)(B)(ii)); and

[16] Subparagraph (h)(2) provided that, where the initial finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock, or after the effective date of such finding, the certifications required shall be that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught, if the tuna were caught on a trip commencing before the effective date of the initial finding by the Secretary, after the effective date of such initial finding and before the effective date of the finding of the Secretary.

[17] Exhibit MEX-29, p. 24.

[18] United States' first written submission, para. 22.

[19] Mexico's first written submission, para. 88.

[20] Mexico's first written submission, Appendix A, Exhibit US-5.

- Tuna caught in a fishery *other* than the ones described in subparagraphs (d)(1)(A)-(C) that is identified by the US Secretary of Commerce as having a *regular and significant mortality* or *serious injury* of dolphins (§1385 (d)(1)(C)).[21]

2.22 As also mentioned above, the DPCIA provisions establish a specific set of conditions that must be fulfilled by each one of these categories of tuna in order to use the term "dolphin-safe" or to make similar claims. In two of these instances (i.e. tuna caught in a fishery in which the US Secretary of Commerce has *determined* that a regular and significant tuna-dolphin association exists, *and* in the case of tuna caught in a fishery other than the ones described in subparagraphs (d)(1)(A)-(C) that is *identified* by the US Secretary of Commerce as having a regular and significant mortality or serious injury of dolphins), the applicability of the relevant requirements is conditioned on the existence of a determination by the Secretary of Commerce that in the fishery in question there is regular and significant tuna-dolphin association similar to the association in the ETP, or regular and significant mortality or serious injury of dolphins.[22]

2.23 The United States has indicated that no fishery outside the ETP has been determined to have a regular and significant association between tuna and dolphins similar to the association in the ETP.[23] Moreover, the United States has also explained that it has not made a determination that any non-purse seine tuna fishery has regular and significant dolphin mortality.[24]

2.24 Therefore, although it remains a possibility, under the DPCIA provisions, that the Secretary of Commerce may determine that there is regular and significant dolphin-tuna association, or regular and significant mortality or serious injury of dolphins in fisheries outside the ETP, such determinations have not been made until to date. Hence the "dolphin-safe" requirements for tuna caught under the circumstances described in subparagraphs (d)(1)(B)(i) and (d)(1)(D) of Section 1385 are not currently applied with respect to any fishery.

2.25 Consequently, the scenarios described in subparagraphs (d)(1) of Section 1385 that are currently applicable are those described in:

(a) subparagraph (d)(1)(A), which refers to tuna caught on the high seas by driftnet fishing;

(b) subparagraph (d)(1)(C), which refers to tuna caught in the ETP by a large vessel using purse seine nets; and

(c) subparagraph (d)(1)(B)(ii), which refers to tuna caught outside the ETP in a fishery that has not been the subject of a determination of regular and significant dolphin-tuna association or of regular and significant dolphin mortality or serious injury to dolphins by the Secretary of Commerce. The "dolphin-safe" certification required for this type of tuna must be provided by the *captain* of the vessel and, according to subparagraph (d)(1)(B)(ii), must only state that *no purse seine net was intentionally deployed on or used to encircle dolphins* during the particular voyage on which the tuna was harvested.[25]

[21] Mexico's first written submission, Appendix A, Exhibit US-5.
[22] Mexico's first written submission, Appendix A, Exhibit US-5.
[23] United States' first written submission paras. 38-39, see also United States' response to question 12 from the Panel.
[24] United States' response to question 85 from the Panel.
[25] Mexico's first written submission, Appendix A, Exhibit US-5.

2.26 As further explained in the next section, the parties disagree on whether a certification that no dolphins were killed or seriously injured is required for the use of non-official labels or marks (alternative labels) if they are carried by products containing tuna caught outside the ETP in a fishery with no regular and significant dolphin-tuna association and no regular and significant dolphin mortality or serious injury of dolphins.

F. OFFICIAL AND ALTERNATIVE "DOLPHIN-SAFE" MARKS AND LABELS

2.27 Subparagraph (d)(3) of the DPCIA provisions establishes the following:

> "(3) (A) The Secretary of Commerce shall develop an official mark that may be used to label tuna products as dolphin-safe in accordance with this Act.
>
> (B) A tuna product that bears the dolphin-safe mark developed under subparagraph (A) shall not bear any other label or mark that refers to dolphins, porpoises, or marine mammals.
>
> (C) It is a violation of section 45 of title 15 to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the mark developed under subparagraph (A) unless—
>
> (i) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught;
>
> (ii) the label is supported by a tracking and verification program which is comparable in effectiveness to the program established under subsection (f) of this section; and
>
> (iii) the label complies with all applicable labeling, marketing, and advertising laws and regulations of the Federal Trade Commission, including any guidelines for environmental labeling."[26]

2.28 Under these provisions, producers wishing to display "dolphin-safe" claims on their tuna products may thus choose between the official "dolphin-safe" mark developed by the Secretary of Commerce under subparagraph (A) or an alternative mark or label of their own design under subparagraph (C). If producers opt to use the official mark, their products may not bear any other label or mark that refers to dolphins, porpoises, or marine mammals.

2.29 Moreover, subparagraphs (C)(i)-(iii), establish specific requirements for the use of alternative "dolphin-safe" labels or marks. According to these subparagraphs, tuna products may carry a label or mark that refers to dolphins, porpoises, or marine mammals other than the official mark only if the specific conditions described in subparagraphs (i) to (iii) are met.

2.30 The text of subparagraph (d)(3)(C) does not specify whether these requirements for the use of alternative labels are *additional* to the requirements for the use of the official mark as set forth in subparagraph (d)(1). In response to a question by the Panel, the United States asserted that tuna products carrying an alternative label must comply with the specific requirements for the use of alternative labels *in addition* to those set forth in subparagraph (d)(1), which are applicable to the use

[26] Mexico's first written submission, Appendix A, Exhibit US-5.

of the official mark or any alternative label.[27] The United States has thus indicated that "section 1385(d)(3) provides that if tuna products are labeled with an alternative dolphin-safe label, those tuna products may not contain tuna that was caught in a set in which dolphins were killed or seriously injured (and this conditions [sic] applies regardless of whether the tuna was caught inside or outside the ETP)".[28] Mexico disputed this description of the law, arguing that the United States in practice does not require that alternative labels be supported with a certification that dolphins were not killed or seriously injured for any fishery outside the ETP, that the United States has no tracking or verification program for this certification for tuna harvested outside the ETP, and that the major producers do not claim that their dolphin-safe labels mean anything other than that purse seine nets were not set on dolphins during the voyage in which the tuna were caught.[29]

G. THE "DOLPHIN-SAFE" TRACKING AND VERIFICATION PROGRAM AND OTHER ENFORCEMENT PROVISIONS

2.31 The US National Marine Fisheries Service (NMFS) has established the Tuna Tracking and Verification Program (TTVP), for tracking and verifying the "dolphin-safe" or "non-dolphin-safe" condition of tuna caught in the ETP.[30] The provisions establishing this program are mainly contained in Title 50, Sections 216.24[31] and 216.91-216.93 of the US Code of Federal Regulations.[32] Through the use of the TTVP, the US government collects information from domestic tuna processors, US tuna vessels, and importers of tuna products, to verify whether tuna products labelled dolphin-safe meet the statutory conditions.[33]

2.32 As explained by the United States and Mexico, every import of every tuna product, regardless of whether the "dolphin-safe" label is intended to be used, must be accompanied by a Fisheries Certificate of Origin (NOAA Form 370). One copy of this form must be submitted to Customs and Border Protection at the time of importation, and a second one to the TTVP. Moreover, US tuna processors must submit monthly reports to the TTVP containing the dolphin-safe status, ocean area of capture, catcher vessel, trip dates, carrier name, unloading dates, and location of unloading of tuna for both imported and domestic receipts. In addition, as part of the TTVP, the NMFS conducts periodic cannery audits and "spot checks" of retail market product.[34]

2.33 According to the United States, if a product is found to be wrongfully labelled during a spot check, the product will most likely be seized as evidence. Later on the US authorities may decide to forfeit, destroy or in the case of imports, have the product re-exported, depending on the facts and circumstances of the case. Moreover, sanctions for offering for sale or export tuna products falsely

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[27] *See* United States' response to question No. 8 from the Panel where the United States stated that "Section 1385(d)(1)-(2) applies to all tuna products regardless of whether those tuna products are labelled with the official dolphin-safe label or an alternative dolphin-safe label" and that "[i]n addition, section 1385(d)(3)(C) sets out *additional* conditions for use of an alternative dolphin-safe mark" (emphasis added). See also United States' response to question No. 11 from the Panel, paras. 24-25.

[28] *See* United States' second written submission, paras. 40-41.

[29] *See* Mexico's second written submission, paras. 14-26.

[30] Exhibit MEX-73.

[31] Section 216.24 is not specifically identified by Mexico in its request for establishment of a panel. Paragraph (f) of Section 1385 of the DPCIA, which is challenged by Mexico, instructs the Secretary of Commerce to issue regulations to implement the Dolphin Protection Consumer Information Act, "including regulations to establish a domestic tracking and verification program that provides for the effective tracking of tuna labeled under subsection (d) of [Section 1385]. (Mexico's first written submission, Appendix A, Exhibit US-5.)

[32] Mexico's first written submission, Appendix B, Exhibits MEX-22, US-57 and US-58.

[33] United States' response to Panel question No. 4, para. 8.

[34] United States' response to Panel question No. 4, paras. 9-10.

labelled "dolphin-safe" may be assessed against any producer, importer, exporter, distributor or seller who is subject to the jurisdiction of the United States.[35] Violators may also be prosecuted directly under the DPCIA provisions or under federal provisions establishing false statement or smuggling prohibitions or federal labelling standards.[36]

H. THE "DOLPHIN SAFE" SCHEME ESTABLISHED UNDER THE AIDCP

2.34 The AIDCP establishes a "dolphin-safe" scheme that is separate from the US scheme.

2.35 The Inter-American Tropical Tuna Commission (IATTC) began in 1976 multilateral endeavours that led to the creation of the International Dolphin Conservation Program (IDCP).[37] These efforts were later reflected in a series of multilateral agreements that were negotiated in response to the evidence that many dolphins were dying in the ETP each year. These agreements were the La Jolla Agreement (1992), the Panama Declaration (1995) and the AIDCP (1999). Both Mexico and the United States are signatories to the La Jolla Agreement and the Panama Declaration and parties to the AIDCP.[38]

2.36 In the Panama Declaration, signatories reaffirm the commitments and objectives of the La Jolla Agreement and state their intention to conclude a binding international agreement on dolphin conservation in the ETP. The preamble to the Panama Declaration thus provides the following:

> "Recognizing the strong commitments of nations participating in the La Jolla Agreement and the substantial successes realized through multilateral cooperation and supporting national action under that Agreement, the Governments meeting in Panama (…) announce their intention to formalize by January 31, 1996, the La Jolla Agreement as a binding legal instrument (…). This shall be accomplished by adoption of a binding resolution of the IATTC or other legally binding instrument. The adoption of the IATTC resolution or other legally binding instrument, that utilizes to the maximum extent possible the existing structure of the IATTC, is contingent upon the enactment of certain changes in US law, as envisioned in Annex 1 to this Declaration."[39]

2.37 Annex 1 of the Declaration lists certain "envisioned changes in United States law", including the following in relation to labelling:

> "the term "dolphin-safe" may not be used for any dolphin caught in the EPO by a purse seine vessel in a set in which a dolphin mortality occurred as documented by observers by weight calculation and well location."[40]

2.38 Mexico argued that the United States, as part of its international obligations under the Panama Declaration was committed to change its "dolphin-safe" definition from "no encirclement of dolphins"

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[35] United States' response to Panel question No. 4, para. 10. For instance, subsection 1385(e) of the DPCIA provisions establishes:

"Any person who knowingly and willfully makes a statement or endorsement described in subsection (d)(2)(B) [referring to the statements and endorsement required in the case of tuna caught in the ETP] of this section that is false is liable for a civil penalty of not to exceed $100,000 assessed in an action brought in any appropriate district court of the United States on behalf of the Secretary."

[36] United States' response to Panel question No. 50, para. 120.

[37] Mexico's first written submission, p. 2, para. 7; United States' first written submission, para. 76-80.

[38] Mexico's first written submission, pp 15-17, paras. 49-50

[39] Declaration of Panama, Exhibit MEX-20, p. 1.

[40] Declaration of Panama, Annex 1, Exhibit MEX-20, p. 5.

to "no dolphin mortality or serious injury"[41]. The United States disagreed with this characterization, stating that the Panama Declaration does not commit the United States to amend its law or to take any other action. In the US view, the Panama Declaration only stated the signatories' intent to adopt a binding dolphin conservation agreement if certain changes were made to US law.[42]

2.39 In 1998, signatories to the Panama Declaration concluded negotiation of the AIDCP, which entered into force in 1999. Through a comprehensive program of monitoring, tracking, verification, and certification, featuring the use of independent observers on board tuna fishing vessels, the AIDCP has maintained and reinforced the progress made after the adoption of the La Jolla Agreement and the Panama Declaration, and dramatically reduced observed dolphin mortality in the ETP.[43] The AIDCP is recognized to have made an important contribution to dolphin protection in the ETP.[44]

2.40 On 20 June 2001, the Parties to the AIDCP adopted the "Resolution to Adopt the Modified System for Tracking and Verification of Tuna". That resolution includes the following definitions:

> "The terms used in this document are defined as follows:
>
> a. *Dolphin safe* tuna is tuna captured in sets in which there is no mortality or serious injury of dolphins;
>
> b. *Non-dolphin-safe* tuna is tuna captured in sets in which mortality or serious injury of dolphins occurs ..."[45]

2.41 On that same date (20 June 2001), the Parties to the AIDCP also adopted the "Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification". That document states that "[t]he terms used in this document are as defined in the AIDCP System for Tracking and Verification of Tuna". Accordingly the AIDCP Tuna Tracking and Verification Resolution's definitions of "dolphin-safe" and "non-dolphin safe" apply with respect to the AIDCP resolution's rules on dolphin-safe certification. The resolution established the procedures that would enable tuna caught and tracked in accordance with the procedures to receive an "AIDCP dolphin-safe certification".[46] The AIDCP Dolphin Safe Certification Resolution states that application of the procedures "shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of a Party".[47]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Mexico requests the Panel to find that the US measures are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.[48]

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[41] Mexico's response to Panel question No. 2, para. 7

[42] United States' first written submission, para. 77. The United States amended the DPCIA in 1997. This amendment provided for a change in the dolphin-safe standard, contingent on the outcome of certain scientific studies performed by the Department of Commerce. The results of these studies were challenged in US courts, and an opinion was issued by the Court of Appeals for the Ninth Circuit in *Earth Island v. Hogarth*.

[43] Mexico's first written submission, pp 17-19, paras. 49-50.

[44] Mexico's first written submission, para. 7; United States first written submission, p. 3, para. 9; p. 74, para. 52.

[45] Mexico's first written submission, para. 229 and Exhibit MEX-55.

[46] See Exhibit MEX-56, United States' first written submission, para. 83 and United States' second written submission, para. 184.

[47] AIDCP Dolphin Safe Certification Resolution,. MEX-56.

[48] Mexico's first written submission, para. 263.

3.2 The United States requests the Panel to reject Mexico's claims that the US dolphin-safe labelling provisions are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.[49]

[Parties' and Third Parties' arguments and Annexes deleted from this version.]

[49] United States' first written submission, para. 80.

VI. INTERIM REVIEW

A. GENERAL

6.1 On 5 May 2011, we transmitted our interim report to the parties. On 26 May 2011, Mexico and the United States requested the Panel to review precise aspects of the Interim Panel Report pursuant to Article 15.2 of the DSU and the Working Procedures adopted by the Panel. On 14 June 2011, both parties presented comments on each other's requests for review.

6.2 In its comments on the US request for review, Mexico argued that "many of the changes proposed by the United States appear to be efforts to change the substantive findings of the Panel, to enter into debate with the Panel, to have the Panel place special emphasis on US arguments, or to alter the Panel's descriptions of Mexico's arguments. Moreover, many of the US comments are more in the nature of requests for reconsideration which are not appropriate for this phase of the proceedings".[139]

6.3 As stated on previous occasions by the Appellate Body, the interim review stage is not an appropriate moment to introduce new and unanswered evidence.[140] However, in our view, requests to review precise aspects of the Panel's report may legitimately include requests for "reconsideration" of specific factual or legal findings, provided that such requests are not based on the presentation of new evidence. We therefore did not find it necessary to exclude *a priori* from consideration any request for review from either party on the sole basis that it would seek reconsideration by the Panel of some of its determinations. We note in this respect that Mexico itself requested the Panel to reconsider its decision to exercise judicial economy in relation to Mexico's claims under the GATT 1994 and sought a review of certain aspects of the Panel's determinations.

6.4 With this preliminary observation in mind, we explain below how we took into account the parties' specific requests for review in our final Report.

B. DESCRIPTIVE PART (SECTION II OF THE REPORT)

6.5 The United States requested some adjustments to the factual description of the US dolphin-safe measures and of the AIDCP regime, in paragraphs 2.7, 2.8, 2.12, 2.15, 2.16, 2.19, 2.20, 2.21, 2.22, 2.23, 2.25, 2.35, and 2.38 in the Descriptive Part of the Report. Mexico objected to the proposed changes, which it found either unnecessary or inappropriate. We adjusted the text of these paragraphs as relevant in light of the parties' comments, with a view to clarifying the description of the relevant facts.

C. FINDINGS

1. General (Section VII.A)

6.6 The United States proposed some adjustments to paragraphs 7.13 (and the associated footnote) and 7.23 of the interim report. The Panel adjusted the language in these paragraphs for greater clarity and accuracy, taking into account also Mexico's comments on the US request.

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[139] Mexico's comments on the United States' comments on the interim report, para. 2.
[140] See Appellate Body Report, *EC – Sardines*, para. 301.

2. Whether the measures at issue constitute a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement (Section VII.B.1)

6.7 The United States requested adjustments to paragraphs 7.60, 7.72, 7.116 of the interim report to improve the accuracy of the descriptions contained therein. The Panel accepted these changes to the extent that they constituted clarifications. The United States also suggested additions to paragraph 7.13 of the interim report to reflect in more detail its arguments concerning US commitments under the Panama Declaration. The Panel addressed this point in paragraphs 2.16 to 2.19 and referred the reader to it through footnote 196.

6.8 Mexico requested the Panel to review paragraphs 7.86, 7.165, 7.176, 7.180 of the interim report "in accordance with the arguments and direct evidence presented by Mexico". Specifically, Mexico suggests that references to evidence concerning canneries and tuna in these paragraphs be eliminated, in light of the fact that Mexico narrowed down its claims in the course of the proceedings to tuna products only and do not include tuna.[141] In light of this, Mexico requests that the Panel focus on the retailer and consumer consumption stages only. Mexico argues that it has put forward evidence concerning the preferences of retailers and consumers suggesting that if the AIDCP label could be placed on its products, they would be acceptable to major US retailers and a substantial proportion of US consumers.

6.9 The United States commented that Mexico's request should be rejected. The United States observed that, while Mexico did state in response to a question from the Panel that the like product analysis should be limited to tuna products, it made arguments and presented evidence throughout the proceedings that addressed the processing of tuna, not just tuna products. In the US view, the Panel's findings properly reflect the scope of Mexico's claims, and Mexico does not explain why its narrowed claims would preclude the Panel from taking evidence relating to the practices of canneries and tuna producers into account.[142] In the US view, such evidence is relevant not only in its own right but also as indirect evidence of the preferences of consumers.

6.10 We first note that, as described in paragraphs 7.232 and 7.233, Mexico clarified in the course of the proceedings that it was seeking findings under Articles III:4, I:1 of GATT and Article 2.1 of the TBT Agreement only in relation of tuna products, and not tuna. For that reason, we made no findings of law under these provisions in relation to tuna as such, and limited our findings in this respect to tuna products.[143]

6.11 We also note, however, that the section of the Report containing the paragraphs referred to above addresses the question of whether compliance with the measures at issue is "mandatory" within the meaning of Annex 1 of the TBT Agreement. This question is not, as such, dependent on the scope of Mexico's non-discrimination claims under Article 2.1 of the TBT Agreement (or under Article III:4 and I:1 of GATT 1994).

6.12 We have adjusted the text of paragraph 7.87 and the associated footnote 265 in order to reflect more clearly the manner in which Mexico presented its arguments concerning canneries and tuna in relation to the "mandatory" character of the measures.

6.13 Other references to the practices of canneries in this Section that Mexico seeks the removal of (in paragraphs 7.165, 7.176 and 7.177 to 7.180 of the interim report) relate to the separate opinion

[141] Mexico's comments on the United States' comments on the interim report, paras. 7-21.
[142] See the United States' comments on Mexico's comments on the interim report, para. 17.
[143] See paras. 7.227 and 7.228.

contained in paragraphs 7.146 to 7.190 in the final report. Modifications made to this part of the Report should therefore be understood as having been made by the author of the separate opinion.

6.14 Paragraph 7.167, which refers to Mexico's arguments, has been modified to clarify the manner in which Mexico referred to the practices of tuna processors in the context of its arguments that the US measures are *de facto* "mandatory".

6.15 Paragraphs 7.176 and 7.177 to 7.180 of the interim report have not been modified because, in the view of their author, references to the practices of canneries in relation to the purchase of tuna are relevant to the determination made in this section, notwithstanding Mexico's decision to narrow down the scope of its non-discrimination claims to tuna products only. This section of the separate opinion addresses whether compliance with the US dolphin-safe provisions is *de facto* mandatory. As observed above, an assessment of this question is not dependent on the scope of Mexico's non-discrimination claims.

6.16 The specific question that the evidence relating to the practices of tuna processors helps to inform in this context is whether the measures are mandatory *by virtue of US actions* rather than as a result of the practices of the market. The evidence relating to tuna processors makes clear that processors do not wish to purchase tuna that would not be eligible for the label, although it would be consistent with the terms of the measures to do so, and that this is a choice that they voluntarily make. In light of Mexico's observation that the analysis should focus on the retailer and consumer level, additional language has been included in paragraph 7.185 to clarify the author's view on the arguments highlighted by Mexico in its request for review. As explained in that paragraph, a consideration of the decision of retailers not to carry tuna products that are not eligible for the dolphin-safe label confirms that it is the decisions of private actors themselves that give weight to the dolphin-safe label on the US market and does not modify the conclusion reached in this section. As explained in paragraph 7.180, in the view of the author of the separate opinion, such decisions of private actors on the market in relation to a voluntary standard do not turn such standard into a "technical regulation" with which compliance is mandatory.

6.17 The author of the separate opinion declined to introduce an additional reference to Mexico's arguments at paragraph 7.162 of the interim report, which reflects the author's assessment of the *EC – Sardines* rulings.

3. Article 2.1 of the TBT Agreement (Section VII.B.2)

6.18 The United States suggested changes to paragraphs 7.224, 7.250, 7.303, 7.307, 7.309, 7.315, 7.316, 7.323 and 7.325 of the interim report to improve the accuracy of the descriptions contained therein. Both parties also requested a number of insertions in order to reflect in more detail their arguments in the findings of the Panel. The United States suggested additions to paragraphs 7.251, 7.253 and 7.342 of the interim report to reflect in more detail its arguments. Mexico objected to such changes arguing that the United States was highlighting arguments that were irrelevant to the point discussed, either seeing to convert them into Panel's findings or changing the focus of the paragraphs making them confusing to read.

6.19 The Panel accepted such requests where it considered that they contributed to a better understanding of the issues and added clarity to the findings. On that basis, the Panel made adjustments to paragraphs 7.230, 7.256, 7.312, 7.314, 7.324, 7.329. 7.329, 7.331 and 7.353 of the final report to reflect the arguments made in the course of the proceedings by both parties and clarify where necessary its treatment of these arguments. The Panel declined, however, to make the requested adjustments to paragraphs 7.303 and 7.253 of the interim report, where it did not consider that the proposed changes were useful to clarify or improve the treatment of the issue addressed in paragraphs 7.308 and 7.257 of the final report.

6.20 Mexico also requested the Panel to review paragraphs 7.258, 7.284, 7.285, and 7.350 to 7.354 of the interim report, "in accordance with the arguments and direct evidence presented by Mexico", for the reasons outlined in paragraph 6.8 above. As described above, we acknowledge that Mexico narrowed its non-discrimination claims, in the course of the proceedings, to tuna products, and not tuna. However, we are not persuaded that this implies that we may not take into consideration relevant evidence presented by the parties in the course of the proceedings in relation to the practices of tuna processors and tuna, to the extent that it may inform our assessment of whether the measures at issue afford Mexican tuna *products* less favourable treatment within the meaning of Article 2.1 of the TBT Agreement. Indeed, should we have excluded from consideration any evidence relating to tuna rather than tuna products, we would also not have been able to take into account some of the main facts at the core of Mexico's claims, including the fishing practices of its tuna fleet.

6.21 Paragraph 7.289 of the final report has been modified to clarify the manner in which the Panel understands Mexico's arguments concerning the practices of tuna processors and how these should be taken into consideration when analysing the US dolphin-safe labelling provisions consistency with Article 2.1 of the TBT Agreement.

6.22 In paragraphs 7.362 to 7.364, reference is made to the practice of tuna processors for the purposes of determining whether access to the label constitutes an advantage on the US market (for tuna products). As explained in paragraph 7.364, the fact that major tuna processors respond to dolphin-safe concerns by ensuring that they source only tuna that will make their tuna products eligible for a dolphin-safe label is, in our view, evidence that a dolphin-safe designation is considered valuable on the US market, and that, consequently, access to the label regulated under the US dolphin-safe measures constitutes an advantage for tuna products on the US market. We see no need to modify our determinations in this respect. However, in order also to address Mexico's observation that the analysis should address the direct evidence provided by Mexico in relation to the preferences of retailers and final consumers, we have added paragraph 7.290.

6.23 In paragraphs 7.350 to 7.354, reference is made to the practices of major tuna processors to inform the relationship between the measures and the practices of operators on the market in relation to the dolphin-safe issue. As described in paragraph 7.353, this contributes, in combination with other elements, to the Panel's assessment of the situation of Mexican tuna *products* on the US market, in particular the role of the measures and other factors in the limited presence of tuna products caught by setting on dolphins, including Mexican tuna products, on the US market. For this reason, we do not consider it necessary to eliminate these references on account of the fact that Mexico's claims are limited to tuna products and do not extend to tuna. Nonetheless, we considered it useful to elaborate further also on the elements highlighted by Mexico in relation to the preferences of retailers and consumers of tuna products to clarify the basis for our findings in this respect. We therefore added paragraph 7.364 to the final report.

6.24 Mexico also sought a review of paragraphs 7.330, 7.334 and 7.335 of the interim report, to reflect more fully its arguments on the costs of adaptation to the US measures. The United States commented that the interim report already included Mexico's arguments about its efforts to adapt and that it saw no reason to reiterate them.[144] We reviewed the relevant section in paragraphs 7.336 to 7.346 to reflect more fully the arguments presented Mexico and accordingly also explained in more detail our treatment of these arguments.

[144] United States' comments on Mexico's comments on the interim report, paras. 42-43.

4. Article 2.2 of the TBT Agreement (Section VII.B.3)

6.25 We adjusted the text of paragraph 7.346 to improve its clarity, further to a request by the United States and taking into account Mexico's comments.

6.26 The United States also requested adjustments to paragraphs 7.301, 7.302, 7.326, 7.327 of the interim report. We declined to make these changes, which would have altered our assessment of the relevant issues in a manner that we did not agree with.

6.27 The United States requested changes to paragraphs 7.381, 7.385, 7.397 and 7.403 of the interim report that would have modified the Panel's assessment of the objective of the US dolphin-safe labelling provisions in relation to dolphin protection, to define it in terms of "ensuring that the US market is not used *to encourage fishing fleets to set on dolphins*" instead of "ensuring that the US market is not used *to catch tuna in a manner that adversely affects dolphins*". For the reasons explained in paragraphs 7.414 to 7.425, we have understood this objective in the manner in which the United States itself initially defined it, i.e. "protecting dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins". We therefore declined to make the changes requested by the United States. However, we made some adjustments to paragraphs 7.397, 7.402, 7.414 and 7.567 of the final report to clarify the manner in which the United States described this objective in its different submissions to the Panel.

6.28 The United States requested the Panel to cite additional factual information in a footnote concerning its arguments on dolphin mortalities in the Western Central Pacific Ocean (WCPO) (footnote 676 in the interim report). In support of this insertion, the United States cites an exhibit presented by Mexico, which was not referred to by the United States in the part of its submissions that the footnote addressed.

6.29 We note that it would have been appropriate for the United States to refer to the relevant evidence in support of its factual assertions at the time of making such assertions, rather than in the interim phase of the proceedings.[145] Nonetheless, we also note that the United States had referred to this particular piece of evidence and the factual information contained therein in one of its comments on responses to questions by Mexico on a related issue.[146] For that reason, we accepted to refer to and address in our final Report the relevant evidence cited by the United States. This is addressed in paragraphs 7.524 to 7.529.

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[145] In its response to the Panel question No. 15, para. 49, the United States noted that:

> "Reports on that fishery reveal that marine mammal take is relatively small. Based on reporting from independent observers on U.S. vessels fishing for tuna in the Western Central Pacific Ocean (WCPO), of the 1500 sets observed in 2008, there were 5 interactions with false killer whales and one interaction with a short-finned pilot whale observed; there were no observed interactions with other marine mammals."

This statement is accompanied by the following text in a footnote "Communication from Dr. Charles Karnella, International Fisheries Administrator, NOAA Fisheries Pacific Islands Regional Office, to Brad Wiley, Foreign Affairs Specialist, NOAA Fisheries Office of International Affairs on October 29, 2010". The communication in question is not provided or otherwise explained.

[146] See US comments to Mexico's response to Panel question No. 101 ("For example, Mexico cites data on marine mammal interactions in the Western Central Pacific Ocean, yet that data show that over an eleven year period 33,319 purse seine sets were observed and bycatch of 1315 marine mammals was reported, 46 of which were reported killed.")

6.30 The United States requested that a new paragraph be added immediately following paragraph 7.490 of the interim report to reflect its response to Mexico's arguments that there are substantial dolphin mortality rates associated with fishing techniques other than setting on dolphins, that scientific research indicates that there are associations of tuna with dolphins outside the ETP and that despite the evidence that dolphins and other marine mammals are being killed in significant numbers in ocean regions other than the ETP, no measures have been taken in those other regions comparable to those taken for the ETP.[147]

6.31 Mexico objected to the proposed insertion, stating that the United States has proposed to add almost an entire new page reciting arguments from its written submissions, repeating points addressed elsewhere in the interim report. Nonetheless Mexico noted that, if the Panel decides to include the new paragraph proposed by the United States, for purposes of maintaining balance in the manner in which the Parties' arguments are described, it would expect the Panel to also repeat in detail Mexico's responses to those US arguments.[148]

6.32 The Panel agreed to incorporate additional references to the parties' arguments (at paragraphs 7.512 to 7.514) and consequently found it necessary to clarify also its treatment of these arguments (at paragraphs 7.524 to 7.530 and 7.559 to 7.561).

6.33 The United States requested a modification of paragraph 7.510 of the interim report to clarify the requirements for access to an alternative label. The Panel clarified the language of this paragraph and accordingly also clarified its treatment of this issue, at paragraphs 7.540 and 7.541.

5. Article 2.4 of the TBT Agreement (Section VII.B.4)

6.34 With respect to the Panel's findings under Article 2.4 of the TBT Agreement, the Panel adjusted the text of paragraphs 7.604, 7.605, 7.606 and 7.612 of the interim report in order to clarify the description of United States' arguments in these paragraphs, at their request. The Panel also edited the text of paragraphs 7.638 to 7.640 of the final report to improve their clarity, further to a request of the United States and taking into account comments by Mexico.[149]

6.35 The United States also sought changes to paragraphs 7.630 to 7.639 of the interim report in relation to the interpretation of the terms "international standard" in Annex 1 of the TBT Agreement.[150] Mexico considered this to amount to a request for reconsideration of the Panel's legal findings.[151] However, as described above, we do not consider that it is inappropriate for a party to seek a review of factual or legal determinations made by the Panel in the interim report, provided that such request is based on evidence previously presented to the Panel. Accordingly, without prejudice to its substantive merits, we do not consider the United States' request to be inadmissible.

6.36 As we understand it, the United States is seeking a review by the Panel of its determination that the "international standard" in Article 2.4 of the TBT Agreement should be understood with

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[147] United States' comments on the interim report, para. 80.

[148] Mexico's comments on the United States comments on the interim report, paras. 75-76.

[149] United States' comments on the interim report, paras. 129, 130 and 134. Mexico objected to the modification proposed in paragraph 7.641, considering that the proposed insertion would not provide further clarity because the meaning was already clear (Mexico comments on the United States' comments on the interim report, para. 108). Given the differences of view between the parties throughout the proceedings on the meaning of the term "dolphin-safe", we saw value in clarifying the context in which the terms "dolphin-safe" and "non-dolphin safe" are used in this paragraph..

[150] United States' comments on the interim report, paras. 131-133, 135-137.

[151] Mexico comments on the United States' comments on the interim report, paras. 107 and 109-110.

reference to the definition of a "standard" contained in the TBT Agreement rather than with reference to the definition of the same term in the ISO/IEC Guide 2.

6.37 For the reasons explained in paragraph 7.670, we are not persuaded that the definition of the term "standard" in Annex 1.2 should be the primary basis for interpreting this term as contained in the expression "international standard" in Article 2.4. Rather, we consider that the meaning of the term "international standard" in that provision should be understood with reference to its definition in the ISO/IEC Guide 2, including the term "standard" as also defined in the same Guide. We have therefore declined to modify paragraphs 7.630 to 7.639 of the interim report as requested by the United States, but adjusted the language of paragraphs 7.670 to clarify the basis for our determination.

6.38 However, we also note that, should the term "international standard" be interpreted with reference to the of the terms "standard" and "international body" as defined in Annex 1 of the TBT Agreement as suggested by the United States, this would not alter our conclusion, for the purposes of this dispute, that the AIDCP dolphin-safe definition constitutes an international standard, insofar as it is voluntary and is approved by parties to the AIDCP, whose membership is open to the relevant bodies of at least all WTO Members.

6.39 The United States also sought a modification to paragraph 7.658 and footnote 852 of the interim report, to remove the reference to the membership of the Antigua Convention.[152] We declined to make this change, on the basis that, as noted by Mexico, this reference is pertinent to the Panel's consideration of whether membership in the AIDCP is open to the relevant national body of every country.[153] To the extent the membership of the AIDCP is linked to the Membership of the Antigua Convention, the reference to the latter is pertinent.

6.40 The United States recommended the addition of a sentence in paragraph 7.667 of the interim report to clarify the conditions of application of the "dolphin safe" certification under the AIDCP resolutions.[154] Mexico objected to this insertion on the basis that it does not directly relate to the issue discussed in this paragraph and seeks to introduce new arguments. We have clarified the language in paragraph 7.640 to clarify the point raised by the United States. In paragraph 7.686 of the interim report, the United States requested the addition of a reference to specific DMLs permitted in the AIDCP.[155] We did not find this addition to be necessary and therefore declined to introduce it.

6. Exercise of judicial economy on Mexico's claims under Articles I and III:4 of GATT 1994 (Section VII.C)

6.41 Mexico requested the Panel to reconsider its decision to exercise judicial economy in regard to findings under Article I:1 and III:4 of the GATT.[156] First, Mexico considered that in this case the report has only resulted in a partial resolution of the dispute and that the Panel has exercised false judicial economy with respect to its discrimination claims because despite finding that the measures were consistent with Article 2.1 of the TBT Agreement, the Panel declined to rule on Articles I:1 and III:4 and therefore left open the question of discrimination.[157] The United States responded that

[152] United States' comments on the interim report, para.138
[153] Mexico comments on the United States' comments on the interim report, para. 110
[154] United States' comments on the interim report, para. 139.
[155] United States' comments on the interim report, para. 140.
[156] Mexico's comments on the interim report, para. 67.
[157] Mexico argued that if a Panel decides to exercise judicial economy, it must be consistent with the aim of the dispute settlement system which is to resolve the matter referred to the DSB and to secure a positive solution to a dispute. (Mexico's comments on the interim report, paras. 69-71). The United States noted that "[t]he Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party but rather a panel has discretion to determine which claims it must address in order to resolve

such assertion misses the point because the question as to the proper exercise of judicial economy is not whether the complainant feels its concerns have been resolved but rather whether the Panel believes it has addressed the claims necessary to resolve the dispute. The United States considered that the Panel acted within the scope of its discretionary authority in deciding to exercise judicial economy on Mexico's claims under the GATT 1994.[158]

6.42 Further, Mexico argued that finding that the US measures are inconsistent with Article 2.2 of the TBT Agreement does not, in itself fully resolve this dispute and referred to the panel's findings in *US – Poultry (China)*, where despite its finding of inconsistency under the SPS Agreement the Panel refrained from exercising judicial economy with respect of a claim under Article I of the GATT 1994 on the basis that there were different obligations embodied in both provisions and a finding only on Article XI would not provide a positive solution to the dispute with respect to discrimination.[159] Mexico considered the same situation arises here with the Panel's findings under Article 2.2 of the TBT Agreement insofar as a finding of inconsistency under Article 2.2 of the TBT Agreement does not provide a positive solution to this dispute in respect of discrimination.[160] The United States considers that the Panel's finding that the measures are inconsistent with Article 2.2 of the TBT Agreement does resolve the dispute because it says it does not understand the Panel to have considered that these findings alone did but rather that the Panel appears to have fully examined Mexico's non-discrimination claims, as well as its claims under Articles 2.2 and 2.4 of the TBT Agreement, and on this basis the Panel considered that it had resolved the dispute.

6.43 Mexico argued that although the three provisions deal with non-discrimination obligations, each of them is different in language, nature, scope and application and that that the TBT provisions cannot be taken to replace, subsume or exclude provisions of the GATT and that thus, the Panel's finding of consistency with Article 2.1 cannot be assumed to mean that the US measures are also consistent with Articles I:1 and III:4.[161] In response the United States observed that Mexico consistently referred the Panel to its arguments under the GATT provisions as the basis for its TBT Article 2.1 claims and that it agreed with the Panel that Mexico has not explained how its assertion of differences in nature, scope, and application of the provisions result in different rights and obligations which would have different implications during implementation. It also noted that Mexico made this same argument earlier in the proceedings and that it appeared from the report that the Panel had already taken these arguments into consideration in deciding to exercise judicial economy.[162] The United States considered Mexico misunderstood the Panel's statement which it says was relying on the fact that Mexico's arguments under Article 2.1 of the TBT Agreement derived directly from its arguments under the GATT 1994 provisions, and so the Panel could be comfortable in concluding that in light of its findings under Article 2.1 of the TBT Agreement it need not reach Articles I:1 and III:4 of the GATT 1994. [163]In Mexico's view, the dissent by one member of the Panel on the threshold issue of whether the US measures constitute a technical regulation and are covered by Article 2.2 further highlights the importance of the Panel ruling on Mexico's claims under the GATT 1994. The United States noted that where the Panel had already resolved the threshold issue in Mexico's favour, the exercise of judicial economy was within the Panel's discretion.[164]

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the dispute between the parties." (footnote omitted) (United States' comments on Mexico's comments on the interim report, fn 25).

[158] United States' comments on Mexico's comments on the interim report, para. 59.
[159] (footnote omitted) (Mexico's comments on the interim report, fn 24).
[160] Mexico's comments on the interim report, para. 73.
[161] Mexico's comments on the interim report, paras. 71-72.
[162] United States' comments on Mexico's comments on the interim report, para. 60.
[163] United States' comments on Mexico's comments on the interim report, para. 62.
[164] United States' comments on Mexico's comments on the interim report, para. 61.

6.44 For the reasons explained in Section VII:C of this Report, we did not consider it necessary to modify our decision to exercise judicial economy in respect of Mexico's claims under Articles I.1 and III:4 of the GATT 1994. As explained in paragraph 7.748, we consider that, in addressing all aspects of Mexico's claims under the TBT Agreement, including, but not limited to, its discrimination claims, we have addressed Mexico's claims in a manner sufficient to resolve the dispute. We further note in this respect that, despite having found a violation of Article 2.2 of the TBT Agreement, the Panel proceeded to examine Mexico's claim under Article 2.4 of the TBT Agreement, in order to address adequately the alleged breaches of the different legal obligations invoked by Mexico under the TBT Agreement.

VII. FINDINGS

A. GENERAL

1. Procedural issue: *Amicus curiae* brief

7.1 Before the first substantive meeting, the Panel received an unsolicited *amicus curiae* brief from Humane Society International and American University's Washington College of Law, accompanied by a letter dated 6 May 2010.

7.2 On 28 June 2010, the Chairman of the Panel informed the parties and third parties that it considered, in light of the Appellate Body's rulings in *US – Shrimp*, that it had the discretionary authority either to accept and consider or to reject information and advice submitted to it, and that it would accordingly treat this submission as it deemed appropriate. The parties and third parties were invited to provide any views they had in relation to the submission at the first substantive meeting. The parties and third parties were also reminded of the possibility of incorporating part or all of the information contained in the submission into their respective submissions and/or oral statements, subject to the provisions of the DSU and the Panel's Working Procedures.[165]

7.3 At the first substantive meeting, the United States requested the Panel to review and consider the submission in its deliberations, in light of the relevant and useful information it contained which it believed could assist the Panel in understanding the issues in this dispute.[166] In addition, in its

[165] Letter from the Chairman of the Panel to the Parties dated 28 June 2010:

> "I would like to inform you that the Dispute Settlement Registrar has received an unsolicited *amicus curiae* brief from Humane Society International and American University's Washington College of Law. The brief has been forwarded to the Panel. A copy of the brief is attached.
>
> Taking into account the determinations of the Appellate Body in *US – Shrimp* (WT/DS58/AB/R), the Panel considers that it has the discretionary authority either to accept and consider or to reject information and advice submitted to it, and it will accordingly treat this brief as it deems appropriate. The Parties and Third Parties are invited to offer any views they may have in relation to the brief at the first substantive meeting.
>
> The Panel reminds Parties and Third Parties that, if they so wish, they have the possibility of incorporating part or all of the information contained in the brief into their respective submissions and/or oral statements, subject to the provisions of the Dispute Settlement Understanding and the Panel's working Procedures. "

[166] The United States mentions that the submission discusses the adverse impact on dolphins and dolphin populations in the ETP resulting from the practice of setting on dolphins to catch tuna; explains that fleet capacity in the ETP is the largest threat to tuna stocks in the ETP rather than particular fishing techniques;

responses to the Panel's questions, the United States referred to some of the information contained in the *amicus curiae* brief in support of its arguments.[167] Mexico did not comment on the filing of the *amicus curiae* brief or on its content at the first substantive meeting.

7.4 The Panel subsequently invited both parties to comment on certain information presented as an exhibit to the *amicus curiae* brief. In its response, Mexico observed that factual information submitted through an *amicus curiae* brief could not be properly treated as part of the record of this dispute.[168] The United States responded that, although a panel is not required to consider information submitted by *amici*, it may consider such information as it sees fit. In particular, the United States noted that the Chairman of the Panel had invited the parties and third parties in this dispute to offer views in relation to the amicus curiae brief filed.[169]

7.5 With respect to the question of whether the information contained in the brief may properly be considered by the Panel, we first note that the Appellate Body in *US – Shrimp* observed that:

> "The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ... "[170]

7.6 In light of the "amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation"[171], the Appellate Body ruled that:

> "If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute."[172]

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reviews the substantial retailer and consumer interest in a dolphin-safe label that ensures that consumers are not misled as to whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. It also emphasized Humane Society International's nearly three decade involvement in the issues surrounding this dispute. United States' opening oral statement of the first substantive meeting, para. 54.

[167] In particular when responding to the Panel's question as to whether consumers' preferences were determined by the fishing method, the United States responded that at the time the US dolphin-safe labelling provisions were enacted, there was strong consumer sentiment that setting on dolphins to catch tuna was unacceptable and that the amicus curiae brief highlighted this sentiment. United States' response to Panel question No. 40(a), para. 98. The United States also referred to the amicus curiae brief to support its assertion that the ETP is fundamentally different from all other oceans in that it is the only ocean where tuna and dolphins have a known regular and significant association and the only ocean where such an association is exploited as the foundation for a commercial fishery. See United States' response to Panel question No. 12(b), fn 18.

[168] Mexico's response to Panel question No. 88, para. 5.

[169] United States' comments on Mexico's response to Panel question No. 88. None of the third parties offered any views with respect to the amicus curiae brief.

[170] Appellate Body Report, *US – Shrimp*, para. 106.

[171] Appellate Body Report, *US – Shrimp*, para. 108.

[172] Appellate Body Report, *US – Shrimp*, para. 107.

7.7 Taking into account these determinations, as described above, the Panel informed the parties prior to the first meeting that:

> "Taking into account the determinations of the Appellate Body in *US – Shrimp* (WT/DS58/AB/R), the Panel considers that it has the discretionary authority either to accept and consider or to reject information and advice submitted to it, and it will accordingly treat this brief as it deems appropriate."

7.8 As also described above, the Panel invited the parties to comment on the brief at issue, in accordance with the requirements of due process.[173]

7.9 The Panel therefore considers that it has the authority to consider the information contained in the submission filed by Humane Society International and American University's Washington College of Law, and has done so to the extent that it deemed it relevant to the examination of the claim before it. Where the Panel considered the information presented in and the evidence attached to the *amicus curiae* brief relevant, it has sought the views of the parties in accordance with the requirements of due process. In addition, to the extent that one of the parties has cited the amicus curiae brief or cross-referenced to the exhibits presented with such brief in its reasoning or responses to questions, as described in paragraph 7.3 above, these elements form part of the submissions of that party in these proceedings and the Panel deems appropriate refer to such information in its findings.

2. Examination of the measures together

7.10 In its request for the establishment of a panel, Mexico identified three separate legal instruments: (i) United States Code, Title 16, Section 1385 –the "Dolphin Protection Consumer Information Act – DPCIA"–, (hereafter "the DPCIA") (ii) the Code of Federal Regulations, Title 50, Section 216.91 –"Dolphin-safe labelling standards"– and Section 216.92 –"Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels"– (hereafter "the implementing regulations") and (iii) the judicial ruling in *Earth Island Institute v. Hogarth*, 494 F. 3d 757 (9th Cir. 2007) (hereafter "the *Hogarth* ruling") as basis for its claims. However, in the course of the proceedings, Mexico referred to the measures as a whole under the generic expression "US measures"[174], "labelling provisions"[175] or "labelling measures"[176], "US dolphin-safe labelling measures"[177] and "labelling scheme".[178] The United States has also referred to the measures as the "US dolphin-safe labelling provisions"[179] or the "labelling scheme".[180]

7.11 The Panel therefore asked Mexico to clarify whether it considered that each measure individually leads to each of the violations it identified, or whether it considered that the violations

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[173] We also note that the Appellate Body recently followed a comparable procedure in similar circumstances:

"On 15 December 2010, the Appellate Body received an unsolicited *amicus curiae* brief. After giving the participants and the third participants an opportunity to express their views, the Division hearing the appeal did not find it necessary to rely on this *amicus curiae* brief in rendering its decision" (Appellate Body Report, *US – AD/CVD on certain products from China*, para. 18).

[174] See for instance Mexico's first written submission, paras. 155, 164, 165, 168, 169 and throughout the written submission.

[175] See for instance Mexico's first written submission, para. 195.

[176] See for instance Mexico's first written submission, para. 240.

[177] See for instance Mexico's first written submission, paras. 226 and 247.

[178] See for instance Mexico's first written submission, para. 203.

[179] See for instance United States' first written submission, paras. 97, 98, 100, 102, 103 and throughout the written submission.

[180] See for instance United States' first written submission, paras. 4, 16 and 55.

arise from the measures in combination, and whether it was seeking from the Panel separate determinations in relation to each measure. The Panel also afforded the United States an opportunity to comment on this matter.

(a) Arguments of the parties

7.12 In response to the Panel's question, Mexico explained that it had identified three separate legal instruments under this dispute, but that each instrument is part of to the same measure: the US dolphin-safe labelling regime.[181] Mexico contends that "[a] measure can be made of up more than one instrument. It is common in the domestic legal systems of many WTO Members for a measure to comprise legislative provisions, regulatory provisions and other kinds of legal instruments".[182]

7.13 Mexico further explained that the DPCIA is a law enacted by the US Congress which contains the requirements to obtain a dolphin-safe label. The regulations codified under 50 CFR Section 216.91 and 216.92 provide, Mexico says, the regulatory conditions imposed by the US Department of Commerce for the use of dolphin-safe label on tuna and tuna products in accordance with the DPCIA. Finally, Mexico noted that, as the United States had recognized, the judicial ruling in *Earth Island Institute vs. Hogarth* "vacated the Secretary of Commerce's final finding under Section 1385(g) that would have permitted tuna products that contained tuna that was caught by setting on dolphins to be labelled dolphins safe".[183] As a consequence of this interpretation by the US Court, the US measure prohibits, Mexico argues, the use of a dolphin-safe label if the tuna was caught in association with dolphins, and it does not matter that no dolphins were killed or injured in the set in which the tuna was caught.[184]

7.14 In light of these observations, Mexico considers that the measures should be analysed as a whole through a "comprehensive analysis" leading to the conclusion that there are violations of Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.[185] Mexico also specifies that it is neither asking for separate rulings for each measure, nor is it suggesting that the Panel undertake an independent analysis of each measure.[186]

7.15 The United States did not comment on Mexico's proposed approach.

(b) Analysis by the Panel

7.16 As described above, Mexico has identified three distinct legal instruments in its request for establishment of a panel (the DPCIA, the implementing regulations, and the *Hogarth* ruling). In the course of the proceedings, Mexico clarified that it seeks findings in relation to the combined operation of these three instruments, rather than for each instrument individually. We must therefore consider whether these various instruments taken together may be described as constituting the measures before us.

7.17 We first recall that, pursuant to Article 3.3 of the DSU, dispute settlement proceedings under the DSU may be initiated in "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another*

[181] Mexico's response to Panel question No. 2, paras. 6-7.
[182] Mexico's response to Panel question No. 2, para. 8.
[183] Mexico's response to Panel question No. 2, para. 7 (footnote omitted).
[184] Mexico's response to Panel question No. 2, para. 7.
[185] Mexico's response to Panel question No. 2, para. 9.
[186] Mexico's response to Panel question No. 2, para. 10.

Member" (emphasis added). With respect to the notion of "measure" in this context, the Appellate Body has observed that:

> "This phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'. In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."[187]

7.18 In principle, therefore, any act or omission attributable to a Member can be a measure for the purposes of dispute settlement proceedings. We also note the Appellate Body's determination that "the parties, and, in particular, the complainant, and the panel enjoy a certain latitude in defining the relevant measures".[188]

7.19 In this instance, Mexico's claims relate to certain provisions of a law (the DPCIA) and of a regulation (sections of the Federal Code), as well as to a federal court ruling (the *Hogarth* ruling), and Mexico invites the Panel to consider these measures as a whole and to make findings in relation to them taken together. The United States has not objected to this approach.

7.20 In addressing this issue, we first note that it has not been suggested in these proceedings that any of these legal instruments taken in isolation would not constitute an "act or omission of the organs of the state" attributable to the United States. We further note that the DPCIA and the implementing regulations constitute legislative or regulatory acts of the federal authorities, while the court ruling constitutes an act of the judicial branch.[189] Each of these normative instruments is *a priori* capable of constituting a measure attributable to the United States, which may be challenged in dispute settlement proceedings under the DSU.

7.21 The question we must consider, however, is whether it is appropriate to consider these measures jointly in our analysis of Mexico's claims, and make findings based on their combined operation, rather than on the basis of each individual measure separately.

7.22 In considering this issue, we find it useful to review how the various instruments cited by Mexico function and relate to each other.[190] First, with respect to the DPCIA, the United States has explained that the DPCIA, codified at 16 U.S.C. 1385, establishes the conditions for use of a "dolphin-safe" label on tuna products.[191] The DOC is legally bound to ensure, through the NOAA and the NMFS, that the criteria set out in the statute are satisfied.[192] In addition, the United States has defined the two sections of the Code of Federal Regulations as the "DPCIA implementing regulations" and has stated that "[T]he DPCIA and implementing regulations are the source and

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[187] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81 and footnote 79. See also Appellate Body Report, *Australia – Apples*, para. 171.

[188] Appellate Body Report, *Australia – Apples*, para. 181.

[189] We note that in *Brazil – Retreaded Tyres*, the panel examined whether discrimination arose from the importation of used tyres through court injunctions. In *US – Section 211 Appropriations Act* the challenged law contained provisions mandating that no US court shall recognize, enforce or otherwise validate any assertion of rights or trademarks made under certain circumstances. The panel noted that the only application of the challenged law by US courts to date of which the parties were aware was the Havana Club Holdings, S.A. v Galleon S.A. (*Havana Club Holdings, S.A. v. Galleon S.A.*, 203 F.2d 116 (2d Cir. 2000)). Panel Report, *US – Section 211 Appropriations Act*, para. 2.13.

[190] Panel question No. 3.

[191] United States' response to Panel question No. 3, paras. 3-6.

[192] In that regard see Panel Report, *US – Export Restraints*, para. 8.91.

authority for understanding the conditions on labelling tuna products dolphin-safe; NOAA Form 370 merely reflects what the law and regulations provide."[193] As explained by the United States, Section 216.91 sets out conditions for the use of the dolphin-safe label and Section 216.92 contains provisions to ensure that tuna caught by certain vessels is labelled dolphin-safe only if the conditions set out in the DPCIA have been met.[194] Given the hierarchical and operational link between the DPCIA and the relevant sections of the Code of Federal Regulation, it is not clear that the latter could be operational on their own or totally independently without the authority of the DPCIA.

7.23 Finally, the Court ruling challenged by Mexico, the *Hogarth* ruling, finds its origin in a challenge to a Secretarial finding mandated by a provision in the DPCIA, which required a determination as to whether the intentional deployment on or encirclement of dolphins with purse seine nets was having a significant adverse impact on any depleted dolphin stock in the ETP. Therefore, in the absence of the DPCIA and actions taken under it, the court ruling would not have existed. In addition, the outcome of that Court ruling has had a direct impact on the rules that are applied under the DPCIA, because the fulfilment of certain conditions foreseen in the DPCIA was dependent on the results of the secretarial findings that were rendered void by the rulings.[195]

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

7.25 We also note that a comparable issue has arisen in two cases relating to SPS measures (*Japan – Apples* and *Australia – Apples*), where the panels considered whether various requirements imposed by Japan and Australia respectively, and embodied in different instruments, should be treated as a single measure or as a combination of several individual measures.[196] In these cases, in addition to considering whether the different requirements might constitute a single measure for the purposes of dispute settlement under the DSU[197], the panel also had to consider whether they constituted a "phytosanitary measure" within the meaning of the *SPS Agreement*, an issue that is not before this Panel. Nonetheless, we find that the test developed by the panel in *Japan – Apples* provides useful guidance for our analysis. The panel in that case considered that the various requirements were interrelated and cumulatively constituted the measures actually applied by Japan to the importation of

[193] United States' response to Panel question No. 7, paras. 19.

[194] The United States has explained that: "Regulations pertaining to the use of dolphin-safe label are set out in the U.S. Code of Federal Regulations (CFR). Mexico challenges the provisions set out at 50 CFR 216. 91 and 216.92. These provisions reflect the conditions for use of the dolphin-safe label on tuna products set out in the DPCIA. Consistent with the DPCIA, section 216.91 sets out the conditions for use of the dolphin-safe label based on whether the tuna was caught in a fishery where there is a regular and significant association between tuna and dolphins or regular and significant mortalities or injuries of dolphins. Section 216. 91 also clarifies that these conditions only apply to vessels in the ETP that have a carrying capacity greater than 362.8 metric tons, and section 216.92 contains provisions to ensure that tuna caught by such vessels is labelled dolphin-safe only if the conditions set out in the DPCIA have been met. Section 216.92 sets out the provisions applicable to domestic and imported tuna separately, although the basic requirements are the same and seek to ensure that claims that tuna is dolphin-safe comply with U.S. law." United States' first written submission, para. 31.

[195] See paras. 2.16-2.19.

[196] Panel Report, *Japan – Apples*, para. 4.17. See also Panel Report, *Australia – Apples*, paras. 7.113-7.115.

[197] The Panel therefore had to interpret Articles 6.2 and 19. 1 of the DSU to verify whether a matter brought before the DSB could refer to several "measures". Panel Report, *Japan – Apples*, para. 8.11.

US apple fruit to protect against the entry, establishment or spread of fire blight within its territory.[198] That panel therefore saw no legal, logical or factual obstacle to treating the requirements identified by the United States as a single phytosanitary measure within the meaning of the SPS Agreement.[199]

7.26 Similarly, we see no "legal, factual or logical obstacle"[200] to treating the various interrelated legal instruments identified by Mexico as the basis for its claims in these proceedings as a single measure for the purposes of our findings. Accordingly, we will consider them together throughout these findings. These measures taken together are hereafter referred to as "the US dolphin-safe labelling provisions".

3. Order of analysis of the claims

7.27 Mexico raises claims under two of the covered agreements: GATT 1994 and the TBT Agreement. We must therefore determine in the first instance the order in which it is appropriate for us to address these claims.

(a) Arguments of the parties

7.28 In its written submissions, Mexico presented its arguments concerning GATT 1994 first, and then its arguments under the TBT Agreement. The United States presented its arguments in the same order.

7.29 In response to a question by the Panel, Mexico clarified that its principal claims concern the discriminatory nature of the US measures and therefore it found it logical for the Panel to first address its claims of discrimination under GATT Articles I:1 and III: 4 and Article 2.1 of the TBT Agreement; followed by an examination of its other claims under Articles 2.2 and 2.4 of the TBT Agreement.[201]

7.30 Mexico also acknowledged that it is an accepted practice, when addressing claims under both the GATT 1994 and the TBT Agreement, to address the claims under the TBT Agreement first. However, it considered the order of examination of a complaining Member's claims important in situations where a panel exercises judicial economy in respect of one or more of the claims. Mexico also held that although a panel has discretion to exercise judicial economy, if the panel fails to make findings that are necessary to resolve the dispute it will constitute a false judicial economy and an error of law.[202]

7.31 Citing the Appellate Body Report in *EC – Bananas III*, Mexico considered that in the case at hand it was essential for an effective resolution of the dispute that the Panel rule on all its claims because of: "(i) the nature of the measures at issue; (ii) the fact that this is the first time that such measures have been subject to dispute settlement under the DSU; (iii) the differences in the wording and potential application of the provisions of the GATT 1994 and the TBT Agreement to the measures; and (iv) the importance of the effective discipline of such non-tariff measures to developing country Members such as Mexico." Mexico emphasized that this final reason was particularly important to developing countries who are, in its view, more exposed to the adverse effects of non-tariff measures. Mexico concluded that for those reasons, the order of its claims was not important and the Panel should examine all the claims in the logical order it had exposed. [203]

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[198] Panel Report, *Japan – Apples*, para. 8.16.
[199] Panel Report, *Japan – Apples*, para. 8.17.
[200] Panel Report, *Japan – Apples*, para. 8.17.
[201] Mexico's response to Panel question No. 1, paras. 1-2.
[202] Mexico's response to Panel question No. 114, para. 68.
[203] Mexico's response to Panel question No. 1, paras. 4-5.

7.32 Mexico further explained that it was necessary for the Panel to rule on its discrimination claims under both the GATT 1994 and the TBT Agreement because the nature, scope and application of the claims under Articles I:1, III:4, and 2.1 are different and address different rights and obligations which, in turn, will have different implications during the implementation phase of this dispute.[204] With respect to its claims under Articles 2.2 and 2.4 of the TBT Agreement, Mexico specified that these claims relate to aspects of the US measures other than discrimination and are necessary to address the trade restrictive effects of the US measures that exist independently of the discrimination.[205] It concluded that due to their different nature, scope and application, none of its claims overlap and all are necessary to an effective resolution of the dispute.[206]

7.33 The United States, in line with its reasoning that the US dolphin-safe labelling provisions are not technical regulations and therefore are not subject to the provisions of the TBT Agreement, considered it would be appropriate for the Panel to analyse first Mexico's claims under the GATT 1994.[207]

7.34 The United States agreed with Mexico that judicial economy gives panels discretion to refrain from making findings which are not necessary to resolve a dispute. However, it considered that the reasons advanced by Mexico in this respect appeared unrelated to whether exercising judicial economy on any of Mexico's claims would fail to resolve the dispute.[208]

(b) Analysis by the Panel

7.35 The TBT Agreement and GATT 1994 are both found in Annex 1A of the WTO Agreement, which contains all the multilateral agreements on trade in goods that form part of the results of the Uruguay Round.

7.36 The Appellate Body has commented on the task of the interpreter when considering two agreements contained in Annex 1A, *in casu*, the Agreement on Agriculture and the SCM Agreement:

> "[T]he *Agreement on Agriculture* and the *SCM Agreement* "are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'), and, as such, are both 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'". Furthermore, as the Appellate Body has explained, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously".[209]

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[204] Mexico's response to Panel question No. 114, para. 69.
[205] Mexico's response to Panel question No. 114, para. 70.
[206] Mexico's response to Panel question No. 114, para. 71.
[207] United States' response to Panel question No. 1, para. 1.
[208] United States' comments on Mexico's response to Panel question No. 114, para. 46.
[209] Appellate Body Report, *US – Upland Cotton*, para. 549. We also note the Appellate Body's analysis of the relationship between the SCM Agreement and GATT 1994:

> The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system. This can be seen from the preamble to the *WTO Agreement* which states, in pertinent part:
> *Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.

7.37 Similarly, the TBT Agreement and GATT 1994 are both "integral parts" of the WTO Agreement and binding on all Members. The question we must consider, in reading the provisions of the two agreements harmoniously, is whether it is appropriate to address the claims presented under these two agreements in any particular order.

7.38 We first note that panels are in principle free to consider the claims before them in the manner that they consider most appropriate to the resolution of the matter before them.[210] Nonetheless, "panels must ensure that they proceed on the basis of a properly structured analysis to interpret the substantive provisions at issue".[211] As the Appellate Body also expressed it:

> "[I]n each case it is the nature of the relationship between two provisions that will determine whether there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law. In some cases, this relationship is such that a failure to structure the analysis in the proper logical sequence will have repercussions for the substance of the analysis itself."[212]

7.39 Thus, in light of the Appellate Body's guidance on this matter, we will examine the nature of the relationship between GATT 1994 and the TBT Agreement so as to ascertain whether a particular order of analysis of the claims is appropriate.

7.40 We note in this respect the Appellate Body's determination that:

> "[A] provision of an agreement included in Annex 1A of the *WTO Agreement* (including the *SCM Agreement*), and a provision of the GATT 1994, that have identical coverage, both apply, but … the provision of the agreement that 'deals specifically, and in detail' with a question should be examined first."[213]

7.41 In the present dispute, provisions of the TBT Agreement and of the GATT 1994 are both invoked. As expressed in its Preamble, the TBT Agreement reflects Members' desire to "further the objectives of GATT 1994". The Appellate Body observed that "it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement

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Article II:2 of the *WTO Agreement* also provides that the Multilateral Trade Agreements are "integral parts" of the *WTO Agreement*, "binding on all Members". The single undertaking is further reflected in the Articles of the *WTO Agreement* on original membership, accession, non-application, acceptance and withdrawal. Furthermore, the *DSU* establishes an integrated dispute settlement system which applies to all the "covered agreements", allowing all the provisions of the *WTO Agreement* relevant to a particular dispute to be examined in one proceeding. Appellate Body Report, *Brazil – Desiccated Coconut*, p.18.

[210] The Appellate Body has thus determined that:

"As a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member. Furthermore, panels may choose to use assumptions in order to facilitate resolution of a particular issue or to enable themselves to make additional and alternative factual findings and thereby assist in the resolution of a dispute should it proceed to the appellate level".(Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126).

[211] As the Appellate Body found in *US – Shrimp* and *Canada – Autos*, panels that ignore or jump over a prior logical step of the analysis run the risk of compromising or invalidating later findings. This risk is compounded in the case of two legally interrelated provisions, where one of those provisions must, as a matter of logic and analytical coherence, be analysed before the other, as is the case with subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994.

Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 127.

[212] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

[213] Appellate Body Report, *US – Softwood Lumber IV*, para. 134.

imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994".[214]

7.42 In addition, the Interpretative Note to Annex 1A to the WTO Agreement clarifies that, in the event of a conflict between a provision of the GATT 1994 and a provision of another Annex 1A Agreement, the latter will prevail to the extent of the conflict. In the present dispute, the provisions of the TBT Agreement would therefore prevail over those of GATT 1994 in such a situation.

7.43 These considerations suggest to us that the TBT Agreement "deals in detail, and specifically" with the matters that it addresses. Therefore, where claims under GATT 1994 are presented in parallel with claims under the TBT Agreement, claims under the TBT Agreement should be considered first. This is not modified, in our view, by the fact that there is some uncertainty about the extent to which the provisions invoked under the TBT Agreement are in fact applicable.

7.44 We note that this was also the approach followed by the panel in *EC – Asbestos*:

> "According to the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*,[215] when the GATT 1994 and another Agreement in Annex 1A appear a priori to apply to the measure in question, the latter should be examined on the basis of the Agreement that deals 'specifically, and in detail,' with such measures. In this particular case, as the parties do not agree on the legal nature of the measure itself (technical regulation covered by the *TBT Agreement* or general ban coming under the scope of the GATT 1994 alone), it is difficult at this stage to determine which Agreement, either the GATT 1994 or the *TBT Agreement*, deals with the measure in question most specifically and in the most detailed manner without undertaking an in-depth examination of the measure in the light of each Agreement.
>
> In order to decide upon the order in which our consideration should proceed, in the way suggested by the Appellate Body, the hypothesis should be that, if the Decree is a 'technical regulation' within the meaning of the *TBT Agreement*, then the latter would deal with the measure in the most specific and most detailed manner. Consequently, in our view it must first be determined whether the Decree is a technical regulation within the meaning of the *TBT Agreement*. If this is the case, we shall start considering this case by examining the ways in which the Decree violates the *TBT Agreement*. If we find that the Decree is not a 'technical regulation', we shall then immediately start to consider it in the context of the GATT 1994."[216]

7.45 We agree with the reasoning and approach reflected in these findings and adopt them for the purposes of our examination of Mexico's claims. In the present case, the GATT 1994 and the TBT Agreement have both been invoked, and as in *EC – Asbestos*, the parties disagree whether the measures at issue constitute technical regulations within the meaning of the TBT Agreement.

7.46 Accordingly, taking into account the specificity of the TBT Agreement and its precedence over GATT 1994 in the event of a conflict between provisions of the two agreements, we find it appropriate to consider first Mexico's claims under the TBT Agreement.

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[214] Appellate Body Report, *EC – Asbestos*, para. 80.

[215] *(footnote original)* Adopted on 25 September 1997, WT/DS27/AB/R, hereinafter "*European Communities – Bananas*", para. 204.

[216] Panel Report, *EC – Asbestos*, paras. 8.16–8.17.

7.47 This determination is without prejudice to the question of whether the provisions of the TBT Agreement invoked by Mexico are applicable to the measures at issue. We will consider this question in the context of our examination under the TBT Agreement in Section B below. This determination is also without prejudice to the question of exercise of judicial economy, which Mexico has referred to in relation to the order of analysis of the claims, but which is, in our view, a distinct matter, to be decided at a later stage of our analysis.

B. MEXICO'S CLAIMS UNDER THE TBT AGREEMENT

7.48 Mexico has presented claims under Articles 2.1, 2.2 and 2.4 of the TBT Agreement. All three of these provisions relate to "technical regulations". The United States, however, considers that the measures at issue do not constitute "technical regulations" within the meaning of the TBT Agreement.

7.49 We must therefore determine, as a threshold matter, whether the measures at issue constitute a "technical regulation", as this question determines the applicability of the provisions invoked by Mexico under the TBT Agreement. If we determine that the US dolphin-safe labelling provisions do constitute a "technical regulation", we will then consider further Mexico's claims under each of the three provisions that it has invoked.

1. Whether the measures at issue constitute a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement

7.50 Annex 1.1 of the TBT Agreement defines a "technical regulation" as follows:

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

7.51 Pursuant to Article 3.2 of the DSU, we must interpret this term in accordance with customary rules of interpretation of public international law. As recognized by the Appellate Body, these customary rules of treaty interpretation have been codified in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention").[217]

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[217] Appellate Body Report, *US – Gambling*, para. 159; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10; Appellate Body Report, *US – Gasoline*, p. 17. Articles 31 and 32 of the *Vienna Convention* read as follows:

> Article 31
>
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

7.52 The general rule of interpretation contained in Article 31 of the *Vienna Convention* has been construed by the Appellate Body as requiring that the interpretation of a treaty provision be primarily based on the text of the treaty provision itself.[218] The words contained in that text must be given their ordinary meaning in their context and in light of the object and purpose of the treaty in question.[219] We also take note of the Appellate Body's conclusion that "[o]ne of the corollaries of the general rule of interpretation in the *Vienna Convention* is that interpretation must give meaning and effect to *all* the terms of a treaty".[220]

7.53 The Appellate Body has interpreted the definition of a "technical regulation" in *EC – Asbestos* and *EC – Sardines*. These rulings provide useful guidance for our analysis in this case. In particular, the Appellate Body established in *EC – Asbestos* a three-tier test for determining whether a measure is a "technical regulation" under the TBT Agreement.[221] This test was then followed in *EC – Sardines*.[222] The three elements under this test are derived from the wording of the definition in Annex 1.1 of the TBT Agreement.[223] Accordingly, a measure is a "technical regulation", if:

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

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

(c) compliance with the product characteristics is mandatory.

7.54 We therefore now consider whether the US measures challenged by Mexico constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, on the basis of these three elements, as articulated by the Appellate Body.

7.55 Accordingly, we will consider the following issues in turn:

(a) Whether the US dolphin-safe labelling provisions apply to an identifiable group of products;

(b) Whether they lay down one or more characteristics of these products;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

[218] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11.
[219] Appellate Body Report, *US – Gasoline*, p. 17.
[220] Appellate Body Report, *US – Gasoline*, p. 23.
[221] Appellate Body Report, *EC – Asbestos*, paras. 66-70.
[222] Appellate Body Report, *EC – Sardines*, para. 176.
[223] Appellate Body Report, *EC – Sardines*, para. 176.

(c) Whether compliance with them is mandatory within the meaning of Annex 1.

(a) Whether the measures apply to an identifiable product or group of products

7.56 Mexico notes that the term "tuna product" is defined in Section 1385(c)(5) of the DPCIA. Mexico also observes that the provisions of the DPCIA apply specifically to a "tuna product" as defined by such provisions. Therefore, according to Mexico, the list of items identified by this definition, constitute an "identifiable group of products" to which the document applies.[224]

7.57 The United States does not disagree with Mexico that the US dolphin-safe provisions apply to an identifiable group of products (tuna products). However, as further discussed in the following subsections, the United States disputes Mexico's assertion that such provisions set out product characteristics and that they are mandatory regulations.[225]

7.58 We note that in *EC – Asbestos*, the Appellate Body clarified that while a technical regulation must be applicable to an *identifiable* product or group of products, this did not mean that the product or group of products needed to be expressly *identified* in the document:

> "A 'technical regulation' must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. ... However, in contrast to what the Panel suggested, this does not mean that a 'technical regulation' must apply to '*given*' products which are actually *named, identified* or *specified* in the regulation. Although the *TBT Agreement* clearly applies to 'products' generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a 'technical regulation'. Moreover, there may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the 'characteristic' that is the subject of regulation."[226]

7.59 We must therefore determine whether the US dolphin-safe labelling provisions apply to an identifiable product or group of products.

7.60 As described in Section II.A above, the DPCIA establishes the conditions under which tuna products may be labelled dolphin-safe. The provisions of the DPCIA relate specifically to two types of goods: "tuna" and "tuna products". They regulate the "tuna products" containing "tuna" that can be labelled as dolphin-safe.[227] As noted above, the DPCIA defines "tuna products" in Section 1385(c)(5) as "food items which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days".[228]

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[224] Mexico's first written submission, para. 196.

[225] United States' first written submission, para. 128.

[226] Appellate Body Report, *EC – Asbestos*, para. 70. See also Appellate Body Report, *EC – Sardines*, paras. 176 and 180.

[227] Exhibit US-5 and Appendix A of Mexico's first written submission.

[228] Exhibit US-5 and Appendix A of Mexico's first written submission. The United States specifies in its first written submission that tuna products include canned or pouched tuna, whole frozen tuna, frozen tuna steaks, frozen tuna filets, tuna loins for canning, tuna in glass jars, tuna burgers, fish balls and fish cakes that contain tuna, and sushi grade frozen tuna.(United States' first written submission, fn 4). Mexico contends that the most common form of tuna products is tuna in retail-ready cans or pouches. (Mexico's first written submission, para. 116).

7.61 Section 216.3 of Title 50 of the Code of Federal Regulations identifies the definitions applicable to Section 216, and makes the following cross-reference: "in addition to the definitions contained in the MMPA and unless the context otherwise require, in this part 216 ... *'Tuna product'* means any food product processed for retail sale and intended for human or animal consumption that contains an item listed in Section 216.24(f)(2)(i) or (ii), but does not include perishable items with a shelf life of less than 3 days." Pursuant to Section 216.24(f)(2)(i) and (ii), tuna products are those products containing one of the listed species of tuna. By virtue of Section 216.3, this definition applies to the regulations challenged by Mexico, i.e. Title 50, Sections 216.91 and 216.92.

7.62 In light of the above, the Panel agrees with Mexico that the US dolphin-safe labelling provisions apply to an "identifiable" product or group of products, that is, "tuna products", as defined in the DPCIA and in Section 216.3 of Title 50 of the Code of Federal Regulations.

(b) Whether the US dolphin-safe labelling provisions lay down one or more "characteristics" of the products

(i) Arguments of the parties

7.63 Mexico argues that the US measures govern the conditions under which a tuna product can be labelled as "dolphin-safe". According to Mexico, this requirement is a product characteristic of the tuna product that is laid down by the United States' measures.[229]

7.64 Mexico observes that the definition of "technical regulation" contained in Annex 1.1 expressly includes "marking or labelling requirements". Mexico also notes that the Appellate Body has established that "a 'labelling requirement' is a product characteristic". Based on the Appellate Body's ruling in *EC – Asbestos*, Mexico submits that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as means of identification, the presentation and the appearance of a product. Mexico also recalls that the panel in *EC – Trademarks and Geographical Indications (Australia)* came to a similar conclusion and considered that the label on a product is itself a product characteristic.[230]

7.65 Mexico further clarifies that in presenting its claims under the TBT Agreement, it has applied the interpretation of "technical regulation" set out by the Appellate Body in *EC – Asbestos* and *EC – Sardines*. Mexico recalls that on those occasions, the Appellate Body ruled that the "heart of the definition" of "technical regulation" under Annex 1.1 is that a "document" must "lay down" "product characteristics".[231] Therefore, Mexico's position is that the measures at issue "relate ... to a labelling requirement that is a product characteristic".[232]

7.66 The United States contends that the US dolphin-safe labelling provisions do not set out product characteristics for tuna products. Instead, they specify the conditions under which tuna products may be labelled dolphin-safe. Therefore, although the United States recognizes that the US dolphin-safe provisions "set out requirements that must be met for tuna to be labeled dolphin-safe", it submits that the US dolphin-safe provisions do not specify the product characteristics that tuna products must meet (or not meet) to be sold on the United States' market.[233]

[229] Mexico's first written submission, para. 198.
[230] Mexico's first written submission, para. 197.
[231] Mexico's response to Panel question No. 46, para. 118.
[232] Mexico's response to Panel question No. 47, para. 127.
[233] United States' first written submission, para. 129.

7.67 In this context, the United States argues that reading together the first and the second sentences of the definition of "technical regulation" in Annex 1.1 of the TBT Agreement makes it clear that technical regulations are "documents with which compliance is mandatory and that 'lay down product characteristics or their related processes and production methods' or 'deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method' or both".[234]

7.68 The United States submits that the Appellate Body in *EC – Asbestos* "appears to mistakenly have read the second sentence of Annex 1.1 of the TBT Agreement as providing examples of 'product characteristics' covered by the first sentence of the definition". Moreover, the United States submits that the panel in *EC – Trademarks and Geographical Indications (Australia)* "repeated this same mistake". According to the United States, the second sentence of the definition of "technical regulation" does not contain examples of "product characteristics"; it rather sets out aspects other than product characteristics that may be the subject of a document with which compliance is mandatory and thus fall within the definition of a "technical regulation".[235]

7.69 The United States discusses the relationship between the two sentences of Annex 1.1 in light of the phrase "it may also or exclusively deal with". According to the United States, the word "it" in this phrase refers back to the word "document" in the first sentence, "such that the document may in addition or instead deal with aspects that are not considered product characteristics such as terminology or labelling requirements". Furthermore, the United States claims that the Appellate Body's interpretation of the second sentence of Annex 1.1 appears to ignore the word "also". According to the United States, the use of the word "also" supports the view that the second sentence is additional to the first. Hence, the United States submits that the Appellate Body's approach "appears not to give full effect to the terms of the relevant provisions of the TBT Agreement" and, therefore, should not be followed.[236]

7.70 The United States notes that the US dolphin-safe provisions "set out the requirements that must be met for tuna to be labeled dolphin-safe".[237] However, the United States submits that this fact and the fact that these provisions make it unlawful to sell tuna products that are labelled "dolphin-safe" without complying with the applicable conditions under the DPCIA labelling scheme, does not prove that the US dolphin-safe provisions constitute a technical regulation. According to the United States, these facts prove "[a]t most… that the U.S. dolphin-safe labelling provisions are 'labelling requirements'".[238] It also submits that "the term 'labelling requirement' should be construed to have the same meaning in both the definition of a technical regulation and the definition of a standard".[239] Therefore, in the United States' view, the US dolphin-safe provisions "establish labelling requirements with which compliance is *not* mandatory".[240]

(ii) Analysis by the Panel

7.71 The Panel recalls the definition of a "technical regulation" in Annex 1.1 of the TBT Agreement, as set out in paragraph 7.50 above. We recall also the Appellate Body's finding that a document meets the second element of its three-tier test for a "technical regulation" if it "lays down

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[234] United States' first written submission, para. 126.
[235] United States' first written submission, fn 141.
[236] United States' first written submission, fn 141; *see also*, United States' first oral statement, para. 40.
[237] United States' first written submission, para. 129, *see also* United States' second written submission, para. 96.
[238] United States' second written submission, para. 89.
[239] United States' second written submission, para. 91.
[240] United States' second written submission, para. 96.

one or more characteristics of the product".[241] Although this finding was made with reference only to the core concept of "product characteristics"[242], we understand this second element of the test as relating more generally to the subject matter of the measure, as defined in Annex 1.1. What we must ascertain, therefore, in this part of our analysis, is whether the matter addressed in the US dolphin-safe labelling provisions falls within the scope of the subject matters of a technical regulation, as defined in Annex 1.1.

7.72 We note in this respect that both sentences of Annex 1.1 provide indications as to the subject matter, or contents, of technical regulations. The first sentence establishes that a technical regulation may lay down "product characteristics *or* their related processes and production methods" (emphasis added). The second sentence ("It may also deal with …"), further elaborates on the subject-matter of technical regulations, and enumerates some specific items that technical regulations may also "include or deal exclusively with". As described by the Appellate Body:

> "In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a 'technical regulation' may set forth the 'applicable administrative provisions' for products which have certain 'characteristics'. Further, we note that the definition of a 'technical regulation' provides that such a regulation 'may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements'. (emphasis added) The use here of the word 'exclusively' and the disjunctive word 'or' indicates that a 'technical regulation' may be confined to laying down only one or a few 'product characteristics'." (emphasis original)[243]

7.73 From these elements, it is clear, in our view, that the subject-matter of a technical regulation may be "confined", as the Appellate Body expressed it, to one of the elements enumerated in the second sentence, including "labelling requirements", "as they apply to a product, process or production method".

7.74 In the present case, Mexico and the United States agree that the measures at issue establish the conditions under which tuna products may be labelled "dolphin-safe".[244] Both parties also acknowledge that the US dolphin-safe labelling provisions establish "labelling requirements" within the meaning of Annex 1 of the TBT Agreement.[245] Moreover, they both consider that the term "labelling requirements" has the same meaning in the definition of a "technical regulation" and the

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[241] Appellate Body Report, *EC – Sardines*, para. 176.

[242] "The heart of the definition of a 'technical regulation' is that a 'document' must 'lay down' – that is, set forth, stipulate or provide – 'product *characteristics*. The word characteristic has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the characteristics of a product include, in our view, any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product. Such 'characteristics' might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a technical regulation in Annex 1.1, the TBT Agreement itself gives certain examples of 'product characteristics' – 'terminology, symbols, packaging, marking or labelling requirements'." Appellate Body Report, *EC – – Sardines*, para. 189.

[243] Appellate Body Report, *EC – Asbestos*, para. 67.

[244] Mexico's first written submission, para. 198; Mexico's second written submission, para. 1; United States' first written submission, para. 129; United States' second written submission, para. 89.

[245] The United States also considers, however, that, these labelling requirements are not "mandatory" within the meaning of Annex 1.1 and thus do not fall within the scope of this provision. This question is considered separately in the next section.

definition of a "standard", [246] and that the meaning to be ascribed to the term "labelling requirement" in this context is that of a set of criteria or conditions that must be met before a label can be used.[247]

7.75 We note that Annex 1 of the TBT Agreement does not contain a definition of the term "labelling requirement". However, it provides that the terms used in the TBT Agreement have the same meaning as the terms defined by the sixth edition of the ISO/IEC Guide 2: 1991, except if otherwise provided in Annex 1. The ISO/IEC Guide 2: 1991 defines the term "requirement" as a "provision that conveys criteria to be fulfilled".[248] The parties' own definition of the term "labelling requirements" as explained in the previous paragraph is consistent with this definition.

7.76 In the present case, the US dolphin-safe labelling provisions define the conditions that must be met in order to bear a "dolphin-safe" label. In so doing, they "convey criteria to be fulfilled" in order to qualify for such label. They therefore lay down "labelling requirements" within the meaning of Annex 1.1. Further, we note that the second sentence of Annex 1.1 refers to labelling requirements "as they apply to a product, process or production method". We must therefore also determine whether the labelling requirements laid down in the US dolphin-safe labelling provisions apply to "a product, process or production method".

7.77 In response to a question by the Panel in this respect, Mexico observed that this phrase means "labelling requirements as they make use of or administer a product, process or production method", and that if the second sentence is referred to, "the labelling requirement in the US measures clearly applies to a "product", namely tuna products"[249]. The United States, for its part, considers that the phrase "they apply to a product, process or production method" clarifies that the second sentence covers terminology, symbols, packaging, marking and labelling requirements as they apply to a product, process or production method", and that the words "as they apply to" may be understood as meaning terminology, symbols, packaging and marking requirements that "refer to, concern or relate to a product, process or production method". In this dispute, the United States considers that its dolphin-safe labelling provisions "concern both a product – tuna products – and a production method".[250]

7.78 We agree with the United States' characterization of the terms "as they apply to" as meaning that the labelling requirements and other elements listed in the second sentence must relate to and concern "a product, process or production method". We also note that there is no disagreement among the parties that the labelling requirements laid down in the US dolphin-safe labelling provisions "apply to" a product, namely tuna products. We agree with this determination. We are therefore satisfied that the measures at issue lay down labelling requirements, as they apply to a product, process or production method and that the subject-matter of the measures therefore falls within the scope of the second sentence of Annex 1.1.

7.79 We do not find it necessary to consider in addition whether the labelling requirements in the US dolphin-safe labelling provisions also fall within the scope of the first sentence as "product characteristics or related production or processing methods", since, as the Appellate Body has

[246] Mexico's response to Panel question No. 48, para. 128; United States' second written submission, para. 91.
[247] Mexico's response to Panel question No. 48, para. 131; United States' second written submission, para. 91.
[248] See also para. 7.5 of ISO/IEC 2004 Guide 2, eight edition.
[249] Mexico's response to Panel question No. 119, para. 86.
[250] United States' response to Panel question No. 119, para. 43.

observed, the terms of the second sentence make it clear that the subject-matter of a technical regulation may be confined to one of the items enumerated in the second sentence.[251]

(c) Whether compliance with the US dolphin-safe labelling provisions is "mandatory" within the meaning of Annex 1.1

(i) Arguments of the parties

7.80 Mexico submits that the US dolphin-safe provisions constitute a mandatory regulation.[252] According to Mexico, the statutory and regulatory provisions that make up the dolphin-safe labelling provisions, as interpreted by a court decision, contain mandatory language that specifies that it is unlawful to include on the label of any tuna product offered for sale in the United States the term "dolphin-safe" or any analogous term or symbol if the product contains tuna harvested in the ETP by a large purse-seine vessel using a purse-seine net intentionally deployed on or to encircle dolphins.[253] Mexico argues that the US dolphin-safe labelling provisions involve a prohibition on the use of the "dolphin-safe" label, or the use of similar terms or symbols, on Mexican tuna products marketed in the United States, and that this prohibition remains if force even when the international standards of the AIDCP are met.[254] Thus, in Mexico's view, the DPCIA labelling requirements are imposed in a negative form, i.e. the United States' measure require that "[t]una products offered for sale in the United States must not possess certain characteristics (*i.e.*, distinguishing marks – the dolphin-safe label or any other analogous label or mark) unless the prescribed requirements are met".[255]

7.81 According to Mexico, the mandatory language of the US dolphin-safe provisions is found in the provisions that specify that it is unlawful to include on the label of any tuna product offered for sale in the United States the term "dolphin-safe" or any analogous term or symbol if the product contains tuna harvested in the ETP by a large purse-seine vessel using a purse-seine net intentionally deployed on or to encircle dolphins.[256]

7.82 Mexico clarifies that what makes the United States' measures in this dispute mandatory is not whether a label is *de jure* required in order to sell tuna products in the US market, but that the measures restrict retailers, consumers and producers to a single choice for labelling tuna products as dolphin-safe. According to Mexico, by virtue of the US dolphin-safe provisions it is not possible to label tuna products as dolphin-safe under more than one standard.[257]

7.83 Mexico submits that the US dolphin-safe provisions exclusively allow the application of the dolphin-safe label on tuna products when certain requirements established by those provisions are met. Therefore, "compliance with those requirements is the only way to be able to use a dolphin-safe label". In Mexico's view, "there are no alternative means to certify that a tuna product is dolphin-safe". According to Mexico "[t]he fact that the U.S. measures prohibit the utilization of any

[251] We note in this respect that the Appellate Body has also determined that "labelling requirements", as well as other items described in the second sentence of Annex 1.1, constitute "product characteristics" within the meaning of the first sentence.

[252] Mexico's first written submission, para. 200; Mexico's second written submission, paras. 192-199.

[253] Mexico's response to Panel question No. 46, para. 120.

[254] Mexico's first written submission, para. 200; Mexico's first oral statement, paras. 3, 5, 23; Mexico's second written submission, para. 195.

[255] Mexico's first written submission, para. 202; Mexico's second written submission, para. 195.

[256] Mexico's second written submission, para. 194; Mexico's response to Panel question No. 46, para. 120.

[257] Mexico's second written submission, para. 196.

other standards to certify that a tuna product is dolphin-safe gives these measures a *de jure* mandatory distinction".[258]

7.84 Mexico adds that the mandatory language of the US dolphin-safe provisions is also found in the enforcement provisions of the DPCIA.[259] Mexico contends that additional support for the argument that the United States' measures are *de jure* mandatory is the fact that these measures establish surveillance and enforcement procedures if an importer tries to import tuna products bearing the dolphin-safe label when such products do not meet the requirements set out in US dolphin-safe provisions.[260]Alternatively, Mexico argues that even if the labelling scheme were not to be considered *a priori* mandatory, it is *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin-safe designation.[261]

7.85 On this basis, Mexico submits that the US dolphin-safe provisions satisfy the third condition recognized by the Appellate Body for a technical regulation to be considered as such.[262]

7.86 According to Mexico, the application of a dolphin-safe label to tuna products has "significant commercial value" in the US market "given that consumers at each consumption stage demand this label in order to sell or buy tuna products".[263]

7.87 Mexico argues that the measures have a direct adverse effect on tuna products imported and sold in the US market, as US distribution and retail networks for tuna products are acutely aware of the dolphin safe issue and the fact that they will encounter actions such as boycotts, promoted by certain economically interested NGOs, if they carry tuna that is not designated as dolphin safe. Mexico argues that large US grocery chains have indicated that they will be unable to carry any Mexican tuna products unless the tuna products bear a US government approved dolphin safe label.[264] Mexico also identifies indirect adverse effects on tuna caught by the Mexican tuna fleet.[265]

7.88 Mexico acknowledges that the United States' argument that carrying the dolphin-safe label is voluntary and that it is legal to sell tuna products in the United States that do not bear this label, "may be correct" from a *de jure* perspective. However, Mexico submits that, from a *de facto* perspective, the label is essential if the tuna products are to be sold in the principal distribution channels in the US market.[266]

7.89 Thus, Mexico claims, the US dolphin-safe provisions have "the effect of excluding Mexican tuna products from the major distribution channels in the U.S. market and creating new barriers to trade". Therefore, Mexico argues that "compliance with the requirements imposed by the United States becomes mandatory for the Mexican tuna industry in order to access the U.S. market".[267]

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[258] Mexico's response to Panel question No. 52, paras. 141-142.
[259] Mexico's second written submission, para. 194.
[260] Mexico's response to Panel question No. 52, para. 143.
[261] Mexico's first written submission, para. 203; Mexico's response to Panel question No. 52, para. 147.
[262] Mexico's first written submission, para. 202.
[263] Mexico's response to Panel question No. 52, para. 148.
[264] Mexico's first written submission, para. 111.
[265] Mexico indicates that the owners of the three major processed tuna brands sold in the United States "refuse to purchase tuna caught in the ETP including Mexican tuna because tuna products containing such tuna cannot be labeled as dolphin-safe". Mexico's first written submission, para. 112.
[266] Mexico's second written submission, para. 195.
[267] Mexico's response to Panel question No. 52, para. 149.

7.90 Mexico further submits that the situation in this dispute is very similar to that addressed by the Appellate Body in *EC – Sardines*. Mexico recalls that on that occasion, the challenged measure provided that only products prepared from *Sardina pilchardus* could be marketed as preserved sardines.[268] Mexico argues that "[m]uch like the European measures in *Sardines*, the U.S. measures provide that the only products that can have the term dolphin-safe or a similar term or symbol are those that meet the U.S. legal provisions".[269]

7.91 The United States responds that the US dolphin-safe provisions are not mandatory. Instead, the United States argues, they constitute a voluntary labelling measure not covered by the definition of a "technical regulation" set out in Annex 1 of the TBT Agreement.[270] According to the United States, the US dolphin-safe provisions do not require tuna products to be labelled "dolphin-safe".[271]

7.92 In the US view, a document dealing with labelling requirements with which compliance is mandatory is one that has the effect of prescribing or imposing labelling requirements affirmatively or by negative implication.[272] In other words, "a labelling scheme would be mandatory if the labelling scheme – or some other government action – prohibited products from being sold, imported, distributed or otherwise marketed that were not labeled in that way".[273] Accordingly, the United States submits that the US dolphin-safe provisions do not prescribe or impose labelling requirements because they do not require tuna products to be labelled or to contain certain information on a label to be sold, imported, distributed or otherwise marketed. [274]

7.93 The United States acknowledges that the US dolphin-safe provisions require that the label may be used only for tuna products containing tuna that was not caught during a trip in which purse-seine nets were deployed on or to encircle dolphins and in a set in which no dolphins were killed or seriously injured. However, according to the United States, a voluntary labelling measure does not become a mandatory labelling requirement "simply because the measure requires what is stated on the label to be truthful".[275]

7.94 The United States further submits that in its view, "inherent in the idea of a standard is that there are certain conditions to be met in order to meet the standard".[276] In the United States' view, if marketers of products were permitted to claim in a label that their products conformed to a particular standard when those products did not meet the conditions to be labelled in that way, the utility of that standard would be lost.[277] The requirement to meet these conditions does not result in the standard becoming mandatory or a technical regulation. According to the United States, arguing otherwise would turn all labelling standards into technical regulations and render the definition of standard

[268] Mexico's second written submission, para. 196.
[269] Mexico's second written submission, para. 198.
[270] United States' first written submission, para. 130.
[271] United States' first oral statement, para. 40; United States' second written submission, paras. 88-95.
[272] United States' first written submission, para. 131.
[273] United States' response to Panel question No. 52, para. 125; United States' second written submission, para. 88.
[274] United States' first written submission, para. 132; United States' response to Panel question No. 52, para. 125; United States' second written submission, para. 96.
[275] United States' first written submission, para. 134.
[276] United States' first written submission, para. 135.
[277] United States' first oral statement, para. 44.

inutile, because there would be no labelling requirement with which compliance could be considered not mandatory.[278]

7.95 In the United States' view, Mexico's position "conflates the meaning of the term 'labelling requirement' with the phrase 'with which compliance is mandatory'".[279] According to the United States, "[w[hether compliance with a labelling requirement is mandatory must turn on something more than the mere fact that the labelling requirement sets out conditions under which products may (or may not) be labelled in a certain way".[280] Therefore, the United States submits that an approach that gives full effect and meaning to the term "labelling requirement" and the phrase "with which compliance is mandatory" defines the term "labelling requirement" with which compliance is mandatory as "a measure that establishes conditions under which a product may be labelled in a certain way *and* requires the product to be labelled in that way in order to be marketed" (emphasis in the original).[281]

7.96 In relation to Mexico's alternative claim that the DPCIA labelling requirements are *de facto* mandatory, the United States submits two arguments. First, according to the United States, whether compliance with a labelling requirement is mandatory depends on whether some government action makes compliance mandatory.[282] The United States contends that Mexico's argument that the US dolphin-safe provisions have prevented Mexican tuna products from accessing the United States' market is not based on these provisions or on any other measure or government action, but on retailer and consumer preferences for tuna products that were not caught in a manner that adversely affects dolphins.[283] According to the United States, "consumer or retailer preferences alone cannot determine whether a labelling requirement is mandatory".[284] Second, the United States argues that the fact that some distribution channels in the United States do purchase and sell tuna products that are not labelled "dolphin-safe" demonstrates that the DPCIA labelling provisions are not mandatory.[285]

7.97 Consequently, the United States also rejects Mexico's alternative argument that the US dolphin-safe provisions are *de facto* mandatory because major distribution channels for tuna products would only purchase and sell dolphin-safe labelled tuna products.[286]

7.98 The United States also submits that the US dolphin-safe provisions are not like the measures in *EC – Asbestos* and *EC – Sardines*. According to the United States, compliance with those measures was mandatory because the products that did not possess the product characteristics set out in the measures challenged in those cases, could not be sold in the territory of the European Union.[287] The United States emphasizes that under the US dolphin-safe provisions it is not prohibited to sell tuna products that fail to meet the DPCIA labelling conditions.[288] Furthermore, the United States submits that a further distinguishing factor is that the US dolphin-safe provisions do not prevent

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[278] United States' first written submission, para. 135,United States' first oral statement, para. 42; United States' response to Panel question No. 52, para. 125; United States' response to Panel question No. 56, para. 128.

[279] United States' second written submission, paras. 90 and 98.

[280] United States' second written submission, para. 92.

[281] United States' second written submission, paras. 93.

[282] United States' second written submission, paras. 108-09.

[283] United States' second written submission, para. 110; United States' response to Panel question No. 52, para. 127.

[284] United States' response to Panel question No. 57, para. 130.

[285] United States' second written submission, para. 113; United States' response to Panel question No. 57, para. 130.

[286] United States' response to Panel question No. 57, para. 130.

[287] United States' second written submission, para. 104.

[288] United States' second written submission, para. 103.

marketers of tuna products from marketing them as tuna products.[289] Finally, the United States observes that in the earlier disputes, the Appellate Body did not address the issue of mandatory compliance with a labelling requirement.[290]

7.99 Accordingly, the United States concludes that compliance with the DPCIA labelling provisions is not mandatory within the meaning of Annex 1 of the TBT Agreement.[291] Thus, the United States submits, such provisions are not technical regulations and cannot be inconsistent with the obligations set out in Article 2 of the TBT Agreement.[292]

(ii) Analysis by the Panel

7.100 As described in paragraph 7.53 above, the Appellate Body has determined that the third condition for a document to be considered a "technical regulation" is that compliance with the product characteristics laid down in the document is "mandatory".[293] We must therefore now determine whether compliance with the labelling requirements established by the US dolphin-safe labelling provisions is "mandatory", as claimed by Mexico, or whether, as the United States argues, they constitute "voluntary" labelling requirements.

7.101 To make this determination, we must first consider the meaning to be given to the term "mandatory" in Annex 1.1.

Interpretation of the term "mandatory" in Annex 1.1

7.102 To recall, Annex 1.1 of the TBT Agreement defines a "technical regulation" as a:

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

7.103 We first note that dictionary definitions of the term "mandatory" include "binding" as well as "obligatory, compulsory, not discretionary"[294], or "required by law or mandate; compulsory".[295] This suggests that the notion of "mandatory" may encompass the legally binding and enforceable character of the instrument, and may also relate to its contents, prescribing/imposing a certain behaviour. We also note that the ISO/IEC Guide 2 establishes that the expression "mandatory requirement", should be used to mean only "a requirement made compulsory by law or regulation".[296]

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[289] United States' second written submission, para. 104.
[290] United States' second written submission, para. 105.
[291] United States' first oral statement, para. 45.
[292] United States' first written submission, para. 138.
[293] Appellate Body Report, *EC – Asbestos*, paras. 66-70; Appellate Body Report, *EC – Sardines*, para. 176.
[294] (OED online)
[295] Concise Oxford Dictionary (10th ed.), p. 865.
[296] We also note the following definitions in the ISO/IEC Guide 2:
"exclusive reference (to standards)": "reference to standards that states that *the only way* to meet the relevant requirements of a technical regulation is to comply with the standards referred to" (emphasis added).
"mandatory standard": "standard the application of which is made compulsory by virtue of a general law or exclusive reference in a regulation".

7.104 In Annex 1.1, the term "mandatory" appears in the phrase "with which compliance is mandatory". In interpreting this expression, the Panel finds useful guidance in the following passage of the Appellate Body's decision in *EC – Asbestos*:

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

7.105 In this and subsequent cases, the Appellate Body further clarified that the product characteristics laid down in a technical regulation may "be *prescribed* or *imposed* … in either a *positive* or a *negative* form", which means that, for instance, "the document may require, positively, that products must possess certain 'characteristics', or the document may require, negatively, that products must not possess certain 'characteristics'".[297]

7.106 As we understand it therefore, and as interpreted by the Appellate Body, the notion of "mandatory" "compliance" in Annex 1.1 relates both to the "binding" character of the instrument and the fact that it prescribes certain characteristics or other features that the product must or must not possess.

7.107 Taking the terms of Annex 1.1 in their context, we also note that the subject-matter of a "technical regulation" and the subject-matter of a "standard" are defined in very similar terms, and it is essentially their "not mandatory" or "mandatory" character that distinguishes the two categories of instruments. For instance, labelling *requirements* may be equally prescribed by technical regulations and standards.[298] However, while technical regulations may prescribe such requirements in a compulsory fashion, standards would only do so on a "not mandatory" basis. This difference is expressed by the words "with which compliance is mandatory" in the definition of a "technical regulation" in Annex 1.1 and the opposite language, i.e. "with which compliance is *not* mandatory" (emphasis added), in the definition of a "standard" in Annex 1.2.

7.108 The Explanatory Note to Annex 1.2 further emphasizes that "[f]or the purpose of this Agreement standards are defined as *voluntary* and technical regulations as *mandatory* documents" (emphasis added). This Explanatory Note clarifies the drafters' intention to make a distinction between the definition of "standard" in the TBT Agreement and that contained in the ISO/IEC Guide 2, according to which standards may be voluntary or mandatory. The use of the term "voluntary" in the Explanatory Note also suggests that the expression "not mandatory" in Annex 1.2 may be understood as meaning in essence "voluntary". By implication therefore, a document that sets out "voluntary" requirements would also not be considered to be "mandatory" within the meaning of Annex 1.1.[299] Our interpretation of the term "mandatory" in Annex 1.1 should be duly informed by this context.

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[297] Appellate Body Report, *EC – Asbestos*, para. 69; see also Appellate Body Report, *EC – Sardines*, para. 176.

[298] The Panel notes that according to the definitions provided by Annex 1 of the TBT Agreement, "product characteristics", "related processes and production methods", "terminology", "symbols", "packaging", "marking" and "labelling requirements" may be the subject of either technical regulations or standards.

[299] We note that the reference to "mandatory" compliance is not repeated in the second sentence of Annex 1.1. Nonetheless, it is undisputed that this requirement applies to all instruments that would constitute "technical regulations". As we understand it, the second sentence merely clarifies that the specific elements

7.109 Against this context, the Panel is mindful of the fact that the term "mandatory" expresses the single characteristic that defines the key conceptual distinction between two of the three types of measures covered under the TBT Agreement (technical regulations and standards) and therefore plays a central role in preserving the balance between the different sub-regimes coexisting within that Agreement.

7.110 We also bear in mind the object and purpose of the TBT Agreement. This Agreement establishes, in the words of the Appellate Body, "a specialized legal regime" that aims at furthering the objectives of the GATT 1994.[300] This specialized set of provisions is intended to discipline very specific categories of measures[301], namely, *technical regulations*, *standards* and *conformity assessment procedures*. The TBT Agreement establishes clear thresholds that define the type of measures that fall within the scope of each of these three categories of measures, and attach different types and levels of obligations to each one. These thresholds are embodied by the definitions of "technical regulation", "standard" and "conformity assessment procedure" contained in Annex 1 of the TBT Agreement.

7.111 In sum, we consider that compliance with product characteristics or their related production methods or processes is "mandatory" within the meaning of Annex 1.1, if the document in which they are contained has the effect of regulating in a legally binding or compulsory fashion the characteristics at issue, and if it thus *prescribes* or *imposes* in a *binding* or *compulsory* fashion that certain product *must* or *must not* possess certain characteristics, terminology, symbols, packaging, marking or labels or that it *must* or *must not* be produced by using certain processes and production methods. By contrast, compliance with the characteristics or other features laid out in the document would not be "mandatory" if compliance with them was discretionary or "voluntary".

7.112 In light of these general observations, we now consider whether the US dolphin-safe labelling provisions impose or prescribe product characteristics, or more specifically, in this case, labelling requirements, in a binding or compulsory fashion, such that compliance with these should be considered to be "mandatory" within the meaning of Annex 1.1. In approaching this determination, we also take note of the Appellate Body's observation, in *EC – Asbestos* and *EC – Sardines*, that when examining whether a measure is a technical regulation, "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole".[302]

Whether the US dolphin-safe provisions are "mandatory" within the meaning of Annex 1.1

7.113 Mexico submits two alternative arguments on this point. *First*, Mexico submits that the US dolphin-safe provisions *de jure* establish mandatory labelling requirements. *Alternatively*, Mexico asks the Panel to decide that, even if the US dolphin-safe provisions do not on their face require certain product characteristics, they do so in a *de facto* manner. We will therefore consider these two

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listed in it may form the subject-matter of a technical regulation, but is not intended to imply that a document laying down such elements, with which compliance would not be mandatory, would be a technical regulation. Indeed, such a reading would render meaningless the corresponding text in Annex 1.2. To the extent that there is any ambiguity in this respect from the structure of Annex 1.1, the clear terms of the Explanatory Note resolve it by clarifying that a technical regulation is defined as a *mandatory* document. This explanation applies to the entirety of the definition of a technical regulation and provides direct guidance as well as context to the interpretation of the terms of Annex 1.1.

[300] *See* second paragraph of the Preamble of the TBT Agreement.

[301] We find support for our understanding in the Appellate Body's decision in *EC – Asbestos*, it concluded that "although the *TBT Agreement* is intended to 'further the objectives of GATT 1994', it does so through a specialized legal regime that applies solely to a limited class of measures", para. 80.

[302] Appellate Body Reports in *EC – Asbestos*, para. 64, and *EC – Sardines*, paras. 192-193.

aspects in turn, without prejudice, at this stage of our analysis, to the question of whether *de facto* "mandatory" compliance is covered by Annex 1.1.

7.114 At the outset, we find it useful to clarify the scope of our enquiry into whether the measures establish *de jure* mandatory labelling requirements. In our view, compliance would be *de jure* "mandatory" in a situation in which the mandatory character of the provisions would be discernable from an examination of the terms or structure of the measures themselves.[303] In order to determine whether the United States' measures *de jure* establish labelling requirements for tuna products, we therefore need to determine whether the alleged mandatory character of the dolphin-safe labelling requirements can be derived from the terms of the US dolphin-safe provisions themselves.

7.115 In approaching this question, we first recall our conclusion under the previous subsection that, as acknowledged by both parties, the US dolphin-safe labelling provisions lay down *labelling requirements* within the meaning of Annex 1 of the TBT Agreement. The particular nature and functioning of this type of instrument should, in our view, inform our understanding of what "mandatory" compliance within the meaning of Annex 1.1 implies in relation to such requirements.

7.116 By hypothesis, both technical regulations and standards laying down "labelling *requirements*" would establish the conditions that a product must comply with before being able to carry a certain

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[303] We are guided in this determination by certain rulings concerning the *de facto* vs. *de jure* distinction in other contexts. We thus find the following passage of the Appellate Body's decision in *Canada – Aircraft* very illustrative:

> "Article 3.1(a) prohibits *any* subsidy that is contingent upon export performance, whether that subsidy is contingent 'in law or in fact'. The Uruguay Round negotiators have, through the prohibition against export subsidies that are contingent *in fact* upon export performance, sought to prevent circumvention of the prohibition against subsidies contingent *in law* upon export performance. In our view, the legal standard expressed by the word 'contingent' is the same for both *de jure* or *de facto* contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument" (italics in the original, underlined added).Appellate Body Report, *Canada – Aircraft*, para. 167.

Similarly, in *Canada – Autos*, the Appellate Body considered that:

> "We start with what we have held previously. In our view, a subsidy is contingent 'in law' upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be de jure export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be de jure export contingent, the underlying legal instrument does not always have to provide expressis verbis that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure." Appellate Body Report, *Canada – Autos*, para. 100.

We note that these two determinations by the Appellate Body were made in relation to provisions contained in a different agreement, i.e. the Agreement on Subsidies and Countervailing Measures. However, we consider that they nonetheless provide useful guidance, because it seems to us that the Appellate Body's reasoning is not determined by the text of the particular provisions involved, but rather by the inherent differences between a *de jure* and a *de facto* analysis.

label. However, as also recognized by both parties, this characteristic, which is common to mandatory and voluntary labelling requirements, does not in itself make compliance with a labelling requirement "mandatory" or "not mandatory".[304] The definitions described above make clear a basic distinction between a "requirement", which refers to the conditions or criteria to be fulfilled in order to comply with a document, and the notion of "mandatory" requirement as a condition made *compulsory by law*.

7.117 Thus, a conclusion that compliance with certain labelling requirements is mandatory within the meaning of Annex 1.1 of the TBT Agreement must be based on considerations other than, or beyond, the mere fact that such document establishes criteria for the use of a certain label. As determined in paragraph 7.111 above, compliance with product characteristics or their related production methods or processes is "mandatory" within the meaning of Annex 1.1, if the document in which they are contained has the effect of regulating in a legally binding or compulsory fashion the characteristics at issue, and if it thus *prescribes* or *imposes* in a *binding* or *compulsory* fashion that certain product *must* or *must not* possess certain characteristics, terminology, symbols, packaging, marking or labels or that it *must* or *must not* be produced by using certain processes and production methods. In the context of a labelling requirement, therefore, the question we must consider is not only whether the document lays down certain conditions for the use of a label, or prescribes a certain content for a given label, but whether the document at issue regulates in a binding fashion these conditions or content.

7.118 In the present dispute, Mexico does not allege that the US dolphin-safe provisions *positively* require, *de jure*, the use of the dolphin-safe label. Indeed, it is undisputed that the measures at issue do not impose a positive requirement to label tuna products for sale on the US market as dolphin-safe. Neither the statutory and regulatory provisions nor the court decision challenged by Mexico[305] contain language that imposes *the use of* the dolphin-safe label for tuna products as a condition for these products to be marketed in the United States.

7.119 Mexico argues, however, that these measures *negatively* require that "tuna products offered for sale in the United States must not possess certain characteristics" unless certain conditions are met.[306] Specifically, Mexico submits that the measures at issue involve a prohibition on the use of a "dolphin-safe" label on Mexican tuna products marketed in the United States.[307] In Mexico's view, this prohibition may be expressed as a requirement that "[t]una products offered for sale in the United States must not possess certain characteristics (*i.e.*, distinguishing marks – the dolphin-safe label or any other analogous label or mark) unless the prescribed requirements are met".[308]

7.120 Mexico further submits that "there are no alternative means to certify that a tuna product is dolphin-safe". According to Mexico "[t]he fact that the U.S. measures prohibit the utilization of any other standards to certify that a tuna product is dolphin-safe gives these measures a *de jure* mandatory distinction".[309]

7.121 We find it necessary to consider in the first instance the terms of the measures, in order to determine whether they support the view that they prescribe the labelling requirements at issue "in a compulsory manner".

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[304] Mexico's response to Panel question No. 48, para. 131; United States' second written submission, para. 91.

[305] Mexico's first written submission, paras. 121-36.

[306] Mexico's first written submission, para. 202.

[307] Mexico's first oral statement, para. 23; Mexico's first written submission, para. 200.

[308] Mexico's first written submission, para. 202.

[309] Mexico's response to Panel question No. 52, paras. 141-142; Mexico's second written submission, para. 196.

7.122 The introductory paragraph of subsection (d)(1) of the Dolphin Protection Consumer Information Act, Title 16, Section 1385, establishes the following:

> "(d) LABELLING STANDARD
>
> (1) *It is a violation* of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States *to include on the label of that product the term 'dolphin-safe'* or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins *if the product contains tuna harvested* …" (emphasis added)

7.123 The fishing techniques in connection with specific geographical areas that do not qualify for the use of a dolphin-safe designation on the product label are then described in various subparagraphs.

7.124 We understand this provision as establishing requirements in relation to the terms that may be used "on the label of [any tuna product that is exported from or offered for sale in the United States]". Specifically, it sets out the conditions for the use of a dolphin-safe designation on such labels: producers may only identify tuna as "dolphin-safe", or more generally represent that their tuna has been caught in conditions that are not harmful to dolphins, if they comply with the conditions set out in subsection (d). In other words, in order for tuna products to be "exported from or offered for sale in the United States" with a dolphin-safe designation, they need to comply with the requirements set out in subsection (d) of the DPCIA.

7.125 In addition, Section 1385 (d)(3) of the DPCIA provides as follows:

> "(A) The Secretary of Commerce shall develop an official mark that may be used to label tuna products as dolphin-safe in accordance with this Act.
>
> (B) *A tuna product that bears the dolphin-safe mark developed under subparagraph (A) shall not bear any other label or mark that refers to dolphins, porpoises, or marine mammals.*
>
> *(C) It is a violation of section 45 of title 15 to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the mark developed under subparagraph (A) unless ..."* (emphasis added).

7.126 This provision therefore further defines the conditions under which reference may be made to certain terms, i.e. "dolphins, porpoises, or marine mammals", on a label for tuna products.

7.127 We also note that violations of these provisions are subject to specific enforcement measures. Section 1385 (e) of the DPCIA, entitled "enforcement", reads: "Any person who knowingly and wilfully makes a statement or endorsement described in subsection (d)(2)(B) that is false is liable for a civil penalty of not to exceed $ 100, 000 assessed in an action brought in any appropriate district court of the United States on behalf of the Secretary."

7.128 Together, the provisions at issue therefore regulate the use of the term "dolphin-safe" and of other related terms on labels for tuna products offered for sale on the US market. They do so in a binding and exclusive manner. The provisions at issue imply in particular that there is no possibility for competing or alternative definitions of what is "dolphin-safe" on the US market, or for any claims to be made relating to "dolphins, porpoises or marine animals", except in compliance with the criteria set out in the measures.

7.129 We recall in this respect the Appellate Body's determination that a document laying down product characteristics is "mandatory" when it "regulates" these characteristics "in a binding and compulsory fashion", and "have the effect of prescribing or imposing" the product characteristics at issue, either in a positive or in a negative fashion. We bear in mind also the Appellate Body's determination that "labelling requirements" constitute "product characteristics" in this context.

7.130 In the present case, the question to be addressed is therefore whether the US measures "regulate" the labelling requirements at issue "in a binding or compulsory fashion", and whether they "have the effect of prescribing or imposing" the labelling requirements at issue, either in a positive or in a negative fashion.

7.131 In our view, to the extent that they prescribe, in a binding and legally enforceable instrument, the manner in which a dolphin-safe label can be obtained in the United States, and disallow any other use of a dolphin-safe designation, the US tuna labelling measures "regulate" dolphin-safe labelling requirements "in a binding or compulsory fashion". It is not compulsory to *meet* these requirements and to bear the label, in order to sell tuna on the US market. The US measures therefore do not impose any *requirement to label*, in a "positive" manner. However, they do prescribe and impose *the conditions under which* a product may be labelled dolphin-safe. In particular, the measures prescribe "in a negative form", to use the Appellate Body's terms, that no tuna product may be labelled dolphin-safe or otherwise refer to dolphins, porpoises or marine mammals if it does not meet the conditions set out in the measures, and thus *impose* a prohibition on the offering for sale in the United States of tuna products bearing a label referring to dolphins and not meeting the requirements that they set out.

7.132 We see a difference, in this respect, between the fact that compliance with the underlying *standard* that provides access to the label (i.e. the use of certain fishing methods to harvest tuna) is not obligatory, and the fact that the measures prescribe in a binding manner the conditions for the use of certain terms on labels for tuna products, on the basis of compliance or absence of compliance with that underlying standard.

7.133 In order to be marketed as dolphin-safe tuna, tuna products must be prepared exclusively from fish caught in the specific conditions laid down in the US dolphin-safe labelling provisions. Tuna products containing tuna caught in a manner not complying with the specific conditions identified in the regulation are, by virtue of the measures at issue, prohibited from being identified and marketed under an appellation including the term "dolphin-safe" or other related designations.

7.134 We note that this situation bears a close resemblance to that addressed by the Appellate Body in *EC – Sardines*. The measure at issue in that case was an EC regulation on "preserved sardines", which set out a number of prescriptions for the sale of such sardines, including the requirement that they contain only one named species of sardines (*sardina pilchardus*), to the exclusion of others (including *sardinops sagax*). In that case, as explained by the European Communities and expressly noted by the Appellate Body, "the only legal consequence of the [EC] Regulation for preserved *sardinops sagax* is that they may not be labeled 'preserved sardines'".[310] In other words, it was legally possible to sell *sardinops sagax* on the EC market, as long as it was not sold under the appellation "preserved sardines".

7.135 In that case, the Appellate Body observed that "preserved products made, for example, of *sardinops sagax* are, by virtue of the EC Regulation, *prohibited* from being identified and marketed under an appellation including the term "sardines" (emphasis in original).[311] The Appellate Body

[310] Appellate Body Report, *EC – Sardines*, para. 185.
[311] Appellate Body Report, *EC – Sardines*, para. 184.

further observed that "Article 2 of the EC Regulation provides that, to be marketed as "preserved sardines", products must be prepared exclusively from fish of the species *Sardina pilchardus*", and determined that this requirement was a "product characteristic" intrinsic to preserved sardines that was laid down in the EC Regulation. The Appellate Body then turned to the fact that compliance with the Regulation was "mandatory" to conclude, overall, that it was a "technical regulation".

7.136 Similarly, the panel in *EC – Trademarks and Geographical Indications (Australia)*, in a finding that was not appealed, determined that:

> "The second indent of Article 12(2) makes a distinction between those products using a GI identical to a Community protected name that satisfy the labelling requirement, and those which do not. The negative implication that follows from this requirement is that products with a GI identical to a Community protected name that do not satisfy this labelling requirement must *not* use the indications PDO, PGI or equivalent national indications and, to the extent that they fall within the protection granted to a prior identical Community protected name, must *not* be marketed in the European Communities using that GI. Therefore, the second indent of Article 12(2) is an obligatory or mandatory requirement".[312]

7.137 These rulings clearly suggest that the mere fact that it is legally permissible to place the product on the market without using the designation that is regulated by the measures at issue does not compel the conclusion that these measures are not "mandatory" within the meaning of Annex 1.1, where the measures effectively regulate in a binding manner the use of the appellation. Similarly, in the present case, the legal consequence of the measures for tuna products not meeting the requirements of the regulation is that they may not be labelled dolphin-safe. This implies that such products are *prohibited* from being identified and marketed under this appellation.

7.138 We also note in this respect that, although the EC "preserved sardines" Regulation set out a "naming" requirement rather than "labelling requirements", the Appellate Body commented that it effectively saw no difference between the two notions, both being "essentially "means of identification" of a product" coming within the scope of the definition of "technical regulation". This suggests that this is not a distinguishing factor in the analysis, that would modify its conclusions.

7.139 We also note the emphasis placed by the Appellate Body in *EC – Sardines*, on the role of such measures in providing consumer information.[313] Similarly in the present case, the measures serve the function of informing consumers about the manner in which the tuna was caught. They regulate in a binding fashion the information that may be conveyed in this respect, as well as the manner in which it may be conveyed.

7.140 Our consideration of these prior rulings thus confirms further our view that compliance with the labelling requirements laid out in the US dolphin-safe labelling provisions is "mandatory" within the meaning of Annex 1.1.

7.141 In making this determination, we are mindful, as discussed in paragraph 7.109 above, that a proper interpretation of the expression "mandatory" compliance in Annex 1.1 of the TBT Agreement must preserve the conceptual and functional distinction between technical regulations and standards.

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[312] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.456.

[313] The Appellate Body noted that the European Communities itself underscores the important role that a "name" plays as a "means of identification" when it argued before the Panel that one of the objectives pursued by the European Communities through the EC Regulation is to provide precise information to avoid misleading the consumer. Appellate Body Report, *EC– Sardines*, para. 191.

In this respect, we find it useful to highlight that we are not suggesting that *any* situation in which access to a label reflecting compliance with a particular standard is reserved for products that comply with the specific requirements of that standard would amount to a situation in which a mandatory technical regulation exists. In our view, the measures at issue in the present case go significantly beyond that.

7.142 First, the measures at issue are legally enforceable and binding under US law (they are issued by the government and include legal sanctions). This is an important component of the "mandatory" character of the measures. This alone, however, might not necessarily distinguish them from any standard that is protected against abusive or misleading use under general law, such as trademark protection or laws against deceptive practices.

7.143 In addition, however, the measures at issue prescribe certain requirements that must be complied with in order to make *any* claim relating to the manner in which the tuna contained in tuna product was caught, in relation to dolphins. The measures at issue regulate not only the use of the particular label at issue, but more broadly the use of a range of terms for the offering for sale of tuna products, beyond even the specific "dolphin-safe" appellation. The measures at issue thus prohibit the use of other terms such as "porpoise" or "marine mammal" or any statement relating to dolphins, porpoises or marine animals, whether misleading or otherwise, if the conditions set out in the regulation are not met.

7.144 Furthermore, the measures embody compliance with a specific standard as the exclusive means of asserting a "dolphin-safe" status for tuna products. The measures leave no discretion to resort to any other standard to inform consumers about the "dolphin-safety" of tuna than to meet the specific requirements of the measure. Effectively, the "dolphin-safe" standard reflected in the measures at issue is, by virtue of these measures, the *only* standard available to address the issue. Through access to the label, the measures thus effectively regulate the "dolphin-safe" status of tuna products in a binding and exclusive manner and prescribe, both in a positive and in a negative manner, the requirements for "dolphin-safe" claims to be made. This distinguishes this situation from one in which, for example, various competing standards may co-exist in relation to the same issue, with different but related claims, each of which may be protected in its own right.[314]

7.145 In light of all the above, we find that the measures at issue establish labelling requirements, compliance with which is mandatory. In light of our conclusion that the measures at issue establish *de jure* mandatory labelling requirements, we do not find it necessary to consider further Mexico's argument that they are also *de facto* mandatory.

Separate opinion

7.146 One of the panelists is unable to agree with the reasoning and conclusions contained in paragraphs 7.128 to 7.145 above. This section reflects the views of that panelist.

7.147 While I agree with the three-tier test for determining whether a measure is a "technical regulation" under the TBT Agreement as established in principle by the Appellate Body in *EC – Asbestos* and followed in *EC – Sardines*, I do not agree with the conclusions of the majority that the measures at issue meet the requirements of this test. According to that test, in order to be a technical

[314] We note in this respect the following definitions of the ISO/IEC Guide 2: "exclusive reference (to standards)": "reference to standards that states that *the only way* to meet the relevant requirements of a technical regulation is to comply with the standards referred to" (emphasis added).

"mandatory standard": "standard the application of which is made compulsory by virtue of a general law *or exclusive reference* in a regulation" (emphasis added).

regulation, (i) a measure has to apply to an identifiable product or group of products, (ii) it has to lay down one or more characteristics of the product or related processes and production methods, and (iii) compliance with the prescribed product characteristics or process and production method is mandatory. Thereby, the second sentence of Annex 1.1 of the TBT Agreement should not be read as independent of the first sentence, it should rather be read as ensuring a broad understanding of the term "technical regulation". The second sentence makes clear that according to the second criteria, technical regulations are not limited to a narrow understanding of "product characteristics" but that they also include prescriptions with regard to "terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method". Thus, a labelling requirement that applies to a process or production method that is not directly related to the product can also be a technical regulation as long as it meets the other two criteria of the test. I agree with the majority that the measures at issue meet the first two requirements. However, I do not agree that the measures at issue require mandatory compliance with the prescribed product characteristics or process and production method.

7.148 A treaty has to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (Article 31.1 of the *Vienna Convention*). Moreover, a treaty should not be interpreted in a manner that leads to an unreasonable result (Article 32(b) of the *Vienna Convention*). It is therefore important to construe Annex 1.1 of the TBT Agreement in accordance with the ordinary meaning to be given to its terms in their context and in the light of the objective and purpose of the TBT Agreement and in a manner that does not make void other provisions of the Agreement.

7.149 Annex 1.1 and 1.2 of the TBT Agreement use similar language, the second sentence is even identical. Thus, both technical regulations and standards can include terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. The main difference is that while compliance with technical regulations is mandatory, compliance with standards is not mandatory. In interpreting the phrase "with which compliance is mandatory", it is important to reflect the context of that formulation, the objective and purpose of the TBT Agreement, and the existence of Annex 1.2. An interpretation that conflates the requirement that compliance with a technical regulation has to be mandatory with the term "labelling requirements" of the second sentence or an interpretation that leaves no space to Annex 1.2 would not be reasonable.

7.150 According to the ordinary meaning of the term, labelling requirements are requirements that must be fulfilled in order to be allowed to use a certain label. Any labelling scheme foresees such requirements – in fact, if such requirements would not exist and if a certain label could be used independent of whether specific requirements are fulfilled, the label would become meaningless. Labelling schemes can be compulsory when the use of a certain label is compulsory to access the market, or they can be voluntary when products can be marketed with or without the label. But "labelling requirements", i.e. the requirements that are formulated to allow the use of a label, must be met also within a voluntary labelling scheme. However, in difference to a compulsory labelling scheme, within a voluntary scheme products have not to be labelled and have not to fulfil these labelling requirements in order to be marketed, they can also be put on the market without that label and without fulfilling these labelling requirements. In a voluntary labelling scheme, labelling requirements are thus not mandatory for marketing products.

7.151 Both Annex 1.1 and Annex 1.2 refer to labelling requirements. Labelling requirements can thus be technical regulations or standards. The criteria whether labelling requirements are a technical regulation or a standard relates to the fact whether compliance is mandatory or not. In order to give any sense to the term "labelling requirement" as used both in Annex 1.1. and 1.2, the requirement that compliance is mandatory cannot relate to the obligation to meet certain requirements to be allowed to use the label, but to the question whether a labelling scheme is compulsory – i.e. whether products must use a label in order to be marketed – or voluntary – i.e. products may be marketed with or

without the label. As indicated by the Appellate Body in *EC – Asbestos*, a technical regulation must "regulate the characteristics of products in a binding or compulsory fashion" and "a 'technical regulation' has the effect of prescribing or imposing one or more 'characteristics' – 'features', 'qualities', 'attributes', or other 'distinguishing mark'".[315] A labelling requirement which is a technical regulation would thus impose to a product the obligation to use the label and to fulfil the related labelling requirements. If however compliance with the labelling requirement and use of the label is not mandatory, the labelling requirement has to be seen as a standard. Arguing that the mere fact that a product is prohibited from using a label if it does not fulfil these standards makes compliance compulsory would leave no space for voluntary labelling schemes as standards.

7.152 From the terms of the measures at issue, it appears that they are legally binding, in that the conditions set out in subsection (d) must be met if a "dolphin-safe" label is used, and the use of a label in violation of these conditions would be subject to enforcement measures. The prohibition on the use of alternative labels unless the conditions set out in subsection (d)(3)(C) are met is also legally enforceable. This is a typical situation common to both voluntary and mandatory labelling schemes. However, neither the use of the "dolphin-safe" label nor the use of the specific fishing techniques and locations that condition access to the label is compulsory, either in a positive or negative manner (i.e. their use is neither obligatory nor prohibited).

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

7.154 The notion of "mandatory compliance" within the meaning of Annex 1.1 implies the obligatory character of *the characteristics* prescribed in the measures, and not simply the legal enforceability of the measures. A distinction should be made, in this context, between on the one hand, the *legally binding* character of a document laying down labelling requirements and, on the other hand, *mandatory compliance* with the conditions advertised through the use of the label. While may well be necessary for the measures at issue to be legally enforceable, this is not necessarily sufficient, in order to make them "mandatory" within the meaning of Annex 1.1. Rather, the notion of "mandatory compliance" relates more fundamentally to the fact that the measure at issue prescribes or *imposes* compliance with specific requirements to allow a product to be marketed, without allowing discretion to depart from them.

7.155 This distinction is consistent with the essence of the core distinction made in the Agreement between "mandatory" technical regulations and "voluntary" standards. The obligatory character of compliance with the characteristics laid out in a technical regulation contrasts with the discretion that exists, under a "voluntary" (or "not mandatory") standard, for operators to comply or not comply with the standard. The requirements to be allowed to use a label have to be clearly distinguished from the obligation to use a label.

7.156 As described above, under the measures at issue, it is the *voluntary* decision of those producers to label their products in a certain way what triggers the obligation to comply with such

[315] Appellate Body Report, *EC – Asbestos*, paras. 68-69; see also Appellate Body Report, *EC – Sardines*, para. 176.

standards. The fact that operators may be legally accountable for any misleading or false declarations in the event that they choose to advertise compliance with a standard without in fact meeting its requirements does not modify the essentially voluntary nature of such standard.

7.157 I note in this respect that governments may want to ensure that whenever a certain product makes a claim in a label, such claim is reflective of the true characteristics of that product or the actual related processes and methods involved in its production. For this reason, governments may enact laws and regulations requiring that *if* a producer claims that its products are in compliance with certain voluntary specifications, i.e. standards, that producer is under a duty to ensure that its products actually meet those standards. For the same reasons (i.e. consumer protection and fair competition), those laws and regulations may require that producers do not use labels or symbols that may induce the public to erroneously believe that the products carrying such labels or symbols comply with the conditions for the use of *other* labels. The existence of such a legally binding norm that compels producers to fulfil the promises they make in relation to compliance with voluntary standards should not transforms such standards into mandatory technical regulations. If it would, no space would be left for labelling requirements as standards as foreseen in Annex 1.2.

7.158 For these reasons, the fact that compliance with the terms of the labelling requirements is legally enforceable alone is not sufficient to render compliance with these requirements "mandatory" within the meaning of Annex 1.

7.159 In the present case, the *chapeau* of subsection (d)(1) of the DPCIA, establish that it is a violation of the Federal Trade Commission Act to export from or to offer for sale in the United States tuna products that "*include on the label* of that product the term '*dolphin-safe'* or any other term or symbol that *falsely claims or suggests* that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins", unless the conditions set out by that section itself are met (emphasis added). In addition, subsection (d)(3) of this statute provides that "[i]t is a violation of section 45 of title 15 to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than the mark developed under subparagraph (A)"[316] unless certain conditions are met.[317].

7.160 The *chapeau* of subsection (d)(1) of the DPCIA is intended to ensure that *when a claim is made* on a label that certain conditions have been met, the producers of the goods carrying that label are bound to meet those conditions. In turn, subsection (d)(3), in combination with subsection (d)(1) of the DPCIA, may be understood as a provision aimed at preventing deceptive practices in relation to the use of the "dolphin-safe" label.

7.161 This conclusion is not modified by the limitations placed by the measures on the use of alternative "dolphin-safe" marks or labels and on the use of certain terms. These aspects of the measures should be understood in connection with the overall architecture of the measure, which aims to ensure that any claims made in relation to the impact on dolphins of the catching of the tuna contained in tuna products are consistent with the conditions set out in the measures, and do not mislead consumers. Most importantly, these provisions do not render the "labelling requirement" mandatory in the sense that the label must be used and that the requirements to use the label must be

[316] Subparagraph (A) establishes: "The Secretary of Commerce shall develop an official mark that may be used to label tuna products as dolphin-safe in accordance with this Act". Therefore, we believe that this subsection may be read as follows: "[i]t is a violation of section 45 of title 15 to label a tuna product with any label or mark that refers to dolphins, porpoises, or marine mammals other than [the 'dolphin-safe' label]".

[317] See paras. 2.27 to 2.30 above.

met in order to put tuna on the US market. In fact, as evidenced by the United States, tuna without the label is marketed within the United States.[318]

7.162 Mexico relies, in support of its claim that the measures at issue constitute a "mandatory" technical regulation, on two prior decisions of the Appellate Body, namely *EC – Asbestos* and *EC – Sardines*. I wish to point out important distinctions between the situations addressed in those disputes and the present case.

7.163 In *EC – Asbestos*, the measure at issue did not contain any voluntary aspect. Asbestos and asbestos-containing products were simply banned by the measure at issue. According to the Appellate Body, this ban negatively imposed on all products the requirement not to contain asbestos. Therefore, the producers and importers of asbestos and asbestos-containing products were not given an alternative in order to market their products in the territory of the European Union. The requirement not to include asbestos in their products was imposed *directly* by the regulations at issue, and not by the producers' or importers' own decision to become bound by such prohibition. Therefore, although the decision of the Appellate Body in *EC – Asbestos* provides useful guidance in relation to several points in discussion in the present dispute, it does not offer conclusive assistance in relation to whether legally enforceable provisions setting out the conditions of use of a label to advertise compliance with a voluntary standard, or prohibiting the use of deceptive labels, turn such standard into a technical regulation.

7.164 In *EC – Sardines*, the mandatory nature of the measures challenged in that case was not in question.[319] In that case, the Appellate Body was therefore not called upon to make a determination concerning the interaction between mandatory and voluntary requirements. The measures in that case required the use of only the species Sardina pilchardus in products marketed as "preserved sardines".[320] The Appellate Body found that "preserved products made, for example, of *Sardinops sagax* [were], by virtue of the EC Regulation, *prohibited* from being identified and marketed under an appellation including the term 'sardines'" (emphasis in the original).[321] In other words, the exporters of preserved sardines containing any species of sardines other than *Sardina pilchardus* were not allowed to market their products as "sardines". *EC – Sardines* did thus not involve a labelling requirement but a naming requirement. And by not allowing to market certain preserved sardines as sardines, these products were prohibited to enter the sardine market at all. However, in difference to *EC – Sardines*, Mexico is not prohibited from selling its tuna as tuna to the United States. It is a fundamental difference between the facts of that case and those of the present dispute that in this case the measures lay down labelling requirements, which allow the operator to make claims reflecting compliance with a particular standard. The US dolphin-safe provisions are intrinsically linked to voluntary labelling scheme, which, in turn, is intended to reflect compliance with a particular standard (a "dolphin-safe" standard). This is a factual circumstance with which neither the panel nor the Appellate Body in *EC – Sardines* was confronted. They could, therefore, conclude that the measures in question laid down product characteristics in a negative form without affecting the conceptual differences between technical regulations and standards. For these reasons, the Appellate Body's decision in *EC – Sardines* does not offer conclusive guidance on whether legally enforceable provisions imposing compliance with particular requirements in order to claim compliance with a standard though the use of a label, or prohibiting the use of deceptive labels relating to the same matter, have the effect of turning a voluntary standard into a technical regulation.

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[318] See para. 7.345 below.

[319] Appellate Body Report, *EC – Sardines*, para. 194.

[320] Appellate Body Report, *EC – Sardines*, para. 179, quoting the Panel Report in that same dispute, para. 7.45.

[321] Appellate Body Report, *EC – Sardines*, para. 184.

7.165 As observed earlier, the US measures need to be considered as a whole. This requirement, along with the duty to interpret the terms of the definition of the *TBT Agreement* in a way that does not deprive the definition of a "standard" of its meaning, compels to conclude that the legally binding components of the US dolphin-safe provisions do not transform voluntary "dolphin-safe" labelling requirements into mandatory technical regulations. In light of all the above, I conclude that the US dolphin-labelling provisions do not establish *de jure* mandatory labelling requirements.

7.166 Mexico alternatively argues that the labelling scheme established by the US dolphin-safe provisions is *de facto* mandatory "because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin-safe designation".[322]In this respect, as described above, Mexico has observed that the US distribution and retail networks for tuna products are acutely aware of the dolphin safe issue and the fact that they will encounter actions such as boycotts, promoted by NGOs, if they carry tuna that is not labelled as dolphin safe. Mexico argues that large US grocery chains have indicated that they will be unable to carry any Mexican tuna products unless they bear a US government-approved dolphin safe label. Mexico has also noted that the three major tuna processors in the United States refuse to purchase tuna caught in the ETP including Mexican tuna because tuna products containing such tuna cannot be labelled as dolphin safe.[323]

7.167 Mexico observes that the use of the "dolphin-safe" label has "significant commercial value" in the United States' market because "consumers at each consumption stage demand this label in order to sell or buy tuna products".[324] Therefore, Mexico contends, the prohibition on having the dolphin-safe label on Mexican tuna products has the effect of excluding Mexican tuna products from the major distribution channels in the US market, and compliance with the requirements imposed by the US dolphin-safe provisions becomes mandatory for the Mexican tuna industry in order to access the US market.[325]

7.168 The United States responds that Mexico's contention that the US dolphin-safe provisions have prevented Mexican tuna products from accessing the United States' market is not based on the US dolphin-safe provisions themselves or on any other measure or government action that limits the opportunity for Mexican tuna products to be imported, sold, distributed or otherwise marketed in the United States. According to the United States, Mexico's argument is based on retailer and consumer preferences for tuna products that were not caught in a manner that adversely affects dolphins.[326] Moreover, the United States argues that some distribution channels in the United States do purchase and sell tuna products that are not labelled "dolphin-safe", and that consumer or retailer preferences alone cannot determine whether a labelling requirement is mandatory.[327]

7.169 In addressing this part of Mexico's claim, it needs to be considered, as a threshold matter, whether the definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* encompasses situations in which the document at issue would be *de facto* rather than *de jure* mandatory.

7.170 Issues relating to the *de facto* or *de jure* coverage of specific obligations have been discussed in the context of various provisions contained in the GATT 1994[328], the GATS[329] and other covered

[322] Mexico's first written submission, para. 203.
[323] Mexico's first written submission, paras. 111-112.
[324] Mexico's response to Panel question No. 52, para. 148.
[325] Mexico's response to Panel question No. 52, para. 149.
[326] United States' second written submission paras. 110-111; United States' response to Panel question No. 52, para. 127.
[327] United States' response to Panel question No. 57, para. 130.
[328] *See e.g.* GATT panel reports, *Belgium – Family Allowances; EEC – Imports of Beef*, GATT panel report, *Spain – Unroasted Coffee* and *Japan – SPF Dimension Lumber* (in relation to Article I of the

agreements, such as the SCM Agreement.[330] Although these precedents must be considered with caution since they refer to provisions that notably differ in scope and nature from those contained in the *TBT Agreement*, the reasoning behind those decisions may shed light on the question at issue here.

7.171 When the Appellate Body and previous panels have addressed the question of whether a particular provision equally applies to *de jure* and *de facto* situations, they appear to have focused both on the text of the provision in question and on the potential consequences of excluding the possibility of applying that norm to *de facto* scenarios. The following passage of the Appellate Body's decision in *EC – Bananas III* illustrates this approach:

> "The question here is the meaning of 'treatment no less favourable' with respect to the MFN obligation in Article II of the GATS. ... The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article" (italics in the original).[331]

7.172 In the present case, the first task is therefore to assess whether the ordinary meaning of the language used in the definition of technical regulation in the *TBT Agreement* allows or excludes the possibility of *de facto* mandatory technical regulations. The relevant language is the term "mandatory", or more broadly, the expression "with which compliance is mandatory" in Annex 1.1. This formulation seems not to exclude the possibility that compliance has to be *de facto* mandatory.

7.173 Namely, it does not exclude that the mandatory character of the measure may result from a combined effect of various measures or actions attributable to the Member in question, and not necessarily exclusively from the specific instrument in which the "product characteristics or related processes and production methods" are laid down. What is required is that compliance with the characteristics laid down in the document be mandatory. This does not necessarily prejudge whether this mandatory character is contained in that instrument itself. It does not exclude that voluntary and non-mandatory labelling requirements may become mandatory as a result of "some other governmental action"[332] or more generally, some other action attributable to the Member concerned.[333]

7.174 The question is therefore whether, despite the absence of a *de jure* requirement in the measures at issue to use the "dolphin-safe" label in order to market tuna products in the United States, tuna products are nonetheless *compelled* to carry that label as a result of some other action attributable to the United States.

GATT 1994); GATT panel report, *Italy – Agricultural Machinery* (in relation to Article III.4); GATT panel report, *Japan – Semi-Conductors* and panel report *Argentina – Hides and Leather* (in relation to Article XI:1 of the GATT 1994).

[329] *See e.g.* Appellate Body Report, *EC – Bananas III* (in relation to Article II of GATS).

[330] *See e.g.* Appellate Body Report, *Canada – Autos* (in relation to Article 3.1(b) of the SCM Agreement).

[331] Appellate Body Report, *EC – Bananas III*, para. 233; see also, Appellate Body Report, *Canada – Autos*, paras. 139-43.

[332] United States' response to Panel question No. 52, para. 125.

[333] It would be conceivable, for example, that if a Member in fact grants certification in relation to one particular standard as a means of complying with a regulatory requirement, but not in relation to other standards, its actions may turn that formally voluntary standard, into a *de facto* technical regulation.

7.175 In summary, the "dolphin-safe" label may be considered *de facto* mandatory in order to market tuna products in the United States, if doing otherwise becomes impossible, not because it would contradict a mandatory provision in the measures, but because it would be prevented by a factual situation that is sufficiently connected to the actions of the United States. Thus, this analysis is two-fold. First, the impossibility of marketing tuna products in the United States without the "dolphin-safe" label must be established. Second, such impossibility must arise from facts sufficiently connected to the US dolphin-safe provisions or to another governmental action of the United States.

7.176 First, it has to be noted that tuna products are sold in the United States without the "dolphin-safe" label. Not only hast the US submitted evidence in this regard, Mexico has also not challenged this fact. However, Mexico maintains that the dolphin-safe labelling scheme "is *de facto* mandatory because *the market conditions* in the United States are such that it is impossible to *effectively* market and sell tuna products without a dolphin-safe designation" (emphases added).[334] As non-labelled tuna is sold in the US to a certain limited extent, to "effectively" market has to mean having access to the major distribution channels and not being limited to the limited market segment that exists in the US for non-labelled Tuna.

7.177 To the extent that Mexico's argument is based on an impossibility of "effectively" marketing and selling tuna products without a dolphin-safe designation, this would not, in my view, provide a sufficient basis for a determination that compliance with the US dolphin-safe labelling requirements is "mandatory" within the meaning of Annex 1.1. Compliance with a voluntary technical document such as a standard may substantially increase the chances of a product being *effectively* sold in a given market. Conversely, failure to comply with such standard may have negative consequences for the competitiveness of a product in that market. However, this fact alone would not alter the voluntary or "not mandatory" nature of that standard, within the meaning of the *TBT Agreement.*

7.178 In explaining the adverse effects of the measures, Mexico argued that they have direct effects on tuna products, because major retailers in the United States refuse to buy tuna products that cannot be labelled dolphin safe, and indirect effects on tuna caught by the Mexican fleet, because major producers of tuna in the United States also refuse to purchase Mexican or other tuna caught in the ETP because tuna product containing such tuna could not be included in tuna products labelled dolphin safe.[335] I agree with the United States, however, that these are decisions made by private actors that do not necessarily involve the participation of the State. Such private actions alone should not be able to turn an otherwise voluntary norm into a technical regulation.

7.179 Therefore, Mexico would need to demonstrate that the decision made by these companies not to buy tuna or tuna products that cannot be labelled dolphin-safe is the result of the application of the US dolphin-safe provisions or of some other action by the United States. However, Mexico has failed to substantiate such contention.

7.180 On the contrary, the United Sates has shown that the three major processors of tuna products in the United States have adopted as their own commercial policies not to use tuna that has been obtained by setting on dolphins".[336] In particular, the United States has presented as evidence the dolphin-safe policy of the major US tuna companies as it is published on their website. Bumble Bee's policy is instructive in this respect:

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[334] Mexico's first written submission, para. 202.
[335] Mexico's first written submission, paras. 111 and 112.
[336] Exhibit US-32; Exhibit US-36; Exhibit US-37.

> "What is Bumble Bee's Dolphin safe policy? Bumble Bee Foods, LLC remains fully committed to the 100% dolphin-safe policy we implemented in April 1990. This policy guarantees the following:
>
> – Bumble Bee will not purchase tuna from vessels that net fish associated with dolphins. Our purchasing agreements require certification of dolphin-safe fishing practices from all tuna suppliers ...
>
> The U.S. Government Dolphin-Safe Regulations are in the process of being modified through the International Dolphin Conservation Program. The new regulations will allow for a less stringent U.S. Dolphin-Safe Regulation. Despite the new, less stringent "compliance" criteria, Bumble Bee remains committed to and in compliance with a "no encirclement" policy. The commitment of Bumble Bee to dolphin-safety will remain unchanged regardless of any changes to the dolphin-safe law.
>
> We continue to adhere to our 100% dolphin-safe policy."[337]

7.181 This evidence also suggests that these companies have been willing to maintain such policies regardless of the potential legislative changes to the US dolphin-safe provisions, and in particular regardless of the potential change of the US definition of "dolphin-safe", to adopt the definition endorsed by the AIDCP, which Mexico argued the United States should apply. Mexico submits that what prompted those policies was the large number of dolphins being killed annually in the ETP at the time these policies were first announced, and that this figure has substantially decreased.[338] However, even if Mexico's assertion is correct, it would not prove that these private actors' commercial policies are determined by the existence or content of the US dolphin-safe labelling scheme. If Mexico's allegation is correct, it would only prove that these companies define their purchase policies in consideration of their own perception of the risks faced by the dolphin populations in the ETP.

7.182 In addition, it is relevant to note that the dolphin-safe policies of the major companies were all implemented prior to the enactment of the first version of the DPCIA which is here challenged, that is to say, prior to the United States having adopted the "strict" definition of dolphin-safe as absence of setting on dolphins.[339] These policies were implemented in April 1990, seven months before the enactment of the DPCIA. The United States has noted that the *amicus curiae* brief submitted to the Panel highlights that at the time of the enactment of the US dolphin-safe labelling provisions, there was a strong consumer sentiment that setting on dolphins to catch tuna was unacceptable and that something should be done to ensure that consumers had a choice not to purchase products that contained tuna caught in association with dolphins.[340] Indeed, the paragraphs of the *amicus curiae* brief to which the United States refer and the exhibits attached to the brief quoted in such paragraphs support the conclusion that such policies were prompted by the lobbying exerted by environmentalists rather than by the enactment of the DPCIA itself. According to a press article the chairman of Heinz's StarKist Seafood Company, the companies' dolphin-safe policy was attributable to both "external influences –lobbying by environmentalists and a consumer boycott of tuna- and an internal corporate debate. ... The consumer boycott, which included a growing number of schoolchildren, seemed to argue for a dolphin-safe policy."[341] This evidence also explains the

[337] Exhibit US-37.
[338] Mexico's response to Panel question No. 43, para. 105.
[339] Exhibit US-32; Exhibit US-36; Exhibit US-37, Exhibit US-38.
[340] See United States' response to Panel question No. 40(a), para. 98 which cites paragraphs 18-20, 25, 62-64 of the amicus curiae brief which in turn refer to exhibits 1, 2, 3 and 4 attached to the amicus submission.
[341] See United States' response to Panel question No 40(a), para. 98 which cites paragraphs 18-20, 25 and 62-64 of the *amicus curiae* brief which in turn refer to Exhibit Amicus EX-2.

nationwide boycott of tuna supported by schoolchildren, celebrities and business leaders was due to a "dolphin campaign video". A biologist footage shot during an undercover operation from October 1987 to January 1988 on a Panamanian vessel provided film evidence that some purse-seiners were indiscriminately slaughtering dolphins while harvesting the yellowfin tuna that swims beneath the mammals. The evidence presented to the Panel suggests that the broadcast of this documentary on television triggered consumers' and civil society reactions.

7.183 Mexico argues that the three major tuna processors in the United States have a commercial interest in maintaining the US dolphin-safe provisions as they stand today because they would otherwise face competition from Mexican tuna product brands.[342] However, even assuming that such economic interest *does* exist, this would not change the fact that this interest and the business decisions taken on the basis of such interest remain within the sphere of private actions that are not necessarily attributable to a measure by the State. Private companies may have strong economic interests that relate to voluntary standards, they may even make important business decisions on the assumption that such standards will or will not remain applicable to their products. However, the existence of those interests and the decisions based upon them do not change the voluntary character of the standard.

7.184 Mexico also observes that large US retailers have indicated that they will be unable to carry any Mexican tuna products unless the tuna products bear a US government approved dolphin safe label.[343] In support of this contention, Mexico has presented an affidavit from an officer of a US company selling Mexican canned tuna in the US market and supporting material. This affidavit states that for several years the company attempted to sell Mexican tuna products in major US grocery chains, which have refused to buy the products because they were not eligible for the dolphin-safe label. The affidavit provides evidence that some of the major US chains have expressly indicated that if the tuna product qualified to be labelled "dolphin-safe", they would sell it and that the company's inability to place the "dolphin-safe" label on the cans has directly affected its ability to sell the Mexican brand in the United States.[344]

7.185 However, this evidence does not, in my view, support the conclusion that the decision of retailers not to carry tuna products not eligible for a dolphin-safe label is the result of actions attributable to the United States. Rather, this evidence confirms that it is the decision of retailers on the market not to carry tuna products unless they are eligible for US dolphin safe labelling. I note in this respect that the affidavit refers to instances of removal of the products from the shelves following interventions by an NGO, which suggests that retailers react to the dolphin-safe concern in a manner comparable to that of the tuna processors referred to above, that is, that they make their decisions in consideration of their perception of the acceptability of the products to consumers rather than by reason of the US measures themselves. One of the supporting documents provided by Mexico expressly states that this is not a legal issue but an issue of "consumer acceptance".[345]

7.186 Based on the above, I find that Mexico has failed to demonstrate that the US dolphin-safe provisions establish either *de jure* or *de facto* mandatory labelling requirements. Thus, I conclude that the third condition for a document to be considered a technical regulation, i.e. that compliance with the labelling requirements at issue is mandatory, has not been met in the present case. Therefore, the US dolphin-safe labelling provisions should not be seen as constituting technical regulations within

[342] Mexico's first written submission, para. 113; *see also* Mexico's response to Panel question No. 43, para. 109.
[343] Mexico's first written submission, para. 111.
[344] Exhibit MEX-58.
[345] See Exhibit MEX-58.

the meaning of the TBT Agreement. Consequently, the provisions of Article 2 of the TBT Agreement, including its paragraphs 1, 2 and 4 should not be applicable to the measures at issue.

7.187 Finally, I wish to make it clear that, in making this determination, no determination is made as to whether the measures at issue might otherwise fall within the scope of the TBT Agreement. However, since Mexico did not submit any claims based on other provisions of the TBT Agreement, no determinations in this regard can be made.

7.188 Notwithstanding this conclusion, I consider it appropriate to pursue the analysis of the measures at issue as a technical regulation, on the basis of the opinion of the majority of the Panel. Without prejudice to my views with respect to this initial determination, I therefore associate myself with the remainder of these findings.

2. Whether the US dolphin-safe labelling provisions are inconsistent with Article 2.1 of the TBT Agreement

7.189 Article 2.1 of the TBT Agreement provides:

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

7.190 Mexico claims that the US dolphin-safe labelling provisions are inconsistent with Article 2.1 because they afford treatment less favourable to Mexican tuna products than to US tuna products and tuna products originating in other countries. We first set out our overall approach to the analysis of this claim, in order to determine what must be established in order for Mexico to prevail in this claim.

(a) Overall approach

(i) Main arguments of the parties

7.191 In its first written submission, with respect to Article 2.1 of the TBT Agreement, Mexico refers the Panel to the arguments it made in the context of its claims under the GATT 1994. According to Mexico, Article 2.1 of the TBT Agreement imposes national treatment and most-favoured-nation treatment obligations on technical regulations. It is, Mexico argues, similar to the national treatment obligation in Article III:4 of the GATT 1994, except that it applies to both national treatment and most-favoured-nation obligations. Mexico also observes that like Articles I:1 and III:4 of the GATT 1994, Article 2.1 prohibits both *de jure* and *de facto* discrimination.[346]

7.192 Mexico noted the following essential elements of an inconsistency with Article 2.1: (i) that the measure at issue is a "technical regulation"; (ii) that products of national origin and products originating in any other country are "like products" with respect to the imported products within the meaning of that provision; and (iii) that the imported products are accorded "less favourable"

[346] (*footnote original*) In *Canada – Autos*, the Appellate Body observed that Article III:4 of the GATT 1994 covered both de jure and *de facto* inconsistency and, on this basis, found that a similar provision that disciplined measures that favoured the use of domestic over imported goods (i.e., Article 3.1(a) of the SCM Agreement) would also apply not only to de jure inconsistency but to *de facto* inconsistency. The same reasoning applies to Article 2.1 of the *TBT Agreement* which is even more analogous to Article III:4 than Article 3.1(a) of the SCM Agreement. See Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 140. (Mexico's first written submission, fn 164).

treatment than that accorded to like products of national origin and to like products originating in any other country.[347]

7.193 With regard to the first element, Mexico refers to earlier arguments and observes that the US dolphin-safe labelling provisions are a technical regulation.[348]

7.194 As far as the second element is concerned, Mexico specifies that although the meaning of the term "like products" in Article 2.1 has not been elaborated upon in WTO jurisprudence, given that the language in Article 2.1 is similar to that in Article III:4 of the GATT 1994, it is reasonable to use the four criteria used to determine likeness under Article III:4 discussed above, reviewed in the proper context and in consideration of the object and purpose, to assist in determining likeness under Article 2.1. In light of its conclusions in the context of Article III:4, Mexico asserts all criteria indicate that tuna and tuna products are like products, irrespective of their originating country.[349]

7.195 Finally, Mexico also contends that for the reasons set out in its claim under Article III:4, the US dolphin-safe labelling provisions do not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products of national origin[350] and for the reasons set out in its claim under GATT Article I:1, the measures do not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products originating in any other country[351] and therefore concludes the US dolphin-safe labelling provisions are inconsistent with Article 2.1 of the TBT Agreement.[352]

7.196 The United States presents its defence in line with Mexico's order of analysis. In addition, the United States notes that Mexico relies solely on the arguments it makes regarding the consistency of the measures with Articles I:1 and III:4 of the GATT 1994 for its arguments under Article 2.1 of the TBT Agreement. Observing that it had already articulated why Mexico's arguments under Articles I:1 and III:4 of the GATT 1994 the United States contends that Mexico's arguments under Article 2.1 of the TBT Agreement also fail for the same reasons.

7.197 In light of the parties' references to their analyses under Article I:1 and Article III:4 of the GATT 1994 in the context of their discussion of Article 2.1 of the TBT Agreement, the Panel asked them to elaborate on whether an analysis of "likeness" and "less favourable treatment" under Article 2.1 of the TBT Agreement should be assumed to have exactly the same contours as the same analysis under Article III:4 of the GATT 1994. Further, if this is the case, the Panel asked the parties to confirm whether this would imply that all interpretations developed by panels and the Appellate Body in the context of Article III:4 of the GATT 1994 are entirely transposable to Article 2.1. The Panel also asked the parties to comment on the differences in the wording used under each provision.

7.198 Mexico responded that although the language used in Article 2.1 is different from that used in Articles III:4 and I:1, both of these GATT 1994 provisions offer guidance on how to interpret Article 2.1.[353] Further, Mexico explained that the essence of the non-discrimination obligations in the GATT 1994 and other covered agreements is that like products should be treated equally, irrespective of their origin. It also noted the importance of these provisions for Members, in the context of non-tariff barriers such as the US dolphin-safe labelling provisions. Accordingly, it is essential that the

[347] Mexico's first written submission, para. 257.
[348] Mexico's first written submission, para. 258.
[349] Mexico's first written submission, para. 259.
[350] Mexico's first written submission, para. 260.
[351] Mexico's first written submission, para. 261.
[352] Mexico's first written submission, para. 262.
[353] Mexico's response to Panel question No. 58(a) and (b), paras. 172.

elements of these provisions, including the definitions of "like products" and "less favourable treatment" be carefully interpreted and applied. Mexico argues that the long history of interpreting and applying these terms in the context of Article III:4 and other provisions of the GATT 1994 should be relied upon when interpreting Article 2.1 of the TBT Agreement in order to maintain, Mexico argues that the integrity of the non-discrimination obligations contained in that provision.[354]

7.199 As for the term "like products", Mexico recalled the Appellate Body's rulings on the need to interpret this term as it appears in different provisions of the covered agreements in light of the context and the object and purpose of the provision at issue and the object and purpose of the covered agreement in which the provision appears.[355] In light of this jurisprudence, Mexico concludes that:

> "Both Article III:4 and Article 2.1 apply to technical regulations so, at a general level, their context is similar. Given that the specific language used in both Articles when referring to the term 'like products' – i.e., 'shall be accorded treatment no less favourable than that accorded to like products of national origin' – is identical, the immediate context of the term when used in the two provisions is also identical. Accordingly, it is appropriate to give the term the same meaning under both provisions. Thus, as stated in Mexico's First Written Submission, the four criteria used to determine likeness under Article III:4 should be used to determine likeness under Article 2.1."[356]

7.200 Mexico considers it appropriate to give the term "treatment no less favourable" the same meaning under both Article III: 4 of the GATT and Article 2.1 of the TBT Agreement. In that regard it noted it is crucial that the term "treatment no less favourable" in Article 2.1 is interpreted and applied with reference to the equality of competitive opportunities for imported products as compared to like domestic products. Such competitive opportunities can be affected Mexico says, in a variety of ways, not only by measures directly regulating products and restricting imports but also by those that indirectly affect imports.[357] Therefore Mexico concludes that the assessment for "treatment no less favourable" in Article 2.1 of the TBT Agreement should be the same as under Article III:4 of the GATT 1994 i.e. whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.[358]

7.201 Regarding the differences in wording between Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994, Mexico noted that the language of Article I:1 provides that "any advantage, favour, privilege or immunity granted by any [Member] to any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... the territories of all other [Members]" whereas Article 2.1 refers to "products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded ... to like products originating in any other country".[359]

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[354] Mexico's response to Panel question No. 58(a) and (b), paras. 173.

[355] (*footnote original*) Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraphs 88-89. (Mexico's response to Panel question No. 58(a) and (b), fn 77).

[356] Mexico's response to Panel question No. 58(a) and (b), para. 175.

[357] Mexico's response to Panel question No. 58(a) and (b), para. 177.

[358] (*footnote original*) Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, paragraphs 91, 93 and 96; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paragraphs 135, 137 and 144. (Mexico's response to Panel question No. 58(a) and (b), fn 81).

[359] Mexico's response to Panel question No. 58(a) and (b), para. 179.

7.202 Although the language in the two provisions differs, Mexico notes that both set out most-favoured-nation treatment obligations. It also observes that:

> "The Appellate Body has observed that '[a]part from Article I:1, several 'MFN-type' clauses dealing with varied matters are contained in the GATT 1994' and '[t]he very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination'. The provisions of the GATT 1994 referred to by the Appellate Body when making this statement use very different language to express the MFN obligation including language similar to Article 2.1 of the *TBT Agreement* as illustrated in GATT Article IX:1—i.e., 'treatment ... no less favourable than the treatment accorded to like products of any third country'."[360]

7.203 Mexico concludes that Article I:1 protects the competitive opportunities of imported products, not trade flows, and imposes upon WTO Members the obligation to treat like foreign products equally, irrespective of their origin. In its view, the jurisprudence interpreting the obligation in Article I:1 of the GATT 1994 is relevant to the interpretation of Article 2.1 of the TBT Agreement.[361]

7.204 In its second written submission, Mexico addresses several issues it considers common to all its discrimination claims, the TBT Agreement and the GATT 1994, including the issue of likeness. However, Mexico addresses separately the question of the "advantage accorded immediately and unconditionally" under Article I:1 of the GATT 1994. Finally, as for Article 2.1 of the TBT Agreement, Mexico refers again to the arguments presented to support its claims under Articles I:1 and III:4 of the GATT 1994.[362]

7.205 The United States observes that, notwithstanding the inapplicability of Article 2.1 of the TBT Agreement to the present dispute, an analysis of likeness and less favourable treatment under Article 2.1 of the TBT Agreement should not be exactly same as under Article III:4 of the GATT 1994 as there are important textual and contextual differences between the two.[363] One such difference the United States observed is that Article 2.1 states that "Members shall require that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin". The United States emphasizes that Article 2.1 applies "in respect" of a technical regulation.[364]

7.206 The United States further observes that the language in Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement differs regarding the treatment afforded to imports from one Member as compared to the treatment afforded imports of another Member. Article 2.1 of the TBT Agreement refers to not affording "less favourable treatment" to imported products as compared to like products originating in other countries, whereas Article I:1 of the GATT 1994 states that any "advantage" or "privilege" granted to products originating in one country "shall be accorded immediately and unconditionally" to like products originating in other countries. These textual differences should be taken into account when interpreting Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement respectively.

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[360] Mexico's response to Panel question No. 58(a) and (b), para. 180 (original footnote omitted)
[361] Mexico's response to Panel question No. 58(a) and (b), para. 181.
[362] Mexico's second written submission, paras. 125-191.
[363] United States' response to Panel question No. 58(a) and (b), para. 132.
[364] United States' response to Panel question No. 58(a) and (b), para. 132.

(ii) Approach of the Panel

7.207 Article 2.1 reads as follows:

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

7.208 This provision must be read in conjunction with the introductory passage of Article 2 ("With respect to their central government bodies:"), which makes clear that the provisions of Article 2, and thus the obligations it contains, relate only to the "central government bodies" of WTO Members. This is further confirmed by the title of Article 2, which reads "Preparation, adoption and application of technical regulations by central government bodies".

7.209 The terms of this provision thus suggest that a violation of Article 2.1 exists if two sets of conditions are met:

(a) the measure is a technical regulation prepared, adopted or applied by a Member's central government bodies; and

(b) products imported from the territory of a Member are accorded "less favourable treatment" than like products of national origin or originating in any other country in respect of this technical regulation.

7.210 We have already determined above that the US dolphin-safe labelling provisions constitute a technical regulation. We must now, in addition, determine whether they fall within the purview of Article 2 as a technical regulation prepared, adopted and applied by one or more "central government body" of the United States.

7.211 Annex 1.6 of the TBT Agreement defines a "central government body" as a "central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question". The measures at issue in this dispute are a federal US law (the DPCIA), a federal regulation (Sections of the US Federal Code), and a ruling by a federal court of the United States (the *Hogarth* ruling). It has not been disputed that these constitute acts of central government bodies of the United States.

7.212 We must now determine whether less favourable treatment is accorded to Mexican imported products than to like products of US origin or like products originating in any other country with respect to these measures. For that purpose, we consider first whether the products at issue are "like products". If we determine that they are, we will then need to consider whether "less favourable treatment" is being afforded by the United States, in respect of the US dolphin-safe labelling provisions, to Mexican products than to like products originating in the United States or in any other country.

(b) Whether the products at issue are like

7.213 As described above, Mexico considers that Mexican tuna products are "like" tuna products of US origin and tuna products originating in any other country. The United States does not dispute this determination. Nonetheless, we must ascertain that this condition is met, to discharge our duty of

making an objective assessment of the matter before us in accordance with Article 11 of the DSU.[365] We also note that it is for the party asserting a fact or claim to bear the burden of proving this fact or claim[366], and that it is therefore for Mexico to put forward sufficient evidence to raise a presumption that the tuna products at issue are "like".

7.214 In order to ascertain whether Mexico has demonstrated that Mexican tuna products and tuna products originating in any other country are "like", we must first clarify the meaning of the terms "like products" in Article 2.1 of the TBT Agreement.

Meaning of the term "like products" in Article 2.1 of the TBT Agreement

7.215 Pursuant to Article 3.2 of the DSU and as described earlier, we must interpret the terms "like products" in Article 2.1 of the TBT Agreement in accordance with the customary rules of interpretation of public international law.

7.216 Mexico recalls the Appellate Body's rulings on the need to interpret the term "like products" in light of the context and of the object and purpose of the provision at issue and of the object and purpose of the covered agreement in which the provision appears.[367] In light of these rulings, Mexico concludes that it is appropriate to give the term the same meaning under Article III:4 of the GATT and Article 2.1 of the TBT Agreement. Thus, as stated in Mexico's First Written Submission, the four criteria used to determine likeness under Article III:4 should be used to determine likeness under Article 2.1."[368]

7.217 Mexico also observes[369] that the Appellate Body in *EC – Asbestos* explained that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products"[370] and that "the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence.[371] Further, Mexico notes that the Appellate Body in the same dispute also "observed that the Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing 'likeness' that has been followed and developed since by several panels and the Appellate Body."[372]

7.218 The United States observes that an analysis of "likeness" and "less favourable treatment" under Article 2.1 of the TBT Agreement should not be exactly the same as under Article III:4 of the

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[365] We note that this approach has been adopted by previous panels. In *US – Anti-Dumping Measures on PET Bags*, the Panel thus noted:

"Notwithstanding the United States' decision not to contest Thailand's claim, we consider that we are still bound by Article 11 of the *DSU* to make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". *US – Anti-Dumping Measures on PET Bags*, para. 7.5.

[366] "Once that party has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence shifts to the other party to rebut the presumption." Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[367] (*footnote original*) Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraphs 88-89. (Mexico's response to Panel question No. 58(a) and (b), fn 77).

[368] Mexico's first written submission, para. 259; Mexico's response to Panel question No. 58(a) and (b), para. 175.

[369] Mexico's first written submission, para. 146.

[370] *(footnote original)* Appellate Body Report, *EC –Asbestos*, para. 99.

[371] *(footnote original) Id.*

[372] *(footnote original)* Id., para. 101.

GATT 1994 as there are important textual and contextual differences between the two.[373] The United States acknowledges that a determination of likeness under Article III:4 is essentially a determination about the nature and extent of a competitive relationship between and among products. However, it offers no specific views on how the interpretation of the term "like products" in Article 2.1 of the TBT Agreement might differ or not from that of the same term in Article III:4 of the GATT 1994.

7.219 We first note that the terms "like products" appear in a number of provisions in the covered agreements, including the non-discrimination obligations of Articles I:1, II:2, III:2 and III:4 of the GATT 1994 and that panels and the Appellate Body have interpreted these terms in some of these provisions. We note in this respect the Appellate Body's observation that:

> "[W]hile the meaning attributed to the term 'like products' in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting Article III:4 of the GATT 1994, the interpretation of 'like products' in Article III:4 need not be identical, in all respects, to those other meanings."[374]

7.220 Similarly, the interpretation of the term "like products" in other provisions of the covered agreements may provide relevant context and guidance in interpreting the same term in Article 2.1 of the TBT Agreement, but it need not be assumed that this term must be interpreted identically in all respects in both provisions. Rather, as expressed by the Appellate Body, "[i]n each of the provisions where the term "like products" is used, the term must be interpreted in light of the context, and of the object and purpose, of the covered agreement in which the provision appears".[375]

7.221 Dictionary definitions of the term "like" point to "[h]aving the same characteristics or qualities as some other person or thing; of approximately identical shape, size, colour, character, etc., with something else; similar; resembling; analogous".[376] This suggests that products would be "like" when they share common "characteristics or qualities" and resemble each other. However, as observed by the Appellate Body, this dictionary definition alone does not resolve all issues of interpretation, as it does not indicate which characteristics or qualities are important, the degree to which products must share such characteristic or qualities, or from whose perspective this is to be assessed.[377] The Appellate Body has thus compared the concept of "likeness" to an "accordion":

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

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[373] United States' response to Panel question No. 58(a) and (b), para. 132.
[374] Appellate Body Report, *EC – Asbestos*, para. 89.
[375] Appellate Body Report, *EC – Asbestos*, para. 88.
[376] Oxford English Dictionary online, at www.oed.com.
[377] "First, this dictionary definition of 'like' does not indicate *which characteristics or qualities are important* in assessing the 'likeness' of products under Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, this dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be 'like products' under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term 'like' can encompass a spectrum of differing degrees of 'likeness' or 'similarity'. Third, this dictionary definition of 'like' does not indicate *from whose perspective* 'likeness' should be judged. For instance, ultimate consumers may have a view about the 'likeness' of two products that is very different from that of the inventors or producers of those products." Appellate Body Report, *EC – Asbestos*, para. 92.

> is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. …"[378]

7.222 Accordingly, our understanding of how narrowly or broadly the accordion of likeness "stretches and squeezes" for the purposes of our examination of Mexico's claims under Article 2.1 of the TBT Agreement in this case or, in other words, the "degree or extent to which products must share qualities or characteristics" and the perspective from which this is to be examined in the case at hand, must be informed by the fact that our examination takes place under Article 2.1 of the TBT Agreement, as well as by the context and circumstances that prevail in this case.

7.223 We also note that the terms of this provision very closely mirror those of Article III:4, the national treatment obligation in the GATT 1994, so that it may be possible to seek guidance from the interpretation of that provision. At the same time, we are mindful that Article 2 of the TBT Agreement does not contain an introductory paragraph comparable to Article III:1 of the GATT 1994, setting out a "general principle" that would inform our understanding of the exact degree or extent to which products must share qualities or characteristics so as to be considered like in the context of Article 2, and the perspective from which this is to be examined. In the context of Article III:4, the Appellate Body determined that:

> "As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* 'less favourable' than the treatment accorded to *domestic* products, it follows that the word 'like' in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products."[379]

7.224 Although this statement was made in the context of Article III:4 of the GATT 1994, we find it pertinent also to an interpretation of the terms "like products" in Article 2.1 of the TBT Agreement.

7.225 The TBT Agreement applies to a limited set of measures, and our understanding of its terms, including the terms "like products" must be informed by this context. As expressed in the preamble of the TBT Agreement, this Agreement reflects the intention of the negotiators to:

> "[E]nsure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to trade."

To the extent that Article 2.1 contributes to avoiding "unnecessary obstacles to trade" arising from undue discrimination with respect to technical regulations, it seeks to preserve the competitive opportunities of products originating in any Member, in relation to technical regulations. Thus, the term "like products" under Article 2.1 of the TBT Agreement may be similarly understood as relating to "the nature and extent of a competitive relationship" between and among products.

7.226 We further note, as the Appellate Body did in relation to Article III:4 of the GATT 1994, that this does not necessarily imply that Members may not draw any regulatory distinctions, under Article 2.1 of the TBT Agreement, between products that have been determined to be like products.[380]

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[378] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21 (DSR 1996:I, p. 97 at 114).

[379] Appellate Body Report, *EC – Asbestos*, para. 99.

[380] In *EC – Asbestos* the Appellate Body found that "… a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like'

The question of the treatment to be given to products that are like is addressed separately in the requirement of not affording treatment less favourable, which we consider in the next Section of our Report.

7.227 With these determinations in mind, we now consider whether Mexican tuna products are like tuna products of other origins, within the meaning of Article 2.1 of the TBT Agreement. As a preliminary matter, we must clarify what products are to be compared for the purposes of this analysis.

Products at issue

7.228 In its request for the establishment of a panel, Mexico refers to measures concerning the importation, marketing and sale of tuna and tuna products.[381] In its first written submission, Mexico similarly identified the subject products as tuna and tuna products, and analysed the likeness under Article III:4 of Mexican and US tuna and tuna products.[382]

7.229 In this context, Mexico explained that "tuna" includes all species of tuna purchased by canneries for processing into tuna products including yellowfin, albacore, and skipjack, and "tuna products" are defined in Section 1385(c)(5) as "a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days".[383] The most common form of tuna products, Mexico explained, is "tuna in retail-ready cans or pouches."[384]

7.230 With reference to a US court decision, Mexico further explained that fresh tuna caught by US flag vessels in international waters is of US origin, tuna caught by Mexican vessels is of Mexican origin, and tuna caught by the vessels of other countries take the origin of the flag country in question.[385] With reference to NAFTA rules of origin, Mexico also explained that the country where processing occurs is the country of origin of a *tuna product*.[386] In response to a question by the Panel, the United States confirmed that in general, for tuna processed into canned or pouched tuna products, the country where the tuna is processed is the country of origin for that tuna *product* under the US law.[387] For *tuna*, the United States stated that the origin of tuna is not determined by where it was caught but by the flag of the vessel that caught it.[388]

7.231 The Panel sought a clarification from both parties whether the comparison for the likeness analysis was between US and Mexican tuna in general, between Mexican tuna caught in the ETP by

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imported products 'less favourable treatment' than that accorded to the group of 'like' *domestic* products. "Appellate Body Report, *EC – Asbestos*, para. 100.

[381] Mexico's request for the establishment of a Panel, WT/DS381/4.

[382] Mexico's first written submission, paras. 114-120.

[383] (*footnote original*) See Appendix A.

[384] *(footnote original) See e.g.*: Starkist – http://www.starkist.com/template.asp?section=products /index.html (Exhibit MEX-54); Bumble Bee – http://www.bumblebee.com/Products/Family/?Family_ID=1; and Chicken of the Sea – http://chickenofthesea.com/product_line_list.aspx?FID=3 and http://chickenofthesea.com/product_line_list. aspx?FID=11 (Exhibit MEX-50).

[385] Mexico's first written submission, para. 118.

[386] Mexico's first written submission, para. 119.

[387] United States' response to Panel question No. 112, fn 48.*(footnote original)* Rules of origin for fish and fish products are codified in the U.S. tariff schedule. *See, e.g.*, Harmonized Tariff Schedule of the United States (2010), General Note 12(b) and 12(n)(v) for North American Free Trade Agreement rule of origin for fish, Exhibit US-56.

[388] United States' response to Panel question No.15 (a), para, 44.

setting on dolphins and US tuna caught otherwise, or between US dolphin-safe tuna and Mexican dolphin-safe tuna.[389]

7.232 Mexico responded that the relevant products are Mexican and US tuna products in general. In addition it observed that the method of fishing and geographic region in which the tuna are caught are unincorporated PPMs that are not relevant to the like products determination.[390] The United States in turn clarified that the like products analysis under Article III:4 should compare US tuna products in general and imported tuna products in general.[391] In its second written submission, Mexico also referred to *tuna products* rather than tuna and tuna products. In light of Mexico's response, the Panel asked Mexico to clarify further whether it was no longer seeking findings on tuna as distinct from tuna products.[392] Mexico confirmed that its claims are limited to findings concerning tuna products, specifying that the great majority of Mexican tuna products are made from tuna caught by the Mexican fleet.[393]

7.233 In light of these clarifications, we understand Mexico to be seeking findings in relation to tuna products and not in relation to tuna as such. Accordingly, the products to be compared for the purposes of determining their likeness are US tuna products and Mexican tuna products, as well as tuna products originating in any other country.

7.234 We also observe that Mexico has explained that although its challenge applies in respect of all tuna products, for the purpose of demonstrating the violation, it would use the most common tuna product, which is tuna meat packaged in retail ready cans and pouches.[394] Accordingly, we consider Mexico's analysis in respect of these specific tuna products and our findings relate to these products.

Whether Mexican tuna products are like tuna products originating in the United States or any other country

7.235 To demonstrate that Mexican tuna products and tuna products originating in the United States or any other country are like, Mexico has followed the approach derived from the GATT Working Party Report on *Border Tax Adjustments.* This approach is based on an analysis of four general criteria, reflecting "four categories of 'characteristics' that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes".

7.236 From this analysis, Mexico concludes that Mexican and US tuna products directly compete against each other in the US wholesale, distribution and retail market and that similarly, Mexican and US tuna directly compete against each other in the US cannery market.[395] It states that all relevant evidence supports a finding that Mexican and US tuna products and tuna are like.[396] Mexico underlines the panel's duty to "examine the evidence relating to each of those four criteria and, then,

[389] Panel question No. 74.
[390] Mexico's response to Panel question No. 74, paras. 272-273.
[391] United States' response to Panel question No. 74, para. 160.
[392] Panel question No. 144.
[393] Mexico's response to Panel question No. 144, paras. 119-120.
[394] Mexico's first written submission, para. 147
[395] Mexico's first written submission para. 153.
[396] Mexico's first written submission para. 154.

weigh all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as 'like'."[397]

7.237 The United States does not address Mexico's assertion that US and Mexican tuna and tuna products are "like" for the purposes of Article 2.1 of the TBT Agreement. Rather, it argues that the US dolphin-safe labelling provisions neither modify the conditions of competition to the detriment of Mexican tuna nor give a competitive advantage to US tuna and tuna products, insofar as they apply to any tuna and tuna products regardless of their origin.[398]

7.238 We first note that the four general criteria used by Mexico as basis for its likeness analysis have been endorsed by the Appellate Body as "tools to assist in the task of sorting and examining the relevant evidence"[399] for the purposes of determining "likeness" in the context of Article III:4 of the GATT 1994. In that context, the Appellate Body also observed that "in this determination, '[n]o one approach … will be appropriate for all cases'.[400] Rather, an assessment utilizing 'an unavoidable element of individual, discretionary judgment' [401] has to be made on a case-by-case basis." We note in this respect that the Appellate Body has also determined that:

> "The kind of evidence to be examined in assessing the 'likeness' of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are 'like' in terms of the legal provision at issue."[402]

7.239 Similarly, in the context of an examination of likeness for the purposes of Article 2.1 of the TBT Agreement, not only the provision to be applied, but also "the context and the circumstances that prevail in any given case to which that provision may apply" have a bearing on the identification of the appropriate approach.

7.240 In light of our earlier conclusions in paragraph 7.223 above, and in the circumstances of this case, we find it *a priori* appropriate to consider the four general criteria used by Mexico, to determine whether Mexican and other tuna products are like within the meaning of Article 2.1 of TBT Agreement. These elements are apt to provide information about the extent and nature of the similarities between these products, so as to ascertain the nature and extent of their (actual or expected) competitive relationship.

7.241 We take note also of the Appellate Body's observation, in the context of Article III:4 of the GATT 1994 that "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence".[403] This consideration applies similarly in the context of Article 2.1 of the TBT Agreement.

7.242 Mexico first submits that the physical properties of Mexican tuna products are identical to those of US tuna products insofar as the products from both WTO Members comprise tuna meat in a retail-ready package. Mexico further observes that canned and pouched tuna meat from the various tuna species compete against each other in the US tuna market, confirmation of this is that the largest

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[397] *(footnote original)* Id., para. 109.
[398] United States' first written submission, para. 104.
[399] Appellate Body Report, EC – Asbestos, para. 102.
[400] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, p.114.
[401] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, p.113.
[402] Appellate Body Report, *EC – Asbestos*, paras. 101–103.
[403] Appellate Body Report, *EC – Asbestos*, para. 102.

seller of tuna products in the United States packages various species of tuna meat.[404] Mexico also observes that, to the extent that there are physical differences in the species of the tuna meat, such differences do not materially affect the competitive relationship between Mexican and US tuna products because Mexican and certain US tuna products contain tuna meat from identical tuna species such as yellowfin tuna and canned and pouched tuna meat from the various tuna species compete against each other in the US market.[405]

7.243 It is not disputed that the physical characteristics and properties of Mexican tuna products and of tuna products of US origin and tuna products originating in any other country are identical, in that they all similarly contain tuna. The information cited in Mexico's submission suggests that tuna products may be made from a variety of tuna species[406] We note in this respect that, in other parts of its arguments, Mexico suggested that some species of tuna have more commercial value than others.[407] However, neither party has suggested or demonstrated that these various products would not be in competition on the same market as a result, or that such variations would have an impact on the extent to which Mexican and US tuna products compete with each other on the US market, such as to make them unlike for the purposes of Article 2.1 of the TBT Agreement.[408]

7.244 Mexico further observes that the end uses of Mexican tuna products and tuna products of US or other origin are identical, insofar as tuna products are destined for consumption by final consumers.[409] We note that it is not disputed that US and Mexican tuna products have the same end uses. We also note that it is not disputed that Mexican tuna products and tuna products from third countries have the same end uses.

7.245 Mexico also observes that Mexican and US tuna products and tuna are classified under the same tariff subheading 1604.14 of the Harmonized System, which relates to "Tunas, Skipjack and Bonito (Sarda Spp.) (Prepared or Preserved)".[410] That the tariff classification is identical for prepared

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[404] *(footnote original) See* http://www.starkist.com/template.asp?section=products/index.html. Exhibit MEX-54.

[405] Mexico's first written submission, para. 148.

[406] "Classic" tuna products are made of chunk light tuna, chunk or solid white albacore tuna; "gourmet" tuna products are made of select chunk light tuna. solid light tuna, yellowfin tuna and solid white albacore, see http://www.starkist.com/template.asp?section=products/index.html. (Mexico's first written submission, fn 100).

[407] See in particular Mexico's response to Panel question No.24 and 38 of the Panel, at fn 26 and para. 43.

[408] We note in this respect the observations of the Appellate Body, in the context of the second sentence of Article III.2 of the GATT 1994, to the effect that a degree of variation is inevitable in the context of grouping products for the purposes of a determination of whether they are "directly competitive or substitutable" under that provision. Similarly, an assessment of "likeness" may involve a grouping of products with some degree of variation in features. The key point, however, is to ascertain whether these products are "like" the domestic products to which they are being compared:

> "… Some grouping is almost always necessary in cases arising under Article III:2, second sentence, since generic categories commonly include products with some variation in composition, quality, function and price, and thus commonly give rise to sub-categories. From a slightly different perspective, we note that "grouping" of products involves at least a preliminary characterization by the treaty interpreter that certain products are sufficiently similar as to, for instance, composition, quality, function and price, to warrant treating them as a group for convenience in analysis. But, the use of such "analytical tools" does not relieve a panel of its duty to make an objective assessment of whether the components of a group of imported products are directly competitive or substitutable with the domestic products. …

Whether, and to what extent, products can be grouped is a matter to be decided on a case-by-case basis." *(Korea – Alcoholic Beverages*, paras. 142-143).

[409] Mexico's first written submission para. 150.

[410] Mexico's first written submission, para. 152 and fn 102.

or preserved tuna of all species confirms that tuna products made from different species are, for commercial purposes, in essence the same product.

7.246 In sum, an analysis of the first three *Border Tax Adjustment* criteria suggests that the products at issue share common physical characteristics and properties, end uses and tariff classifications. Indeed, they are in essence the same products, processed in a different country.

7.247 The fourth and final "general criterion" considered by Mexico is "consumer preferences", which the Appellate Body has defined in the context of Article III:4 of the GATT 1994 as the "extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses".[411] Mexico considers that, but for the regulatory distinction that is at the core of the dispute, consumers' tastes and habits are identical with respect to Mexican and US tuna products and tuna.[412] The United States does not challenge this conclusion.

7.248 We note that the European Union, in its third party submission, observed that the elements presented to the Panel suggest that there may be different consumer perceptions and preferences with respect to dolphin-safe and not dolphin-safe tuna and tuna products, and that this may have an impact on whether the two types of products are like.[413]

7.249 The information presented to the Panel does suggest that US consumers have certain preferences with respect to tuna products, based on their dolphin-safe status, and we do not exclude that such preferences may be relevant to an assessment of likeness. To the extent that consumer preferences, including preferences relating to the manner in which the product has been obtained, may have an impact on the competitive relationship between these products, we consider it *a priori* relevant to take them into consideration in an assessment of the likeness.[414] However, we are not persuaded that, in the circumstances of this case, a consideration of US consumer preferences relating to the dolphin-safe status of tuna products should lead us to modify our conclusion with respect to the likeness of US and Mexican tuna products and tuna products originating in any other country.

7.250 The basis for our analysis is a comparison between Mexican tuna products and tuna products of US origin and tuna products originating in any other country, not between dolphin-safe and not dolphin-safe tuna. A comparison on the basis of dolphin-safe status would imply that Mexican tuna products are assumed not to be dolphin-safe while US tuna products and tuna products originating in any other country would be assumed to be dolphin-safe. However, we see no basis for making such

[411] Appellate Body Report, *EC— Asbestos*, para. 117.
[412] Mexico's first written submission para. 151.
[413] European Union's third party written submission, para. 28.
[414] In *EC – Asbestos*, the European Communities had requested the Appellate Body to find the Panel's approach had misconstrued the relationship between Articles III:4 and XX of the GATT 1994 by requiring the likeness of two products be determined solely on the basis of commercial factors. In the EC's view, "If non-commercial considerations may only be considered at the Article XX stage of the analysis, then the list of policy for which regulators may distinguish between products is unduly limited to the categories listed in Article XX." The Appellate Body disagreed with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. It stated that "The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implied a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*." Evaluating evidence relating to the health risks arising from the physical properties of a product does not, in the Appellate Body's opinion, prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). The Appellate Body found the Panel erred in excluding the health risks associated with chrysotile asbestos fibres from its examination of the physical properties of that product. Appellate Body Report in *EC – Asbestos*, paras. 34 , 115 and 116.

an assumption at this stage of our analysis.[415] We also note that it has not been suggested that, to the extent that US consumers would distinguish between different tuna products based on their dolphin-safe status, they would not apply this distinction to all tuna products, whatever their origin. As observed by Mexico, the preferences of US consumers are identical, in respect of US and Mexican tuna products and indeed, tuna products originating in any other country. In light of these elements, we find that an examination of US consumer preferences in relation to the dolphin-safe status of tuna products does not modify our conclusion that Mexican tuna products are like tuna products of US origin and tuna products originating in any other country.

7.251 We therefore conclude that Mexico has established that Mexican tuna products are like tuna products of US origin and tuna products originating in any other country within the meaning of Article 2.1 of the TBT Agreement.

(c) Whether Mexican tuna products are afforded less favourable treatment than tuna products originating in the United States and other countries in respect of the US dolphin-safe labelling provisions

7.252 Having determined that Mexican tuna products and tuna products of US and other origins are like products within the meaning of Article 2.1, we must now determine whether Mexican tuna products are afforded less favourable treatment than tuna products of US and other origins in respect of the US dolphin-safe labelling provisions.

(i) Arguments of the parties

7.253 In its first written submission,[416] Mexico explained that the less favourable treatment arising from the measures is a result of the following:

(a) Mexican tuna are almost exclusively caught in the ETP using purse seine nets set on dolphins; Mexican tuna products containing this tuna cannot be designated as dolphin-safe although the Mexican fleet complies with the stringent requirements of AIDCP;

(b) the US fleet fishes outside the ETP using other methods such as setting on FADs; tuna products containing this tuna can be labelled dolphin-safe under the measures, even where marine mammal mortality might have occurred and bycatch reduction might be compromised;

(c) accordingly, Mexican tuna products cannot be labelled dolphin-safe while US tuna products can;

(d) it is established that participants in the US market are sensitive to "issues related to dolphin mortality" and will make decisions on the basis of whether the products are designated as dolphin-safe. Most participants will not purchase tuna products that are not designated as dolphin-safe;

[415] Indeed, such an assumption would imply that "dolphin-safe" tuna is defined as meaning exclusively what the US measures at issue define it to mean, i.e. inter alia, tuna caught without setting on dolphins. This definition is, however, disputed between the parties. Furthermore, as observed by the United States and acknowledged by Mexico, not all of the tuna of Mexican origin is caught by setting on dolphins.

[416] Mexico's first written submission, para. 165.

(e) accordingly, most US market participants will not purchase, offer for sale, distribute or use Mexican tuna products but will purchase US tuna products. The US measures prevent Mexico and Mexican tuna industry from taking action to re-balance the competitive opportunities between Mexican and like US tuna products by labelling their tuna products as dolphin-safe and promoting the integrity and legitimacy of the AIDCP standard;

(f) although the measures apply to tuna products, they have an indirect discriminatory effect on Mexican tuna, because canneries will not accept Mexican tuna for processing.

7.254 Subsequently, as we have clarified, Mexico expressly limited its claims to tuna products and not tuna. As we understand it, therefore, the final element identified in (f) is no longer relevant to Mexico's claim.

7.255 In its rebuttal submission, Mexico also clarifies that its discrimination claims "are not dependant on demonstrating that the treatment of ETP and non-ETP fisheries is different" and that "the factual basis of Mexico's discrimination claims is that the *prohibition* against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like product from the United States and other countries".[417]

7.256 The United States argues that Mexico has failed to establish that the origin-neutral conditions (the manner or the place in which the tuna was caught) under which tuna products may be labelled dolphin-safe do actually accord different treatment to imported tuna products. Specifically, the United States argues that Mexico has not adduced evidence to show that the US dolphin-safe labelling provisions – although origin neutral on their face – in fact use the manner or the place in which the tuna was caught to single out imports. On the contrary the evidence leads to the opposite conclusion.[418]

7.257 The United States considers that Mexico has failed to establish that the origin-neutral conditions under which tuna products may be labelled dolphin-safe in fact accord different treatment to imported tuna products. The United States considers in particular the following aspects:

(a) the overwhelming majority of tuna products on the US market are imported and the vast majority of those products are not caught by setting on dolphins[419];

(b) Mexican vessels use methods other than setting on dolphins to catch tuna[420];

(c) US vessels set on dolphins to catch tuna at the time the US dolphin-safe labelling provisions were enacted[421];

(d) that Mexican vessels fish in the ETP is not a basis to argue that the US dolphin-safe labelling provisions accord different treatment to Mexican tuna products; [422] and finally

[417] Mexico's second written submission, para. 150.
[418] United States' second written submission, para. 21.
[419] United States' second written submission, paras. 22-23.
[420] United States' second written submission, paras. 24-27.
[421] United States' second written submission, para. 28.
[422] United States' second written submission, paras. 29-32.

(e) there is no evidence that the objective of the US dolphin-safe labelling provisions is to afford protection to domestic production.

7.258 The United States also explains why, in its view, to the extent that there are any differences in documentation required to substantiate dolphin-safe claims, they are calibrated to the risk that dolphins may be killed or seriously injured when tuna is caught.[423] In the US view, dolphin mortalities outside the ETP are not comparable to dolphin mortalities and injury in the ETP.[424] The United States further considers that the structure of the statute shows a clear relationship with its stated objectives and does not support the conclusion that the dolphin-safe labelling conditions are applied in a manner so as to afford protection.[425]

7.259 As far as the MFN component of its claim is concerned, Mexico refers to its arguments presented under Articles I:1 and III: 4 of the GATT on the basis that "[t]his provision of the TBT Agreement imposes national treatment and most-favoured nation treatment obligations on technical regulations. It is similar to the national treatment obligation in Article III:4 of the GATT 1994, except that it applies both national treatment and most-favoured-nation obligations. Like Articles I:1 and III:4 of the GATT 1994, Article 2.1 prohibits both *de jure* discrimination and *de facto* discrimination".[426]

7.260 In that respect, Mexico observes, as in respect of its claim under Article III:4, that the US measures do not, on their face, discriminate on the basis of the foreign country that is the source of particular tuna and tuna products; rather, they discriminate on the basis of where the tuna is harvested and the fishing method. But this has the effect of favouring tuna and tuna products from some countries over others because different countries harvest tuna in different ocean fisheries using different fishing methods.[427] In its opinion, by reflecting the longstanding fishing practice of the Mexican fishery, whilst the fleets of other countries fish outside of the ETP using other fishing methods such as purse-seine nets that are set upon FADs, the US dolphin-safe labelling provisions *de facto* discriminate against Mexican tuna insofar as tuna products that contain tuna originating from these countries' fleets can be designated as dolphin-safe and a dolphin-safe label can be affixed to those products whilst Mexican tuna products cannot be designated as dolphin-safe.

7.261 Given the preference of the US market for products labelled as safe, Mexico asserts that the US measures prevent Mexico and the Mexican tuna industry from taking action to re-balance the competitive opportunities between Mexican tuna products and like products originating in other countries by labelling their tuna products as dolphin-safe and promoting the legitimacy and integrity of the AIDCP standards, which in its view, has led to a situation whereby tuna and tuna products from certain countries are prevalent in the US market, while it is not commercially viable to sell imported Mexican tuna products in the US market.[428]

7.262 Mexico concludes that due to the lack of dolphin-safe designation, fish canneries located in other WTO Members will not accept Mexican tuna for processing into tuna products. These canneries will, however, accept tuna in other countries that can be designated dolphin-safe once processed. Therefore, for the same reasons as the one alleged under Article I:1 of the GATT, the US measures do

[423] United States' second written submission, para. 38.
[424] United States' second written submission, paras. 33-36.
[425] United States response to Panel question No. 150, para. 106.
[426] Mexico's first written submission, para.256.
[427] Mexico's first written submission, para. 185.
[428] Mexico's first written submission, para. 185.

not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products originating in any other country.[429]

7.263 According to the United States, the US dolphin-safe labelling provisions do not afford less favourable treatment to Mexican tuna products *vis-à-vis* products of other origin insofar as they afford the use of the dolphin-safe label equally to all tuna products that meet the conditions set out in those provisions and deny that possibility equally to all tuna products that fail to meet those conditions. In the United States' view, the fact that the US dolphin-safe labelling provisions prohibit tuna products containing tuna caught by setting on dolphins – a technique that some Mexican vessels happen to use – does not mean that the US provisions afford less favourable treatment to Mexican tuna and tuna products. Instead, it means that Mexican vessels have chosen to set on dolphins to catch tuna and, because of that choice, tuna products that contain tuna caught by setting on dolphins by those vessels do not meet the conditions necessary to use the dolphin-safe label, just as tuna products containing tuna caught by vessels flagged to any other country, including the United States, do not meet the conditions necessary to use the dolphin-safe label.[430]

7.264 In response to a question by the Panel on whether less favourable treatment under Article 2.1 of the TBT Agreement should be assumed to have exactly the same contours as the same analysis under Article III:4 of GATT 1994, Mexico noted that the provision contains two non-discrimination obligations applicable to technical regulations, one that is similar to the national treatment obligation in Article III:4 and the other that is similar to the most-favoured-nation obligation in Article I:1, although the language used in Article 2.1 is different from that used in Articles III:4 and I:1. [431] It observed however that the immediate context of the term "treatment no less favourable" is identical in Articles III:4 and 2.1 and that therefore, it is appropriate to give the term the same meaning under both provisions.[432] In its view, it is crucial that the term "treatment no less favourable" in Article 2.1 is interpreted and applied with reference to the equality of competitive opportunities for imported products as compared to like domestic products. Mexico contends that such competitive opportunities can be affected in a variety of ways, not only by measures directly regulating products and restricting imports but by those that indirectly affect imports. In that regard, the concept of the equality of competitive opportunities is flexible and protects the integrity of the non-discrimination obligations in a broad range of factual circumstances, Mexico says.[433]

7.265 For that reason, Mexico concludes that the assessment for "treatment no less favourable" in Article 2.1 of the TBT Agreement should be the same as under Article III:4 of the GATT 1994 i.e., whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.[434] Mexico acknowledges the different language used in Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement but however notes that while the language in the two provisions differs, both set out the MFN treatment obligations which is a cornerstone of the GATT and one of the pillars of the WTO trading system.[435] Mexico finally recalls that Article I:1 protects the competitive opportunities of imported products, not trade flows and it imposes upon WTO Members the obligation to treat like foreign products equally, irrespective of their origin and that it is in the sense of the protection of competitive opportunities for imported products from one WTO Member *vis-à-vis* like products from other WTO Members that the jurisprudence interpreting

[429] Mexico's first written submission, para. 261.
[430] United States' first written submission, para. 108.
[431] Mexico's response to Panel's question No. 58(a), para 172.
[432] Mexico's response to Panel's question No. 58(a), para 176.
[433] Mexico's response to Panel's question No. 58(a), para 177.
[434] Mexico's response to Panel's question No. 58(a), para. 178.
[435] Mexico's response to Panel's question No. 58(a),para. 180.

the obligation in Article I:1 of the GATT 1994 is relevant to the interpretation of Article 2.1 of the TBT Agreement.[436]

7.266 In response, the United States emphasizes the textual differences between Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement which it argues should be taken into account when interpreting Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement respectively. It holds that with respect to the U.S. arguments in connection with Mexico's claim under Article 2.1 of the TBT Agreement, Mexico did not present any evidence or argument in support of that claim that differed from the evidence and argument it presented in connection with its claims under Article I:1 or Article III:4 of the GATT 1994, whereas the United States has demonstrated in its response to Mexico's claims under Articles I:1 and III:4 of the GATT 1994 that those claims are without merit.[437]

(ii) Analysis by the Panel

7.267 We must first clarify the meaning of the terms "less favourable treatment" in Article 2.1 of the TBT Agreement, before turning to a consideration of whether, in the present case, such less favourable treatment is afforded to Mexican tuna products with respect to the US dolphin-safe labelling provisions.

Meaning of "less favourable treatment" in Article 2.1 of the TBT Agreement

7.268 To recall, Article 2.1 of the TBT Agreement provides:

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

7.269 As previously, we must interpret the terms "less favourable treatment" in this provision in accordance with the customary rules of interpretation of public international law, which direct the interpreter to determine the ordinary meaning of the terms, taken in their context, and in light of the object and purpose of the treaty.

7.270 We note that the term "less favourable treatment", like the term "like products", appears in more than one provision of the covered agreements, and has previously been interpreted in the context of some of these provisions, including Article III:4 of the GATT 1994 and, to some extent, Article II of the GATS.[438] We also note that these terms fulfil, in these various provisions, a comparable function, i.e. they define the content of a non-discrimination obligation (e.g. MFN in the case of Article II of the GATS, and national treatment in the context of Article III:4). Interpretations of the same term in these other provisions may therefore provide useful guidance for its interpretation in the context of the TBT Agreement.

7.271 At the same time, as previously, we are mindful that the same terms may not have exactly the same contours in various provisions of different covered agreements, and that we must interpret the

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[436] Mexico's response to Panel's question No. 58(a),paras, 181-182.

[437] United States' response to Panel's question No. 58 (a), para. 133.

[438] See *US – Gasoline* (Panel Report, *US – Gasoline*, para. 6.10), *Japan – Film* (Panel Report, *Japan – Film*, para. 10.379), *Korea – Beef* (Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-137.), *EC – Asbestos (*Appellate Body Report, *EC – Asbestos*, para. 100), *EC – Bananas III* (Appellate Body Report, *EC – Bananas III*, paras. 231-234), *Canada – Autos* (Panel Report on *Canada – Autos*, para. 10.254).

terms "less favourable treatment" in Article 2.1 of the TBT Agreement taking account of the specific context in which they appear in this particular covered agreement. We note in this respect the Appellate Body's observations concerning the interpretation of the MFN obligation contained in Article II of the GATS, which is also expressed in terms of "less favourable treatment":

> "The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994".[439]

7.272 This observation suggests that the object of the specific provision at issue, as well as its wording, must be given due consideration in interpreting the terms "less favourable treatment". This is consistent with the requirements of the customary rules of interpretation, which require a consideration of the terms of the treaty in their context and in light of its object and purpose.

7.273 The relevant dictionary meanings of the word "treatment" suggest that it refers to the manner in which something is addressed.[440] Dictionary definitions of the adjective "favourable" point to something "positive", and a synonym is "advantageous".[441] The plain meaning of the term therefore suggests that imports of any Member must not be dealt with, in respect of technical regulations, in a manner less advantageous, than the like products of national or any other foreign origin. Read in light of the broader context of Article 2, less favourable treatment would arise "in respect of technical regulations", if imported products originating in any Member were placed at a disadvantage, compared to like domestic products and imported products originating in any other country, with respect to the preparation, adoption or application of technical regulations.

7.274 This is consistent with the general concept articulated by the Appellate Body that: "[t]he essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin".[442] Although this statement was made in the context of an analysis of Article I of the GATT 1994, in our view it sheds light on the essence of non-discrimination obligations in the covered agreements under Annex 1A generally (i.e. those agreements concerning trade in goods), both MFN and national treatment.

7.275 In our view, such "equality" of treatment does not necessarily imply *identity* of treatment for all products, but rather an *absence of inequality* to the detriment of imports from any Member. Here, we see some commonality between this requirement and the non-discrimination obligations embodied in Articles III:4 and Article I:1 of the GATT 1994. Under Article III:4, the Appellate Body thus observed that:

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[439] (*footnote original*) In addition to Article I (the fundamental MFN provision of the GATT), Articles III:7, IV(b), V:2 and V:5, IX:1 and XIII:1 are also MFN-type obligations in the GATT 1994. Appellate Body Report, *EC – Bananas III*, para. 231.

[440] Oxford English Dictionary Online, at www.oed.com.

[441] Oxford English Dictionary Online, at www.oed.com.

[442] Appellate Body Report, *EC – Bananas III*, para. 190.

> "[A] Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products."[443]

7.276 The same reasoning extends also to Article 2.1 of the TBT Agreement. The essence of the measures covered under this provision is to set out certain product characteristics or their related processes and production methods (or terminology, symbols, packaging, marking or labelling requirements as they apply to products or related processes and production methods), that must be complied with. Distinctions in treatment may therefore arise in this context, but they must not be designed or applied to the detriment of imports or imports of certain origins. In the context of Article 2.1 of the TBT Agreement, this question is also informed by the terms of the preamble, which makes it clear that measures covered by the TBT Agreement must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

7.277 We also note that the obligation placed on Members is to "*ensure that* products ... *shall* be accorded treatment no less favourable". This language requires the achievement of "treatment no less favourable", and not only "reasonable measures" to that end, as is the case under Article 3 in relation to technical regulations by local government bodies and non-governmental bodies.

7.278 In the light of these determinations, we now consider whether Mexican tuna products are treated *less favourably* than US and/or other imported tuna products originating in any other country, i.e. in essence, whether Mexican tuna products are at a disadvantage compared to tuna products originating in the United States or in any other country, in respect of the US dolphin-safe labelling provisions.

> Whether less favourable treatment is afforded to Mexican tuna products than to tuna products of US or originating in any other country

7.279 Mexico explains that the factual basis for its discrimination claim is that the "prohibition" against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like products from the United States and other countries.[444] As described above, Mexico explains that its products do not have access to the label regulated by the measures, because Mexican tuna are caught "almost exclusively" in the ETP by setting on dolphins, while US tuna products have access to the label, because the US fleet fishes outside the ETP by other fishing methods. The "prohibition" that Mexico alleges therefore rests on an assumption that its products fall under one (less desirable) regulatory category, i.e. tuna caught by setting on dolphins, which is not eligible for the label under any circumstances, while those of the United States and a number of other countries fall under another (more desirable) one, i.e. tuna caught outside the ETP using other methods, which is eligible for the label.

7.280 In response to a question by the Panel concerning the basis for its claims, Mexico clarified that its non-discrimination claims "are not dependant on demonstrating that the treatment of ETP and non-ETP fisheries is different".[445] As we understand it, therefore, Mexico does not challenge any differences in treatment arising from different regulatory categories for tuna caught in different fishing zones. Rather, Mexico's discrimination claim is based on the requirement of "no setting on

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[443] Appellate Body Report, *EC – Asbestos*, para. 100.
[444] Mexico's second written submission, para. 150.
[445] Mexico's response to Panel question No 145, para. 124.

dolphins" that conditions access to the US dolphin-safe label, wherever the fish is caught, and its implications in practice for Mexican tuna products.

7.281 What Mexico argues, in essence, is that this distinction *in fact* operates so as to exclude most Mexican tuna products from access to the label, while most US tuna products and those of a number of other countries, will benefit from it. As we understand it, this argument rests on the following key elements:

(a) that access to the label has a value on the marketplace, such that it is an advantage to have access to the label, and a disadvantage not to have access to it;

(b) that Mexican tuna products have no access (or virtually no access) to this added value on the market, while US and other imported tuna products do, by virtue of the different fishing practices of their respective fleets; and

(c) that, as a result, the measures modify the conditions of competition on the marketplace to the detriment of Mexican tuna products.

7.282 With respect to the MFN component of its claim, Mexico argues that the measures at issue make the advantage of access to the label "subject to conditions with respect to the situation or conduct of Mexico, and that these conditions discriminate products from Mexico in favour of tuna products of other countries".[446] It further argues that tuna products from "virtually all other countries, including the two largest exporters Thailand and the Philippines", are allowed to label their products dolphin-safe, and that, by contrast, exporters of Mexican tuna products are not.[447]

7.283 As we have determined above, "less favourable treatment" would be afforded to Mexican tuna products in respect of the measures if they were placed at a disadvantage compared to US and/or other imported products with respect to the preparation, adoption or application of the US dolphin-safe measures. Mexico's claim in the present case is that it is *de facto* deprived of the benefit of access to the label, and thus at a competitive disadvantage on the US market because it fishes in the ETP by setting on dolphins while the US and other fleets fish outside the ETP by other methods.

7.284 We agree that, to the extent that access to the label would be an advantage granted by the measures, and that Mexican tuna products were to be deprived of access to this advantage while US or other imported tuna products originating in any other country had access to it, this would place Mexican tuna products at a disadvantage on the US market and thus constitute "less favourable treatment" within the meaning of Article 2.1 of the TBT Agreement. We therefore must consider whether (a) access to the label is an advantage and (b) Mexican tuna products are denied access to it under the measures, so that they are disadvantaged on the US market as compared to US or imported tuna products originating in any other country.

Whether access to the US dolphin-safe label constitutes an advantage on the US market

7.285 As described in Section 7.53(c) above, the measures at issue do not *require* any tuna products to be labelled "dolphin-safe", nor do they subject the right to market tuna products on the US market to meeting the conditions for the label.[448] Nonetheless, access to the label is controlled by compliance

[446] Mexico's second written submission (Article I).
[447] Mexico's opening oral statement at the second substantive meeting (Article I).
[448] We note that the GATT 1947 *US – Tuna* panels examined embargoes on importation of tuna products in addition to the dolphin safe labelling scheme.

with the terms of the measures. Therefore, to the extent that access to the label is an advantage on the marketplace, this advantage is provided by the measures themselves. The exact value of the advantage provided by access to the label on the marketplace will depend on the commercial value attributed to it by operators on the market, including retailers and final consumers.

7.286 The United States observes that its dolphin-safe labelling provisions do not impose any choice on marketers of tuna products in terms of selling tuna products in the United States, and that Mexico has not identified anything in the provisions that would limit the marketing of tuna products that are not dolphin-safe or are not labelled dolphin-safe. It argues that the limited demand for non-dolphin-safe tuna products is a result of retailer and consumer preferences for dolphin-safe tuna products, not the US dolphin-safe labelling provisions.[449]

7.287 We agree with the United States that US consumers' decisions whether to purchase dolphin-safe tuna products are the result of their own choices rather than of the measures. However, as observed above, it is the measures themselves that control access to the label and allow consumers to express their preferences for dolphin-safe tuna. An advantage is therefore afforded to products eligible for the label by the measures, in the form of access to the label.[450]

7.288 We further note that it is undisputed that US consumers are sensitive to the dolphin-safe issue. This is acknowledged by both Mexico and the United States[451], and is also confirmed by the evidence presented with the *amicus curiae* brief to which the United States has referred to in its answers to questions.[452] This evidence suggests that, following public campaigning by the environmental organization "Earth Island Institute" in the late 1980s (including through film footage shot in 1987-88 showing the capture and killing of dolphins during a fishing trip where setting on dolphins was used), tuna processors were under pressure to stop purchasing tuna caught in conditions that were harmful to dolphins.[453] The evidence presented to the Panel also shows that major tuna processors reacted to these dolphin-safe concerns, and that this led to changes in their purchasing policies as of April 1990. These policies are still in place: such companies will not purchase tuna from vessels that fish in association with dolphins.[454]

7.289 These elements suggest that the dolphin-safe label has a significant commercial value on the US market for tuna products, as the only means through which dolphin-safe status can be claimed. Indeed, the evidence that canners refuse to buy tuna caught in association with dolphins suggest that the pressure is sufficient to induce processors of tuna products to avoid altogether tuna that would make their final products ineligible for the label. While this is only indirect evidence as to the final consumers' behaviours, it suggests that the producers themselves assume that they would not be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase.

7.290 In addition, Mexico has presented evidence concerning retailers' and final consumers' preferences regarding tuna products. With respect to retailers, Mexico has presented an affidavit from an officer of a US company selling Mexican canned tuna in the US market, in which it stated that for

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[449] United States' second written submission, para. 61.

[450] See the panel's findings in *Colombia – Ports of Entry*, in the context of Article I, where an "advantage" was granted in the form of "flexibility" to present import declarations in more favourable conditions. See Panel Report, *Colombia – Ports of Entry*, paras. 7.339-7.347.

[451] Mexico's first written submission, para. 160 and response to Panel question No. 40 (b) United States' response to Panel question No. 40 (a).

[452] United States' response to Panel question No. 40(a), para. 98 which cites paras. 18-20, 25, 62-64 of the amicus curiae brief which in turn refer to Exhibits 1, 2, 3 and 4 attached to the amicus submission.

[453] Exhibit Amicus curiae brief EX-2.

[454] Exhibit US-32, Exhibit US-36 and Exhibit US-37.

several years the company attempted to sell Mexican tuna products in major US grocery chains which have refused to buy the products because they were unable to sell the brand that was not eligible for the dolphin-safe label. The affidavit provides evidence that some of the major US chains have expressly indicated that if the tuna product qualified to be labelled "dolphin-safe" they would sell it and that the company's inability to place the "dolphin-safe" label on the cans has directly affected its ability to sell the Mexican brand in the US.[455] This evidence confirms the value of the dolphin safe label on the US market.

7.291 We therefore agree with Mexico that access to the label provides an advantage on the US market. With this initial determination in mind, we now consider whether, as Mexico argues, its tuna products are effectively denied access to the advantage provided by the label, while US and other imported tuna products originating in any other country benefit from access.

> Whether Mexican tuna products are denied access to the advantage offered by the dolphin-safe label and are thereby disadvantaged, compared to tuna products originating in the United States or in any other country

7.292 As described above, Mexico analyses the existence of less favourable treatment in terms of comparing the treatment afforded to Mexican tuna products made from tuna caught in the ETP by setting on dolphins (not eligible for the label) and the treatment afforded to US tuna products made from tuna caught by other methods (eligible for the label) outside the ETP. Mexico's analysis is therefore based on comparing the treatment currently received by most of its own tuna (which is caught in conditions that do not entitle products made from it to the label) and that currently received by most of the US tuna (caught in conditions that entitle products made from it to bear the label).

7.293 The United States, on the other hand, considers that "the US dolphin-safe labelling provisions afford use of the dolphin-safe label equally to all tuna products that meet the conditions set out in those provisions and deny that possibility equally to all tuna products that fail to meet those conditions".[456] This approach appears to assume that the relevant comparison is whether within the categories of tuna products entitled or not entitled to the label, there is any differentiated treatment between Mexican tuna products and those products originating in the United States or in any other country. However, Mexico's complaint lies in the difference of treatment between products falling on either side of the regulatory distinction, i.e. between products that are entitled to the label and those that are not.

7.294 A comparison of treatment *within* each of the regulatory categories, although it may reveal differences in treatment, cannot therefore form the sole basis of the assessment of Mexico's claim in this case. The analysis to be conducted must necessarily, in this case, encompass a comparison of the treatment afforded to imported products that have access to the label and domestic products that do not have access to it. On the other hand, a comparison that considered *only* those imports that have no access to the label and those domestic products that do have access to it may also be insufficient, if it were to only reveal that some imports do not receive the better treatment afforded to some domestic products.

7.295 In this respect, we find that the Appellate Body's suggestion, in *EC – Asbestos*, that an enquiry into less favourable treatment involves a comparison of how the group of domestic like products and the group of like imports are treated,[457] provides useful guidance. It suggests that the starting point for the analysis should be the entire groups of both products identified as like products.

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[455] Exhibit MEX-58.
[456] United States' first written submission, para. 109.
[457] Appellate Body Report, *EC – Asbestos*, para. 100.

Accordingly, we approach this analysis on the basis of a comparison between the treatment afforded to the groups of US and Mexican tuna products as a whole, as well as Mexican tuna products compared to tuna products originating in any other country, in order to assess the relative situation of these products in respect of access to the dolphin-safe label regulated by the US dolphin-safe provisions.

7.296 The parties have also debated the relevant timeframe for the assessment, and we therefore find it useful to clarify this also as a preliminary matter.

7.297 The United States cites the panel report in *Mexico – Taxes on Soft Drinks* in support of an analysis of the measure at the time of its adoption, therefore comparing the impact the measure had on domestic and imported like products at the time it was enacted rather than the actual trade effect the measure has as of today on imported compared to domestic like products. Mexico objects to this approach, arguing that the US measures violate the non-discrimination provisions because their effect is to adversely modify the conditions of competition in the US marketplace for Mexican tuna products when compared to like tuna products from the United States and other countries, and that such denial of competitive opportunities is shown by the relevant facts as they existed at the time of the establishment of the Panel.[458] In particular, Mexico argues that it is not necessary for the Panel to determine whether the US measures when introduced in 1990 *de facto* discriminated against Mexican tuna products but that it must examine the facts as of the date of the Panel's establishment and determine whether, on the basis of those facts, there is *de facto* discrimination.[459] Mexico also argues that it is not possible, without a complete assessment of all relevant facts to determine whether there was *de facto* discrimination at that time and hence it cannot be assumed that they were not *de facto* discriminatory in 1990.[460] Mexico also observes that the European Union's position as a third party in the present dispute differs from its position in the context of the *US – COOL* dispute (DS386).[461]

7.298 Finally, Mexico considers that the unadopted GATT 1947 panel report in *US – Tuna (Mexico)* further illustrates the importance of the Panel examining the facts as they existed at the time of its establishment insofar as, at the time of the GATT 1947 panel, the United States had a trade embargo in place against Mexican tuna. As a result, Mexican tuna imports were blocked so there was no factual basis upon which to assess the effects of the dolphin-safe labelling provisions in the US market. In other words, there was no evidence of the *de facto* discrimination and trade-restrictive effects of the challenged measures.[462] In Mexico's view, the *de facto* discriminatory and trade restrictive effects are clearly occurring today and it is the existence of those effects that gives rise to Mexico's request that the Panel rule upon its claims of *de facto* discrimination in this dispute.[463]

7.299 We first recall that our mandate requires us to consider the consistency of the measures in accordance with our terms of reference.[464] These terms of reference are defined by Mexico's request

[458] Mexico's second written submission, para. 132.
[459] Mexico's second written submission, paras. 133134.
[460] Mexico's second written submission, paras. 135.
[461] Mexico explains that in *US – COOL*, the European Union argued, in response to an argument that the Panel should consider historic facts that existed long before a Panel's establishment when assessing whether *de facto* discrimination exists today, that the Panel must look at future facts insofar as "the immediate regulatory shock" of a regulation does not, in itself, necessarily demonstrate less favourable treatment (see Mexico' rebuttal submission, fn 88) (The Panel has not been provided with the European Union's third party submission in that dispute).
[462] Mexico's second written submission, para. 138.
[463] Mexico's second written submission, para. 139.
[464] See Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22 ("The matter referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference").

for establishment of a panel. Accordingly, we are required to determine the existence of a violation as of that time, and to make recommendations for compliance on that basis.[465] In the present case, our task is therefore to determine whether, as of the date of the establishment of this Panel, the US dolphin-safe labelling provisions violate the relevant provisions of the covered agreements.

7.300 However, this does not necessarily imply that past events are irrelevant to an assessment of whether such a violation exists. It is quite possible that past events will shed light on the Panel's assessment of the situation as of its establishment, and an understanding of the situation as it presents itself today may legitimately be informed by its history.[466] There is, in our view, no reason to exclude *a priori* such aspects from consideration, to the extent that they may inform a proper understanding of the situation as of establishment of the Panel.

7.301 With these initial clarifications in mind, we now consider whether Mexican tuna products are at a disadvantage, compared to tuna products of US and any other origin, with respect to access to the US dolphin-safe label under the measures at issue.

7.302 Mexico argues that its fleet primarily catches tuna in the ETP by setting on dolphins (thereby making it ineligible for the US label), while the US and other fleets catch tuna primarily outside the ETP using other fishing methods. It is therefore the combination of the fishing method used and geographical fishing zone exploited by different fleets with the requirements of the measures that results in what Mexico calls a "prohibition" on using the label for Mexican tuna products.

7.303 We therefore consider in turn the regulatory distinction upon which Mexico's claims rest (i.e. the requirement of not setting on dolphins), the fishing practices of the Mexican and other fleets, and the relative situation of Mexican and other tuna products originating in any other country on the US market, in order to determine whether Mexican tuna products are at a disadvantage in respect of the US dolphin-safe labelling provisions. Finally, we also address an additional argument by Mexico to the effect that less favourable treatment is demonstrated by the very nature of the measures at issue and the "pressure" that they exert on Mexico to modify its fishing practices.

The regulatory distinctions at issue: setting on dolphins as opposed to not setting on dolphins

7.304 As described in Section II above, the US dolphin-safe labelling provisions involve a number of regulatory distinctions, that form the basis for different substantive and documentary requirements for the obtention of a "dolphin-safe" label, depending on the fishery involved, the type of vessel, and the fishing method employed. As also described above, the key regulatory distinction of relevance to Mexico's discrimination claims is the distinction between the treatment of tuna products containing tuna caught by setting on dolphins and the treatment of tuna products containing tuna caught by other fishing methods. Both inside and outside the ETP, tuna is required not to be caught by setting on dolphins for tuna products made from it to qualify for the US dolphin-safe label.[467] Because its fleet sets on dolphins while the United States and a number other fleets do not, Mexico considers that this requirement amounts to a "prohibition" on bearing the label for Mexican tuna. We therefore first consider this regulatory distinction in itself.

[465] In accordance with Article 19.1 of the DSU, when a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.

[466] We note that in the context of an assessment of "less favourable treatment" under Article III:4 of GATT 1994, the Appellate Body's reference to whether the measure at issue "modifies" the conditions of competition suggest that a consideration of the situation today as compared to what it was prior to the enactment of the measure may be pertinent in assessing its impact. The same considerations apply in the present context.

[467] Paragraph (d) of Section 1385 of the DPCIA.

7.305 We first note that, the fact that the measures distinguish between fish based on its capture method rather than its origin, this distinction is not inherently tied to the "national" origin of the fish. The fishing method at issue, setting on dolphins, is accessible to any fleet operating in an area where such method can be practised. Therefore, denying the label to tuna caught by "setting on dolphins" does not, in itself, imply that "less favourable treatment" is afforded to Mexican tuna products. Indeed, any fleet operating anywhere in the world must comply with the requirement.

7.306 The evidence before the Panel suggests that setting on dolphins occurs especially in the ETP, because of the regular association observed between tunas and dolphins in that area.[468] However, we note that Mexico itself has suggested that association between tunas and dolphins, and setting on dolphins as a fishing method, is also practised outside of the ETP.[469] The evidence before us confirms that such association and the practice of "setting" on dolphins has been observed in other areas of the world, though not on the commercial scale observed in the ETP.[470] To the extent that setting on dolphins is or can be practised outside the ETP, the impact of the requirement not to set on dolphins would be felt also in those other fisheries.

7.307 We acknowledge that the requirement of not intentionally setting on dolphins as a condition for access to the label may be more onerous in practice for those fleets operating in the ETP, to the extent that the method is known to be regularly employed on a commercial scale in the ETP. However, even assuming that access to the label may be more onerous for purse seine fleets fishing in the ETP as compared to those fishing outside the ETP, this would in principle affect equally all fleets fishing in the ETP. It is undisputed that, as a fishery, the ETP is accessible to – and is in fact used by – a number of fleets, including those of Bolivia, Colombia, Ecuador, El Salvador, Guatemala,

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[468] Although Mexico has pointed out that there may be association that occurs outside of the ETP and setting on dolphins causing mortality or serious injury it has not challenged the United States' assertion that association occurs in the ETP. Mexico's second written submission, para. 3 and Mexico's response to Panel question No. 86.

[469] "With regard to the U.S. argument that non-ETP tuna is not caught by setting nets on dolphins, Mexico has already explained that there is considerable evidence to the contrary. Mexico has already submitted evidence that dolphins and other marine mammals are being killed in substantial numbers outside the ETP by other fishing methods. Mexico has further explained that for non-ETP tuna, the United States has no mechanism to verify the accuracy of captains' certifications or the precision of non-U.S. canneries' tracking systems. If the goal of the U.S. measure genuinely is to give consumers accurate information on whether the specific tuna products they are purchasing were caught in a manner harmful to dolphins, the U.S. measure cannot fulfil that objective for tuna products made from non-ETP tuna." Mexico's response to Panel question No. 156, para. 147.

[470] "Vessels outside the ETP that may intentionally or incidentally trap dolphins in their nets do not possess the training, the gear or the nets to safely release those dolphins." Mexico's response to Panel question No. 28, para. 54.

"There is substantial evidence of significant interactions between fishing vessels and dolphins outside the ETP, but the United States has devoted no resources to investigating or monitoring those interactions." Mexico's response to Panel question No. 86, para. 3.

Exhibit MEX-4: The association of yellowfin tuna with dolphins has been observed in all oceans of the world.

Exhibit MEX-97 : List of bycatch species recorded as being ever caught by any major tuna fishery in the Atlantic/Mediterranean proves that there is dolphin bycatch with the use of purse seine nets (however it does not explicitly say whether the purse seine was set on dolphins).

Exhibit MEX-98: On the Western and Central Pacific tuna fishery: "There is a relatively high level of observer coverage in the equatorial purse-seine fishery, with 33,319 sets of observed in the last 11 years 1995-2005. Marine mammals were caught in a very small proportion of these observed sets, mainly from sets targeting tuna schools associated with either whales or dolphins.

Exhibit MEX-105 "... several interactions with species of special interest including ... pilot whales ... This could indicate that vessels are, intentionally or unintentionally, setting their nets around these species dolphins". (note: pilot whales are dolphins)

Honduras, Mexico, Nicaragua, Panama, Peru, Spain, the United States, Vanuatu, and Venezuela[471], In addition, the technique of fishing in association with dolphins in the ETP is not exclusive to Mexico since, as Mexico itself admits, it was the US fishing fleet who pioneered the method of circling herds of dolphins with purse seine nets and a number of other nations' vessels set on dolphins to catch tuna in the ETP.[472] Therefore, any fleet deciding to fish for tuna in the ETP could set on dolphins.

7.308 Mexico explained that it has developed its tuna fishery in the ETP and that almost the entirety of its vessels have operated within that region.[473] Mexico has explained that the ETP is a "traditional fishing ground" for it, due to its geographical proximity to the zone[474], and that its fleet catches tuna "almost exclusively" in the ETP (by setting on dolphins). We note however that, as described above, a number of other fleets have also been fishing in the ETP for tuna. In fact, it appears that there are vessels of more nationalities fishing for tuna in the ETP today than there were at the time of enactment of the measures.[475]

7.309 Therefore, to the extent that the requirement of not setting on dolphins is based on a fishing method that may be used by vessels of any nationality operating where this method can be practiced, tuna of any nationality, including US and Mexican, as well as others, could potentially meet (or not meet) the requirements for dolphin-safe labelling. As described above, the measures at issue involve further distinctions, in particular in the certification requirements for different areas, depending on the status of the fishery, the type of vessel and fishing method used. However, Mexico has indicated that these differences in treatment are not the factual basis for its discrimination claims. We therefore do not address them in this context.[476]

7.310 We also note that the eligibility of a tuna *product* of a given nationality to bear (or not) the label does not necessarily depend on the manner in which the fleet bearing the flag of the same country operates, and on whether the fish caught by that fleet is eligible to be included in dolphin-safe tuna products. As mentioned earlier, the origin of a tuna product is determined not by the origin of the fish that it contains but by its place of processing.[477] Accordingly, Mexican tuna products need not be composed of Mexican tuna. Therefore, even assuming, for the sake of argument, that tuna of Mexican origin might more likely not be eligible for the label because it would be caught in the ETP by setting on dolphins, this would not necessarily imply that products processed in Mexico would be less likely to qualify for the label. This is because Mexican processors could choose to make their products from tuna of other origins meeting the requirements of the label. Mexico has asserted that Mexican canners use Mexican tuna.[478] The evidence presented to the Panel suggests that this is the case. According to the information submitted by Mexico, the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP. Because of such integration Mexico contends that the effect of the US measure is to limit the ability of Mexican brands of tuna products from competing with the brands produced by canneries and canneries of third countries.[479] However, the integration of the Mexican

[471] "The Active Purse Seine Vessel Register, which lists all purse seine vessels authorized to fish for tuna in the ETP, includes vessels from Bolivia, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Spain, the United States, Vanuatu, and Venezuela." (United States' response to Panel Question No 15 para. 44 and fn 36 referring to Exhibit US-15).
[472] Mexico's first oral statement, para. 7.
[473] United States' response to Panel question No. 91, para. 24.
[474] See Mexico's first written submission, paras. 165, 167, 186 and 188.
[475] See Mexico's and the United States' responses to Panel questions Nos. 89 and 90.
[476] Mexico's response to Panel question No. 145, para. 122.
[477] See para. 7.230 above.
[478] Mexico's response to Panel question No. 144, para. 120.
[479] Mexico's response to Panel question No. 44, para. 108.

tuna industry does not mean that it must use Mexican tuna, or that it could not choose to require such tuna to be caught in conditions that would make it eligible for the US label.

7.311 In sum, an examination of the requirement of not setting on dolphins embodied in the US dolphin-safe provisions as a condition for access to the label does not suggest that this requirement in itself, places Mexican tuna products at a disadvantage as compared to US and other imported tuna products. Bearing in mind this initial determination, we now consider whether less favourable treatment nonetheless arises from the application of the measures, by reason of the practices of the fleets.

Fishing practices of US and Mexican tuna fleets, and their impact on access to the US dolphin-safe label for Mexican tuna products and tuna products originating in the United States or in any other country

Practices of Mexican and other fleets

7.312 Mexico has explained that its tuna fleet fishes almost exclusively in the ETP by setting on dolphins, in conditions meeting the requirements for "dolphin-safe" designation under the AIDCP, but not meeting the requirements of the US measures for dolphin-safe labelling.[480] The United States observes that Mexico's assertion that its fleet operates almost exclusively by setting on dolphins is incorrect insofar as one third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna (and therefore tuna products that contain tuna caught by these vessels are eligible to be labelled dolphin-safe)[481] and the remaining two thirds of Mexico's purse seine fleet also opportunistically uses techniques other than setting on dolphins to catch tuna.[482] The United States also notes that Mexico has several non-purse seine vessels that fish for tuna in the ETP that do not set on dolphins.[483]

7.313 The United States also argued that during the first meeting with the Panel, Mexico acknowledged that 20 per cent of its catch is caught by techniques other than setting on dolphins.[484] The United States observes that tuna caught by those vessels using those techniques are also eligible to use the dolphin-safe label. The United States also holds that Mexico does not substantiate its assertion that the third of its fleet that comprises vessels of 363 metric tons carrying capacity or less accounts for only 5 per cent or less of the Mexican fleet's total catch[485] and that it is incorrect for Mexico to assert that "vessels [with 363 metric tons carrying capacity or less] are not economically viable".[486] Mexico responded that its fleet under 363 metric tons of carrying capacity amounts to less than 4 per cent of the total catch of the Mexican tuna fleet and this tuna is sold in the domestic market.[487] With respect to the vessels above 363 metric tons that sometimes use techniques other than

[480] Mexico's first written submission, para. 165.

[481] *(footnote original)* U.S. first written submission, paras. 108. These are vessels that have a carrying capacity of 363 metric tons or less and for which the AIDCP prohibits the setting on dolphins to catch tuna. *See id.* para. 45, 91. (United States' second written submission, fn 24).

[482] *(footnote original)* U.S. first written submission, paras. 68-69. (United States' second written submission, fn 25).

[483] See US response to Panel question No. 91, para. 14, noting that in 2010, the Mexican fleet comprised 69 purse seine vessels and 158 non-purse seine vessels in the ETP, and some non-purse seine vessels in the Caribbean, citing Exhibit US-16.

[484] *(footnote original)* U.S. Closing Statement at the First Panel Meeting, para. 7. (United States' second written submission, fn 26).

[485] *(footnote original)* Mexico Opening Statement at the First Panel Meeting, para. 25; Mexico Answers to the First Set of Questions from the Panel, para. 40. (United States' second written submission, fn 27).

[486] United States' second written submission, fn 30 (footnote omitted).

[487] Mexico's second written submission, para. 40.

setting on dolphins, Mexico explains that this tuna cannot be labelled as dolphin-safe given that the US measures require that the dolphin set method not be used during an entire voyage.[488]

7.314 Based on the above, we note that it is undisputed that at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins (therefore fishing for tuna that would not be eligible to be contained in a "dolphin-safe" tuna product under the US dolphin-safe labelling provisions). We also take note of Mexico's indication that the portion of its fleet that the United States identifies as catching tuna eligible to be included in dolphin-safe tuna products (i.e. vessels under 363 metric tons) represents only a limited share of the total catch of the fleet, although we also note that the exact figures are disputed.[489]

7.315 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[490], most of which were authorized to set on dolphins to catch tuna.[491] The United States further indicates that US vessels did not fully discontinue the practice until years later, in the mid-1990s.[492]

7.316 From these undisputed elements, it appears that the US fleet currently does not practice setting on dolphins in the ETP. We note also that two US full time purse seine vessels are currently registered to fish in the ETP for 2010 but neither has sought or obtained a Dolphin Mortality Limit (or DML) under the AIDCP, which implies that they are not allowed to set on dolphins. Mexico has also observed that these two vessels are also registered in the WCPFC, which suggests that they are not operating exclusively in the ETP.

7.317 From the above, it can be inferred that, as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions. However, most tuna caught by US vessels is potentially eligible for the label, provided that it otherwise complies with the requirements of the measures.

7.318 Mexico also contends that US tuna products manufacturers source less than 1 per cent of their supplies of tuna from the ETP and that virtually all tuna used in canned and pouched tuna products is harvested by purse seine vessels.[493] Mexico accordingly concludes that the US measures do not impact the US fleet, or challenge existing commercial arrangements by the large canneries, and makes it much easier for the United States to maintain the measures.[494]

7.319 However, for the reasons explained below, we are not persuaded that it follows from these facts that the United States affords Mexican tuna products "less favourable treatment" than to tuna products originating in the United States or any other country in respect of the measures at issue.

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[488] Mexico's second written submission, para. 40.

[489] United States' comments on Mexico's response to Panel question No. 148, para. 78.

[490] *(footnote original)* U.S. Opening Statement at the First Panel Meeting, para. 20; IATTC, 1990 Annual Report, Exhibit US-54. (United States' second written submission, fn 37).

[491] *(footnote original)* U.S. Opening Statement at the First Panel Meeting, para. 20. (United States' second written submission, fn 38).

[492] *(footnote original)* U.S. first written submission, para. 43. (United States' second written submission, fn 39).

[493] Mexico's second written submission, fn 14 and para. 37. Exhibit MEX-72.

[494] Mexico's comments to United States' response to Panel question No. 92 (b), para. 16.

Relationship between the practices of fleets and access to the label

7.320 It is undisputed that, at the time of enactment of the measures, there were a number of vessels of different fleets fishing in the ETP by setting on dolphins, including a number of US and Mexican vessels. Each vessel operating in the ETP by setting on dolphins was therefore faced with the choice of either continuing to fish in these conditions, and renouncing the benefit of the US dolphin-safe label on the US market, or discontinuing this practice in favour of another fishery or another fishing method in the ETP, and thus having access to the market for dolphin-safe tuna in the United States. In this respect, as discussed earlier, the measures modified the conditions of operation on the market equally for purse seine vessels of all origins.

7.321 In light of the information provided by the parties, it appears that both the US and Mexican fleets were fishing in the ETP at the time of the enactment of the measures and that both were setting on dolphins. Mexico has stated that in 1990, its fleet dominated the purse seine fishery in the ETP, both in terms of carrying capacity and in terms of number of vessels. Mexico had an annual total capacity of 35 to 40 per cent followed by the United States, between 20 and 25 per cent. However, following the adoption of the dolphin-safe policy, the number of major US vessels operating in the ETP decreased.[495] According to the United States, in 1990, US purse seine vessels set on dolphins and on unassociated sets (FADs and free swimming schools) in order to catch tuna in the ETP. Based on NMFS staff knowledge, it suggests that in addition to the United States, Mexico was amongst the countries that had purse seine vessels in the ETP fishing for tuna by setting on dolphins and that foreign vessels also used other techniques such as unassociated purse seine sets, pole and line, troll, longline and gillnet.[496]

7.322 The United States has also explained that in 1990, 49 per cent of its purse seine tuna fleet was inside the ETP and in addition a large portion of the US non-purse seine vessels were outside the ETP.[497] Mexico has not provided exact data on the portion of purse seine and non-purse seine vessels it had operating in the ETP at the time of the enactment of the measure but has stated that since it has developed its tuna fishery in the ETP, almost the entirety of its vessels have operated within that region and that this remains today.[498] In light of the information provided by the United States on the fishing techniques used in the ETP in 1990, it appears that Mexico also had some non-purse seine vessels operating in the ETP, such as baitboats. A baitboat is a vessel that fishes for tuna using hooks and bait and can use among other things pole and line and troll to catch tuna.[499]

7.323 According to Mexico, in 1989, it had a total of 52 purse seiners operating in the ETP and a total of 16 baitboats, while the United States had 53 purse seiners, 8 baitboats and 1 jigboat.[500] In 1990, Mexico had 52 purse seiners and 11 baitboats and the United States had 46 purse seiners and 6 baitboats.[501] In 1991, Mexico had 49 purse seine vessels operating in the ETP and 9 baitboats and the United States had 23 purse seiners and 7 baitboats. From this information we observe that at the time of the enactment of the measure, the majority of the US and Mexican fleets operating in the ETP was composed of purse seiners. To the extent that such vessels were capable of setting on dolphins[502], all of them would have similarly had to adapt to the requirements of the US dolphin-safe provisions if they wished to catch tuna eligible for inclusion in a dolphin-safe tuna product on the US market.

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[495] Mexico's response to question 89 (b) from the second substantive meeting, paras. 21-22.
[496] United States' response to question 89 (b) from the second substantive meeting, para. 7.
[497] United States' response to question 91 from the second substantive meeting, para. 11.
[498] Mexico's response to question 91 from the second substantive meeting, para. 24.
[499] United States' response to question 89 (b) from the second substantive meeting.
[500] Exhibit MEX-109.
[501] Exhibit MEX-110.
[502] The prohibition for purse seiners smaller than 363 metric tons of carrying capacity to set on dolphins is set forth in Annex VIII.6 of the AIDCP

7.324 To summarize, as of 1990 (enactment of the first version of the DPCIA), Mexico and the United States had a comparable number of purse seine vessels operating in the ETP, although it remains unclear what proportion of those purse seiners was setting on dolphins (as opposed to unassociated sets). In addition, the Mexican fleet had a higher number of baitboats (non-purse seine vessels) than the US fleet had. On that basis, it appears that the United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins. Both of these fleets had therefore to adapt their fishing methods in order to catch tuna eligible for the US dolphin-safe label. We now consider how the practices of the different fleets subsequently evolved in this respect.

7.325 As Mexico describes its own fishing techniques, it appears that its fleet concentrated on improving the dolphin friendliness of its fishing methods by continuing to set on dolphins, but respecting the conditions of the AIDCP, which entered into force in February 1999 as a successor of the non-binding La Jolla Agreement, with the objective of reducing incidental dolphin mortalities in tuna purse seine fishery rather than by abandoning this method and switching to another fishing method. Mexico explains that its fleet fishes almost exclusively by setting on dolphins in accordance with the AIDCP requirements. The United States challenges Mexico's assessment that its fleet fishes almost exclusively by setting on dolphins, but does not dispute that most Mexican tuna is caught in this manner.

7.326 It is worth noting also that some of the evidence presented to the Panel suggests that at least some Mexican companies also abandoned setting on dolphins and sought to meet the "no setting on dolphins" requirement (and defended the maintenance of the current US standard before the US Congress).[503]

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[503] The United States submitted as evidence a statement which it states was made by the President of Seafood Emporium Inc. to the US Congress, in which it supported the definition of the US dolphin-safe label and expressed opposition to the proposed redefinition of dolphin-safe tuna, which includes the following:

> "Passage of S. 1420 and H.R. 2823 will undermine the efforts of Mexican tuna canneries that have gone dolphin-safe by allowing companied and fishing owners in Mexico that do not have dolphin-safe policies to flood the US market with their cheap tuna caught on dolphins. There are currently several tuna companies in Mexico that are considering adopting dolphin-safe policies, but are hesitant due to concern that the current US dolphin-safe definition will be weakened.
>
> By allowing tuna caught by net setting on dolphins to be labeled dolphin-safe, you remove the incentive for those Mexican Flag tuna seiners that are currently operating dolphin-safe to fish without setting nets on dolphins. Why should they make the effort not to set nets on dolphins when their competition can intentionally set nets on dolphins and call their tuna dolphin-safe?
>
> We fully support the environmental leads in Congress, especially Senator Boxer and Biden, and Representatives Studds and Miller, who are totally opposed to weakening the current U.S. definition of dolphin-safe. On behalf of the tuna companies in Mexico that have adopted dolphin-safe policies which prohibit the setting of nets on dolphins, I strongly urge President Clinton and the Members of Congress to oppose S. 1420 and H.R. 2823 and to co-sponsor S. 1460 and H.R. 2856."
>
> United States' response to Panel's question No. 41, para. 105 and Exhibit US-39.

We note that Mexico disputed the reliability of this evidence, stating that it was "'an undated letter from a purported trader in Mexican tuna products and that two of the cited companies were not in the tuna business, and the third had gone out of business (See Mexico's second written submission, para. 41 and footnote 23). As

7.327 US vessels, on the other hand, gradually discontinued setting on dolphins to catch tuna, and abandoned the practice entirely in 1994, four years after the enactment of the measures. The United States indicated that some of its vessels reflagged and continued to set nets on dolphins to catch tuna, while others began using other techniques to catch tuna either in the ETP or in other oceans, mainly in the Western Central Pacific Ocean. [504] Mexico observed in this respect that the US fleet had already begun transitioning to the Western Pacific.[505] A report published in 1992 by the US National Research Council notes in this respect that "the US tuna fleet in the ETP has become very small, probably because of a variety of factors, probably including the recent decision by major canners to buy only "dolphin-safe" tuna.[506]

7.328 The information presented to the Panel suggests that other fleets operating in the ETP also adapted in different ways.[507] The United States explains that non-US vessels also either continued to set on dolphins to catch tuna or began to use other techniques to catch tuna either in the ETP or in other oceans but that Mexican vessels remained in the ETP and continued to set on dolphins.[508] It appears that certain fleets fishing in the ETP for tuna have chosen to catch tuna using other techniques and do so in the ETP.

7.329 According to the evidence provided by Mexico, in 1989 Ecuador had 34 purse seiners and no baitboats operating in the ETP[509], in 1990, it had 34 purse seiners and 7 baitboats[510], and in 1991 it had 33 purse seiners and 6 baitboats; Spain had 2 purse seiners. Thus, at the time of the enactment of the measures, the majority of Ecuador's fleet operating in the ETP was composed of purse seiners and given that the AIDCP had not yet entered into force and that therefore there was no prohibition for small purse seine vessels to set on dolphins, arguably all of Ecuadorian purse seine vessels were capable of setting on dolphins.[511] Thus, all of them would have had to adapt to the requirements of the US dolphin-safe labelling provisions. According to the IATTC fourth quarter report for 2009 presented by Mexico, the Ecuadorian fleet represents 39 per cent of the ETP total fleet in terms of number of vessels and 28 per cent in terms of carrying capacity. The Mexican fleet has 23% of carrying capacity, and Venezuela and Panama each had 14%.[512] The ETP fleet is therefore currently dominated by the Ecuadorian and Mexican fleets. However, during the years 1989-1990 the ETP fleet

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we understand it, the United States represents that this statement was presented in hearings leading to the congressional passage of the DPCIA, similar to the statement by Representative Boxer, also referred to by the United States (United States response to question No. 39, para. 99) and by the statement. We make no determination relating to the activities of the companies referred to in this statement and their interest in this respect, but we have no reason to assume that the evidence presented by the United States does not reflect a genuine statement to the US Congress as it purports to do.

[504] United States' response to Panel question No. 18, para. 53.

[505] Mexico argues that, in order to fish in that area it is necessary to fish in the EEZ's of the member nations of the Commission, which requires requesting licenses and paying fees. Mexico argues that despite the high cost of the licenses, such licenses are very difficult to obtain from the relevant Island States and that Mexican vessels have tried for 3 consecutive years to obtain a license with no success. Moreover, Mexico observes that it has not been accepted as a Party in the WCPFC where its current status is "cooperating non member". (Mexico's response to Panel question No 38, para. 89).

[506] Exhibit MEX-2, p. 3.

[507] Mexico notes that, of the various fleets operating in the ETP, Belize, Bolivia, Colombia, Guatemala, Honduras, Nicaragua, Panama, Vanuatu, Venezuela, and Peru, are subject to a U.S. embargo on imports of yellowfin tuna, imposed independently of the measures at issue here (Mexico's response to Panel question No. 78, para. 275).

[508] United States' response to Panel question No. 18, para. 53.

[509] Exhibit MEX-109.

[510] Exhibit MEX-110.

[511] The prohibition for purse seiners smaller than 363 metric tons of carrying capacity to set on dolphins is set forth in Annex VIII.6 of the AIDCP.

[512] See Mexico's response to Panel question No. 89(a), para. 18. See also Exhibit MEX-108.

was dominated by the Mexican and the US fleets.[513] As pointed out by Mexico, the Mexican fleet was the largest with 35-40 per cent of the annual total capacity.[514]

7.330 As far as the adaptation to the US dolphin-safe labelling provisions is concerned, Ecuador decided to fish for tuna in the ETP using techniques other than setting on dolphins[515], exporting $76.4 million of tuna products in airtight containers to the United States in 2009[516], all of which was dolphin-safe[517] and $48 million of which contained tuna caught in the ETP.[518] For comparison with other years, the United States indicated that in 2006, tuna products in airtight containers from Ecuador totalled $94.0 million (all dolphin-safe except for 11 importations; in 2007, $89.1 million dollars (all of which was dolphin-safe) and $101.9 million dollars in 2008 (all dolphin-safe except for one importation).[519] The United States explained that Ecuador's fleet made the choice in 2010 to catch tuna in the ETP exclusively using techniques other than setting on dolphins, and that for years it had been using those other techniques to catch tuna and exporting those tuna products to the United States that are labelled as dolphin-safe.[520] During the years 1989-1990, Ecuador's fleet represented around 19 per cent of the total ETP fishing fleet in terms of number of vessels, however it did not dominate the ETP fleet as it does today. Ecuador itself explained, as a third party, that its fleet has done very little to fish by setting on dolphins in the ETP, due to market restrictions on tuna caught by using this technique, the high costs of the equipment required, the limited number of schools of tuna associated with dolphins at the moment, and the low DMLs.[521]

7.331 These elements suggest that the various fleets operating in the ETP by setting on dolphins adapted in different ways to dolphin-safe concerns, the Mexican fleet having concentrated its efforts on complying with the AIDCP requirements on observer coverage and fishing gear and equipment. As a result, Mexican (and any other) vessels that chose to continue to set on dolphins under the AIDCP requirements were not eligible for dolphin-safe labelling under the existing US measures, while tuna caught without setting on dolphins remained eligible.

7.332 We note, in this respect, that countries party to the AIDCP and the fleets that sought to respond to dolphin-safe concerns by complying with AIDCP requirements may have expected the US dolphin-safe labelling provisions eventually to evolve towards accepting tuna caught in accordance with these requirements as "dolphin-safe". Indeed, this possibility was foreseen in the Panama Declaration and the DPCIA itself. However, as described above, as a result of the rulings in

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[513] See Exhibits MEX-109 and MEX-110.

[514] Mexico's response to Panel question No. 89(b), para, 21.

[515] *(footnote original)* U.S. Answers to the First Set of Questions from the Panel (Question 17), para. 52; NMFS, Foreign Trade and TTPV databases. In 2010, Ecuador made the choice to fish for tuna in the ETP exclusively using techniques other than setting on dolphins, and has again made this choice for 2011. U.S. Opening Statement at the First Panel Meeting, para. 32; U.S. first written submission, para. 40 &n.40. (United States' second written submission, fn 34).

[516] *(footnote original)* US Imports of Tuna 2005-2009 (Ecuador), Exhibit US-1C. (United States' second written submission, fn 35).

[517] United States' response to Panel question No. 17, para. 52 and United States' second written submission, fn 35.

[518] *(footnote original)* NMFS, Foreign Trade and TTPV databases. (United States' second written submission, fn 36).

[519] *(footnote original)* Imports of Tuna from Ecuador, Exhibit US-1C; NMFS, Tuna Tracking and Verification Program Databases. (United States' response to Panel question No. 17 fn 49).

[520] United States' second written submission, para. 79.

[521] See Ecuador's response to Panel question No. 2.

Hogarth, this did not happen because the conditions foreseen in the DPCIA for this change to occur were ultimately not fulfilled.[522]

7.333 We acknowledge that this circumstance may have had a significant impact on the choice of countries party to the AIDCP to enter into that agreement, and to require their fleets to adhere to its provisions and on the choices made by fleets in adapting to dolphin-safe concerns, to the extent that they had an interest in catching tuna that would be eligible for inclusion in dolphin-safe tuna products for sale on the US market. However, the question before us is whether the US measures at issue placed Mexican tuna products at a disadvantage, compared to US or other imported tuna products. In this respect, we note that the choice facing the fleets of the United States, of Mexico and other foreign origins was the same, and that US and other fleets operating in the ETP could equally have chosen to continue to set on dolphins in the ETP under the conditions set out in the AIDCP, on the assumption that the US measures may evolve towards an acceptance of tuna caught in accordance with these requirements as eligible for inclusion in a dolphin-safe tuna product in the United States. In that respect, the situation arising from the measures was the same for both fleets. [523] Similarly, other tuna fleets operating in international waters face the choice of determining, where to operate and in what conditions, based on a variety of factors, including economic, geographical and environmental factors, and the markets to which they would have access.

7.334 Based on the evidence before us, and taking into account the evolution in the practices of tuna fleets over time, including since the enactment of the US dolphin-safe provisions, as described above, we are not persuaded that any current discrepancy in their relative situations is a result of the measures rather than the result of their own choices. In this respect, we note the observation of the Appellate Body in *Korea – Various Measures on Beef* that where it is the decision of private actors rather than the governmental measure that results in the segregation of imported and domestic like products, this would not be a breach of Article III:4 insofar as what is addressed by this provision is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market.[524] Similarly, in the context of Article 2.1 of the TBT Agreement, what must be considered is the treatment arising from the preparation, adoption and

[522] See paras. 2.16 to 2.19 above.

[523] The Panel is aware of the fact that from 1994 to 1997, US purse seine vessels were prohibited from setting on dolphins in the ETP (United States' first written submission, fn 34). Indeed, the International Dolphin Conservation Act (IDCA) imposed a general moratorium on the taking or importation of marine mammals or marine mammal products and contemplated an exception for incidental taking of marine mammals in the course of commercial fishing operations conducted under a permit issued by the National Marine Fisheries Service. Such permit would be issued allowing up to a maximum allowable quota of dolphins to be taken annually. It is in the context of a permit that had been accorded to the American Tunaboat Association that the prohibition of setting on dolphins was imposed. (Exhibit US-12) While we note that such prohibition to set on dolphins was imposed only to the US fleet because a determination had been made that the US purse seine fleet had reached the maximum allowable quota mandated by the IDCA (International Dolphin Conservation Act), we observe that the IDCA also imposed a ban on the importation of fish or products from fish caught with commercial fishing technology that resulted in incidental mortality or serious injury to ocean mammals in excess of the United States' standards. In particular, the importation of yellowfin tuna harvested with purse-seine nets in the ETP and products therefrom was prohibited unless the Secretary of Commerce made an affirmative finding for the nation that it complied with the United States' standards. On 10 October 1990, the US Government, pursuant to court order, imposed an embargo on imports of such tuna from Mexico until the Secretary made a positive finding based on documentary evidence that it did not exceed the percentage of admitted dolphin mortality. Therefore, while the United States was prohibited from setting on dolphins, Mexican fleet was barred from importing its tuna products to the United States. For that reason, we believe the US and the Mexican fleet were both on equal footing with respect to the choice they had to make in terms of adapting their fishing techniques to US labelling requirements. (See *US – Tuna (Mexico)*, GATT Report, paras.2.3-2.7)

[524] United States cites the Appellate Body Report in *Korea – Various Measures Beef*, para. 149.

application of the technical regulation by the Member taking the measure, rather than differences in the impact of the measure that are attributable to the behaviour of private actors on the market.

Adaptation costs

7.335 Mexico also argues that the Mexican fleet would have to incur considerable financial and other costs by changing its fishing method to be able to label its products as dolphin-safe. In its second written submission, however, Mexico also contended that the nature and extent of such costs that would be incurred by the Mexican tuna fleet to change fishing areas or methods is immaterial to Mexico's *de facto* discrimination claims, given that access to the principal US distribution channels for Mexican tuna products is being denied by the US measures."

7.336 Mexico explained that there are regional differences within the ETP in terms of oceanic conditions, the tuna species that are available and the most efficient methods of harvesting. Mexico argues that substantial costs would derive from switching to alternative fishing methods such as FAD fishing. [525] It held that because FAD fishing concentrates on less mature tuna, which are found near the Mexican coast the vessels would have to travel much farther, which would entail very significant additional costs.[526] Mexico explained that its fishing efforts primarily concentrated in the waters adjacent to Mexico's coast (EEZ) where mature yellowfin tuna can be found in association with dolphins.[527]

7.337 In that area, Mexico argues, the yellowfin tuna not associated with dolphins is found in lesser quantities and at juvenile stage of development and targeting juvenile yellowfin tuna not associated with dolphins would be neither commercially viable nor sustainable because it would result in significantly smaller catches that would have a negative impact on the tuna stocks. Mexico argues that to avoid destroying the yellowfin fishery close to Mexico, the fleet would have to cut production dramatically or move to another region to fish for a different species of tuna, skipjack, which is more commonly found in association with FADs.[528]

7.338 Moving from the ETP would imply substantial financial costs, Mexico argues, as its vessels would have to travel greater distances (12 to 15 days) before they could even begin to fish. Moreover, vessels would have to focus on skipjack, which is less valuable. Mexico has specified that skipjack, even mature, is smaller than yellowfin tuna, that the market considers it to be of lower quality, and that its value is approximately 30 per cent lower than yellowfin tuna, per ton. Mexico concludes that it would therefore be disadvantaged with respect to other fleets that fish in their adjacent waters.[529]

7.339 The United States responds that Mexico overstates the cost and difficulty of using other techniques to catch tuna insofar as the same boats and much of the same gear used to set on dolphins to catch tuna may be used to catch tuna using other techniques, specifically sets on floating objects and unassociated schools of tuna. The United States challenges Mexico's arguments that its proximity to the ETP gives it a competitive advantage relative to the United States and other countries in terms of fishing for tuna by setting on dolphins, observing that other countries, including the United States, are similarly close to the ETP, including those areas of the ETP where setting on dolphins to catch tuna occurs.

[525] Mexico's response to Panel question No. 38, paras 84.
[526] Mexico's response to Panel question No. 38, para. 86.
[527] Mexico's response to Panel question No. 38, paras. 84-86.
[528] Mexico's response to Panel question No. 38, para. 86.
[529] Mexico's response to Panel question No. 38, para. 88.

7.340 Mexico also argues that there would be significant administrative complexities because of the need to seek licences from the Pacific island nations to fish in their Exclusive Economic Zones (EEZs) and to comply with the rules of the applicable fishery commission. Mexico refers to the Central and Western Pacific area, regulated by the Western and Central Pacific Commission (WCPFC), which has established regulations that prohibit fishing in the international waters. Mexico adds that in order to fish in that area it is necessary to fish in the EEZ's of the member nations of the Commission, which in turn implies requesting licences and paying fees.[530]

7.341 The European Union, as third party, asserts that there are no technical or legal barriers preventing any of the WTO Members bordering the ETP to fish for tuna outside the ETP. Mexico responds that this is not correct because licences would have to be obtained which are expensive and, to date, unobtainable.

7.342 We do not exclude that costs of adaptation to a technical regulation may be pertinent to an examination of whether less favourable treatment is being afforded with respect to a technical regulation. However, the existence of adaptation costs, in itself, does not, in our view, imply the existence of less favourable treatment. The existence of additional costs for some operators as a result of factors such as existing practices also does not necessarily, in our view, imply that less favourable treatment is being afforded in respect of the measures at issue, in violation of Article 2.1 of the TBT Agreement.

7.343 We first observe that, to the extent that Mexico suggests that there would be ecological costs associated with adapting to the US dolphin-safe provisions, in terms of sustainability of tuna stocks in the ETP, we do not understand the US measures to require or expect any vessel to adopt unsustainable fishing practices in order to comply with the requirements for dolphin-safe labelling.[531]

7.344 We recognize that, to the extent that the Mexican fleet would need to modify its fishing techniques, or relocate to other fisheries, in order to comply with the requirements of the US dolphin-safe provisions, this may entail some economic and financial costs, taking into account the fact that setting on dolphins is a particularly effective means of fishing for tuna in the ETP.[532] We also acknowledge that, to the extent that, due to its geographical proximity to an area within the ETP where setting on dolphins can easily be practiced, costs associated with travelling from one area of the ETP to the other to catch tuna by methods other than setting on dolphins and possibly targeting different types of tuna could be greater for Mexican vessels than for those of other fleets whose coasts are not similarly close to those areas. To that extent, adapting to the US dolphin-safe standard could in practice be more onerous for the Mexican fleet than for others who either did not exploit the association with dolphins in the first place or for whom relocating to another fishing area within the ETP or elsewhere implies less additional distance.

7.345 However, we are not persuaded that this implies that Mexican tuna products are being denied access to the advantage provided by the US dolphin safe labelling provisions or demonstrates the

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[530] Mexico's response to Panel question No. 38, para. 89.

[531] The United States has noted that it is concerned with the issue of ecosystem protection and seeks to address it through various means, both domestically and internationally. (United States' response to Panel question No. 64, para. 145).

[532] See Exhibit MEX-2, pp. 2 and 3 ("Dolphin fishing usually catches large fish that are often sexually mature and produces larger average catches than the other methods. Thus, redirecting the fishing away from tuna associated with dolphins would be less efficient and would have a negative effect on the yield of the fishery and perhaps on the conservation of tuna populations. Considering only the point of view of economics and harvesting tuna, large tuna should be sought; fishermen should fish on dolphins and be discouraged from fishing on logs or schools. However, dolphin fishing kills dolphins; to minimize the killing of dolphins, all fishing should be directed away from dolphins. This dichotomy is the basis of the tuna-dolphin problem").

existence of "less favourable treatment" being afforded to Mexican tuna products by the US measures. As observed in paragraph 7.376 below, it is possible that a technical regulation, by setting out certain requirements that must be complied with, would affect different operators on the market differently, depending on a range of factors such as their geographical circumstances, their existing practices or their technical capacities. Such factors may have an impact on how easily products of various origins will or will not be able to meet the requirements at issue. However, the existence of such differences does not necessarily imply, in our view, that the measures at issue discriminate against products of certain origins in violation of Article 2.1 of the TBT Agreement. This is especially the case, in our view, where the differential impact of the measures on products of different origins is the result of external factors other than the origin of the products itself.

7.346 In the present case, such costs would be felt also, though perhaps to varying degrees depending *inter alia* on the geographical location and existing practices of the fleets and their commercial choices, by vessels of other fleets wishing to catch tuna eligible for inclusion in a dolphin-safe tuna product for sale on the US market. These consequences would therefore not, in our view, be sufficient to amount to "less favourable treatment" within the meaning of Article 2.1 of the TBT Agreement. In addition, as discussed below, the practices of the national fleet do not necessarily dictate the dolphin-safe status of tuna products of the same origin.

Fishing practices of fleets and origin of tuna products

7.347 We also recall that, as discussed above, tuna products are not necessarily made from tuna of the same origin, so that processors of US, Mexican and other nationalities retain the choice of sourcing their tuna from vessels of any origin fishing for tuna in conditions that meet the requirements of the US measures, even if the Mexican fleet primarily choose not to fish in accordance with these requirements.

7.348 For that reason also, we are not persuaded that it necessarily follows from the fishing practices of the national fleet that the tuna *products* of the same origin are in the same situation. As observed above, Mexico explains that the great majority of Mexican tuna products are made from tuna caught by the Mexican fleet.[533] However, the United States has noted that if tuna products from other countries, including the United States, were made with tuna caught by the Mexican vessels that set on dolphins to catch the tuna, those (non-Mexican) tuna products would also be ineligible to be labelled dolphin-safe. Indeed, the United States has also observed that, in 2009, two thirds of domestic canned tuna was sourced from foreign vessels. It thus concludes that 84 per cent of the US market for canned tuna in 2009 was accounted for by a combination of imported canned and domestic canned tuna that contains imported tuna.[534]

7.349 Conversely, the United States argues, if Mexican tuna producers choose to purchase tuna from vessels other than large purse seine vessels that set on dolphins to catch the tuna, including large purse seine vessels that use other gear types or fishing methods or small purse seine vessels that are prohibited from setting on dolphins, those (Mexican) tuna products could be eligible to use the dolphin-safe label. The United States observes that nothing requires the Mexican canneries to use tuna caught by Mexican vessels (indeed, Mexico is a net importer of tuna and tuna products), and that Mexican vessels use other methods beyond dolphin setting to catch tuna.[535]

7.350 We agree with the United States' observations. The fact that the Mexican tuna fleet fishes in the ETP by setting on dolphins while the US fleet does not, in itself does not imply that tuna

[533] Mexico's response to Panel question No. 144, para. 120.
[534] United States response to Panel question No. 97, para. 21.
[535] United States' comments to Mexico's response to Panel question No. 144, para. 64.

processors of Mexican and US origin are necessarily similarly affected, as Mexico argues, in such a manner that the relative situation of US and Mexican tuna *products* on the US market is affected. We now consider the situation of Mexican tuna products on the US market.

Mexican tuna products on the US market

7.351 As described above, Mexico contends that it has established that major grocery chains will not carry Mexican brands unless they have the dolphin-safe label and that the United States does not dispute that Mexican tuna products are not sold in major US distribution channels.[536] In support for this assertion, Mexico has presented evidence that major retailers in the United States do not accept for sale tuna that is not eligible for the label, and that they would accept for sale such products if they were eligible for "dolphin-safe" labelling.[537]

7.352 The United States indicates that, although until 2002 Mexican tuna caught using methods other than setting on dolphins by small purse seine vessels in the ETP was incorporated into tuna products sold in the United States, and these products may have been sold in major US grocery retailers as dolphin-safe, there have been no imports of similar Mexican tuna products containing tuna caught by such vessels since that time.[538] The United States points to specific instances of Mexican tuna products sold in specialty stores. The United States explains that Mexican tuna products not labelled as dolphin-safe are sold in speciality grocery stores and on the Internet and that tuna products originating in other countries that are not labelled as dolphin-safe are sold in major distribution channels, such as Walmart's Great Value Tuna, which is a product of Thailand.[539] We note that the United States has also confirmed, however, that it is not aware of any major US grocery retailers that sell tuna products that contain tuna caught by setting on dolphins.

7.353 In the course of the proceedings, the United States presented evidence suggesting that tuna pouches (of the "Great Value" brand) that are not labelled dolphin-safe can be purchased from a major US retailer, Walmart. The United States argues that regardless of the source of the tuna, the fact that the largest US food distributor sells a product not labelled dolphin-safe belied Mexico's assertion that the label is necessary for tuna products to be sold in major distribution channels.[540] Mexico observes however that the US Commerce Department lists Great Value on its "dolphinsafe.gov" website as a dolphin-safe brand, and that in any event Wal-Mart faces no market barrier in convincing itself to carry its own brand. The United States confirmed that the NMFS has verified that the pouches of that brand meet the conditions under the US dolphin-safe labelling provisions.[541] The United States also argues that Mexico misconstrued the information on the US Commerce Department website, and that Great Value tuna products are sold both with and without dolphin-safe labels.[542] In addition, the United States contends that the tuna contained in these Great Value pouches was not sourced from vessels flagged to Mexico. To the extent that the pouches at issue contain tuna eligible for labelling and thus meet the requirements for dolphin-safe labelling, however, we are not persuaded that their

[536] Mexico's comments on the United States' response to Panel question No. 102(b), para. 24.

[537] An affidavit from an officer of a US company that has the right to sell canned tuna from a Mexican producer in the US market submitted by Mexico states that for years this company attempted to sell the tuna product in major US grocery but the chains have been pressured not to sell this brand of canned tuna because it is not able to carry the "dolphin-safe" label in the U.S. market. It provides evidence that some of the major US chains have expressly indicated that if the tuna product qualified to be labeled "dolphin-safe" they would sell it and that the company's inability to place the "dolphin-safe" label on the cans has directly affected its ability to sell the Mexican brand in the U.S. Exhibits MEX-58, MEX-64 and MEX-100.

[538] United States' response to Panel question No. 102 (a), para. 24.

[539] United States' oral statement at the second substantive meeting, para. 19.

[540] United States' response to Panel question No. 102(b), para. 25.

[541] United States' response to Panel question No. 95, para. 19.

[542] United States' response to Panel question No. 107, paras. 26-28.

availability calls into question Mexico's assertion that major retailers will not carry tuna products that are not eligible for the label.

7.354 More generally, the United States has explained that in 2009, US imports of fresh and frozen tuna totalled $538 million (or 96 million kilos) and US imports of canned tuna totalled $613 million (or 180.5 million kilos).[543] It has specified that imports of tuna and tuna products from countries with purse seine vessels that fish for tuna in the ETP totalled $139 million and that imports of tuna and tuna products from Mexico totalled $13 million in 2009 of which $7.5 million were tuna in cans, pouches and other air-tight containers.[544] The United States has also observed that significant amounts of domestic canned tuna contained imported tuna. For example, in 2009, two thirds of domestic canned tuna was sourced from foreign vessels. It concludes that this means that 84 per cent of the US market for canned tuna in 2009 was accounted for by a combination of imported canned and domestic canned tuna that contains imported tuna.[545]

7.355 Mexico does not challenge the United States' import data, nor does it challenge the contention that the majority of imports of tuna products to the US market are not caught by setting on dolphins. However, it argues that it is precisely those facts that show the adverse impact the US measures have on Mexican tuna. Mexico observes that in 2009, US imports of tuna products totalled $613 million. However, it notes that Mexico's exports have remained minimal throughout this period, and in 2009 US imports from Mexico were only $7.5 million. Therefore, Mexican tuna products accounted for only 1 per cent of the US market for imported tuna products, and an even smaller percentage of the total US market.[546]

7.356 Mexico also does not challenge the assertion that the majority of imported products on the US market are not caught by setting on dolphins but considers that the rise in the import share applies only with respect to tuna caught outside the ETP and/or using a fishing method other than the dolphin set method. For tuna caught in association with dolphins there has not been any significant growth or gains in market share.[547] Mexico also asserts that because a substantial majority of the tuna products allowed to carry the dolphin-safe label in the US market are from tuna sourced from the Western and Central Pacific, there can be no doubt that the US provisions are for non-ETP tuna.[548]

7.357 An examination of these import figures, which are not disputed, suggests that the United States imports a considerable proportion of the tuna that it consumes. These figures also suggest that the vast majority of the tuna and tuna products found on the US market is made from tuna caught without setting on dolphins, that is potentially eligible for dolphin-safe labelling under the US dolphin-safe labelling provisions, and that Mexican tuna products represent a very small proportion of the tuna products found on the US market. However, we are not persuaded that these elements, taken together, demonstrate that the measures place Mexican tuna products at a disadvantage, compared to US and other tuna products to the detriment of Mexican tuna products.

7.358 We highlight, in this respect, that the question to be considered in examining a claim of less favourable treatment is not simply whether the measure has some impact, or even some detrimental impact on imports, but, rather, whether the measures put the imported like products at issue at a

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[543] US Imports of Tuna 2009 (all countries), Exhibit US-2.

[544] United States first written submission, para. 89.

[545] United States response to Panel question No. 97, para. 21.

[546] *(footnote original)* NOAA, Fisheries of the United States, Fisheries Statistics and Economics Division, available at http://www.st.nmfs.noaa.gov/pls/webpls/trade_prdct_cntry_ind.results?qtype=IMP&qyearfrom=2000&qyearto=2010&qprod_name=TUNA+%25+ATC+%28%25&qcountry=%25&qsort=COUNTRY&qoutput= PRINTER. Exhibit MEX-88. (Mexico's second written submission, fn 19).

[547] Mexico's second written submission, para. 38.

[548] Mexico's second written submission, para. 23.

disadvantage compared to like products of national origin and like products originating in any other country.[549] In other words, what we must determine in this case is whether the measures have modified the relative position on the market of US and Mexican tuna products, to the detriment of Mexican tuna products.

7.359 In this respect, the fact that Mexican imports represent only 1 per cent of tuna on the US market, in itself, only indicates that Mexico has a relatively limited penetration on the US tuna market. In the absence of further information as to what share of the US market Mexico might expect to secure in the absence of the measures at issue, we are not in a position to assess whether Mexico's level of participation in the US tuna market reflects a modification of the conditions of competition to the detriment of Mexican tuna products or whether it simply reflects Mexico's expected level of participation in the US market.[550]

7.360 Similarly, that the vast majority of the tuna imported by the United States is caught by methods *other* than setting on dolphins support the view that it is more difficult to sell tuna that is caught by setting on dolphins in the United States. This is consistent with the elements described above relating to the value of access to the label on the market. However, this does not necessarily imply that the US dolphin-safe labelling provisions place Mexican tuna products at a disadvantage on the US market in this respect, as compared to tuna products of US or other origins. Rather, as observed earlier, this constraint would seem to apply equally to all tuna products on the market.

7.361 Furthermore, we note that the decisions by major processors of tuna products not to purchase tuna caught by setting on dolphins in fact predate the adoption of the first version of the DPCIA, enacted 28 November 1990, which first defined dolphin-safe tuna harvested by a vessel using purse seine nets in the ETP as tuna that is not caught on a trip involving intentional deployment on or encirclement of dolphins measures at issue. This suggest that their decision was not necessarily related to the adoption the measures.

7.362 One of the major tuna processors explains its dolphin-safe policy on its website as follows:

> "Bumble Bee Foods, LLC remains fully committed to the 100% dolphin-safe policy we implemented in April 1990. ... The US Government Dolphin-Safe Regulations are in the process of being modified through the International Dolphin Conservation Program. The new regulations will allow for a less stringent US Dolphin-Safe Regulation. Despite the new, less stringent 'compliance' criteria, Bumble Bee remains committed to and in compliance with a 'no encirclement' policy. The commitment of Bumble Bee to dolphin-safety will remain unchanged regardless of any changes to the dolphin-safe law. We continue to strictly adhere to our 100% dolphin-safe policy."[551]

7.363 This statement suggests that even if the US measures were amended to allow the labelling of tuna caught in accordance with the terms of the AIDCP (which authorizes setting on dolphins subject to certain conditions and monitoring) certain tuna processors at least would not necessarily modify their purchasing policies.[552] Indeed, according to the record of the hearing in the Senate before the

[549] See para. 7.273 above.

[550] In response to a question from the Panel in this respect, Mexico asserted that its share of the US market should be higher and that latent demand should be taken into account, but it did not elaborate further on the extent of such demand. (See Mexico's response to Panel question No. 94).

[551] Exhibit MEX-47 (1).

[552] The evidence presented with the Amicus curiae brief and referred to in the paragraphs to which the United States has referred in its answers to questions suggests that the opposition of the tuna processing companies to a change in the dolphin-safe standard is likely to be explained by the pressure that had been

Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science and Transportation discussing the amendment of the DPCIA on 30 April 1996, which was cited in the paragraphs of the *amicus curiae* brief to which the United States has referred to, tuna processing companies which had taken "voluntary actions", despite not taking a formal position on any legislation, had clearly stated their firm support for the existing definition of "dolphin-safe".[553]

7.364 To the extent that these companies would maintain their practices on the basis of their perception of consumer preferences, independently of any change in the US standard, the causal relationship between the US measures and the refusal of processors to purchase tuna caught by setting on dolphins is unclear. Indeed, these elements suggest that there is only a marginal relationship between the measures themselves and the practices of tuna processors, and that what these companies consider to be the determining factor in their decision is an absence of setting on dolphins, rather than compliance with the terms of the US measures.

7.365 Mexico argues that access to the principal US distribution channels is being denied to Mexican tuna products by the US measures, and that retailers, as well as consumers, would purchase such tuna products if they were eligible for dolphin-safe labelling.[554] In support of this assertion, Mexico presents an affidavit, suggesting that retailers would buy Mexican tuna products if they were eligible for a label. This confirms the importance of dolphin-safe status to US retailers selling tuna products. However, the terms of the affidavit do not, in our view, make it clear, as Mexico suggests, that the AIDCP label would be acceptable to the retailers as an alternative dolphin-safe certification. The affidavit and supporting documents refer to eligibility for a "dolphin-safe" label. These statements may therefore be understood to mean that the retailers at issue would be prepared offer the products for sale if they met the conditions for dolphin-safe labelling under the existing US measures. Indeed, the affidavit explains that retailers who initially carried a Mexican brand withdrew it from sale following an intervention from an NGO. Another supporting document presented by Mexico expressly indicates that the retailer at issue is not concerned with legal issues but with consumer acceptance.[555]

7.366 We also note that Mexico itself has indicated that retailers are acutely aware of the dolphin-safe issue and of the risk of facing actions such as boycotts if they carry tuna not eligible for a label.[556] This suggests that retailers are sensitive to the dolphin-safe issue in a manner comparable to that of the processors referred to above, i.e. that they do not wish to carry tuna products containing tuna

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exerted since 1989-1990 by Earth Island Institute. According to a press article, official of Earth Island Institute charged that Bumblebee Seafoods had broken its pledge to sell only "dolphin-safe" tuna because, among other things, its parent company in Thailand had bought a cargo without getting documents to show it had been caught using techniques that did not kill dolphins and launched newspaper advertisements the week of 8 December 1990 to urge a consumer boycott of Bumblebee tuna. Exhibit attached to the Amicus curiae brief EX-2, NYT Article "A storm erupts over saving the dolphins". 8 December 1990.

[553] "Prepared Statement by Senator Barbara Boxer: ... Tuna processing companies listed (Starkist, Bumblebee and Chicken of the Sea) and announced that they would only accept tuna that had been caught without harassing dolphins. These voluntary actions dramatically and immediately transformed the two-decades long controversy over using dolphins to catch yellowfin tuna in the Eastern Tropical Pacific (ETP) ... Members of the U.S. tuna processing industry (canners) have not taken a formal position on any legislation, but StarKist, BumbleBee and Van Camp (Chicken of the Sea), which constitute 100% of the U.S. industry and 25% of the world market, have clearly stated their firm support for the current definition of 'dolphin-safe'." Exhibit attached to the Amicus curiae brief EX-4. (United States' response to Panel question No. 40(a), para. 98 which cites paragraphs 18-20, 25, 62-64 of the amicus curiae brief which in turn refer to exhibits 1, 2, 3 and 4 attached to the amicus submission.).

[554] Mexico's first written submission, para. 112.

[555] See Exhibit MEX-58.

[556] Mexico's first written submission, para. 111.

caught in association with dolphins that may lead to pressure from NGOs and negative perception from consumers. A consideration of this evidence therefore does not modify our conclusion in paragraph 7.364 that the elements before us suggest that there is only a marginal relationship between the US measures and the practices of operators on the market, including retailers.

7.367 This conclusion is also not modified, in our view, by a consideration of the evidence presented by Mexico in relation to consumers' understanding of the term "dolphin-safe". As reflected in paragraph 4.141, Mexico submitted an opinion poll indicating that 48% of the public believes that dolphin-safe means no dolphins were injured or killed in the course of capturing the tuna (AIDCP standard), 22% believes it means there is no dolphin meat in the can, and only 12% believe it means dolphins were not encircled and then released in the capture of the tuna (US standard). According to this poll, 59% of the public think the definition of dolphin-safe should mean that no dolphins were injured or killed in the course of capturing tuna, whereas only 10% believe it should mean dolphins were not encircled and then released in the capture of the tuna.[557] However, the Panel is not persuaded that this supports Mexico's view that retailers and consumers would accept tuna products made of tuna labelled with the AIDCP label, or that those surveyed individuals who assume "dolphin-safe" to mean that no dolphins were injured or harmed would consider that no dolphin was injured or harmed if setting on dolphins was involved. We also note that the poll addresses consumer's perception of the meaning of the term "dolphin-safe", rather than their interest in purchasing one or another type of tuna based on its dolphin-safe status.[558] The results of this poll would therefore not provide a sufficient basis, in our view, to conclude that consumers would consider tuna products made of tuna caught in conformity with AIDCP requirements to be "dolphin-safe", nor do they provide a basis for concluding that the US dolphin-safe provisions deny Mexican tuna products access to the US market.

7.368 We further note in this respect that some of the evidence presented to the Panel suggests that 90 per cent of the world's tuna companies have adopted a strict "no setting on dolphins" standard.[559] If this is the case, the proportion of tuna imported in the United States that is caught by other methods than setting on dolphins may simply reflect the general distribution of the products on the world market, rather than any specific features of the US market. Mexico observed that such claims were unverifiable insofar as the organization making this claim, whose standard is largely copied on the rules of the United States for the ETP, has no mechanism to authoritatively verify it. Mexico noted that the Earth Island Institute (EII) reportedly requires companies to pay annual or per-can/case fee to be listed as "dolphin-safe" on Earth Island's lists but that it had no mechanism of verification –other than to ask the companies to self-certify compliance. Mexico also emphasized that the United States had not disputed that there was no manner in which it could verify claims that no dolphins were killed or seriously injured during particular net sets outside the ETP because there are not trained, independent observers on board fishing vessels outside the ETP and because no fisheries management organization other than the IATTC requires vessels to keep tuna caught in sets that harmed dolphins in a separate well, and not mix them with tuna caught in sets that did not harm dolphins. Finally Mexico argued that the major three US distributors do not advertise that they comply with the EII standard but rather that they define "dolphin-safe" to mean not setting nets on dolphins. We acknowledge that the EII may not have an independent review mechanism to verify compliance with the EII standard, which is stricter than the US standard. However, compliance with the requirement of

[557] Exhibit MEX-64.

[558] The only question in the poll relating to purchasing preferences was expressed in terms of species rather than dolphin-safe status (44/52% of respondents indicated that they look for albacore tuna, 3/2% looked for skipjack and 6% for yellowfin). See Exhibit MEX-64.

[559] Amicus Exhibit-28. As explained in paragraph 2.9 above, insofar as the Panel deemed this information to be relevant for the purposes of its assessment, it invited Mexico to comment on it in order to take full account of Mexico's right of response and defense in respect of due process considerations. Panel's question No. 88.

absence of setting, which is the common denominator of the US and the EII standard, is certified through the US procedures and the NOAA form.[560] The lack of review mechanism alone therefore does not disprove the assertion that 90 per cent of the world's tuna companies catch tuna with methods other than setting on dolphins.

"Pressure" to adapt to the US standard

7.369 Finally, Mexico contends that the US measures unilaterally exert pressure on the Mexican fleet to change fishing areas and/or fishing methods, which Mexico argues is evidence of the *de facto* discriminatory effect of the measures.[561] For Mexico, the fact that the US measures are aimed at encouraging foreign fishing fleets such as those of Mexico to change either their fishing areas or their methods is further evidence of the link between the US measures and the WTO-inconsistent discrimination. In its view, such an attempt at extraterritorial regulation by the United States is inconsistent with the national treatment and most-favoured nation obligations[562] and the obligations in the WTO Agreements must not be interpreted so as to allow a WTO Member to condition access to its domestic market based on compliance with that Member's unilateral policy relating to actions outside its territory, including unincorporated processes and production methods (PPMs).[563]

7.370 Mexico observes that a stated objective of the US measures is to use the US market to encourage fishing fleets such as those of Mexico to change their fishing areas and/or practices. Therefore it flows from that objective, according to Mexico, that the measures *de facto* condition access to the principal US distribution channels for tuna products on compliance with a fishing method that has been unilaterally imposed by the United States.[564] Moreover, Mexico considers that merely because there may be alternative ways to obtain the dolphin-safe label and thereby access to the principal US distribution channels does not alter the fact that Mexican tuna products caught using the established fishing methods of the Mexican fleet are *de facto* treated less favourably.[565] For Mexico, in its view, such an attempt at extraterritorial regulation by the United States is inconsistent with the national treatment and most-favoured nation obligations.[566] Mexico acknowledges that conceivably, in some limited circumstances, a unilateral effort aimed at altering the behaviour of another sovereign country could be justified under one of the specific exceptions to the

[560] Mexico contends that the certification on Form 370 that nets were not intentionally set on dolphins is not as verifiable for non-ETP vessels as for ETP vessels because certifications of the former are made only by the vessel's captain, while certifications of the latter must be ratified by an independent observer on board the vessel. See para. 4.127.

[561] Mexico's second written submission, para. 151.

[562] Mexico's second written submission, para. 148.

[563] *(footnote original)* Unincorporated process and production methods (PPMs), which are also referred to as non-product related PPMs, leave no trace in the final product and are not reflected in the physical attributes of the product. The fishing methods at issue in this dispute are an example. They leave no trace in the tuna products nor are they reflected in the physical attributes of the tuna products. (Mexico's second written submission, fn 80).

[564] Mexico's second written submission, para. 116.

[565] (*footnote original*) In *Canada – Wheat Exports and Grain Imports*, the Panel found that the fact alternative commercially more attractive distribution channels were open to imports did not alter the fact that the Canadian measure treated imported grain less favourably than like domestic grain. See Panel Reports, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R, paragraphs 6.213 and 6.295. In *Canada – Autos*, the Panel found that where an advantage accorded to the sale or use of domestic products but not to the sale or use of like imported products, it did not matter that the advantage could also be obtained by means other than the sale or use of domestic products. See Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, paragraph 10.87. (Mexico's second written submission, fn 121).

[566] Mexico's second written submission, para. 148.

WTO obligations, however it emphasizes that none of those exceptions has been invoked by the United States nor do any of them apply to the US measures.[567]

7.371 In considering Mexico's arguments on this point, we recall the Appellate Body's observation, in *US – Shrimp*, that:

> "It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."[568]

Although this statement was made in the context of an analysis under Article XX, it implies that the fact that the measures at issue reflect a certain choice of policy or standard is not in itself a reason to assume that a measure is WTO-inconsistent. The same considerations are pertinent, in our view, in the context of Article 2.1 of the TBT Agreement.

7.372 We also note that the US dolphin-safe labelling provisions do not require the importing *Member* to comply with any particular fishing method (these measures do not state, for example, that no tuna may be imported if it originates in a country where tuna is caught by setting on dolphins). Rather, it is the products themselves that need to comply with the requirements of the labelling scheme, *if* they wish to benefit from the label and make dolphin-safe claims on the US market.

7.373 The United States describes one of the measures' objectives in terms of protecting dolphins by ensuring that the US market is not used to encourage fleets to catch tuna in a manner that adversely affects dolphins.[569] However, we do not consider that in itself constitutes evidence of a discriminatory effect of the measures. As described above, to the extent that the measures at issue provide an incentive for fleets setting on dolphins to discontinue that practice to gain a commercial advantage on the US market, such incentive applies also to the US fleet and other tuna fleets operating in international waters.

Conclusion

7.374 In conclusion, based on the evidence presented to us, we are not persuaded that Mexico has demonstrated that the US dolphin-safe provisions afford less favourable treatment to Mexican tuna products within the meaning of Article 2.1 of the TBT Agreement.

7.375 That these measures may, through the operation of origin-neutral regulatory categories, have a detrimental impact on certain imports does not, in our view, necessarily imply that the measures afford less favourable treatment to such imported products within the meaning of Article 2.1. We acknowledge, in this respect, that different products of various origins may be affected differently by a measure that lays down certain product characteristics with which compliance is mandatory. However, as observed above, what matters for the purposes of determining whether there is a violation of Article 2.1 is not only the existence of some adverse impact on some imported products, but whether the group of imported products is placed at a disadvantage, in this respect, *compared to* the groups of like domestic and imported products originating in any other country. We also note, in this respect, the following findings of the Appellate Body in the context of Article III:4:

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[567] Mexico's second written submission, paras. 118 and 148.
[568] Appellate Body Report, *US – Shrimp*, para. 121.
[569] See the description of the US objectives in Section II.A below.

> "[T]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product."[570]

7.376 In addition, as observed above with reference to the rulings of the Appellate Body in *Korea – Various Measures on Beef*, in our view, the form of the analysis is the treatment afforded by the measures themselves, rather than the consequences that arise as a result of the actions of private actors on the market.

7.377 In the present case, as discussed above, it appears to us that the measures at issue, in applying the same origin-neutral requirement to all tuna products, do not inherently discriminate on the basis of the origin of the products, and that they also do not make it impossible for Mexican tuna products to comply with this requirement, or, as Mexico puts it, "prohibit" the use of the label for Mexican tuna products.

7.378 Rather, on the basis of the elements presented to us in these proceedings, it appears to us that the impact of the US dolphin-safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices. In this context, any particular adverse impact felt by Mexican tuna products on the US market is, in our view, primarily the result of "factors or circumstances unrelated to the foreign origin of the product", including the choices made by Mexico's own fishing fleet and canners.

3. Whether the US dolphin-safe labelling provisions are inconsistent with Article 2.2 of the TBT Agreement

7.379 Article 2.2 of the TBT Agreement establishes:

> "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products."

7.380 Mexico submits that the US dolphin-safe provisions are inconsistent with Article 2.2 of the TBT Agreement because they do not fulfil a legitimate objective or, in the alternative, to the extent that the US measures fulfil any objectives, taking into account the risks of non-fulfilment, those objectives could be fulfilled using less trade-restrictive measures.[571]

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[570] Appellate Body Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 96.

[571] Mexico's first written submission, paras. 204-25; Mexico's first oral statement, para. 47; Mexico's second written submission, paras. 200-210; Mexico's second oral statement, paras. 85-115.

7.381 The United States contends Mexico's arguments should be rejected insofar as it holds the US dolphin-safe labelling provisions fulfil a legitimate objective and are not more trade restrictive than necessary to meet those objectives.[572]

7.382 In order to address Mexico's claim, we must first clarify how a violation of this provision may be established. We note that Mexico's claim is based on an absence of compliance with the terms of the second sentence of Article 2.2. We note that the parties appear to agree that the second sentence of Article 2.2 gives meaning to the first sentence, but that they have proposed somewhat different approaches to the establishment of a violation of the second sentence of Article 2.2.

7.383 In Mexico's view, a technical regulation creates an "unnecessary obstacle to international trade" if its objective is not legitimate *or* if the regulation is more trade-restrictive than necessary to fulfil a legitimate objective taking account of the risks non-fulfilment would create.[573] According to Mexico, two issues must be addressed under this provision: (i) whether the technical regulation fulfils a legitimate objective; and (ii) whether it is not more trade-restrictive than necessary to fulfil such objective taking account of the risks non-fulfilment would create.[574]

7.384 In the United States' view, the second sentence of Article 2.2 of the TBT Agreement explains what the first sentence of this provision means.[575] The United States submits that two elements must be shown for a measure to be considered more trade-restrictive than necessary: (i) the measure must be trade-restrictive; and (ii) the measure must restrict trade more than is necessary to fulfil the measure's legitimate objective.[576]

7.385 The Panel first notes that this provision embodies one of the core objectives of the TBT Agreement, namely "that technical regulations ... do not create unnecessary obstacles to international trade".[577] The first sentence of Article 2.2 translates this general objective into a positive obligation by requiring Members to ensure that their technical regulations are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

7.386 The second sentence of Article 2.2 contains a more detailed obligation, i.e. that technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. The Panel also notes that the first and the second sentences of this provision are connected by the expression "[f]or this purpose". In the Panel's view, this expression indicates that complying with the requirements contained in the second sentence of Article 2.2 serves the purpose of ensuring that technical regulations do not create unnecessary obstacles to international trade.

7.387 Thus, the Panel agrees with the United States that "the second sentence of Article 2.2 of the TBT Agreement explains what the first sentence of this provision means".[578] In other words, the second sentence of Article 2.2 of the TBT Agreement establishes two requirements that technical regulations must comply with in order not to constitute unnecessary obstacles to international trade. A plain reading of the second sentence of Article 2.2 reveals that these requirements are:

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[572] United States' first written submission, para. 145.
[573] Mexico's first written submission, para. 205.
[574] Mexico's first written submission, para. 205.
[575] United States' first written submission, para. 143.
[576] United States' first written submission, para. 163.
[577] The fifth preambular paragraph of the TBT Agreement expresses the WTO Members' desire to:
"[E]nsure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade".
[578] United States' first written submission, para. 143.

– Technical regulations must pursue a legitimate objective; and

– They must not be more trade-restrictive than necessary to fulfil that legitimate objective, taking into account the risks non-fulfilment would create.

7.388 Therefore, we agree with Mexico that the analysis of its claims under Article 2.2 of the TBT Agreement may be conducted in two steps.[579] First, to determine whether the US dolphin-safe provisions fulfil a legitimate objective; and, second, if that is the case, to determine whether those provisions are more trade-restrictive than necessary to fulfil such objective, taking account of the risks non-fulfilment would create.[580] We also note that the burden rests on Mexico, as the complainant, to demonstrate that the conditions are met, to conclude that a violation of Article 2.2 of the TBT Agreement exists.

7.389 On the basis of this approach, we now consider Mexico's claims under Article 2.2 of the TBT Agreement.

(a) Whether the US dolphin-safe labelling provisions pursue a legitimate objective

7.390 As observed above, the burden of demonstrating that the US dolphin-safe labelling provisions are inconsistent with Article 2.2 of the TBT Agreement, including that they are "more trade restrictive than necessary to fulfil *a legitimate objective*" (emphasis added) rests on Mexico.

7.391 We note in this respect that in the context of its analysis under Article 2.4 of the TBT Agreement, the panel in *EC – Sardines* expressed the view that "it is incumbent upon the respondent to advance the objectives of its technical regulation which it considers legitimate".[581] We also note, however, that the Appellate Body observed in this respect that the burden of proof was not modified by considerations relating to the fact that it is the respondent that has adopted the technical regulation at issue and thus was in the best position to ascertain its objectives:

> "The TBT Agreement acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives. That said, part of the reason why the Panel concluded that the burden of proof under Article 2.4 is on the respondent is because, in the Panel's view, the complainant cannot "spell out" the "legitimate objectives" of the technical regulation. In addition, the Panel reasoned that the assessment of the appropriateness of a relevant international standard involves considerations which are properly the province of the Member adopting or applying a technical regulation.
>
> In our opinion, these two concerns are not justified."[582]

7.392 Similarly under Article 2.2 of the TBT Agreement, which also relies on the notion of "legitimate objective" pursued by the measures, the burden is on the complainant, i.e. in this case Mexico, to establish the existence of a violation of this provision, including that the measures are "more trade-restrictive than necessary to fulfil a legitimate objective", and this necessarily involves a determination of what such objective is and its legitimacy within the meaning of Article 2.2.[583] As we

[579] Mexico's first written submission, para. 205.
[580] Mexico's first written submission, para. 205.
[581] Panel Report, *EC – Sardines*, paras. 7.120-7.121.
[582] Appellate Body Report, *EC – Sardines*, paras. 276-277.
[583] See Appellate Body Report, *EC – Sardines*, paras. 282.

understand it, the Appellate Body's observations with respect to the complainant's role in discharging its burden of proof are intended to make clear that a complainant is not relieved of its duty to present a *prima facie* case by the fact that some aspects of the provision at issue relate to the objectives of the measures, which are determined by the Member taking the measure. This does not imply, however, that the objectives of the measures as defined by that Member itself are not relevant to this determination. It only assumes that the complainant is expected to present its claims taking into account the information at its disposal in this respect.

7.393 In the present case, in order to determine whether the US dolphin-safe labelling provisions pursue a legitimate objective, we must identify such objective, and ascertain its "legitimacy" within the meaning of Article 2.2. In accordance with the burden of proof described above, it is appropriate, in our view, to consider in the first instance the objective of the measure as described by Mexico. Nonetheless, in order to make an objective assessment of the matter in accordance with Article 11 of the DSU and ensure that the right of the defending Member to adopt measures in pursuance of certain legitimate objectives in accordance with Article 2.2 is preserved, we must also consider in this respect, the United States' description of its own objectives, in order to clarify as necessary what the objectives of the measure are and the legitimacy of such objectives.

(i) The objectives pursued by the US measures

Arguments of the parties

7.394 Mexico argues that ascertaining the true objectives of a technical regulation rather than just the stated or acknowledged objectives is an important part of the interpretation and application of Article 2.2 of the TBT Agreement. According to Mexico, the objective assessment required by Article 11 of the DSU includes the facts pertaining to the objectives of the measures at issue. In Mexico's view, in ascertaining the objectives of the US measures the Panel should consider the "design, structure and characteristics of the measure".[584] Mexico submits that "the U.S. measures do not protect animal life or health or the environment in the general sense". According to Mexico, the objective of the US measures is much narrower, namely, "to preserve dolphin stocks in the course of tuna fishing operations in the ETP".[585]

7.395 The United States first submitted that the objectives of the US dolphin-safe labelling provisions are:

– ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and

– 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.[586]

7.396 According to the United States, these objectives are reflected both in the name of the Dolphin Protection Consumer Information Act itself as well as the findings of the US Congress specified in that statute.[587]

[584] Mexico's first written submission, para. 211; Mexico's response to Panel question No. 64, paras. 213, 218, 220.
[585] Mexico's first written submission, paras. 207-208.
[586] See United States' first written submission, para. 146; United States' first oral statement, para. 47. .
[587] United States' second written submission, para. 128.

7.397 The United States later described the second objective as ensuring that the US market is not used to encourage fishing fleets to catch tuna "by setting on dolphins".[588]

7.398 Mexico submits that the way in which the United States has represented the objectives has created a moving target or evolving objectives. Mexico also argues that the United States' representation of the objectives confuses the objectives with the methods necessary to achieve them.[589] As described above, Mexico further submits that the objective of the US measures is narrower than the protection of animal life or health or the environment.[590]

7.399 The United States agrees with Mexico that the architecture and design of the US dolphin-safe labelling provisions as well as the findings of the US Congress are relevant to ascertaining the objectives of the US measures.[591] The United States claims that the architecture, structure and design of the US dolphin-safe provisions also reflect their stated objectives.[592]

Analysis by the Panel

7.400 As described above, there is some difference of views among the parties as to what objectives the US dolphin-safe labelling provisions seek to fulfil.

7.401 As described above, the United States itself initially identified two objectives of the US dolphin-safe provisions:

– 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

– 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.[593]

7.402 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".[594]

[588] See United States' response to Panel question No. 27, para. 66; United States' response to Panel question No 64, paras. 146-147; United States' second written submission, paras. 36, 127-135, 156, 161, 188; United States' second oral statement, paras. 54-55; United States' response to Panel question Nos. 111 and 147, paras. 33 and 80.

[589] Mexico's response to Panel question No. 64, para. 207.

[590] Mexico's first written submission, para. 208; Mexico's response to Panel question No. 64, para. 214.

[591] United States' second written submission, para. 129.

[592] For instance, the United States observes that the US dolphin-safe provisions establish conditions under which tuna products may be labelled dolphin-safe based on whether those products contain tuna that was caught in a manner that adversely affects dolphins. In addition, the United States claims that the US dolphin-safe provisions are designed in such a way that labelling tuna products dolphin-safe or with "any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins" when the conditions for labelling products in that way are not met is a violation of the US law prohibiting deceptive practices, United States' second written submission, para. 129.

[593] See para. 7.394 above.

[594] See para. 7.395 above.

7.403 Mexico described the objective of the US measures as being "narrower than the protection of animal life or health or the environment", and suggested that the actual objective of these measures is "to preserve dolphin stocks in the course of tuna fishing operations in the ETP".[595]

7.404 Mexico then further clarified that its contention is not that the two objectives of the measures, as identified by the United States, "could not be found within the design and structure of the US measures".[596] Mexico rather argues that US dolphin-safe provisions pursue an additional objective, i.e. "protecting dolphins", and that they fail to fulfil this objective.[597]

7.405 In light of these contentions, the Panel considers it necessary to seek to first clarify the objectives of the US dolphin-safe provisions. As the Appellate Body has recognized in the context of Article XIV of GATS, a panel's analysis is not bound by a Member's characterization of the objectives of its own measures. Such categorization must be made in an independent and objective fashion, based on the evidence in the record.[598] The same considerations apply, in our view, in the context of Article 2.2 of the TBT Agreement.

7.406 In this task, the Panel's analysis will be guided by the description of the objectives of the measures by both parties, as well as by the structure and design of the US dolphin-safe provisions. We note in this respect that the parties both consider that the design, structure and characteristics of the US dolphin-safe provisions themselves are relevant to a clarification of their objectives.[599] We wish to make clear, however, that at this stage of the analysis our enquiry is limited to the question of what the *objective* or purpose of the measures is, and does not seek to address the separate question of what the measures actually do or do not do in pursuance of this objective.

7.407 We first note that Mexico has not suggested that the two objectives of the measures, as identified by the United States, "could not be found within the design and structure of the US measures". Accordingly, as we understand it, it is not disputed that the US dolphin-safe provisions pursue objectives relating both to consumer information and to dolphin protection, both in relation to the manner in which tuna is caught. We now consider further both aspects.

Consumer information objective

7.408 As described above, the United States has described the first objective of its measures as "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins".

7.409 In relation to this objective, we first note that the title of the statute codifying the US dolphin-safe provisions is "Dolphin Protection Consumer Information Act". This title supports the contention that this piece of legislation is intended to protect consumers from being deceived by the information that is provided to them.

7.410 In addition, the US dolphin-safe provisions contain several findings of the US Congress that underline their enactment. Subsection 1385(b) of the DPCIA establishes:

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[595] Mexico's first written submission, para. 208.

[596] Mexico's response to Panel question No. 137, para. 110.

[597] Mexico stated that "it appears to Mexico that these two objectives [referring to the objectives identified by the United States] encompass a third incidental objective which relates to 'protecting dolphin'", see Mexico's response to Panel question No. 64, para. 214.

[598] Appellate Body Report, *US – Gambling*, para. 304.

[599] See Mexico's response to Panel question No. 64, paras. 213, 218-219 and United States' second written submission, para. 129.

> "The Congress finds that-
>
> (1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world;
>
> (2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and
>
> (3) consumers would like to know if the tuna they purchase is falsely labelled as to the effect of the harvesting of the tuna on dolphins."

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

7.412 Therefore, the structure and design of the US dolphin-safe provisions support the view that one of their objectives is to ensure accurate information to consumers of tuna products concerning the harmful effects on dolphins resulting from fishing methods employed to catch the tuna contained in those products.

7.413 Consequently, the Panel accepts the United States' contention that its measures aim, *inter alia*, at "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins".

Dolphin protection objective

7.414 As described above, the United States initially described its second objective as "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" and later referred to it 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".

7.415 Mexico has suggested, however, that the US objective is "narrower than the protection of animal life or health or the environment", and that the actual objective of these measures is "to preserve dolphin stocks in the course of tuna fishing operations in the ETP"[600] and that they pursue an "additional objective", i.e. "protecting dolphins".[601]

7.416 In relation to this objective, we first note that the United States' own description of its operation implies an end-and-means relation between two different elements, i.e. ensuring that the US market is not used to encourage certain fishing techniques, *in order to* contribute to the protection of dolphins. In other words, as we understand it, the ulterior objective is contributing to the protection

[600] Mexico's first written submission, para. 208.

[601] Mexico stated that "it appears to Mexico that these two objectives [referring to the objectives identified by the United States] encompass a third incidental objective which relates to 'protecting dolphin'", see Mexico's response to Panel question No. 64, para. 214.

of dolphins, whereas the means chosen to achieve this objective is to ensure that the US market is not used to encourage certain fishing techniques.

7.417 With respect to the ulterior objective of contributing to the protection of dolphins, the Panel notes that the US dolphin-safe provisions appear under Subchapter II of Title 16, Section 1385 of the USC, entitled Conservation and Protection of Marine Mammals, which gives support to the United States' assertion that the measures at issue are part of its policies relating to the protection of marine mammals, including dolphins.[602]

7.418 Moreover, the first two findings of the US Congress cited above also reveal a preoccupation on the part of the US legislator with the protection of dolphins and other marine mammals. The US Congress seemed concerned in particular about the harmful effects suffered by these species arising from two sources: tuna fishing operations in the ETP, on one hand; and driftnet fishing in the high seas worldwide, on the other hand. In the Panel's view, these findings suggest the existence of a direct link between the enactment of the US dolphin-safe provisions and the US Congress' desire to protect dolphins and other marine mammals. Therefore, the structure and design of the US dolphin-safe provisions support the United States' argument that its measures are intended to "protect dolphins".

7.419 Mexico has suggested that the actual objective of these measures is "narrower" than the protection of animal life or health or the environment and is in fact "to preserve dolphin stocks in the course of tuna fishing operations in the ETP".[603] We note in this respect that the United States has often referred in the course of the proceedings to its conviction that the dolphin populations in the ETP remain depleted.[604] These references however, do not imply in our view that the US measures aim exclusively to preserve dolphin stocks in the ETP as suggested by Mexico. As we understand them, the United States' allegations that the dolphin stocks in the ETP remain depleted were rather meant to substantiate its contention that setting on dolphins is harmful to dolphins.[605] Furthermore, the text of the US dolphin-safe provisions establishes certification requirements and conditions for access to the dolphin-safe label also with respect to tuna caught outside the ETP.[606] Therefore, the design and structure of the US dolphin-safe provisions themselves support the view that they aim at protecting dolphins generally, in and outside the ETP.[607] Thus we disagree with Mexico's allegation that the objectives of the measures, as reflected in the design and structure of the measures, are limited "to preserve dolphin stocks in the course of tuna fishing operations in the ETP".

7.420 We also note that, in response to a question by the Panel, the United States explained that its objective was not to achieve a specific number or rate of dolphin mortality, but rather generally to reduce the adverse effects of setting on dolphins to catch tuna by ensuring that the US market is not

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[602] United States' first written submission, fn 69.

[603] Mexico's first written submission, para. 208.

[604] United States first written submission, paras. 9, 47; United States' first oral statement, para. 7; United States' second written submission, paras. 2, 43; United States' second oral statement, para. 10.

[605] United States' first written submission, paras. 46-59; United States' response to Panel question No. 65, para. 150; United States' second oral statement, para. 10.

[606] Subsection 1835(d)(1)(B) and 1835(d)(1)(D).

[607] We also note that Subsection 1835(h) of the US dolphin-safe provisions conditioned the change in the certification requirements for tuna caught in the ETP by using purse seine nets to certifying that no dolphins were killed or seriously injured, instead of that no purse seine net was used *and* that no dolphins were killed or seriously injured, to the existence of a finding by the Secretary of Commerce that setting on dolphins was not "having a significant adverse impact on any depleted dolphin stock" (emphasis added). However, such determination would have had effects only within the ETP. Thus, in principle, the requirement of certifying that no dolphins were set upon would have remained possible in other fisheries if there was, for instance, a determination that regular and significant association existed in that fishery.

used to encourage setting on dolphins. The United States added that "[s]eeking to protect dolphins from these adverse effects might also be considered as seeking to conserve dolphin populations".[608]

7.421 In this respect, we note that, as explained above, the US description of the manner in which it sought to contribute to protecting dolphins through the measures has varied in the course of the proceedings. Initially, the United States depicted its objective as contributing to the protection of dolphins by "ensuring that the US market is not used to encourage fishing fleets to use *fishing techniques that adversely affect dolphins*" (emphasis added).[609] On other occasions, the United States defined it as contributing to the protection of dolphins by "ensuring that the US market is not used to encourage the practice of *setting on dolphins* to catch tuna" (emphasis added).[610] These differences may have a bearing on later parts of our analysis. Hence, we consider it necessary to clarify this aspect, in light of the structure and design of the US dolphin-safe provisions.

7.422 The operative paragraphs of the US dolphin-safe provisions controlling the use of the dolphin-safe label bar its use on tuna that was caught using driftnet fishing in the high seas, regardless of whether any incidental killing or injury of dolphins or any other marine mammal occurred during the fishing trip.[611] As explained above in Section II of this Report, access to the dolphin-safe label is also denied to tuna caught by a large vessel (with 363 metric tons or more carrying capacity)[612] in the ETP by intentionally setting on dolphins or in a fishing trip where dolphins were killed or seriously injured, regardless of the fishing method used.[613] The use of the label is also prohibited for tuna caught outside the ETP if dolphins were intentionally set upon[614]; and in cases where an alternative label is used[615], if dolphins were killed or seriously injured, even if no setting on dolphins was involved.[616]

7.423 Consequently, the use of both driftnets in the high seas as well as the fishing technique known as setting on dolphins disqualify a tuna product from access to the label. It seems that the reason underlying this prohibition is the assumption that these two fishing techniques result in adverse effects on marine mammals including dolphins.[617] The measures also go further than addressing setting on dolphins by requiring that the tuna has not been caught in a set where dolphins were killed or seriously injured, when the tuna was caught using purse seine nets in the ETP.[618] In addition, the United States itself also describes the measures as conditioning access to an alternative dolphin-safe

[608] United States' response to Panel question No. 65(a), para. 151.

[609] United States first written submission, paras. 6-9, 60, 146; United States' response to Panel question No. 64, para. 149; United States' second written submission, para. 1.

[610] United States first written submission, para. 28; United States' response to Panel question Nos. 64 and 65, paras. 146 and 150, respectively; United States second written submission, paras. 7, 36, 133.

[611] Subsection 1385(d)(1)(A) of the US dolphin-safe provisions.

[612] See para. 2.12 above.

[613] Subsections 1385(d)(1)(C), 1385(d)(2) and 1385(h) of the US dolphin-safe provisions.

[614] Subsections 1385(d)(1)(B) of the US dolphin-safe provisions.

[615] As described in Section II.F of this Report, an "alternative label" under the DPCIA is a dolphin-safe label developed by private individuals or companies, that is in compliance with the dolphin-safe labelling requirements, but does not reproduce the official mark developed by the US Secretary of Commerce.

[616] Subsections 1385(d)(3)(A) of the US dolphin-safe provisions.

[617] The second finding of the US Congress expressly indicates that "the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins" (emphasis added). The United States has also clarified that "setting on dolphins to catch tuna adversely affects dolphins", United States first written submission, paras. 46-57; United States' first oral statement, para. 7; United States' second oral statement, paras. 7-13.

[618] As described in para. 2.22 above, the same requirement would also apply outside the ETP if it were determined that a regular and significant tuna-dolphin association exists.

label on the tuna not being caught in a set where dolphins were killed or seriously injured (in addition to dolphins not having been set upon).

7.424 Thus, the structure and design of the US measures suggest that the US dolphin-safe provisions do not seek to discourage only setting on dolphins. They rather seem directed to discouraging, more generally, the use of fishing techniques that have harmful effects on dolphins, as the United States itself initially described it. This is also consistent with the manner in which the US objective relating to consumer information is formulated.

7.425 Therefore, for the purposes of our analysis of Mexico's claims under Article 2.2 of the TBT Agreement, we accept the United States' representation of the objectives of the US dolphin-safe provisions as described in paragraph 7.401 above.

7.426 Finally, we note that there is a direct correlation between the two objectives identified by the United States. As explained by the United States itself:

> "The objectives of the U.S. dolphin-safe labeling provisions are (1) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and (2) *to the extent that consumers choose not to purchase tuna without the dolphin-safe label*, the U.S. provisions ensure that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins" (*emphasis added*).[619]

7.427 To the extent that, as described, the US dolphin-safe provisions operate on the basis of incentives created by consumer choice, achievement of the second objective seems to be dependant in large part on the achievement of the first objective. Only if consumers can and do accurately distinguish, under the measures at issue, tuna caught in conditions that are harmful to dolphins from tuna caught in conditions that are *not* harmful to dolphins, can the use of such harmful fishing techniques be discouraged on the US market through the use of the label.

(ii) Whether the objectives pursued by the United States are legitimate

Arguments by the parties

7.428 Mexico submits that the US dolphin-safe provisions promote the use of alternative fishing methods that result in substantially higher bycatch and the depletion of ocean sealife. Mexico also argues that the US measures undermine the economic incentive for countries and fishing fleets to participate in the AIDCP, which has been recognized to be a very successful multilateral environmental agreement.[620]

7.429 Accordingly, Mexico claims that the US measures "trade off" the protection of the life or health of other animals and the protection of the environment in general against the professed protection of the life or health of dolphins in the geographic confines of the ETP.[621] According to Mexico, this trade-off undermines broader environmental objectives that are enshrined in the AIDCP.

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[619] United States first written submission, paras. 146, 158.

[620] Mexico cited to the fact that AIDCP was awarded the Margarita Lizárraga Medal by the Director General of the Food and Agriculture Organization (FAO) in November, 2005. The medal is awarded biennially to a person or organization that serves with distinction in the application of the Code of Conduct for Responsible Fisheries (Mexico's first written submission, para. 207). Mexico also cited support for the AIDCP from environmental NGOs (Mexico's first written submission, para. 90).

[621] Mexico's first written submission, para. 209.

Therefore, Mexico submits, the US dolphin-safe provisions cannot be found to "fulfil a legitimate objective" within the meaning of Article 2.2 of the TBT Agreement.[622]

7.430 The United States claims that the objectives of the US dolphin-safe provisions fall within two of the objectives expressly listed in Article 2.2 of the TBT Agreement, namely, the "prevention of deceptive practices"; and the "protection of human health or safety, animal or plant life or health, or the environment".[623]

7.431 Moreover, the United States submits that the preamble of the TBT Agreement provides relevant context for the words "legitimate objective" in Article 2.2. The United States considers that the preamble makes it clear that each Member has the right to decide for itself which legitimate objectives to pursue and to take measures to meet those objectives "at the levels it considers appropriate", including with respect to measures to protect animal life or health or the environment and to prevent deceptive practices.[624]

7.432 The United States claims that since dolphins are animals, protecting them is a legitimate objective expressly contemplated under Article 2.2. Further, as dolphins comprise part of the environment, protecting dolphins also constitutes protecting the environment.[625]

7.433 The United States disagrees with Mexico that the US dolphin-safe provisions "trade off" the protection of dolphin population in the ETP and the protection of the environment in general. In the first place, the United Sates argues that it is neither for Mexico nor for a WTO panel, to decide what policy objectives the United States should pursue.[626] The United States adds that nothing in the TBT Agreement dictates that Members must prioritize one set of policy objectives over another.

7.434 Secondly, the United States disagrees with the implication of Mexico's suggestion that the United States does not take measures to protect other marine species or the environment. However, the United States submits, even assuming *arguendo* that such goals conflict, the decision over which to pursue, and to what level, is completely for the United States to make.[627] According to the United States, the US dolphin-safe provisions seek to protect dolphins and they do not need also to protect every other marine species and the environment as a whole to serve a legitimate objective.[628] The objectives of the US dolphin-safe provisions cannot be "illegitimate" simply because other environmental concerns also merit attention.[629]

7.435 In addition, the United States argues that the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins, also falls within the illustrative list in Article 2.2, which refers to the "prevention of deceptive practices". According to the United States, the US dolphin-safe provisions are intended to prevent deceptive practices by ensuring that tuna products are not falsely or misleadingly labelled dolphin-safe when they are caught using a fishing practice that adversely affects dolphins.[630]

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[622] Mexico's first written submission, para. 210.
[623] United States' first oral statement, para. 47.
[624] United States' first written submission, para. 145.
[625] United States' first written submission, para. 151.
[626] United States' first written submission, para. 148; United States' first oral statement, para. 47.
[627] United States' first written submission, para. 149.
[628] United States' first written submission, para. 150.
[629] United States' first oral statement, para. 47.
[630] United States' first written submission, para. 152.

Analysis by the Panel

7.436 Having clarified the objectives pursued by the US dolphin-safe provisions, we must now ascertain whether these objectives are "legitimate" within the meaning of Article 2.2 of the TBT Agreement. As observed by the panel in *EC – Sardines*, although the elaboration of the objectives of a measure is a prerogative of the Member establishing that measure, "[p]anels are required to determine the legitimacy of those objectives".[631] The Appellate Body supported this conclusion by stating that it shared the view of the Panel this part of the analysis "implies that there must be an examination and a determination on the legitimacy of the objectives of the measure".[632]

7.437 Article 2.2 of the TBT Agreement provides a non-exhaustive list of legitimate objectives under this provision.[633] This list includes, as the United States has pointed out, the "prevention of deceptive practices" and the "protection of ... animal or plant life or health, or the environment". We are satisfied that the objectives of the US dolphin-safe provisions, as described in the previous section, fall within the scope of these two categories of legitimate objectives. The objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations falls within the broader goal of preventing deceptive practices. Similarly, the protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to "animal life or health" in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.

7.438 Furthermore, for the reasons explained below, we also find that the US objectives relate to genuine concerns in relation to the protection of the life or health of dolphins and deception of consumers in this respect. The evidence presented by the parties amply demonstrates that dolphins and other marine mammals may be adversely affected by tuna fishing activities.[634] The Panel also notes that certain fishing techniques seem to pose greater risks to dolphins than others. It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries, especially when used without applying certain fishing gear and procedures designed to reduce dolphin bycatch. The number of dolphins killed in the ETP before the adoption of the controls established by the AIDCP[635], and the ensuing degradation of the dolphins stocks in this area, are illustrative of the potentially devastating consequences that tuna fishing activities may have on dolphins.

7.439 Both parties also share the view that consumers of tuna products in the United States are sensitive to these adverse consequences, and that this concern is reflected in the public's preference for tuna products that are labelled dolphin-safe.[636] Moreover, the parties have also pointed out that consumers have expectations about the harmfulness to dolphins of the fishing methods employed to

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[631] Panel Report, *EC – Sardines*, para. 7.121.

[632] Appellate Body Report, *EC – Sardines*, para. 286.

[633] Appellate Body Report, *EC – Sardines*, para. 286.

[634] See e.g. Exhibits MEX-2, MEX-3, MEX-4, MEX-5, MEX-67, MEX-84, MEX-93, MEX-97, MEX-98, MEX-99, MEX-105 (containing information relating to harm caused to dolphins resulting from setting on dolphins and other fishing techniques); Exhibits US-4, US-10, US-19, US-20, US-21, US-22, US-24, US-27, US-57, US-62, US-75 (referring to the negative effects on dolphins arising from the practice of setting purse-seine nets on them).

[635] Mexico's first written submission, para. 50.

[636] Mexico's second written submission, para. 165; United States' response to Panel question No. 40, para. 97; United States' second written submission, para. 61. The parties disagree, however, on what meaning consumers attribute to the terms "dolphin-safe".

catch tuna that is labelled dolphin-safe.[637] Thus, there is a possibility that consumers may be deceived about whether the tuna contained in the products they purchase was caught using a method that is harmful to dolphins.

7.440 Moreover, nothing prevents Members from using the incentives created by consumer preferences to encourage or discourage particular behaviours that may have an impact on the protection of animal life or health. Hence, the Panel considers that regulating the information that appears on a label to ensure that consumers may safely exercise their preference is a legitimate mechanism to ensure this purpose. Consequently, we find the objective of contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing methods that adversely affect dolphins to be legitimate.

7.441 In relation to Mexico's argument that the objectives of the US dolphin-safe provisions conflict with broader environmental objectives, such as protecting other marine species or sealife in general, the Panel considers that it is a well-established principle underlying the provisions of the GATT 1994 and the covered agreements, that Members enjoy the right to determine the legitimate policies they want to pursue.[638] In this regard, the Panel finds the following passage of the Appellate Body's decision in *US – Gasoline* illustrative:

> "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements."[639]

7.442 As established above, the US dolphin-safe provisions aim at protecting dolphins. That this particular piece of legislation does not afford protection to other animals or marine species should not be sufficient reason to consider the goal of the measure to be illegitimate. As the Appellate Body has recognized, "certain complex public health or environmental problems may be tackled only when a comprehensive policy comprising a multiplicity of interacting measures".[640] The United States has indicated that its measures are part of a comprehensive policy to protect dolphins.[641] Moreover, Mexico has never argued that the US dolphin-safe provisions are the only instrument the United States has put in place to protect marine life. It would be highly implausible to expect that a single regulatory instrument should serve all the purposes that may be legitimately pursued by the Members. Therefore, the Panel does not consider that the objective of contributing to the protection dolphins of the US dolphin-safe provisions should be considered illegitimate because it does not cover the protection of other marine species.

7.443 In the Panel's view, the objectives of protecting consumers from deceptive practices and contributing to protecting dolphins by discouraging certain fishing practices do not go against the object and purpose of the TBT Agreement, even in light of the existence of potentially conflicting objectives that could also be recognized as legitimate.

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[637] Mexico's first oral statement, para. 49; Mexico's second written submission, para. 177; United States' second written submission, para. 153.

[638] Appellate Body Report, *US – Gasoline*, p. 28. See also, Panel Report, *US – Shrimp*, para. 7.26, fn 629; GATT Panel Report, *Japan – Alcoholic Beverages I*, para. 5.13.

[639] Appellate Body Report, *US – Gasoline*, p. 29.

[640] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[641] United States' first written submission, para. 171; United States' second written submission, para. 157.

7.444 For these reasons, we find that the objectives of the US dolphin-safe provisions, as described by the United States and ascertained by the Panel, are legitimate within the meaning of Article 2.2 of the TBT Agreement.

(b) Whether the US dolphin-safe provisions are more trade-restrictive than necessary to fulfil their objectives, taking into account the risks that non-fulfilment would create

(i) Approach of the Panel

Arguments by the parties

7.445 As stated above, Mexico claims *in the alternative* that if the US measures are found to fulfil a legitimate objective, they are more trade-restrictive than necessary to fulfil that legitimate objective, taking into account the risks that non-fulfilment would create.[642]

7.446 Mexico observes that the term "necessary" has been interpreted in the context of Articles XX(b) and XX(d) of the GATT 1994 and Article XIV of the GATS. According to Mexico, these previous interpretations should guide the Panel's analysis of Mexico's claims under Article 2.1 of the TBT Agreement.[643] Based on these previous interpretation of the word "necessary" in the above-mentioned provisions, Mexico argues that for a measure to be "necessary", the following factors must be examined, weighed and balanced: (i) the importance of the interests or values at stake; (ii) the extent of the contribution of the measure to the achievement of the measure's objective; (iii) the trade restrictiveness of the measure; and (iv) whether there are reasonably available alternative measures which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.[644]

7.447 Therefore, Mexico argues that in the context of the facts of this dispute, the phrase "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create" means that the US measures shall not be more trade-restrictive (i.e. deny competitive opportunities to imports of Mexican tuna products and tuna) than necessary (i.e. in light of the importance of the objective of preserving dolphin stocks in the ETP tuna fishery and the contribution of the US measures to the achievement of that objective, there are no reasonably available less trade-restrictive measures that provide an equivalent contribution to the achievement of the objective), taking account of the risks non-fulfilment would create (i.e., in light of the available scientific and technical information, the chance or possibility of adverse consequences should the objective not be carried out).[645]

7.448 The United States considers that a measure that is "more" trade-restrictive than "necessary" is a measure that restricts trade more than is needed or required to fulfil the measure's objective.[646] The United States submits that the Panel should interpret Article 2.2 based on the ordinary meaning of its terms in their context in light of the object and purpose of the TBT Agreement, and look to supplementary means of interpretation to confirm that interpretation. According to the United States, Article 5.6 of the SPS Agreement provides relevant context for Article 2.2 of the TBT Agreement since the two provisions contain very similar language. According to the United States, the contextual reference to Article 5.6 of the SPS Agreement confirms that determining whether a measure is more trade-restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement involves

[642] Mexico's first written submission, para. 213, Mexico's first oral statement, para. 56.
[643] Mexico's first written submission, para. 219.
[644] Mexico's first written submission, para. 219.
[645] Mexico's first written submission, para. 222; Mexico's first oral statement, para. 84.
[646] United States' first written submission, para. 166.

determining whether there is an alternative measure that could fulfil the measure's objective that is *significantly* less trade-restrictive.[647]

7.449 The United States considers that the word "necessary" in Article 2.2 of the TBT Agreement appears in a very different context than the word "necessary" in Article XX of the GATT 1994. According to the United States, in Article XX(b) the question is whether it is necessary for a Member to breach its GATT obligations to protect human, animal or plant life or health. In Article 2.2, the question is whether an otherwise WTO-consistent measure restricts trade more than is necessary to fulfil the measure's objective.[648] In Article 2.2 of the *TBT Agreement*, unlike under Article XX, it is the complaining party that has the burden of establishing that the measure is "more trade-restrictive than necessary."[649]

7.450 The United States also argues that the analysis under Article 2.2 of the TBT Agreement entails comparing two alternatives that are WTO-consistent, while the alternatives being compared under Article XX of the GATT 1994 are an alternative that is WTO-inconsistent and another that is WTO-consistent.[650] The United States concludes that in light of the different context in which the word "necessary" appears in Article 2.2 as compared to Article XX and the different circumstances surrounding conclusion of those provisions, it would not be appropriate to apply the same meaning or interpretive approach to both provisions.[651]

7.451 Mexico contends that when attempting to interpret the term "necessary", the United States erroneously relies on Article 5.6 of the SPS Agreement and its associated footnote.[652] According to Mexico, the United States uses these provisions and their related jurisprudence to include in the definition of "necessary" in Article 2.2 of the TBT Agreement: (i) the concept that the measure must fulfil a legitimate objective "at the level that the Member imposing the measure has determined appropriate"; and (ii) the qualifying term "significantly" in the phrase "not more trade restrictive".[653]

7.452 Although Mexico acknowledges that Article 5.6 and footnote 3 of the SPS Agreement provide guidance for the interpretation of the phrase "shall not be more trade restrictive than necessary to fulfil a legitimate objective" in Article 2.2 of the TBT Agreement, it observes that in Article 2.2 there is no language similar to that of footnote 3 to Article 5.6 of the SPS Agreement.[654]

Analysis by the Panel

7.453 Having determined that the US dolphin-safe labelling provisions pursue legitimate objectives within the meaning of Article 2.2 of the TBT Agreement, we must now determine whether they are "more trade-restrictive than necessary" to fulfil such objectives, "taking account of the risks non-fulfilment would create".

7.454 The terms of Article 2.2 suggest that some restrictions on international trade may arise from the preparation, adoption or application of technical regulations that pursue legitimate objectives

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[647] United States' first written submission, paras. 166-69; United States' first oral statement, para. 157; United States' second written statement, para. 121.

[648] United States' first oral statement, para. 49.

[649] United States' response to question 69, para. 155.

[650] United States' second written submission, para. 124.

[651] United States' first oral statement, para. 49; United States' second written submission, paras. 123-125.

[652] Mexico's second oral statement, para. 79.

[653] Mexico's second oral statement, para. 80.

[654] Mexico's response to question 67 from the Panel, para. 227; Mexico's second oral statement, para. 82.

under the TBT Agreement. It further suggests that while a degree of "trade-restrictiveness" may be justified, where it is "necessary to fulfil a legitimate objective", a measure could not be justified under Article 2.2 if it is *more* trade restrictive than is necessary to achieve the objective at issue. What we must determine, therefore, is in what circumstances a measure may be considered to be "more trade-restrictive than necessary" under this provision. As observed above, a measure that would be "more trade-restrictive than necessary" within the meaning of the second sentence of Article 2.2 would create "unnecessary obstacles to trade" within the meaning of the first sentence.

7.455 Turning first to the question of what constitutes "trade-restrictiveness" in this context, we note that Mexico argues that measures that are "trade restrictive" include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imports[655] and that the United States agrees with Mexico that a measure that imposes limits on imports or discriminates against them would meet the definition of a measure that is "trade-restrictive".[656] We also agree.

7.456 We further note that the wording of the provision in terms of the measure "not" being "more" trade restrictive than necessary implies that trade-restrictiveness is only permissible *to the extent that* it is necessary to the achievement of the objective. *A contrario*, where it would be possible to achieve the same objective through a *less* trade restrictive measure, then the measure at issue would be in violation of Article 2.2, because it would then be more trade restrictive than necessary to achieve the said objective.

7.457 We find support for this interpretation in past interpretations of the terms of Article XX of the GATT 1994. Most recently, in *China – Publications and Audiovisual Products*, the Appellate Body summarized the approach it had developed in previous cases under Article XX of the GATT 1994 and under Article XIV of GATS. It thus noted, *inter alia*, that in *Brazil – Retreaded Tyres*, it had described the process in the context of an analysis of "necessity" under Article XX(b) of the GATT 1994:

> "The Appellate Body observed that a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution made by the measure to the achievement of the relevant objective, and the measure's trade restrictiveness. The Appellate Body stated that, if such an analysis 'yields a preliminary conclusion' that a measure is necessary, then the necessity of the measure must be 'confirmed' by comparing the measure with possible alternatives, in the light of the importance of the interests or values at stake."[657]

7.458 Similarly, under Article 2.2 of the TBT Agreement, the analysis involves an assessment of the degree of trade-restrictiveness of the measure at issue in relation to what is "necessary" for the fulfilment of the legitimate objective being pursued, and this can be measured against possible alternative measures that would achieve the same result with a lesser degree of trade-restrictiveness. At the same time, we note that there are differences in the wording of Article 2.2 of the TBT Agreement, as compared to Article XX of the GATT 1994 or Article XIV of the GATS, which reflect also the different positions of the provisions within their respective agreements. In particular, we note that Article 2.2 of the TBT Agreement sets out a positive obligation, and is not formulated as an exception.

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[655] Mexico's first written submission, para. 217.
[656] United States' first written submission, paras. 164-165.
[657] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 241.

7.459 With reference to Mexico's observation that the term "necessary" has been interpreted in the context of Articles XX(b) and XX(d) of the GATT 1994 and Article XIV of the GATS and that such interpretation should guide us in our interpretation of Article 2.2 of the TBT Agreement, we note that Article 2.2 of the TBT Agreement refers to technical regulations that are more *trade restrictive* than necessary to fulfil a legitimate objective, whereas Article XX of the GATT 1994 refers to "*measures* necessary" to protect public morals, to protect human, animal or plant life or health, to secure compliance with laws or regulations.

7.460 Thus, under Article 2.2 of the TBT Agreement, unlike in Article XX of the GATT 1994, the aspect of the measure to be justified as "necessary" is its trade restrictiveness rather than the necessity of the measure for the achievement of the objective. Given the fact that, under Article 2.2, the "necessity" to be assessed is that of the "trade-restrictiveness" of the measures rather than of the measures themselves[658], we understand the term "necessary" in the second sentence of Article 2.2 to mean essentially that the trade-restrictiveness must be "required" for the fulfilment of the objective. At the same time, we note that this question is distinct from that of the level of protection that the Member seeks to achieve in relation to its objective. In this respect, we recall that the preamble of the TBT Agreement makes clear that a Member is entitled to take measures "at the level it consider appropriate", in pursuance of a legitimate objective under the Agreement. This implies, in our view, that an assessment of whether any trade-restrictiveness arising under the measures at issue is "necessary" within the meaning of Article 2.2 must be understood as an enquiry into whether such trade-restrictiveness is required to fulfil the legitimate objectives pursued by the Member *at its chosen level of protection.*

7.461 We find further support for our interpretation of the terms of Article 2.2 in the text of Article 5.6 of the SPS Agreement, which contains language very similar to that of Article 2.2 of the TBT Agreement:

> "Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more

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[658] This is different from the situation under Article XX of GATT 1994. In *US – Gasoline*, the Appellate Body thus determined that "[o]bviously, there had to be a finding that the measure provided "less favourable treatment" under Article III:4 before the Panel examined the "General Exceptions" contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under XX(g), and not the legal finding of 'less favourable treatment'." Appellate Body Report, *US – Gasoline*, p. 16. We also note the Appellate Body's observations in this respect in *China - Publications and Audiovisual Products*:

"We turn next to China's allegation that the Panel committed a "logical error" in finding that the provisions of its measures are not 'necessary' for essentially the same reasons as the ones for which the Panel found those provisions to be in violation of China's trading rights commitments. China suggests that the restrictive effect of a measure could be relevant to a panel's analysis of whether a measure is consistent with an obligation, or its analysis of whether that measure can be justified under an exception, but that it could not be relevant for both questions. We disagree. The fact that the restrictive effect of a measure is relevant in one context does not preclude that it may also be relevant in the other. In analyzing whether the provisions of China's measures are inconsistent with Article 5.1 of China's Accession Protocol, the Panel assessed *whether* the provisions restrict the enterprises that may engage in importing. Thereafter, in analyzing whether the provisions could be justified as 'necessary' under Article XX(a) of the GATT 1994, the Panel assessed *to what extent* the provisions restrict those wishing to engage in importing, as well as *how* the restrictive effect comports with the degree of contribution to the achievement of the objective, and the societal importance and value of the legitimate objective concerned.[658] The restrictive effect of the provision was relevant to each of these distinct analytical inquiries. Therefore, we do not believe that the Panel's approach constitutes circular reasoning. On the contrary, it is the result of a proper sequential analysis.[658]

> trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."

7.462 In addition, footnote 3 to Article 5.6 sets forth:

> "For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than 'required' unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."

7.463 As explained by the Appellate Body, Article 5.6 of the SPS Agreement establishes a three-pronged test of Article 5.6 in which it must be demonstrated, as one of the steps of such test, that the alternative is significantly less trade restrictive than the SPS measure contested.[659]

7.464 We recall that the United States suggested that this provision provides guidance for the interpretation of Article 2.2 of the TBT Agreement. We also note that Mexico recognizes this, although it warns against unduly incorporating into Article 2.2 of the TBT Agreement language that pertains to Article 5.6 of the SPS Agreement and its corresponding footnote.[660] We are duly mindful of the fact that each provision must be interpreted in its proper context and that a similarly worded provision in a distinct covered agreement should not be assumed to have the same meaning as in another context. Nonetheless, we find that footnote 3 of the SPS Agreement, and the clarification that it provides concerning the meaning of the terms "not more trade restrictive than required" is pertinent for the purposes of confirming our understanding of the corresponding terms of Article 2.2 of the TBT Agreement, which play, in the context of this agreement, a comparable role. We note, however, that Article 2.2 of the TBT Agreement makes no reference to a technical regulation being "significantly" more trade restrictive than necessary. Without prejudice to what this term may imply in the context of Article 5.6 of the SPS Agreement, we note that Article 2.2 contains no such qualification.

7.465 In light of the above, we find that in order to determine whether a measure is more trade restrictive than necessary within the meaning of Article 2.2, we must assess the manner in which and the extent to which the measures at issue fulfil their objectives, taking into account Member's chosen level of protection, and compare this with a potential less trade restrictive alternative measure, in order to determine whether such alternative measure would similarly fulfil the objectives pursued by the technical regulation at the Member's chosen level of protection. To the extent that a measure is capable of contributing to its objective, it would be more trade-restrictive than necessary if an alternative measure that is less trade-restrictive is reasonably available, that would achieve the challenged measure's objective at the same level.

7.466 We also note that, in making this determination, we are required to take into account "the risks that non-fulfilment would create". The final sentence of Article 2.2 further clarifies that "[i]n assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-used of products".

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[659] The Appellate Body in *Australia – Salmon* agreed with the panel that "Article 5.6 and, in particular, the footnote to this provision, clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:

(1) is reasonably available taking into account technical and economic feasibility;

(2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and

(3) is significantly less restrictive to trade than the SPS measure contested." Appellate Body Report, *Australia – Salmon*, para. 194. It consistently followed this approach in *Japan – Agricultural products II* and in *Australia – Apples* (para. 328).

[660] Mexico's response to Panel question No. 67, para. 227; Mexico's second oral statement, para. 82.

7.467 As we understand it, this part of the text enjoins us to consider, as part of our analysis, both the likelihood and the gravity of potential risks (and any associated adverse consequences) that might arise in the event that the legitimate objective being pursued would not be fulfilled. We further understand this to imply that an alternative means of achieving the objective that would entail greater "risks of non-fulfilment" would not be a valid alternative, even if it were less trade-restrictive. This is consistent, in our view, with the fact that each Member is entitled, as expressed in the preamble of the TBT Agreement and as discussed above, to define its own level of protection.

7.468 Finally, we note that the burden on Mexico to demonstrate that the measures are more trade restrictive than necessary includes the identification of a reasonably available alternative that is capable of achieving the objective pursued by the challenged measure at the same level as the challenged measure, taking into account the risks non-fulfilment would create. As is the case under Article XX of the GATT 1994 and under Article 5.6 of the SPS Agreement, it is, in our view, for the complainant to make a prima facie case that the alternative meets the requirements of the provision at issue. As observed by the panel in *Australia – Apples*, "[t]he Appellate Body explained in *EC – Hormones* that the complainant must establish a prima facie case by presenting "evidence and legal arguments" sufficient to demonstrate that the defendant has breached its obligations with respect to a specific provision.[661] In the context of Article 5.6 of the SPS Agreement, the Appellate Body confirmed in a subsequent dispute that "[p]ursuant to the rules on burden of proof ... it was for the [complainant] to establish a prima facie case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a prima facie case of inconsistency with Article 5.6".[662] The same considerations similarly apply in the context of Article 2.2 of the TBT Agreement.

7.469 On the basis of the above, we now consider whether Mexico has demonstrated that the US dolphin-safe provisions are more trade restrictive than necessary, taking account of the risks non-fulfilment would create. In light of the fact that, as described above, the US measures pursue two related but distinct objectives, we consider this question from the perspective of each of these two objectives in turn.

(ii) Whether the US dolphin-safe labelling provisions are more trade-restrictive than necessary to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in conditions that are harmful to dolphins

7.470 Mexico submits that the US dolphin-safe provisions fail to fulfil their stated objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught by a method that adversely affects dolphins because they allow tuna products to be labelled as dolphin-safe even if they contain tuna from fishing sets in which dolphins were killed or injured, when tuna was caught anywhere outside the ETP.[663]

7.471 Mexico further claims that it has met the burden of presenting prima facie evidence that there is a reasonably available less trade-restrictive measure.[664] In Mexico's view, the United States could create dolphin-safe standards rather than a technical regulation whereby the AIDCP standard could be recognized and a label complying with the AIDCP standard used. At the same time, the different US standard could be recognized and a label complying with that standard used. In this way, Mexico

[661] Panel Report, *Australia – Apples*, para. 7.1104 (original footnote omitted).
[662] Panel Report, *Australia – Apples*, para. 7.1104 (original footnote omitted).
[663] Mexico's first oral statement, para. 48.
[664] Mexico's response to question 67 from the Panel, paras. 234-36.

argues, US consumers would be fully informed of all aspects of dolphin-safe fishing methods and could choose accordingly when purchasing tuna products from US retailers.[665]

7.472 The United States submits that the US dolphin-safe provisions fulfil the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins by establishing conditions under which tuna products may be labelled dolphin-safe that are based on whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins. The United States further submits that specifically, tuna products that contain tuna that was caught by setting on dolphins – a technique known to harm dolphins – or in a set in which dolphins were observed killed or seriously injured may not be labelled dolphin-safe or with any other term or symbol that falsely claims or suggests that the tuna products do not contain tuna that was caught in a manner harmful to dolphins. According to the United States, by limiting use of the term dolphin-safe and any other term or symbol that claims or suggests that the tuna products do not contain tuna that was caught in a manner that is harmful to dolphins, to those products that contain tuna that was not caught in a manner that adversely affects dolphins, the U.S. provisions ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.[666]

7.473 As we understand it, Mexico argues both that the US dolphin-safe provisions as they currently exist and are applied fail to fulfil their objective, and that a less trade-restrictive alternative is reasonably available to the United States to fulfil its objective, by allowing the AIDCP certification to be recognized in addition to the existing US standard. As described above, to the extent that the measures are capable of contributing to their objective, they would be more trade-restrictive than necessary if an alternative measure that is less trade-restrictive is reasonably available, that would achieve the challenged measure's objective at the same level.

7.474 We recall that the United States has defined its consumer protection objective in terms of "ensuring that consumers are not misled or deceived about whether products contain tuna that was caught in a manner that adversely affects dolphins". While the articulation of this objective does not expressly state what the intended "level of protection" to be achieved is, a certain level of protection is embodied in the measure itself, and this is, in our view, what must form the basis for our assessment of the proposed alternative. We must therefore first clarify what the existing US measures achieve, in terms of "ensuring that consumers are not misled" with respect to the manner in which tuna is caught, and then compare that to what Mexico's proposed alternative would achieve in this respect.

7.475 On that basis, we first consider the manner and extent to which the US dolphin-safe labelling provisions fulfil the US objective of ensuring that consumers are not misled or deceived about whether tuna has been caught in a manner that adversely affects dolphins, and then whether, as Mexico claims, this objective could be similarly fulfilled by allowing the AIDCP standard to be applied in addition to the existing US standard.

> The contribution of the US dolphin-safe provisions to the US objective of ensuring that consumers are not misled about whether the tuna contained in tuna products was caught in a manner that adversely affects dolphins

7.476 As observed above, Mexico claims that the US dolphin-safe provisions fail to achieve their objective of ensuring that the consumer is not misled about whether the tuna contained in tuna products was caught in a manner that adversely affects dolphins. In Mexico's view, the United States presumes that dolphins are always harmed by dolphin sets in the ETP, even if no dolphins are killed

[665] Mexico's second written statement, para. 210; Mexico's second oral statement, para. 115.
[666] United States second written statement, para. 136.

or seriously injured, while it presumes that no dolphins or other marine mammals are harmed outside the ETP.[667]

7.477 According to Mexico, most consumers would expect the term "dolphin-safe" to mean that no dolphins were killed or injured in harvesting the tuna. Nevertheless, Mexico submits, the dolphin-safe provisions allow tuna products to be labelled as dolphin-safe even if they contain tuna from fishing sets in which dolphins were killed or injured, when the tuna was caught anywhere outside the ETP. According to Mexico, 48% of the public in the United States believe that the term dolphin-safe means no dolphins were injured or killed in the course of capturing tuna.[668] However, according to Mexico, the US dolphin-safe label does not mean that for tuna caught outside the ETP. Mexico submits that for tuna products made from non-ETP tuna, the US dolphin-safe designation is meaningless and conveys no useful information to consumers.[669] In Mexico's view, for non-ETP tuna products, consumers are not accurately informed about whether dolphins were "adversely affected". Thus, Mexico concludes, the US measures mislead consumers and for this reason cannot be fulfilling their stated objective of protecting consumers.[670]

7.478 As we understand it, Mexico's argument is based on the fact that, under the US dolphin-provisions, no certification that no dolphin was killed or seriously injured in the sets is required with respect to tuna caught outside the ETP by methods other than setting on dolphins,[671] even though such methods may in fact have resulted in significant harm to dolphins, and that this is misleading to consumers.

7.479 In our view, the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins can be achieved if the dolphin-safe label allows consumers to accurately distinguish between tuna that was caught by using a fishing method that adversely affects dolphins and tuna that was *not* harvested in such manner, and to make decisions on the basis of accurate information in this respect, when purchasing tuna products. Therefore, the extent to which the US measures are able to fulfil this objective is directly related to the extent to which they accurately identify (and distinguish between) tuna that was caught in a manner that adversely affects dolphins and tuna that was caught in conditions that are not harmful to dolphins.

7.480 We must therefore determine whether the US dolphin-safe provisions grant access to the label to tuna products containing tuna that was caught by methods that may or do in fact adversely affect dolphins. This requires in the first instance a clarification of the meaning of the expression "tuna … caught in a manner that adversely affects dolphins" in this context. Once this is clarified, we will need to consider the manner in which the measures at issue distinguish between different fishing methods in this respect.

7.481 The Panel notes that the only piece of evidence presented in these proceedings to ascertain what US consumers in fact understand the terms "dolphin-safe" to mean is an opinion poll submitted by Mexico.[672] This poll shows that 48 per cent of the 800 individuals surveyed believe that "dolphin safe" means that "no dolphins were killed or injured" while 12 per cent believe that it means that "dolphins were not encircled and then released to capture the tuna". The United States considers that

[667] Mexico's response to Panel question Nos. 86, para. 3 and 136, para. 108.
[668] Mexico's first oral statement, para. 48-49; Mexico's response to Panel question No. 110, para. 65.
[669] Mexico's response to Panel question No. 86, para. 4.
[670] Mexico's first oral statement, para. 48; Mexico's second written statement, para. 205; Mexico's second oral statement, para. 98; Mexico's response to question 86 from the Panel, para. 4.
[671] Section 1385 (d) of the AIDCP. See the description of the measures in Section II above.
[672] Exhibit MEX-64.

the poll includes misleading questions and therefore, does not support Mexico's contentions, because respondents indicating that dolphin-safe means that no dolphins were killed or injured could include respondents who believed that dolphin-safe means that dolphins were not set upon to catch the tuna.[673]

7.482 We note, in light of this poll, that it is not clear that US consumers understand the term "dolphin-safe" to mean the same as what the US dolphin-safe provisions define it to mean. We also note that, to the extent that there are discrepancies between the meaning of this term under the measures and consumer perceptions, this may create confusion and undermine the ability of the measure to effectively ensure that consumers are not misled. However, as described above, our enquiry should focus on the manner in which the measures themselves allow or disallow access to a dolphin-safe label, and through this, define the meaning of the term "dolphin-safe" and the extent to which this accurately reflects a distinction between situations in which dolphins are adversely affected and situations in which this is not the case.

Meaning of the phrase "tuna caught in a manner that adversely affects dolphins"

7.483 The US dolphin-safe provisions do not define the notion of fishing methods that "adversely affect" dolphins. As described above, however, these terms have been used by the United States itself to describe the objectives of its measures and we have accepted the US characterization of its objectives. The arguments and evidence presented to the Panel suggest that there are different ways in which dolphins could be "adversely affected" by the manner in which tuna is caught, and the measures themselves also provide some indications as to the type of harmful effects that may arise and that are of concern in this context.

7.484 We first note that the Congress findings cited in paragraph 7.410 above refer to dolphins and other marine mammals being "frequently killed" in the course of fishing operation in the ETP and in other parts of the world. It is clear therefore that the killing of dolphins in the course of fishing operations is understood to constitute a situation in which dolphins are "adversely affected". In addition, in relation to the technique of setting on dolphins, the United States has identified certain negative impacts on dolphins beyond observed deaths and serious injuries.[674] These may be generally described as *unobserved* consequences.[675]

7.485 We further note that, beyond injuries and deaths of individual dolphins, the evidence presented to the Panel shows that concerns arise or may arise in respect of the conservation of dolphin populations more generally. In this respect, in response to a request for clarification by the Panel as to whether its objective in terms of protection of dolphins could be expressed in terms of a certain level of mortality or whether it should be understood in terms of conservation of dolphin populations, the United States indicated that :

> "The objective of the US dolphin-safe labelling provision that aims at protecting dolphins includes protecting dolphins from all of these adverse effects [observed mortalities and other effects of setting on dolphins]. It does not aim to achieve a

[673] United States' response to Panel question No. 42, paras. 108-09.

[674] See for example United States' first written submission, paras. 46-51, 54-59, United States' response to the Panel questions Nos. 66, 34, 35, 36, 37, 5(a) and United States' second written submission, paras. 48-49.

[675] The Panel understands the United States' use of the terms "observed mortalities and injuries" as referring to dolphin killings or serious injuries that are reported during (or immediately after the conclusion of) dolphin-setting operations. Thus, to the extent that setting on dolphins also result in dolphin deaths or injuries that are *not* observed or taken into account as *observed* killings or serious injuries, the other adverse effects identified by the United States may be described as *unobserved* deaths of injuries of dolphins. Mexico disputes the extent and the consequences of such unobserved consequences. This is discussed in paragraphs 7.494 to 7.505 below.

> specific number or rate of dolphin mortality, but rather generally to reduce the adverse effects of setting on dolphins to catch tuna by ensuring that the US market is not used to encourage setting on dolphins to catch tuna. Seeking to protect dolphins from these adverse effects *might also be considered as seeking to conserve dolphin populations*." (emphasis added)[676]

7.486 Therefore, the adverse effects on dolphins targeted by the US dolphin-safe provisions, as described by the United States, relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations. In addition, as described by the United States, to the extent that addressing such adverse effects "might also be considered as seeking to conserve dolphin populations", the US objectives also incorporate, at least indirectly, considerations regarding the conservation of dolphin stocks. Thus, in the Panel's view, the meaning of the terms "adversely affect" dolphins, the contribution of the US dolphin-safe provisions to the fulfilment of its stated objectives needs to be assessed in light of all three of these dimensions of the objectives pursued by the US dolphin-safe provisions.

7.487 With these clarifications in mind, we now consider the manner in which the US dolphin-safe provisions allow or deny access to the dolphin-safe label to tuna products, in consideration of the manner in which the tuna was caught and its potential to adversely affect dolphins.

7.488 As described in Section II:C above, the US dolphin-safe provisions deny access to a dolphin-safe label to tuna caught by setting on dolphins, wherever it is caught.[677] They also deny access to the dolphin-safe label to tuna that was caught by using driftnets in the high seas.[678] In addition, for tuna caught in the ETP by a vessel using a purse seine net with a carrying capacity of more than 362.8 metric tons, the United States requires a certificate that no dolphin was killed during the sets in which the tuna was caught. Outside the ETP, however, the US measures allow access to the label without such certification in all instances where the tuna was harvested by techniques other than setting on dolphins, unless the tuna was caught in a fishery where it has been determined that there is regular and significant tuna-dolphin association[679], or regular and significant dolphin mortality or serious injury of dolphins.[680] Since no such determinations have been made, access to the dolphin-safe label is in practice available to tuna caught outside the ETP by any method other than setting on dolphins or high seas driftnet without a requirement to certify that no dolphin was killed in the sets in which the tuna was caught.

7.489 It appears from these elements that two fishing methods (setting on dolphins and high seas driftnet fishing) are specifically identified in the US dolphin-safe provisions as disqualifying tuna for access to the label, thus reflecting an assumption that these methods "adversely affect" dolphins. For tuna caught by other methods, access to the label is subject to a certification that no dolphin was killed in the sets in which the tuna was caught for tuna caught in the ETP, but not elsewhere. The United States has also explained that if an alternative label rather than the official DOC label is used, this is conditioned on no dolphin having been killed or seriously injured, regardless of the type of fishery.[681]

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[676] US response to Panel question No. 66(a), para. 151.
[677] Subsections 1835(d)(1)(B) and 1835(d)(1)(C).
[678] Subsection 1835(d)(1)(A).
[679] Subsection 1835(d)(1)(B)(i).
[680] Subsection 1835(d)(1)(D).
[681] Subsection 1835(d)(3)(C)(i). See also the United States' own explanation of the operation of this provision, United States' second written submission, para. 40.

7.490 What we must consider, therefore, is the extent to which these distinctions, as contained in the US dolphin-safe labelling provisions and as applied by the United States, allow consumers to accurately distinguish between tuna that was caught in a manner that adversely affects dolphins and other tuna, by ensuring that the label is available exclusively to products containing tuna that was not caught "in a manner that adversely affects dolphins". As described above, we understand adverse effects on dolphins in this context to encompass observed as well as unobserved deaths and injuries, with the understanding that, as described by the United States, this may be considered to also seek to conserve dolphin populations.

Denial of access to the label for tuna caught by setting on dolphins (and high seas driftnet fishing)

7.491 We first consider the two fishing methods in relation to which access to the label is denied, i.e. setting on dolphins and high seas driftnet fishing. Mexico has not made any claim with respect to high seas driftnet fishing.

7.492 With respect to setting on dolphins, the United States argues that it is uncontested by Mexico that this fishing method adversely affects dolphins and that, therefore, by conditioning the labelling of tuna products to not containing tuna caught by setting on dolphins, the US provisions fulfil their objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner harmful to dolphins.[682]

7.493 We first note that both parties recognize that setting on dolphins may adversely affect dolphins.[683] The number of dolphins killed in the ETP before the adoption of the controls established by the AIDCP, and the ensuing degradation of the dolphins stocks in this area, are well-documented.[684] Indeed, Mexico does not deny that dolphins may be killed or seriously injured during purse-seine net fishing manoeuvres.[685] We also agree with the United States that the existence of the DMLs established by the AIDCP shows that setting on dolphins, even in controlled conditions, may result in some dolphin mortality.[686] In 2008, observed dolphin mortality in the ETP amounted to 1,168 dolphins, whereas in 2009, 1,239 dolphins were observed killed or seriously injured when set upon to catch tuna in the ETP.[687] The parties to the AIDCP agreed to limit total incidental dolphin mortality in the purse-seine tuna fishery in the ETP to no more than five thousand dolphins annually.[688] These limits have remained the same in recent years.[689]

7.494 In addition, as described above, the United States has argued that setting on dolphins has adverse consequences for dolphins beyond observed mortalities or serious injuries, resulting from repeated chase and encirclement of dolphins (referred to in paragraph 7.484 above as "unobserved" consequences). Mexico disagrees with the United States about the magnitude and impact of such unobserved consequences.

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[682] United States' second oral statement, para. 56.

[683] Mexico's second written submission, para. 204; United States' first written submission, para. 52.

[684] Mexico's first written submission, para. 50; Exhibit MEX-4, p. 4; Exhibit MEX-5, pp. 29-30; Exhibit US-61, p. 124.

[685] Mexico's first oral statement, para. 9.

[686] Although Mexico argues that the number of dolphins being killed annually in the ETP (around 1000) does not have a significant adverse effect on dolphins from a population recovery perspective, it does not deny that setting on dolphins even according to the AIDCP may still result in *observed* dolphin mortality or serious injury, Mexico's second written submission, para. 204.

[687] Exhibit US-24, p. 50; Exhibit US-66, p. 3.

[688] Exhibit MEX-11, Article V.

[689] Exhibit US-50, p. 1.

7.495 The United States notes that dolphins are likely to be repeatedly exposed to the dangers of purse seine dolphin sets, and that millions of dolphins are chased and encircled each year as they are set upon to catch tuna in the ETP.[690] The United States refers to a number of reports and studies, including a report of the scientific research program mandated under the IDCPA which included abundance estimation, ecosystem studies, stress and other fishery effect studies and stock assessment.[691] The stress studies in that report were required to be undertaken by the IDCPA and consisted in four related research projects, a stress literature review, a necropsy study, a review of historical data, and a field study involving the repeated chasing and capturing of dolphins.

7.496 From the review of scientific literature on stress in mammals, the report concluded that tuna purse seine operations involve well-recognized stressors in other wild mammals, and it is plausible that stress resulting from chase and capture could compromise the health of at least some of the dolphins involved. With respect to the stress studies that included a combination of field experiments the report concludes that they support the possibility that purse seine fishing involving dolphins may have a negative impact on the health of some individuals. However, it also noted that several lines of research suggested potential physiological mechanisms of stress effects, but larger sample sizes and baseline data for the affected species are needed to fully interpret the findings. In particular, cow-calf separation and potential muscle injury leading to delayed death warrant future study.

7.497 As far as mother-calves separation is concerned, the study explains that unobserved calf mortality that has been reported and studied from 1973 to 1990 potentially could be large, and continuing at the present time, if mother-calf separation occurs during the chase portion of the fishing operation; however it also specifies that whether, and if so how often, such separations occur during the chase is unknown and that given these uncertainties, only a minimum estimate of unobserved calf mortality is possible, with the caveat that the actual mortality is likely to be larger by an unknown amount.

7.498 The United States has also provided evidence regarding mortality of nursing calves permanently separated from their mothers during fishery operations in the ETP in a scientific article published in 2007. This study finds that because dolphin calves are sometimes incapable of keeping up with their mothers during chase and encirclement, they are sometimes separated from them and vulnerable to starvation or predation. It also explains that despite the fact that observed mortality in the ETP is currently low, dolphin stocks are not recovering at expected rates because of the frequency of sets on dolphins and unobserved mortality of nursing calves.[692] Finally, the United States has also presented a scientific article regarding evidence of acute pre-mortem stress in chased and purse-seine captured male dolphins.[693] This article concludes that a 2- to 3-h purse-seine set on dolphins to catch yellowfin tuna, including chase, net deployment, and closed net confinement, generates stressful stimuli.

7.499 These studies therefore suggest that various adverse impacts can arise from setting on dolphins, beyond observed mortalities, including cow-calf separation during the chasing and encirclement, threatening the subsistence of the calf and adding casualties to the number of observed

[690] The United States observes that on average, each northeastern offshore spotted dolphin is chased 10.6 times and captured 0.7 times per year, and each coastal spotted dolphin chased twice a year. See United States' first written submission, para. 58; United States' second written submission, para. 49.

[691] Exhibit US-19., US-21, US-22; see also United States' first written submission, para. 54, United States' response to Panel question no. 34, paras. 82-83. The United States also submitted studies specifically addressing cow-calf separation (see Exhibits US-4, US-27 and US-28).

[692] Exhibit US-4.

[693] Exhibit US-11.

mortalities[694], as well as muscular damage, immune and reproductive systems failures and other adverse health consequences for dolphins, such as continuous acute stress.[695]

7.500 The Panel also notes that other studies question these conclusions. We note that, for instance, it has been suggested that the cow-calf bond remained intact, even after repeated sets.[696] It has also been suggested that there are no indications of compromised immune system, capture myopathy or adverse impacts due to heat stress occurring as a result of dolphin chase and encirclement.[697] One of the studies submitted by the United States, which in its opinion "represents the best information available at this time"[698], concludes that "[w]hile the physiological and behavioral changes [resulting from the chase and encirclement of dolphins] may affect some individuals, they have not been shown to be common enough to have population-level consequences".[699] The same study, citing a "summary of recent research" also concludes that "the purse-seine fishery has the capacity to affect dolphins beyond the direct mortality observed as bycatches".[700]

7.501 Mexico presents a 1992 study by the Committee on Reducing Porpoise Mortality from Tuna Fishing, the Board on Environmental Studies and Toxicology, The Commission on Life Sciences and the National Research Council mandated by the MMPA, which found that:

> "No specific information is available concerning the effects of the chase on the biology of dolphins. The chase is likely to result in stress. Some herds have developed strategies to avoid capture; others seem to have habituated to encirclement and seem to have developed behavioral patterns that reduce their risks once in the net. Further studies on physiological and behavioral impacts of the chase are obviously needed."[701]

7.502 Mexico also refers to a report prepared by the IATTC in response to the SWFSC report mandated by the IDCPA.[702] This report concludes that "[t]he SWFSC Chase Encirclement Stress Studies (CHESS) cruise conducted some studies examining various aspects of stress, and the results of most of these studies were either negative (no evidence of significant stress-related injury) or equivocal."[703]

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[694] Exhibit US-4, p. 24.
[695] Exhibit US-11, pp. 191, 201; Exhibit US-19, p. 5.
[696] Exhibit MEX-67, p. 9 (containing a literature review on this subject).
[697] Exhibit MEX-67, p. 9.
[698] United States' second written submission, fn 70.
[699] Exhibit US-21, p. 11.
[700] Exhibit US-21, p. 11.
[701] *Dolphins and the Tuna Industry*, a study by the Committee on Reducing Porpoise Mortality from Tuna Fishing, the Board on Environmental Studies and Toxicology, The Commission on Life Sciences and the National Research Council mandated by the MMPA, (1992) Exhibit MEX-2, p. 114.
[702] Inter- American Tropical Tuna Commission Scientific Report on the Status of Dolphins Stocks in the Eastern Tropical Pacific Ocean. 2002. Exhibit MEX-67.
[703] Inter- American Tropical Tuna Commission Scientific Report on the Status of Dolphins Stocks in the Eastern Tropical Pacific Ocean. 2002. Exhibit MEX-67. This report summarizes its findings in this respect as follows:

> "Evidence Refuting a Finding of a Significant Adverse Impact
> The SWFSC Chase Encirclement Stress Studies (CHESS) cruise conducted some studies examining various aspects of stress, and the results of most of these studies were either negative (no evidence of significant stress-related injury) or equivocal. The studies showing no significant adverse impact are listed and described.
> Behavioral studies – The study of the behavior of spotted dolphins encircled by purse seines noted that these dolphins are well-habituated to set operations (Santurtún and Galindo 2002).

7.503 Mexico further argued that the US position in this proceeding seemed to contradict the US actions in the multilateral forum of the AIDCP, and that the US theories of unobserved mortality presented in this case are scientifically unsupportable and not applied to any other fishery in the United States or the world.[704]

7.504 From the above, it appears that there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality. Nonetheless, we consider that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect. The information presented to us in this respect also suggests that this is a field of research in which the collection and analysis of information is inherently difficult, but that efforts have been ongoing to better understand these issues, including in the context of the implementation of the DPCIA.[705] We further note that such effects would arise as a result of the chase in itself, and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP. [706]

7.505 In light of the above, it appears that, to the extent that the US dolphin-safe provisions deny access to the label to products containing tuna caught by setting on dolphins, they enable the US consumer to avoid buying tuna caught in a manner involving the types of observed and unobserved adverse impact on dolphins associated with this method, as described above.

7.506 We also note, however, that, to the extent that the measures make no distinction between setting on dolphins in general and setting on dolphins under the controlled conditions developed in the context of the AIDCP, they would not allow the US consumer to be informed of any of the measures that have been taken in the context of this Programme. We note in this respect that the United States itself acknowledges that the implementation of the AIDCP has made an important contribution to the

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> This corroborates the findings of the IATTC (1986) and Pryor and Kang-Shallenberger (1991) that indicate that the dolphins have learned behaviors that reduce the risk of entanglement and allow them to anticipate events in the fishing operations.
> Heat stress studies – One of the [SWFSC Chase Encirclement Stress Studies] studies (Pabst *et al.* 2002) examined the thermal stress by measuring deep-core temperatures and surface temperatures and heat flux from the dorsal fins of the dolphins (the dorsal fin functions as a radiator to release excess heat). None of these measurements showed any indications that adverse impacts due to heat stress were occurring. The data for one dolphin were puzzling because it displayed the highest deep-body temperature after being involved in the shortest chase (12 min.) of the study. It is most likely that the temperature reading was confounded by the long process (17 min.) required to capture this particular dolphin just prior to sampling".
> Lymphoid study – A study of the lymphoid organs conducted as part of the SWFSC Necropsy Program (Romano *et al.* 2002) showed no signs of stress or of a compromised immune system-10).

Blood analysis study – Analyses of the blood collected from dolphins captured during the CHESS studies were largely equivocal, being hampered by small sample sizes and few recaptures of tagged and sampled dolphins (St. Aubin 2002). In general, "certain changes were noted signaling a stress response, but none that suggested distress at the time of second capture." The SWFSC report suggests that capture myopathy may be a cause of delayed mortality (p. 68), but the blood analyses during the CHESS cruise reported by Forney *et al*. (2002) indicated that recaptured dolphins had lower values of the muscle-specific enzyme CK, rather than the higher IATTC Report – Oct 2002 10 values that would be encountered if capture myopathy were occurring" (Exhibit MEX-67, pp. 9-10).

[704] Mexico's responses to the Panel's questions from the Second Substantive Meeting, paras. 55-56.

[705] It has been recognized that the "difficult logistics of studying pelagic dolphins have precluded detailed observations of [dolphin behaviour] during and after tuna purse-seine sets", Exhibit US-4, p. 20.

[706] One study indicates for instance that "a 2- to 3-h purse-seine set on dolphins to catch yellowfin tuna, including chase, net deployment, and closed net confinement, generates stressful stimuli", Exhibit US-11, p. 191.

reduction in numbers of observed dolphin killings in the ETP.[707] Moreover, the Panel recalls that the United States has acknowledged that "[s]ince the AIDCP's conclusion in 1998 and entry into force in 1999, all parties including Mexico have generally been abiding by their obligations under the AIDCP".[708]

Conditions of access to the label for tuna caught by other methods

7.507 As described above, the US dolphin-safe labelling provisions contain further distinctions, for the granting or denial of the dolphin-safe label. We must also consider, therefore, the extent to which the requirements contained in the US dolphin-safe provisions and applied by the United States to tuna caught by methods other than setting on dolphins (and high seas driftnet fishing) allow consumers to accurately distinguish between tuna that was caught in a manner that adversely affects dolphins and other tuna, by ensuring that the label is available exclusively to products containing tuna that was not caught "in a manner that adversely affects dolphins".

7.508 As explained in paragraph 7.488 above, access to the label is available for tuna caught by methods other than setting on dolphins outside the ETP without certifying that no dolphins were killed or seriously injured, while tuna caught inside the ETP by the same methods requires a certificate that no dolphin was killed or seriously injured in the sets. Mexico observes in this respect that the US Form 370 (Fisheries Certificate of Origin) does not require any certification at all with respect to harm to dolphins in the capture of tuna outside the ETP[709], and that even if it did, there is no system to verify certifications.[710]

7.509 Mexico claims that there are substantial dolphin mortality rates associated with fishing techniques other than setting on dolphins[711], and that it is well established that dolphins are regularly killed in gillnets, both in US waters and elsewhere.[712] Mexico also argues that scientific research indicates that there are associations of tuna with dolphins outside the ETP and that a number of cetaceans species are affected in different fisheries and by different methods.[713]

7.510 According to Mexico, notwithstanding the evidence that dolphins and other marine mammals are being killed in significant numbers in ocean regions other than the ETP, no measures have been taken in those other regions comparable to those taken for the ETP[714], and the United States tolerates such harm, even when the absolute numbers of marine mammals being killed are comparable to the ETP and when the ratios of marine mammals being harmed are higher in relation to their populations than in the ETP.[715] Thus, according to Mexico, the United States applies a standard for sustainability of marine mammal stocks to its own fisheries that tolerates level of mortalities, as a percentage of the potential biological removal (PBR), equivalent to or greater than those of dolphins in the ETP.[716]The

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[707] The United States has accepted that the AIDCP "has made an important contribution to dolphin conservation in the ETP, including that it has fostered the continued reduction in *observed* dolphin mortalities in the fishery" (emphasis in the original), United States' first written submission, para. 9; United States' second written submission, para. 141.

[708] United States' second written submission, fn 187.

[709] Mexico's response to Panel question No. 103, paras. 47-48.

[710] Mexico's first oral statement, para. 54.

[711] Mexico's first oral statement, para. 50.

[712] Mexico's first oral statement, para. 52.

[713] Mexico's first written submission, paras. 11-18; Mexico's second written submission, paras. 98-110; Mexico's second oral statement, paras. 99-103.

[714] Mexico's first written submission, para. 19.

[715] Mexico's second oral statement, para. 105.

[716] Mexico's response to Panel question No. 15, para. 31. Mexico has clarified that the PBR "is intended to be an estimate of the maximum level of takings that may be removed from a stock without affecting

United States considers, however, that Mexico's assertions are both factually incorrect and legally irrelevant, *inter alia* because the MMPA and the DPCIA are different measures with different objectives and, in the US view, comparisons between the tuna purse seine fisheries in the ETP and other fisheries that are not tuna fisheries are inappropriate.[717]

7.511 The United States argues that the hypothetical situation of a tuna caught in a set where dolphins have been killed entering the US market with a dolphin-safe label might exist only in the limited scenario where three factors coincide, namely: (1) the tuna are caught in a fishery where there is no regular or significant association between tuna and dolphins and no regular or significant dolphin mortality; (2) a dolphin is accidentally killed when a purse seine net is accidentally set on a dolphin; and (3) the official dolphin-safe label is used. The United States claims that "the likelihood of any such products being on the US market is low" and that Mexico has presented no evidence that such hypothetical actually exists.[718]

7.512 The United States also argues that dolphin mortalities in the ETP are fundamentally different from dolphin mortalities that may occasionally occur in other fisheries because, in the ETP, dolphins are intentionally exploited commercially and on a wide scale to catch tuna, and this results not only in observed mortalities but also in other unobserved effects, as described above.[719] In the US view, outside the ETP there is no tuna-dolphin association similar to that in the ETP, and absent repeated intentional chase and encirclement of dolphins to catch tuna, there is no basis to infer that there are significant unobserved dolphin mortalities outside the ETP, much less so that such mortality would be anywhere close to the level of unobserved mortality in the ETP.[720] The United States considers that observer programs exist in other fisheries, that are capable of detecting whether there is any indication of regular or significant mortality or regular and significant tuna-dolphin association, and that these programs have not reported any such indications.[721] In the US view, the sources cited by Mexico rely on anecdotal information, from earlier reports not subsequently substantiated, are based on reporting of non-tuna fisheries, or are otherwise misrepresented.[722]

7.513 Mexico refers to information from the websites of the other major tuna fisheries to show that they do not have observer programmes comparable to the ETP. It observes that the Indian Ocean Tuna Commission (IOTC) has no meaningful data on bycatch and no observer program. It also refers to the International Commission for the Conservation of Atlantic Tunas (ICCAT), which indicated it has a goal of achieving five percentage observer coverage on large longline vessels fishing for bigeye tuna and to establish observer coverage for large vessels fishing for bigeye in one small subregion. Mexico states that ICCAT reports include 26 species of dolphins and whales captured by fishing vessels in the Atlantic and Mediterranean, of which 15 were caught in purse seine nets. Mexico also noted that the Western and Central Pacific Fisheries Commission (WCPFC) has limited observer coverage and has not made data publicly available – even projections – on the overall interaction of

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the ability of the stock to reach or maintain its optimum sustainable population". Mexico added that PBRs are developed for individual fisheries and stocks, Mexico's first written submission, fn 64.

[717] See United States' second written submission, para. 53-58.

[718] United States' second written submission, paras. 143-146; United States' second oral statement, para. 56.

[719] See United States' second written submission, paras. 48-52; United States' response to Panel question No. 15, paras. 43-50; United States' second oral statement, paras. 14-18; United States comments on Mexico's response to Panel question Nos. 86 and 100, paras. 9 and 25; United States response to Panel question No. 37, para. 92.

[720] United States' comments on Mexico's response to Panel question No. 86, para. 3.

[721] United States' comments on Mexico's response to Panel question No. 86, para. 9.

[722] United States' second written submission, paras. 50-51; 56-57; United States second oral statement, paras. 15-16, United States' response to Panel question No. 108, para. 31, United States' comments on Mexico's response to Panel question No. 136, para. 57 and fn 83.

this fishery with marine mammals, or attempted to estimate the size of dolphin stocks but that nonetheless, observers witnessed intentional setting of nets on dolphin and whales, indicating that there is an association between tuna and marine mammals in at least some parts of the Western and Central Pacific.

7.514 Thus, according to Mexico, these other regional fisheries management organizations are still in the early stages of beginning to monitor the impact of fishing operations on marine mammals and evidence of dolphin mortalities in these other fisheries already presented by Mexico cannot be refuted by citing to inaction by those fisheries management organizations.[723] Mexico adds that the United States does not make the same projections of multiplier effects on populations that it applies to the ETP when evaluating observed marine mammal mortalities in other fisheries, even though dolphins killed in those fisheries are separated from their calves, and escaping dolphins are likely injured by destructive fishing techniques such as FAD and longline fishing.[724] For Mexico, there is no reason to believe that the indirect ("unobserved") effects on dolphins outside the ETP are less than those within the ETP because the evidence indicates that dolphin mortalities – both "observed" and "unobserved" – in these other ocean regions are likely higher than in the ETP, as in those other regions there is no regulation of fishing designed to protect dolphins and other marine mammals, and no one is even monitoring the impact of fishing on marine mammals.[725]

7.515 In light of these arguments, we now consider the manner in which the requirements of the US dolphin-safe provisions operate in respect of tuna caught by methods other than setting on dolphins, and the extent to which they allow the consumer to accurately distinguish, based on the label, between tuna caught in a manner harmful to dolphins and other tuna. This question, in our view, turns in the first instance on the conditions of eligibility for the label, rather than on the "likelihood" of the situation arising on the market.

7.516 As we understand it, there are two related aspects to Mexico' argument: first, if access to the label *is* available to tuna caught in conditions where dolphins may in fact have been harmed, this would be misleading to the consumer, in that it would lead it to believe incorrectly that such tuna was caught in conditions that are not harmful to dolphins; secondly, to the extent that some tuna caught in conditions that are equally harmful to dolphins are *denied* access to the label, this is also misleading in that the consumer would not be in a position to accurately identify these products as equally harmful or not harmful to dolphins.

Whether fishing techniques other than setting on dolphins may adversely affect them

7.517 In order to address this argument, we must first consider whether, as Mexico argues, fishing for tuna by methods *other* than setting on dolphins outside the ETP may adversely affect dolphins, such that access to the US label is available to tuna that has in fact been caught in a manner that adversely affects dolphins.

7.518 We note at the outset that, as several of the studies submitted by the parties observed, information is lacking to evaluate the existence and extent of the threats faced by different species of dolphins in different areas around the globe, especially outside the ETP.[726] A report commissioned by

[723] Mexico's second written submission, paras. 86–110.

[724] See Mexico's responses to the panel's questions from the first substantive meeting, para. 26; Mexico's second written submission, para. 69.

[725] See Mexico's second written submission, para. 104.

[726] E.g. Exhibit MEX-2 (suggesting more research "on behaviour of tuna and dolphins" in the ETP); Exhibit MEX-5, p. vii (recommending research globally); Exhibit US-10, p. 38 (stating that "data collection by

the US National Oceanic and Atmospheric Administration (NOAA) Fisheries cautions in this respect that the lack of evidence that dolphins are being affected by fishery-related activities in certain fisheries should not be wrongfully taken as evidence of the absence of a problem:

> "There are large areas of the world where it seems likely there may well be interactions between cetaceans and fisheries, but for which there are, as yet, no data, and no idea of any impact that such fisheries may cause. This lack of information on the impacts of a fishery does not imply, however, that there is no problem, especially since reporting of just a few individuals in a specific fishery may be indicative of a larger interaction. Only when scientists can accomplish a detailed study of the cetacean stock abundance, the fishing effort, and the bycatch rate in each fishery can a thorough and accurate assessment be made".[727]

7.519 In contrast, due in particular to the AIDCP On-Board Observers Program and the AIDCP System for Tracking and Verifying Tuna, detailed information is available about dolphin mortalities resulting from tuna fishing activities *in* the ETP. Hence, the Panel's analysis of the existence of dolphin bycatch during tuna fishing operations *outside* the ETP is based on the evidence contained in a limited amount of *ad hoc* studies. In this regard, we find the following observation of the Appellate Body in the context of an analysis under Article XIV of the GATS pertinent for the purposes of our own assessment of the evidence in this case:

> "The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made".[728]

7.520 The evidence submitted to the Panel suggests that the association between schools of tunas and dolphins does not occur outside the ETP as *frequently* as it does within the ETP.[729] This evidence further suggests that although there are indications that intentional setting on dolphins occurs outside

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objective scientific agencies may be the only route to a truly unbiased picture of dolphin mortality incidental to purse-seine operations" in the western Pacific Ocean).

[727] Exhibit MEX-5, p. vii. The Panel notes that, as indicated above, Exhibit MEX-5 is a report commissioned by the United States National Oceanic and Atmospheric Administration (NOAA) Fisheries. We also recall that the United States has submitted that NOAA neither edited nor endorsed this report. Moreover, the United States highlights that the "views or opinions expressed in this report are those of the authors" and not necessarily those of NOAA, United States' second written submission, fn 75. Despite these observations, the Panel considers that the fact that this study was commissioned to outside contractors and that it reflects their views and not those of the US agency does not diminish its probative value. The fact that NOAA commissioned this study to these contractors in particular suggests that they deserved a certain level of credibility in the eyes of agency itself. Moreover, the Panel notes that the authors of this report base their conclusions on previous studies, estimates and field-research. Thus, the Panel sees no reason to disregard this evidence as untrustworthy.

See also Exhibit MEX-99, p. Ev 26, which states that:

> "During the 1990s, observer studies of By-Catch in pelagic trawl fisheries recorded dolphin catches in four fisheries targeting sea bass, hake, tuna and horse mackerel. The report notes that, given the size of the European fleet and the amount of fishing effort, the total number of animals caught may be significant. It also observes that the By-Catch estimate must be treated as a minimum because, for instance, some fishing fleets refused to take observers on board".

[728] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

[729] United States' first written submission, para. 58. See e.g. Exhibits MEX-2, p. 45 and US-61 (describing the type of tuna-dolphin association that takes place in the ETP); Exhibits MEX-4, p. 16-17 and Exhibit US-10, p. 38 (stating that such association occurs rarely outside the ETP).

the ETP[730], there are "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP".[731] However, there are clear indications that the use of certain tuna fishing techniques *other* than setting on dolphins may also cause harm to dolphins. [732]

7.521 For instance, the use of unassociated purse-seine sets or FADs to catch tuna may result, in certain cases, in substantial dolphin bycatch.[733] Trawl fishing is another method that may be employed to harvest tuna, and that may also produce dolphin bycatch.[734] Similarly, the use of driftnets to catch tuna in coastal areas within Exclusive Economic Zones is considered "a highly destructive practice" and one of "the greatest threats to populations of small cetaceans" in certain areas of the world.[735] A report prepared by the Committee on Porpoise Mortality from Tuna Fishing established under auspices of the National Research Council thus observes that "[a]lthough purse seining for yellowfin tuna associated with dolphins in the ETP is the primary focus of this report, other methods, including additional purse-seining modes, are used for catching yellowfin. Some of these methods are known to kill dolphins, as are other techniques of fishing for other fish species (Northridge, 1984, 1991)." The report identifies longline, log and school fishing as the most important of the other fishing methods known to kill dolphins.[736]

7.522 There are reports on dolphin bycatch resulting from tuna fishing operations in European fisheries.[737] There are also reports on dolphin mortalities arising from tuna fishing activities in

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[730] See e.g. Exhibit MEX-98, page. 59; Exhibit MEX-105. See also United States' response to Panel question No. 108, para. 30, where it acknowledges that, in oceans other than the ETP, it may be possible to intentionally set a purse seine net on dolphins but if this occurs, it does not involve the intentional chase and encirclement of dolphins as a means to catch tuna.

[731] See e.g. Exhibit US-10, p. 38.

[732] Exhibit MEX-2, pages 37, 98.

[733] Exhibit MEX-5, pages 26, 112, 131 (reporting on an estimate annual bycatch of 2000 dolphins as a result of tuna fishing operations by a fleet of five purse seiners using fish-aggregating devices or FADs).

[734] According to the UK Department of Environment, Food and Rural Affairs a study of a *pair-trawl for tuna*, conducted by the Republic of Ireland in 1998 and 1999, recorded a total bycatch of 180 cetaceans, including the Atlantic white-sided dolphin and the striped dolphin, Exhibit MEX-99, pages 13, Ev 27. See also the information on European fisheries using pelagic trawl Exhibit MEX-99, p. Ev 26.

[735] See e.g. "[t]he By-Catch of cetaceans in fisheries is recognised to be one of the greatest threats to populations of small cetaceans and has been highlighted by various international fora including the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS). Several fisheries and sea areas have already been identified where By-Catch presents a serious and unsustainable problem. The case of pelagic driftnets used in tuna and swordfish fisheries is an example of a highly destructive practice that has now been addressed by the EU in the form of the driftnet ban that came into effect in January 2002. However, there is ample evidence of problems in other fisheries that have yet to be addressed. Moreover, many fisheries in the EU that present a threat to cetaceans are not yet being monitored for their By-Catch. Therefore, the data that are available represent only a minimum estimate of the scale of the problem". Exhibit MEX-99, p. Ev 26.

See also Exhibit MEX-5, p. 100, stating:

"In the Northeast Atlantic, within the framework for cooperation and research of the [Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, ASCOBANS], does not provide authority for actual regulation of fishing operations, even though it has documented how those operations affect cetacean bycatch. Action is up to individual parties of ASCOBANS for measures within the EEZs".

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

[736] Exhibit MEX-2, p. 37.

[737] "There is some evidence that other pelagic fisheries may also be responsible for some by-catch of common dolphins, although few observer studies of by-catch in these fisheries appear to have been carried out. The Whale and Dolphin Conservation Society (WDCS) and Nick Tregenza both note that, during the 1990s,

fisheries in Asia[738] and Africa.[739] For instance, a study commissioned by the NOAA of the

observer studies of by-catch in pelagic trawl fisheries recorded dolphin catches in three other fisheries, those for mackerel, horse mackerel, hake and tuna" (emphasis added), Exhibit MEX-99, p. 31.

"The [Whale and Dolphin Conservation Society] also pointed out that a number of other pelagic fisheries share common characteristics with the pelagic sea bass fishery: other fisheries also use trawling and pair trawling gear and operate in the Celtic Sea/Bay of Biscay area during the winter months, when dolphin strandings occur on the south-west coast. In addition to the fisheries named above, they also cited the herring, blue whiting, pilchard, sardine and anchovy fisheries, and the albacore tuna fishery, which operates during the summer months but uses pair trawling gear. The WDCS considers that, until these fisheries are properly monitored, it is reasonable to assume that some, if not all, may be responsible for some cetacean by-catch" (emphasis added), Exhibit MEX-99, p. 32.

"Goujon estimates that the French driftnet fishery for tuna caught 1,722 (1365-2079) common, striped and bottlenose dolphins, and long-finned pilot whales in 1992; and 1,654 (1115-2393) common, striped and bottlenose dolphins, and long-finned pilot whales in 1993" (emphasis added), Exhibit MEX-5, p. XX-16, fn 89.

"In 1995, the UK driftnet fishery for albacore caught 104 striped dolphins (38 – 169)" (emphasis added), Exhibit MEX-5, p. AA-16.

"In 1996 and 1998 respectively, the Irish driftnet fishery for albacore caught 136 and 964 striped dolphins" (emphasis added), Exhibit MEX-5, p. AA-16.

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

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

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

"A now-terminated Taiwanese shark and tuna gillnet fishery operated off Northern Australia and caught bottlenose dolphins, spinner dolphins, spotted dolphins, humpback dolphins and false killer whales, a proportion of which are in this area. The fishery was mainly located in Area 71 and is discussed under that section. Given the amount of gillnetting likely to occur in this region, accidental catches may adversely affect small coastal species such as the finless porpoise and Irrawaddy dolphin to some extent. The driftnet fisheries operating farther offshore—in the Bay of Bengal, for example—might be expected to catch spinner and spotted dolphins, at least, and perhaps other species. Driftnet fisheries in the southern Indian Ocean may catch a variety of species such as the spectacled porpoise, the southern right whale dolphin, and common dolphin. All of these fisheries require more detailed information on non-target catches" (emphasis added), Exhibit MEX-5, p. 23.

"Catches in India are reported quite frequently, and formed 33% of the total catch of cetaceans recorded in the gillnet fishery at Calicut. Bottlenose dolphins are one of the commonly caught dolphins in seerfish and tuna driftnet fisheries on the west coast of India, and in coastal gillnet fisheries for pomfrets and other species too. In Sri Lanka, this species was found to consist of between 5 and 25% of the total cetacean catch in four different surveys amounting to 1,250 to 10,000 animals" (emphasis added), Exhibit MEX-5, p. AA-40.

"Spinner dolphins are caught in Sri Lankan coastal gillnet and driftnet fisheries. This species is caught in Pakistani offshore deepwater gillnet fisheries and is commonly entangled in coastal driftnet fisheries for seerfish and tunas on the west coast of India, and is also entangled in other gillnet fisheries for sharks, pomfrets and other species" (emphasis added), Exhibit MEX-5, p. AA-41.

"Spinner dolphins are the most frequently caught species in the Sri Lankan fishery, where they formed between 33 and 47% of the total cetacean catch in for different surveys, or roughly 7,050-11,750 dolphins per year" (emphasis added), Exhibit MEX-5, p. AA-41.

US Department of Commerce refers to the case of 1,700 bottlenose dolphins and 1,000 spinner dolphins being caught in one year in the western central Pacific by gillnet, driftnets and purse-seine fisheries, including coastal gillnets fishing for tuna. The study also states that "[i]n the Philippines, scientists estimated that about 2000 dolphins –primarily spinner, pan-tropical spotted, and Fraser's- were being killed each year by a fleet of five tuna purse seiners using fish aggregating devices".[740] Moreover, the study also stresses the "need to continue efforts to assess incidental catch in the tuna purse seine and drift gillnet fisheries" in the western central Pacific.[741]

7.523 The Panel also notes that, based on the number of documented incidental bycatch of dolphins and other small cetaceans in the western central Pacific, the same study identified the need to address the western central Pacific tuna-dolphin interactions as a second tier priority for agency action.[742] This study refers to examples of observed dolphin mortalities in the western central Pacific[743], which equate or exceed the number of dolphin observed mortalities in the ETP in recent years (which amount to approximately 1000 to 1200 deaths per year).[744]

7.524 We note that the United States has submitted that observer programmes outside the ETP exist and that they have not reported significant mortalities.[745] Mexico observes however that there is limited observer coverage outside of the ETP[746] and argues that the United States greatly overstated the monitoring activities of the non-ETP regional fisheries management organizations.[747] Mexico also

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"Finless porpoise are entangled in Sri Lankan coastal gillnet and driftnet fisheries, shark nets in Australian, and Indian ocean coastal gillnets. This species is commonly caught in seerfish and tuna driftnet fisheries throughout the west coast of India. Finless porpoises have been caught in a shrimp trawl in Pakistan in 1989, entangled in beach seines and stake nets for shrimp, and entangled in small and medium mesh finfish gillnets in shallow inshore waters of Pakistan" (emphasis added), Exhibit MEX-5, p. AA-43.

"The annual bycatch of small cetaceans in a single tuna driftnet fishery in Negros Oriental was estimated at about 400" (emphasis added), Exhibit MEX-5, pages 26, 27, 131.

[739] "In the Eastern Central Atlantic, the clymene dolphin (Ghanaians call it the "common dolphin"), bottlenose, pantropical spotted, Risso's, long-beaked common, and rough-toothed dolphins; short-finned pilot whale, melon-headed whale, dwarf sperm, and Cuvier's beaked whale may all be caught in large-meshed drift gillnets targeting tuna, sharks, billfish, manta rays, and dolphins", (emphasis added), Exhibit MEX-5, p. 102.

"In 1997, the IWC Scientific Committee concluded that information on small cetaceans in Africa (outside southern Africa) is very sparse and that issues of cetacean fishery bycatch must be addressed. Projects that have sampled landing sites of small scale coastal fisheries in Ghana since 1998 show that bycatch and directed harvests of small cetaceans are commonplace and possibly increasing. The largest catches, by far, are the result of deployment of large meshed drift gillnets targeting tuna, sharks billfish, manta rays, and dolphins. The species most frequently caught are clymene (Ghanaians call it the "common dolphin"), bottlenose, pan-tropical spotted, Risso's, long-beaked common, and rough-toothed dolphins, together with short-finned pilot and melon-headed whales" (emphasis added), Exhibit MEX-5, p. 9.

[740] Exhibit MEX-5, pages 26-27, AA-60-63. The United States criticises this information by pointing out that it "was based on data from a report from 1994" and that "there has been no substantiation of these claims in the 16 plus years since they were made". In addition the United States claims that these estimates "do not appear to be supported by robust scientific method", United States' second written submission, para. 50. The Panel considers that while the information seems to be based on a study prepared in 1994, the United States did not submit any previous or more recent piece of evidence showing that these estimates were wrongfully calculated. Furthermore, the United States did not elaborate on why, in its opinion, the scientific basis of this study was not "robust".

[741] Exhibit MEX-5, p. 27.

[742] Exhibit MEX-5, pp. xxi-xxii.

[743] Exhibit MEX-5, pp. 26-29, AA-60-63.

[744] The United States claims that dolphin observed mortalities in the ETP has been reduced to approximately 1200 dolphins per year, United States' second written submission, para. 2.

[745] See para. 7.512 above.

[746] Mexico's second written submission, para. 99.

[747] Mexico's second written submission, para. 89.

argues that it has produced evidence that no regional fisheries management organization other than the IATTC has had a comprehensive program for many years to monitor bycatch of marine mammals.[748] We note in this respect that the United States has not challenged Mexico's assertion that observer coverage outside of the ETP is not as comprehensive as it is in the ETP.[749] Instead, the United States has argued that Mexico's conclusion that the lack of 100 per cent observer coverage in fisheries outside of the ETP means that the risk of dolphin mortality or serious injury is unknown should be rejected.[750] The United States suggests that if there were reasons to believe that there was a regular and significant association between tuna and dolphins in purse seine tuna fisheries outside the ETP or regular and significant dolphin mortality or serious injury in other fisheries outside of the ETP, the relevant regional fisheries management organizations would be aware of the issue and it would be their responsibility to address such issue.[751] However, as described above, some studies warn that absence of information should not be a basis for assuming that no problem exists and suggested rather that the level of information should be increased.[752]

7.525 The United States also argues that there are very few interactions between US vessels fishing for tuna and dolphins in the WCPO and that reports on that fishery reveal that marine mammal take is "relatively small". In support of this assertion, the United States states that "based on reporting from independent observers on US vessels fishing for tuna in the Western Central Pacific Ocean (WCPO), the United States noted that of the 1500 sets observed in 2008, there were 5 interactions with false killer whales and one interaction with a short-finned pilot whale observed; there were no observed interactions with other marine mammals".[753] The United States cites as source for this assertion a communication of a NOAA official, without however providing such communication or any supporting evidence. As observed by Mexico, this leaves unexplained the basis for this assertion, including whether the observers were specifically trained to watch for dolphin interactions, where the observed vessels were fishing, or how the vessels were fishing.[754] We also note Mexico's observation that the observation of 1500 sets represents a sample of 1.5% of the total number of sets in the WCPO, making it meaningless. We further note that this information relates only to US vessels.

7.526 The United States further refers to a report of the Secretariat of the Pacific Community in the framework of the Oceanic Fisheries Program, assessing the status of stocks in the western and central

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[748] Mexico noted that the Indian Ocean Tuna Commission (IOTC) is still in the initial stages establishing programs to monitor bycatch quoting a report that stated that the IOTC had resolved to implement a regional observer scheme (ROS) beginning in July 2010 that would target a coverage of 5% of fishing operations for vessels larger than 24m from 1 July 2010 which would gradually increase towards a 5% coverage for vessels smaller than 24m fishing outside their EEZ and develop sampling programs to monitor artisanal fisheries at landings. The report quoted by Mexico noted that although the ROS started on 1 July 2010, to date, no observer trip reports had been sent to the Secretariat. Mexico also showed that the International Commission for the Conservation of Atlantic Tunas (ICCAT) also has very limited information on bycatch by referring to its latest biennial report published in 2010, includes the following, which with respect to observer coverage noted that "In order to obtain data on the composition of the catches, particularly those of spawners, relative to the fishing areas and seasons, there shall be observers on board at least 5% of longline vessels over 24 meters fishing for bigeye." Mexico also explained that the *ICCAT Regional Observer Program* shall be established to ensure observer coverage of 100% of all fishing vessels over 20 m fishing for bigeye tuna in a specific area is nonetheless limited to large vessels fishing for bigeye tuna in a specific region and the specific tasks of the observers do not appear to include recording data on bycatch. See Mexico's second written submission, paras. 90-96.

[749] United States' second written submission, para. 47.

[750] United States' second written submission, para. 47.

[751] United States' comments on Mexico's answers to Panel question No. 101, para. 29.

[752] See paragraph 7.518 above , fn 725 referring to MEX-5.

[753] United States' response to the Panel question No. 15, para. 49.

[754] Mexico's second written submission, para. 98.

pacific tuna fishery, which was provided as evidence by Mexico.[755] The United States notes that this report shows that over an eleven year period, 33,319 tuna purse seine sets were observed and bycatch of 1315 marine mammals was reported, 46 of which were reported killed.[756]

7.527 We note that the figures at issue relate specifically to the equatorial purse-seine fishery in the WCPO. The report takes note of a "relatively high level of observer coverage", with one-third of sets observed over the period, and observes that marine mammals were caught in a very small proportion of these observed sets, mainly from sets targeting tuna schools associated with either whales or dolphins. We also note that the full data set reflects, in addition to the 46 marine mammals identified as killed referred to above, 36 alive and 1233 whose fate remained "unknown".

7.528 We also note that the authors of the report themselves do not consider these figures to be a sufficient basis for overall estimates for the fishery. Rather, the authors suggest that a more detailed analysis would be required for this purpose:

> "For the WCP–CA, incidences of capture of marine mammals in the equatorial purse-seine and area-specific longline fisheries were summarised from observer data to identify (where possible) the main species caught and provide an indication of the level of fishery interaction. However, it is important to note that no attempt has been made to apply these data to provide overall estimates for the fishery. This work would require a more detailed analysis of observer coverage rates of individual fleets and consideration of appropriate spatial and temporal stratification. It is intended to undertake such an analysis during the next year."

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

7.530 Furthermore, the authors' conclusion that further study would be required in order to draw overall conclusions for the fishery confirms that the information available in this respect is incomplete and that this issue warrants further analysis. This observation is consistent with other evidence presented by Mexico and discussed above.[757] We also recall in this respect the observations of the

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[755] See Secretariat of the Pacific Community, "'The Western And Central Pacific Tuna Fishery: 2006 Overview And Status Of Stocks,'" 2008, ps. 59-60. Exhibit MEX-98. The Secretariat of the Pacific Community (SPC) is an international organisation that provides technical and policy advice and assistance, training and research services to its Pacific Island members. The Fisheries, Aquaculture and Marine Ecosystems Division assists members to sustainably develop and manage their coastal, aquaculture and oceanic (tuna) fisheries by providing technical advice, assistance and training; conducting research and monitoring; and disseminating information through two programs mainly, the Oceanic Fisheries Program and the Coastal Fisheries Program. The Oceanic Fisheries Program provides data products, such as stock assessment and evaluation of species. It is in this context that the 2006 report on stock assessment was issued, with a view primarily to assessing tuna stocks. The SPC is not responsible for international management of tuna fisheries throughout the region; this is the responsibility of the Western and Central Pacific Fisheries Commission (WCPFC) whose membership includes all 26 SPC members, as well as Canada, China, Chinese Taipei, the European Union, Japan, Korea and Philippines. The OFP provides data management and stock assessment services and advice to WCPFC under an annual service agreement.

[756] See Exhibit MEX-98, p. 59-60.

[757] See also Exhibit MEX-5, p.27.

report commissioned by NOAA and referred to above, that the absence of information should not be assumed to reflect an absence of problem.[758]

7.531 Therefore, based on the evidence provided to us, we conclude that Mexico has demonstrated that certain tuna fishing methods other than setting on dolphins have the potential of adversely affecting dolphins, and that the use of these other techniques outside the ETP may produce and has produced significant levels of dolphin bycatch, during the period over which the US dolphin-safe provisions have been in force.

Whether access to the US dolphin-safe label is available to tuna caught in conditions that may adversely affect dolphins

7.532 We note that where such tuna is caught outside the ETP, it would be eligible for the US official label, even if dolphins have in fact been caught or seriously injured during the trip, since there is, under the US measures as currently applied, no requirement for a certificate to the effect that no dolphins have been killed or seriously injured outside the ETP.[759]

7.533 The Panel further observes that some of the examples referred to above involve dolphin mortalities occurring as a result of tuna fishing operations in the western central Pacific Ocean (WCPO)[760] where, according to the United States, "almost all U.S. purse seine vessels fish for tuna".[761] The United States has further clarified that the US tuna canning industry uses tuna caught by both, domestic and foreign vessels.[762] According to the information provided by the United States, during 2009, 99 per cent of the tuna used by US canners was caught in the western Pacific by US vessels. Similarly, 80 per cent of the tuna US canners sourced from foreign vessels was also caught in the western Pacific.[763] Thus, according to these figures, approximately 86% of the tuna packed by US canners in 2009 was fished in the western Pacific Ocean.[764] The Panel also notes that

[758] See para. 7.518 above and fn 725 referring to MEX-5.

[759] We recall in this respect that, as described in para. 2.25 above, such a requirement would exist in the event of a determination by the Secretary of Commerce that there is regular and significant dolphin mortality or serious injury of dolphins, but that no such determination has in fact been made.

[760] Exhibit MEX-5, pages 18, 23, 26, 27, 112, 131, AA-40, AA-41, AA-43.

[761] United States' response to Panel question No. 15(b), para. 49.

[762] United States' second written submission, para. 22; see also Exhibit US-61, p. 151.

[763] Exhibit US-55, p. 2.

[764] Moreover, there are indications that the three major tuna canners have processing facilities in locations situated near the western Pacific Ocean. Indeed, the study conducted by the Committee on Reducing Porpoise Mortality from Tuna Fishing established by the National Research Council, and funded by the US Department of Commerce narrates that:

"During the 1960s and 1970s, U.S. tuna companies relocated most of the canning operations from the U.S. west coast to offshore U.S. sites in American Samoa and Puerto Rico to take advantage of favorable economic conditions including relatively inexpensive labor and tax advantages offered by commonwealth and territorial governments. During the 1980s, these companies began shifting from these offshore U.S. territories to Asian sites to take advantage of even cheaper labor and less costly worker benefits and environmental restrictions" (emphasis added).

The same study reports that, at the moment it was concluded, Starkist was the only US company still operating in American Samoa or Puerto Rico, while the companies that owned the brands Chicken of the Sea and Bumble Bee had been sold to Indonesian and Thai companies, respectively. Exhibit MEX-5, p. 31. This suggests the possibility that all three major tuna canners participating in the US market, including those that have been sold to foreign companies, could source the tuna contained in their products from fleets operating in near-by waters, including the western Pacific Ocean.

Thailand's tuna canners, which dominate the US market of imported tuna products[765], also obtain most of their tuna supply from companies operating in the WCPO.[766]

7.534 In addition, the United States has explained that the techniques currently used by US and foreign vessels to catch tuna for products sold on the US market include "purse seine sets on dolphins, *unassociated purse seine sets* (sets on floating objects such as FADs and free swimming schools), longline, troll, pole and line, *gillnet*, harpoon and handline" (emphasis added).[767] The United States has also stated that "most tuna products sold in the United States are eligible to be labelled dolphin-safe", and that for instance, "98.5% of total US imports (by volume) of canned tuna products were eligible to be labelled dolphin-safe in 2009".[768] This means the vast majority of tuna products containing tuna caught in the western Pacific Ocean by using, for instance, FADs, trolls or gillnets, sold in the US market are eligible to be labelled dolphin-safe.[769]Based on this information, the Panel considers that Mexico has sufficiently demonstrated that tuna caught during a trip where dolphins were killed or seriously injured using a method of fishing *other than* setting on dolphins *outside* the ETP may be contained in the tuna products sold in the US market under the dolphin-safe label. This is particularly true considering that no determination of existence of regular and significant tuna-dolphin association[770] or regular and significant mortality[771] has been made for any fishery outside the ETP, which means that under the DPCIA provisions that are currently applicable *all* tuna products containing tuna caught in a non-ETP fishery using a method other than setting on dolphins are eligible to be labelled dolphin-safe without certifying that no dolphin was killed or seriously injured in the set.

7.535 We also note that the United States has explained that Subsection 1385(d)(3)(C)(i) of the US dolphin-safe provisions establishes conditions that must be met in addition to those contained in Subsections (d)(1) and (d)(2), to label tuna products dolphin-safe with an alternative mark (rather than the official DOC mark).[772] Namely, if an alternative label rather than the official DOC label is used, no dolphin may have been killed or seriously injured in the sets in which the tuna was caught regardless of the type of fishery. Thus, according to the United States, tuna products using an alternative dolphin-safe mark may not contain tuna caught in a trip where dolphins were killed or seriously injured even if there is no determination that there is regular and significant tuna-dolphin association or dolphin mortality in the fishery where that tuna was caught. The United States further

[765] Mexico's first written submission, para. 37.

[766] These companies are FCF, Tri Marine and Itochu, which specialize in the procurement of canning-grade tuna, Exhibit MEX-111.

[767] United States' response to Panel question 90, para. 10. The Panel also recalls that the United States has clarified that techniques used to catch tuna used in tuna products exported to the United States by vessels flagged to Thailand, the Philippines, Ecuador, Vietnam and China since 2000, include gillnet, longline, pole and line, purse seine, troll, etc. The Thai fleet for instance uses, *inter alia*, gillnets and trolls to fish for tuna, United States' response to Panel question No. 98, para. 22.

[768] United States' response to Panel question No. 95, para. 18.

[769] This is particularly true if we consider that approximately 1% of the imports of tuna products in the United States come from Mexico, and that most of these imports do not qualify to be labelled as dolphin-safe. See Exhibits MEX-86(A), MEX-86(B), MEX-86(C) and MEX-66. The United States has stated that "of the $1.2 billion of U.S. imports of tuna and tuna products, the vast majority contained tuna that was caught by methods other than setting on dolphins and are eligible to be labelled dolphin-safe" (emphasis added). The United States added that "[f]or example, of the over 10,000 entries of canned tuna products in 2009, all but 137 entries were dolphin-safe", United States' response to Panel question No. 95, para. 18.

[770] United States' response to Panel question No. 12(a), para. 29.

[771] United States' response to Panel question No. 85(a), para. 1.

[772] See paragraph 7.489 above.

argues that none of the US canners uses the official dolphin-safe label mark, since they have developed their own dolphin-safe logos.[773]

7.536 The Panel recognizes that Subsection 1385(d)(3)(C)(i) suggests that tuna products using alternative labels must not contain tuna caught in a set where dolphins were killed or seriously injured even if no determination of regular and significant tuna-dolphin association or dolphin mortality has been made in relation to the fishery in question.[774] Although the Panel fails to understand the reasons behind the US regulator's decision to establish a difference in this regard between the official and alternative dolphin-safe labels, it defers to the United States' interpretation of its own regulations and accepts its explanation that these requirements apply *in addition* to the general requirements of Subsections (d)1 and (d)2.[775]

7.537 At the same time, we also note that according to NOAA Form 370, which is the instrument that "reflects the documentation requirements necessary to support dolphin-safe claims for tuna products as set forth in the [US dolphin-safe provisions]"[776], tuna products imported to United States containing tuna caught in a non-ETP fishery where there is no regular and significant tuna-dolphin association or dolphin mortality, using a method other than setting on dolphins, do not need to demonstrate (or even declare) that no dolphins were killed or seriously injured in order to use the official DOC mark. NOAA Form 370 also does not appear to provide any particular space in which such declaration might be made.

7.538 Therefore, although the text of the US dolphin-safe provisions seems to require that tuna products using an alternative label must not contain tuna caught in a set where dolphins were killed or seriously injured, regardless of whether there is a determination of regular and significant tuna-dolphin association or dolphin mortality, it is not clear that the application of these provisions through the use of the NOAA Form 370, as described by the United States itself, involves any enforcement of such requirement. This seems to considerably increase the chances of tuna caught during trips involving dolphin killings or serious injuries, being sold as dolphin-safe in the US market.

7.539 In addition, we note that to the extent that the use of an "alternative" label is subjected to different – and more stringent – requirements than the official label, the official label and alternative labels would have different meanings, leading, as Mexico points out, to further confusion for consumers.[777] Furthermore, that the requirements applicable to the use of an alternative label may be more stringent than those for access to the official label does not modify the fact that access to the official label is available to tuna products caught outside the ETP by methods other than setting on dolphins, regardless of whether dolphins have been killed or seriously injured in the sets.

7.540 Finally, we note that the United States also argues that in adopting measures to fulfil legitimate objectives, it is appropriate for Members to consider the costs of such measures in light of their benefits and that, where the risk of a product containing tuna caught in a set in which a dolphin was killed or seriously injured is low, the dolphin-safe provisions do not condition dolphin-safe claims on the provision of an observer's statement that no dolphins were killed or seriously injured.[778] The United States argues that the cost of requiring a certification for tuna caught in the ETP using purse seine nets that no dolphins were killed or seriously injured in the set in which the tuna was

[773] United States' response to Panel question No. 11, para. 28.
[774] Exhibit US-05.
[775] United States' response to Panel question No. 8; United States' second written submission, paras. 40-41. See also Section II.F above.
[776] United States' response to Panel question No. 7, para. 16.
[777] Mexico's response to Panel question No. 86, para. 3.
[778] United States' second oral statement, para. 56.

caught is relatively low as compared to the cost of imposing the same requirement for tuna caught outside the ETP, because if it required certification that no dolphins were killed or seriously injured for tuna caught outside the ETP, this would impose the additional cost of maintaining 100 per cent observer coverage on vessels in that fishery, for which there is no intergovernmental agreement that such observer coverage would be warranted.[779]

7.541 We note that this explanation is not consistent with the United States' own explanation that Subsection 1385(d)(3)(C)(i) imposes a requirement that no dolphin be killed or seriously injured if an alternative label is used, as discussed in the preceding paragraphs. We understand the United States to suggest that the requirement that no dolphin has been killed or seriously injured is in fact not enforced through a certification requirement with respect to the alternative label, while a statement by an observer is required with respect to the same substantive requirement, for the use of the official label in the ETP. We fail to see, however, how the cost of demonstrating compliance with the same requirement (i.e. that no dolphin was killed or seriously injured) would justify that no such requirement be imposed with respect to the use of an official label, while it would be imposed for the same tuna caught in the same conditions in the same fisheries, in the case of use of an alternative label. It is also not clear to us what the imposition of this additional requirement means in practice in respect of the alternative label, if it is assumed that it cannot be verified and that this is a reason not to impose it for the use of the official label.

7.542 In light of the above, we find that, to the extent that the US dolphin-safe measures grant access to the label to certain tuna products that may have been caught in a manner that adversely affects dolphins (i.e. tuna products containing tuna caught outside the ETP by methods other than setting on dolphins, regardless of whether dolphins may have been killed on the trip), they do not allow the consumer to accurately distinguish between tuna caught in a manner that adversely affects dolphins and other tuna. In addition, to the extent that, depending on whether such tuna is caught in the ETP or outside the ETP, the measures require or do not require a certification that no dolphin has been killed or seriously injured, we find that this also does not allow the consumer to accurately identify tuna caught in conditions that are similarly harmful to dolphins.

7.543 We also note that the provisions of the DPCIA themselves envisage the possibility that a fishery outside the ETP would be identified as one "having a regular and significant mortality, or serious injury of dolphins", which would then lead to the application in such fishery of requirements comparable to those applied in the ETP, including a requirement to certify that no dolphin has been killed or seriously injured on the trip. However, in the absence of such determination – despite strong evidence that regular and significant mortality and serious injury of dolphins also exists outside of the ETP, as described in paragraph 2.25 and explained in paragraph 7.532 above – no such requirement currently applies outside the ETP. We note in this respect that we are not aware of any process or procedure having been established or initiated, under the US dolphin-safe measures, in order to trigger such determination.

7.544 To summarize, therefore, the US dolphin-safe labelling provisions, as currently applied, address observed and unobserved mortality resulting from setting on dolphins, in any fishery, as well as observed mortality from other fishing methods within the ETP. However, they do not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP. In addition, the measures also do not allow the consumer to be informed in any manner with respect to measures taken in the context of the AIDCP, to minimize the incidental taking and killing of dolphins when setting on them in the ETP.

[779] United States' second written submission, paras. 46, 149.

7.545 Consequently, when consumers buy a tuna product labelled dolphin-safe under the US measures, they may be completely assured that no dolphin was adversely affected during the catching of that tuna in the ETP. However, consumers would not have equal certainty that no dolphin was killed or injured or that dolphins were not otherwise adversely affected in respect of tuna caught outside the ETP.

Adverse effects of fishing activities on dolphins in and outside of the ETP

7.546 The Panel would like now to address the United States' suggestion that granting access to the dolphin-safe label to tuna caught outside the ETP using a method other than setting on dolphins does not represent a considerable risk of confusion for the consumers, because the probability that dolphins were hurt during the fishing of that tuna is very low. The United States has explained that the difference in certification requirements between tuna coming from the ETP and tuna harvested in other areas reflects a calibration of the likelihood that any given dolphin would interact with fishing gear and be accidentally killed or seriously injured as a result.[780]

7.547 The United States has suggested that the rationale behind these differences in requirements for tuna harvested in the ETP is the existence of special conditions of this area of the Pacific Ocean. First, according to the United States, in the ETP "there is regular and significant tuna-dolphin association that is commercially exploited on a wide scale commercial basis to catch tuna" and for which dolphin mortality and serious injury are "a regular, foreseeable and expected consequence of exploiting that association".[781] Second, in the United States' view, "dolphin populations in the ETP are depleted with abundance levels at less than 30 per cent of the levels they were at before the practice of setting on dolphins to catch tuna began".[782]

7.548 The United States submits that these differences mean that outside the ETP there is much lower likelihood that dolphins will be killed or seriously injured as a result of tuna fishing activities.[783] However, the United States adds that "to the extent that unintentional deaths of dolphins in purse seine fishery other than the ETP or in non-purse seine fishery does indicate a systemic issue", the US measures contemplate "that dolphin-safe claims on tuna products that contain tuna caught in such fisheries be supported by an observer's statement that no dolphins were killed or seriously injured in the set".[784]

7.549 We understand the United States' explanation to suggest that the US dolphin-safe provisions aim at establishing different requirements based on the likelihood that dolphins will be killed or seriously injured. Thus, the greater the risk, the stricter the certification requirements are for tuna products to be labelled dolphin-safe. We acknowledge that it may be legitimate to provide for a different degree of stringency or of tolerance to adverse impacts, depending on the extent of the threat. This is consistent, in our view, with the requirement to take into account the risks that non-fulfilment of the objective would create, as foreseen in Article 2.2. However, we are not persuaded that this is what the US dolphin-safe measures achieve, in respect of the different treatment of tuna caught within and outside of the ETP.

7.550 We first observe that, as described by the United States itself, its measures seek to address a range of adverse effects of fishing techniques on dolphins. As established in paragraphs 7.483 to 7.486 above, this includes situations in which dolphins are killed or seriously injured. It is also clear,

[780] United States' second written submission, paras. 39-47.
[781] United States' second written submission, para. 42; United States' second oral statement, para. 14
[782] United States' second written submission, para. 43.
[783] United States' second written submission, para. 44.
[784] United States' second written submission, para. 44.

from the United States' own description of its objectives, that its intention to address adverse effects of fishing techniques on dolphins in the form of observed or unobserved mortality is not subordinated to considerations relating to the conservation of depleted dolphin stocks. This is made clear by its clarification, in response to a question by the Panel, that addressing such impacts "*might also be considered* to seek to conserve dolphin populations".[785] In these conditions, we are not persuaded that differences with respect to the depletion status of the stocks at issue would be sufficient to justify the absence of any requirement to certify that no dolphin has been killed or seriously injured, in situations where dolphins may in fact have been be killed or seriously injured.

7.551 Notwithstanding this conclusion, we also note that, although the United States did not identify the conservation of dolphin stocks or populations as a direct objective of its measures, the recovery of dolphin populations, as well as the likelihood of mortality or serious injury in a particular fishery, are among the considerations reflected in the design and structure of the US dolphin-safe labelling provisions.[786] We therefore consider further the extent to which such considerations could explain the absence of a requirement to certify that no dolphin was killed for tuna caught outside the ETP.

7.552 We first note that, even assuming that the United States' contention that certain environmental conditions in the ETP (such as the intensity of tuna-dolphin association) are unique,[787] the evidence submitted to the Panel suggests that the *risks* faced by dolphin populations in the ETP are *not*. As discussed above, a study commissioned by NOAA entitled "*An evaluation of the most significant threats to cetaceans, the affected species and the geographic areas of high risk, and the recommended actions from various independent institutions*", contains multiple examples of numerous dolphins being killed annually in other fisheries as a result of tuna fishing activities and recommends further action being taken in this respect.[788]

7.553 In some cases, cetacean bycatch in other fisheries targeting different species including tuna, has been considered "a serious and unsustainable problem".[789] For instance, the above-mentioned study recommends that the United States collaborates with international organizations to "investigate the interaction between tuna purse seine vessels fishing for tuna off the coast of West Africa and whales and dolphins". According to this study, "allegations and sparse documentation of these interactions have existed for more than twenty years". Thus the study identifies the need to "plac[e] observers on tuna vessels fishing in these areas [to] help document the occurrence of association of

[785] See paragraphs 7.485-7.486.

[786] As noted in footnote 162 above, the change in the US dolphin-safe standard from a standard of absence of setting on dolphins to a standard of absence of killing or seriously injury dolphins was made contingent upon secretarial findings 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. The type of scientific research mandated to substantiate the secretarial finding also evidenced the preoccupation for conservation matters insofar as it required, *inter alia*, population abundance surveys of depleted stocks and research into whether the physiological stress effects of using purse seine nets to chase and encircle dolphins is adversely affecting depleted dolphin populations prior to implementing any change in the dolphin-safe label. However, the court rulings overruled the findings, emphasizing among other things the recovery issue and stating that all of the best available evidence pointed towards the fishery as the cause of the dolphin's failure to recover (See for instance Earth Island Institute v Evans). No. 03-0007, 2004 U.S. Dist. LEXIS 15729, 2004 WL 1774221, at *30-31 (N.D. Cal. Aug. 9, 2004). In addition, the DPCIP foresees the possibility of requiring a certification that no dolphins are killed or seriously injured, if a determination is made that serious mortality or tuna-dolphin association exists in the fishing. In addition, as described in Section III above, the US dolphin-safe provisions foresee the possibility of more onerous certification requirements outside the ETP in the event of a determination of regular mortality, or of association between tuna and dolphins, in a fishery.

[787] United States' second oral statement, paras. 14-18

[788] E.g. Exhibit MEX-5, pp. 26, 27, 112, 131AA-16, fn 89, AA-40, AA-41.

[789] Exhibit MEX-99, p. Ev 26.

tuna schools with whales and dolphins and the frequency of encirclement and magnitude of any bycatch.[790] At the same time, the study reports that the bycatch in this area "threatens the continued existence of Atlantic humpback dolphins" and reports that populations of this species of dolphin near the coast of Ghana and Togo are "severely depleted".[791]

7.554 The Panel also observes that in the western Pacific Ocean, where most of the tuna sold in the US market is sourced from, there are also examples of incidental dolphin mortalities which affect a percentage of the dolphin populations in that area that is higher than the percentage of dolphins observed to be affected in the ETP (which is less than 0.1 per cent) under the controlled conditions of the AIDCP.[792] The Panel notes in particular, that the same study indicates that in the Philippines, Indonesia, Thailand, and elsewhere in the western central Pacific, relatively little is known about abundance, distribution, and bycatch levels of cetaceans such as the Irrawaddy dolphin, Indo-Pacific humpback dolphin, Indo-Pacific bottlenose dolphin, finless porpoise, and spinner dolphin (and its dwarf form) and that "comprehensive cetacean abundance and bycatch surveys are needed to develop effective mitigation strategies",[793] including assessments on "incidental catch in the tuna purse seine and drift gillnet fisheries".[794] The Panel also notes that the study reports that Irrawaddy dolphin populations are seriously depleted in parts of Thailand and the Philippines.[795]

7.555 Thus, based on the evidence, we are not persuaded that the US statement that "in the course of using other fishing methods for tuna outside the ETP, *a* dolphin may be killed or seriously injured"[796], accurately represents the magnitude of the threat posed by tuna fishing to dolphins outside of the ETP.

7.556 Again, the Panel recognizes that the evidence concerning dolphin bycatch outside the ETP is not as detailed and as abundant as the information in relation to the ETP. As mentioned above, it has been observed in this respect that the absence of information is not indicative of absence of a problem and that the scarce information available should be considered as an underestimation of the bycatch.[797] It is also known that some fishing fleets refuse to take observers on board.[798] Therefore, we disagree with the United States that "[i]f anything can be inferred from the absence of a 100 per cent observer requirement to monitor marine mammal interactions in other fisheries is that in those fisheries there is no problem such as the one in the ETP".[799]

7.557 We also note that the evidence suggests that observed dolphin mortality in the ETP, by contrast, is low relative to population size.[800] Indeed, the United States acknowledges that the observed annual dolphin mortality in the ETP "is not believed to be significant from a population recovery perspective".[801] In addition, most of the studies submitted by the parties also suggest that the

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[790] Exhibit MEX-5, p. xxi.
[791] Exhibit MEX-5, p. 12.
[792] Exhibit MEX-5, p. 30 (reporting that the percentage of the population of dolphins observed killed is less than 0.1 per cent), p. 96 (indicating for instance that the estimate bycatch mortality for spinner dolphins in this area is 1,500-3,000 dolphins which represents between 5 and 10 per cent of the population of this type of dolphins in this area); see also, e.g., United States' first written submission, paras. 62-64 (noting that bycatch of dolphins in the ETP stands apart from other fisheries in that three to six million dolphins are chased and encircled each year when purse seine nets are intentionally set on them to catch tuna).
[793] Exhibit MEX-5, pp. 29 and 114.
[794] Exhibit MEX-5, p. 27.
[795] Exhibit MEX-5, p. 28-29, 113.
[796] United States' second written submission, para. 44 (emphasis added).
[797] Exhibit MEX-5, p. vii.
[798] Exhibit MEX-99, p. Ev 26.
[799] United States' second oral statement para. 18.
[800] Exhibit US-20, p. 12; Exhibit US-21, p. 10.
[801] United States' response to Panel question No. 36, para. 89.

dolphin populations identified by the United States as depleted are recovering,[802] although they disagree as to whether they are growing at sufficiently high rates. Nevertheless, the most recent estimates show that "[o]ver the 8-year period from 1998-2006 all 3 of the officially depleted dolphin stocks (coastal and northeastern offshore spotted dolphins and eastern spinner dolphins) were estimated to be growing at rates considered to be near the 4-8 per cent maximum possible for dolphins".[803] The United States, while suggesting the possibility that uncertainty in abundance estimates may mean that dolphin stocks are actually declining, notes that the most recent assessment model estimates median annual population growth rates of northeastern offshore spotted dolphins and eastern spinner dolphins of 1.7 per cent and 1.4 per cent per year, respectively. The United States also notes, however, that this estimate is 2.3 per cent and 2.6 per cent below the expected annual population growth rate, i.e. 4 per cent.[804]

7.558 We also note that it has been suggested that factors other than purse-seine fishery-related effects are hindering the growth rate of dolphins stocks in the ETP. Evidence submitted by the United States indicates that "it is unknown whether such low intrinsic growth rates are natural to these species or whether the low rates are due to other factors impeding the recovery of these stocks".[805]

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[802] Exhibit US-4, p. 1; Exhibit US-19, p. 32.

[803] Exhibit US-20, p. 12. The Panel notes that the United States has questioned Mexico's assertion that this report stands for the proposition that the relevant dolphin populations are growing at rates near 4-8 per cent and pointed out that the report gave several caveats that precluded drawing that conclusion. *First*, the United States submits that statistical and methodological constraints preclude a definitive conclusion as to whether the higher estimates mean the populations have actually increased. Given the 95% confidence intervals on the estimates of growth rate, it is possible that these stocks are declining, United States' first written submission, para. 48, United States' second oral statement, para. 12, Exhibit US-20, p. 12-13. *Second*, the United States also points out that this study indicates that the apparent decrease in abundance of the western/southern stock of offshore spotted dolphin is coincident with the apparent increase abundance of northeastern offshore spotted dolphins, suggesting that dolphins could be moving across the geographic boundaries, United States' first written submission, fn 49, United States' second oral statement, para. 12, Exhibit US-20, p. 13. *Finally*, the United States submits that this report contains an abundance estimate and is not an assessment model, United States' second oral statement, para. 11. The United States explains that because of variability in and uncertainty surrounding point estimates of abundance, it is not possible to infer population growth rates by looking at perceived trends in these point estimates over time. The United States further explains that the rate at which dolphin populations are growing should be estimated using assessment models, which can condition based on realistic population dynamics, United States' response to Panel question No. 37, para. 92, United States second oral statement, paras. 11-12, Exhibit US-20, p. 13. In this regard the Panel observes that, because of the very nature of the issues this type of studies deal with, it appears to be extremely difficult to arrive to an optimum level of absolute certainty. We are aware that the conclusions contained in most of the studies submitted by the parties imply a certain margin of error. For instance, the study used by the United States to support its argument that dolphin stocks in the ETP are not recovering, also includes certain caveats and tempers its conclusions by "admitting that there is small probability that, relative to their respective estimates … neither [the northeastern offshore spotted stock nor eastern spinner dolphins] stock was depleted in 2002", Exhibit US-21, p. 9. The Panel also observes that besides pointing out that this study is not an assessment model, the United States did not submit any other reason indicating that the results provided in this study were not reliable. Nor did the United States provide any evidence supporting the hypothesis that the increase in the numbers of northeastern offshore spotted dolphins is due to a relocation of the western/southern stock. Finally, the Panel notes the United States itself has also relied on it to support its own arguments, see e.g. United States' first written submission, para. 47.

[804] United States' response to Panel question No. 37, paras. 90-92. According to the United States northeastern offshore spotted dolphins are growing at rates of 1.7% while eastern spinner dolphins growth rate is 1.4 per cent.

[805] Exhibit US-21, page 10. One hypothesis is that northeastern offshore spotted and eastern spinner dolphin populations are already at, or near, their carrying capacities (Exhibit US-19, page 32). Another hypothesis is that after bycatch due to the purse-seine fishery has been reduced or eliminated, there is a lag

7.559 As described above, the United States has argued that any differences in documentation to substantiate dolphin-safe claims are calibrated to the risk that dolphins will be killed or seriously injured when tuna is caught. In this context, the United States has emphasized the uniqueness of the ETP in terms of the phenomenon of tuna-dolphin association, which is such that it is used widely on a commercial basis and causes observed and unobserved mortalities, which the United States argues are fundamentally different from dolphin mortalities occurring in other oceans. We are not persuaded, however, that the United States has demonstrated that the requirements of the US dolphin-safe labelling provisions are "calibrated" to the likelihood of injury, as it suggests.

7.560 We recall that under the US measures, intentionally setting on dolphins disqualifies tuna products from access to a dolphin-safe label, both in and outside the ETP. In these circumstances, it is unclear to us why the requirement that no dolphin be killed or seriously injured in the sets in which the tuna was caught would apply in respect of tuna caught by methods other than setting on dolphins in the ETP but not outside the ETP, for access to the official label. Even assuming that, as we have accepted earlier, setting on dolphins may result in observed and unobserved harmful effects on dolphins, these are not the effects targeted by the additional requirement imposed, in respect of tuna caught in the ETP, that no dolphin have been killed or seriously injured during the set (since, by hypothesis, no setting on dolphins must have taken place, in order to qualify for the label). Accordingly, the only types of adverse effects on dolphins that can be targeted by the additional requirement applied in the ETP that no dolphin have been killed or seriously injured (applied in addition to the requirement of not setting on dolphins) are those arising from incidental bycatch as a result of fishing methods *other* than setting on dolphins. The United States does not explain, however, why such incidental bycatch would be more likely to take place in the ETP than outside the ETP, and justify a requirement that no dolphin be killed or seriously injured with respect only to the ETP.

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

7.562 Therefore, in light of the evidence presented in these proceedings, the Panel is not persuaded that the threats arising from the use of fishing methods other than setting on dolphins to catch tuna outside the ETP are insignificant, as the United States suggests, be it in terms of observed mortality or serious injury, or even, in at least some cases, in terms of sustainability of the populations. Nor are we persuaded that they are demonstrated to be lower than the similar threats faced by dolphins in the ETP. As a result, granting access to dolphin-safe label to tuna products containing tuna caught in this manner creates a genuine risk that consumers may be misled about whether that tuna was caught by using a technique that does not adversely affect dolphins.

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period before recovery begins (Exhibit US-19). One study has thus predicted that "a long-term, declining trend in the biomass of large phytoplankton (e.g. diatoms) in the ETP will cause the biomass of dolphins to decline regardless of potential fishery effects" (Exhibit US-21, page 11).

7.563 From these elements, we conclude that in relation to the first objective pursued by the US dolphin-safe provisions, the US measures can only *partially* ensure that consumers are informed about whether tuna was caught by using a method that adversely affects dolphins.[806]

7.564 This is in part because they could be misled into thinking that a tuna product did not involve injury or killing of a dolphin when this may in fact have been the case (if caught outside the ETP), and also because, to the extent that the measures would guarantee an absence of killing with respect to some tuna (caught in the ETP) but not others (caught outside the ETP), this creates ambiguity as to the meaning of the guarantee provided by the label. Furthermore, although the United States submits that the requirements for the alternative label differ from those of the official label, this difference would also not allow the consumer to accurately distinguish between tuna that has and has not been caught in a manner that adversely affects dolphins and create further confusion as to the meaning of the label and thus create the potential to mislead the consumer.

Whether the alternative measure proposed by Mexico provides a reasonably available less-trade restrictive means of achieving the same level of protection

7.565 The parties agree, and we concur, that the burden of establishing prima facie the existence of an alternative measure that would similarly fulfil the objectives of the United States rests on Mexico as the complainant.[807]

7.566 Mexico has suggested that "a 'reasonably available alternative measure' for the United States would be to permit the use in the US market of the AIDCP 'dolphin-safe label'".[808] According to Mexico, the objective of informing the consumers can be accomplished by the AIDCP, since the monitoring, tracking, verification and certification system under the AIDCP would allow the consumers to have the assurances that no dolphins were injured or killed during the capturing of tuna.[809]

7.567 In the United States' view, neither the AIDCP (or measures implemented pursuant to it) nor the AIDCP label constitutes a "reasonably available alternative" that could fulfil the legitimate objectives of the DPCIA provisions.[810] According to the United States, eliminating the DPCIA provisions *in lieu* of the AIDCP would not fulfil the objective of contributing to the protection of dolphins or ensuring that consumers are not misled or deceived about whether or not tuna products contain tuna caught in a manner that adversely affects dolphins.[811] The United States explains that while the AIDCP has made an important contribution to dolphin protection, the US provisions further contribute to protecting dolphins by ensuring the U.S. market is not used to encourage fishing fleets to set on dolphins to catch tuna, which is a fishing technique that, in the United States' view, adversely affects dolphins.

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[806] According to the evidence provided by Mexico, at least around 12% of the public in the United States believes that dolphin-safe means that setting on dolphins were encircled and then released in the capture of the tuna, Exhibit MEX-64.

[807] United States' first written submission, para. 169; Mexico's response to Panel question No. 67, para. 234. See also para. 7.468 above.

[808] Mexico's response to Panel question No. 134, para. 52.

[809] Mexico's response to question 67 from the Panel, para. 238.

[810] United States' first written submission, para. 170; United States' first oral statement, para. 48; United States' response to question 37 from the Panel, paras. 91-2; United States' second written submission, paras. 140 and 155.

[811] United States' first written submission, paras. 170-172; United States' first oral statement, para. 48. United States' second written submission, paras. 160-162.

7.568 We first note that the US dolphin-safe provisions do not formally restrict the importation or sale of tuna or tuna products that are not labelled dolphin-safe. However, as noted above, the parties agree that the US public has a preference for tuna products that are dolphin-safe, and access to the label is therefore a valuable advantage on the US market. To the extent that the proposed alternative would provide access to the label, and thus to this advantage, to a greater range of tuna products, including imported tuna products, it would be less-trade restrictive than the existing US measures, in that it would allow greater competitive opportunities on the US market to those products.

7.569 We now consider whether this proposed alternative is reasonably available to the United States, to achieve the same level of protection as it currently achieves with the existing US dolphin-safe labelling provisions.

7.570 In the Panel's view, Mexico has not suggested, as described by the United States, "eliminating the DPCIA provisions *in lieu* of the AIDCP".[812] As we understand it, what Mexico suggests is that the US dolphin-safe label and the AIDCP label should be allowed to coexist on the US market in order to provide fuller information to US consumers. In practical terms, this would entail that tuna caught in the ETP by setting on dolphins could be labelled as complying with the AIDCP requirements for dolphin-safe labelling, and sold in the US market, as long as it was harvested in accordance with the AIDCP.

7.571 The AIDCP requirements for dolphin-safe labelling are based on compliance with the Procedures for AIDCP Dolphin Safe Tuna Certification, which includes submitting an independent observer's statement that no dolphin was killed or seriously injured during the sets in which the tuna were caught.[813] Therefore, if tuna products labelled dolphin-safe according to the AIDCP were allowed in the US market, US consumers buying these products would have the assurance that no *observed* dolphin deaths or serious injuries occurred during the sets in which that tuna was caught. They would also been assured that certain specific measures have been taken, in the process of setting on dolphins to catch the tuna, in order to minimize incidental catches of dolphins. However, consumers would not be assured that tuna products using this label do not contain tuna caught by setting on dolphins, or that no *unobserved* negative effects on dolphins arose in this context.

7.572 As observed in the preceding section, insofar as the US dolphin-safe provisions do not require a certification that no dolphin was killed or seriously injured in respect of tuna caught outside the ETP, consumers can only be assured that such tuna, when labelled dolphin-safe, did not result in *unobserved* adverse effects on dolphins. However, as discussed above, they would remain unsure whether no dolphins were observed being killed or seriously injured, insofar as the US dolphin-safe labelling provisions fail to impose the obligation to show that tuna caught outside of the ETP without setting on dolphins involved no dolphin mortality or serious injury.

7.573 Thus, under both, the US measures and the AIDCP regime, consumers of tuna products would bear a certain level of uncertainty whether dolphins were adversely affected during the catching of the tuna contained in those products. Considering that under the US measures, as we concluded above, it is possible that tuna caught during a trip where dolphins were in fact killed or injured may be labelled dolphin-safe; while under the AIDCP, a label would only be granted where no dolphins was killed, but where certain unobserved adverse effects could nonetheless have been caused to dolphins, we consider that the extent to which consumers would be misled as to the implications of the manner in which the tuna was caught would not be greater if the AIDCP label were allowed to co-exist with the US dolphin-safe provisions, than it currently is under the existing measures.

[812] United States' first written submission, para. 172.
[813] Exhibit MEX-56.

7.574 In this respect, and bearing in mind the United States' submission that its measures calibrate the applicable requirements for the use of the dolphin-safe label in accordance with the level of risk faced by dolphins, we are not persuaded that allowing consumers to be fully informed about the efforts made in the context of the AIDCP for the protection of dolphins in fishing for tuna and the monitoring of dolphin stocks in the ETP would be more misleading than allowing a dolphin-safe label to be applied to tuna caught outside the ETP in the absence of any monitoring of observed or unobserved killing or of dolphin populations.

7.575 Moreover, the Panel notes that Mexico goes beyond simply suggesting that the use of the AIDCP dolphin-safe logo be allowed in the US market. Mexico submits that the coexistence of the US and the AIDCP dolphin-safe labels, would permit US consumers to be "fully informed of *all aspects* of dolphin-safe fishing methods" (emphasis added) so that "they [could] choose accordingly when purchasing tuna products from US retailers".[814] The Panel understands Mexico's suggestion as advocating the inclusion of more information on the dolphin-safe labels allowed in the US market on the actual and potential fishery-related adverse effects on dolphins.[815] The Panel considers that such addition would contribute to informing consumers about the precise dolphin-safe characteristics of the various techniques used to harvest tuna. In our view, this would enhance the ability of the dolphin-safe labels to remedy market failures arising from asymmetries of information between tuna producers, retailers and final consumers in the US market. Well-informed consumers would be in a better position to use their purchasing power to influence the way tuna fisheries and canners operate.

7.576 In such conditions, accepting the use of the AIDCP dolphin-safe label as a tool to provide more precise information to US consumers would not imply that the United States should forego its own dolphin-safe label. To the extent that the alternative suggested by Mexico implies conveying more complete information to consumers, such alternative may have the potential to reduce the possibilities of consumer deception *more* than the current US dolphin-safe label.

7.577 Therefore, the Panel concludes that allowing compliance with the dolphin-safe requirements of the AIDCP dolphin-safe label in conjunction with the existing standard embodied in the US dolphin-safe provisions would be at least as apt to contribute to the objective of ensuring that consumers are not misled about whether tuna has been caught in a manner that adversely affects dolphins. Both the existing US measures and the alternative suggested by Mexico may reduce to some extent, but do not eliminate, the possibilities of the US consumers being misled. Taking into account the risks of non-fulfilment of the United States' objective if the AIDCP label was allowed, the Panel concludes, accordingly, that the alternative measure suggested by Mexico does not entail a greater risk of consumers being deceived than the US dolphin-safe provisions, as currently applied.

7.578 In light of all the above, we find that, in relation to the objective of consumer information, Mexico has identified a less trade-restrictive alternative that would achieve a level of protection equivalent to that achieved by the US measures, taking account of the risks non-fulfilment would create. Thus, the Panel concludes that Mexico has demonstrated that the US dolphin-safe provisions are more trade restrictive than necessary to fulfil their objective of ensuring that consumers are not misled about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, and the United States has not successfully rebutted this claim. In reaching this conclusion, the Panel has considered the available scientific and technical information, related processing technology and the intended end-uses of tuna products.

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[814] Mexico's second written statement, para. 210; Mexico's second oral statement, para. 115.

[815] The Panel recognizes that without additional information in the labels, the US and the AIDCP dolphin-safe logos may be confused with one another.

(iii) Whether the US dolphin-safe provisions are more trade-restrictive than necessary to contribute 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

Arguments by the parties

7.579 Mexico claims that the US measures have no effect on encouraging foreign fishing fleets not to set upon dolphins. Mexico argues that the US measures will not influence or modify the conduct of the ETP tuna fishery so as to further preserve dolphin stocks. According to Mexico, the US measures do not add to that protection, particularly in respect of the actions of fishing fleets from countries that are signatories to the AIDCP and that are already fishing in what Mexico considers as the most environmentally responsible manner.[816]

7.580 According to Mexico, all the US measures accomplish is to block imports of tuna products and tuna from those countries and, thereby, protect the US tuna industry. In Mexico's view, by withdrawing the economic incentive for countries and fishing fleets to comply with the AIDCP, the US measures undermine the viability of the AIDCP. Thus, Mexico concludes that undermining the AIDCP does *not* fulfil the objective of preserving dolphin stocks in the ETP.[817]

7.581 Mexico also submits that the key underlying factual premise of the *Hogarth* ruling is the belief that dolphin stocks in the ETP were not recovering. According to Mexico, a recent study commissioned by the US Department of Commerce shows that dolphin populations in the ETP are recovering.[818] Moreover, Mexico submits that no scientific evidence supports the view that setting on dolphins in a manner consistent with the AIDCP adversely affects dolphins from a stock sustainability perspective.[819] Therefore, Mexico concludes the court ruling does not fulfil the objective of preserving dolphin stocks in the ETP.[820]

7.582 Thus, Mexico argues that the US measures are based on conditions that existed in the late 1980s but which ceased to exist many years ago and that they provide no mechanism for the United States to re-evaluate the status of marine mammal protection in the ETP based on the best available evidence.[821]

7.583 Mexico also rejects the US argument that besides the observed dolphin injuries and mortalities in the ETP, there are unobserved mortalities of dolphins due to the fishing practice of setting on them. According to Mexico, the United States does not make projections about unobserved mortalities for any fishery other than the ETP, even when other fisheries have been identified by the United States as having high levels of mortality.[822]

7.584 Mexico claims that the United States does not apply the same multipliers to account for alleged unseen mortalities in its own fisheries as it does for the ETP. According to Mexico, the US analytical approach to evaluating dolphin populations incorporates a considerable amount of speculation and unreliable assumptions. Mexico submits that following the United States approach would mean that unobserved mortalities are over 28 times greater than the observed mortalities of about 1,200. Nonetheless, in Mexico's view, even if the US approach is applied, the best available

[816] Mexico's first written submission, para. 211; Mexico's second written statement, para. 206.
[817] Mexico's first written submission, para. 211; Mexico's second written statement, para. 206.
[818] Mexico's first written submission, para. 211.
[819] Mexico's second written submission, para. 204.
[820] Mexico's first written submission, para. 211.
[821] Mexico's second oral statement, para. 111; Mexico's response to question 86, para. 4.
[822] Mexico's response to question 100 from the Panel, para. 43.

evidence is that dolphin mortalities in the ETP are negligible and do not affect populations of any of the dolphin stocks.[823]

7.585 According to the United States, the US dolphin-safe provisions help protect dolphin populations, by ensuring that the "dolphin-safe" label is not used on tuna products that contain tuna caught by setting on dolphins. According to the United States, to the extent customers choose not to purchase tuna products without the dolphin-safe label, the US dolphin-safe provisions help ensure that the US market is not used to encourage fishing fleets to set on dolphins. In the United States' view, as the practice of setting on dolphins to catch tuna in the ETP decreases in frequency, the associated adverse effects on dolphin populations decrease as well.[824]

7.586 The United States argues that the most probable reason dolphin populations remain depleted and show no clear signs of recovery is the practice of setting dolphins to catch tuna and the many adverse effects beyond immediate mortality or serious injury in the nets.[825]

7.587 The United States submits that setting on dolphins has significant adverse effects on individual dolphins.[826] First, the United States argues that dolphin deaths are a foreseeable and expected consequence of setting on dolphins to catch tuna, and this is why under the AIDCP each vessel that wishes to fish for tuna in this way is assigned a set number of dolphins that it may be observed killing each year.[827] Therefore, the United States claims that "it cannot be disputed that not setting on dolphins to catch tuna affords greater protection to dolphins than setting on them".[828]

7.588 Second, the United States submits that the observed dolphin mortalities and serious injuries are only one of the many adverse effects of setting on dolphins to catch tuna. In the United States' view, as long as dolphins are set upon to catch tuna, they will suffer the adverse effects of that practice.[829] The United States accepts that the magnitude of observed dolphin mortality due to setting on dolphins with purse seine nets has decreased significantly.[830] However, according to the United States, the AIDCP does not address the many other adverse effects of setting on dolphins to catch tuna, such as separation of dependent calves from their mothers, reduced reproductive success due to stress induced foetal mortality, acute cardiac and muscle damage, cumulative organ damage, compromised immune function and increased predation.[831] The United States points out that speedboats and helicopters are used to encircle dolphins during setting on dolphins operations.[832] Thus, the US dolphin-safe provisions further contribute to protecting dolphins by ensuring that the US market is not an incentive for fishing fleets to use fishing techniques that adversely affect dolphins.[833]

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[823] Mexico's second oral statement, paras. 105-107.
[824] United States' first written submission, para. 158.
[825] United States' response to question 66 from the Panel, para. 154.
[826] United States' first written submission, paras. 49-59; United States' second oral statement, paras. 7-9.
[827] United States' second written submission, para. 139.
[828] United States' second written submission, para. 157.
[829] United States' second written submission, para. 157.
[830] United States' first written submission, para. 54.
[831] United States' first written submission, para. 56; United States' second written submission, paras. 139-40.
[832] United States' second oral statement, para. 7; Mexico's response to question 99 from the Panel, para. 40.
[833] United States' first written submission, para. 170; United States' first oral statement, para. 48

Analysis by the Panel

7.589 For the purposes of determining whether the US dolphin-safe provisions are more trade-restrictive than necessary to contribute to protecting dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins", we need first to ascertain the manner and extent to which these measures contribute to this objective, and then consider whether the same level of protection could be achieved by the alternative measure proposed by Mexico.

The contribution of the US dolphin-safe provisions to protecting dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins

7.590 In considering the contribution of the US dolphin-safe provisions to protecting dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins, we first note that, as described earlier, the achievement of this objective is in large part dependent on the successful achievement of the first objective relating to consumer information. Only if consumers are correctly guided by the dolphin-safe label towards products that contain tuna not caught using a fishing method that adversely affects dolphins, can the US measures successfully avoid encouraging those fishing techniques.

7.591 We also note in this respect that this US objective goes beyond mere information, as it seeks to provide a disincentive for certain behaviour, based on consumer choice. As described by the United States itself, it is only "to the extent that consumers choose" to buy dolphin-safe products that the measures will be able to ensure that the US market is not used to encourage the use of fishing techniques harmful to dolphins.[834]

7.592 At the outset, we recall that we have already determined above that the US dolphin-safe provisions can only partially achieve the objective of ensuring that consumers are not misled about whether tuna was harvested by a method that adversely affects dolphins. It follows that the second objective can only be partially fulfilled, at best: to the extent that the measures fail to allow the consumer to accurately distinguish between tuna caught in conditions harmful to dolphins and other tuna, the related fishing techniques cannot be discouraged or encouraged in a manner that accurately reflects this distinction. With this in mind, we consider further the extent to which the US dolphin-safe provisions contribute to protecting dolphins.

7.593 The Panel observes that the United States has articulated its objective in general terms, without making any distinctions among fisheries, suggesting its intention to discourage the use of harmful techniques in *all* tuna fisheries regardless of their location.

7.594 We recall that under the US measures, tuna caught in the ETP may only be labelled dolphin-safe if a certification is provided that no dolphins were set upon and, *in addition*, that no dolphins were killed or seriously injured. We also recall that the US measures allow virtually *all* tuna harvested outside the ETP by using a method other than setting on dolphins to be labelled dolphin-safe, without requiring a statement that no dolphins were killed or seriously injured, despite indications that dolphins may be adversely affected by those fisheries.

7.595 We further recall that, as described above, the United States has also explained that in relation to tuna that is intended to be labelled with an alternative label, it is necessary to certify that no dolphins were killed or seriously injured, wherever it was caught. However, as discussed earlier, it is

[834] United States first written submission, paras. 146, 158.

not clear that this requirement is in fact enforced through the NOAA Form 370. In addition, as also previously observed, if such a requirement is enforced, it would not modify the fact that access to the official label is available without such certification.

7.596 As described above, Mexico considers that the US measures effectively discourage rather than encourage the efforts undertaken by signatories of the AIDCP to prevent the harmful effects of setting in dolphins in the ETP. Mexico argues in particular that the US measures mistakenly assume that dolphin populations in the ETP are depleted. As discussed previously, however, the US objectives in relation to dolphin protection are not limited to the conservation of dolphin populations or to the avoidance of direct mortality. They also encompass additional unobserved incidental impacts of setting on dolphins. To the extent that denying a dolphin-safe label to any tuna caught by setting on dolphins ensures that these *unobserved* impacts of setting on dolphins are not encouraged, the US dolphin-safe provisions thus contribute to the United States' objective of not encouraging fleets to catch tuna in a manner that adversely affects dolphins.

7.597 However, to the extent that the US measures allow the use of a dolphin-safe label for tuna caught by any method other than setting on dolphins outside the ETP, without requiring any certification in relation to whether a dolphin may have been killed or seriously injured, the US dolphin-safe provisions do not ensure that the US market is not used to encourage fishing techniques that adversely affect dolphins. As determined above, the potential for dolphin mortality or serious injury outside the ETP, in the course of fishing operations using techniques other than setting on dolphins, is not insignificant.

7.598 Moreover, the Panel notes that by granting access to the dolphin-safe label to tuna caught by using fishing techniques that adversely affect dolphins outside the ETP, while at the same time denying it to tuna caught in the controlled conditions of the AIDCP in the ETP, the US dolphin-safe provisions may not only fail to discourage such harmful fishing techniques, but may actually have the *opposite* effect. Indeed, it seems that under the current implementation of the US measures, virtually *all* tuna caught outside the ETP by using a method other than setting on dolphins may be labelled dolphin-safe. Fisheries using these other techniques, knowing that their tuna is granted virtually unrestricted access to the dolphin-safe label, have no incentive to adapt their fishing gear and practices to address dolphin protection concerns. As we established earlier, the application of some of these other techniques may result in the death of a considerable number of dolphins and other marine mammals around the world.[835] This means that, in practice, fleets wishing to have access to the US market could be discouraged from setting on dolphins in the ETP under the regulated conditions of the AIDCP and encouraged to relocate instead to other fisheries in which dolphins populations are less closely monitored and where the incidental killing of dolphins is not monitored. We note in this respect the following observations made in the report commissioned by NOAA, referred to previously:

> Cetaceans are "migratory." They spend several months each year traveling from one area to another, often covering vast distances in search of food, a particular climate, or a safe breeding ground. From a conservation and management perspective migratory species are exposed to an array of threats because they do not confine themselves to one location. Moreover, because they periodically cross through a number of jurisdictions, the level of protection afforded to cetaceans fluctuates according to their geographical location. Inevitably, migrating animals will pass

[835] See paragraphs 7.520 to 7.531 above.

through jurisdictions where cetacean conservation is less of a priority than in other areas.[836]

7.599 For these reasons, the Panel concludes that the US dolphin-safe provisions are capable of protecting dolphins by ensuring that the US market is not used to encourage fishing practices that may kill or seriously injure dolphins, only within the ETP. In other fisheries, the US measures are capable of achieving their objective only in relation to the practices of setting on dolphins and using high seas driftnets. However, in relation to all other fishing techniques used outside the ETP, the US measures are not able to contribute to the protection of dolphins. Therefore, the Panel concludes that US measures may, at best, only partially fulfil their stated objective of protecting dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.

7.600 As in relation to the first objective, we note that the United States has explained that the difference in certification requirements between tuna caught in the ETP and tuna harvested in other areas reflects a calibration of the likelihood that any given dolphin would interact with fishing gear and accidentally be killed or seriously injured[837] and that the rationale behind these differences is the existence of special conditions, such as regular and significant tuna-dolphin association and the fact that dolphin populations in the ETP do not show clear signs of recovery in the ETP.[838] However, as discussed in relation to the first objective, in light of the evidence presented in these proceedings, the Panel is not persuaded the threats from tuna fishing for dolphins outside the ETP are insignificant, either in terms of observed mortality or serious injury, or even, for at least some of populations, in terms of sustainability of the populations or that the US measures calibrate the requirements to the likelihood of interaction and harmful effects to dolphins.

Whether the alternative suggested by Mexico provides a reasonably available less trade restrictive means of achieving the same level of protection

7.601 Having clarified the extent to which the US dolphin-safe provisions are able to contribute 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, we must now consider whether the alternative measure proposed by Mexico would provide a less trade-restrictive means of achieving the same level of protection.

7.602 Mexico submits that the objective of discouraging fishing techniques that affect dolphins can also be accomplished by the AIDCP. According to Mexico, the dolphin set method administered by the AIDCP provides the most comprehensive and tightly regulated protection for dolphins and other bycatch of any fleet in the world, including the US fleet. In addition, Mexico claims that the objective of protecting dolphins has long been accomplished in the ETP through the AIDCP, which Mexico considers to be the most successful multilateral agreement regarding effective dolphin protection.[839]

7.603 In the United States' view, neither the AIDCP itself nor measures implemented pursuant to it constitute a "reasonably available alternative" that could fulfil the legitimate objectives of the DPCIA provisions. While the United States agrees that the AIDCP has made an important contribution to

[836] Exhibit MEX-5, p. v.

[837] United States' second written submission, paras. 39-47. See the discussion of the adverse effects of setting on dolphins in paragraphs 7.485-7.486, 7.587-7.588 above.

[838] United States' second written submission, para. 42-43; United States' second oral statement, para. 14

[839] Mexico's response to question 67 from the Panel, paras. 239-40; Mexico's first oral statement, para. 56.

dolphin protection in the ETP, in its view, despite the conservation measures called for under the AIDCP, dolphin populations remain depleted and have not recovered.[840]

7.604 The United States accepts that the magnitude of observed dolphin mortality due to setting on dolphins with purse seine nets has decreased significantly.[841] However, according to the United States, the AIDCP does not address the many other adverse effects of setting on dolphins to catch tuna, such as separation of dependent calves from their mothers, reduced reproductive success due to stress induced foetal mortality, acute cardiac and muscle damage, cumulative organ damage, compromised immune function and increased predation.[842] The United States points out that speedboats and helicopters are used to encircle dolphins during setting on dolphins operations.[843] As discussed earlier, the United States submits that setting on dolphins has significant adverse effects on individual dolphins.[844] The United States claims that "it cannot be disputed that not setting on dolphins to catch tuna affords greater protection to dolphins than setting on them".[845] In the United States' view, as long as dolphins are set upon to catch tuna, they will suffer the adverse effects of that practice.[846]

7.605 The United States observes that the AIDCP does not contain provisions aimed at discouraging the practice of setting on dolphins to catch tuna. Thus, in the United States' view, the AIDCP is not a substitute for provisions that seek to protect dolphins by discouraging the practice of setting on them to catch tuna.[847]

7.606 The United States claims that the DPCIA provisions together with the measures called for under the AIDCP and other provisions of US law form part of a comprehensive US strategy to protect dolphins. Thus, the United States claims that substituting the DPCIA provisions for measures called for under the AIDCP would reduce the overall ability of the United States to protect dolphins.[848]

7.607 The Panel first recalls that the alternative measure suggested by Mexico would allow the coexistence of the US and the AIDCP dolphin-safe labels in the US market, with the aim of providing the US consumers with more detailed information about the dolphin-safe implications of the fishing methods employed to catch the tuna contained in those products. As noted above, Mexico does not suggest replacing the US dolphin-safe provisions in their entirety with the AIDCP regime. Nor could the provisions of the AIDCP be applicable in other fisheries to countries that are not parties to this treaty.

7.608 We have already concluded that the US dolphin-safe provisions are capable of contributing to the protection of dolphins in the ETP by discouraging the practice of setting on dolphins and other

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[840] United States' first written submission, para. 170; United States' first oral statement, para. 48; United States' response to question 37 from the Panel, paras. 91-2; United States' second written submission, paras. 140 and 155.

[841] United States' first written submission, para. 54.

[842] United States' first written submission, para. 56; United States' second written submission, paras. 139-40.

[843] United States' second oral statement, para. 7; Mexico's response to question 99 from the Panel, para. 40.

[844] United States' first written submission, paras. 49-59; United States' second oral statement, paras. 7-9. See the discussion of the adverse effects of setting on dolphins in paras. 7.485-7.486 and 7.587-7.588.

[845] United States' second written submission, para. 157.

[846] United States' second written submission, para. 157.

[847] United States' second written submission, para. 157.

[848] United States' first written submission, para. 171; United States' second written submission, para. 157.

fishing methods that may cause dolphin deaths or injuries. On the other hand, since tuna caught by setting on dolphins may be labelled dolphin-safe under the AIDCP, Mexico's alternative would not discourage the use of this practice in the ETP. To that extent, any adverse effects on dolphins of setting on them that are not addressed by the AIDCP regime would not be discouraged.

7.609 It is undisputed that the application of the AIDCP controls has played a decisive role in the considerable reduction of dolphin mortalities in the ETP in the last decades.[849] Annual estimate of dolphin mortality in the ETP in 1986 was 132,169 marine mammals, whereas the estimate in 2008 was 1,169 individuals.[850] As noted above, the United States recognizes that the observed dolphin mortalities as a result of setting on dolphins in the ETP are approximately 1,200 dolphins per year.[851] Furthermore, the Panel observes that the majority of sets on dolphins in the ETP these days produce *zero* observed dolphin mortalities. In 2008, for instance, in 92 per cent of the sets on dolphins in the ETP no incidental mortalities of dolphins were observed to have occurred.[852]

7.610 Improvements in the fishing gear and methods may considerably reduce the risks arising from setting on dolphins.[853] Mexico has explained that some of these adaptations have already been adopted in the ETP under the AIDCP.[854] According to the Committee on Reducing Porpoise Mortality from Tuna Fishing established by the US National Academy of Science, small and major modifications to the gear and techniques may be adopted to further reduce dolphin mortality.[855] Moreover, the same Committee has indicated that "improvement in captain performance is the single most important step that can be taken to reduce dolphin mortality in the ETP purse-seine fishery".[856]

7.611 Moreover, the AIDCP establishes overall dolphin mortality limits (DMLs) for the fleets fishing for tuna in the ETP (5,000 individuals). In recent years, these limits have not been met.[857] The Panel also notes that the AIDCP has established certain mechanisms to enforce these limits. Under the AIDCP observer program 100 per cent of the trips are monitored by an independent observer.[858] The AIDCP has also established an International Review Panel (IRP) that monitors the compliance by the vessels operating in the ETP with requirements and controls established by the AIDCP.[859] Finally, under the System for Tracking and Verifying Tuna of the AIDCP, each party establishes its own tracking and verification programme, implemented and operated by a designated national authority, which includes periodic audits and spot checks for caught, landed, and processed

[849] Exhibit MEX-5, p. 31, Exhibit US-24, pp. 22-23.
[850] Exhibit US-24, p. 52.
[851] United States' second written submission, para. 2.
[852] Exhibit US-24, page 23. Already in 1992, only 0.5% of dolphins encircled in the purse-seine net sets monitored by the NMFS were injured or killed, Exhibit MEX-2, page 19.
[853] Exhibit MEX-2, page 110.
[854] This methods include: (i) backing down the edges of the nets to create a channel through which the dolphins may escape, (ii) using divers and personnel in small boats to assist the dolphins, (iii) covering the top portion of the purse seine with a skirt of mesh that prevents dolphins from catching their beaks or heads in the net in the event of a net "canopy", and (iv) prohibiting fishing after sundown to ensure that dolphins within the net can be seen, Mexico's first written submission para. 29.
[855] Exhibit MEX-2, pages 72-90.
[856] Exhibit Mex-02, page 10.
[857] Exhibit US-24, page 26.
[858] The IATTC's international observer program and the national observer programs of Colombia, Ecuador, the European Union, Mexico, Nicaragua, Panama and Venezuela constitute the AIDCP On-Board Observer Program, Exhibit US-24, P. 23.
[859] During 2008, the IRP consisted of 20 members: the 14 participating governments that have accepted the Agreement, and 6 representatives of non-governmental organizations (NGOs), 3 from environmental organizations and 3 from the tuna industry, Exhibit US-24, p. 26.

tuna products.[860] Should the mortalities of the fleet of any party to the AIDCP meet or exceed the total amount of DML distributed, fishing for tuna in association with dolphins must cease for all vessels operating under the jurisdiction of that party.[861]

7.612 On the basis of the above, we conclude that, when conducted under "controlled" circumstances, e.g. in accordance with the requirements of the AIDCP, the adverse effects of setting on dolphins in the form of observed dolphin mortality or serious injury may be considerably reduced. In addition, compliance with the AIDCP dolphin-safe labelling requirements includes a requirement that no dolphin has been killed or seriously injured in sets in which the tuna was caught. Therefore, allowing compliance with the AIDCP labelling requirements to be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US dolphin-safe provisions do and would involve no reduction in the level of protection in this respect.

7.613 However, as described earlier, the US objectives also include an intention to minimize unobserved consequences of setting on dolphins. Such adverse effects would not be discouraged through the AIDCP labelling requirements, which allows setting on dolphins. We also note that, according to the United States, these unobserved effects are responsible for the fact that the dolphin populations in the ETP remain depleted. Therefore, to the extent that it would not discourage these unobserved effects of setting on dolphins and their potential consequences on dolphin populations within the ETP, the use of the AIDCP labelling requirements as the exclusive basis for a dolphin-safe label could potentially provide a lesser degree of protection than the existing US dolphin-safe provisions, which disqualify setting on dolphins entirely for access to the dolphin-safe label. However, we note that, as observed above, other fishing techniques may also have adverse consequences on dolphins. As discussed above, the evidence before the Panel suggests that significant dolphin mortality also arises outside the ETP from the use of other techniques than setting on dolphins, and that some of the affected dolphin populations may be at risk as a result. The Panel notes in this respect the example of a Japanese driftnet fishery for albacore that was observed to have a dolphin mortality rate of *three* animals per net.[862] In contrast, as previously mentioned, the vast majority of the dolphin sets in the ETP are *zero*-kills.[863]

7.614 As also discussed above, the US dolphin-safe measures do not address such adverse impacts, and thus do not discourage the use of such fishing techniques, in respect of tuna caught outside the ETP. To the extent that they may encourage relocation from the ETP to other areas where such adverse effects arise but where access to the label is not subjected to certification that no dolphin was killed or seriously injured in the course of the trip, the US measures as currently applied (i.e. in the absence of any determination of regular and significant mortality outside the ETP pursuant to Section 1385(d)(1)(D) of the DPCIA) may even have the effect of encouraging the development of such fishing techniques without seeking to monitor and reduce the level of incidental killings and other harmful effects on dolphins.

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

[860] This system also includes mechanisms for communication and cooperation between and among national authorities, Exhibit US-24, p. 26.
[861] See Mexico's second written submission, para.67 and MEX-110
[862] See Exhibit MEX-2, p. 101.
[863] See para. 7.574 and footnote 770 above.

than the risks arising from other fishing techniques applied without controlling for dolphin mortality or other adverse impacts.

7.616 This conclusion is not modified by the fact that access to alternative labels under the US measures are subjected to the additional requirement that no dolphin was killed even for tuna caught outside the ETP, since this would not modify the fact that access to the US official label, which provides the same advantage on the US market as an alternative label, is available without a requirement that no dolphin was killed or seriously injured.

7.617 We are mindful of the United States' submission that its measures calibrate the applicable requirements for the use of the dolphin-safe label in accordance with the level of risk faced by dolphins. However, as discussed in the context of our earlier consideration of this issue in relation to the first US objective, 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.

7.618 In light of all the above, the alternative suggested by Mexico does not seem to create greater risks to dolphins in the ETP than those accepted by the United States under the challenged measures in relation to other fishing techniques used outside the ETP. Thus, we consider that Mexico's alternative would achieve a level of protection equal to that achieved by the US dolphin-safe provisions outside the ETP, as currently applied. As mentioned above in relation to the objective of consumer information, we note that this does not imply, in our view, that the different conditions for compliance with the US and the AIDCP label could not be made clear, to allow the consumer the benefit of full information in this respect.

7.619 Recalling our conclusion that the alternative submitted by Mexico is less trade-restrictive than the US dolphin-safe provisions, we therefore conclude that Mexico has identified a reasonably available less-trade restrictive alternative that would meet the level of protection achieved by the US measures in relation to the objective of contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing to catch tuna in a manner that adversely affects dolphins. In reaching this conclusion, we have taken into account the available scientific and technical information, related processing technology and the end-uses of tuna products.

(iv) Conclusion

7.620 In light of our determinations above in relation to both objectives of the US dolphin-safe provisions, we find that these measures are more trade-restrictive than necessary to fulfil their legitimate objectives, taking account of the risks non-fulfilment would create. Consequently, the Panel finds that the US dolphin-safe provisions are inconsistent with Article 2.2 of the TBT Agreement.

7.621 As described above, we make this determination taking into account our finding that the US dolphin-safe measures, as applied, only partly address the adverse effects on dolphins of tuna fishing that the United States has identified as relevant it the context of its objectives of informing consumers and contributing to the protection of dolphins in relation to the impact of such fishing techniques. Specifically, the US dolphin-safe provisions do not address observed mortality, and any resulting adverse effects on dolphin populations, for tuna not caught by setting on dolphins or high seas driftnet fishing outside the ETP. Similarly, the proposed AIDCP dolphin-safe standard which Mexico identified as part of its proposed alternative measure would also not address the entirety of the adverse effects identified by the United States, insofar as it would not address unobserved mortalities from setting on dolphins, and any resulting adverse effects on dolphin populations.

7.622 We also recall, in this context, our determination that the choice of the level of protection to be achieved in pursuance of the legitimate objectives identified is the prerogative of the Member taking the measures, and we therefore make no determination as to what might be an appropriate level of protection to achieve in relation to the objectives identified by the United States for the information of consumers and the protection of dolphins in relation to the manner in which tuna is caught.

7.623 Finally, we note that, as reflected in our analysis above, our findings take into account the information, including scientific information concerning the effects of tuna fishing on dolphins that is available to us for the purposes of these proceedings. From these elements, it appears that a number of aspects of this issue are not fully documented and that further research may be necessary in order to ascertain the exact situation in various areas.

4. Whether the US dolphin-safe labelling provisions are inconsistent with Article 2.4 of the TBT Agreement

7.624 Article 2.4 of the TBT Agreement provides that:

> "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

7.625 Mexico argues the US dolphin-safe labelling measures are not based on an existing relevant international standard for the following reasons: (i) a relevant international standard exists (the "AIDCP standard"); (ii) the United States has failed to base its regulation on that international standard; and (iii) the relevant international standard is not an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued.[864] The United States has failed to base its measures on the international standard, Mexico argues, because, it contemplated the application of the AIDCP Standard but rejected its application in favour of a unilateral standard, a "setting of nets on dolphins" standard.[865]

7.626 The United States first considers that the AIDCP resolutions cited by Mexico do not set out a relevant international standard. Secondly, it argues that the use of the definition of dolphin-safe in the AIDCP resolution would neither be effective nor appropriate to fulfil the objectives of the US labelling provisions, clarifying that it is for Mexico to show that the relevant international standard it identifies would be effective and appropriate in meeting the objective pursued by the US dolphin-safe labelling provisions.[866]

(a) Overall approach

7.627 The elements of a violation of Article 2.4 of the TBT Agreement were addressed by the Appellate Body in *EC – Sardines*. In that case, although the panel and the Appellate Body followed the same approach in their assessment of Peru's claim under Article 2.4. They first considered whether the alleged international standard was indeed a "relevant international standard" within the meaning of Article 2.4, then they analysed whether the relevant international standard had been used "as a basis for" the EC regulation challenged by Peru; finally the third element considered was the

[864] Mexico's first written submission, para. 228.
[865] Mexico's first written submission, para. 245.
[866] United States' first written submission para. 178.

"ineffectiveness or inappropriateness" of the relevant international standard for the fulfilment of the legitimate objectives pursued.[867] We find this approach to be consistent with the terms and structure of Article 2.4. Accordingly, we find it appropriate to examine Mexico's claim under Article 2.4 of the TBT Agreement on the basis of the following three elements:

– the existence or imminent completion of a relevant international standard;

– whether the international standard has been used as a basis for the technical regulation; and

– whether the international standard is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, taking into account fundamental climatic or geographical factors or fundamental technological problems.

7.628 We also note that, in addressing the allocation of burden of proof under this provision, the Appellate Body held that the complaining party had to prove that the alleged international standard had not been used as a basis for the challenged regulation and that it also had to show that the alleged international standard was effective and appropriate to fulfil the legitimate objectives pursued by the regulation.[868]

7.629 We therefore now consider the three elements identified above in order to determine whether Mexico has demonstrated that the US dolphin-safe labelling provisions are not based on a relevant international standard in violation of Article 2.4. Specifically, we will consider:

– whether the "AIDCP standard" constitutes a relevant international standard;

– whether the United States has used it as a basis for its dolphin-safe labelling provisions; and

– whether it is an effective and appropriate means for the fulfilment of the legitimate objectives pursued by the United States.

(b) Whether the "dolphin-safe" definition contained in the AIDCP Tuna Tracking System Resolution is a relevant international standard

(i) Arguments of the parties

7.630 In its first written submission, Mexico explained that the parties to the AIDCP adopted in 2001 the "Resolution to Adopt the Modified System for Tracking and Verification of Tuna" which contains the following definitions:

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[867] See Panel Report, *EC – Sardines*, paras. 7.61-7.139 and Appellate Body Report, paras. 217-291.

[868] "Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the SPS Agreement, there is no 'general rule-exception' relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru – as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities – to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used 'as a basis for' the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the 'legitimate objectives' pursued by the European Communities through the EC Regulation." Appellate Body Report, *EC – Sardines*, paras. 274-275.

– Dolphin-safe tuna is tuna captured in sets in which there is no mortality or serious injury of dolphins;

– Non-dolphin-safe tuna is tuna captured in sets in which mortality or serious injury of dolphins occurs.[869]

7.631 Further, Mexico explains that the parties to the AIDCP also adopted the "Resolution To Establish Procedures For AIDCP Dolphin Safe Tuna Certification" and that that document states the "[t]he terms used in this document are as defined in the AIDCP System for Tracking and Verification of Tuna"; therefore Mexico notes that the AIDCP's definitions of "dolphin-safe" and "non-dolphin-safe" apply with respect to the AIDCP's rules on dolphin-safe certification.[870]

7.632 Following the Panel's reasoning in *EC – Sardines*, Mexico observes that before addressing the question of whether an international standard is relevant, it must first be determined that an international standard exists.[871] Mexico referred to the definition of "standard" provided in Annex 1.2 of the TBT Agreement:

> "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

7.633 According to Mexico the definition of "dolphin-safe" contained in the AIDCP Resolution to Adopt the Modified System for Tracking and Verification of Tuna[872] is an international standard within the meaning of Annex 1.2 of the TBT Agreement for of the following reasons: (i) the AIDCP provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods because it provides rules expressly dealing with the characterization of tuna as dolphin-safe and non-dolphin-safe[873], (ii) compliance with the AIDCP dolphin-safe certification is not mandatory and Section 2.1 of the Resolution To Establish Procedures For the AIDCP Dolphin Safe Tuna Certification which provides that "Application of the procedures for the use of the AIDCP *Dolphin Safe* Tuna Certificate shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of a Party"[874] and (iii) the AIDCP Standard was prepared and approved by the AIDCP member governments, which constitute a recognized body according to the sixth edition of the ISO/IEC Guide 2: 1991 which defines the terms used in the TBT Agreement according to Annex 1 of the TBT Agreement.[875] Mexico notes that:

> "[T]he 1991 Guide states in Article 4.1 that a 'body' is defined as a '[l]egal or administrative entity that has specific tasks and composition.' The AIDCP fits this definition. Article 4.2 states that an 'organization' is defined as a '[b]ody that is based

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[869] Mexico's first written submission, para. 229.

[870] Mexico's first written submission, para. 230.

[871] (*footnote original*) Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted. (Mexico's first written submission, fn 151).
23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, para. 7.63.

[872] Mexico refers to the definition as the "AIDCP Standard". See Mexico's first written submission, fn 149.

[873] Mexico's first written submission, para. 234.

[874] Mexico's first written submission, para. 235.

[875] Mexico notes that the TBT Agreement does not defined "recognized body" but that Annex I of the TBT Agreement establishes that the terms of the sixth edition of the ISO/IEC Guide 2: 1991when used in the TBT Agreement shall be given the same meaning.

> on the membership of other bodies or individuals and has an established constitution and its own administration.' The AIDCP also fits this definition, as it is composed of governments and is administered by the secretariat of the IATTC."[876]

7.634 Mexico notes that a "standardizing body" under Article 4.3, is a "[b]ody that has recognized activities in standardization" and that under Article 1.1, "standardization" is "[a]ctivity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of an optimum degree of order in a given context."[877] Mexico also recalls the definition of a "provision" of Article 7.1 of the ISO/IEC Guide which is an "[e]xpression in the content of a normative document, that takes the form of a statement, an instruction, a recommendation, or a requirement."[878]

7.635 Taking all these elements into account, Mexico concludes that "the characterization of tuna as dolphin-safe is an activity that falls within the definition of a 'provision' suitable for 'standardization', and the AIDCP organization is a 'recognized body' for purposes of the definition of a 'standard' in Annex I.2 of the TBT Agreement. For these reasons, the AIDCP Standard falls within the definition of "standard" contained in Annex 1.2 of the TBT Agreement."[879]

7.636 The United States in turn argues that "the definition of 'dolphin-safe' in the AIDCP tuna tracking resolution Mexico cites does not constitute a relevant international standard within the meaning of Article 2.4 of the TBT Agreement as it is not (1) a standard; (2) international; or (3) relevant."[880]

7.637 The United States observes that as the "relevant international standard" for the purpose of its claims under Article 2.4, Mexico cites the definition of "dolphin-safe" in an AIDCP resolution: Resolution to Adopt the Modified System for Tracking and Verification of Tuna which states that "the terms used in this document are defined as follows" and includes in the list of those terms a definition for "dolphin-safe". The United States also observes that Mexico cites a second AIDCP resolution: "Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification" and that it characterizes this resolution as setting out the "AIDCP's rules on dolphin-safe certification". The United States specifies that this resolution defines the term "AIDCP Dolphin Safe Tuna Certificate" for the purposes of the resolution as a "[d]ocument issued by the competent national authority, evidence of the dolphin-safe status of tuna and tuna products, in accordance with the AIDCP System for Tracking and Verification of Tuna."[881]

7.638 The United States first notes that the definition in the AIDCP tuna tracking resolution does not meet the definition of a "standard" in Annex 1 of the TBT Agreement because it does not set out "rules, guidelines or characteristics for products or related processes and production methods"; it sets out a definition for purposes of an intergovernmental agreement. The United States contends that the definition does not itself establish any rules, guidelines or characteristics for products or their related processes and production methods, or aspects covered under the second sentence of the definition of a

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[876] Mexico's first written submission, paras. 233-237.
[877] Mexico's first written submission, para. 238.
[878] *(footnote original)* Pursuant to Article 3.1, a "normative document" is a "Document that provides rules, guidelines or characteristics for activities or their results." Article 7.2 provides that a "statement" is a "Provision" that conveys information, while Article 7.3 provides that an "instruction" is a "Provision that conveys an action to be performed." Pursuant to Article 7.4, a "recommendation" is a "Provision that conveys advice or guidance," while Article 7.5 provides that a "requirement" is a "Provision that conveys criteria to be fulfiled." (Mexico's first written submission, fn 153).
[879] Mexico's first written submission, paras. 238-239.
[880] United States' first written submission, para. 182.
[881] United States' first written submission, para. 181.

technical regulation, such as labelling requirements.[882] The United States argues that the definition in the AIDCP resolution, simply defines a term and while the tuna tracking resolution more broadly seeks to establish procedures to track tuna, Mexico does not appear to be arguing that the resolution constitutes the "rules" at issue but that the definition itself sets out such "rules".[883]

7.639 Secondly, the United States argues that the "dolphin-safe" definition in the tuna tracking resolution is not "for common and repeated use".[884] The United States further argued that to construe the definition of "dolphin safe" in the AIDCP resolution as a standard for "common and repeated use" would expand the scope of the definition of a "standard" and have serious implications with respect to Members' rights and obligations under any intergovernmental agreement.[885]

7.640 The third reason the United States invokes in support of its argument is that the "dolphin-safe" definition in the tuna tracking resolution is not contained in a "document approved by a ... body". It holds that the AIDCP tuna tracking resolution (as well the AIDCP dolphin-safe certification resolution) is a document approved by the parties to the AIDCP, and neither the AIDCP nor the parties to it constitute a "body" (i.e. a "legal or administrative entity that has specific tasks and composition").[886] The United States points out that the AIDCP is an inter-governmental agreement and that countries are parties to, not members of, the AIDCP. The United States asserts that, even assuming *arguendo* that the AIDCP was a "body", it does not have recognized activities in standardization and therefore would not constitute a "recognized" body.[887]

7.641 Finally, the United States argues that the definition in the AIDCP tuna tracking resolution does not qualify as "international" insofar as the resolution has only been adopted by the 14 countries parties to the AIDCP. It notes that despite the AIDCP being open to ratification by other countries, its accession is still limited to countries meeting certain criteria.[888] Recalling that the term "international standard" is defined in the ISO/IEC Guide 2: 1991 as "[s]tandard that is adopted by an international standardizing/standards organization and made available to the public," and that the TBT Agreement defines "international body" as a "body ... whose membership is open to the relevant bodies of at least all Members", the United States holds that read together, an international standard is adopted by a body whose membership is open to the relevant bodies of at least all Members, and yet the AIDCP is not open for any Member to join.[889] Assuming *arguendo* that the AIDCP were a "body", neither the

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[882] United States' second written submission, para. 170.

[883] United States' first written submission, para. 183.

[884] The United States explains that the word "common" in the definition of a standard refers to a rule, guideline or characteristic of general application and a rule, guideline, or characteristic that is for common and repeated use would not be one that was drafted for the specific purpose of defining a term in an international agreement, and that the AIDCP does not purport to establish a definition of "dolphin safe" for application outside the context of the AIDCP resolutions. United States' second written submission, paras. 171-172; United States' answers to Panel question No. 33, paras. 74-76

[885] For example, the United States argues, it would mean that any time a Member agreed to the definition of a term for purposes of an intergovernmental agreement, it would have an obligation to use that definition as the basis for its technical regulations, even for example, where the intergovernmental agreement expressly states that no party has an obligation to implement that definition for purposes of domestic law. United States' second written submission, para. 172; United States' answers to Panel question No. 33, para. 77

[886] United States' first written submission, fn 197.)

[887] It stresses that the objectives of the AIDCP and the activities parties take pursuant to it are fundamentally different from those of bodies such as the Codex Alimentarius Commission (Codex) or ASTM International that have as their core function the development of standards. United States' first written submission, para. 185.

[888] (i) with a coastline bordering the ETP; (ii) that are a member of the IATTC; or (iii) whose vessels fished for tuna in the ETP between 21 May 1998 and 14 May 1999.

[889] United States' first written submission, paras. 186-187.

AIDCP nor resolutions adopted by its parties qualify as international within the meaning of Article 2.4 of the TBT Agreement.

7.642 In the absence of a definition of the term "international standard" in the TBT Agreement, the Panel invited the parties to clarify this term for the purposes of Article 2.4 of the TBT Agreement. The United States explained that, by virtue of the chapeau of Annex 1 of the TBT Agreement the terms of the TBT Agreement had the same meaning as given in the sixth edition of the ISO/IEC Guide 2: 1991. It also noted that the ISO/IEC Guide in turn defines an "international standardizing organization" as a standardizing organization "whose membership is open to the relevant national body from every country"[890] and "organization" as a "body" and that Annex 1 of the TBT Agreement provides in paragraph 4 that an "international body" is a "body ... whose membership is open to the relevant bodies of at least all Members". The United States also observed that in paragraph 2 (explanatory note) that "[s]tandards prepared by the international standardization community are based on consensus". In light of these definitions the United States concluded that "an international standard is a standard that is (i) adopted by a body whose membership is open to the relevant bodies of at least all Members, (ii) based on consensus and (iii) made available to the public".[891] It further noted that this interpretation of the term "international standard" was consistent with the work of Members since the conclusion of the Uruguay Round and particularly with the 2000 Decision of the Committee on Technical Barriers to Trade on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the [TBT] Agreement[892] that sets out principles and procedures that standardizing bodies should observe when developing international standards, guides and recommendations.

7.643 Mexico agrees that the ISO/IEC Guide definition of "international standard" is applicable by virtue of Annex I of the TBT Agreement.[893] It further notes that the 1991 Guide defines "international standardizing organization" as a "Standardizing organization whose membership is open to the relevant national body from every country" and that a standardizing body is a "Body that has recognized activities in standardization".[894] However, Mexico submits that the concept of "international standard" should be applied flexibly to suit the circumstances of a particular situation. It illustrates that statement with the example of the Institute of Electronics Engineers and SAE International, Mexico asserts that these organizations are engaged in setting international standards despite the fact that they have as members individuals and not governments. Mexico adds that it is not clear that the TBT Agreement was intended to exclude the standards of those organizations from being treated as "international standards" even though those entities are not open to WTO members as such.[895] Finally Mexico points out to that the use of national standards by developed countries to create non-tariff barriers to import from developing countries is a growing source of concern for the WTO system and that Article 2.4 is an important tool in ensuring that standards are adopted and applied in a trade-neutral manner.[896]

7.644 With regard to the United States' contention that the AIDCP should not be considered as a "recognized body" insofar as it does not have recognized activities in standardization, Mexico replied that the United States had not explained what it considered to be "recognized activities" in standardization and that the AIDCP is not only *a* recognized body but *the* recognized body for the

[890] ISO/IEC Guide 2: 1991, para. 4.3.2.
[891] United States' response to Panel question No. 59, para. 135.
[892] *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement*, G/TBT/1/Rev.9, pp. 37-39.
[893] Mexico's response to Panel question No. 59, paras. 184-185.
[894] Mexico's response to Panel question No. 59, para. 186.
[895] Mexico's response to Panel question No. 59, para. 187.
[896] Mexico's response to Panel question No. 59, para. 188.

setting of standards relating to the protection of dolphins in the ETP insofar as its main role is to establish rules and procedures – i.e., standards – governing the interaction between fishing and dolphins. It notes that the members of the AIDCP have issued the Procedures for AIDCP Dolphin Safe Tuna Certification which are directly applicable to the subject of this dispute. It also holds that the AIDCP has issued a number of other standards, including Procedures for Maintaining the AIDCP List of Qualified Captains, Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds, and Guidelines for Required Raft for the Observation and Rescue of Dolphins and that the core function of the AIDCP is to establish procedures to be followed by the commercial fleets of the individual nations that are members of the AIDCP.[897]

7.645 As for the characteristics that a body must meet to produce "international standards" within the meaning of Article 2.4 of the TBT Agreement Mexico, recalling that Annex 1 of the TBT Agreement defines an "international body or system" to be a "[b]ody or system whose membership is open to the relevant bodies of at least all Members", notes that Annex 1 also defines "regional body", "central government body", "local government body" and "non-governmental body" and that, accordingly, participation in the "body or system" by central government – as is the case for the AIDCP - is sufficient to meet the qualification test for "relevant bodies".[898] Noting that "body" is not defined in the TBT Agreement, Mexico recalls that the 1991 Guide states in Article 4.1 that a "body" is defined as a "[l]egal or administrative entity that has specific tasks and composition." It argues that Article 4.2 states that an "organization" is defined as a "[b]ody that is based on the membership of other bodies or individuals and has an established constitution and its own administration." According to Mexico national governments of course are "bodies", and the AIDCP is based on government's membership. It explains the AIDCP has its own administration, which is implemented by the Secretariat of the IATTC and that AIDCP system operates in conformity with the 2000 TBT Committee decision.[899] Mexico concludes that the AIDCP has the characteristics appropriate for a body to produce international standards.[900]

7.646 In light of the definition of international standard, the United States contends that in order for a standard developed by a body to be international that body must (i) permit at least all Members to be members of that body, (ii) have developed the standard based on consensus, and (iii) made the standard publicly available. Therefore, determining whether a particular standard is "international" involves determining, in its view, not only whether the body that developed the standard is "international" but also whether the standard was adopted by consensus and made publicly available.[901]

7.647 In response to a question by the Panel, Mexico observed that if negotiators of the TBT Agreement had intended that "recognized body" have the exact same meaning as "standardizing body" as defined in the ISO/IEC Guide 2: 1991, they would have used the same term.[902] It also asserted that the core purpose of the AIDCP organization – which is composed of the member central governments acting collectively, and is administered by the secretariat of the IATTC – is to establish standards for tuna fishing to protect marine mammals and that there is no support for the US claim that the AIDCP organization is not a "recognized" or "standardizing" body for establishing when tuna caught in the ETP is dolphin-safe.[903] In contrast, the United States is of the view that a reasonable

[897] Mexico's response to Panel question No. 60, paras. 190-191.
[898] Mexico's response to Panel question No. 61, paras. 192-193.
[899] Mexico's response to Panel question No. 61, paras. 195-196 and Mexico's second written submission, para. 212.
[900] Mexico's response to Panel question No. 61, para. 197.
[901] United States' response to Panel question No. 61, para. 137.
[902] Mexico's response to Panel question No. 62, para. 199.
[903] Mexico's second written submission, para. 213.

interpretation of "recognized" in the context of a standard would be that the body has recognized activities in standardization insofar as neither the TBT Agreement nor the ISO Guide contain a definition of "recognized body" but the ISO Guide does include a definition of the term "standardizing body".[904] Mexico however contends that the United States' proposed interpretation would conflict with the wording of Annex 1.2.

7.648 The United States also commented on Canada's argument in its third party submission that the question of whether a body is "recognized" within the meaning of Annex 1 should be determined based on whether the body applies the six principles set out in the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations stating that given that the Committee Decision sets out principles and procedures that standardizing bodies should observe when developing international standards it would seem to support the position that a "recognized" body means a body that has recognized activities in standards development. However, the United States acknowledged Canada's suggestion that a body may be "recognized" not simply because it develops standards or has recognized activities in standardization, but because it develops standards or engages in standardization activities in accordance with certain recognized principles, for example, those in the Committee Decision.[905] Finally the United States concludes that under either interpretation, however, the AIDCP resolutions were not adopted by a "recognized body" because neither the AIDCP nor the parties to it constitute a "body" within the meaning of Annex 1 of the TBT Agreement and neither the AIDCP or the parties to it have recognized activities in standardization, or under Canada's interpretation, develop standards in accordance with the TBT Committee Decision principles, since only parties to the AIDCP participate in activities related to the AIDCP and only certain Members may be parties to the AIDCP.[906]

7.649 Concerning the meaning of the term "international body" contained in Annex 1.4 of the TBT Agreement, Mexico is of the view that the definition should be interpreted to mean that membership is open to those WTO Members who have an interest in the subject matter of the regulation.[907] In that regard it notes that first the AIDCP is not closed to additional members and that it remains open to accession by any State or regional economic integration organization that meets the requirements set out in the agreement, or is otherwise invited to accede to the Agreement on the basis of a decision by the Parties. It explains that no additional countries or regional economic integration organizations have expressed interest in joining the AIDCP and that further it is common that during the AIDCP meetings, Parties invite observer countries that regularly attend such meetings with the intention in the future to become Parties. In addition it stresses that unlike the SPS Agreement which specifically identifies three specific sources of international standards, the TBT Agreement does not and therefore retains flexibility for determining what are the relevant and applicable international standards on a case-by-case basis. Mexico also notes that in this case, the United States – a founding member of the AIDCP – has asserted that it can ignore an international standard that it created, to the disadvantage of Mexico, a developing country that expressly agreed to the international standard. Finally it observes that the US measure at issue is a standard specially designed to have an impact only on the ETP, where Mexico fishes and that this is reflected in the fact that the United States applies a different, less restrictive standard to other fisheries. Mexico finally contends that it cannot reasonably be expected that countries that are unaffected would be interested in participating.[908]

7.650 On the contrary the United States notes that Annex 1 of the TBT Agreement states that an "international body or system" is a "body or system whose membership is open to the relevant bodies

[904] United States' response to Panel question No. 62, para. 138.
[905] United States' response to Panel question No. 62, paras. 138-139.
[906] United States' response to Panel question No. 62, paras. 140.
[907] Mexico's response to Panel question No. 63, para. 200.
[908] Mexico's response to Panel question No. 63, paras. 201-206.

of at least all Members" and that nothing in this text supports reading the reference to "at least all Members" as meaning a subset of Members, for example, those that have interest in some or all of the work of that body or system. In fact, the context in which the definition of "international body or system" appears supports the opposite conclusion. In particular, the definition of a "regional body or system" is "body or system whose membership is open to the relevant bodies of only some of the Members". Thus, a body whose membership is open to only some Members, for example those that have an interest in the work of the body, would be a regional body; it would not be an international body.[909]

7.651 In the United States' view, if an international body included bodies whose membership was only open to a subset of Members, it would mean that bodies that are not open to all Members may develop "international standards". This would have two important implications: (i) pursuant to Article 2.4 of the TBT Agreement, Members would have an obligation to use such "international standards" as the basis for their technical regulations (unless ineffective or inappropriate to meet a legitimate objective); (ii) it would also, pursuant to Article 2.5 of the TBT Agreement, give any Member that based a technical regulation on such an "international standard" a presumption that the technical regulation was not an unnecessary obstacle to trade. In other words, defining an international body to include bodies whose membership is open to only a subset of Members, would result in that subset of Members determining for other Members the "international standards" that must be the basis of their technical regulations.[910]

7.652 Conversely, the United States contends that defining an international body whose membership is open to all Members ensures that all Members have the opportunity to participate in the development of any "international standard" that by virtue of Article 2.4 of the TBT Agreement they are obliged to use as the basis for their technical regulations (unless ineffective or inappropriate to fulfil the legitimate objective pursued). It also ensures that Members do not benefit from a presumption that their technical regulations are no more trade restrictive than necessary when based on standards developed by bodies that permitted only a subset of Members to participate.[911]

7.653 The United States also contends that when standards are developed by bodies not open to at least all Members, the likelihood that they will develop standards that are relevant, effective and appropriate in fulfilling the objectives pursued by Members that were not permitted to participate in their development is greatly reduced along with the likelihood that those standards will be used as the basis for the Member's technical regulations.

7.654 The Panel asked the United States whether it agreed that the concept of "international standard" in Article 2.4 "should be applied flexibly". The United States responded that if this meant the term should be interpreted in a manner that departs from the text of the TBT Agreement, it did not agree with Mexico's assertion. It reiterated, for the reasons set in paragraph 7.646 above, the meaning of the term "international standard" is a standard that is (i) adopted by a body whose membership is open to the relevant bodies of at least all Members; (ii) based on consensus and (iii) made available to the public.[912] The United States said it based this interpretation on the text of the TBT Agreement, in particular the definition of the term "international body" together with the ISO/IEC Guide 2:1991 definition of an "international standard" and the language in paragraph 2 of

[909] United States' response to Panel question No. 63, para. 141.
[910] United States' response to Panel question No. 63, para. 142.
[911] United States' response to Panel question No. 63, para. 143.
[912] United States' response to Panel question 59, paras. 134-135 and United States' second written submission, paras. 176-177.

Annex 1 of the TBT Agreement: "Standard prepared by the international standardization community are based on consensus".[913]

7.655 As for Mexico's comment that certain organizations despite being composed of individuals and not governments as members are nonetheless engaged in standard setting activities[914] the United States agrees that bodies such as IEEE and SAE may develop international standards based on the meaning of the term "international standards" derived from the text of the TBT Agreement. This is because TBT Agreement defines an international body as a body whose membership is open to the relevant bodies of at least all Members, and the ISO/IEC Guide 2 defines "international standardizing organization" as a "standardizing organization whose membership is open to the relevant national body from every country". The United States specifies that nothing in these definitions indicate that membership is limited to governments. A body such as SAE that allows individuals as well as bodies[915] of at least all WTO Members to be members would fall within the definition of a body whose membership is open to the relevant bodies of at least all WTO Members, the United States says.[916]

7.656 The United States also noted that there is an important policy reason to not interpret the term "international standard" "flexibly" as Mexico suggests or in a way that departs from the text of the TBT Agreement: under Article 2.4 of the TBT Agreement, Members have an obligation to base their technical regulations on relevant international standards, unless ineffective or inappropriate to fulfil a legitimate objective. Accordingly, it is important for Members to know which standards are "international" and therefore standards on which they have an obligation to base their technical regulations. If the term "international standard" is given a "flexible" meaning that departs from the text of the TBT Agreement, it is not clear how Members could be expected to know which standards are international and in turn how to comply with their obligation under Article 2.4 of the TBT Agreement it argues.[917]

7.657 The Panel asked whether it should take into account the fact that the United States is a member of the IATTC and a signatory party to the AIDCP, Mexico argued that the AIDCP's role is to establish standards governing the interaction between fishing and dolphins, which then must be implemented and enforced by its member nations. It further noted that the AIDCP has promulgated the Procedures for AIDCP Dolphin Safe Tuna Certification which incorporates a definition of "dolphin-safe" which is the multilateral standard for dolphin-safe for tuna harvested in the ETP. According to Mexico, this meant that the United States, as a founding and fully participating member of the AIDCP, has "recognized" the AIDCP's standardizing activities.[918]

7.658 The United States considers that the AIDCP is an intergovernmental agreement, not a body. It further says that the AIDCP resolutions were adopted by the parties to the AIDCP and not by a "body" as that term is defined for the purposes of the TBT Agreement. While the IATTC is a body, neither the AIDCP nor the AIDCP resolutions were adopted by the IATTC. Finally it holds that the fact that the United States is a signatory to the AIDCP and a member of IATTC does not change these facts.[919] It also emphasizes that decisions regarding implementation of the international dolphin conservation program established under the AIDCP are taken by the parties to the AIDCP, not the

[913] United States' response to Panel's question No. 139, para. 66.
[914] See paragraph 7.643.
[915] ISO/IEC Guide 2:1991 defines a "body" as a "legal or administrative entity that has specific tasks and composition", for example a company, organization or authority. ISO/IEC Guide 2:1991, para. 4.1; *see also* ISO/IEC Guide 2:1991, para. 4.5 (defining "authority" as "body that has legal powers and rights").
[916] United States' response to Panel question No. 139, para. 67.
[917] United States' response to Panel question No. 139, para. 68.
[918] Mexico's response to Panel question No. 141, paras. 114-115.
[919] United States' response to Panel question No. 141, para. 70.

IATTC and that while meetings of the parties to the AIDCP typically take place in conjunction with IATTC meetings and the IATTC is to provide Secretariat support for the AIDCP, decisions regarding implementation of the international dolphin conservation program including any resolutions thereunder remain decisions of the parties to the AIDCP. It further specifies that the IATTC has no legal authority to undertake activities or make decisions regarding the international dolphin conservation program established by the AIDCP and that in addition the 1949 IATTC Convention and its successor agreement the Antigua Convention, which establish the IATTC, and the AIDCP are distinct legal instruments, each with their own objectives and obligations.[920]

(ii) Analysis by the Panel

7.659 We must determine, in this part of our analysis, whether the "dolphin-safe" definitions and labelling provisions contained in the AIDCP resolutions identified by Mexico constitute a "relevant international standard" in relation to the US dolphin-safe labelling provisions within the meaning of Article 2.4 of the TBT Agreement.

7.660 For that purpose, we must first clarify the notion of "international standard" for the purposes of this provision, and then determine whether the AIDCP resolution falls within the scope of this notion, and whether it is "relevant" in this dispute.

The notion of "international standard" in Article 2.4 of the TBT Agreement

7.661 Article 1.1 of the TBT Agreement provides that "[g]eneral terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement. In addition, Annex 1 of the TBT Agreement, entitled "Terms and their definitions for the purpose of this Agreement", provides that:

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

7.662 Annex 1 also provides specific definitions for the terms: "technical regulation", "standard", "conformity assessment procedures", "international body or system", "regional body or system", "central government body", "local government body" and "non-governmental body". As expressed by the Appellate Body in *EC – Sardines*: "[A]ccording to the Chapeau [of Annex 1], the terms defined in Annex 1 apply for the purposes of the TBT Agreement only if their definitions depart from those in the ISO/IEC Guide 2: 1991 (the 'ISO/IEC Guide'). This is underscored by the word 'however'".[921]

7.663 The term "international standard" is not defined in Annex 1 of the TBT Agreement, but is defined in the ISO/IEC Guide 2. In accordance with the terms of Annex 1, in the absence of a specific definition of this term in Annex 1, the term "international standard" should be understood to have the same meaning in the TBT Agreement as in the ISO/IEC Guide 2, which defines it as a "standard that is adopted by an international standardizing/standards organization and made available to the public".

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[920] United States' response to Panel question No. 141, para. 71.
[921] Appellate Body Report, *EC – Sardines*, para. 224.

7.664 An "international standard" is thus composed of three elements: (i) a standard; (ii) adopted by an international standardizing/standards organization; and (iii) made available to the public. We must therefore consider whether the provisions of the AIDCP tuna tracking and verification resolution (which contain a definition of dolphin-safe) and of the AIDCP dolphin-safe certification resolution (which provides for the AIDCP dolphin-safe label) meet each of these components and thus constitute an "international standard".

7.665 Finally, we note that both parties have referred to the TBT Committee Decision on *Principles for the Development of International Standards, Guides and Recommendations* that sets out principles and procedures that standardizing bodies should observe when developing international standards. We consider it appropriate to take into account the principles contained in this decision where they may inform our understanding of certain aspects of the ISO/IEC Guide definitions such as the terms "international standardizing/standards organization" and "made available to the public" in the definition of "international standard". However we note that the Panel in *EC – Sardines*, in a statement not addressed by the Appellate Body, observed that the TBT decision "is a policy statement of preference and not the controlling provision in interpreting the expression 'relevant international standard' as set out in Article 2.4 of the TBT Agreement".[922]

Whether the AIDCP dolphin-safe definition and certification constitutes a "standard" for the purposes of Article 2.4

7.666 The term "standard" is defined both in the ISO/IEC Guide 2 and in Annex 1 of the TBT Agreement.

7.667 The ISO/IEC Guide 2 defines a "standard" as a:

> "[D]ocument, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context".

7.668 Annex 1.2 of the TBT Agreement defines a "standard" as a:

> "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

7.669 We note that the existence of differences between the ISO/IEC definition and the definition of a "standard" in Annex 1 of the TBT Agreement is acknowledged in the Explanatory Note, which distinguishes between standards "prepared by the international standardizing community" and standards covered by the TBT Agreement, i.e. those standards the preparation, adoption of application of which is regulated in the relevant provisions of the TBT Agreement. The Explanatory Note suggests that standards prepared by the international standardizing community are based on consensus while the TBT Agreement also covers "documents that are not based on consensus", and that standards as defined in the ISO/IEC Guide may be voluntary or mandatory, whereas those covered by the TBT Agreement are defined as voluntary.[923]

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[922] Panel Report, *EC – Sardines*, para. 7.91.

[923] The Explanatory Note to Annex 1.2 provides as follows:

7.670 We see a difference between the notion of "standard", as defined in Annex 1.2 of the TBT Agreement for the purposes of defining the scope of application of the provisions of the TBT Agreement on standards (such as Articles 4), and the use of the term "standard" in the definition of the composite term "international standard" in the ISO/IEC Guide 2.

7.671 We acknowledge that, as noted by the Appellate Body, the terms defined in Annex 1 apply for the purposes of the TBT Agreement if these definitions depart from those in the ISO/IEC Guide.[924] Nonetheless, in our view, the term "standard" as used in the definition of an "international standard" in the ISO/IEC Guide 2 must be read in its proper context, i.e. as it is defined in the ISO/IEC Guide itself, in order to assign it the meaning intended in that definition. This is consistent with the terms of Article 1.1 and with Annex 1 of the TBT Agreement, which, as described above, provides that "[t]he terms presented in the sixth edition of the ISO/IEC Guide 2: 1991 (…) shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide".

7.672 Accordingly, pursuant to the definition of the ISO/IEC Guide 2, we must consider whether the AIDCP "dolphin-safe" provisions of the AIDCP constitute a "document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context".

7.673 We first note that the AIDCP tuna tracking and verification resolution containing the dolphin-safe definition is a document that describes a system for tracking tuna caught in the Agreement Area by vessels fishing under the AIDCP. The purpose of this system is to enable dolphin-safe tuna to be distinguished from non-dolphin-safe tuna, from the time of capture to the time it is ready for retail sale, on the basis of tuna tracking forms and additional verification procedures described in this document. Therefore, insofar as it contains provisions that relate to the capture, unloading, storage, transfer and processing of tuna, the AIDCP tuna tracking and verification resolution is a document that provides rules, guidelines or characteristics for tuna fishing and tuna.

7.674 The United States asserted that "one element necessary for a measure to constitute a standard is that it provide rules, guidelines etc. for 'common and repeated' use" and while noting that the ordinary meaning of "common" is "shared ... of general application" and of "repeated" is "frequent", the United States deduces that "'common' addresses the shared or general nature of the measure, while 'repeated' addresses the frequency of the measure is to be used".[925] In its view, a rule, guideline etc. that is for common and repeated use would not be one that was drafted for the specific purpose of defining a term in an international agreement. We agree with the United States that one component of

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> "The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus."

These language differences were emphasized by the Appellate Body in *EC – Sardines*: "[t]he definition of a 'standard' in the ISO/IEC Guide expressly includes a consensus requirement" (Appellate Body Report, *EC – Sardines*, para. 225). According to the Appellate Body, the omission of a consensus requirement in Annex 1.2 was a deliberate choice on the part of the drafters of the TBT Agreement and the last two sentences of the Explanatory note give effect to this choice. The Appellate Body considered had the negotiators considered consensus to be necessary to satisfy the definition of "standard", they would have said so explicitly in the definition as is the case in the ISO/IEC Guide (ibid).

[924] Appellate Body Report, *EC – Sardines*, para. 224.

[925] United States' response to Panel question No. 33, para. 75.

the content of an international standard concerns the general applicability of the rules, guidelines or characteristics therein provided. This in turn has a bearing on the frequency of the use of such rules, guidelines or characteristics. We observe that to the extent that the rules and guidelines of the tracking system need to be observed and the tuna tracking forms completed for each fishing, unloading, storage, processing and marketing operation, the AIDCP tuna tracking and verification resolution provides rules "for common and repeated use".

7.675 In addition, the AIDCP dolphin-safe certification resolution is a document that establishes procedures to obtain the dolphin-safe certificate, provides what constitutes an invalid dolphin-safe certificate and it regulates the content of such certificate. This resolution defines the AIDCP Dolphin Safe Certificate as a "[d]ocument issued by the competent national authority, evidence of the dolphin-safe status of tuna and tuna products, in accordance with the definition of the AIDCP System for Tracking and Verification of Tuna". It also provides a definition of AIDCP Dolphin Safe Tuna Label as: "[g]raphic representation which distinguishes *dolphin-safe* tuna and tuna products, as defined in the System for Tracking and Verifying Tuna, which can be used on the packaging of tuna certified under this resolution". We infer from this description that the AIDCP dolphin-safe certification resolution is a document which includes symbols, packaging, marking or labelling requirements as they apply to tuna and tuna products.

7.676 We acknowledge the Appellate Body's statement that consensus is not an element of the definition of an international standard.[926] Nonetheless, we observe that the two AIDCP resolutions cited by Mexico are documents that, as the United States pointed out, are approved by the Parties of the AIDCP. AIDCP resolutions are adopted in ordinary or extraordinary meetings of the AIDCP where quorum is reached when a majority of parties are present and are adopted by consensus. Specifically, the parties to the AIDCP agreed, at the 5th Meeting of the Parties, held on 15 June 2001 in San Salvador (El Salvador), to "adopt the following Procedures for AIDCP Dolphin-Safe Tuna Certification" and the "modified System for Tracking and Verification of Tuna developed by the Permanent Working Group on Tuna Tracking and recommended by the International Review Panel". The Parties to the AIDCP that were present at the meeting and approved these resolutions are States which have ratified or acceded to the Agreement (Colombia, Costa Rica, Ecuador, El Salvador, the European Union, Mexico, Nicaragua, Panama, Peru, the United States, Vanuatu and Venezuela). Both resolutions took effect thirty days after their adoption date. We believe that these documents therefore meet the ISO/IEC Guide 2 definition of "consensus", which is described as a "[g]eneral agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments".

7.677 In conclusion, from and analysis of the content of the AIDCP resolutions we conclude that the dolphin-safe definition in the AIDCP tuna tracking and verification resolution cross-referenced in the AIDCP dolphin-safe certification resolution provides, for common and repeated use, rules, guidelines or characteristics for tuna fishing and tuna products, and thus constitutes a "standard" for the purposes of Article 2.4 of the TBT Agreement. With this preliminary determination in mind, we now consider whether it constitutes an "*international* standard" within the meaning of that provision.

[926] See para. 7.669 above.

Whether the dolphin-safe definition in the AIDCP tuna tracking and verification resolution has been approved by an international standardizing or standards organization and made available to the public

7.678 As described above, the ISO/IEC Guide defines an "international standard" as a "[s]tandard that is adopted by an international standardizing/standards organization and made available to the public". Further, a standard is defined, *inter alia*, as a document approved by a "recognized body".

7.679 We must therefore now consider whether the AIDCP dolphin-safe definition has been approved by an "international standardizing/standards organization". We note that the ISO/IEC Guide 2 defines an "international standardizing organization" as a "standardizing organization whose membership is open to the relevant national body from every country". A "standardizing body", in turn, is defined as a "body that has recognized activities in standardization". The term "organization" is defined as a "body that is based on the membership of other *bodies* or individuals and has an established constitution and its own administration". (*emphasis added*) The Guide also defines the term "body" as a "legal or administrative entity that has specific tasks and composition". The TBT Agreement does not define these various terms, but does contain definitions of "international body or system", "regional body or system" and "central government body".[927]

7.680 In light of these definitions, we must therefore determine whether the AIDCP dolphin-safe definition and labelling provisions were adopted by a legal or administrative entity based on the membership of other bodies or individuals that has an established constitution and its own administration, has recognized activities in standardization, and whose membership is open to the relevant national body of every country.

7.681 We first note that the two relevant AIDCP resolutions cited by Mexico are documents that are approved by the Parties of the AIDCP. AIDCP resolutions are adopted in ordinary or extraordinary meetings of the AIDCP where quorum is reached when a majority of parties are present and are adopted by consensus.[928] The parties to the AIDCP adopted the Procedures for *AIDCP Dolphin-Safe* Tuna Certification and the modified System for Tracking and Verification of Tuna on 15 June 2001. The Parties to the AIDCP that were present at the meeting and approved these resolutions are States which have ratified or acceded to the Agreement (Colombia, Costa Rica, Ecuador, El Salvador, the European Union, Mexico, Nicaragua, Panama, Peru, the United States, Vanuatu and Venezuela[929]). Both resolutions took effect thirty days after their adoption date.

7.682 The AIDCP is an international agreement concluded among States, and it does not as such have an established constitution or its own administration as such. However, the Parties to the convention acting jointly accomplish specific tasks in fulfilment of its objectives, as illustrated by the two resolutions at issue. Article II of the AIDCP thus provides that:

"The objectives of this Agreement are:

[927] Annex 1.4 of the TBT Agreement defines an "international body or system" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members". "Regional body or system" is defined in Annex 1.5 as a:"[b]ody or system whose membership is open to the relevant bodies of only some of the Members". Finally "central government body" is, according to Annex 1.6, a "[c]entral government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question".

[928] Article VIII and Article IX of the AIDCP.

[929] Guatemala and Honduras did not attend the AIDCP meeting.

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

7.683 In addition, the implementation of the IDCP (the programme undertaken under the AIDCP), is supported by the IATTC, which has significant responsibilities in this respect and provides the Secretariat for the programme. The IATTC has an institutional structure composed of a principal body (the Commission), advisory committees, permanent working groups and two other types of committees (the committee for the review of implementation of measures adopted by the Commission and the scientific advisory committee. It also has a constitution, the Antigua Convention[930] as well as its own administration, insofar as it is governed by its own rules of procedures and financial regulations and has a Secretariat.

7.684 The institutional link between the AIDCP and the organization is strengthened by the fact that all the States that are parties to the AIDCP are members of the IATTC (with the exception of Honduras). The AIDCP is open for signature, *inter alia* by States or regional economic integration organizations that are members of the IATTC. As for the ordinary annual meeting of the Parties of the AIDCP where decisions related the implementation of the agreement are taken, the AIDCP provides that it should take place preferably in conjunction with the IATTC meeting.[931] In light of these facts, we conclude that the parties of the AIDCP acting within the institutional framework of the IATTC constitute an "organization" for the purposes of the application of Article 2.4 of the TBT Agreement.

7.685 We now consider whether the parties of the AIDCP collectively act as a "standardizing body", that is, a "[*b*]*ody* that has recognized activities in *standardization*"(*emphasis added*) as defined by the ISO/IEC Guide 2. "Standardization" is defined as the "[a]ctivity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context".[932] As concluded above, the AIDCP resolutions contain provisions, for common and repeated use, that concern tuna and tuna products and their related processes and production methods and that also deal with marking and labelling requirements. We therefore conclude that the parties of the AIDCP, within the institutional framework of the IATTC, develop and establish, with regard to dolphin mortality and tuna-stock sustainability problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of dolphin

[930] Which was negotiated to strengthen and replace the 1949 Convention establishing the IATTC, and entered into force on 27 August 2010.

[931] Article VIII.2 of the AIDCP.

[932] 1.1 of the ISO/IEC Guide 2. We note in this respect that it is not necessary for the standardizing activity to be the single or even a "principal function" of the organization, in order for it to be a "standardizing body". This contrasts with the definitions of a "standards body", which is defined by the ISO/IEC Guide 2 as a "standardizing body" "that has as a principal function, the preparation, approval or adoption of standards".

protection and rational use of tuna resources in the context of the ETP tuna purse-seine fishery.[933] The AIDCP has *activities* in standardization.

7.686 Mexico has also stressed that "[t]here can be no doubt that the United States, as a founding and fully participating member of the AIDCP, has 'recognized' the AIDCP's standardizing activities".[934] We agree that the term "recognized" refers to the body's activities in standards development, and that the participation in these activities of the countries that are parties to the Agreement is evidence of their recognition. In our view, such recognition may also be inferred from the recognition of the resulting standard, i.e. when its existence, legality and validity has been acknowledged.[935] In this respect, it appears that the AIDCP dolphin-safe definition and certification have been recognized by the parties to the Agreement, including the United States. This is reflected in one of the court rulings that led to the final *Hogarth* ruling that Mexico has challenged. The District Court for the Northern District of California in Earth Island Institute v. Evans, ruled that:

> "Accordingly, Congress rejected the Panama Declaration on this point and instead adopted a compromise which provided that any change from the existing standard to the *less protective standard* called for by the Panama Declaration would turn on the scientific question of '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 [ETP].'"[936] (emphasis added).

7.687 In light of the above, we conclude that the AIDCP has "recognized activities in standardization" and thus constitutes a "standardizing body". We must now consider whether membership in the AIDCP is open to the relevant national body of every country, such that it may be considered to be an "international standardization organization" as defined in the ISO/IEC Guide 2.

7.688 Article XXVI of the AIDCP provides that:

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

7.689 The requirements of Article XXIV are temporal rather than geographical. The Article reads as follows:

> "This Agreement is open for signature at Washington from May 21, 1998, until May 14, 1999 by States with a coastline bordering the Agreement Area and by States or regional economic integration organizations which are members of the IATTC or whose vessels fish for tuna in the Agreement Area while the Agreement is open for signature."

7.690 In addition, given that the AIDCP was open for signature by Members of the IATTC it may be useful to note that IATTC membership is open to the following: (a) the Parties to the 1949 Convention (i.e. the United States and Costa Rica); (b) States not Party to the 1949 Convention with a coastline bordering the Convention Area; (c) States whose vessels fish for fish stocks covered

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[933] See AIDCP Preamble.
[934] Mexico's response to Panel question No. 141, para. 115.
[935] The S*horter Oxford English Dictionary*, 5th ed. (Oxford University Press), Volume II, p. 2490.
[936] Exhibit MEX-29.

by the Convention, following consultation with the Parties; or (d) States that are otherwise invited to join on the basis of a decision by the Parties.[937]

7.691 Furthermore, we consider that the principle of openness embodied in Section C of the TBT decision on *Principles and Procedures for the Development of International Standards, Guides and Recommendations* which establishes that membership should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members may assist us in interpreting the term "international standardizing/standards organization". The AIDCP membership was open for signature from 21 May, 1998 until 14May, 1999 to States whose vessels fished for tuna in the Agreement Area. Given that there were no limitations to or prohibitions of fishing in the agreement area, provided that the vessels did not operate in the EEZ of one of the coastline countries of the agreement area, any country whose fishing fleet was operating in the ETP could have signed the AIDCP. Thus the AIDCP was indeed open to signature on a non-discriminatory basis to the relevant bodies of at least all WTO Members in accordance with the principle of openness as described in the TBT decision. In addition, the AIDCP remains open to accession to any States or regional economic integration organization that is invited to accede to the Agreement on the basis of the parties' decision. To this day, the AIDCP membership is therefore open on a non-discriminatory basis to the relevant bodies of at least all WTO Members in accordance with the principle of openness as described in the TBT Committee Decision.

7.692 We find that the AIDCP is therefore an international standardizing organization for the purpose of Article 2.4 of the TBT Agreement.

7.693 In light of the above, we conclude that the AIDCP is open to the relevant body of every country and is therefore an international standardizing organization for the purposes of Article 2.4 of the TBT Agreement.

7.694 The final point to be addressed is whether the AIDCP dolphin-safe definitions and certification were made available to the public. We note that the dolphin-safe certification resolution, entitled "Public education", provides for transparency procedures. It establishes that:

> "a. Each Party, as appropriate, and the Secretariat shall give due publicity to the new *AIDCP Dolphin Safe* Certificate and *AIDCP Dolphin Safe* Label through relevant communications to interested governmental and non-governmental entities.
>
> b. The Parties agree to disseminate objective information to, *inter alia*, importers, fishermen's organizations, and non-governmental organizations, using their own capabilities within their national and international markets, to support an accurate public perception of the AIDCP, in order to increase the broad understanding of the AIDCP and its objectives.
>
> c. The Parties, through the Secretariat, may support the design and implementation of an international public education campaign to accomplish the objectives set forth within this section."

7.695 These transparency procedures aim at informing market operators about the AIDCP and its objective and the procedures for the dolphin-safe certificate and the dolphin-safe label which, by the same token, makes it possible to obtain the certificate and the label. Thus, these procedures are "made available to the public". We are therefore satisfied that the IADCP dolphin-safe definition and certification are made available to the public.

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[937] See Article XXVII of the Antigua Convention.

7.696 In addition, we consider that the principle of transparency contained in Section B of the TBT Committee Decision on *Principles for the Development of International Standards, Guides and Recommendations* and which informs the reading of the terms "made available to the public" supports this finding. We agree with Mexico that the AIDCP system operates in conformity with the principle of transparency as described in the TBT decision. As Mexico noted AIDCP Article XVII provides:

> "1. The Parties shall promote transparency in the implementation of this Agreement, including through public participation, as appropriate.
>
> 2. Representatives from intergovernmental organizations and representatives from non-governmental organizations concerned with matters relevant to the implementation of this Agreement shall be afforded the opportunity to take part in meetings of the Parties convened pursuant to Article VIII as observers or otherwise, as appropriate, in accordance with the guidelines and criteria set forth in Annex X. Such intergovernmental organizations and nongovernmental organizations shall have timely access to relevant information, subject to procedural rules on access to such information that the Parties may adopt."[938]

7.697 This provision ensures that information on the procedures for the dolphin-safe certificate and the dolphin-safe label is effectively disseminated to all interested parties in the territories of the parties of the AIDCP, in accordance with Section B of the TBT decision on *Principles for the Development of International Standards, Guides and Recommendations* which defines transparency in terms of accessibility of standards to at least all interested parties in the territories of at least all WTO Members and effective dissemination of information concerning transparency procedures which should include *inter alia*, at a minimum, the prompt publication of a standard upon adoption.

Whether the AIDCP dolphin-safe definition and certification are "relevant"

7.698 Mexico considers that the AIDCP standard is relevant "because it serves the exact same purpose as the United States dolphin-safe labelling provisions" insofar as it is used to determine when tuna and tuna product can be certified as dolphin-safe and bear a dolphin-safe label.[939]

7.699 On the contrary, in the United States' view, the definition Mexico cites "does not bear upon, relate to or pertain to the U.S. dolphin-safe labeling provisions".[940] The United States reiterates that the definition is just that – a definition and that it does not set out any rules, guidelines or characteristics for the *labelling* of tuna products and therefore, concludes that the definition does not bear upon, relate to or pertain to the US dolphin-safe labelling provisions. In addition, the United States argues, it is also clear from the text of the tuna tracking resolution that the relevance of its definition of dolphin-safe is limited to defining that term for purposes of the resolution.[941] Finally, the United States contends that the definition of dolphin-safe in the tuna tracking resolution does not relate or pertain to the objective of the United States dolphin-safe labelling provisions because, whilst it defines dolphin-safe as tuna caught in a set in which no dolphins were observed killed or seriously injured, the United States dolphin-safe labelling provisions, however, seek to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, which includes not only whether the tuna was caught in a set in which

[938] See Mexico's response to Panel question No. 61 , para. 196.
[939] Mexico's first written submission, para. 241.
[940] United States' first written submission, para. 189.
[941] United States' first written submission, para. 189.

dolphins were observed killed or seriously injured but whether dolphins were otherwise adversely affected.[942]

7.700 As noted by both parties, in *EC – Sardines*, the Appellate Body agreed with the panel's statement that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent".[943] According to the panel's reasoning, to be a "relevant international standard", the standard at issue in the dispute – Codex Stan 94 – would have to "bear upon, relate to, or be pertinent to the EC Regulation".[944]

7.701 In the present case, we need therefore to determine whether the AIDCP dolphin-safe definition and certification bear upon, relate to, or are pertinent to the US dolphin-safe labelling provisions. As noted by Mexico "the measures apply to the same product, i.e. tuna, which are caught in the same area, and are then processed into canned tuna and bear a dolphin-safe label".[945] Indeed, the US dolphin-safe labelling provisions and the AIDCP resolutions both deal with the same products: tuna and tuna products. In addition, the AIDCP dolphin-safe certification resolution establishes the "AIDCP Dolphin Safe Tuna Certificate" and the "AIDCP Dolphin Safe Tuna Label", respectively defined as "Document issued by the competent national authority, evidence of the dolphin-safe status of tuna and tuna products, in accordance with the definition of the AIDCP System for Tracking and Verification of Tuna" and "Graphic representation which distinguishes *dolphin-safe* tuna and tuna products, as defined in the System for Tracking and Verifying Tuna, which can be used on the packaging of tuna certified under this resolution". The US dolphin-safe labelling provisions and the later AIDCP resolution therefore regulate the same subject matter, insofar as they both deal with the definition of criteria for identifying tuna as "dolphin-safe" and means for identifying dolphin-safe tuna, in the form of labelling requirements.

7.702 In our view, the dolphin-safe definition in the AIDCP tuna tracking and verification resolution cross-referenced in the AIDCP dolphin-safe certification resolution is relevant for the purposes of the US dolphin-safe labelling provisions, for the reasons explained below.

7.703 The US dolphin-safe labelling provisions establish regulatory categories based on a dual criterion: the area where the tuna fishery takes place and the fishing method used. The AIDCP regulates the ETP, which is an area regulated also by the US dolphin-safe provisions. In addition, the AIDCP is also pertinent to the extent that it addresses the fishing method to which the United States' measures foreclose access to the US dolphin-safe label: setting on dolphins. Because of the combination of these two elements, the AIDCP dolphin-safe standard bears upon the matter that is regulated by the US dolphin-safe label, insofar as both instruments address the consequences of the

[942] United States' first written submission, para. 190.

[943] Panel report, *EC – Sardines*, para. 7.68, quoting Webster's New World Dictionary (William Collins & World Publishing Co., Inc. 1976), p. 1199; Appellate Body Report on *EC – Sardines*, para. 230.

[944] In examining this issue, the panel noted: "The title of Codex Stan 94 is 'Codex Standard for Canned Sardines and Sardine-type Products' and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indicated in its response that the term 'canned sardines' and 'preserved sardines' are essentially identical. Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines. The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2.3), packing medium (Article 3.2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7.3), foreign matter (Article 8.1) and odour and flavour (Article 8.2). The EC Regulation contains these corresponding provisions set out in Codex Stan 94, including the section on labelling requirement." Panel report, *EC – Sardines*, para. 7.69.

[945] Mexico's first written submission, para. 241.

tuna-dolphin association in the ETP tuna purse-seine fishery and define "dolphin-safe" tuna with a view to promoting fishing methods that minimize harm to dolphins.

7.704 The AIDCP also has a bearing on the documentary evidence required to obtain the dolphin-safe label under the US measures, insofar as Annex II establishes an on-board observer program aimed at certifying the manner in which tuna was harvested; the US dolphin-safe label is then, by virtue of the US dolphin-safe labelling provisions, contingent upon this type of certification. For instance, for tuna caught in the ETP to be labelled dolphin-safe, the DPCIA provides that it must be accompanied, *inter alia*, by a written statement executed by:

> "(I) the Secretary or the Secretary's designee;
>
> (II) a representative of the Inter-American Tropical Tuna Commission; or
>
> (III) an authorized representative of a participating nation whose national program meets the requirements of the International Dolphin Conservation Program, which states that there was an observer approved by the International Dolphin Conservation Program on board the vessel during the entire trip and that such observer provided the certification required under subsection (h); and"

7.705 This provision confirms, in our view, the relevance of the AIDCP and the IATTC as competent authorities that regulate the ETP tuna purse seine fishery.

7.706 In addition, for fisheries located outside of the ETP where regular and significant tuna-dolphin association has been determined, the US dolphins safe labelling provision also require a written statement of "an observer participating in a national or international program acceptable to the Secretary"; this evidences, in our view, the pertinence of this mechanism put in place by the AIDCP that serves as a reference for other fisheries. The US dolphin-safe labelling provisions build on the institutional framework established by the AIDCP which signals, not only the matters regulated by the two types of provisions are closely connected, but that in addition the US dolphin-safe labelling provisions heavily rely on the AIDCP system. In light of the above, we find that the dolphin-safe definition in the AIDCP tuna tracking and verification resolution cross-referenced in the AIDCP dolphin-safe certification resolution is relevant for the US dolphin-safe labelling provisions within the meaning of Article 2.4 of the TBT Agreement.

7.707 In light of the above, we find that the AIDCP dolphin-safe definition and certification constitute a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement, for the purpose of the US dolphin-safe labelling provisions.

(c) Whether the United States used the AIDCP standard as a basis for its dolphin-safe labelling provisions

(i) Arguments of the parties

7.708 Article 2.4 of the TBT Agreement provides that, where international standards exist or their completion is imminent Members shall use them, or the relevant parts of them, as a basis for their technical regulations.

7.709 We have already determined that the dolphin-safe definition in the AIDCP tuna tracking and verification resolution cross-referenced in the AIDCP dolphin-safe certification resolution is the relevant international standard for the purposes of the US dolphin-safe labelling provisions. The next step in the enquiry is to determine whether it was used as a basis for the US dolphin-safe labelling provisions.

7.710 Mexico contends that the United States has not based the US labelling provisions on the AIDCP standard, but on the contrary it "contemplated the application of the AIDCP Standard – which is incorporated into the U.S. national statute – but rejected its application in favour of a unilateral standard, a setting of nets on dolphins standard".[946] Under these circumstances, it is obvious that the current US standard is not based on the AIDCP Standard, Mexico states.[947]

(ii) Analysis by the Panel

7.711 In *EC — Sardines*, the Appellate Body agreed with the panel that an international standard is used "as a basis for" a technical regulation "when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation".[948] As Mexico noted the Appellate Body cited certain definitions of the term "basis", and concluded that:

> "From these various definitions, we would highlight the similar terms 'principal constituent', 'fundamental principle', 'main constituent', and 'determining principle' — all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other".[949]

7.712 As noted above, we consider that there the US dolphin-safe labelling provisions and the AIDCP resolutions are closely connected. In our view, the US legislator has constructed the US dolphin-safe labelling scheme building on the AIDCP foundations. However, the strong relationship between the two bodies of rules appears to be insufficient to infer that the AIDCP standard was used as a basis for the technical regulation.

7.713 In *EC – Sardines*, the Appellate Body rejected the European Communities' assertion that a "rational relationship" between an international standard and a technical regulation was sufficient to find that the former is used "as a basis for" the latter:

> "[W]e see nothing in the text of Article 2.4 to support the European Communities' view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a 'rational relationship' is the appropriate criterion for determining whether something has been used 'as a basis for' something else.
>
> We see no need here to define in general the nature of the relationship that must exist for an international standard to serve 'as a basis for' a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation."[950]

7.714 Finally, as Mexico points out, the Appellate Body also stated that:

> "In our view, it can certainly be said – at a minimum – that something cannot be considered a 'basis' for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each

[946] Mexico's first written submission, para. 245.
[947] Mexico's first written submission, para. 245.
[948] Appellate Body Report, *EC – Sardines*, para. 240–245.
[949] (*footnote original*) Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 245. (Mexico's first written submission, fn 157).
[950] Appellate Body Report, *EC – Sardines*, paras. 247–248.

> other, it cannot properly be concluded that the international standard has been used 'as a basis for' the technical regulation."[951]

7.715 In the case at hand, the departure from the AIDCP standard was formally stated by the Court rulings, and in particular the *Hogarth* ruling which describes it as an explicit refusal to adopt the standard:

> "The program was formalized into a legally-binding agreement known as the Panama Declaration, pursuant to which the United States' delegation agreed to seek a weakening of the dolphin-safe labeling standard and allow such a label to be affixed to tuna caught with purseseine nets as long as no dolphins were observed to be killed or seriously injured during the set. ...
>
> When the delegation asked Congress to change the standard, however, Congress refused to relax its strict requirements without affirmative evidence that the tuna fishery was not significantly contributing to the slowness of the recovery rate of already depleted dolphin stocks."[952]

7.716 In light of this evidence, we conclude that the United States failed to base the US dolphin-safe labelling provisions on the relevant international standard of the AIDCP.

(d) Whether the AIDCP dolphin-safe standard would be an ineffective or inappropriate means for the fulfilment of the legitimate objective(s) pursued by the United States

(i) Arguments of the parties

7.717 Mexico considers the AIDCP standard to be an effective means for achieving the pursued objective of protecting dolphins given that dolphin mortality in the ETP has decreased by 99 per cent. In addition, Mexico infers from the fact that the United States agreed to the standard itself in the context of the AIDCP that the United States considered it as "an effective means for accomplishing the objective of informing consumers that tuna was fished in a manner safe for dolphins."[953]

7.718 The United States argues that the use of the definition of dolphin-safe in the AIDCP resolution would neither be effective nor appropriate to fulfil the objectives of the US labelling provisions, in particular, the definition would not ensure that consumers are not misled or deceived about whether the tuna products contain tuna that was caught in a manner that adversely affects dolphins.[954] It adds that that the use of the definition would not be effective at protecting dolphins at the level the United States considers appropriate. Although the United States agrees with Mexico that the AIDCP has made an important contribution to protecting dolphins in the ETP, it considers however that it has only addressed part of the problem aiming at reducing observed dolphin mortality and serious injury caused by setting on dolphins to harvest tuna but not addressing other adverse effects of setting on dolphins.[955] Furthermore, it argues that the US dolphin-safe labelling provisions have addressed both observed dolphin mortality and serious injury but also other adverse effects by encouraging fishing fleet to use other fishing techniques. It concludes that the US provisions have the objective to protect dolphins in ways that go beyond the protection provided under the AIDCP.[956] In

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[951] Appellate Body Report, *EC – Sardines*, para. 248.
[952] *Earth Island Institute v. Hogarth*, Exhibit MEX-30.
[953] Mexico's first written submission, para. 251.
[954] United States' first written submission, paras. 191-192.
[955] United States' first written submission, para. 193.
[956] United States' first written submission, para. 194.

that sense, the United States considers that the AIDCP only addresses partially the first objective targeted by the US labelling provisions, that is, the protection of dolphin populations. In its first oral statement the US asserted that allowing tuna products to be labelled dolphin-safe based on the AIDCP resolution definitions would defeat the objective of ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and also defeat the objective of ensuring that the US market is not used to encourage the technique of setting on dolphins to catch tuna.

7.719 The Parties were asked whether the United States, acting as member of the IATTC and within the context of this organization had ever objected the appropriateness or effectiveness of the AIDCP regime to protect the dolphin populations in the ETP and whether it had, within the same context, has the United States ever expressed concerns about the consumer-deceiving potential of the AIDCP "dolphin-safe" designation. The United States confirmed it had been and continues to be a strong supporter of the AIDCP, whether at meetings of the parties to the AIDCP, IATTC meetings or in other contexts because it recognizes that setting on dolphins to catch tuna occurs and that the conservation measures called for under the AIDCP are an effective means to reduce observed dolphin mortalities when dolphins are set upon to catch tuna. In the context of the AIDCP, the United States said it had periodically proposed or supported efforts to strengthen implementation of the AIDCP. However it also observed that its strong support for the AIDCP should not be understood to mean that the United States supports the practice of setting on dolphins to catch tuna or that the United States believes the measures called for under the AIDCP are sufficient to protect dolphins from the harms associated with setting on dolphins to catch tuna. Regarding its concerns about other countries' use of the AIDCP dolphin-safe designation for their markets in the IATTC or AIDCP party meetings, the United States responded it never expressed any.[957]

7.720 Mexico also confirmed the United States had never expressed objections to the AIDCP regime to protect dolphins and that it was also not aware that the United States has expressed concern over the AIDCP designation being deceptive. It noted that if the United States had concerns about the AIDCP, it should have raised those concerns in the IATTC rather than imposing a unilateral measure and emphasized that a key point is that the decisions, resolutions and regulations of the AIDCP are adopted by consensus which means that the United States has specifically agreed to all aspects of the AIDCP regime, including the AIDCP dolphin-safe certification program.[958]

(ii) Analysis by the Panel

7.721 We first recall the Appellate Body's clarification in *EC – Sardines* that the burden of proving that the international standard is effective and appropriate to fulfil the legitimate objectives pursued by the challenged measures rests on the complaining party:

> "There are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the SPS Agreement, and our reasoning in *EC — Hormones* is equally apposite for this case. ... Accordingly, as Articles 3.1 and 3.3 of the SPS Agreement, there is no 'general rule-exception' relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru — as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities — to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used 'as a basis for' the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to

[957] United States' response to Panel question No. 142.
[958] Mexico's response to Panel question No. 142, paras. 117-118.

> fulfil the 'legitimate objectives' pursued by the European Communities through the EC Regulation."[959]

7.722 Accordingly, in the present case, it is for Mexico to demonstrate that the AIDCP dolphin-safe standard is effective and appropriate to fulfil the legitimate objectives pursued by the United States through its dolphin-safe labelling provisions.

7.723 With respect to the meaning of the term "ineffective or inappropriate means", we note that the Appellate Body in *EC – Sardines* agreed with the Panel's view that the term "ineffective or inappropriate means" refers to two questions, the question of the effectiveness of the measure and the question of the appropriateness of the measure and that these two questions, although closely related, are different in nature.[960] The Panel had interpreted the term "ineffective" as referring to something which is not "having the function of accomplishing", "having as a result", or "brought to bear", whilst it had interpreted the term "inappropriate" as referring to something which is not "specially suitable", "proper" or "fitting".[961] In sum, the Panel had noted that: "... in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. … The question of effectiveness bears upon de *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed. (original emphasis)."[962]

7.724 In light of these determinations, we now consider whether Mexico has discharged its burden of showing that the AIDCP standard is appropriate and effective to fulfil the US dolphin-safe labelling provisions' objectives. We note that this enquiry differs from that conducted earlier under Article 2.2. In that context, as discussed earlier, Mexico had suggested that a label complying with the AIDCP standard could be allowed to coexist with the existing US standard.[963] Under Article 2.4 of the TBT Agreement, the Panel's point of enquiry is whether this international standard *in itself* would fulfil the legitimate objectives of the United States.

7.725 In accordance with the clarifications provided by the Appellate Body as described above, we consider that the AIDCP standard would be effective if it had the capacity to accomplish the two legitimate objectives defined by the United States, and it would be appropriate if it were suitable for the fulfilment of both of these objectives.[964] In addition, as noted by the Panel and the Appellate Body, insofar as the terms "ineffective" and "inappropriate" have different meaning and that it is conceptually possible that a measure could be effective but inappropriate, Mexico bears the burden of showing that the AIDCP standard is both effective and appropriate.[965] Mexico therefore has the duty to adduce sufficient evidence that the AIDCP standard meets the legal requirements of effectiveness and appropriateness set out in Article 2.4 of the TBT Agreement.[966]

7.726 As described in Section (i) above, the US dolphin-safe labelling provisions have two stated objectives: (1) ensuring that consumers are not misled or deceived about whether tuna products

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[959] Appellate Body Report, *EC – Sardines*, paras. 274–275

[960] Appellate Body Report, *EC – Sardines*, para. 285 citing the Panel Report, *EC – Sardines*, para. 261.

[961] Appellate Body Report, *EC – Sardines*, para. 285 citing the Panel Report, *EC – Sardines* para. 7.116.

[962] Appellate Body Report, *EC – Sardines*, para. 285 citing the Panel Report, *EC – Sardines* para. 7.116.

[963] Mexico's second written submission, para. 210.

[964] Appellate Body Report, *EC – Sardines*, para. 288.

[965] Appellate Body Report, *EC – Sardines*, para. 289 citing the Panel Report, *EC – Sardines*, para. 7.116.

[966] Appellate Body Report, *EC – Sardines*, para. 290.

contain tuna that was caught in a manner that adversely affects dolphins; and (2) 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.[967] We recall that, as discussed in Section 3(b)(ii)above (in particular in paragraphs 7.484 to 7.486), the scope of these objectives is not limited to the ETP, and encompasses a consideration of direct consequences of fishing techniques such as killing or serious injuries, and of unobserved consequences of setting on dolphins. We also recall the United States' observation that reducing such adverse effects "might also be considered to contribute to the protection of dolphin populations".[968]

7.727 We first note that, to the extent that the US objectives are not limited to the ETP, and that the AIDCP standard addresses fishing conditions in the ETP and not in any other fishery, the AIDCP standard alone would not have the capacity to address US concerns in relation to the manner in which tuna is caught beyond the ETP. Although, as observed above, the types of mechanisms developed and implemented under the AIDCP may provide guidance in addressing the dolphin-safe issue beyond the ETP, we cannot assume that this would necessarily lead to the achievement of US objectives in these fisheries. Nonetheless, we consider further whether the requirements of the AIDCP for dolphin-safe labelling would be appropriate or effective to fulfil the US objectives with respect to the area that it addresses, i.e. the ETP.

7.728 With respect to the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, the United States holds that the AIDCP standard would not be effective because tuna caught in accordance with the AIDCP may be caught by setting on dolphins and nonetheless is certified as dolphin-safe under the AIDCP and the AIDCP label would not ensure that consumer have accurate information about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and are not misled or deceived.[969]

7.729 As described earlier, compliance with the AIDCP standard allows the use of setting on dolphins as a fishing technique, but subjects it to a number of conditions and a monitoring programme, to reduce the number of incidental bycatches of dolphins. In addition, the AIDCP dolphin-safe standard is only accorded to tuna that was caught on a trip in which no dolphin was killed or seriously injured. Therefore, with the AIDCP label alone, consumers will not be misled or deceived about whether dolphins were killed during the sets in which the tuna is caught. However, to the extent that there might be other adverse effects deriving from that fishing method, the AIDCP standard alone would not address them. It would not also, in itself, convey any information in this respect. The AIDCP dolphin-safe label itself does not convey any information on the fishing method that has been used for harvesting tuna contained in the product that bears the AIDCP logo, or on the impact that such method may have on dolphins. Even assuming that the parties to the AIDCP comply strictly with their transparency obligations, this would only inform the interested actors that the meaning of the term "dolphin-safe" in the context of the AIDCP framework refers to tuna captured in association with dolphins, in sets in which mortality or serious injury of dolphins does not occur.

7.730 Therefore, to the extent that it would not allow consumers to be informed of the fact that dolphins were chased in the context of catching the tuna at issue, and of the existence of potential unobserved consequences from such setting, the AIDCP label would not address some of the adverse effects on dolphins that the United States has identified as part of its objectives.

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[967] See e.g. United States' first written submission, para. 146; United States' first oral statement, para. 47.

[968] See para. 7.484 and fn 617.

[969] United States' first written submission, paras. 195-196.

7.731 We therefore conclude that the AIDCP standard, applied alone, would not be an effective or appropriate means of fulfilling the US objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.

7.732 We now turn to the objective of contributing to protecting dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. In the United States' view, while the AIDCP has made an important contribution to protecting dolphins in the ETP, it only addresses part of the problem – that is how to reduce dolphin mortality when setting on dolphins to catch tuna. However, because it does not prohibit setting on dolphins to catch tuna, it does not ensure that no dolphins are in fact killed or seriously injured when dolphins are used to catch tuna and it does not address other adverse effects of setting on dolphins to catch tuna, the United States says. It emphasizes that the AIDCP contemplates that up to 5000 dolphins may be killed using this technique per year.[970] And yet, the United States explains that its measures seek not only to reduce observed dolphin mortality and serious injury, but also to address other adverse effects of setting on dolphins to catch tuna by encouraging fishing fleets to transition to techniques to catch tuna that do not involve setting on dolphins by prohibiting use of the dolphin-safe label for tuna products that contain tuna that was caught during a trip in which purse seine nets were deployed or used to encircle dolphins.[971]

7.733 The United States therefore concludes that the US dolphin-safe labelling provisions have as their objective to protect dolphins in ways that go beyond the protections provided for under the AIDCP and that relying solely on the AIDCP or its resolutions would not be an effective means of fulfilling the objective of the US dolphin-safe labelling provisions "to protect dolphins above and beyond minimizing observed mortalities and serious injuries as a consequence of setting on dolphins to catch tuna".[972]

7.734 Mexico's main argument in support of its assertion that the AIDCP standard is an effective means for achieving the objective of protecting dolphins is that the objective of the US dolphin-safe labelling provisions relate solely to adverse effect on dolphins that occur when nets are set upon dolphins, but that the measures have no objectives concerning adverse effects on dolphins resulting from other fishing methods or occurring in ocean regions other than the ETP.[973] Mexico also argues that the US dolphin-safe labelling provisions are based on the underlying assumption that the fishing method used by the Mexican fleet and regulated by the AIDCP adversely affects dolphins, which it deems is unsupported by reliable evidence. Mexico focuses on the dolphin stocks recovery and affirms that the best available scientific evidence shows that dolphin mortalities in the ETP are negligible and are not affecting populations of any of the dolphin stocks. Mexico underlines the fact that the IATTC has also questioned whether the overall United States' analytical approach to evaluating dolphin populations is sound.[974] To summarize, Mexico argues that there is "no scientific evidence that setting upon dolphins in a manner consistent with the AIDCP adversely affects dolphins from a stock sustainability perspective."[975] It holds that the most recent study, a 2008 US DOC study, indicated that dolphin stocks are recovering, indicating that the fishing methods are not having adverse effect on dolphins.[976]

[970] United States' first written submission, para. 193.
[971] United States' first written submission, para. 194.
[972] United States' first written submission, para. 194.
[973] Mexico's oral statement of the second substantive meeting, para. 88.
[974] Mexico's oral statement of the second substantive meeting, para. 106.
[975] Mexico's second written submission, para. 204.
[976] Mexico's second written submission, para. 204.

7.735 Mexico argues that the US dolphin-safe labelling provisions are based on the assumption that one of the fishing method used by the ETP fishing fleets adversely affects dolphins which is, in turn, based on the assumption that dolphin stocks are not recovering.[977] As explained in paragraph 7.550 above, however, we are not persuaded that the objective of protecting dolphins through the US dolphin-safe provisions is to be understood exclusively, or even primarily, in terms of dolphin population recovery. Rather, both US objectives are defined in terms of "adverse effects" of fishing practices on dolphins. As described above, this includes observed mortality from tuna fishing as well as unobserved consequences of setting on dolphins. As also described above, the United States has indicated that this "may also be considered as seeking to conserve dolphin populations". This suggests to us that the US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent on dolphin populations being depleted.

7.736 As we understand it therefore, the United States' assumption that setting on dolphins is harmful to dolphins is not premised only on the lack of dolphin stocks recovery. As mentioned above, the United States has referred to a diversity of adverse effects of setting on dolphins, emphasizing both the individual dolphin mortality (observed or delayed) as well as the issue of the recovery of dolphin stocks. As a study presented as evidence by Mexico itself states describes, there are ecological but also other concerns for dolphins and various target levels of either dolphin population size or mortality. We note that this study also suggests that the difficulty presented by the tuna-dolphin issue as an international problem is due to differing conservation ethics, and suggests that the United States' laws and policies have the goal of preventing all dolphin mortality from tuna fishing, while the laws and policies of other nations and more often directed toward conserving dolphin populations but not necessarily preventing all mortality.[978]

7.737 As explained earlier in the context of our determinations under Article 2.2 in relation to the legitimate objectives pursued by the United States, the Panel has considered that despite the existence of a degree of uncertainty in relation to the extent to which setting on dolphins may have adverse impact on dolphins beyond observed mortality, sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect and that the method of setting on dolphins "has the capacity" of resulting in observed and unobserved adverse effects on dolphins .

7.738 We acknowledge that the AIDCP standard contributes importantly, as the United States itself observes, to the reduction of dolphin mortality from setting on dolphins within the ETP.[979] It may even contribute to the protection of dolphin stocks and progressive recovery of depleted populations. However, taken alone, it fails to address unobserved adverse effects derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase.[980]

7.739 We also note that, to the extent that the AIDCP standard addresses setting on dolphins and not other fishing techniques that may also result in adverse effects on dolphins, it would also not provide an effective or appropriate means of fulfilling the US objectives in this respect.

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[977] See Mexico's oral statement at the second substantive meeting, para.104.

[978] *Dolphins and the Tuna Industry*, a study by the Committee on Reducing Porpoise Mortality from Tuna Fishing, the Board on Environmental Studies and Toxicology, The Commission on Life Sciences and the National Research Council mandated by the MMPA, (1992) p. 3, 5 and 21 . MEX-2

[979] United States' first written submission, para. 170.

[980] Exhibits US-4 and US-11.

7.740 For all these reasons, we find that Mexico has failed to demonstrate that the AIDCP dolphin-safe standard is an effective and appropriate means to fulfil the US objectives at the United States' chosen level of protection.

C. MEXICO'S CLAIMS UNDER THE GATT 1994

7.741 In addition to its claims under the TBT Agreement, Mexico has also raised claims under Articles I:1 and III:4 of the GATT 1994. Given the strong commonalities between these claims and some of Mexico's claim under the TBT Agreement, we must consider whether it is necessary, for the full resolution of the dispute, to consider also these claims under GATT 1994.

7.742 We note that, in response to a question by the Panel[981], Mexico has argued that it was necessary and essential to the effective resolution of this dispute that the Panel rule on all of the claims raised by Mexico under Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement because of: "(i) the nature of the measures at issue; (ii) the fact that this is the first time that such measures have been subject to dispute settlement under the DSU; (iii) the differences in the wording and potential application of the provisions of the GATT 1994 and the TBT Agreement to the measures; and (iv) the importance of the effective discipline of such non-tariff measures to developing country Members such as Mexico. This final reason – the importance of these disciplines to developing country Members – is particularly important because developing country Members may be most likely to be exposed to the adverse effects of non-tariff measures such as those at issue in this dispute."[982]

7.743 We agree with Mexico that, should the Panel fail to make findings that are necessary to resolve the dispute this would constitute a false judicial economy and an error of law.[983] However, we also note that if the panel finds that the matter in dispute is sufficiently resolved by the findings on the first claims examined, there is no need to examine additional claims. As explicitly stated by the Appellate Body, "[n]othing in [Article 11 of the DSU] or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party.[984]

7.744 In this respect, we note that three of the reasons invoked by Mexico in support of its view that the Panel should not exercise judicial economy with respect to any of its claims (reasons (i), (ii) and (iv)) do not appear to directly relate to the question of whether the dispute would be fully resolved. These considerations therefore have little, if any, bearing on the question of whether we may exercise judicial economy.

7.745 The third reason invoked by Mexico, i.e. "differences in the wording and potential application of the provisions of the GATT 1994 and the TBT Agreement to the measures", does, however, have a bearing on the question at hand. To the extent that the legal and factual bases of different claims are distinct, this may affect the question of whether all the issues before the Panel have been properly addressed through an examination of some of these claims only.

7.746 We note that Mexico's claims under the GATT 1994 are non-discrimination claims under Articles I:1 and III:4. We also note that in the context of considering Mexico's claims under the TBT Agreement, we have considered among others, Mexico's non-discrimination claims under Article 2.1 of that Agreement.

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[981] Mexico's response to Panel question No. 1 paras. 3-4.
[982] Mexico's response to Panel question No. 114 para. 67.
[983] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.
[984] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 339.

7.747 We further recall that, in the presentation of its arguments to the Panel under the TBT Agreement, Mexico consistently referred the Panel to its arguments under Articles I.1 and III:4 of the GATT 1994 (and the United States similarly referred to its own responses under the GATT 1994). In that context, Mexico argued that Article 2.1 of the TBT Agreement contains two non-discrimination obligations applicable to technical regulations, one that is similar to the national treatment obligation in Article III:4 and the other that is similar to the most-favoured-nation obligation in Article I:1, and that although language used in Article 2.1 is different from that used in Articles III:4 and I:1, both of these GATT 1994 provisions offer guidance on how to interpret Article 2.1.[985] Mexico has not provided any explanation for its contrary view expressed in the context of its request that the Panel refrain from exercising judicial economy, that it was necessary to rule on these claims under both agreements and under both contexts (national treatment and MFN) because the nature, scope and application of the claims under Articles I:1 and III:4 of the GATT 1994, and Article 2.1 of the TBT Agreement, are different, and address different rights and obligations which, in turn, will have different implications during the implementation phase of this dispute.[986]

7.748 In light of the fact that we have addressed, in the context of our examination of Mexico's claims under the TBT Agreement, all aspects of Mexico's claims, including non-discrimination aspects under Article 2.1, and other aspects under Article 2.2 and 2.4, and in light of our findings under these provisions, we are not persuaded that it is necessary for us to consider separately and additionally Mexico's claims under Articles I:1 and III:4 of the GATT 1994. Accordingly, we exercise judicial economy in respect of these claims and decline to rule on them.[987]

VIII. RULINGS AND RECOMMENDATIONS

8.1 In light of the above findings, the Panel finds that the US dolphin-safe provisions:

(a) are not inconsistent with Article 2.1 of the TBT Agreement;

(b) are inconsistent with Article 2.2 of the TBT Agreement because they are more trade-restrictive than necessary to achieve a legitimate objective, taking into account the risks that non-fulfilment would create;

(c) are not inconsistent with Article 2.4 of the TBT Agreement.

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[985] Mexico's response to Panel question No. 58 para. 172.

[986] Mexico's response to Panel question No. 114 para. 69.

[987] We note in this respect the following determinations of the Appellate Body in relation to the completion of the analysis in the context of Peru's claims under Articles 2.1, 2.2 and 2.4 of the TBT Agreement and Article III:4 of GATT 1994 in *EC – Sardines*:

"Peru submits that, if we conclude that the EC Regulation is consistent with Article 2.4, it would be appropriate for us to complete the Panel's analysis and resolve the dispute by making findings on those provisions of Article 2 of the *TBT Agreement* on which the Panel did not make any findings, namely Articles 2.2 and 2.1 of the *TBT Agreement*. Although Peru made a claim before the Panel under Article III:4 of the GATT 1994, Peru does not ask us to complete the analysis by addressing that provision. The European Communities objects to the completion of the analysis, expressing the view that there are not sufficient undisputed facts in the record to do so.

Because we have found that the EC Regulation is *not* consistent with Article 2.4 of the *TBT Agreement*, the conditions to Peru's request have not been met, and, therefore, we do not think it is necessary for us to make a finding under Articles 2.2 and 2.1 of the *TBT Agreement* in order to resolve this dispute. Equally, we do not think it is necessary to make a finding under Article III:4 of the GATT 1994 in order to resolve this dispute. Therefore, we decline to make findings on Articles 2.2 and 2.1 of the *TBT Agreement*, or on Article III:4 of the GATT 1994." (Appellate Body Report, *EC – Sardines*, paras. 312-313).

8.2 For the reasons explained in Section VII of this Report, the Panel exercises judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.

8.3 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent that the United States has acted inconsistently with the provisions of the TBT Agreement, it has nullified or impaired benefits accruing to Mexico under that Agreement. We therefore recommend that the DSB request the United States to bring its measures into conformity with its obligations under the TBT Agreement.