

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

**AB-2012-2**

*Report of the Appellate Body*



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ANNEX II Notification of an Other Appeal by Mexico, WT/DS381/11

## CASES CITED IN THIS REPORT

<b>Short Title</b>	<b>Full case title and citation</b>
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
<i>Canada – Dairy</i>	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by Appellate Body Report WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III")</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008

<b>Short Title</b>	<b>Full case title and citation</b>
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, 6365
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, 3451
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005, DSR 2005:X, 4603
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
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<i>Mexico – Taxes on Soft Drinks</i>	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, 43
<i>Philippines – Distilled Spirits</i>	Appellate Body Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011

<b>Short Title</b>	<b>Full case title and citation</b>
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, circulated to WTO Members 18 November 2011 [appeal in progress]
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, 119
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted 17 June 1987, BISD 34S/136
<i>US – Tuna (Mexico)</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , DS21/R, 3 September 1991, unadopted, BISD 39S/155
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, circulated to WTO Members 15 September 2011
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , 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
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809



<b>Short Title</b>	<b>Full case title and citation</b>
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
AIDCP	Agreement on the International Dolphin Conservation Program (Panel Exhibits US-23a and MEX-11)
DML	dolphin mortality limit
DPCIA	Dolphin Protection Consumer Information Act, <i>United States Code</i> , Title 16, Section 1385 <i>et seq.</i> (Panel Exhibit US-5)
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
ETP	Eastern Tropical Pacific Ocean
FADs	fish aggregating devices
GATS	<i>General Agreement on Trade in Services</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Hogarth Ruling	United States Court of Appeals for the Ninth Circuit, <i>Earth Island Institute v. Hogarth</i> , 494 F.3d 757 (9th Cir. 2007) (Panel Exhibit MEX-31)
IATTC	Inter-American Tropical Tuna Commission
IDCPA	International Dolphin Conservation Program Act, Public Law No. 115-42, 111 Stat. 1122 (15 August 1997) (Panel Exhibit MEX-21)
Implementing regulations	<i>United States Code of Federal Regulations</i> , Title 50, Section 216.91 ("Dolphin-safe labeling standards") and Section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP by large purse seine vessels") (Panel Exhibit US-6)
ISO/IEC Guide 2: 1991	International Organization for Standardization / International Electrotechnical Commission Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, sixth edition (1991)
La Jolla Agreement	La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, done at La Jolla, California, 21 April 1992
MFN	most favoured nation
NOAA	National Oceanic and Atmospheric Administration
Panel Report	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R
SPS Agreement	<i>Agreement on Sanitary and Phytosanitary Measures</i>
TBT Agreement	<i>Agreement on Technical Barriers to Trade</i>

<b>Abbreviation</b>	<b>Definition</b>
TBT Committee Decision	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, in WTO document G/TBT/1/Rev.9, Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, 8 September 2008, pp. 37-39; and WTO document G/TBT/1/Rev.10, 9 June 2011, pp. 46-48
USDOC	United States Department of Commerce
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WCPO	Western Central Pacific Ocean
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>



WORLD TRADE ORGANIZATION  
APPELLATE BODY

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

United States, *Appellant, Appellee*  
Mexico, *Other Appellant, Appellee*

Argentina, *Third Participant*  
Australia, *Third Participant*  
Brazil, *Third Participant*  
Bolivarian Republic of Venezuela, *Third Participant*  
Canada, *Third Participant*  
China, *Third Participant*  
Ecuador, *Third Participant*  
European Union, *Third Participant*  
Guatemala, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
New Zealand, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu,  
Kinmen and Matsu, *Third Participant*  
Thailand, *Third Participant*  
Turkey, *Third Participant*

AB-2012-2

Present:

Zhang, Presiding Member  
Bhatia, Member  
Graham, Member

**I. Introduction**

1. The United States and Mexico each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by Mexico<sup>2</sup> regarding the consistency of certain measures imposed by the United States on the importation, marketing, and sale of tuna and tuna products with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and the *Agreement on Technical Barriers to Trade* (the "TBT Agreement").

2. Before the Panel, Mexico challenged the *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act" or "DPCIA"), the *United States Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92 (the "implementing regulations"), and a

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<sup>1</sup>WT/DS381/R, 15 September 2011.

<sup>2</sup>Request for the Establishment of a Panel by Mexico, WT/DS381/4.

ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*<sup>3</sup> (the "Hogarth ruling") as inconsistent with the United States' obligations under Article 2 of the *TBT Agreement* and Articles I and III of the GATT 1994. The Panel reasoned that the legal instruments identified by Mexico in its panel request "set out the terms of the US 'dolphin-safe' labelling scheme" and considered it appropriate therefore to treat them as a single measure for purposes of its analysis of Mexico's claims and its findings.<sup>4</sup> The Panel thereafter referred to the measure at issue in this dispute as "the US dolphin-safe labelling provisions".<sup>5</sup>

3. Having found that the US "dolphin-safe" labelling provisions constitute a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*, the Panel proceeded to examine the substantive claims brought by Mexico under the *TBT Agreement*. With respect to Mexico's claim that the measure is inconsistent with Article 2.1, the Panel found that Mexico had failed to establish that the measure affords treatment less favourable to Mexican tuna products than to US tuna products and tuna products originating in other countries and concluded, therefore, that the measure is not inconsistent with the United States' obligations under that provision.<sup>6</sup> Next, the Panel found that the measure is more trade restrictive than necessary to fulfil its legitimate objectives, taking account of the risks non-fulfilment would create. Therefore, the Panel found that the measure is inconsistent with Article 2.2 of the *TBT Agreement*.<sup>7</sup> With respect to Mexico's claim under Article 2.4 of the *TBT Agreement*, the Panel found that the Agreement on the International Dolphin Conservation Program<sup>8</sup> (the "AIDCP") is a relevant international standard, but that Mexico had failed to prove that it is an effective and appropriate means to fulfil the United States' objectives at its chosen level of protection.<sup>9</sup> The Panel decided to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.<sup>10</sup>

4. In a communication dated 31 October 2011, Mexico and the United States jointly requested the Dispute Settlement Body (the "DSB") to agree to an extension of the 60-day period provided for in Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*

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<sup>3</sup>United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Panel Exhibit MEX-31).

<sup>4</sup>Panel Report, para. 7.24.

<sup>5</sup>Panel Report, para. 7.26.

<sup>6</sup>Panel Report, paras. 7.374 and 8.1(a).

<sup>7</sup>Panel Report, paras. 7.620 and 8.1(b).

<sup>8</sup>Panel Exhibits US-23a and MEX-11.

<sup>9</sup>Panel Report, paras. 7.740 and 8.1(c).

<sup>10</sup>Panel Report, para. 7.748.

(the "DSU") for the adoption or appeal of the Panel Report until 20 January 2012.<sup>11</sup> At a meeting held on 11 November 2011, the DSB agreed that, upon a request by Mexico or the United States, it would adopt the Panel Report no later than 20 January 2012, unless the DSB decided by consensus not to do so, or either party to the dispute notified the DSB of its decision to appeal.<sup>12</sup>

5. On 20 January 2012, the United States notified the DSB of its intention to appeal certain issues of law and certain legal interpretations developed by the Panel, pursuant to Article 16 of the DSU, and filed a Notice of Appeal and an appellant's submission pursuant to Rules 20 and 21, respectively, of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On the same day, the Appellate Body Division hearing this appeal received a request from the United States to hold the oral hearing in this appeal during the week of 19 February 2012 on the ground that a senior member of the US legal team would be unable to travel to Geneva after that time period for medical reasons relating to her pregnancy. In the alternative, the United States proposed, by letter dated 26 January 2012, that the oral hearing be held in the week of 26 March 2012 to provide additional preparation time for the Appellate Body and the participants. On 3 February 2012, having carefully considered the United States' request and the comments received from Mexico and the third participants in this dispute, and having also considered the size and complexity of this appeal, the Division ruled that the oral hearing would be held on 15-16 March 2012.

6. On 25 January 2012, Mexico notified the DSB of its intention to appeal certain issues of law and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Other Appeal<sup>13</sup> and an other appellant's submission, pursuant to Rules 23(1) and 23(3), respectively, of the *Working Procedures*. On 7 February 2012, Mexico and the United States each filed an appellee's submission.<sup>14</sup>

7. On 10 February 2012, Australia, Brazil, Canada, the European Union, Japan, and New Zealand each filed a third participant's submission.<sup>15</sup> On the same day, Argentina, China, Ecuador, Guatemala, and Korea each notified its intention to appear at the oral hearing as a third participant, pursuant to Rule 24(2) of the *Working Procedures*, and Turkey notified that it would not be filing a third participant's submission. On 7 March and 12 March 2012, respectively, the Separate

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<sup>11</sup>WT/DS381/9. The joint request was made in view of the "current workload of the Appellate Body" and in order to "provide greater flexibility in scheduling any possible appeal".

<sup>12</sup>WT/DSB/M/306.

<sup>13</sup>WT/DS381/11 (attached as Annex II to this Report).

<sup>14</sup>Pursuant to Rule 22 of the *Working Procedures*.

<sup>15</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

Customs Territory of Taiwan, Penghu, Kinmen and Matsu and Thailand each notified the Secretariat of its intention to appear at the oral hearing as third participants.<sup>16</sup>

8. On 2, 3, and 17 February 2012, the Appellate Body received unsolicited *amicus curiae* briefs from, respectively, the Humane Society of the United States/Humane Society International and Washington College of Law (WCL), ASTM International (formerly the American Society for Testing and Materials), and Professor Robert Howse. The participants and the third participants were given an opportunity to express their views on these briefs at the oral hearing. The Division hearing this appeal did not find it necessary to rely on these *amicus curiae* briefs in rendering its decision.

9. The oral hearing in this appeal was held on 15-16 March 2012. The participants and nine of the third participants—Argentina, Brazil, Canada, China, Ecuador, Guatemala, Japan, Korea, and Thailand—made oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

10. On 20 March 2012, the Chair of the Appellate Body informed the Chair of the DSB that, due to the size of this appeal, including the complexity of the issues raised by the participants, along with the large caseload that the Appellate Body was facing and the scheduling constraints resulting therefrom, it was expected that the Appellate Body Report in this appeal would be circulated to WTO Members no later than 16 May 2012.<sup>17</sup>

## II. Arguments of the Participants and the Third Participants

### A. *Claims of Error by the United States – Appellant*

#### 1. Annex 1.1 to the TBT Agreement and the Definition of "Technical Regulation"

11. The United States requests the Appellate Body to reverse the Panel's finding that the measure at issue is a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*. The United States asserts that such reversal would also dispose of Mexico's claims under Article 2 of the *TBT Agreement*. Therefore, the United States further requests the Appellate Body to declare moot and of no legal effect the Panel's findings with respect to Article 2 of the *TBT Agreement*.

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<sup>16</sup>On 7 March 2012, Thailand submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. On 12 March 2012, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submitted its delegation list. For the purpose of this appeal, we have interpreted these actions as notifications expressing their intention to attend the oral hearing pursuant to Rule 24(4) of the *Working Procedures*.

<sup>17</sup>This letter was circulated as document WT/DS381/12.



12. The United States alleges that the Panel erred in finding that the measure at issue is a "technical regulation", because compliance with the measure is not "mandatory" within the meaning of Annex 1.1 to the *TBT Agreement*. The United States maintains that the Panel's interpretation of the word "mandatory" is indistinguishable from the term "requirement".<sup>18</sup> However, because the word "requirement" is used in both the definition of "technical regulation" in Annex 1.1 and in the definition of "standard" in Annex 1.2, a finding that compliance with certain labelling requirements is "mandatory" within the meaning of Annex 1.1 must be based on considerations other than the fact that a document establishes criteria for the use of a certain label.<sup>19</sup> The United States submits that compliance with a labelling requirement is "mandatory" within the meaning of Annex 1.1 if there is a requirement to use a particular label in order to place a product for sale on the market.<sup>20</sup> By contrast, compliance with a labelling requirement is not mandatory in situations where producers retain the option of not using the label. For the United States, this interpretation "respects the definition" of both a labelling requirement that is a "technical regulation" under Annex 1.1 and the definition of a labelling requirement that is a "standard" under Annex 1.2.<sup>21</sup>

13. The United States also alleges that the Panel incorrectly applied prior Appellate Body reports interpreting the phrase "with which compliance is mandatory". In particular, the Panel's interpretation of "mandatory" fails to give effect to the Appellate Body's statement in *EC – Asbestos* that "mandatory compliance" is characterized by being "binding" or "compulsory".<sup>22</sup> The United States takes issue with the Panel's statement that it must consider "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 must also consider "whether the document at issue *regulates in a binding fashion* these conditions or content".<sup>23</sup> For the United States, the condition of "regulating in a binding fashion" is redundant, because it is not clear how a document could "lay down" or "prescribe" conditions for use of a label or certain content for a label if that "laying down" or "prescription" was not "binding".

14. The United States further alleges that the Panel incorrectly applied the Appellate Body's distinction between "positive" and "negative" prescriptions in documents. The United States refers to the Appellate Body's statement in *EC – Asbestos* that a document may provide, positively, that products must possess certain characteristics, or a document may require, negatively, that products

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<sup>18</sup>United States' appellant's submission, heading III.B.1.

<sup>19</sup>United States' appellant's submission, para. 30 (quoting Panel Report, para. 7.117, and referring to para. 7.151).

<sup>20</sup>United States' appellant's submission, para. 32 (referring to Panel Report, para. 7.150).

<sup>21</sup>United States' appellant's submission, para. 34.

<sup>22</sup>United States' appellant's submission, para. 39 (quoting Appellate Body Report, *EC – Asbestos*, para. 68).

<sup>23</sup>United States' appellant's submission, para. 39 (quoting Panel Report, para. 7.117). (emphasis added by the United States)

must not possess certain characteristics. In the United States' view, this distinction is a device to help explain that there is more than one way to set out product characteristics in a measure. However, it is not a useful tool for distinguishing a technical regulation from a standard, because both types of measures may set forth product characteristics. The United States contends that the Panel erred in finding that the measure at issue was a "negative" requirement because it "impose[s] 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".<sup>24</sup> The United States submits that standards, like technical regulations, may "reserve access to a label to products that comply with that standard's requirements" and, where "a standard is a measure of a Member, that standard will naturally not permit products that do not meet that standard to claim they do".<sup>25</sup>

15. Furthermore, the United States argues that enforceability, as such, does not distinguish technical regulations from standards, and points out that labelling requirements may be subject to enforcement regardless of whether they are set forth in a standard or in a technical regulation.<sup>26</sup> In addition, the United States submits that the Panel erred in relying on specific enforcement possibilities in relation to the measure at issue in order to distinguish it from a standard. First, with respect to enforcement in the sense of restricting the use of the label to those products that meet the requirements for the use of the label, the United States contends that this alone does not "make compliance with a labelling requirement 'mandatory'", because denying access to a label for failure to meet the conditions required to use the label is inherent in the term "labelling requirement".<sup>27</sup> Second, the United States refers to two "specific enforcement measures" considered by the Panel, namely, a law against deceptive practices and a fine to be levied against ship captains for falsely certifying that dolphins were not set upon. With respect to the law against deceptive practices, the United States maintains that, even "if it is accepted that a specific enforcement measure can make a labeling requirement mandatory, it would still have to be a measure that goes beyond a general prohibition on using deceptive labels".<sup>28</sup> Moreover, a "fine to be levied against ship captains" does not apply to false use of a "dolphin-safe" label, but rather is a penalty for false certification by captains and observers aboard tuna-fishing vessels.<sup>29</sup>

16. In addition, the United States submits that the Panel's interpretation "was largely based on its reading of the Appellate Body report in *EC – Sardines*".<sup>30</sup> According to the United States, the Panel's

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<sup>24</sup>United States' appellant's submission, para. 45 (quoting Panel Report, para. 7.131). (emphasis added by the United States omitted)

<sup>25</sup>United States' appellant's submission, para. 45.

<sup>26</sup>United States' appellant's submission, para. 51 (referring to Panel Report, para. 7.150).

<sup>27</sup>United States' appellant's submission, para. 54 (quoting Panel Report, para. 7.116).

<sup>28</sup>United States' appellant's submission, para. 58.

<sup>29</sup>United States' appellant's submission, para. 59.

<sup>30</sup>United States' appellant's submission, footnote 92 to para. 61.

reliance on that Appellate Body report is incorrect for two reasons. First, in that dispute, neither the panel nor the Appellate Body considered whether compliance with the document at issue was mandatory. Second, *EC – Sardines* involved a requirement that products marketed as "preserved sardines" be prepared exclusively from fish of the species *Sardina pilchardus*. The United States maintains that, unlike the EC regulation at issue in that dispute, the measure in the present case does not specify the product characteristics that tuna products must meet to be sold on the US market. Rather, tuna products can be marketed in the United States as tuna products either with or without a "dolphin-safe" label.<sup>31</sup>

17. Finally, the United States argues that the Panel erred in finding that a standard becomes a technical regulation if it is "the only standard" available to address an issue.<sup>32</sup> The United States argues that "[n]othing in Annex 1.1 provides that a technical regulation must be exclusive, and nothing in Annex 1.2 provides that a standard cannot be exclusive."<sup>33</sup> The United States contends that the only basis the Panel suggests for its view that there must be various competing standards are in definitions contained in the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities<sup>34</sup> (the "ISO/IEC Guide 2: 1991"). The United States submits that it appears that the Panel drew upon the definition of the term "mandatory standard" in the ISO/IEC Guide 2: 1991 and argues that this definition is "irrelevant" because the term "mandatory standard" does not appear in the *TBT Agreement*.<sup>35</sup> The United States further asserts that, if "a labelling requirement sets out multiple similar labels to choose from, but an operator must still use one in order to market its product, then the operator still faces mandatory compliance with respect to that labelling requirement".<sup>36</sup> By contrast, "if the operator has the option of not using any of the labels, then it does not face a mandatory compliance obligation".<sup>37</sup>

18. According to the United States, the Panel found that the measure at issue is "the only standard available"<sup>38</sup> because the measure prohibits labels that make deceptive claims about "dolphin-safety" and also prohibits deceptive labels using similar terms, such as "marine mammal" and "porpoise".<sup>39</sup> The United States contends that this contradicts the Panel's earlier finding that standards may be

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<sup>31</sup>United States' appellant's submission, footnote 92 to para. 61.

<sup>32</sup>United States' appellant's submission, para. 65 (referring to Panel Report, paras. 7.143 and 7.144).

<sup>33</sup>United States' appellant's submission, para. 66.

<sup>34</sup>International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, sixth edition (1991).

<sup>35</sup>United States' appellant's submission, footnote 97 to para. 66.

<sup>36</sup>United States' appellant's submission, para. 67.

<sup>37</sup>United States' appellant's submission, para. 67.

<sup>38</sup>United States' appellant's submission, para. 68 (quoting Panel Report, para. 7.144). (emphasis omitted by the United States)

<sup>39</sup>United States' appellant's submission, para. 68 (quoting Panel Report, para. 7.143).

protected against "abusive or misleading use under general law".<sup>40</sup> According to the United States, it is not clear why a standard may be protected against deceptive use of the label when using the term "dolphin", but not when using similar or overlapping terms, such as "marine mammal" or "porpoise". The United States alleges that the Panel erred in introducing a caveat that "standards must allow similar labels to be used, even if the similar label does not meet the standard's requirements, and even if potentially deceptive."<sup>41</sup> In addition, the United States maintains that the Panel may have made its conclusion on the basis of factual errors and refers to a Panel statement that the prohibition applies to claims about marine mammal and porpoise safety "whether misleading or otherwise".<sup>42</sup> The United States maintains that, if this statement reflects the belief that references to "marine mammal" and "porpoise" are prohibited even if the labelling requirements are met, this is factually incorrect, because, pursuant to the measure at issue, if the conditions for using a "marine mammal-safe" label are met, such a label can be used. In any event, submits the United States, even if the Panel had made correct legal and factual findings with regard to the measure's prohibition of deceptive labels, it failed to explain the reasons for drawing a distinction between a measure providing for a single standard that need not be used and a measure providing for multiple standards that need not be used. For the United States, "[s]uch a distinction is without logic".<sup>43</sup>

## 2. Consistency of the Measure at Issue with Article 2.2 of the *TBT Agreement*

19. The United States requests the Appellate Body to reverse the Panel's finding that the US "dolphin-safe" labelling provisions are more trade restrictive than necessary to fulfil their legitimate objectives and are therefore inconsistent with Article 2.2 of the *TBT Agreement*. The United States alleges that the Panel erred in finding that the measure at issue is more trade restrictive than necessary to fulfil its legitimate objectives. The United States also challenges several intermediate findings and conclusions by the Panel and alleges that the Panel failed to make an objective assessment of the matter before it as required under Article 11 of the DSU.

20. The United States alleges that the Panel erred in finding that the coexistence of the US "dolphin-safe" label and the AIDCP label would provide a reasonably available, less trade-restrictive alternative means of achieving the objectives pursued by the United States at the level chosen by the United States. In particular, 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 takes issue with the Panel's finding that "the extent to which consumers would be misled as to the implications of the manner in which the tuna was caught

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<sup>40</sup>United States' appellant's submission, para. 68 (quoting Panel Report, para. 7.142).

<sup>41</sup>United States' appellant's submission, para. 68.

<sup>42</sup>United States' appellant's submission, footnote 102 to para. 68 (quoting Panel Report, para. 7.143).

<sup>43</sup>United States' appellant's submission, para. 69.

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."<sup>44</sup> With respect to the objective of 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, the United States disagrees with the Panel's finding that "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."<sup>45</sup>

21. The United States alleges that both of these conclusions of the Panel are in error for several reasons. First, allowing the AIDCP label to coexist with the US "dolphin-safe" label would not address risks to dolphins outside the Eastern Tropical Pacific Ocean (the "ETP"), since by its terms the former label only applies to tuna caught inside the ETP. In addition, the AIDCP label allows the practice of setting on dolphins to catch tuna, which is harmful to dolphins, and would therefore frustrate the dolphin protection objective. Second, the measure at issue already requires that tuna bearing the US "dolphin-safe" label adhere to the AIDCP requirements if that tuna was caught in the ETP and, in addition to these requirements, it also requires that tuna from the ETP was not caught by setting on dolphins. Therefore, the AIDCP label could not add any further information to consumers. Rather, it would give the impression that tuna caught in the ETP was not caught in a manner that adversely affects dolphins, when in reality it was caught by setting on dolphins. Third, coexistence of the two labels would be confusing for consumers because the two labels are identical, except for the term "AIDCP" or "US Department of Commerce" written on them. Moreover, consumers would have difficulty appreciating the difference between the information conveyed by each label so as to make an informed decision about the tuna they buy. Finally, the Panel "implies" that the United States is required to fulfil its objective to the same level inside and outside the ETP, regardless of the costs.<sup>46</sup> The United States submits that an approach that weighs costs and benefits is consistent with "well-established approaches to policymaking" and with the *TBT Agreement*.<sup>47</sup> For the United States, the measure reflects the fact that the lower likelihood that a dolphin may be killed or seriously injured in a fishery outside the ETP must be balanced against the additional burden imposed by conditioning the use of a "dolphin-safe" label on a certification based on an independent observer's statement.

22. The United States alleges that in determining that the measure at issue only partially fulfils its objectives the Panel failed to make an objective assessment of the matter before it as required

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<sup>44</sup>United States' appellant's submission, para. 120 (quoting Panel Report, para. 7.573).

<sup>45</sup>United States' appellant's submission, para. 120 (quoting Panel Report, para. 7.612).

<sup>46</sup>United States' appellant's submission, para. 115.

<sup>47</sup>United States' appellant's submission, para. 115.

pursuant to Article 11 of the DSU. The United States alleges that this finding is based on two erroneous factual findings by the Panel. First, the Panel's finding that "the risks to dolphins outside the ETP from other fishing techniques are not lower than similar risks faced by dolphins in the ETP". Second, the Panel's finding that it was not persuaded 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".<sup>48</sup> The United States alleges that these findings are not based on an objective assessment of the facts and that the Panel therefore acted inconsistently with Article 11 of the DSU. The United States raises six allegations of error in this respect.

23. First, the United States argues that "[t]he Panel's conclusion that the risk to dolphins from other fishing techniques is not lower than the risk from setting on dolphins" contradicts the Panel's finding that "certain fishing techniques seem to pose greater risks to dolphins than others" and that "setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries".<sup>49</sup> This contradiction itself, submits the United States, constitutes a violation of Article 11 of the DSU.

24. Second, the United States asserts that the Panel found that "harm to dolphins resulting from setting on [dolphins] is equivalent to that resulting from other fishing methods".<sup>50</sup> This finding is inconsistent with the evidence before the Panel suggesting that setting on dolphins to catch tuna poses greater risks to dolphins than other fishing techniques. In particular, the United States points to its arguments before the Panel that there is a regular and significant tuna-dolphin association in the ETP but not in other oceans, that 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 began, and that "[o]utside the ETP, dolphin populations have not been depleted on account of their exploitation to catch tuna and do not remain depleted on account of any such exploitation."<sup>51</sup> The United States argues that there was no evidence before the Panel suggesting that the tuna-dolphin association outside the ETP is similar to that within the ETP, and alleges that the Panel failed to address evidence to the effect that the levels of the tuna-dolphin association in the ETP are unique, as well as evidence relating to the fishing methods used to catch tuna based on exploiting that association, and "what that means in terms of risks to dolphins".<sup>52</sup>

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<sup>48</sup>United States' appellant's submission, para. 93 (quoting Panel Report, paras. 7.562 and 7.617).

<sup>49</sup>United States' appellant's submission, para. 94 (quoting Panel Report, para. 7.438).

<sup>50</sup>United States' appellant's submission, para. 96 (referring to United States' second written submission to the Panel, paras. 42-44).

<sup>51</sup>United States' appellant's submission, para. 96 (quoting United States' second written submission to the Panel, para. 43).

<sup>52</sup>United States' appellant's submission, para. 99 (referring to United States' first written submission to the Panel, paras. 52-59, and 62).

25. Third, the United States alleges that the Panel erred in finding, on the one hand, that the quantity and the quality of the evidence of the risks faced by dolphin populations outside the ETP is less comprehensive than that of the evidence about dolphin mortality resulting from tuna fishing within the ETP, and in finding, on the other hand, that "significant dolphin mortality also arises outside the ETP from the use of other techniques than setting on dolphins".<sup>53</sup> In the United States' view, the Panel "leaps" from what it acknowledges to be minimal evidence that there may be some harm to dolphins outside the ETP to concluding that "significant dolphin mortality" occurs.<sup>54</sup> Thus, the United States submits that the Panel merely assumed that dolphin mortality stemming from tuna fishing existed outside the ETP.

26. Fourth, the United States alleges that evidence cited by the Panel regarding harm to dolphins caused by tuna fishing outside the ETP does not support the Panel's finding of significant dolphin mortality outside the ETP. When examining the harm to dolphins from tuna-fishing techniques other than setting on dolphins outside the ETP, the Panel erroneously relied on evidence referring to fishing in general, and not particularly to tuna fishing. The United States asserts that "[s]ources that refer to harms to dolphins from fishing operations other than tuna fishing operations cannot be relied upon to support [the Panel's] conclusion."<sup>55</sup> Furthermore, many of the sources on which the Panel relies as evincing harm to dolphins outside the ETP refer to tuna caught by driftnet fishing. Yet, the US measure disallows labelling tuna products as "dolphin-safe" when the tuna is caught using this fishing technique on the high seas. The possibility that dolphins may be harmed in driftnet fishing does not support the conclusion that there is significant harm to dolphins outside the ETP that is unaddressed by the measure at issue. If the Panel's references to non-tuna fisheries and driftnet fisheries are removed, the "paucity of evidence" stands in contrast to the substantial evidence submitted by the United States regarding the "unique characteristics of the ETP".<sup>56</sup> Furthermore, the United States alleges that the Panel erred in, on the one hand, dismissing the value of evidence suggesting that dolphin bycatch in the Western Central Pacific Ocean ("WCPO") is significantly lower than in the ETP on the basis that the authors of the relevant study stated that more detailed analysis would be required and, on the other hand, basing its conclusion that harm to dolphins outside the ETP is significant and greater than in the ETP on studies that similarly noted the need for further study.<sup>57</sup>

27. Fifth, the United States alleges that the Panel acted inconsistently with Article 11 of the DSU by failing to fully consider two studies submitted by the United States as Panel Exhibits US-21 and

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<sup>53</sup>United States' appellant's submission, para. 114 (quoting Panel Report, para. 7.613).

<sup>54</sup>United States' appellant's submission, para. 101.

<sup>55</sup>United States' appellant's submission, para. 103.

<sup>56</sup>United States' appellant's submission, para. 106.

<sup>57</sup>United States' appellant's submission, para. 106 (referring to Panel Report, paras. 7.528 and 7.529).

US-22.<sup>58</sup> In particular, the United States disagrees with the Panel's statement that other studies "question[] the conclusions" of the studies contained in Panel Exhibits US-21 and US-22.<sup>59</sup> The United States submits that in fact they did not, and could not have done so, as the other studies referred to by the Panel largely pre-date the studies contained in the above-mentioned Panel exhibits.

28. Sixth, the United States alleges that the Panel's findings regarding depleted dolphin stocks are not supported by the facts. The sources cited by the Panel in support of its statement that depleted dolphin populations in the ETP are recovering in fact state that "dolphin stocks are *not* recovering at expected rates" and that "neither population is recovering at a rate consistent with these levels of depletion and reported kills".<sup>60</sup> Moreover, the United States takes issue with the Panel's statement that dolphin populations near Ghana and Togo are "severely depleted", because there is "no indication in the source cited that the dolphin stocks off the coast of Ghana and Togo are depleted because of tuna fishing activities".<sup>61</sup> Furthermore, the Panel "neglected to consider" evidence adduced by the United States demonstrating that dolphin populations in the ETP are depleted and that the most likely reason for recovery rates below the expected rates was the continued tuna purse seine fishing in the ETP, even under the AIDCP guidelines.<sup>62</sup>

29. Finally, the United States raises a challenge under Article 11 of the DSU relating to the Panel's finding that coexistence of the US "dolphin-safe" label and the AIDCP label would be a less trade-restrictive alternative measure. The United States alleges, first, that Mexico did not offer evidence indicating that consumers appreciate tuna that meets the AIDCP definition of "dolphin-safe" to the same degree as tuna that meets the definition set forth by the US "dolphin-safe" labelling

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<sup>58</sup>P. Wadel, G.M. Watters, T. Gerrodette, and S.B. Reilly, "Depletion of spotted and spinner dolphins in the eastern tropical Pacific: modeling hypotheses for their lack of recovery", *Marine Ecology Progress Series*, Vol. 343: 1-14 (published 7 August 2007) (Panel Exhibit US-21); and T. Gerrodette and J. Forcada, "Non-recovery of two spotted and spinner dolphin populations in the eastern tropical Pacific Ocean", *Marine Ecology Progress Series*, Vol. 291: 1-21 (published 28 April 2005) (Panel Exhibit US-22).

<sup>59</sup>United States' appellant's submission, para. 109.

<sup>60</sup>United States' appellant's submission, para. 112 (referring to S.R. Noren and E.F. Edwards, "Physiological and behavioural development in Delphinid calves: Implications for calf separation and mortality due to tuna purse-seine nets" in *Marine Mammal Science*, Vol. 23, No. 1 (January 2007) (Panel Exhibit US-4), p. 1; and S.B. Reilly et al., "Report of the Scientific Research Program under the International Dolphin Conservation Program Act", National Oceanic and Atmospheric Administration (NOAA) Technical Memorandum NOAA-TM-NMFS-SWFSC-372 (March 2005) (Panel Exhibit US-19), p. 32). (emphasis added by the United States)

<sup>61</sup>United States' appellant's submission, para. 111 (quoting Panel Report, para. 7.553).

<sup>62</sup>United States' appellant's submission, para. 113 (referring to Panel Exhibit US-4, *supra*, footnote 60, pp. 15-29; T. Gerrodette, G. Watters, W. Perryman, and L. Balance, "Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003", NOAA Technical Memorandum NMFS-SWFSC-422 (April 2008) (Panel Exhibits US-20 and MEX-33); Panel Exhibit US-21, *supra*, footnote 58; F. Archer, T. Gerrodette, S. Chivers, and A. Jackson, "Annual estimates of missing calves in the pantropical spotted dolphin bycatch of the eastern tropical Pacific tuna purse seine fishery" in NOAA's *Fishery Bulletin*, Vol. 102(2): 233-244 (2004) (Panel Exhibit US-27); and F. Archer, T. Gerrodette, T. Dizon, K. Abella, and S. Southern, "Unobserved kill of nursing dolphin calves in a tuna purse seine fishery" in *Marine Mammal Science*, Vol. 17, No. 3 (July 2001), pp. 540-554 (Panel Exhibit US-28)).



provisions. Second, the Panel misinterpreted the significance of evidence that US consumers prefer tuna that is "dolphin-safe". This evidence suggests that consumers prefer tuna that is "dolphin-safe" as defined under the measure at issue, rather than labelled "dolphin-safe" in accordance with different dolphin-safe conditions. The Panel further erred in evaluating the evidence in connection with its finding that consumers cannot distinguish between tuna caught in a manner that adversely affects dolphins and other tuna. In particular, the United States points to the Panel's statement that an opinion poll offered by Mexico is "the only piece of evidence presented in these proceedings to ascertain what US consumers in fact understand [by] the term[] 'dolphin-safe'."<sup>63</sup> However, this poll was not the only piece of evidence presented with regard to US consumers' understanding of "dolphin-safe" labelling. For instance, the United States introduced evidence in support of the contention that, at the time the measure at issue was adopted, "there was 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 a product that contained tuna caught in association with dolphins."<sup>64</sup>

3. Article 2.4 of the *TBT Agreement* and the Notion of "International Standard"

30. In the event that the Appellate Body finds the US "dolphin-safe" labelling provisions to constitute a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*, the United States seeks review by the Appellate Body of the Panel's finding that the AIDCP "dolphin-safe" definition and certification is an "international standard" within the meaning of Article 2.4 of that Agreement.<sup>65</sup> According to the United States, the Panel's conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the *TBT Agreement*, including the Panel's finding that the AIDCP is an "international standardizing organization" for the purposes of the *TBT Agreement*.

31. The United States recalls the Panel's statement that, in order to conclude that the AIDCP definition of "dolphin-safe" constitutes an "international standard", it had to find that: (i) the AIDCP definition is a standard; (ii) the AIDCP is an international standardizing organization; and (iii) the AIDCP standard was made available to the public. The United States asserts that the Panel's conclusion that the AIDCP is an "international standardizing organization" is in error. In support of its position, the United States refers to the Panel's finding that an international standardizing organization is "*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*

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<sup>63</sup>United States' appellant's submission, para. 130 (quoting Panel Report, para. 7.481).

<sup>64</sup>United States' appellant's submission, para. 130 (referring to United States' response to Panel Question 40, paras. 98-101).

<sup>65</sup>United States' appellant's submission, para. 167.

*standardization, and whose membership is open to the relevant body of every country.*"<sup>66</sup> The United States asserts that the AIDCP meets none of these criteria because: (i) it is not "international" within the meaning of the *TBT Agreement* because its membership was not and is not open to all WTO Members; (ii) it does not have "recognized activities in standardization"; and (iii) the parties to the AIDCP are parties to an international agreement, not to a body or organization.<sup>67</sup>

32. With respect to the question of whether the AIDCP is "open to the relevant bodies of at least all Members" and hence "international" for the purposes of the *TBT Agreement*, the United States submits that the Panel's conclusion that the AIDCP is "international" was based on "an incorrect understanding of what is required for an organization to be 'open'".<sup>68</sup> The United States contends that the AIDCP "was not open when the dolphin safe definition was developed, and the AIDCP is not open today".<sup>69</sup>

33. The United States points out that both Annex 1 to the *TBT Agreement* and the ISO/IEC Guide 2: 1991 refer to the openness of a body in the present tense ("a body that *is* open"). On this basis, the United States argues that the "organization must be open to all Members during the period during which the standard in question was developed and it must remain open thereafter."<sup>70</sup> The United States finds support for this interpretation in the TBT Committee's Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement<sup>71</sup> (the "TBT Committee Decision"), which defines openness to all Members as including "openness without discrimination with respect to the participation at the policy development level and at every stage of standards development".<sup>72</sup>

34. The United States notes that the period for signature of the AIDCP ended on 14 May 1999, but that the AIDCP resolutions in question were not adopted until 15 June 2001. For the United States, the closing of the signature period before the development of the definition at issue "precludes a finding that the AIDCP was open through signature for purposes of the definition at issue".<sup>73</sup> Moreover, the United States disagrees with the Panel's finding that the fact that all States whose vessels fished for tuna in the agreement area during the signature period were eligible to join

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<sup>66</sup>United States' appellant's submission, para. 137 (quoting Panel Report, para. 7.680). (emphasis added by the United States)

<sup>67</sup>United States' appellant's submission, para. 137.

<sup>68</sup>United States' appellant's submission, para. 138.

<sup>69</sup>United States' appellant's submission, para. 138.

<sup>70</sup>United States' appellant's submission, para. 139.

<sup>71</sup>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, in WTO document G/TBT/1/Rev.9, Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, 8 September 2008, pp. 37-39.

<sup>72</sup>United States' appellant's submission, para. 139 (quoting TBT Committee Decision, p. 38).

<sup>73</sup>United States' appellant's submission, para. 141.

the AIDCP and that there were no prohibitions of fishing in the agreement area at the time means that the AIDCP was open to all Members, "since other Members who may have an interest in the AIDCP's activities other than fishing (such as consumer or conservation interests) were ineligible to become parties to the AIDCP."<sup>74</sup>

35. With respect to the Panel's finding that the AIDCP remains open to all Members on a non-discriminatory basis, since any State or regional economic integration organization can be invited to accede to the agreement on the basis of a decision by the parties, the United States asserts that "[a] body in which Members may participate by invitation only is not a body that is 'open'."<sup>75</sup> The United States stresses that "becoming a party to the AIDCP is not an option available to at least all Members; it is an option available only to those Members invited".<sup>76</sup> For the United States, it follows therefore that "not all Members have the ability to participate in review or revision of the definitions at issue."<sup>77</sup>

36. The United States elaborates on the reasons why standardizing organizations must be open to all Members in order to be considered "international" for the purposes of the *TBT Agreement*. Referring to Articles 2.4 and 2.5 of the *TBT Agreement*, the United States submits that international standardizing organizations have the "power to affect" the rights and obligations of Members, and that all Members must therefore be able to participate in their work.<sup>78</sup> The United States stresses that, *if* "international standards" could be developed by bodies that are not open to all Members, all Members would be required to base their technical regulations on those international standards, despite the inability of some of them to participate in the development, review, and revision of those standards. Finally, the United States highlights that the *TBT Agreement* specifically recognizes that some transnational standardizing bodies are not "international bodies" for the purposes of the *TBT Agreement*. Thus, Annex 1.5 specifies that a "regional body" is a body not open to at least all Members.

37. With respect to the question whether the AIDCP has "recognized activities in standardization", the United States recalls the Panel's finding that recognition of standardizing activities can occur in two ways: either by participation in a body's standardization activities, or by acknowledgment of the "existence, legality and validity" of the body's standards.<sup>79</sup> The United States submits that the first criterion articulated by the Panel is flawed, and that the second, while valid in principle, was not properly applied by the Panel.

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<sup>74</sup>United States' appellant's submission, para. 142.

<sup>75</sup>United States' appellant's submission, para. 143.

<sup>76</sup>United States' appellant's submission, para. 143 (referring to AIDCP, Article IX).

<sup>77</sup>United States' appellant's submission, para. 143.

<sup>78</sup>United States' appellant's submission, para. 144.

<sup>79</sup>United States' appellant's submission, para. 150 (referring to Panel Report, para. 7.686).

38. According to the United States, by suggesting that participation in standardizing activities is evidence of the recognition of those activities, the Panel "effectively read the term 'recognized' out of the definition".<sup>80</sup> The United States suggests that, if the act of creating a standard was at the same time an act of recognition by the creators, "there would be no need to specify that standardization activity need to be recognized", since the existence of a standard would in itself establish that recognition occurred.<sup>81</sup> The Panel's criterion would thus fail to give meaning to the element of "recognition" in the definition of a "standardizing body".

39. The United States concedes that the Panel's second criterion of how recognition of standardizing activity occurs, namely, "through acknowledgment of a body's standards", is valid, but argues that the Panel did not apply it properly.<sup>82</sup> In particular, the United States asserts that the Panel "cited no facts and provided no findings" in support of its assertion that the parties to the AIDCP had acknowledged the existence, legality, and validity of the AIDCP "dolphin-safe" definition.<sup>83</sup>

40. In the United States' view, the passage from a court ruling cited by the Panel as evidence of the United States' recognition of the AIDCP standard does not support the Panel's conclusion, because the passage does not refer to the AIDCP standard, but instead to the definition of "dolphin-safe" envisaged for adoption into US law by the Panama Declaration. Moreover, the United States points out that the quoted passage discusses this definition in the context of its rejection by the US Congress for the United States' labelling scheme.<sup>84</sup>

41. The United States submits that, in any event, recognition of a single standard would not amount to recognition of a body's "standardizing activities". For the United States, the plural "activities" implies that "the body has been involved in the development of more than one standard."<sup>85</sup> The United States asserts that "[i]f recognition of a single standard were sufficient to make a body a 'standardizing body' then it would be impossible for Members to know at the time they were working on a standard whether that standard would be an international standard ... that would trigger the obligations under the TBT Agreement."<sup>86</sup> In the United States' view, the "better approach is to give meaning to 'standardizing activities' as being more than a single standard, such that the body's standardizing activities would have been recognized before the development of the standard at

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<sup>80</sup>United States' appellant's submission, para. 151.

<sup>81</sup>United States' appellant's submission, para. 151.

<sup>82</sup>United States' appellant's submission, para. 152.

<sup>83</sup>United States' appellant's submission, para. 153.

<sup>84</sup>United States' appellant's submission, paras. 155-158.

<sup>85</sup>United States' appellant's submission, para. 154.

<sup>86</sup>United States' appellant's submission, para. 154.

issue."<sup>87</sup> This would mean that all WTO Members would "be on notice that the standard being developed would trigger the TBT Agreement obligations".<sup>88</sup>

42. Finally, the United States argues that the Panel does not explain why recognition by one Member would be sufficient to satisfy the requirement of "recognition" of a body's "standardizing activities" for purposes of the *TBT Agreement*. If this were so, the United States submits, "Members would be unable to dispute the existence, legality, and validity of a standard that may be acknowledged by another Member."<sup>89</sup>

43. With respect to the question of whether the AIDCP is an "organization", the United States recalls that the Panel relied upon the ISO/IEC Guide 2: 1991 to determine that an "organization" is a "legal or administrative entity" that is "based on the membership of other bodies" and has "an established constitution and its own administration".<sup>90</sup> The United States submits that the Panel "correctly concluded that the parties to the AIDCP do not meet this definition, but then proceeded to analyze an entirely different organization" to find that the AIDCP may nonetheless be deemed to constitute an "organization".<sup>91</sup> The United States challenges both the legal reasoning and the factual basis of this finding.

44. The United States recalls the Panel's observation that "[t]he AIDCP is an international agreement concluded among States" and "does not as such have an established constitution or its own administration".<sup>92</sup> The United States agrees with this statement and argues that this should have been the end of the Panel's enquiry. The United States faults the Panel for relying on the characteristics of "a separate organization—the Inter-American Tropical Tuna Commission [“IATTC”]" in order to conclude that the parties to the AIDCP constitute an organization.<sup>93</sup> In the United States' view, the alleged "institutional links" between the AIDCP and the IATTC were insufficient to attribute to the parties to the AIDCP the institutional structure maintained by a separate entity. The United States therefore argues that the Panel's examination of the IATTC was "irrelevant".<sup>94</sup>

45. The United States additionally alleges that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts concerning the links it found to exist between the AIDCP and the IATTC. The United States submits that the Panel ignored the "many key

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<sup>87</sup>United States' appellant's submission, para. 154.

<sup>88</sup>United States' appellant's submission, para. 154.

<sup>89</sup>United States' appellant's submission, para. 159.

<sup>90</sup>United States' appellant's submission, para. 161 (referring to Panel Report, para. 7.680).

<sup>91</sup>United States' appellant's submission, para. 161.

<sup>92</sup>United States' appellant's submission, para. 162 (quoting Panel Report, para. 7.682).

<sup>93</sup>United States' appellant's submission, para. 163.

<sup>94</sup>United States' appellant's submission, para. 163.

attributes that distinguish the two entities".<sup>95</sup> The United States emphasizes that the AIDCP is legally distinct from the IATTC and that the IATTC has no legal authority to make decisions regarding the subject matter of the AIDCP. According to the United States, these "uncontested facts" support a reversal of the Panel's finding that the "institutional links" between the AIDCP and the IATTC are "sufficient to consider the attributes of the IATTC as attributes of the parties to the AIDCP".<sup>96</sup>

B. *Arguments of Mexico – Appellee*

1. Annex 1.1 to the TBT Agreement and the Definition of "Technical Regulation"

46. Mexico requests the Appellate Body to uphold the Panel's finding that the measure at issue constitutes a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*. Mexico disagrees with the United States' contention that the Panel's interpretation of "mandatory" is indistinguishable from the term "requirements". Mexico contends that the Panel carefully explained how its interpretation distinguished the meaning of "mandatory" from the meaning of "requirements". Mexico agrees, however, with the United States that: (i) labelling requirements may be equally prescribed by technical regulations and standards; (ii) a conclusion that compliance with certain labelling requirements is "mandatory" within the meaning of Annex 1.1 must be based on considerations other than, or beyond, the mere fact that such documents establish criteria for the use of a certain label; and (iii) a labelling requirement sets out the conditions that a product is required to meet in order to use a label.

47. Mexico maintains that what makes the US "dolphin-safe" labelling provisions mandatory is not whether a label is *de jure* required in order to sell tuna products in the market. Rather, it is the fact that the US "dolphin-safe" labelling provisions restrict retailers, consumers, and producers to a single choice for labelling tuna products as "dolphin-safe", because it is not possible to label tuna products as "dolphin-safe" under any other definition. No other label, term, or symbol that claims or suggests dolphin-safe can be used unless it meets the requirements in the US "dolphin-safe" labelling provisions. Mexico contends that the prohibition of using a label based on any standard other than the US standard is a measure that is separate from and in addition to the "labelling requirements". It is this prohibition that transforms what would otherwise be a standard into a technical regulation.

48. Mexico takes issue with the United States' argument that only the interpretation set out in the separate opinion would leave space for characterizing voluntary labelling schemes as standards. Mexico contends that, in the absence of the prohibition in the US "dolphin-safe" labelling provisions,

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<sup>95</sup>United States' appellant's submission, para. 164.

<sup>96</sup>United States' appellant's submission, para. 164.

both the AIDCP dolphin-safe standard and the US dolphin-safe standard could co-exist, each subject to its own labelling requirements. This would constitute a voluntary labelling scheme using "standards" (that is, documents with which compliance is not mandatory), as opposed to the current scheme of a "technical regulation" (that is, a document with which compliance is mandatory).

49. Mexico also disagrees with the United States' contention that the Panel failed to give effect to the statement by the Appellate Body in *EC – Asbestos* that mandatory compliance is characterized by being "binding" or "compulsory".<sup>97</sup> Contrary to what the United States argues, the relevant statements by the Appellate Body in *EC – Asbestos* and by the Panel in the present dispute make it clear that "regulation ... in a binding and compulsory fashion" relates to the "product characteristics" (that is, the "dolphin-safe" label) and not to the sale, importation, distribution, or marketing of the tuna product. Mexico argues that this exposes a "fundamental flaw" in the United States' argument and in the separate opinion, because, under their interpretation, whether or not the product is permitted to be sold in the market is pivotal to the meaning of "mandatory". Mexico, however, contends that what matters is not whether the "sale" of tuna products is regulated but whether the "product characteristics"—that is, the "dolphin-safe" label—are regulated.<sup>98</sup>

50. Mexico disagrees with the United States' argument that the Panel incorrectly applied the "positive and negative distinction" employed by the Appellate Body in *EC – Asbestos*.<sup>99</sup> For Mexico, the Appellate Body's reference to "prescribing or imposing" product characteristics relates to the mandatory criterion contained in the definition of "technical regulation", in particular, to the fact that a technical regulation can prescribe or impose characteristics in a positive or negative form. Thus, for Mexico, the reference to "positive or negative form" is relevant to the mandatory criterion in the definition of a "technical regulation".<sup>100</sup>

51. With respect to the United States' allegation that the Panel erred in relying on the fact that the measure at issue is legally enforceable and binding under US law in its analysis of whether the measure constitutes a technical regulation, Mexico contends that the United States confuses the enforcement of "labelling requirements" with the enforcement of the single "dolphin-safe" definition.

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<sup>97</sup>Mexico's appellee's submission, paras. 54 and 55 (quoting United States' appellant's submission, paras. 38 and 39).

<sup>98</sup>Mexico's appellee's submission, para. 58.

<sup>99</sup>Mexico's appellee's submission, para. 60 (referring to Appellate Body Report, *EC – Asbestos*, para. 69).

<sup>100</sup>Mexico's appellee's submission, para. 62 (referring to Appellate Body Report, *EC – Asbestos*, paras. 68 and 69).

Mexico maintains that it is the "separate and distinct prohibition" of any other label that is the focus of the Panel's analysis with respect to "enforceability".<sup>101</sup>

52. Mexico also takes issue with the United States' arguments regarding "exclusivity". Mexico contends that what the United States refers to as "exclusivity" is the single exclusive definition of "dolphin-safe" under US law. Mexico disagrees with the United States' argument that the Panel's finding of "exclusivity" and its reference to "mandatory standard" in the ISO/IEC Guide 2: 1991 is not based on the text of the *TBT Agreement*.<sup>102</sup> Mexico maintains that the introductory clause of Annex 1 to the *TBT Agreement* allows recourse to the definitions contained in the ISO/IEC Guide 2: 1991. Accordingly, the ISO/IEC Guide 2: 1991 provides that a "mandatory standard" is one that is made compulsory by, *inter alia*, an "exclusive reference" in a regulation, and an "exclusive reference (to standards)" is a reference that states that the only way to meet the relevant requirements of a technical regulation is to comply with the standard(s) referred to. Mexico contends that the Explanatory Note to Annex 1.2 to the *TBT Agreement* provides the "relevant textual link" to support the proposition that a "mandatory standard" under the ISO/IEC Guide 2: 1991 is a "technical regulation" under the *TBT Agreement*.<sup>103</sup> Mexico concludes that the "standard" set out in the US "dolphin-safe" labelling provisions is a "mandatory standard" within the meaning of the ISO/IEC Guide 2: 1991 and is therefore, by virtue of the Explanatory Note to Annex 1.2, a "technical regulation" within the meaning of the *TBT Agreement*.

53. Mexico further submits that the Panel acknowledged that the situation in this dispute closely resembles the disputes in *EC – Sardines* and *EC – Trademarks and Geographical Indications (Australia)*. For Mexico, these rulings indicate that the mere fact that it is legally permissible to place a product on the market without using the designation that is regulated by the measure at issue does not compel the conclusion that the measure is not "mandatory" within the meaning of Annex 1.1, where the measure "effectively regulate[s] in a binding manner the use of the appellation".<sup>104</sup> Mexico disagrees with the separate opinion that the Appellate Body's findings in *EC – Sardines* are irrelevant to the present case, because the situation in that dispute was different to the present case in that it involved a prohibition to market certain preserved sardines as "sardines", and thus these products were prohibited to enter the sardine market altogether. Mexico submits that, in *EC – Sardines*, the product at issue could be marketed as "sardines" only if it were a certain species of fish, but it could in any event be sold in the EU market—although not as "sardines"—if it consisted of another species.

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<sup>101</sup>Mexico's appellee's submission, para. 68 (referring to Panel Report, paras. 7.128, 7.131, 7.137, and 7.142-7.145).

<sup>102</sup>Mexico's appellee's submission, para. 70 (referring to United States' appellant's submission, footnote 97 to para. 66).

<sup>103</sup>Mexico's appellee's submission, para. 75.

<sup>104</sup>Mexico's appellee's submission, para. 81 (referring to Panel Report, paras. 7.133-7.137).



Similarly, in this dispute, the tuna products at issue can be marketed as "dolphin-safe" only if they comply with the requirements of the US "dolphin-safe" labelling provisions. If they do not comply with these requirements, they may be sold in the US market, but not as "dolphin-safe".<sup>105</sup>

54. Furthermore, Mexico maintains that the US "dolphin-safe" labelling provisions concern "regulation" and not "standardization". According to Mexico, the act of regulation has an imperative and binding nature, whereas standardization is not imperative or binding in nature. Standardizing bodies have knowledge and expertise in the relevant area of standardization. Market participants understand the benefits of standardization and, for that reason, apply standards. They are not compelled by a regulatory measure to use specific standards because, by their very nature, standards are optional and voluntary. To the contrary, in the present case, US central government bodies have pursued certain policy objectives by adopting "dolphin-safe" labelling requirements with which market participants must comply if they are to use any form of "dolphin-safe" designation. Thus, Mexico concludes that the US "dolphin-safe" labelling provisions do not standardize, but rather regulate.

55. Finally, in the event that the Appellate Body reverses the Panel's finding that the measure at issue is of a *de jure* mandatory nature, Mexico requests the Appellate Body to affirm the Panel's conclusion on the basis that the measure is *de facto* mandatory. Mexico contends that the measure at issue is *de facto* mandatory, because market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a "dolphin-safe" designation.

## 2. Consistency of the Measure at Issue with Article 2.2 of the *TBT Agreement*

56. Mexico requests the Appellate Body to uphold the Panel's finding that the US "dolphin-safe" labelling provisions are more trade restrictive than necessary to fulfil their legitimate objectives and are therefore inconsistent with Article 2.2 of the *TBT Agreement*. According to Mexico, the Panel's finding is correct because the United States' objectives can be fulfilled with a less trade-restrictive alternative measure, namely, allowing the AIDCP label and the US "dolphin-safe" label to coexist in the US market.

57. Mexico maintains that the Panel correctly found that coexistence of the AIDCP label with the US "dolphin-safe" label would be a less trade-restrictive alternative measure that would fulfil the United States' objectives. In particular, 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, Mexico contends that the Panel was correct in finding that the

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<sup>105</sup>Mexico's appellee's submission, paras. 84 and 85 (referring to Panel Report, paras. 7.138 and 7.164; and Appellate Body Report, *EC – Sardines*, para. 118).

US "dolphin-safe" label currently does not provide certainty to consumers and that the extent to which consumers would be misled would not be greater if the AIDCP label were also allowed. Mexico considers that the Panel found that it was misleading not to allow consumers to be aware that tuna was caught in compliance with the AIDCP, because the Panel stated that, to the extent the measure at issue makes no distinction between setting on dolphins in general and setting on dolphins under AIDCP standards, it would not allow the US consumer to be informed of the AIDCP dolphin protection measures. Mexico also points to the Panel's statement that it was 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 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 of dolphins in those fisheries.

58. Regarding the United States' argument that coexistence of the AIDCP label and the US "dolphin-safe" label on the US market would be confusing for consumers, Mexico contends that the Panel did not share the United States' scepticism that consumers could understand the difference between the two labels. Moreover, Mexico alleges that the United States makes little effort to provide consumers with accurate information on what its "dolphin-safe" label means. The relevant website<sup>106</sup> only provides information on what the "dolphin-safe" label means for tuna caught in the ETP, but does not provide information about the meaning of the label for tuna harvested in other ocean regions. This gives the false impression that tuna caught in those other regions have been certified as not causing death or serious injury to dolphins. Mexico further argues that the fact that in January 2003 tuna products complying with the AIDCP standard could be labelled "dolphin-safe" in the United States demonstrates that, prior to this dispute, the United States agreed that the AIDCP standard met the expectations of producers, retailers, and consumers, and that the United States had the ability to alter the definition.

59. With respect to the United States' objective of 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, Mexico takes issue with the United States' argument that allowing the AIDCP label would not address the risks to dolphins outside the ETP. Mexico contends that the Panel found that the measure at issue may actually be harmful to dolphin populations worldwide, because it has the effect of encouraging fleets to fish outside the tightly regulated ETP and to fish instead in other ocean regions where dolphins are unprotected. Thus, Mexico considers that the Panel found the

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<sup>106</sup>According to Mexico, the website <[www.dolphinsafe.gov](http://www.dolphinsafe.gov)> is the only website with information published by the United States Department of Commerce (the "USDOC") for consumers on the meaning of the "dolphin-safe" label. (Mexico's appellee's submission, para. 166)

US dolphin protection provisions to be "counter-productive" and contrary to the objective of dolphin protection outside the ETP.<sup>107</sup>

60. In addition, in response to the United States' argument that allowing setting on dolphins is inherently harmful to dolphins and would therefore frustrate the dolphin protection objective, Mexico submits that the United States is suggesting that its goal is to eliminate the possibility of even a single dolphin mortality in all fishing operations. However, it has been established that dolphin mortalities occur in relation to all the major commercial tuna-fishing methods, including fish aggregating devices ("FAD") sets, unassociated sets, gillnet fishing, and longline fishing.<sup>108</sup> In the ETP, the incidental mortalities of dolphins in relation to their populations are lower than the rate of incidental mortalities of marine mammals permitted by the United States in its domestic fisheries.

61. Mexico maintains that, even if the Appellate Body were to find merit in the United States' arguments, the US "dolphin-safe" labelling provisions are nonetheless more trade restrictive than necessary within the meaning of Article 2.2 of the *TBT Agreement*, because they are applied in a manner that constitutes a means of arbitrary and unjustifiable discrimination and thus constitute an unnecessary obstacle to international trade contrary to the sixth recital of the preamble of the *TBT Agreement*. Mexico contends that Article 2.2 must be read together with the sixth recital, which requires Members not to apply technical regulations in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Noting similarity between the present dispute and the factual situation in *US – Shrimp*, Mexico submits that the US "dolphin-safe" labelling provisions have created a "rigid and unbending standard".<sup>109</sup> The purpose of the measure at issue is to "unilaterally and extraterritorially impose U.S. fishing method requirements" as a condition for access to the principal distribution channels in the US tuna products market, and in that manner to pressure foreign tuna fleets to change their fishing methods.<sup>110</sup>

62. Finally, in response to the United States' contention that the Panel implied that the United States was required to fulfil its objective to the same extent inside and outside the ETP, regardless of the cost, Mexico asserts that the Panel was correct in rejecting the United States' argument that the measure at issue is "calibrated" to risks to dolphins in different ocean regions. The Panel was correct in taking into account 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 killed or seriously

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<sup>107</sup>Mexico's appellee's submission, para. 170.

<sup>108</sup>Mexico's appellee's submission, para. 175.

<sup>109</sup>Mexico's appellee's submission, para. 183 (quoting Appellate Body Report, *US – Shrimp*, para. 163).

<sup>110</sup>Mexico's appellee's submission, paras. 178-186.

injured.<sup>111</sup> Mexico further submits that the United States Department of Commerce (the "USDOC") has never conducted an inquiry into whether it should consider designating any ocean region as having "regular and significant association between marine mammals and tuna" or as having "a regular and significant mortality or serious injury to dolphins", and therefore never evaluated the risk to dolphins from tuna fishing in other ocean regions.<sup>112</sup> In addition, the United States did not submit to the Panel any information regarding cost for the tuna industry of carrying independent observers. Mexico contends that, in the absence of such evidence, it would not have been appropriate for the Panel to rely on such factors as a justification for the failure of the US measure to fulfil its objectives outside the ETP.

63. Furthermore, Mexico requests the Appellate Body to reject the United States' allegations that the Panel failed to make an objective assessment of the facts and therefore acted inconsistently with Article 11 of the DSU.

64. First, Mexico disagrees with the United States that the Panel made contradictory findings regarding the relative risks to dolphins arising from different fishing techniques. Mexico alleges that the United States relies on a "selective quotation" that omits important information when it quoted the Panel Report. In particular, Mexico asserts that the United States omitted the underlined part of the sentence: "[i]t 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."<sup>113</sup> Mexico asserts that it submitted substantial evidence demonstrating that the fishing methods permitted under the AIDCP have been successful in limiting dolphin mortalities to levels considered acceptable in fisheries subject to US territorial jurisdiction. Mexico agrees that high risks to dolphins exist in other ocean regions where nets are being set on dolphins.<sup>114</sup>

65. Second, in response to the United States' challenge of the Panel's findings relating to the harm to dolphins resulting from setting on dolphins to catch tuna as compared to the harm to dolphins resulting from other fishing methods, Mexico disagrees with the United States that the Panel failed to address evidence suggesting that the levels of the tuna-dolphin association in the ETP are unique, and the implications of that for risks to dolphins. Mexico maintains that the Panel extensively analyzed

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<sup>111</sup>Mexico's appellee's submission, paras. 152 and 153 (quoting Panel Report, paras. 7.549, 7.550, and 7.561).

<sup>112</sup>Mexico's appellee's submission, para. 156 (referring to Panel Report, para. 2.23, in turn referring to United States' first written submission to the Panel, paras. 38 and 39; and United States' responses to Panel Questions 12 and 85).

<sup>113</sup>Mexico's appellee's submission, paras. 117 and 118 (quoting Panel Report, para. 7.438, and referring to United States' appellant's submission, para. 94). (underlining added by Mexico)

<sup>114</sup>Mexico's appellee's submission, para. 118.

the United States' contention that certain environmental conditions in the ETP (such as the intensity of tuna-dolphin association) are unique, and refers to the Panel's statement that, even assuming this were the case, "the evidence submitted to the Panel suggests that the *risks* faced by dolphin populations in the ETP are *not*."<sup>115</sup>

66. Third, Mexico submits that the Panel objectively assessed the evidence concerning relative harm to dolphins inside and outside the ETP. Mexico submits that the Panel did not say that the evidence regarding risks to dolphins arising from tuna fishing outside the ETP was "minimal", as the United States asserts.<sup>116</sup> Mexico argues that the United States omits a number of the Panel's references to relevant evidence and takes statements by the Panel out of context. According to Mexico, while the United States alleges that the Panel failed to address evidence it had put forward, the United States acknowledges that the Panel cited other evidence demonstrating that there are "multiple examples of numerous dolphins being killed annually in other fisheries."<sup>117</sup> For Mexico, the United States itself thus acknowledges that the Panel engaged in weighing that evidence. In any event, Mexico contends that panels have a margin of discretion in the assessment of the facts and not according the weight that one of the parties believes should be accorded to the evidence does not in itself constitute legal error.

67. Fourth, Mexico disagrees with the United States that the evidence relating to risks to dolphins outside the ETP did not support the Panel's conclusion. Mexico contends that the United States ignores much of the evidence before the Panel or argues that the Panel should have construed evidence differently.<sup>118</sup> In respect of the United States' argument that the Panel erred in relying on evidence relating to harm to dolphins from driftnet fishing because tuna caught using this fishing method in the high seas is not eligible for the US "dolphin-safe" label, Mexico submits that most of the evidence cited by the Panel does not involve driftnet fishing on the high seas, but instead refers to the use of driftnets in coastal waters. Mexico emphasizes that tuna caught in this manner is eligible for the US "dolphin-safe" label under the measure at issue. Moreover, restrictions concerning tuna caught with driftnets on the high seas do not apply automatically. To "trigger the enforcement

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<sup>115</sup>Mexico's appellee's submission, para. 133 (quoting Panel Report, para. 7.552 (original emphasis)). Mexico also notes that, in making this finding, the Panel referred to several different pages of N.M. Young and S. Iudicello, "Worldwide Bycatch Of Cetaceans: 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", NOAA Technical Memorandum NMFS-OPR-36 (July 2007) (Panel Exhibit MEX-05).

<sup>116</sup>Mexico's appellee's submission, para. 120 (quoting United States' appellant's submission, para. 100).

<sup>117</sup>Mexico's appellee's submission, para. 119 (quoting United States' appellant's submission, para. 99, in turn quoting Panel Report, para. 7.552).

<sup>118</sup>Mexico's appellee's submission, paras. 126, 127, and 128 (referring to National Research Council, "Dolphins and the Tuna Industry" (National Academy Press, Washington, D.C., 1992) (Panel Exhibit MEX-02); and Panel Exhibit MEX-05, *supra*, footnote 115).

mechanism", a country must be designated by the USDOC as a nation fishing with large scale driftnets.<sup>119</sup> The only country to have been so designated is Italy.<sup>120</sup>

68. Fifth, Mexico disagrees with the United States that the Panel failed to consider fully two studies submitted by the United States as Panel Exhibits US-21 and US-22 regarding the unobserved effects on dolphins from being chased and encircled in the ETP. Mexico contends that the validity and reliability of these two studies was a major topic of the panel proceedings and that these studies were based on estimates of population and population growth that the USDOC own 2008 abundance estimate considered to be incorrect.<sup>121</sup> The 2008 study concluded that each of the depleted dolphin stocks (coastal and northeastern offshore spotted and eastern spinner dolphins) were estimated to be growing at rates near the 4-8% maximum possible for dolphins.<sup>122</sup> Furthermore, the AIDCP's Scientific Advisory Board produced a report recommending increases in the dolphin mortality limits enforced by the AIDCP based on the fact that the populations of these stocks are significantly larger than previously believed.<sup>123</sup>

69. Sixth, Mexico disagrees with the United States that the Panel's findings regarding depleted dolphin stocks are not supported by facts. Mexico maintains that the Panel fully acknowledged the United States' argument that dolphin populations are not increasing fast enough.<sup>124</sup> With respect to the United States' allegation that the Panel "neglected to consider" evidence that two dolphin stock populations are not growing at the expected rates because of unobserved harm resulting from setting on dolphins, Mexico contends that the Panel described and analyzed the studies and evidence referred to by the United States.<sup>125</sup> Therefore, in Mexico's view, the United States' claim of "neglect" is in reality a complaint that the Panel did not agree with the United States.<sup>126</sup>

70. Finally, Mexico rejects the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in reaching its finding that the coexistence of the US "dolphin-safe" label and the AIDCP label would be a less trade-restrictive alternative measure. Mexico maintains that the

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<sup>119</sup>Mexico's appellee's submission, para. 123 (referring to *United States Code*, Title 50, Section 216.24(f)(7) (Panel Exhibit US-23b)).

<sup>120</sup>Mexico's appellee's submission, para. 123 (referring to Mexico's comments on United States' responses to Panel Questions after second Panel meeting, para. 27).

<sup>121</sup>Mexico's appellee's submission, paras. 143 and 144 (referring to United States' appellant's submission, para. 108; and Mexico's second written submission to the Panel, paras. 43-60).

<sup>122</sup>Mexico's appellee's submission, paras. 139 and 140 (referring to Panel Exhibits US-20 and MEX-33, *supra*, footnote 62, p. 12; and Mexico's second written submission to the Panel, para. 50-61).

<sup>123</sup>Mexico's appellee's submission, para. 141 (referring to International Dolphin Conservation Program (IDCP) Scientific Advisory Board, "Updated Estimates Of Nmin And Stock Mortality Limits", Document SAB-07-05 (30 October 2009) (Panel Exhibit MEX-91)).

<sup>124</sup>Mexico's appellee's submission, para. 137 (referring to Panel Report, para. 7.557).

<sup>125</sup>Mexico's appellee's submission, para. 138 (referring to Panel Report, paras. 7.495-7.499).

<sup>126</sup>Mexico's appellee's submission, para. 138 (referring to United States' appellant's submission, para. 113).

Panel did not disregard, as alleged by the United States, "ample evidence" that retailers will sell and consumers will purchase tuna products that are "dolphin-safe" as defined under the measure at issue, rather than labelled "dolphin-safe" in accordance with different conditions, such as the AIDCP.<sup>127</sup> Mexico contends that the Panel considered in its analysis of Article 2.1, evidence suggesting that, contrary to Mexico's position, while the AIDCP label would not be acceptable to retailers as an alternative "dolphin-safe" certification, US retailers would be prepared to offer Mexican tuna products for sale if they meet the conditions for labelling under the existing US measure.<sup>128</sup> For Mexico, this demonstrates that the Panel considered relevant evidence and did not fail to make an objective assessment of the matter.

71. Moreover, Mexico submits that the Panel did not exceed its margin of discretion in assessing evidence when finding that a poll was the only piece of evidence presented in respect of the US consumers' understanding of "dolphin-safe" labelling. Additional evidence adduced by the United States refers to consumers' perception from more than 20 years ago and is thus irrelevant to determine consumer perceptions today. For Mexico, the Panel properly exercised its discretion as the trier of facts in deciding which evidence to utilize in making its findings.<sup>129</sup>

3. Article 2.4 of the TBT Agreement and the Notion of "International Standard"

72. Mexico requests the Appellate Body to reject the United States' appeal and to uphold the Panel's findings that the AIDCP standard is an "international standard" within the meaning of Article 2.4 of the TBT Agreement.<sup>130</sup>

73. At the outset, Mexico stresses that the United States is a founding member of the AIDCP and "fully participated in the creation and establishment of the AIDCP's dolphin-safe standard".<sup>131</sup> Mexico highlights that "the very purpose of that standard was to facilitate access of tuna products into the U.S. market" and that the United States enacted the International Dolphin Conservation Program Act<sup>132</sup> (the "IDCPA") in 1997 in order to, *inter alia*, bring the United States' definition of "dolphin-safe" into conformity with the AIDCP standard.<sup>133</sup>

74. Mexico rejects the United States' argument that the AIDCP is not "open" to the relevant bodies of at least all WTO Members and therefore not "international" for the purposes of the

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<sup>127</sup>Mexico's appellee's submission, para. 192.

<sup>128</sup>Mexico's appellee's submission, para. 193 (referring to Panel Exhibit MEX-58 (BCI)).

<sup>129</sup>Mexico's appellee's submission, paras. 195 and 196.

<sup>130</sup>Mexico's appellee's submission, para. 226.

<sup>131</sup>Mexico's appellee's submission, para. 198.

<sup>132</sup>International Dolphin Conservation Program Act, Public Law No. 115-42, 111 Stat. 1122 (15 August 1997) (Panel Exhibit MEX-21).

<sup>133</sup>Mexico's appellee's submission, para. 198.

*TBT Agreement*. Mexico submits that the Panel correctly concluded otherwise, on the basis that the AIDCP provides for accession by new States or regional economic integration organizations, that it was open for signature from 1998 to 1999, and that it remains open to accession by any States or regional economic integration organizations that are invited to accede to the AIDCP on the basis of a decision by the parties.<sup>134</sup>

75. Mexico disagrees with the United States' argument that the AIDCP was not open when the AIDCP "dolphin-safe" definition was developed. Mexico submits that the definition embodied in the resolutions of the AIDCP was based on "the definition initially developed in the Panama Declaration in 1995", and that the parties to the AIDCP were "well aware" of this definition when the AIDCP was enacted.<sup>135</sup> Mexico further claims that the AIDCP "dolphin-safe" definition was elaborated during the period for signature of the AIDCP. Hence, Mexico submits, the AIDCP was open when the AIDCP definition of "dolphin-safe" was developed.<sup>136</sup>

76. Mexico argues that the requirement that new parties need to be invited in order to join the AIDCP does not mean that the AIDCP is not open to the relevant bodies of at least all WTO Members. Mexico contends that, considering the particular nature of the AIDCP regime that regulates tuna fishing in the ETP, it is understandable that any State or regional organization that has interest in the AIDCP regulation of tuna fishing techniques can accede today "by a simple invitation of the rest of members".<sup>137</sup> Mexico suggests that being invited to accede to the AIDCP is a "formality". Mexico further notes that no additional countries or regional economic integration organizations have expressed an interest in joining the AIDCP and that "it is common that during the AIDCP meetings, Parties to the Agreement invite observer countries that regularly attend such meetings with the intention in the future to become Parties."<sup>138</sup>

77. Mexico stresses that, unlike the *Agreement on Sanitary and Phytosanitary Measures* (the "SPS Agreement"), which identifies three specific international standardizing organizations, the *TBT Agreement* "retains flexibility for determining what are relevant and applicable international standards on a case by case basis".<sup>139</sup>

78. Mexico supports the Panel's conclusion that the AIDCP has "recognized activities in standardization". Mexico submits that it has demonstrated the recognition of the AIDCP's standardizing activities by the United States by showing that the United States "was a founding and

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<sup>134</sup>Mexico's appellee's submission, para. 206.

<sup>135</sup>Mexico's appellee's submission, para. 207.

<sup>136</sup>Mexico's appellee's submission, para. 207.

<sup>137</sup>Mexico's appellee's submission, para. 208.

<sup>138</sup>Mexico's appellee's submission, para. 209.

<sup>139</sup>Mexico's appellee's submission, para. 211.



fully participating member of the AIDCP".<sup>140</sup> Mexico agrees with the Panel that participation by countries in the development of a standard "is sufficient evidence of their recognition".<sup>141</sup> Mexico further submits that the elaboration of the "dolphin-safe" definition was one of the main reasons for many members to participate in the AIDCP. Mexico suggests that this is a "clear signal of acknowledgement".<sup>142</sup>

79. In Mexico's view, the fact that the United States has disallowed the use of the AIDCP "dolphin-safe" label "does not mean that the AIDCP does not have 'standardizing activities' or that the AIDCP dolphin-safe label is not currently being used."<sup>143</sup> Moreover, Mexico submits that the AIDCP's main role is to establish rules and procedures related to the "interaction between fishing and dolphins" and that, with regard to the protection of dolphins in the ETP, the AIDCP is the exclusive organization with recognized activities in standardization.<sup>144</sup> Mexico points out that the AIDCP's members have 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".<sup>145</sup>

80. Mexico rejects the United States' argument that the parties to the AIDCP are merely parties to an international agreement, not to a body or an organization. Mexico further submits that the Panel correctly identified the "institutional link" between the AIDCP and the IATTC.<sup>146</sup> Mexico emphasizes that this institutional link is "well established in the AIDCP itself".<sup>147</sup> In this respect, Mexico notes that Article XIV of the AIDCP states that the parties to the AIDCP shall "request the IATTC to provide Secretariat support and to perform such other functions as are set forth in this Agreement or are agreed upon pursuant to this Agreement".<sup>148</sup> Mexico also points to other provisions of the AIDCP that demonstrate the "integral role" that the IATTC has in coordinating the implementation of the AIDCP.<sup>149</sup>

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<sup>140</sup>Mexico's appellee's submission, para. 213.

<sup>141</sup>Mexico's appellee's submission, para. 213.

<sup>142</sup>Mexico's appellee's submission, para. 216.

<sup>143</sup>Mexico's appellee's submission, para. 216.

<sup>144</sup>Mexico's appellee's submission, para. 218.

<sup>145</sup>Mexico's appellee's submission, para. 218 and footnote 235 thereto (referring to AIDCP, "Procedures for Maintaining the AIDCP List of Qualified Captains" (amended 24 June 2004); "Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds" done at 7th meeting with the parties, Manzanilla (Mexico), 24 June 2002; and "Guidelines for Required Raft for the Observation and Rescue of Dolphins" done at 22nd meeting of the parties, La Jolla (USA), 30 October 2009 (Panel Exhibit MEX-83)).

<sup>146</sup>Mexico's appellee's submission, para. 221 (quoting Panel Report, para. 7.684).

<sup>147</sup>Mexico's appellee's submission, para. 222.

<sup>148</sup>Mexico's appellee's submission, para. 222 (quoting AIDCP).

<sup>149</sup>Mexico's appellee's submission, para. 223.

81. Mexico requests the Appellate Body to reject the United States' claims under Article 11 of the DSU, and in particular the United States' argument that the parties to the AIDCP are not the same as the members of the IATTC. Mexico points out that both the AIDCP and the IATTC remain open to accession by any State. Mexico concludes that the Panel did not fail to make an objective assessment of the facts before it as required by Article 11 of the DSU.

C. *Claims of Error by Mexico – Other Appellant*

1. Consistency of the Measure at Issue with Article 2.1 of the *TBT Agreement*

82. Mexico alleges various errors in the Panel's analysis and requests the Appellate Body to reverse the Panel's finding that the US "dolphin-safe" labelling provisions are not inconsistent with Article 2.1 of the *TBT Agreement*, and to find instead that the measure at issue is inconsistent with the United States' obligations under Article 2.1. In particular, Mexico alleges that the Panel erred in its interpretation and application of the phrase "treatment no less favourable" in Article 2.1. Additionally, Mexico challenges several intermediate findings and conclusions by the Panel as legally erroneous and contrary to the Panel's duty to make an objective assessment of the matter before it as required under Article 11 of the DSU.

(a) *Interpretation and Application of Article 2.1 of the *TBT Agreement**

83. Mexico faults the Panel for applying what Mexico refers to as a "'denial of access to an advantage' test" for determining whether a measure provides "less favourable treatment" within the meaning of Article 2.1.<sup>150</sup> Mexico agrees that "the denial of an advantage could lead to the denial of competitive opportunities and therefore to a violation of the non-discrimination obligations in Article 2.1."<sup>151</sup> Mexico suggests, however, that the Panel applied a standard under which a measure could be found to be inconsistent with Article 2.1 of the *TBT Agreement* only to the extent that it imposes an "absolute prohibition or bar" on imports.<sup>152</sup>

84. Regarding the Panel's interpretation of Article 2.1 of the *TBT Agreement*, Mexico acknowledges that the Panel correctly considered the ordinary meaning of the phrase "treatment no less favourable". Yet, in Mexico's view, the Panel failed to "fully consider the context of Article 2.1 and the object and purpose of the *TBT Agreement*".<sup>153</sup> Referring in particular to past jurisprudence interpreting the national treatment and most favoured nation ("MFN") provisions in the context of the

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<sup>150</sup>Mexico's other appellant's submission, para. 74 (referring to Panel Report, paras. 7.284, 7.291, and 7.301).

<sup>151</sup>Mexico's other appellant's submission, para. 75.

<sup>152</sup>Mexico's other appellant's submission, para. 75.

<sup>153</sup>Mexico's other appellant's submission, para. 86.

GATT 1994, Mexico argues that the "applicable test" under Article 2.1 of the *TBT Agreement* is to assess "whether a measure modifies the conditions of competition in the relevant market to the detriment of the imported products in question".<sup>154</sup> However, Mexico also highlights that the "immediate context" of Article 2.1 of the *TBT Agreement* is different from the non-discrimination obligations in the GATT 1994 and the GATS, in that the *TBT Agreement* does not contain a "substantive equivalent" to the general exception provisions found in Article XX of the GATT 1994 and Article XIV of the GATS.<sup>155</sup> Mexico submits that, even though the *TBT Agreement* does not provide for general exceptions, the sixth recital of its preamble includes language suggesting that "certain technical regulations which would violate the above-noted interpretation of Article 2.1 should not be prohibited if they fall within the specified criteria" of the recital.<sup>156</sup> While Mexico acknowledges that language in the preamble of the *TBT Agreement* is "not substantive", it contends that the substantive provisions of the *TBT Agreement* must be "interpreted in a manner that is consistent with this important context".<sup>157</sup> In Mexico's view, this implies that technical regulations that meet all the criteria of the recital should not be prohibited by Article 2.1, even if they modify the conditions of competition in the relevant market to the detriment of the imported product in question. Mexico emphasizes that this interpretation does not transform the recital into an exception analogous to general exceptions, but "modifies the meaning of the substantive obligation in Article 2.1 so that the discrimination that is prohibited in that Article does not extend to measures meeting the criteria of the preamble".<sup>158</sup> According to Mexico, a measure that modifies the conditions of competition in the relevant market to the detriment of an imported product will thus not be prohibited by Article 2.1 if: (i) the measure is necessary to pursue one of the objectives mentioned in the sixth recital; (ii) the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; (iii) the measure is not applied in a manner that would constitute a disguised restriction on international trade; and (iv) the measure is otherwise in accordance with the provisions of the *TBT Agreement*.<sup>159</sup>

85. Referring to the Appellate Body's jurisprudence under Article XX of the GATT 1994, Mexico argues that the US "dolphin-safe" labelling provisions are not necessary for the protection of animal life or health or for the prevention of deceptive practices. Mexico argues, in particular, that the "exclusive single definition of dolphin-safe" established by the US measure "does not contribute to the realization of these two objectives through consumer choice".<sup>160</sup> First, according to Mexico, there

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<sup>154</sup>Mexico's other appellant's submission, para. 99.

<sup>155</sup>Mexico's other appellant's submission, para. 101.

<sup>156</sup>Mexico's other appellant's submission, para. 103.

<sup>157</sup>Mexico's other appellant's submission, para. 104.

<sup>158</sup>Mexico's other appellant's submission, para. 109.

<sup>159</sup>Mexico's other appellant's submission, para. 111.

<sup>160</sup>Mexico's other appellant's submission, para. 117.

is "no evidence of 'deceptive practices'" in connection with the AIDCP label that would need to be prevented.<sup>161</sup> Mexico also recalls, in this regard, the Panel's finding that "allowing the AIDCP label to be used in the U.S. market 'may have the potential to reduce the possibilities of consumer deception *more* than the current US dolphin-safe label'."<sup>162</sup> Second, with respect to the objective of protecting dolphins through consumer choice, Mexico argues that prohibiting the AIDCP label restricts how consumers can express their preferences for "dolphin-safe" tuna products and "limits to a single definition an objective that, in reality, is much more complex".<sup>163</sup> Mexico concludes that the measure at issue is therefore "unnecessary" within the meaning of the sixth recital.<sup>164</sup>

86. With respect to the requirement that a measure not be applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, Mexico argues that the current dispute presents a factual situation that is "closely similar" to the one in *US – Shrimp*, because, in that dispute, the United States was seeking to "coerce" other countries into adopting the United States' approach to the conservation of turtles.<sup>165</sup> Referring to the Appellate Body's findings in that case, Mexico submits that the measure at issue in this dispute "unilaterally and extraterritorially impose[s] U.S. fishing method requirements as a condition for access to the principal distribution channels in the U.S. tuna products market".<sup>166</sup> Mexico further argues that, in this dispute, the United States has established a "rigid and unbending standard" that does not allow the extensive measures taken by Mexico to protect dolphins and other changing conditions to be taken into account.<sup>167</sup> Mexico emphasizes that, even if the United States were to find now, or in the future, that the dolphin stocks that it deems to be depleted had fully recovered, the US measure would not allow the definition of "dolphin-safe" to be amended to accommodate the AIDCP standard. Mexico also argues that the US "dolphin-safe" labelling provisions are discriminatory because tuna products produced from tuna harvested outside the ETP can be labelled as "dolphin-safe" "under relaxed compliance standards even though there are no protections for dolphins outside the ETP".<sup>168</sup> By contrast, tuna products from Mexican producers—who have taken "extensive and demonstrably highly successful measures to protect dolphins"—are prohibited from using the label.<sup>169</sup> Furthermore, Mexico refers to the Appellate Body's statement in *US – Shrimp* that the United States' failure to engage the appellees in

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<sup>161</sup>Mexico's other appellant's submission, para. 118.

<sup>162</sup>Mexico's other appellant's submission, para. 118 (quoting Panel Report, para. 7.576). (emphasis added by Mexico)

<sup>163</sup>Mexico's other appellant's submission, para. 119.

<sup>164</sup>Mexico's other appellant's submission, para. 120.

<sup>165</sup>Mexico's other appellant's submission, para. 123.

<sup>166</sup>Mexico's other appellant's submission, para. 124 (referring to Appellate Body Report, *US – Shrimp*, para. 161).

<sup>167</sup>Mexico's other appellant's submission, para. 127 (referring to Appellate Body Report, *US – Shrimp*, para. 165).

<sup>168</sup>Mexico's other appellant's submission, para. 129.

<sup>169</sup>Mexico's other appellant's submission, para. 129.

that case in "serious, across the board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles" "bears heavily in any appraisal of justifiable or unjustifiable discrimination".<sup>170</sup> Mexico submits that, in the present case, the situation is even more aggravated because the United States entered into the AIDCP, which has been extremely successful in protecting dolphins, and then disregarded the standard established by the AIDCP in maintaining its own unilateral measure.

87. With respect to the requirement that a measure not be applied in a manner that would constitute a disguised restriction on international trade, Mexico submits that a measure that constitutes arbitrary and unjustifiable discrimination also represents a disguised restriction on international trade. Moreover, Mexico argues that the US measure, by restricting the information available to US consumers, interferes with the free operation of consumer choice. This converts "an otherwise valid consumer choice measure into a disguised restriction on international trade".<sup>171</sup>

88. With respect to the last phrase of the sixth recital, namely, that the measure be otherwise in accordance with the provisions of the *TBT Agreement*, Mexico argues that, because the Panel found that the US "dolphin-safe" labelling provisions are inconsistent with Article 2.2 of the *TBT Agreement*, there is no basis on the facts of this dispute "to narrow the interpretation of the non-discrimination obligations" in Article 2.1 to take into account the sixth recital.<sup>172</sup> According to Mexico, the "traditional interpretation" of "no less favourable treatment" therefore applies. Hence, if the US "dolphin-safe" labelling provisions are found to "modify the conditions of competition in the relevant market to the detriment of Mexican tuna products, they are inconsistent with Article 2.1 and are prohibited".<sup>173</sup>

89. In this respect, Mexico recalls the Panel's finding that access to the "dolphin-safe" label is an advantage on the US market and that the measure at issue controls access to the label. Mexico further submits that the evidence before the Panel shows that most Mexican tuna products do not have access to the "dolphin-safe" label, while all like US tuna products and most tuna products of other countries have access to that label. In addition, Mexico notes the Panel's finding that allowing the AIDCP label in the US market would provide greater competitive opportunities for Mexican tuna products. For Mexico, the corollary of this finding is that "prohibiting the use of the AIDCP label denies imports competitive opportunities".<sup>174</sup> On this basis, Mexico contends that it is clear that the US "dolphin-safe" labelling provisions modify the conditions of competition in the relevant market to

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<sup>170</sup>Mexico's other appellant's submission, para. 130 (referring to Appellate Body Report, *US – Shrimp*, para. 166).

<sup>171</sup>Mexico's other appellant's submission, para. 134.

<sup>172</sup>Mexico's other appellant's submission, para. 137.

<sup>173</sup>Mexico's other appellant's submission, para. 137.

<sup>174</sup>Mexico's other appellant's submission, para. 139.

the detriment of imported Mexican tuna products and in favour of like tuna products from the United States and other countries, and thereby violate Article 2.1.

90. Thus, Mexico submits that the Panel could have confined its analysis to finding that access to the "dolphin-safe" label was an "advantage", that access to the label was controlled by the US "dolphin-safe" labelling provisions, and that most Mexican tuna products do not have access to the label, while all or most tuna products from the United States and other countries do have access.<sup>175</sup> Mexico suggests that this would have been a sufficient basis to conclude that the US measure results in *de facto* discrimination. Mexico submits that the Panel erred by conducting a detailed analysis of whether "Mexican tuna products *could somehow* get access to the label."<sup>176</sup> According to Mexico, the Panel was essentially ruling that, if there is an alternative way to obtain the advantage, there is no less favourable treatment under Article 2.1. Mexico submits that this interpretation goes against established jurisprudence that "the availability of alternatives to avoid less favourable treatment does not eliminate the less favourable treatment."<sup>177</sup> Mexico adds that the Panel's interpretation of Article 2.1 would, in this case, require a developing country to give up its natural comparative advantage and force it to adopt environmentally unsustainable fishing methods.

91. Mexico further alleges that the Panel erred by relying on the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes* to find that the adverse impact of the challenged measure on Mexican tuna products is "unrelated to the foreign origin of the product".<sup>178</sup> Mexico submits that the Appellate Body's findings in that case are "readily distinguishable from the facts in this case".<sup>179</sup> Mexico points out that, in this dispute, the discriminatory effect exists not between certain producers and importers but between the group of Mexican tuna products overall compared to the group of like tuna products from the United States and, in the case of Mexico's MFN claims, between the group of Mexican tuna products and the group of tuna products from other countries. Further, the discrimination in this dispute does not depend upon the characteristics of individual importers, but rather on the fishing practices of the fleets that catch the tuna and the canneries that produce the tuna products for exportation to the United States. Mexico adds that a measure that is "origin neutral" on its face can violate the national treatment obligation if it has the effect of modifying the conditions of competition to the detriment of the imported product by denying the imported product the equality of competitive opportunities with a like domestic product in the market

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<sup>175</sup>Mexico's other appellant's submission, para. 142.

<sup>176</sup>Mexico's other appellant's submission, para. 143. (emphasis added)

<sup>177</sup>Mexico's other appellant's submission, para. 144 (referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 6.213 and 6.295; and Panel Report, *Canada – Autos*, para. 10.87).

<sup>178</sup>Mexico's other appellant's submission, paras. 170 and 172 (referring to Panel Report, para. 7.375, in turn quoting Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

<sup>179</sup>Mexico's other appellant's submission, para. 172.

of the importing WTO Member.<sup>180</sup> Mexico emphasizes that, by its very nature, *de facto* discrimination occurs when the challenged measure does not, on its face, discriminate based on origin. Mexico adds that it is only when the relevant facts are examined as a whole that *de facto* discrimination becomes apparent. Mexico concludes that, since the challenged measure uses a market access restriction "to pressure Mexico and the Mexican fleet to adopt essentially the same dolphin-safe regime as in force in the United States", the measure "*per se* target[s] the origin of the tuna products—i.e., Mexican tuna products".<sup>181</sup> If it did not do so, Mexico submits, the underlying objective of the US "dolphin-safe" labelling provisions to change Mexico's fishing methods would not be met.

92. Finally, Mexico claims that the Panel erred in concluding that the adverse impact on Mexican tuna products is caused by the actions of private actors. Referring to the Appellate Body report in *Korea – Various Measures on Beef*, Mexico argues that the measure at issue, by laying down exclusive conditions for the use of the "dolphin-safe" label, restricts the conditions under which the label may be used and, therefore, also restricts the nature of the choice that can be made by US consumers. In particular, Mexico points to the Panel's finding that the measure at issue creates an exclusive standard to inform consumers about the "dolphin-safety" of tuna products and that there is no possibility for any alternative definitions of what is "dolphin-safe" on the US market (such as AIDCP "dolphin-safe"), except in compliance with the exclusive criteria set out in the measure. According to Mexico, both parties agree that US consumers will make choices based on whether or not the "dolphin-safe" label is displayed on a tuna product. As a direct consequence of the measure, US consumers are denied the option of choosing Mexican tuna products that are labelled with the international AIDCP "dolphin-safe" label. Mexico maintains that, to the extent some element of private choice is involved, it does not relieve the United States' responsibility to comply with its non-discrimination obligations given the "undeniable impact" of the US measure on the consumers' choice.<sup>182</sup> Mexico concludes that it is the government intervention in the form of a technical regulation that adversely affects the conditions of competition in the relevant market to the detriment of imported products, and not the actions of private parties.

(b) Article 11 of the DSU

93. In the event that the Appellate Body finds that the Panel did not err in its interpretation and application of Article 2.1 of the *TBT Agreement*, Mexico claims that the Panel acted inconsistently with Article 11 of the DSU in failing to consider evidence put forward by Mexico that it was

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<sup>180</sup>Mexico's other appellant's submission, para. 174.

<sup>181</sup>Mexico's other appellant's submission, para. 179.

<sup>182</sup>Mexico's other appellant's submission, para. 186.

"impossible" for the Mexican tuna industry to change its fishing practices to adapt to the US "dolphin-safe" labelling provisions.<sup>183</sup> Mexico explains that a change in its fishing practices or fishing areas would make the Mexican tuna industry unprofitable and unable to compete. According to Mexico, the only way for the industry to remain viable is by fishing mature yellowfin tuna in association with dolphins within its exclusive economic zone and adjacent waters. In support of its position, Mexico points to evidence provided by Mexico to the Panel "in which the three major companies making up the Mexican tuna industry clearly state that it is impossible to change their fishing practices or fishing area due to financial, administrative, environmental and practical constraints".<sup>184</sup> According to Mexico, this evidence also "confirms" that the Mexican tuna industry's principal concern is not the adaptation costs but the impossibility of adapting to the US measure.<sup>185</sup> In Mexico's view, the Panel should have properly weighed the costs that the Mexican industry would have to bear in order to obtain access to the advantage provided by the US "dolphin-safe" label. For Mexico, this is relevant for evaluating whether the suggested approach is feasible taking into account the particular circumstances of the Mexican fleet.

94. Mexico also claims that, in finding that it was not clear that the AIDCP label had value to retailers and that retailers had similar perceptions to canneries, the Panel acted inconsistently with Article 11 of the DSU because it omitted from its analysis relevant factual findings, evidence, and arguments. In particular, Mexico takes issue with what it describes as the Panel's "view that there was evidence that a dolphin-safe label associated with no setting on dolphins had value in the U.S. market but the evidence was less clear that the AIDCP dolphin-safe label, which allows for setting on dolphins under the strict requirements of the AIDCP, has value in that market."<sup>186</sup> Additionally, Mexico submits that the Panel's analysis is "faulty" because it is based primarily on the perceptions of canneries, who are consumers of tuna and producers of tuna products.<sup>187</sup> Mexico argues that the perceptions of canneries must be distinguished from those of retailers because: (i) canneries and retailers operate at different levels of trade; (ii) retailers do not label tuna products themselves, but rather receive tuna products already labelled by the canneries; and (iii) retailers do not have a legal need to know precisely what the label means; rather, their concern is to have tuna products that can be lawfully labelled as "dolphin-safe".<sup>188</sup> Mexico further alleges that the Panel acted inconsistently with Article 11 of the DSU by failing to address Mexico's argument that allowing the use of the AIDCP "dolphin-safe" label will enable Mexico to fully inform US consumers and promote its tuna

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<sup>183</sup>Mexico's other appellant's submission, para. 149.

<sup>184</sup>Mexico's other appellant's submission, para. 150 (referring to Panel Exhibits MEX-86(A), MEX-86(B), and MEX-86(C) (BCI)).

<sup>185</sup>Mexico's other appellant's submission, para. 151.

<sup>186</sup>Mexico's other appellant's submission, para. 161.

<sup>187</sup>Mexico's other appellant's submission, para. 162.

<sup>188</sup>Mexico's other appellant's submission, para. 162.



products and the sustainability of its fishing practices to rebalance the competitive opportunities and that this in turn would "unlock latent demand" in the market for those tuna products.<sup>189</sup> Finally, Mexico contends that the Panel's conclusion is inconsistent with evidence indicating that some of the major US chains have expressly indicated that, if the tuna product at issue qualified to be labelled "dolphin-safe", they would sell it, and that a 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.

2. Consistency of the Measure at Issue with Article 2.2 of the *TBT Agreement*

95. Mexico raises two claims in its conditional appeal of the Panel's finding under Article 2.2 of the *TBT Agreement*. Each of these claims is conditional upon the Appellate Body reversing the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*. First, Mexico requests the Appellate Body to reverse the Panel's intermediate finding that the United States' objective of 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 is a legitimate objective, and to find, instead, that it is not a legitimate objective within the meaning of Article 2.2 of the *TBT Agreement*. In the alternative, Mexico requests the Appellate Body to confirm that the US "dolphin-safe" labelling provisions are inconsistent with Article 2.2 of the *TBT Agreement* based on the Panel's finding that the US "dolphin-safe" labelling provisions did not fulfil the United States' objectives.

96. With respect to its first claim, Mexico submits that the Panel formulated the legal test of whether an objective is legitimate within the meaning of Article 2.2 of the *TBT Agreement* as whether the "objective[] 'go[es] against the object and purpose'" of the *TBT Agreement*.<sup>190</sup> According to Mexico, this legal test is incorrect, because it allows for "coercive objective[s]" creating barriers to trade to be considered legitimate. Mexico further alleges that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective.<sup>191</sup> The list of examples of legitimate objectives in Article 2.2 of the *TBT Agreement* informs the interpretation of the term "legitimate objective" in that provision. None of the listed objectives includes language similar to "by ensuring that the US market is not used to encourage". These examples do not contemplate a "coercive and trade restrictive objective".<sup>192</sup> The United States' dolphin protection objective, however, is a "coercive objective", because its purpose is to "coerce" another WTO Member to change its practices to comply with the unilateral policy of the United States.

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<sup>189</sup>Mexico's other appellant's submission, para. 166.

<sup>190</sup>Mexico's other appellant's submission, para. 266 (quoting Panel Report, para. 7.443).

<sup>191</sup>Mexico's other appellant's submission, para. 267.

<sup>192</sup>Mexico's other appellant's submission, para. 271.

97. Moreover, Mexico alleges that the dolphin protection objective is unnecessary, and constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. Mexico submits that the Panel's references to the Appellate Body reports in *US – Gasoline* and *US – Shrimp* do not support the proposition for which the Panel cited them, namely, that Members can identify whatever objectives they wish. Yet, Mexico asserts that the situation in *US – Gasoline* is "closely analogous" to the situation in the present case.<sup>193</sup> In *US – Gasoline*, the measure at issue was found to be inconsistent with Article III:4 of the GATT 1994 and could not be justified under Article XX, because it constituted a "disguised restriction on trade" and "unjustifiable discrimination" inconsistent with the chapeau of Article XX. Mexico asserts that the basis of these findings of breach was that the United States had acted unilaterally, without first attempting to achieve its goal through cooperation with the affected Members. For Mexico, the situation in the present case is similar to that in *US – Gasoline*, in that the United States disregarded a multilateral agreement that addresses the very same subject as the measure at issue, namely, the protection of dolphins and the prerequisites for labelling tuna products as "dolphin-safe".<sup>194</sup>

98. In addition, Mexico asserts that the fifth recital of the preamble of the *TBT Agreement* refers to ensuring that technical regulations do not create unnecessary obstacles to international trade. Yet, a coercive and trade restrictive objective can only be "fulfilled" within the meaning of Article 2.2 by a measure that is coercive and trade restrictive and, thus, such obstacles to trade would always be "necessary". In the face of such an objective, it would be difficult to give meaning to the term "unnecessary obstacles to trade" in the preamble. However, Mexico considers it important that this language in the preamble be given meaning, because otherwise WTO Members could define the objectives of their technical regulations so narrowly, and with such high levels of protection, that no other alternative measure could fulfil those objectives.

99. With respect to its alternative claim, Mexico alleges that the Panel erred in proceeding to examine whether there was a less trade-restrictive alternative measure after it had found that the measure at issue could, at best, only partially fulfil the two objectives. For Mexico, it is not possible to find that there is a less trade-restrictive alternative measure that fulfils the objectives when the US measure itself does not fulfil the objectives. In addition, it would be impossible to take account of the risks non-fulfilment would create if, in fact, non-fulfilment already exists with the measure at issue. Mexico alleges that, upon concluding that the US "dolphin-safe" labelling provisions did not

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<sup>193</sup>Mexico's other appellant's submission, para. 275.

<sup>194</sup>Mexico's other appellant's submission, para. 275 (referring to Appellate Body Report, *US – Gasoline*, p. 25, DSR 1996:1, 3, at 23).

fulfil the two objectives, the Panel's analysis should have ended and it should have found that the US "dolphin-safe" labelling provisions were inconsistent with Article 2.2.<sup>195</sup>

3. Article 2.4 of the TBT Agreement and the Effectiveness and Appropriateness of the AIDCP Standard as a Means to Fulfil the United States' Objectives

100. Mexico appeals the Panel's finding that the AIDCP standard would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the United States.<sup>196</sup> Mexico submits that there is "some flexibility ... between the standard and the fulfillment of the legitimate objectives" and that the "necessary degree of fulfillment" will depend on the individual facts and circumstances of each case.<sup>197</sup> Mexico further submits that, in this dispute, "the fact that the U.S. dolphin-safe labelling provisions do not themselves completely fulfill either of the two legitimate objectives ... is relevant to the determination of whether the AIDCP standard is 'ineffective or inappropriate'."<sup>198</sup>

101. Mexico clarifies that the relevant international standard that it has identified is "the definition of 'dolphin safe' established by the AIDCP's 'Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification'". This definition, in turn, incorporates by reference the definition of "dolphin-safe" from the AIDCP's "Resolution to Adopt the Modified System for Tracking and Verification of Tuna".<sup>199</sup> The definition provides that "[d]olphin safe tuna" is "tuna captured in sets in which there is no mortality or serious injury of dolphins", and "[n]on-dolphin safe tuna" is "tuna captured in sets in which mortality or serious injury occurs".<sup>200</sup> Mexico stresses that it "expressly defined 'AIDCP standard' to mean this definition".<sup>201</sup>

102. Mexico argues that the Panel erred in not evaluating whether the AIDCP standard would be an effective and appropriate means to fulfil the United States' objectives in fisheries *outside* the ETP. Mexico recalls the Panel's statement 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

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<sup>195</sup>Mexico's other appellant's submission, paras. 279-287.

<sup>196</sup>Mexico's other appellant's submission, para. 232 (referring to Panel Report, paras. 7.740 and 8.1(c)) and para. 260.

<sup>197</sup>Mexico's other appellant's submission, para. 234.

<sup>198</sup>Mexico's other appellant's submission, para. 235.

<sup>199</sup>Mexico's other appellant's submission, para. 237 (referring to AIDCP Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001) (Panel Exhibit MEX-55); and AIDCP Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification (20 June 2001) (Panel Exhibit MEX-56)).

<sup>200</sup>Mexico's other appellant's submission, para. 237 (quoting Panel Exhibit MEX-55, *supra*, footnote 199).

<sup>201</sup>Mexico's other appellant's submission, para. 238 (referring to Mexico's first written submission to the Panel, footnote 149 to para. 229).

the manner in which tuna is caught beyond the ETP."<sup>202</sup> Mexico submits that there is "nothing inherent about the definition 'captured in sets in which there is no mortality or serious injury of dolphins' that is limited in applicability to the ETP."<sup>203</sup> For Mexico, it appears that the Panel was referring to the measures taken by the AIDCP to implement and enforce the AIDCP's requirements. In Mexico's view, the fact that these measures "have not yet been implemented outside the ETP" does not justify the conclusion that the AIDCP standard would be ineffective outside the ETP.<sup>204</sup> Mexico argues that the Panel appears to have "confused" the definition of "dolphin-safe" with the means for verifying compliance with the applicable definition of "dolphin-safe".<sup>205</sup>

103. Mexico further submits that, even assuming that the AIDCP enforcement mechanisms were relevant, the Panel "did not explain" why implementing the same enforcement mechanisms outside the ETP would not address the United States' concern of protecting dolphins. In Mexico's view, the Panel's statement that it could not assume that a regime modelled on the AIDCP would lead to the achievement of the United States' objectives outside the ETP contradicts its earlier finding regarding the "pertinence" of the AIDCP's independent observer programme for other fisheries.<sup>206</sup>

104. Mexico contends that the Panel's "limited approach" in analyzing the effectiveness and appropriateness of the AIDCP "dolphin-safe" definition led it to ignore evidence showing that most tuna products sold in the US market contain tuna sourced from the WCPO.<sup>207</sup> As Mexico sees it, this evidence, reviewed by the Panel under Article 2.2 of the *TBT Agreement*, would have shown that "the potential effectiveness and appropriateness of applying the definition of dolphin-safe of the AIDCP standard to non-ETP tuna products was crucial to a proper evaluation of the Article 2.4 claim."<sup>208</sup> In addition, Mexico alleges that the Panel's failure to evaluate whether the AIDCP definition of "dolphin-safe" would be effective and appropriate in fulfilling the United States' objectives outside the ETP was inconsistent with the Panel's obligation under Article 11 of the DSU to make an objective assessment of the matter before it.

105. Turning to the Panel's evaluation of whether the AIDCP standard would be effective and appropriate for the fulfilment of the United States' objectives *inside* the ETP, Mexico faults the Panel for applying an "incorrect legal test" and conducting an "inconsistent and incomplete" analysis.<sup>209</sup> With regard to the consumer information objective, Mexico takes issue with the Panel's finding that

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<sup>202</sup>Mexico's other appellant's submission, para. 241 (quoting Panel Report, para. 7.727).

<sup>203</sup>Mexico's other appellant's submission, para. 243.

<sup>204</sup>Mexico's other appellant's submission, para. 243.

<sup>205</sup>Mexico's other appellant's submission, para. 243.

<sup>206</sup>Mexico's other appellant's submission, para. 244 (referring to Panel Report, para. 7.706).

<sup>207</sup>Mexico's other appellant's submission, para. 245.

<sup>208</sup>Mexico's other appellant's submission, para. 246.

<sup>209</sup>Mexico's other appellant's submission, para. 251.

the AIDCP standard "does not convey 'any information on the fishing method that has been used ... , or on the impact [that] such method may have on dolphins'".<sup>210</sup> Mexico submits that this statement "incorrectly" describes the AIDCP standard, since "[b]y its express terms and as reflected in its implementation, the AIDCP standard is not limited in application to any specific fishing method."<sup>211</sup>

106. Mexico further alleges that the Panel did not properly assess whether the AIDCP standard would be "ineffective". Mexico submits that for over 90 per cent of the tuna products sold in the US market the AIDCP standard would accomplish the legitimate objectives pursued by the United States "in a *more effective manner* than the U.S. dolphin-safe labelling provisions".<sup>212</sup> In Mexico's view, it would be illogical to conclude that the AIDCP standard would be ineffective in fulfilling the consumer information objective when it is "overall much more effective" than the measure at issue in fulfilling this objective.<sup>213</sup>

107. With regard to the dolphin protection objective, Mexico recalls what it views as the Panel's finding in the context of Article 2.2 of the *TBT Agreement*, namely, that the US measure does not fulfil this objective and in fact undermines it.<sup>214</sup> Mexico argues that, because the Panel "chose not to evaluate the potential application of the AIDCP standard to tuna products made from tuna harvested outside the ETP, it did not address the inconsistency arising from its prior finding that the U.S. dolphin-safe label is ineffective in fulfilling the U.S. objective outside the ETP."<sup>215</sup> Mexico submits that "if the AIDCP standard is more effective at fulfilling the U.S. objective for over 90 percent of the tuna products sold in the U.S. market, ... the only logical conclusion is that the AIDCP standard overall would be effective at fulfilling the U.S. objective."<sup>216</sup> Finally, Mexico submits that the AIDCP standard would also be "appropriate" to fulfil the United States' objectives. In particular, Mexico claims that "the United States has already determined that the 'no dolphins killed or seriously injured' standard is appropriate for the ETP".<sup>217</sup> Hence, Mexico suggests that "certainly it is also appropriate for application outside the ETP."<sup>218</sup>

#### 4. The Panel's Exercise of Judicial Economy

108. Mexico argues that the Panel exercised false judicial economy and acted inconsistently with its obligations under Article 11 of the DSU by declining to rule on Mexico's claims under Articles I:1

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<sup>210</sup>Mexico's other appellant's submission, para. 253 (quoting Panel Report, para. 7.729).

<sup>211</sup>Mexico's other appellant's submission, para. 253.

<sup>212</sup>Mexico's other appellant's submission, para. 256. (original emphasis)

<sup>213</sup>Mexico's other appellant's submission, para. 256.

<sup>214</sup>Mexico's other appellant's submission, para. 257 (referring to Panel Report, paras. 7.597 and 7.598).

<sup>215</sup>Mexico's other appellant's submission, para. 258.

<sup>216</sup>Mexico's other appellant's submission, para. 258.

<sup>217</sup>Mexico's other appellant's submission, para. 259.

<sup>218</sup>Mexico's other appellant's submission, para. 259.

and III:4 of the GATT 1994. Mexico points out that, although Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 deal with non-discrimination obligations, each of them is different in scope and application. Referring to the panel report in *US – Upland Cotton*, Mexico further argues that the obligations in Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement* apply simultaneously to the US measure and should be read cumulatively. Thus, after finding no violation of Article 2.1 of the *TBT Agreement*, the Panel should have continued with an analysis of Mexico's claims under the GATT 1994. Referring to the Appellate Body report in *Australia – Salmon*, Mexico further argues that a panel cannot exercise judicial economy "where only a partial resolution of a dispute would result".<sup>219</sup>

109. Mexico further argues that the Panel's finding that the challenged measure is inconsistent with Article 2.2 of the *TBT Agreement* is not sufficient to provide a positive solution to the dispute with respect to Mexico's discrimination claims under the GATT 1994. Mexico recalls that in *US – Poultry (China)* the panel declined to limit its examination to the *SPS Agreement* and a claim under Article XI of the GATT 1994 and proceeded to examine China's claim under Article I of the GATT 1994.<sup>220</sup> Similarly, in *US – Clove Cigarettes*, the panel stated that, if it did not make a finding of violation under Article 2.1 of the *TBT Agreement*, it would examine the alternative claim under Article III:4 of the GATT 1994.<sup>221</sup> According to Mexico, these disputes resemble the present case where the Panel should have ruled on Mexico's claims under Articles I:1 and III:4 of the GATT 1994. Mexico also requests the Appellate Body to rule that the United States acted inconsistently with these provisions.

110. In support of its position that the US "dolphin-safe" labelling provisions are inconsistent with Article I:1 of the GATT 1994, Mexico argues that tuna products from Mexico, the United States, and other countries were correctly found by the Panel to be "like products". Mexico further posits that the advantage of access to the label is not granted "immediately and unconditionally" to the like product of Mexico, since the US "dolphin-safe" labelling provisions make the advantage (that is, the right to use the "dolphin-safe" label) subject to conditions with respect to the situation or conduct of Mexico (that is, fishing methods for tuna). In Mexico's view, these conditions discriminate *de facto* against Mexican tuna products in favour of tuna products from other countries.

111. With respect to Article III:4 of the GATT 1994, Mexico recalls that the products at issue in the present dispute were found to be "like products" and submits that the US measure constitutes a law, regulation, or requirement within the meaning of Article III:4. Mexico further contends that the

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<sup>219</sup>Mexico's other appellant's submission, para. 204 (referring to Appellate Body Report, *Australia – Salmon*, para. 223; and Panel Report, *EC – Sardines*, paras. 7.148-7.152).

<sup>220</sup>Mexico's other appellant's submission, para. 205 (referring to Panel Report, *US – Poultry (China)*, paras. 6.28 and 6.34).

<sup>221</sup>Mexico's other appellant's submission, para. 205 (referring to Panel Report, *US – Clove Cigarettes*, para. 7.16).

measure at issue "affects" the internal sale, offering for sale, purchase, transportation, distribution, or use of tuna products and tuna, since participants in the US tuna and tuna product market are highly sensitive to issues related to dolphin mortality and will make decisions on whether or not to purchase, offer for sale, distribute, process, or use tuna products on the basis of whether they are designated as "dolphin-safe" or, in the case of tuna, can be designated as "dolphin-safe" after processing. Finally, referring to its arguments regarding less favourable treatment in the context of Article 2.1 of the *TBT Agreement*, Mexico claims that, for the same reasons, the US measure accords less favourable treatment to imported Mexican tuna compared to that accorded to like US tuna products.

D. *Arguments of the United States – Appellee*

1. Consistency of the Measure at Issue with Article 2.1 of the *TBT Agreement*

112. The United States requests the Appellate Body to reject Mexico's other appeal of the Panel's finding that the US "dolphin-safe" labelling provisions are not inconsistent with Article 2.1 of the *TBT Agreement*. According to the United States, the Panel properly interpreted and applied Article 2.1 in concluding that the measure at issue does not accord Mexican tuna products less favourable treatment than US tuna products and tuna products originating in other countries.

(a) Interpretation and Application of Article 2.1 of the *TBT Agreement*

113. The United States disagrees with Mexico's assertion that the Panel erred in its interpretation of the phrase "treatment no less favourable" in Article 2.1. According to the United States, the Panel's interpretation is fully consistent with the ordinary meaning of the term, in both the immediate context of Article 2.1 and in the context of similar provisions in other WTO agreements, as well as the object and purpose of the *TBT Agreement*.

114. In the United States' view, "an inquiry into whether a measure provides 'less favourable treatment' requires a determination of whether a measure accords different treatment to imported products versus domestic products *and* whether it does so based on origin."<sup>222</sup> According to the United States, "[t]he notion that the different treatment must be based on origin (as opposed to origin-neutral criteria) is evident from Article 2.1 itself", as well as relevant context provided by that of Article III of the GATT 1994 and the *TBT Agreement*.<sup>223</sup> The United States quotes the Appellate Body's statement in *EC – Asbestos* that "[t]he broad and fundamental purpose of Article III

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<sup>222</sup>United States' appellee's submission, para. 32 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.420 and 7.421; Panel Report, *Canada – Autos*, paras. 7.179-7.182; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.164; Appellate Body Reports, *China – Auto Parts*, paras. 192-195; Panel Report, *India – Autos*, paras. 7.199-7.202; Appellate Body Report, *Korea – Various Measures on Beef*, paras. 143 and 144; and Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.120-8.122). (original emphasis)

<sup>223</sup>United States' appellee's submission, para. 32.

is to avoid protectionism in the application of internal tax and regulatory measures."<sup>224</sup> The United States argues that, given the "similar nature of the obligations" in Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*, the "broad and fundamental purpose" of Article 2.1 may also be considered as avoiding protectionism in the application of technical regulations.<sup>225</sup> For the United States, the fact that Article 2.1 is part of the *TBT Agreement* is also relevant context. The United States notes in this regard that standards, technical regulations, and conformity assessment procedures, by definition, draw distinctions among products. According to the United States, this supports the view that the types of measures with which Article 2.1 is concerned are those that accord different treatment based on origin, not those that provide different treatment based on factors other than origin (such as whether a product possesses characteristics that may be harmful to humans or the environment or is produced in a manner that would make a particular label deceptive or misleading). For the United States, the language in the sixth recital of the preamble of the *TBT Agreement* confirms this interpretation.

115. The United States acknowledges that the WTO agreements "do not specify a precise approach" to the question when the treatment accorded to imported products is "less favourable".<sup>226</sup> However, in previous cases addressing this question in the context of Article III of the GATT 1994, panels and the Appellate Body have "typically assessed" whether a measure "modifies the conditions of competition to the detriment of like imported products".<sup>227</sup> In the United States' view, "these cases reflect the fact that, even if a measure modifies conditions of competition, it does not provide 'less favourable treatment' within the meaning of Article 2.1 if it does so for reasons other than *origin*."<sup>228</sup> According to the United States, this "critical element" of the analysis is absent from Mexico's theory of less favourable treatment.<sup>229</sup> By contrast, the Panel's analysis of "less favourable treatment" was "fully consistent" with this framework.<sup>230</sup> The United States notes, in particular, that the Panel's assessment focused on whether any different treatment was accorded to Mexican tuna products under the measure and whether the difference was attributable to origin, and that the Panel "rejected Mexico's argument on both counts".<sup>231</sup>

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<sup>224</sup>United States' appellee's submission, para. 33 (quoting Appellate Body Report, *EC – Asbestos*, para. 97, in turn quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:1, 97, at 109).

<sup>225</sup>United States' appellee's submission, para. 33.

<sup>226</sup>United States' appellee's submission, para. 35.

<sup>227</sup>United States' appellee's submission, para. 35.

<sup>228</sup>United States' appellee's submission, para. 35 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2514 and 7.2515; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96). (original emphasis)

<sup>229</sup>United States' appellee's submission, para. 35.

<sup>230</sup>United States' appellee's submission, para. 36.

<sup>231</sup>United States' appellee's submission, para. 36.



116. The United States dismisses Mexico's criticism of the Panel's "denial of access to an advantage" test for whether "treatment no less favourable" exists. The United States submits that, to the extent that the Panel referred to "denial of access", it did so to address what Mexico itself described as "the factual basis" for its claim under Article 2.1, namely, that Mexican tuna products are "prohibited" from using the "dolphin-safe" label and are therefore denied competitive opportunities as compared to like products from the United States and other countries.<sup>232</sup> Moreover, argues the United States, the Panel's discussion of the existence of an "advantage" does not indicate a failure to consider conditions of competition in its analysis because, in several parts of its analysis, the Panel explicitly referred to conditions of competition.<sup>233</sup> The United States further contends that nothing in the Panel's analysis suggests that it viewed less favourable treatment as arising only when an "absolute prohibition or bar" exists.<sup>234</sup> Finally, the United States argues that the ability of Mexican tuna products to qualify for the US "dolphin-safe" label through other means "bears on the threshold question of whether different treatment is attributable to origin", which Mexico failed to establish.<sup>235</sup>

117. Turning to Mexico's proposed interpretation of the phrase "treatment no less favourable" in Article 2.1 of the *TBT Agreement*, the United States asserts that Mexico's understanding of the concept is "flawed".<sup>236</sup> As the United States sees it, Mexico asks, under the guise of "context", that the Appellate Body "read into the text of Article 2.1 an entire set of obligations that are not there".<sup>237</sup> Mexico's suggestion that the Panel should have evaluated in the light of the sixth recital whether the measure is "necessary, is applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or is applied in a manner which would constitute a disguised restriction on trade", represents, in the United States' view, a "misuse of context" and has no basis in the text of Article 2.1.<sup>238</sup> The United States also submits that Mexico equates a conditions-of-competition analysis with the concept of "equality of competitive opportunities".<sup>239</sup> To the United States, this reflects Mexico's view that the non-discrimination obligation in Article 2.1 seeks to ensure not only that a measure does not modify the conditions of competition to the detriment of imports, but that a measure also preserves "equality of

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<sup>232</sup>United States' appellee's submission, para. 37 (referring to Mexico's other appellant's submission, paras. 74, 75, 143, and 144; and Panel Report, para. 7.279, in turn referring to Mexico's second written submission to the Panel, para. 150).

<sup>233</sup>United States' appellee's submission, para. 38 (referring to Panel Report, para. 7.359).

<sup>234</sup>United States' appellee's submission, para. 39 (referring to Mexico's other appellant's submission, para. 143).

<sup>235</sup>United States' appellee's submission, para. 40.

<sup>236</sup>United States' appellee's submission, para. 41.

<sup>237</sup>United States' appellee's submission, para. 41.

<sup>238</sup>United States' appellee's submission, para. 48 (referring to Mexico's other appellant's submission, para. 111).

<sup>239</sup>United States' appellee's submission, para. 50 (referring, for example, to Mexico's other appellant's submission, paras. 96 and 97).

competitive opportunities" for all products.<sup>240</sup> The United States submits that this interpretation does not comport with how prior panel and Appellate Body reports have applied a conditions-of-competition analysis, as well as with the terms of Article 2.1.

118. Finally, the United States submits that Mexico's interpretation would create a "serious obstacle" for legitimate regulatory action.<sup>241</sup> The United States points out that it is impossible for a Member to know in advance the precise costs that a measure will impose on each producer in every other Member, and that it would be "nearly impossible" to calibrate a measure such that it does not have a greater impact on one or another Member's products relative to its own or other Members.<sup>242</sup> According to the United States, under Mexico's interpretation, Members would not be able to adopt origin-neutral technical regulations without breaching their non-discrimination obligations "unless they were able to 'justify' the measure under Mexico's quasi-Article XX analysis."<sup>243</sup> For the United States, this would be "at odds" with the *TBT Agreement's* approach to respecting Members' legitimate objectives, since the *TBT Agreement* does not limit the legitimate objectives that a Member may pursue through technical regulations.<sup>244</sup> By contrast, Mexico's interpretation would prevent Members from adopting technical regulations except to fulfil the limited number of objectives specified in the sixth recital of the preamble of the *TBT Agreement*.

119. The United States rejects Mexico's assertion that the Panel erred in concluding that the adverse impact felt by Mexican tuna products in the US market is the result of factors or circumstances unrelated to the foreign origin of the product. The United States argues that it is not the Panel, but Mexico, that misconstrues the findings of the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*. The United States agrees with Mexico that discrimination in this dispute does not depend upon the characteristics of individual importers but, rather, on the fishing practices of the fleet that caught the tuna and the canneries that produced the tuna products for exportation to the United States. According to the United States, this is "precisely the argument that, based on the facts before it, left the Panel unpersuaded"<sup>245</sup>, since Mexico did not provide sufficient evidence to demonstrate that the fishing methods used by a country's fleet "correlated" to the origin of that country's tuna products.<sup>246</sup> The United States also disagrees with Mexico's assertion that the Panel's interpretation is "somehow at odds with the notion that discrimination may be *de facto* as well

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<sup>240</sup>United States' appellee's submission, para. 50.

<sup>241</sup>United States' appellee's submission, para. 53.

<sup>242</sup>United States' appellee's submission, para. 53.

<sup>243</sup>United States' appellee's submission, para. 53.

<sup>244</sup>United States' appellee's submission, para. 53.

<sup>245</sup>United States' appellee's submission, para. 86.

<sup>246</sup>United States' appellee's submission, para. 86 (referring to Panel Report, paras. 7.302-7.358).

as *de jure*".<sup>247</sup> According to the United States, the Panel fully understood the notion and ambit of *de facto* discrimination. Yet, the fact that some imported products may fall within the group of like products that are subject to different treatment that may be less favourable is not evidence that a measure accords less favourable treatment to imported products as compared to like domestic products, particularly where there is evidence that the different treatment is not based on origin. The United States finds support for its position in the Appellate Body report in *EC – Asbestos*, noting that "distinctions based on criteria other than origin are not distinctions that accord less favourable treatment ... and neither Article III:4 nor Article 2.1 prohibit such distinctions."<sup>248</sup>

120. The United States further argues that Mexico misinterprets and misapplies the Appellate Body's findings in *Korea – Various Measures on Beef* when it claims that the Panel erred in concluding that the adverse impact is caused by private actors, rather than the measure at issue. The United States submits that, unlike the measure in *Korea – Various Measures on Beef*, the US "dolphin-safe" labelling provisions do not "require retailers to choose between ... tuna products that are labeled dolphin-safe and those that are not or that contain tuna caught by setting on dolphins and those that do not."<sup>249</sup> Instead, any decision to sell one or the other is "purely" the choice of private actors.<sup>250</sup> Recalling the Panel's finding that there is a preference in the US market for "dolphin-safe" tuna products, the United States argues that the preference of private actors for "dolphin-safe" tuna products cannot form the basis for concluding that the measure at issue modifies the conditions of competition because "[t]he limited demand for non-dolphin safe tuna products is a result of preferences of market operators not the U.S. measure."<sup>251</sup> The United States agrees with Mexico that the measure at issue restricts the option of selling tuna products labelled "dolphin-safe" that contain tuna caught by setting on dolphins. However, it argues that this is not evidence that "establishes competitive conditions that are less favorable for imported products".<sup>252</sup> According to the United States, "any change the U.S. measure introduced regarding the conditions under which tuna products compete is not one that modified the conditions of competition to the detriment of imported products or tuna products originating in some countries as compared to others", since "all tuna products compete under the same conditions", irrespective of their origin.<sup>253</sup> In addition, the United States asserts that Mexico confuses the Panel's conclusion that the measure accords an advantage in the form of access to the label with the question of whether the US measure accords that

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<sup>247</sup>United States' appellee's submission, para. 87 (referring to Mexico's other appellant's submission, para. 174).

<sup>248</sup>United States' appellee's submission, para. 89 (referring to Appellate Body Report, *EC – Asbestos*, para. 100).

<sup>249</sup>United States' appellee's submission, para. 95.

<sup>250</sup>United States' appellee's submission, para. 95.

<sup>251</sup>United States' appellee's submission, para. 96.

<sup>252</sup>United States' appellee's submission, para. 97.

<sup>253</sup>United States' appellee's submission, para. 98.

advantage to Mexican tuna products. The United States agrees with the Panel's finding that the measure at issue does not deny the advantage to Mexican tuna products.

(b) Article 11 of the DSU

121. The United States requests the Appellate Body to dismiss Mexico's argument that the Panel failed to consider and take into account evidence put forward by Mexico that it was impossible for the Mexican tuna industry to change its fishing practices to adapt to the US measure. The United States asserts that the Panel did consider and take into account the evidence regarding the adaptation costs incurred by Mexican producers and therefore did not fail to make an objective assessment of the matter as required by Article 11 of the DSU.<sup>254</sup> The United States notes that the Panel summarized Mexico's arguments on this issue.<sup>255</sup> Moreover, the United States contends that the Panel exhibits on which Mexico relies do not stand for the proposition that it is impossible for Mexican producers to meet the conditions for labelling tuna products "dolphin-safe".<sup>256</sup> The United States points out that the affidavits contained in the Panel exhibits cover the same points regarding costs associated with fishing for tuna using techniques other than setting on dolphins that the Panel summarized in its Report.<sup>257</sup> For the United States, a panel fails to make an objective assessment of the facts if it wilfully disregards or distorts the evidence before it or makes affirmative findings that lack a basis in the evidence. The fact that the Panel, having considered the evidence, did not conclude that it would be impossible for Mexican producers to meet the labelling conditions does not, in the United States' view, amount to a failure of the Panel to assess the matter in an objective manner.

122. In addition, the United States asserts that Mexico disregards the Panel's finding that not only is it possible for Mexican producers to adapt to catching tuna in a manner that would give them access to the US "dolphin-safe" label, but also that Mexican producers already catch tuna in a manner that makes them eligible for the label. The United States recalls the Panel's observations that a part of the Mexican fleet already catches tuna by methods other than setting on dolphins.<sup>258</sup> The United States also asserts that Mexico's arguments ignore the fact that the measure at issue does not require a nation's entire shipping fleet to completely abandon the practice of setting on dolphins in order to gain access to the label. For the United States, the Panel's finding that Mexican producers could choose to

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<sup>254</sup>United States' appellee's submission, para. 58 (referring to Panel Report, para. 7.344).

<sup>255</sup>United States' appellee's submission, paras. 59 and 60 (referring to Panel Report, paras. 7.335-7.340, and 7.343).

<sup>256</sup>United States' appellee's submission, para. 61 (referring to Panel Exhibits MEX-86(A), MEX-86(B), and MEX-86(C) (BCI)).

<sup>257</sup>United States' appellee's submission, para. 61 (referring to Panel Report, paras. 7.336-7.340; and Mexico's response to Panel Question 38, paras. 84-88).

<sup>258</sup>United States' appellee's submission, para. 63 (referring to Panel Report, paras. 7.313-7.317).

use tuna harvested by vessels flagged to other nations whose fleets do not set on dolphins, shows that the costs Mexico cites with respect to modifying fishing techniques or location could be avoided.

123. Contrary to Mexico's view, the United States argues that the Panel did not fail to consider evidence regarding retailer preferences. The Panel evaluated the evidence regarding retailer preferences and concluded that the evidence did not support the conclusion that retailers would purchase tuna products that contained tuna caught by setting on dolphins if they could be labelled "dolphin-safe".<sup>259</sup> According to the United States, the Panel considered the affidavits submitted by Mexico, and cited evidence that retailers are concerned with consumer acceptance of tuna products, and not with whether the product can legally be labelled "dolphin-safe" or not.<sup>260</sup> Thus, the United States argues that, contrary to Mexico's assertion, the Panel did not rely solely upon the perceptions of canneries to reach its conclusion regarding retailers' preferences. Therefore, the United States asserts that the Panel did not act inconsistently with Article 11 of the DSU.

124. Regarding Mexico's claim that the Panel failed to properly assess the "value" of the AIDCP label on the US market, the United States contends that the findings and evidence Mexico cites do not support its contention that the AIDCP label has value in the US market. The United States submits that the mere existence of the measure at issue does not support Mexico's position. This is so because the reason for prohibiting the use of the AIDCP label on tuna products containing tuna caught by setting on dolphins is not that the AIDCP label has value, but because allowing its use on such products would be misleading.

125. The United States rejects Mexico's argument that the Panel failed to consider that there could be "latent demand" for tuna products containing tuna caught by setting on dolphins and labelled with the AIDCP label.<sup>261</sup> The United States begins by noting that Mexico cites no evidence in this regard, and relies only upon past Appellate Body reports. These Appellate Body reports cited by Mexico are distinguishable from the situation at hand because the measure at issue does not affect consumers' ability to purchase tuna products.<sup>262</sup> As the United States sees it, what affects consumer and retailer demand for Mexican tuna products is whether the tuna is "dolphin-safe", and not where the tuna product originates.<sup>263</sup> Thus, unlike in *Philippines – Distilled Spirits*, there is no basis for the Panel to have considered that there might be any "latent demand" for Mexican tuna products that contain tuna caught by setting on dolphins. Furthermore, for the United States, the evidence before the Panel

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<sup>259</sup>United States' appellee's submission, para. 70.

<sup>260</sup>United States' appellee's submission, para. 70 (referring to Panel Report, para. 7.365).

<sup>261</sup>United States' appellee's submission, para. 79 (referring to Mexico's other appellant's submission, paras. 166 and 167).

<sup>262</sup>United States' appellee's submission, para. 81.

<sup>263</sup>United States' appellee's submission, para. 81 (referring to Panel Report, paras. 7.360, 7.364, 7.366, and 7.367).

indicates the strong preference of US market operators for tuna products that do not contain tuna caught in association with dolphins, and does not support the conclusion that market operators would accept such tuna products if they could bear the AIDCP label. Therefore, it is not the measure at issue but market operators that are responsible for the absence of Mexican tuna products in major distribution channels. Consequently, the United States requests the Appellate Body to reject Mexico's claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU in assessing the "value" of the AIDCP label.<sup>264</sup>

2. Consistency of the Measure at Issue with Article 2.2 of the *TBT Agreement*

126. The United States requests the Appellate Body to reject Mexico's conditional appeal of the Panel's findings regarding Article 2.2 of the *TBT Agreement*. With respect to Mexico's first ground of appeal, the United States argues that the Panel correctly interpreted and applied the term "legitimate objective" in Article 2.2 to the United States' dolphin protection objective. The United States contends that the Panel did not formulate a "legal test" for determining whether a measure is legitimate based on whether the objectives of the measure "go against the object and purpose of the TBT Agreement".<sup>265</sup> Rather, it reviewed several factors relevant to whether the second objective of the US measure is "legitimate". The Panel found that the protection of dolphins may be understood as intended to protect animal life or health or the environment. When the Panel stated that the United States' objective "do[es] not go against the object and purpose of the TBT Agreement", it addressed and rejected an argument by Mexico that the measure at issue was not in fact concerned with protecting dolphins because it did not also protect other marine species. In that respect, the United States points out that the phrase "do[es] not go against the object and purpose of the TBT Agreement" is followed by the phrase "even in light of the existence of potentially conflicting objectives that could also be recognized as legitimate".<sup>266</sup>

127. In respect of Mexico's argument that a "coercive and trade restrictive" objective is not "legitimate" within the meaning of Article 2.2 of the *TBT Agreement*, the United States submits that the Panel did not find that the objectives of the US measure include "coercion or trade restrictiveness" and that Mexico does not appeal these factual findings. There is no basis for equating an objective aimed at discouraging or encouraging certain practices harmful to animal life or health with an

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<sup>264</sup>United States' appellee's submission, para. 83.

<sup>265</sup>United States' appellee's submission, para. 136 (referring to Mexico's other appellant's submission, para. 266, in turn referring to Panel Report, para. 7.443).

<sup>266</sup>United States' appellee's submission, para. 136 (referring to Panel Report, para. 7.433).

objective that is "coercive and trade-restrictive". This would render "illegitimate" the objective of any labelling scheme that seeks to inform consumers about products that reflect their preferences.<sup>267</sup>

128. Furthermore, the United States maintains that Mexico confuses the objectives of a measure with how that objective is achieved. A measure may pursue a legitimate objective but do so through means that restrict the marketing of certain products. In addition, the United States contends that the Panel correctly pointed out that the terms of Article 2.2 suggest that some restrictions on international trade may arise from the preparation, adoption, and application of technical regulations that pursue legitimate objectives. A measure's objective is not illegitimate merely because the measure restricts trade. Finally, while Mexico is correct that the measures at issue in *US – Shrimp* and *US – Gasoline* were found to constitute "arbitrary and unjustifiable discrimination" and a "disguised restriction on international trade", that was not because the objectives of the measures at issue in those disputes were illegitimate.

129. The United States requests the Appellate Body also to reject the second claim of Mexico's other appeal. The United States maintains that the Panel's approach for examining whether the measure at issue is more trade restrictive than necessary is consistent with Article 2.2 of the *TBT Agreement*. Mexico's argument that a measure that does not *fully* meet its objective is *per se* a breach of Article 2.2 is based on a "misreading" of this provision. The United States emphasizes that Article 2.2 does not include an obligation that technical regulations fulfil their objectives at a particular level, let alone at a "100% level".<sup>268</sup> In deciding what level of fulfilment a Member seeks to achieve, the Member may weigh a number of factors, such as technical feasibility, costs, and enforcement resources. Article 2.2 requires technical regulations not to restrict trade more than necessary to achieve legitimate objectives. The preamble of the *TBT Agreement*, in particular the words "at the levels it considers appropriate" in the sixth recital, confirms that Members remain free to determine at what level they seek to achieve an objective. The fact that a Member is not seeking to fulfil an objective to the utmost extent does not render the measure *per se* more trade restrictive than necessary. Therefore, the Panel was correct in proceeding to examine the alternative measure put forward by Mexico after it had made the finding that the United States' measure only "partially" achieves its objectives.<sup>269</sup>

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<sup>267</sup>United States' appellee's submission, paras. 137 and 138.

<sup>268</sup>United States' appellee's submission, para. 144.

<sup>269</sup>United States' appellee's submission, para. 146.

3. Article 2.4 of the TBT Agreement and the Effectiveness and Appropriateness of the AIDCP Standard as a Means to Fulfil the United States' Objectives

130. The United States observes, first, that Mexico has not challenged "the Panel's findings that support the conclusion that, *inside the ETP*, the AIDCP standard would be ineffective and inappropriate for fulfilling the U.S. objectives as they relate to ensuring consumers are not misled or deceived about whether tuna products contain tuna caught in a manner harmful to dolphins".<sup>270</sup> The United States argues that the Panel's ultimate conclusions should therefore remain unaltered even if the Appellate Body were to agree with the arguments advanced by Mexico on appeal.

131. The United States contends that Mexico mischaracterizes the Panel's findings when it describes the "AIDCP definition of 'dolphin safe'" as the "standard at issue".<sup>271</sup> The United States emphasizes that the basis for the Panel's finding that the AIDCP resolutions constitute a standard is that the resolutions establish "a system" for tracking, certifying, and labelling tuna caught in the ETP by vessels fishing under the AIDCP.<sup>272</sup> The United States contends that the Panel did not find that the AIDCP "dolphin-safe" definition "was, in itself, a standard".<sup>273</sup> In response to Mexico's argument that the AIDCP standard could be transposed to other fishing regions, the United States submits that "the standard the Panel examined by its terms could not readily be used in other oceans."<sup>274</sup> This is so because the system for tracking, certifying, and labelling tuna caught in the ETP depends on the independent observer programme implemented under the AIDCP. The United States asserts that a standard cannot be effective or appropriate "if it requires a Member to base its domestic standard on regimes that do not actually exist".<sup>275</sup>

132. Given that the AIDCP standard "is built upon the international dolphin conservation program set out in the AIDCP"<sup>276</sup>, the United States argues that it was appropriate for the Panel to inquire whether the AIDCP standard would be effective and appropriate for fulfilling the objectives of the US measure in the ocean for which it was designed, where it is applied, and where it should be at its most effective.<sup>277</sup> The Panel's finding that the AIDCP standard is "ineffective or inappropriate" for achieving the United States' objectives within the ETP was a sufficient basis to conclude that the AIDCP standard is ineffective and inappropriate overall.<sup>278</sup> The United States submits, therefore, that there was no need for the Panel "to consider the hypothetical application of the AIDCP standard

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<sup>270</sup>United States' appellee's submission, para. 119. (original emphasis)

<sup>271</sup>United States' appellee's submission, para. 120 (referring to, for example, Mexico's other appellant's submission, paras. 243 and 256).

<sup>272</sup>United States' appellee's submission, para. 120 (referring to Panel Report, para. 7.673).

<sup>273</sup>United States' appellee's submission, para. 120.

<sup>274</sup>United States' appellee's submission, para. 121.

<sup>275</sup>United States' appellee's submission, para. 121.

<sup>276</sup>United States' appellee's submission, para. 125.

<sup>277</sup>United States' appellee's submission, para. 126 (referring to Panel Report, para. 7.727).

<sup>278</sup>United States' appellee's submission, para. 126.



outside of the ETP"<sup>279</sup>, and that the Panel did not act inconsistently with Article 11 of the DSU in declining to do so.<sup>280</sup>

133. The United States further contends that Mexico's arguments concerning the appropriateness and effectiveness of the AIDCP standard do not account for the full scope of the United States' objectives.<sup>281</sup> In support of its position, the United States refers to the Appellate Body's statement in *EC – Sardines* that a relevant international standard "would be *effective* if it had the capacity to accomplish all three of these objectives [of the EC measure], and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives".<sup>282</sup> The United States observes that Mexico's argument disregards that the United States' objectives pertain to both observed mortality and serious injury to dolphins and to unobserved mortality and serious injury, as well as "other adverse effects".<sup>283</sup> Consequently, Mexico's argument that the AIDCP definition of "dolphin-safe" would fulfil one aspect of the United States' objectives is "beside the point", as it does not account for the full scope of the United States' objectives.<sup>284</sup> The United States also notes that Mexico appears to accept the Panel's conclusion that the AIDCP standard would be ineffective and inappropriate with respect to "unobserved" mortality and serious injury to dolphins.<sup>285</sup>

134. The United States disagrees with Mexico that the AIDCP standard would be more effective than the measure at issue. The United States submits that the focus of the inquiry under Article 2.4 is "whether use of a technical regulation based on the relevant international standard at issue fulfills the Member's legitimate objectives, rather than the extent to which the challenged technical regulation fulfills those objectives".<sup>286</sup> The United States submits, therefore, that Mexico's arguments concerning the relative effectiveness of the United States' measure, as compared to the AIDCP standard, are "inapposite".<sup>287</sup>

#### 4. The Panel's Exercise of Judicial Economy

135. The United States argues that the Panel acted within its discretion to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994. The United States asserts that Mexico has not explained why it believes that a finding of

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<sup>279</sup>United States' appellee's submission, para. 126.

<sup>280</sup>United States' appellee's submission, para. 127.

<sup>281</sup>United States' appellee's submission, paras. 129-132.

<sup>282</sup>United States' appellee's submission, para. 129 (quoting Appellate Body Report, *EC – Sardines*, para. 288). (original italics; underlining added by the United States)

<sup>283</sup>United States' appellee's submission, para. 130 (referring to Panel Report, para. 7.484 and footnote 675 thereto, and para. 7.486).

<sup>284</sup>United States' appellee's submission, para. 131.

<sup>285</sup>United States' appellee's submission, para. 132.

<sup>286</sup>United States' appellee's submission, para. 133.

<sup>287</sup>United States' appellee's submission, para. 133.

non-discrimination made under Article 2.1 of the *TBT Agreement* would be different if examined under Articles I:1 and III:4 of the GATT 1994. The United States agrees with the Panel that Mexico's arguments under Article 2.1 "derived directly" from its arguments under the GATT 1994, and the Panel could therefore properly address all of Mexico's non-discrimination claims and arguments through its examination of Article 2.1.<sup>288</sup>

136. The United States alleges that, in asserting that the Panel's findings under Article 2.2 of the *TBT Agreement* failed to resolve the dispute, Mexico "misconstrued" the Panel Report. To the contrary, argues the United States, the Panel "addressed 'all aspects of Mexico's claims, including non-discrimination aspects under Article 2.1, and other aspects under Article[s] 2.2 and 2.4', such that it was not 'necessary for it to consider separately and additionally Mexico's claims under Articles I:1 and III:4 of the GATT 1994.'"<sup>289</sup> With respect to Mexico's reference to the Appellate Body's findings in *Australia – Salmon*, the United States submits that the same report also stated that false judicial economy occurs if exercising it does not "enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings".<sup>290</sup> According to the United States, Mexico does not explain how reconsidering those claims under Articles I:1 and III:4, using the same facts and arguments that were provided under Article 2.1, would lead to a different result and different DSB recommendations or rulings.

137. Finally, in respect of Mexico's argument that the alleged false judicial economy constitutes a violation of Article 11 of the DSU, the United States recalls the Appellate Body's finding that "a claim under [that provision] must stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."<sup>291</sup> Since Mexico relies on the same arguments and facts, the United States concludes that its claim under Article 11 of the DSU does not "stand by itself". Furthermore, the United States argues that the invocation of Article 11 of the DSU does not relieve Mexico from showing that the Panel's use of judicial economy would not allow the DSB to make recommendations and rulings that would help achieve a satisfactory resolution of the dispute.

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<sup>288</sup>United States' appellee's submission, para. 107 (referring to Panel Report, paras. 7.747 and 7.748).

<sup>289</sup>United States' appellee's submission, para. 110 (referring to Panel Report, para. 7.748).

<sup>290</sup>United States' appellee's submission, para. 108 (referring to Appellate Body Report, *Australia – Salmon*, para. 223).

<sup>291</sup>United States' appellee's submission, para. 111 (referring to Appellate Body Report, *US – Tyres (China)*, para. 321).

E. *Arguments of the Third Participants*

1. Australia

(a) Annex 1.1 to the *TBT Agreement* and the Definition of "Technical Regulation"

138. In relation to whether the US "dolphin-safe" labelling provisions constitute a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*, Australia endorses the reasoning set out in the separate opinion, in particular, the view that private actions alone cannot make a measure *de facto* mandatory. Accordingly, Australia supports the United States' request that the Appellate Body reverse the Panel's finding in this regard.

(b) The Panel's Exercise of Judicial Economy

139. In Australia's view, the Panel erred in exercising judicial economy in respect of Mexico's claims under Articles I:1 and III:4 of the GATT 1994. Recalling that the aim of the dispute settlement system is "to secure a positive solution to a dispute" and that the Appellate Body has emphasized that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy", Australia considers that the Panel exercised false judicial economy, given the lack of consensus among the panelists as to whether the measure at issue constitutes a technical regulation.<sup>292</sup> Australia takes this view having regard to: (i) the possibility of the Panel's finding being reversed; (ii) the simultaneous and cumulative application of Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*; and (iii) the differences in scope and application of each of the non-discrimination obligations contained in those provisions. Australia states that it would welcome the Appellate Body completing the analysis in relation to Articles I:1 and III:4 should the Appellate Body consider that the findings of fact on the Panel record enable it to do so.<sup>293</sup>

2. Brazil

(a) Annex 1.1 to the *TBT Agreement* and the Definition of "Technical Regulation"

140. Brazil submits that the main question to be solved in this dispute is whether compliance with the labelling requirements in the US "dolphin-safe" scheme is mandatory, that is, whether the term "mandatory" is related to: (i) a condition to have access to the US market; or (ii) to binding

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<sup>292</sup>Australia's third participant's submission, paras. 5-9 (referring to Appellate Body Report, *Australia – Salmon*, para. 223; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 257; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133; Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335; and Appellate Body Report, *Japan – Agricultural Products II*, para. 111).

<sup>293</sup>Australia's third participant's submission, paras. 9 and 10.

requirements regarding labelling. Brazil understands that there is no mention in the text—either in Annex 1.1 or Annex 1.2 to the *TBT Agreement*—to the effect that these requirements should be read in the light of a product's access to the market. Therefore, it would seem that, if a product must necessarily comply with specific requirements related to its characteristics, irrespective of the market access conditions available for that product, these requirements are closer to a "technical regulation" than to a "standard".<sup>294</sup> Brazil argues that the fact that labelling requirements are: (i) defined by US regulations; (ii) enforceable by the US authorities; and (iii) a basis for sanctions in cases where they are not strictly followed, demonstrates the binding and obligatory effect they have for tuna traders as they establish a pattern of conduct that cannot be avoided or "bypassed".<sup>295</sup>

141. Brazil emphasizes that, if a "market access" criterion were to be adopted without further qualification, a "significant loophole" would be created in the implementation of the *TBT Agreement*. As a consequence, Members would be given space to create "voluntary" labelling schemes, which, albeit exclusive and distortive of the competitive environment in the Members' markets, would not be classifiable as technical regulations and would thus be exempt from complying with most of the provisions of the *TBT Agreement*.<sup>296</sup> Finally, Brazil submits that, if the Appellate Body were to accept the reasoning developed in the separate opinion, it should interpret "market access" as meaning "market access in the same competitive position" as granted to domestic products.<sup>297</sup>

(b) Consistency of the Measure at Issue with Article 2.2 of the *TBT Agreement*

142. Brazil believes that the Panel erred in its analysis of the term "necessary" in Article 2.2 of the *TBT Agreement*. According to Brazil, the Panel considered that the word "necessary" in the second sentence of Article 2.2 relates to the "trade-restrictiveness" of the measure and not to the measure itself and its legitimate objective.<sup>298</sup> In Brazil's view, the Panel did not give due account to the first sentence of Article 2.2, which connects the expression "unnecessary obstacles to international trade" with "technical regulations", and not with "trade-restrictiveness". Further, the word "necessary" in the second sentence is directly linked with "the fulfilment of a legitimate objective", which indicates that these terms should be analyzed together.<sup>299</sup>

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<sup>294</sup>Brazil's third participant's submission, para. 19.

<sup>295</sup>Brazil's third participant's submission, para. 22.

<sup>296</sup>Brazil's third participant's submission, paras. 20 and 21.

<sup>297</sup>Brazil's third participant's submission, para. 24.

<sup>298</sup>Brazil's third participant's submission, para. 31 (referring to Panel Report, para. 7.460).

<sup>299</sup>Brazil's third participant's submission, para. 31.

143. In addition, Brazil argues that it is of "crucial importance" to draw on the jurisprudence developed under Article XX of the GATT 1994 when interpreting Article 2.2.<sup>300</sup> Brazil notes that, in *Brazil – Retreaded Tyres*, the Appellate Body held that "[a] contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue" and that such a "contribution to the achievement of the objective must be material, not merely marginal or insignificant".<sup>301</sup> As a result, Brazil suggests that, if the measure adopted by a Member is not able to significantly contribute to the achievement of the legitimate objectives, there is no need further to assess the "trade-restrictiveness" criterion, as the relevant measure would not be in conformity with Article 2.2.<sup>302</sup> In the light of the above, Brazil argues that the Panel should have inquired whether the measure at issue significantly contributes to the objectives of providing consumer information and of promoting the protection of dolphins.

144. With regard to whether a measure is more trade restrictive than necessary, Brazil contends that once a measure has been found to genuinely contribute to the fulfilment of the legitimate objectives, then the analysis of its "trade-restrictiveness" may occur. In Brazil's view, the Panel erred in its interpretation of Article 2.2 of the *TBT Agreement* by drawing guidance from Article 5.6 of the *SPS Agreement*. Under the *SPS Agreement*, Members are faced with a "stricter policy space", such as requirements of a scientific justification and a risk assessment.<sup>303</sup> In this regard, Brazil points out certain differences between the two agreements, such as the differences in scope and objectives, the differences in wording between Article 5.6 and Article 2.2, and the fact that the *TBT Agreement* requires no risk assessment when deviating from international standards.<sup>304</sup> On this basis, Brazil concludes that Article 5.6 does not seem to be relevant for the interpretation of Article 2.2.<sup>305</sup>

(c) Article 2.4 of the *TBT Agreement* and the Notion of "International Standard"

145. With respect to the question of what constitutes an "international standard" within the meaning of Article 2.4 of the *TBT Agreement*, Brazil argues that the meaning of "international" in Article 2.4 should be interpreted carefully. In particular, Brazil submits that Annex 1.4 to the

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<sup>300</sup>Brazil's third participant's submission, para. 33.

<sup>301</sup>Brazil's third participant's submission, para. 33 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210).

<sup>302</sup>Brazil's third participant's submission, para. 34.

<sup>303</sup>Brazil's third participant's submission, paras. 41 and 42.

<sup>304</sup>Brazil argues that, in the light of the negotiating history of the Uruguay Round, a connection between Article 5.6 of the *SPS Agreement* and Article 2.2 of the *TBT Agreement* was clearly not intended by the Members. It refers to a US proposal for the creation of a footnote for Article 2.2 similar to the footnote to Article 5.6 of the *SPS Agreement*—as indicated by the letter written by the then Director-General of the GATT to the Chief US Negotiator—which was eventually not accepted by the Membership. (See Brazil's third participant's submission, para. 44)

<sup>305</sup>Brazil's third participant's submission, para. 46.

*TBT Agreement*, which defines "international body or system" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members", establishes that "Members should have the opportunity to accede to [international] standardizing organizations whenever they consider adequate."<sup>306</sup> Moreover, the fact that Annex 1.4 is written in the present tense indicates that membership of an international body or system should be open to all WTO Members at any time, and especially during the process of development and/or review of a standard.<sup>307</sup> Therefore, where the accession of new members was possible during a specific period in the past but is currently contingent, for example, upon the invitation and further acceptance by its members, an organization would not, in Brazil's view, seem to comply with the provisions of Annex 1 to the *TBT Agreement*.<sup>308</sup> According to Brazil, this interpretation is supported by the TBT Committee Decision, which sets out principles and procedures that should be observed when international standards are elaborated. Finally, Brazil argues that, as the WTO Members wishing to accede to a standardizing organization may face political or legal difficulties in the accession process, a case-by-case analysis may be required to determine the level of "openness" of the organization to new members.<sup>309</sup>

### 3. Canada

#### (a) Article 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994

146. Canada submits that, because of the virtually identical wording of Article 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994, the interpretation of the terms found in both provisions, in particular, the term "treatment no less favourable", as developed by the jurisprudence under Article III:4, should be substantially the same.<sup>310</sup> Referring to previous Appellate Body reports, Canada contends that an examination of whether imported products are treated "less favourably" than like domestic products requires a consideration of whether there is detriment to imported products—not, as the United States suggests, a determination of whether the discrimination is "based on" or "for reasons of" origin.<sup>311</sup> Canada argues that, if the United States' suggestion were accepted, *de facto* discrimination claims would virtually be removed from the ambit of both Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*.

147. In addition, Canada submits that the "legitimacy" of a technical regulation is not relevant for the less favourable treatment analysis under Article 2.1 of the *TBT Agreement*. If the drafters of the

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<sup>306</sup>Brazil's third participant's submission, para. 53.

<sup>307</sup>Brazil's third participant's submission, para. 54.

<sup>308</sup>Brazil's third participant's submission, para. 54.

<sup>309</sup>Brazil's third participant's submission, para. 55.

<sup>310</sup>Canada's third participant's submission, para. 4.

<sup>311</sup>Canada's third participant's submission, para. 6 (referring to United States' appellee's submission, paras. 32 and 35).

*TBT Agreement* had intended that issues regarding the legitimacy of regulatory action should factor into the less favourable treatment test, they could have drafted the text accordingly. Canada disagrees with what it describes as Mexico's attempt to incorporate elements of the test pertaining to Article XX of the GATT 1994 through the recitals of the preamble of the *TBT Agreement*. Canada also opposes the United States' similar argument that "legitimate regulatory action" and "legitimate objectives" are elements to consider in assessing whether there is less favourable treatment under Article 2.1.<sup>312</sup> However, Canada points out that Article 2.1, like Article III:4 of the GATT 1994, provides significant flexibility to WTO Members to impose measures that distinguish between products for "legitimate" purposes. This is illustrated by the Appellate Body's finding in *EC – Asbestos* that an otherwise essentially identical product may not be "like" another product if that other product imposes greater health risks.<sup>313</sup>

(b) The Panel's Exercise of Judicial Economy

148. Canada supports Mexico's claim that the Panel should have made findings under Articles I:1 and III:4 of the GATT 1994, particularly since the relationship between Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 is "not settled".<sup>314</sup> In particular, Canada submits that, unless the result of the application of Article 2.1 and the corresponding provisions of the GATT 1994 to a particular measure will necessarily be the same, it is false judicial economy for panels to fail to make findings under both agreements. Canada further notes that making findings on additional claims allows the Appellate Body to consider additional provisions and to resolve the dispute if it reverses other findings made by the Panel.<sup>315</sup> In the present case, Canada considers that, by failing to make findings under the *TBT Agreement* and the GATT 1994, the Panel risked providing only a partial resolution of the matter at issue.<sup>316</sup>

(c) Consistency of the Measure at Issue with Article 2.2 of the *TBT Agreement*

149. With respect to the interpretation of Article 2.2 of the *TBT Agreement*, Canada suggests a five-step test, which it considers generally consistent with the panel reports in the present case, in *US – COOL*, and in *US – Clove Cigarettes*.<sup>317</sup>

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<sup>312</sup>Canada's third participant's submission, paras. 7-9.

<sup>313</sup>Canada's third participant's submission, paras. 10 and 11 (referring to Appellate Body Report, *EC – Asbestos*, paras. 114-116, 122, and 130).

<sup>314</sup>Canada's third participant's submission, para. 15.

<sup>315</sup>Canada's third participant's submission, para. 14 (referring to Panel Report, *Canada – Dairy*, para. 7.119; and Appellate Body Reports, *China – Auto Parts*, para. 208).

<sup>316</sup>Canada's third participant's submission, para. 15.

<sup>317</sup>Canada's third participant's submission, para. 17.

150. According to Canada, a panel should first determine if the technical regulation restricts international trade. If it does not, the measure cannot violate Article 2.2. In the present case, Canada argues that there does not appear to be any dispute about whether the measure at issue restricts international trade. As a second step, a panel should identify the objective of the technical regulation by looking at the design, structure, and architecture of the measure, as well as other relevant documents.

151. Canada argues that, as a third step, a panel should determine if the objective of the technical regulation is legitimate. If it is not, the technical regulation violates Article 2.2 of the *TBT Agreement*. In this regard, Canada agrees with the Panel that a proper analysis starts by determining whether the objective falls within the explicitly listed objectives in Article 2.2. If the objective does not fall within the list, it is necessary to determine if it is nevertheless "legitimate" within the broader scope of that term as used in this provision. Canada agrees with Mexico that Members do not have an unlimited right to adopt any policy objective and cannot establish legitimacy on the basis of a mere assertion. It further notes that whether policies address a "legitimate objective" within the meaning of Article 2.2 is a question of legal interpretation for a panel. Referring to the *ejusdem generis* principle, Canada submits that a general term, such as "legitimate objectives", followed by an illustrative list of specific items means that the general term is limited to the type of items specifically listed. In order to distinguish non-legitimate objectives from legitimate ones, a panel should take into account the importance of the specifically listed objectives and the "common interests or values that are at stake".<sup>318</sup>

152. In Canada's view, as a fourth step, a panel should determine if the technical regulation fulfils the legitimate objective. If it does not, the technical regulation violates Article 2.2 and it is not necessary to consider alternative less trade-restrictive measures. Canada observes that, although the Panel did not address this issue as an independent element, it did in essence perform this analysis and concluded that the measure "can only *partially* ensure that consumers are informed about whether tuna was caught by using a method that adversely affects dolphins".<sup>319</sup> For Canada, the Panel's finding that consumers "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" may be the same as a finding that the challenged measure does not meet the fourth step of the test.<sup>320</sup> Alternatively, the Appellate Body may interpret the Panel's finding as a determination that the measure meets this fourth step, but that

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<sup>318</sup>Canada's third participant's submission, para. 26 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 162).

<sup>319</sup>Canada's third participant's submission, para. 27 (quoting Panel Report, para. 7.563).

<sup>320</sup>Canada's third participant's submission, paras. 27 and 28 (quoting Panel Report, para. 7.564).



the level of fulfilment is limited. If so, Canada argues that the level of fulfilment of the objective is a factor to consider in assessing the alternative measure proposed by Mexico in the next step.<sup>321</sup>

153. As a last step, Canada submits that a panel should assess alternative measures that would fulfil the legitimate objective in a less trade-restrictive way, "taking account of the risks non-fulfilment would create". If there are such alternative measures, the technical regulation violates Article 2.2. Canada emphasizes that what the text requires to be considered are the risks that would arise from a failure to fulfil the legitimate objective and not the "risks of non-fulfilment" in the sense of an assessment of the likelihood that a measure will not fulfil its objective. Canada alleges that the panels in this case and in *US – Clove Cigarettes* appear to have equated the two terms.<sup>322</sup> Furthermore, although not explicitly envisaged by Article 2.2, the extent of fulfilment of the objective by both the challenged measure and the proposed alternative measure should be taken into account. Similarly, the harm that would arise from the failure to fulfil an objective should be considered with the "trade-restrictiveness" of an alternative measure. Finally, Canada argues that a reduction of potential costs on domestic products is not a factor to consider in balancing a challenged measure against an alternative measure.

#### 4. European Union

##### (a) Annex 1.1 to the *TBT Agreement* and the Definition of "Technical Regulation"

154. Recalling the Appellate Body's finding in *EC – Asbestos* that the term "mandatory" suggests that a measure regulates the characteristics of a product "in a binding or compulsory fashion" with the "effect of prescribing or imposing" one or more of them, the European Union argues that the mere fact that the US "dolphin-safe" labelling scheme is contained in a law is not sufficient to conclude that it is "binding or compulsory".<sup>323</sup> Such an argument would "formalistically" focus on the binding nature of the document containing the labelling scheme and would disregard the substance of the product characteristics, that is, that the labelling requirements leave economic operators the choice of whether they want to market their products with or without the label.<sup>324</sup> Additionally, the US measure cannot be considered "binding or compulsory" simply because it establishes conditions or requirements for the use of the "dolphin-safe" label, as such a reading would conflate the meaning of the terms "mandatory" and "requirement" and thus leave no space for the voluntary labelling requirements

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<sup>321</sup>Canada's third participant's submission, para. 29.

<sup>322</sup>Canada's third participant's submission, para. 31 (referring to Panel Report, para. 7.467; and Panel Report, *US – Clove Cigarettes*, para. 7.424).

<sup>323</sup>European Union's third participant's submission, paras. 17 and 18 (referring to Appellate Body Report, *EC – Asbestos*, para. 68).

<sup>324</sup>European Union's third participant's submission, para. 18.

addressed in Annex 1.2 to the *TBT Agreement*.<sup>325</sup> In addition, the European Union submits that the fact that compliance with the conditions of the US "dolphin-safe" labelling scheme is legally enforceable does not appear to be sufficient either to render compliance "mandatory". As the separate opinion points out, legally binding norms, such as consumer protection or fair competition laws, which compel producers to fulfil promises concerning (voluntary) standards, should not "transform" such standards into mandatory technical regulations.<sup>326</sup>

155. Although the European Union disagrees that the "exclusivity" of a labelling scheme is always the dividing line between mandatory and voluntary schemes, it accepts that there may be circumstances in which this factor could contribute to the mandatory nature of a labelling scheme.<sup>327</sup> However, in the European Union's view, the Panel did not properly explain how the "exclusivity" of a labelling scheme makes compliance therewith "binding or compulsory". First, the Panel's assertion that "the measures prescribe 'in a negative form' ... 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" does not address why this situation makes compliance mandatory.<sup>328</sup> This is so because economic operators remain free to market tuna without any labels relating to their "dolphin-safety". Second, contrary to the Panel's position, the European Union considers that *EC – Sardines* provides no support for the Panel's "exclusivity" argument. In *EC – Sardines*, the imported product could not be sold as preserved sardines unless it complied with the labelling requirements, whereas in the present case tuna products may be sold as "tuna" even if they do not comply with the "dolphin-safe" labelling requirements.<sup>329</sup>

(b) Consistency of the Measure at Issue with Article 2.1 of the  
*TBT Agreement*

156. The European Union notes that, in order to distinguish between the exercise of regulatory autonomy that is acceptable and that which is not, one must look at the effects of a measure as well as its aim, which includes an enquiry into the design of the measure. This further entails an examination of whether or not the measure has some other purpose (as opposed to discriminating against imports), whether or not that purpose is "justified" or "legitimate", whether the measure reasonably contributes to achieving that objective (as opposed to being "arbitrary"), and whether or not there is another measure available equally capable of contributing to the objective but "less restrictive of trade".<sup>330</sup> Further, the European Union submits that numerous provisions of the covered agreements express this

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<sup>325</sup>European Union's third participant's submission, para. 19.

<sup>326</sup>European Union's third participant's submission, para. 20.

<sup>327</sup>European Union's third participant's submission, para. 22.

<sup>328</sup>European Union's third participant's submission, para. 23 (quoting Panel Report, para. 7.131).

<sup>329</sup>European Union's third participant's submission, para. 23.

<sup>330</sup>European Union's third participant's submission, paras. 53-56.

basic approach, most obviously the chapeau of Article XX of the GATT 1994 and in the "necessity" language of that article, as well as Article III:4, and that these GATT 1994 provisions are "re-cast" in Articles 2.1 and 2.2 of the *TBT Agreement*.<sup>331</sup>

157. Regarding the question of an "in fact" claim of a national treatment violation, the European Union notes that the outcome depends mostly on what is meant by "'factors or circumstances' related to the foreign origin of the product". It also depends on whether this concept is to be construed relatively narrowly or relatively broadly, and whether any countervailing explanations are to be considered only in case such a "relation" is identified, or rather at the same time as considering whether there is any "relation" at all. The European Union argues for a broader concept, including, for example, consumer preferences and/or regulations in the exporting country, but highlights that any countervailing explanations should be considered at the same time as considering whether or not there is any such "relation" with foreign origin. Such an approach would be sufficiently flexible and broadly similar to the approach under the GATT 1994.<sup>332</sup> Concerning the present case, the European Union is of the view that the Panel carefully considered all of the evidence before it and made an objective assessment pursuant to Article 11 of the DSU.<sup>333</sup>

(c) Consistency of the Measure at Issue with Article 2.2 of the  
*TBT Agreement*

158. The European Union agrees with the United States that Mexico had the initial burden of proof with respect to all aspects of its claim under Article 2.2 of the *TBT Agreement*. Furthermore, the European Union stresses the importance of the way in which the legitimate objective is framed (either more broadly or more narrowly) for the analysis under this provision. The United States' approach of narrowing the objective so as to correspond to the subject matter of the complaint ("setting on dolphins") is, in the European Union's view, somewhat "mechanistic". It would not leave much room for the balanced consideration of all the facts, such as, for example, why the circumstances of death might be relevant to circumscribe the objective itself if, presumably, the United States and its consumers really do care about dolphin mortality.<sup>334</sup> As to the question of whether the costs associated with a measure should play a role in the assessment under Article 2.2, the European Union submits that it may be relevant to examine the balance between the objective and the costs, as well as the manner in which the costs are distributed amongst different WTO Members, particularly in the

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<sup>331</sup>European Union's third participant's submission, para. 60.

<sup>332</sup>European Union's third participant's submission, paras. 62-66. The European Union recognizes, however, that such an approach would result in a conceptual overlap between an in fact assessment under Article 2.1 of the *TBT Agreement*, and an assessment under Article 2.2 of the *TBT Agreement*, taking into account the observation that, in an in fact assessment, no facts are *per se* excluded from the scope of the adjudicator's review.

<sup>333</sup>European Union's third participant's submission, para. 67.

<sup>334</sup>European Union's third participant's submission, para. 76.

long-term.<sup>335</sup> Finally, the European Union agrees with the United States that the relative risk to dolphins inside and outside the ETP would be relevant to the assessment.<sup>336</sup>

(d) Article 2.4 of the *TBT Agreement* and the Notion of "International Standard"

159. The European Union submits that the determination of which documents qualify as "international standards" must be undertaken with great care, since such standards trigger the obligation in Article 2.4 of the *TBT Agreement*. As regards the requirement of "recognition" of an entity as an international standardizing organization, the European Union argues that this relates to the standardization activities of a body and that it would be circular to infer "recognition" from "participation" by countries in a body's standardizing activities as this would devoid the "recognition" element of any meaning.<sup>337</sup>

160. In addition, the European Union argues that "recognition" by only one country regarding only one document should not qualify as recognition that the relevant entity is an international standards organization. Recognition of standardization activity should depend on those who establish and use standards, that is, the market participants, and not governments or courts.<sup>338</sup> The European Union advances additional factors, which, in its view, indicate that the AIDCP may not be an entity with recognized activities in standardization. The European Union points out that the issuance of standards is not mentioned as one of the objectives of the AIDCP and that there is no indication that the AIDCP has accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to the *TBT Agreement*, which would have indicated that the AIDCP sees itself as a standardizing body. Finally, the European Union doubts that the AIDCP has the necessary institutional structure to qualify as an "organization" and is sufficiently "open" to qualify as "international" for the purposes of the *TBT Agreement*.

5. Japan

(a) Annex 1.1 to the *TBT Agreement* and the Definition of "Technical Regulation"

161. Japan agrees with the Panel's analysis concerning the mandatory nature of the measure at issue. In Japan's view, no single factor of the three listed by the Panel should be decisive on its own. Japan submits, however, that all three considered together should be given considerable weight in determining whether a measure is a technical regulation that regulates the "characteristics of products"

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<sup>335</sup>European Union's third participant's submission, para. 76.

<sup>336</sup>European Union's third participant's submission, para. 77.

<sup>337</sup>European Union's third participant's submission, paras. 85-87.

<sup>338</sup>European Union's third participant's submission, para. 88.

in a binding or compulsory fashion.<sup>339</sup> According to Japan, the distinguishing characteristic of the US measure is that it privileges and enforces a single definition of "dolphin-safety" and excludes other definitions, thereby restricting the choice to use indications on products regardless of whether that tuna was actually harvested in a "dolphin-safe" manner.<sup>340</sup> In Japan's view, if the measure permitted alternative descriptive labels addressing the "dolphin-safety" of tuna, then it would most likely not be mandatory because products not satisfying one description could indicate their product characteristics or quality appropriately.<sup>341</sup>

162. Japan suggests that the reports of the panels in *EC – Sardines* and *EC – Trademarks and Geographical Indications (Australia)* should guide the Appellate Body's analysis in this case. In the former case, the European Communities argued that its regulation did not bar the sale of the product at issue in the European Communities at all, unless labelled as "preserved sardines". In the latter case, the regulation at issue did not bar the importation or sale of a product as such, but simply prohibited the marketing of certain products in the EC if the product used a particular label. Japan notes that, in this dispute, the measure at issue similarly bars marketing of tuna products that bear a non-conforming "dolphin-safe" label suggesting that it is therefore a "technical regulation" for purposes of the *TBT Agreement*.<sup>342</sup>

163. In Japan's opinion, the Appellate Body should not conclude that a labelling requirement can only be a technical regulation if the requirement mandates that a label must be used in order for the good to be sold on the market. This reading would be "too narrow", inconsistent with prior cases, and would leave many potentially trade-distorting measures outside the scope of the *TBT Agreement*.<sup>343</sup>

(b) Article 2.4 of the *TBT Agreement* and the Notion of "International Standard"

164. With respect to the Panel's finding regarding Article 2.4 of the *TBT Agreement*, Japan is of the view that "no purported international standard should be recognized as such" if the six principles set out in the TBT Committee Decision were disregarded in its elaboration.<sup>344</sup>

165. Japan agrees with the United States that the Panel was incorrect in finding that the AIDCP definition is an "international standard" within the meaning of Article 2.4. In particular, Japan disagrees that the AIDCP is "international" as it is not "open" in the sense of the TBT Committee

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<sup>339</sup>Japan's third participant's submission, para. 13 (referring to Appellate Body Report, *EC – Asbestos*, para. 69).

<sup>340</sup>Japan's third participant's submission, para. 14.

<sup>341</sup>Japan's third participant's submission, para. 19.

<sup>342</sup>Japan's third participant's submission, paras. 15-18.

<sup>343</sup>Japan's third participant's submission, para. 20.

<sup>344</sup>Japan's third participant's submission, para. 23.

Decision, which calls for "openness without discrimination with respect to participation at the policy development level and at every stage of standards development".<sup>345</sup> Japan requests the Appellate Body to consider the relevant facts and carefully assess whether an organization with participation as narrow as the AIDCP should be deemed to be "open" within the meaning of Annex 1.4 to the *TBT Agreement*.<sup>346</sup>

6. New Zealand

(a) Annex 1.1 to the *TBT Agreement* and the Definition of "Technical Regulation"

166. In New Zealand's view, the Panel erred in its analysis of whether the US measure constitutes a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*. According to New Zealand, the Panel's focus should have been on whether there was a mandatory requirement for tuna producers to label their product as "dolphin-safe" to be sold in the US market, rather than whether the labelling criteria were binding in nature.<sup>347</sup>

167. New Zealand submits that the Appellate Body should first consider whether there is a *de jure* mandatory requirement for tuna producers to label their product as "dolphin-safe". If it determines that no such requirement exists and that the use of the label is only voluntary, the second step should be to consider whether there are facts and circumstances that imply that the criteria for use of the "dolphin-safe" label could nevertheless be considered a *de facto* mandatory requirement to label, and thus constitute a technical regulation.<sup>348</sup> According to New Zealand, a conclusion that a measure is *de facto* mandatory must be clearly supported by the facts of the case so as to maintain the distinction between technical regulations and standards in the *TBT Agreement*. New Zealand notes, in this regard, that the Appellate Body may wish to consider the relevance of the fact that the US measure appears to prohibit the use of other terms or statements relating to "dolphin-safety".<sup>349</sup>

(b) Consistency of the Measure at Issue with Article 2.2 of the *TBT Agreement*

168. In New Zealand's view, the Panel appropriately considered whether the measure fell within any of the legitimate objectives listed under Article 2.2. While agreeing with the Panel's finding that Article 2.2 provides a non-exhaustive list of legitimate objectives, New Zealand argues that the phrase "legitimate objectives" also implies that some objectives are illegitimate. Therefore, an objective not

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<sup>345</sup>Japan's third participant's submission, para. 26.

<sup>346</sup>Japan's third participant's submission, para. 27.

<sup>347</sup>New Zealand's third participant's submission, para. 8.

<sup>348</sup>New Zealand's third participant's submission, para. 9.

<sup>349</sup>New Zealand's third participant's submission, para. 10.

included in the illustrative list (such as "consumer information") should only be considered legitimate where the regulating Member is able to provide clear and compelling evidence as to its legitimacy.<sup>350</sup>

169. New Zealand disagrees with the Panel's conclusion that the consumer information objective of the US measure fits within the broader goal of preventing deceptive practices. New Zealand notes that these objectives are not interchangeable and that, from a systemic perspective, there is a fundamental distinction between the objectives of consumer information and the prevention of deceptive practices. A Member regulating to prevent deceptive practices (which is specifically recognized as a legitimate objective in Article 2.2) only has to show that its measure is in fact aimed at preventing deceptive practices. Conversely, a Member regulating to provide consumer information must first demonstrate that consumer information is indeed a legitimate objective in the circumstances of the case. When determining whether "consumer information" is a legitimate objective, a panel should take the nature of the objectives in the illustrative list in Article 2.2 into account.<sup>351</sup>

(c) Article 2.4 of the *TBT Agreement* and the Notion of "International Standard"

170. New Zealand supports the Panel's approach to ascertaining whether the AIDCP "dolphin-safe" standard is an "international standard" for the purposes of Article 2.4 of the *TBT Agreement*. This approach allows for a careful consideration of any standard claimed to be an international standard and should ensure that an inappropriate burden is not imposed on regulating Members with respect to the use of international standards. Moreover, New Zealand agrees with the Panel's approach to determining whether an organization is an international standardizing/standards organization. It also endorses the Panel's examination of whether standardizing activities are "recognized activities" carried out by the organization, and whether membership of an organization is open on a non-discriminatory basis to relevant bodies of at least all WTO Members.<sup>352</sup>

### III. Issues Raised on Appeal

171. The following issues are raised on appeal:

- (a) whether the Panel erred in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*;

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<sup>350</sup>New Zealand's third participant's submission, paras. 17 and 18.

<sup>351</sup>New Zealand's third participant's submission, paras. 20 and 21.

<sup>352</sup>New Zealand's third participant's submission, paras. 12 and 13 (referring to Panel Report, paras. 7.685 and 7.691).

- (b) whether the Panel erred in finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labelling provisions are not inconsistent with Article 2.1 of the *TBT Agreement*, and in particular:
  - (i) whether the Panel erred in its interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the *TBT Agreement*; and
  - (ii) whether the Panel acted inconsistently with Article 11 of the DSU in its evaluation of Mexico's claim under Article 2.1 of the *TBT Agreement*.
- (c) whether the Panel erred in law, or acted inconsistently with Article 11 of the DSU, in finding, in paragraph 7.620 of the Panel Report, that the measure at issue is more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking account of the risks non-fulfilment would create, and that, therefore, the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*;
- (d) if the Appellate Body reverses the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*, then whether the Panel erred in finding that the United States' objective of "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" is a legitimate objective within the meaning of that provision;
- (e) if the Appellate Body reverses the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement* and rejects the ground of appeal in item (d) above, then whether the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement* based on the Panel's finding that the measure did not entirely fulfil its objectives;
- (f) whether the Panel erred in finding, in paragraph 7.707 of the Panel Report, that the AIDCP "dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*; and in finding, in paragraph 7.740 of the Panel Report, that Mexico had failed to demonstrate that the AIDCP standard is an effective and appropriate means to fulfil the United States' objectives "at the United States' chosen level of protection"; and



- (g) whether the Panel acted inconsistently with Article 11 of the DSU in deciding to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.

#### IV. Background and Overview of the Measure at Issue

172. This dispute arises out of a challenge brought by Mexico against certain legal instruments of the United States establishing the conditions for the use of a "dolphin-safe" label on tuna products. In particular, Mexico identified the following legal instruments as the object of its challenge: the *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act" or "DPCIA"); the *United States Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92 (the "implementing regulations"); and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*<sup>353</sup> (the "Hogarth ruling"). Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling set out the requirements for when tuna products sold in the United States may be labelled as "dolphin-safe".<sup>354</sup> More specifically, they condition eligibility for a "dolphin-safe" label upon certain documentary evidence that varies depending on the area where the tuna contained in the tuna product is harvested and the type of vessel and fishing method by which it is harvested. In particular, tuna caught by "setting on"<sup>355</sup> dolphins is currently not eligible for a "dolphin-safe" label in the United States, regardless of whether this fishing method is used inside or outside the Eastern Tropical Pacific Ocean (the "ETP").<sup>356</sup> The DPCIA and the implementing regulations also prohibit any reference to dolphins, porpoises, or marine mammals on the label of a tuna product if the tuna contained in the product does not comply with the labelling conditions spelled out in the DPCIA. However, they do not make the use of a "dolphin-safe" label obligatory for the importation or sale of tuna products in the United States. We refer to the legal instruments challenged

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<sup>353</sup>United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Panel Exhibit MEX-31).

<sup>354</sup>Panel Report, para. 7.24.

<sup>355</sup>The fishing technique of "setting on" dolphins takes advantage of the fact that tuna tend to swim beneath schools of dolphins in the ETP. The fishing method involves chasing and encircling the dolphins with a purse seine net in order to catch the tuna swimming beneath the dolphins.

<sup>356</sup>The ETP, as defined under US law, extends westward from the west coast of the Americas to include most of the tropical Pacific east of the Hawaiian Islands, and includes high seas areas as well as the exclusive economic zones and territorial seas of Chile, Colombia, Costa Rica, Ecuador, El Salvador, France (due to the French overseas possession, Clipperton Island), Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and the United States. More specifically, the DPCIA defines the ETP as "the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America." (DPCIA, subsection 1385(c)(2))

by Mexico collectively as the "measure at issue", the "US measure", or "the US 'dolphin-safe' labelling provisions" for ease of reference and uniformity with the Panel.<sup>357</sup>

173. With respect to the conditions for access to a "dolphin-safe" label, the DPCIA distinguishes between five different fisheries, namely: (1) large<sup>358</sup> purse seine vessels in the ETP; (2) purse seine vessels in any ocean region outside of the ETP where the US Secretary of Commerce has determined that there is a regular and significant tuna-dolphin association similar to that found in the ETP; (3) purse seine vessels in any other ocean region outside the ETP; (4) non-purse seine vessels in any ocean area where the US Secretary of Commerce has determined that there is a regular and significant mortality or serious injury of dolphins; and (5) vessels engaged in driftnet fishing on the high seas. At the time of the panel request in this dispute, the US Secretary of Commerce had not identified any fisheries as having a regular and significant tuna-dolphin association or as having a regular and significant mortality or serious injury of dolphins.<sup>359</sup>

174. Depending on the fishery in which the tuna contained in a tuna product is harvested, the DPCIA requires either one or both of the following certifications as a condition for a "dolphin-safe" label: (1) a certification that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught; (2) a certification that no dolphins were killed or seriously injured in the sets in which the tuna were caught. The DPCIA further prescribes whether these certifications are to be provided: (1) by the captain of the vessel; or (2) by the captain of the vessel and an observer. The DPCIA provides that access to the "dolphin-safe" label is prohibited for tuna products containing tuna fished with driftnets on the high seas.

175. Under the DPCIA, the type of certification required for tuna products containing tuna harvested by large purse seine vessels in the ETP was subject to a finding by the US Secretary of Commerce on whether the intentional deployment on or encirclement of dolphins with purse seine

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<sup>357</sup>The Panel treated 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 its findings. The Panel reasoned that "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." The Panel also noted that "the United States [did] not object to Mexico's request to consider the various instruments together and that [the United States had] articulated its defence in these proceedings on the basis of the measures taken together." (See Panel Report, para. 7.24) The legal nature of the measure at issue is one of the issues raised in this appeal, and, like the Panel, we use the term "US 'dolphin-safe' labelling provisions" without prejudice to the substantive issue of whether the measure at issue constitutes a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement*.

<sup>358</sup>Pursuant to subsection 1385(d)(2)(A) of the DPCIA, the labelling conditions do not have to be met by vessels that are "of a type and size that the Secretary has determined, consistent with the International Dolphin Conservation Program, is not capable of deploying its purse seine nets on or to encircle dolphins". This limitation applies only to the ETP.

<sup>359</sup>Panel Report, paras. 2.23, 7.488, and 7.534.

nets is having a significant adverse impact on any depleted dolphin stock in the ETP.<sup>360</sup> In the event of a negative finding, a certification that "no dolphins were killed or seriously injured during the sets in which the tuna were caught" would have been sufficient in order to make the tuna products eligible for a "dolphin-safe" label. In the event of a positive finding, an additional certification 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" would have been required.

176. The US Secretary of Commerce found 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."<sup>361</sup> However, this finding was overturned through court rulings, on the basis that the Secretary failed to conduct statutorily mandated studies and that the best available scientific evidence did not support the Secretary's finding.<sup>362</sup> The United States explained to the Panel that, as a result of these rulings, "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)."<sup>363</sup> The Panel accepted this characterization of the current situation under US law. Accordingly, it found that:

... 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 [the "International Dolphin Conservation Program"] 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.<sup>364</sup> (original emphasis)

177. Subsection 1385(d)(3) of the DPCIA provides for the development of an official "dolphin-safe" label and stipulates conditions for the use of alternative "dolphin-safe" labels. Either the official label or an alternative one may be used, provided that the conditions are met.<sup>365</sup> In response to questioning by the Panel, the United States clarified that the requirements for the alternative label apply in addition to the conditions for the official label. The Panel accepted the United States' characterization of the law.<sup>366</sup>

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<sup>360</sup>DPCIA, subsection 1385(h).

<sup>361</sup>Panel Report, para. 2.18 (quoting US District Court for the Northern District of California, *Earth Island Institute v. Evans*, (9 August 2004) (Panel Exhibit MEX-29), p. 4).

<sup>362</sup>*Earth Island Institute v. Evans*, *supra*, footnote 361, affirmed by *Earth Island Institute v. Hogarth*, *supra*, footnote 353.

<sup>363</sup>Panel Report, para. 2.19 (quoting United States' first written submission to the Panel, para. 22).

<sup>364</sup>Panel Report, para. 2.20.

<sup>365</sup>Panel Report, paras. 2.28 and 2.29.

<sup>366</sup>Panel Report, paras. 2.30 and 7.536 (referring to United States' response to Panel Question 8; and United States' second written submission to the Panel, paras. 40 and 41).

## V. Legal Characterization of the Measure at Issue

178. Before the Panel, Mexico challenged the consistency of the US "dolphin-safe" labelling provisions with Articles I:1 and III:4 of the GATT 1994 and Article 2 of the *TBT Agreement*. Before proceeding to examine the substance of Mexico's claims, the Panel stated that it would determine, as a threshold matter, whether, as contended by Mexico, the measure at issue constitutes a "technical regulation" to which Article 2 of the *TBT Agreement* applies.<sup>367</sup>

179. In its analysis of this question, the Panel applied what it described as a "three-tier test"<sup>368</sup> and made three intermediate findings. First, the Panel found that the measure at issue applies to an "identifiable" product or group of products, namely, "tuna products" as defined in the DPCIA and Section 216.3 of Title 50 of the *United States Code of Federal Regulations*.<sup>369</sup> Second, the Panel found that the measure at issue sets out the conditions under which tuna products may be labelled "dolphin-safe" and that it thus establishes "labelling requirements, as they apply to a product, process or production method" within the meaning of Annex 1.1 to the *TBT Agreement*.<sup>370</sup> Third, the Panel found that the measure at issue establishes "labelling requirements, compliance with which is mandatory".<sup>371</sup> The United States does not contest the first two intermediate findings made by the Panel. Instead, its appeal focuses on the Panel's finding that the measure at issue establishes labelling requirements "with which compliance is mandatory" and the Panel's conclusion that the US measure therefore constitutes a "technical regulation" within the meaning of Annex 1.1.

180. Based on its review of the measure at issue, the Panel found, *inter alia*, that, in order for tuna products to be exported from or offered for sale in the United States with a "dolphin-safe" designation, such products must comply with the requirements set out in the DPCIA.<sup>372</sup> The Panel added that the US "dolphin-safe" labelling provisions are subject to specific enforcement measures<sup>373</sup>; and that they prescribe in a binding manner the conditions for the use of certain terms on labels for tuna products, on the basis of compliance with the underlying standard.<sup>374</sup> The Panel further emphasized that the US "dolphin-safe" labelling provisions are "legally enforceable and binding under US law" and were "issued by the government and include legal sanctions".<sup>375</sup> Furthermore, the Panel remarked that the challenged measure prescribes "certain requirements that must be complied with in order to make *any* claim relating to the manner in which the tuna contained in [a] tuna product was

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<sup>367</sup>Panel Report, para. 7.49.

<sup>368</sup>Panel Report, para. 7.53.

<sup>369</sup>Panel Report, para. 7.62.

<sup>370</sup>Panel Report, para. 7.78.

<sup>371</sup>Panel Report, para. 7.145.

<sup>372</sup>Panel Report, para. 7.124.

<sup>373</sup>Panel Report, para. 7.127.

<sup>374</sup>Panel Report, para. 7.132.

<sup>375</sup>Panel Report, para. 7.142.

caught, in relation to dolphins" and regulates "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".<sup>376</sup> The Panel added that the measure at issue prohibits "any statement relating to dolphins, porpoises or marine [mammals], whether misleading or otherwise, if the conditions set out in the regulation are not met" and leaves no other possibility to inform consumers about the "dolphin-safety" of tuna products, except to meet the specific requirements of the measure.<sup>377</sup> The Panel considered therefore that, effectively, the specific requirements of the measure at issue are the only option available to address "dolphin-safety" and that, through access to the label, the US measure regulates "the 'dolphin-safe' status of tuna products in a binding and exclusive manner".<sup>378</sup> On this basis, the Panel concluded that the US "dolphin-safe" labelling provisions constitute a "technical regulation" subject to the disciplines of Article 2 of the *TBT Agreement*.<sup>379</sup>

181. The United States takes issue with several aspects of the Panel's analysis, alleging in particular that the Panel erred in its interpretation of the word "mandatory" by making it indistinguishable from the term "requirement".<sup>380</sup> In the United States' view, a labelling requirement is "mandatory" within the meaning of Annex 1.1 if there is a requirement to use a particular label in order to place a product for sale on the market.<sup>381</sup> The United States submits that the Panel erred in relying on the fact that the measure at issue is legally enforceable and binding under US law, since enforceability, as such, does not distinguish technical regulations from standards.<sup>382</sup> The United States also alleges that the Panel erred by relying on a criterion of "exclusivity" to find that a standard becomes a technical regulation if it is "the only standard" available to address an issue.<sup>383</sup> The United States argues in this regard that "[n]othing in Annex 1.1 provides that a technical regulation must be exclusive, and nothing in Annex 1.2 provides that a standard cannot be exclusive."<sup>384</sup>

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<sup>376</sup>Panel Report, para. 7.143.

<sup>377</sup>Panel Report, paras. 7.143 and 7.144.

<sup>378</sup>Panel Report, para. 7.144.

<sup>379</sup>In a separate opinion, one member of the Panel found that compliance with the "dolphin-safe" labelling provisions is not "mandatory" and concluded, therefore, that the US measure does not constitute a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*. According to that panelist, a labelling scheme is "mandatory" when the use of a certain label is compulsory to access the market and "voluntary" when products can be marketed with or without the label. Notwithstanding this conclusion, the panelist in question considered it appropriate to pursue the analysis of the measure at issue as a "technical regulation" and agreed with the remainder of the Panel's findings. (Panel Report, para. 7.188)

<sup>380</sup>United States' appellant's submission, heading III.B.1.

<sup>381</sup>United States' appellant's submission, para. 32 (referring to Panel Report, para. 7.150).

<sup>382</sup>United States' appellant's submission, para. 51.

<sup>383</sup>United States' appellant's submission, para. 65 (referring to Panel Report, paras. 7.143 and 7.144).

<sup>384</sup>United States' appellant's submission, para. 66.

182. Mexico disagrees with the United States that the Panel's interpretation of "mandatory" is indistinguishable from the term "requirements".<sup>385</sup> Mexico maintains that what makes the US "dolphin-safe" labelling provisions mandatory is not whether a label is *de jure* required in order to sell tuna products in the market, but the fact that they restrict retailers, consumers, and producers to a single choice for labelling tuna products as "dolphin-safe".<sup>386</sup> Mexico contends that the prohibition of using a label "based on any standard other than the U.S. standard is ... separate from and in addition to the 'labelling requirements'".<sup>387</sup> It is this prohibition that, in Mexico's view, "transforms what would otherwise be a standard into a technical regulation".<sup>388</sup> In response to the United States' argument that "enforceability" as such does not distinguish technical regulations from standards, Mexico contends that the United States confuses the enforcement of the "labelling requirements" with the enforcement of the single "dolphin-safe" definition. In Mexico's view, it was the separate and distinct prohibition of other labels that was the focus of the Panel's analysis with respect to "enforceability".<sup>389</sup>

A. *Interpretation of Annex 1.1 to the TBT Agreement*

183. Before we review the definition of "technical regulation" contained in Annex 1.1 to the *TBT Agreement*, we recall that the Appellate Body has previously addressed the meaning of that provision in *EC – Asbestos* and *EC – Sardines*. In the latter case, the Appellate Body held that, in order to fall under the definition of "technical regulation", a document must apply to an identifiable product or group of products, it must lay down one or more characteristics of the product, and "compliance with the product characteristics must be mandatory".<sup>390</sup>

184. Article 1.2 of the *TBT Agreement* stipulates that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies". The first paragraph of Annex 1 to the *TBT Agreement* defines the term "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.

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<sup>385</sup>Mexico's appellee's submission, heading III.A.2.

<sup>386</sup>Mexico's appellee's submission, para. 41 and footnote 43 thereto (quoting Panel Report, para. 7.144).

<sup>387</sup>Mexico's appellee's submission, para. 44.

<sup>388</sup>Mexico's appellee's submission, para. 44.

<sup>389</sup>Mexico's appellee's submission, para. 68 (referring to Panel Report, paras. 7.128, 7.131, 7.137, and 7.142-7.145).

<sup>390</sup>Appellate Body Report, *EC – Sardines*, para. 176.

185. Annex 1.1 defines the term "technical regulation" by reference to a "document", which is defined quite broadly as "something written, inscribed, etc., which furnishes evidence or information upon any subject".<sup>391</sup> The use of the term "document" could therefore cover a broad range of instruments or apply to a variety of measures. Annex 1.1 to the *TBT Agreement*, however, narrows the scope of measures that can be characterized as a "technical regulation" by referring to a document that "lays down product characteristics or their related processes and production methods, including the applicable administrative provisions". The verb "lay down" is defined as "establish, formulate definitely (a principle, a rule); prescribe (a course of action, limits, etc.)".<sup>392</sup> Annex 1.1 further describes a technical regulation by reference to a "document" "with which compliance is mandatory". The noun "compliance" is defined as "[t]he action of complying".<sup>393</sup> The verb "comply" refers to an "[a]ct in accordance with or *with* a request, command, etc."<sup>394</sup> The word "mandatory" means "obligatory in consequence of a command, compulsory"<sup>395</sup>, or "being obligatory".<sup>396</sup>

186. Regarding the subject matter of a technical regulation, we note that the language in Annex 1.1 clarifies that a technical regulation may establish or prescribe "product characteristics or their related processes and production methods". Annex 1.1 to the *TBT Agreement* further states that a technical regulation may include or "deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." Regarding the meaning of the notion of "labelling requirements", we note that the word "requirement" means "a condition which must be complied with".<sup>397</sup> The term "labelling requirements" thus refers to provisions that set out criteria or conditions to be fulfilled in order to use a particular label.

187. The second sentence of Annex 1.2, which sets out the definition of "standard" for purposes of the *TBT Agreement*, contains language identical to that found in the second sentence of Annex 1.1. With respect to the second sentence of these provisions, the subject matter of a particular measure is therefore not dispositive of whether a measure constitutes a technical regulation or a standard. Instead, "terminology", "symbols", "packaging", "marking", and "labelling requirements" may be the

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<sup>391</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 731. We note that the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities (the "ISO/IEC Guide 2: 1991") establishes that "[a] document is to be understood as any medium with information recorded on or in it."

<sup>392</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1562.

<sup>393</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 472.

<sup>394</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 473.

<sup>395</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1694.

<sup>396</sup>*Merriam Webster's Dictionary of Law*, L.P. Wood (ed.) (Merriam-Webster Inc., 1996), p. 304.

<sup>397</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2541.

subject-matter of either technical regulations or standards. The fact that "labelling requirements" may consist of criteria or conditions that must be complied with in order to use a particular label does not imply therefore that the measure is for that reason alone a "technical regulation" within the meaning of Annex 1.1.

188. For all these reasons, we consider that a panel's determination of whether a particular measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case.<sup>398</sup> In some cases, this may be a relatively straightforward exercise. In others, the task of the panel may be more complex. Certain features exhibited by a measure may be common to both technical regulations falling within the scope of Article 2 of the *TBT Agreement* and, for example, standards falling under Article 4 of that Agreement. Both types of measure could, for instance, contain conditions that must be met in order to use a label. In both cases, those conditions could be "compulsory" or "binding" and "enforceable". Such characteristics, taken alone, cannot therefore be dispositive of the proper legal characterization of the measure under the *TBT Agreement*. Instead, it will be necessary to consider additional characteristics of the measure in order to determine the disciplines to which it is subject under that Agreement.<sup>399</sup> This exercise may involve considering whether the measure consists of a law or a regulation enacted by a WTO Member, whether it prescribes or prohibits particular conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure.

189. Having examined the meaning of the term "technical regulation" as defined in Annex 1.1, we turn to examine the United States' appeal of the Panel's conclusion that the measure at issue constitutes a "technical regulation" within the meaning of the *TBT Agreement*.

B. *Whether the Measure at Issue Constitutes A Technical Regulation*

190. As already mentioned, we consider that a determination of whether a particular measure constitutes a technical regulation must be made in the light of the features of the measure and the circumstances of the case.

191. In assessing whether the US "dolphin-safe" labelling provisions constitute a technical regulation, we note first that the measure at issue consists of a law enacted by the US Congress<sup>400</sup> and regulations pertaining to the use of the "dolphin-safe" label set out in the *United States Code of*

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<sup>398</sup>See Appellate Body Report, *EC – Asbestos*, para. 64; and Appellate Body Report, *EC – Sardines*, paras. 192 and 193.

<sup>399</sup>See Appellate Body Reports, *China – Auto Parts*, para. 171.

<sup>400</sup>As noted, the DPCIA is codified in Title 16, Section 1385 of the *United States Code*.



*Federal Regulations*.<sup>401</sup> In other words, the DPCIA and the implementing regulations constitute legislative or regulatory acts of the US federal authorities.<sup>402</sup>

192. Before the Panel, the United States clarified that the DPCIA establishes the conditions for use of a "dolphin-safe" label on tuna products.<sup>403</sup> In addition, the United States referred to the implementing regulations as the "DPCIA implementing regulations" and stated that "[t]he DPCIA and implementing regulations are the source and authority for understanding the conditions on labelling tuna products dolphin-safe".<sup>404</sup> The United States further explained that the regulations reflect the conditions for the use of the "dolphin-safe" label and ensure that tuna caught by certain vessels is labelled "dolphin-safe" only if the conditions set out in the DPCIA have been met.<sup>405</sup>

193. Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling set out the requirements for when tuna products sold in the United States may be labelled as "dolphin-safe". More specifically, they condition eligibility for a "dolphin-safe" label upon certain documentary evidence that varies depending on the area where the tuna contained in the tuna product is harvested and the type of vessel and fishing method by which it is harvested. They also prohibit any reference to dolphins, porpoises, or marine mammals on the label for tuna products if the tuna contained in such products does not comply with the labelling conditions spelled out in the DPCIA. Other labelling schemes that do not satisfy the specific requirements in the US measure are therefore prohibited by virtue of the measure at issue. Consequently, the US measure establishes a single and legally mandated set of requirements for making any statement with respect to the broad subject of

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<sup>401</sup>These regulations were promulgated in accordance with the DPCIA and are codified in Title 50, Section 216, of the *United States Code of Federal Regulations*.

<sup>402</sup>Panel Report, para. 7.20.

<sup>403</sup>Panel Report, para. 7.22 (referring to United States' response to Panel Question 3, paras. 3-6).

<sup>404</sup>Panel Report, para. 7.22 (quoting United States' response to Panel Question 7, para. 19).

<sup>405</sup>More specifically, the United States argued 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 serious injury 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 labeled 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.

(Panel Report, footnote 194 to para. 7.22 (quoting United States' first written submission to the Panel, para. 31)) (footnotes omitted by the Panel)

"dolphin-safety" of tuna products in the United States. As the Panel found, the US "dolphin-safe" labelling provisions set out "certain requirements that must be complied with in order to make *any* claim relating to the manner in which the tuna contained in [a] tuna product was caught, in relation to dolphins".<sup>406</sup> The US measure thus covers the entire field of what "dolphin-safe" means in relation to tuna products in the United States. We attach importance to these characteristics of the measure at issue in assessing whether it can properly be characterized as a "technical regulation" within the meaning of the *TBT Agreement*.

194. We further note that the US measure provides for specific enforcement mechanisms.<sup>407</sup> Thus, under the DPCIA, it is "a violation of section 45 of title 15 for any producer, importer, exporter, distributor, or seller of any tuna product ... 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."<sup>408</sup> In addition, the measure at issue sets out active surveillance mechanisms to guarantee compliance with its norms and imposes sanctions in case of wrongful labelling.<sup>409</sup>

195. The United States submits that whether the measure at issue is legally enforceable does not provide a basis for drawing a distinction between technical regulations and standards.<sup>410</sup> The United States explains, for example, that "labelling requirements" may be subject to enforcement regardless of whether they are set forth in a standard or in a technical regulation. It is true that "labelling requirements" in a standard or in a technical regulation may be subject to enforcement. However, the US measure not only sets out certain conditions for the use of a label, but, in addition, it enforces a prohibition against the use of any other label containing the terms "dolphin-safe", "dolphins", "porpoises", or "marine mammals" on a tuna product that does not comply with the

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<sup>406</sup>Panel Report, para. 7.143. (original emphasis)

<sup>407</sup>We note that, in *EC – Asbestos*, the Appellate Body attached importance to the fact that the measure was legally enforceable. The Appellate Body added that the measure included "applicable administrative provisions", with which compliance was mandatory for products with certain objective characteristics. (Appellate Body Report, *EC – Asbestos*, paras. 72-74)

<sup>408</sup>Subsection 1385(d)(1) of the DPCIA.

<sup>409</sup>The Panel noted in this regard that:

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

(Panel Report, para. 2.33) (footnotes omitted)

<sup>410</sup>United States' appellant's submission, para. 51.

requirements set out in the measure. Moreover, the enforcement of the US measure does not require proving that a given conduct is deceptive under a law against deceptive practices. Rather, the measure at issue establishes that including on the label of a tuna product the term "dolphin-safe", or even using any label or mark that refers to dolphins, porpoises, or marine mammals without meeting the conditions set forth in the measure, is, in itself, a violation of Section 45 of Title 15 of the *United States Code*.<sup>411</sup> In effect, the measure at issue establishes a single definition of "dolphin-safe" and treats any statement on a tuna product regarding "dolphin-safety" that does not meet the conditions of the measure as a deceptive practice or act.

196. The United States contends that compliance with a labelling requirement is "mandatory" within the meaning of Annex 1.1 only "if there is also a requirement to use the label in order to place the product for sale on the market".<sup>412</sup> By contrast, in the United States' view, compliance with a labelling requirement is not mandatory in situations where producers retain the option of not using the label but nevertheless are able to sell the product on the market. The text of Annex 1.1 to the *TBT Agreement* does not use the words "market" or "territory". Nor does it indicate that a labelling requirement is "mandatory" *only* if there is a requirement to use a particular label in order to place a product for sale on the market. To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a "technical regulation" within the meaning of Annex 1.1. Instead, in the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a "dolphin-safe" label in the United States, any "producer, importer, exporter, distributor or seller"<sup>413</sup> of tuna products must comply with the measure at issue in order to make any "dolphin-safe" claim.

197. The United States suggests that the Panel's allegedly erroneous interpretation of Annex 1.1 was "largely based on its reading of the Appellate Body report in *EC – Sardines*".<sup>414</sup> According to the United States, the Panel's reliance on that Appellate Body report was incorrect for two reasons. First, in that dispute, neither the panel nor the Appellate Body considered whether compliance with the measure at issue was mandatory. Second, *EC – Sardines* involved a requirement that products marketed as "preserved sardines" be prepared exclusively from a certain type of sardines. The United States maintains that this is a product characteristic "intrinsic to" preserved sardines, and unless preserved sardines met this product characteristic, they were prohibited from being marketed as such. By contrast, the measure in the present case does not relate to product characteristics that tuna

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<sup>411</sup>Subsections 1385(d)(1) and 1385(d)(3)(C) of the DPCIA. In response to questioning at the oral hearing, the United States indicated that the law referred to in the DPCIA is the US law against deceptive acts or practices.

<sup>412</sup>United States' appellant's submission, para. 32 (referring to Panel Report, para. 7.150).

<sup>413</sup>Subsection 1385(d)(1) of the DPCIA.

<sup>414</sup>United States' appellant's submission, footnote 92 to para. 61.

products must meet to be sold on the US market. Rather, tuna products can be sold in the United States as tuna products either with or without a "dolphin-safe" label.<sup>415</sup>

198. The measure at issue in *EC – Sardines* was a regulation setting out a number of prescriptions for the sale of "preserved sardines", including the requirement that they contain only one named species of sardines, to the exclusion of others. Under the facts of that case, it was possible to sell these other species of sardines on the EC market, provided that such sardines were not sold under the appellation "preserved sardines". The fact that the Appellate Body characterized the measure at issue in *EC – Sardines* as a "technical regulation" appears to support the notion that the mere fact that it is legally permissible to sell a product on the market without using a particular label is not determinative when examining whether a measure is a "technical regulation" within the meaning of Annex 1.1.

199. As noted, a determination of whether a particular measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case. In this case, we note that the US measure is composed of legislative and regulatory acts of the US federal authorities and includes administrative provisions. In addition, the measure at issue sets out a single and legally mandated definition of a "dolphin-safe" tuna product and disallows the use of other labels on tuna products that do not satisfy this definition. In doing so, the US measure prescribes in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety", regardless of the manner in which that statement is made. As a consequence, the US measure covers the entire field of what "dolphin-safe" means in relation to tuna products. For these reasons, we *find* that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*.<sup>416</sup>

## **VI. Article 2.1 of the *TBT Agreement***

200. We turn next to address Mexico's appeal of the Panel's finding that Mexico failed to demonstrate that the US "dolphin-safe" labelling provisions are inconsistent with Article 2.1 of the *TBT Agreement*.

201. Article 2.1 of the *TBT Agreement* provides that, with respect to their central government bodies:

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

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<sup>415</sup>United States' appellant's submission, footnote 92 to para. 61.

<sup>416</sup>Having found that the measure at issue constitutes a technical regulation, we need not address Mexico's alternative argument that the US measure is *de facto* mandatory.

products of national origin and to like products originating in any other country.

202. Article 2.1 of the *TBT Agreement* consists of three elements that must be demonstrated in order to establish an inconsistency with this provision, namely: (i) that the measure at issue constitutes a "technical regulation" within the meaning of Annex 1.1; (ii) that the imported products must be like the domestic product and the products of other origins; and (iii) that the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries.<sup>417</sup> Mexico's appeal concerns only the Panel's finding in respect of the third element, namely, the "treatment no less favourable" standard in Article 2.1.<sup>418</sup> We further note that the United States has not appealed the Panel's finding that Mexican tuna products are "like" tuna products of United States' origin and tuna products originating in any other country within the meaning of Article 2.1 of the *TBT Agreement*.

A. *The Panel's Findings regarding "Treatment No Less Favourable"*

203. On the basis of its reading of Article 2.1 of the *TBT Agreement*, the Panel found that 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.<sup>419</sup>

204. The Panel observed that the essence of the measures covered under Article 2.1 of the *TBT Agreement* is to set out certain product characteristics or their related processes and production methods or, for example, labelling requirements as they apply to products or processes and production methods that must be complied with. The Panel added that "[d]istinctions in treatment may therefore arise ... but they must not be designed or applied to the detriment of imports or imports of certain origins".<sup>420</sup> The Panel further emphasized that the question of what is less favourable treatment within the meaning of Article 2.1 is also "informed by the terms of the preamble [of the *TBT Agreement*], 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'".<sup>421</sup>

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<sup>417</sup>Appellate Body Report, *US – Clove Cigarettes*, para. 87.

<sup>418</sup>We recall that, earlier in our analysis, we found that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*.

<sup>419</sup>Panel Report, para. 7.273.

<sup>420</sup>Panel Report, para. 7.276.

<sup>421</sup>Panel Report, para. 7.276.

205. In its analysis of less favourable treatment, the Panel examined first the regulatory distinction upon which the US measure was based, that 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, and found that this distinction, in itself, does not place "Mexican tuna products at a disadvantage compared to US and other imported tuna products".<sup>422</sup> The Panel reasoned that denying the "dolphin-safe" label to tuna caught by setting on dolphins does not necessarily imply that less favourable treatment is afforded to Mexican tuna products, because "any fleet operating anywhere in the world must comply with the requirement".<sup>423</sup> For the Panel, even assuming "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".<sup>424</sup> In the Panel's view, this is because "Mexican processors could choose to make their products from tuna of other origins meeting the requirements of the label".<sup>425</sup>

206. The Panel then considered whether less favourable treatment nonetheless arises from the "application" of the US measure, due to the practices followed by Mexican and other fishing fleets.<sup>426</sup> The Panel observed 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)".<sup>427</sup> The Panel further noted that the US fishing fleet currently did not appear to practise setting on dolphins in the ETP.<sup>428</sup> Based on its analysis, the Panel found 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".<sup>429</sup> By contrast, "most tuna caught by US vessels is potentially eligible for the label, provided that it otherwise complies with the requirements of the measures".<sup>430</sup> However, the Panel was "not persuaded that it follows from these facts that the United States affords Mexican tuna products 'less favourable treatment' than that afforded to tuna products originating in the United States or in any other country".<sup>431</sup> The Panel explained that, as of 1990, when the first version of the DPCIA was enacted, "the United States and Mexico were in a comparable position with regard to their fishing

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<sup>422</sup>Panel Report, paras. 7.304 and 7.311.

<sup>423</sup>Panel Report, para. 7.305.

<sup>424</sup>Panel Report, para. 7.310.

<sup>425</sup>Panel Report, para. 7.310.

<sup>426</sup>Panel Report, para. 7.311.

<sup>427</sup>Panel Report, para. 7.314.

<sup>428</sup>Panel Report, para. 7.316.

<sup>429</sup>Panel Report, para. 7.317.

<sup>430</sup>Panel Report, para. 7.317.

<sup>431</sup>Panel Report, para. 7.319.

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".<sup>432</sup> While US vessels "gradually discontinued setting on dolphins to catch tuna, and abandoned the practice entirely in 1994, four years after the enactment of the measures"<sup>433</sup>, the Mexican fleet "concentrated its efforts on complying with the AIDCP requirements on observer coverage and fishing gear and equipment" rather than abandoning setting on dolphins.<sup>434</sup> As a result, the Mexican fleet and other fishing fleets that chose to continue to set on dolphins "were not eligible for dolphin-safe labelling under the existing US measures, while tuna caught without setting on dolphins remained eligible."<sup>435</sup> The Panel was therefore not persuaded that "any current discrepancy in the[ ] relative situations [of the Mexican and other fishing fleets]" was a result of the US "dolphin-safe" labelling provisions rather than the result of the choices of private actors.<sup>436</sup> The Panel added that the existence of adaptation costs, in itself, did not establish less favourable treatment.<sup>437</sup> The Panel further remarked that the decisions by major processors of tuna products not to purchase tuna caught by setting on dolphins predated the adoption of the first version of the DPCIA in 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.<sup>438</sup> Based on its analysis, the Panel was therefore not convinced that access to the principal US distribution channels was being denied to Mexican tuna products by the measure at issue. Nor was the Panel persuaded that both retailers and consumers would purchase Mexican tuna products if they were eligible for a "dolphin-safe" label, as Mexico had argued.

207. On this basis, the Panel concluded that Mexico had failed to demonstrate that the US "dolphin-safe" labelling provisions afford less favourable treatment to Mexican tuna products within the meaning of Article 2.1 of the *TBT Agreement*. Instead, the Panel found that the US "dolphin-safe" labelling provisions "do not inherently discriminate on the basis of the origin of the products", and "do not make it impossible for Mexican tuna products to comply with" the requirement not to set on dolphins.<sup>439</sup> Rather, it considered significant the fact that "the impact of the US dolphin-safe provisions on different operators on the market and on tuna products of various origins depends

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<sup>432</sup>Panel Report, para. 7.324.

<sup>433</sup>Panel Report, para. 7.327.

<sup>434</sup>Panel Report, para. 7.331.

<sup>435</sup>Panel Report, para. 7.331.

<sup>436</sup>Panel Report, para. 7.334. In support of its position, the Panel referred to the Appellate Body's finding 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." (Panel Report, para. 7.334 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 149))

<sup>437</sup>Panel Report, para. 7.342.

<sup>438</sup>Panel Report, para. 7.361.

<sup>439</sup>Panel Report, para. 7.377.

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."<sup>440</sup> The Panel concluded therefore that "any particular adverse impact felt by Mexican tuna products on the US market" was "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".<sup>441</sup>

B. *Mexico's Appeal regarding "Treatment No Less Favourable"*

208. On appeal, Mexico argues that the Panel erred in its interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the *TBT Agreement*. According to Mexico, the Panel failed to "fully consider the context of Article 2.1 and the object and purpose of the *TBT Agreement*."<sup>442</sup> Mexico submits that the "applicable test" under Article 2.1 of the *TBT Agreement* is to assess "whether a measure modifies the conditions of competition in the relevant market to the detriment of the imported products in question."<sup>443</sup> Mexico considers, however, that technical regulations that meet the criteria of the sixth recital of the preamble of the *TBT Agreement*<sup>444</sup> "should not be prohibited by Article 2.1 even if they modify the conditions of competition in the relevant market to the detriment of the imported product in question."<sup>445</sup> Mexico reasons that the preamble "modifies the meaning of the substantive obligation in Article 2.1 so that discrimination that is prohibited in that Article does not extend to measures meeting the criteria of the preamble."<sup>446</sup> In addition to challenging the Panel's interpretation and application of Article 2.1, Mexico also claims

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<sup>440</sup>In support of its approach, the Panel pointed to the Appellate Body's statement in *Dominican Republic – Import and Sale of Cigarettes* that the "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". (Panel Report, paras. 7.375 and 7.378 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96))

<sup>441</sup>Panel Report, para. 7.378.

<sup>442</sup>Mexico's other appellant's submission, para. 86.

<sup>443</sup>Mexico's other appellant's submission, para. 99.

<sup>444</sup>The sixth recital reads as follows:

*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

<sup>445</sup>Mexico's other appellant's submission, para. 109.

<sup>446</sup>Mexico's other appellant's submission, para. 109.



that the Panel acted inconsistently with its obligation to make an objective assessment of the matter in accordance with Article 11 of the DSU.<sup>447</sup>

209. The United States considers that the Panel properly interpreted Article 2.1 of the *TBT Agreement* and rightly found that the US "dolphin-safe" labelling provisions do not accord Mexican tuna products "less favourable treatment" than it accords to US tuna products and tuna products originating in other countries.<sup>448</sup> In the United States' view, an inquiry into whether a measure provides "less favourable treatment" requires a determination of whether the "measure accords different treatment to imported products versus domestic products *and* whether it does so based on origin".<sup>449</sup> That such different treatment must be based on origin *de jure* or *de facto*, as opposed to origin-neutral criteria, is, according to the United States, evident from Article 2.1 and the relevant context provided by the *TBT Agreement* and Article III of the GATT 1994. Regarding the question of how to assess whether the treatment accorded to imported products is less favourable, the United States observes that the covered agreements do not specify a "precise approach to this question". In previous cases on Article III of the GATT 1994, panels and the Appellate Body have "typically" assessed whether, if a measure provides different treatment to imported and like products, it modifies the conditions of competition to the detriment of imported products. However, for the United States, the emphasis is on whether a measure modifies the conditions of competition based on the origin of the imported product.<sup>450</sup>

210. We begin our analysis by examining the legal standard of the "treatment no less favourable" requirement in Article 2.1 of the *TBT Agreement*. We then turn to Mexico's appeal regarding the Panel's interpretation and application of this requirement.

C. *"Treatment No Less Favourable" under Article 2.1 of the TBT Agreement*

211. Article 2.1 of the *TBT Agreement* applies "in respect of technical regulations". A technical regulation is defined in Annex 1.1 as a "[d]ocument which lays down product characteristics or their related processes and production methods ... with which compliance is mandatory". As such, technical regulations are measures that, by their very nature, establish distinctions between products

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<sup>447</sup>Mexico's other appellant's submission, para. 188.

<sup>448</sup>United States' appellee's submission, para. 102.

<sup>449</sup>United States' appellee's submission, para. 32 (referring to Panel Report, *Brazil – Retreaded Tyres*, paras. 7.420 and 7.421; Panel Report, *Canada – Autos*, paras. 7.179-7.182; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.164; Appellate Body Reports, *China – Auto Parts*, paras. 192-195; Appellate Body Report, *Korea – Various Measures on Beef*, paras. 143 and 144; Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.120-8.122; Panel Report, *India – Autos*, paras. 7.199-7.202; Panel Report, *US – FSC (Article 21.5 – EC)*, paras. 8.154-8.157; and Panel Report, *US – Gasoline*, para. 6.10). (original emphasis)

<sup>450</sup>United States' appellee's submission, para. 35 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96; and Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2514 and 7.2515).

according to their characteristics or their related processes and production methods. Article 2.1 should not be read therefore to mean that any distinctions, in particular ones that are based exclusively on particular product characteristics or on particular processes and production methods, would *per se* constitute "less favourable treatment" within the meaning of Article 2.1.<sup>451</sup>

212. The context provided by Article 2.2<sup>452</sup> supports a reading that Article 2.1 does not operate to prohibit *a priori* any restriction of international trade.<sup>453</sup> The question of what is "less favourable treatment" within the meaning of Article 2.1 is also informed by a consideration of the context provided by the preamble of the *TBT Agreement*.<sup>454</sup>

213. The sixth recital of the preamble recognizes that a WTO Member may take measures necessary for, *inter alia*, the protection of animal or plant life or health, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" and are "otherwise in accordance with the provisions of this Agreement". Although the sixth recital does not explicitly set out a substantive obligation, we consider it nonetheless sheds light on the meaning and ambit of the "treatment no less favourable" requirement in Article 2.1, by making clear, in particular, that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.<sup>455</sup>

214. Regarding the context provided by other covered agreements, we further note that the expression "treatment no less favourable" can be found in Article III:4 of the GATT 1994.<sup>456</sup> In the context of that provision, the Appellate Body has indicated that whether or not imported products are

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<sup>451</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 169.

<sup>452</sup> Article 2.2 of the *TBT Agreement* provides:

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.

<sup>453</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 171.

<sup>454</sup> Article 31.2 of the *Vienna Convention* states, in relevant part, that "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes".

<sup>455</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 173.

<sup>456</sup> Article III:4 of the GATT 1994 reads:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

treated "less favourably" than like domestic products should be assessed "by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products."<sup>457</sup> We consider these previous findings by the Appellate Body to be instructive in assessing the meaning of the expression "treatment no less favourable", provided that the specific context in which the term appears in Article 2.1 of the *TBT Agreement* is taken into account.<sup>458</sup>

215. As the Appellate Body has previously explained, when assessing claims brought under Article 2.1 of the *TBT Agreement*, a panel should therefore seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country.<sup>459</sup> The existence of such a detrimental effect is not sufficient to demonstrate less favourable treatment under Article 2.1.<sup>460</sup> Instead, in *US – Clove Cigarettes*, the Appellate Body held that a "panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."<sup>461</sup>

216. With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall that it is well-established "that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".<sup>462</sup> Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing. The nature and scope of arguments and evidence required to establish a *prima facie* case will necessarily vary according to the facts of the case. In the context of Article 2.1 of the *TBT Agreement*, the complainant must prove its claim by showing that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1.<sup>463</sup> If, however, the respondent

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<sup>457</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (original emphasis) In *Thailand – Cigarettes (Philippines)*, the Appellate Body further clarified that there must be in every case a "genuine relationship" between the measure at issue itself "and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably". (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134)

<sup>458</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 180. See also para. 215.

<sup>459</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 180. See also para. 215.

<sup>460</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

<sup>461</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215. The Appellate Body also stated that a panel must examine, in particular, whether the technical regulation is even-handed. (*Ibid.*, para. 182)

<sup>462</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335.

<sup>463</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.

217. With this in mind, we turn to review the Panel's interpretation of Article 2.1 of the *TBT Agreement* and the analytical approach adopted by the Panel.

1. The Panel's Approach to Assessing "Treatment No Less Favourable"

218. Mexico argues that the Panel correctly considered the ordinary meaning of the phrase "treatment no less favourable". Yet, in Mexico's view, the Panel failed to "fully consider the context of Article 2.1 and the object and purpose of the *TBT Agreement*".<sup>464</sup> Mexico recalls that although the *TBT Agreement* does not include a substantive equivalent to the general exceptions found in, for example, Article XX of the GATT 1994, the sixth recital of the preamble of the *TBT Agreement* does include similar language. Referring to the text of the sixth recital, Mexico submits that "technical regulations that meet all the criteria of the recital should not be prohibited by Article 2.1 even if they modify the conditions of competition in the relevant market to the detriment of the imported product in question."<sup>465</sup> Mexico asserts, however, that the US "dolphin-safe" labelling provisions do not meet these criteria.

219. As explained above, we consider that the preamble of the *TBT Agreement* informs the meaning of Article 2.1. However, we do not agree with Mexico's argument that compliance with Article 2.1 must be assessed by examining first whether a technical regulation satisfies each of the criteria of the sixth recital, and then, as a second step, examining whether it modifies the conditions of competition in the relevant market to the detriment of the imported products. Mexico appears, in effect, to be suggesting that the preamble sets out a test that is separate and independent from Article 2.1. This, in our view, does not find support in the text of Article 2.1. Moreover, the approach suggested by Mexico would appear to contradict Mexico's own view that language in the preamble is not substantive.<sup>466</sup>

220. Mexico argues that the Panel departed from the way in which the phrase "treatment no less favourable" has been examined in previous disputes under Article III:4 of the GATT 1994 and erred by conducting a detailed analysis of whether "Mexican tuna products could somehow get access to the label", suggesting that this reflects an erroneous interpretation of Article 2.1.<sup>467</sup> Mexico faults the Panel in particular for imposing a standard under which a measure could be found to be inconsistent

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<sup>464</sup>Mexico's other appellant's submission, para. 86.

<sup>465</sup>Mexico's other appellant's submission, para. 109.

<sup>466</sup>Mexico's other appellant's submission, para. 104.

<sup>467</sup>Mexico's other appellant's submission, paras. 143 and 144.

with Article 2.1 of the *TBT Agreement* only if it imposed an "absolute prohibition" on imports.<sup>468</sup> Mexico recognizes that, under the facts of this case, there was no "absolute prohibition" or bar "to the use of the label by Mexican tuna products because the label was available to Mexican tuna products if the Mexican tuna fleet and Mexican canneries accepted the conditions of access to the label and modified their practices to comply with those conditions."<sup>469</sup> However, Mexico emphasizes that the question was not whether there was such a prohibition. Instead, argues Mexico, the phrase "treatment no less favourable" in Article 2.1 of the *TBT Agreement* must be interpreted and applied with reference to whether imported products are provided equal competitive opportunities as compared to like domestic products and like products from other countries.<sup>470</sup>

221. An enquiry into whether a measure comports with the "treatment no less favourable" requirement in Article 2.1 does not hinge on whether the imported products could somehow get access to an advantage, for example, by complying with all applicable conditions. Rather, as explained above, a determination of whether imported products are accorded "less favourable treatment" within the meaning of Article 2.1 of the *TBT Agreement* calls for an analysis of whether the contested measure modifies the conditions of competition to the detriment of imported products. Contrary to what the Panel appears to have assumed, the fact that a complainant could comply or could have complied with the conditions imposed by a contested measure does not mean that the challenged measure is therefore consistent with Article 2.1 of the *TBT Agreement*.

222. Mexico submits that the Panel erred in relying on the findings of the Appellate Body Report in *Dominican Republic – Import and Sale of Cigarettes* because the facts of this dispute are different from those in that case.<sup>471</sup> In particular, Mexico points out that in this dispute the discriminatory effect is not between certain producers and importers but between the group of Mexican tuna products overall compared to the group of like tuna products from the United States and, in the case of Mexico's MFN claim, between the group of Mexican tuna products and the group of tuna products from other countries.<sup>472</sup> Mexico adds that a measure that is "origin neutral" on its face can still violate the national treatment obligation if it has the effect "of modifying the conditions of competition to the detriment of the imported product by denying the imported product an equality of competitive opportunities with a like domestic product in the marketplace of the importing WTO Member."<sup>473</sup>

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<sup>468</sup>Mexico's other appellant's submission, para. 143.

<sup>469</sup>Mexico's other appellant's submission, para. 143.

<sup>470</sup>Mexico's other appellant's submission, paras. 97 and 99.

<sup>471</sup>Mexico's other appellant's submission, paras. 170-172 (referring to Panel Report, para. 7.375, in turn quoting Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

<sup>472</sup>Mexico's other appellant's submission, para. 172.

<sup>473</sup>Mexico's other appellant's submission, para. 174.

According to Mexico, "[i]t is only when the relevant facts are examined as a whole that the *de facto* discrimination becomes apparent."<sup>474</sup>

223. The United States counters that it is not the Panel, but Mexico, that misconstrues the findings of the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*.<sup>475</sup> The United States also disagrees with Mexico's assertion that the Panel's interpretation is "somehow at odds with the notion that discrimination may be *de facto* as well as *de jure*".<sup>476</sup> According to the United States, the Panel fully understood the notion and ambit of *de facto* discrimination. Yet, "the fact that some imported products may fall within the group of like products that are subject to different treatment that may be less favourable alone is not evidence that a measure accords less favourable treatment to imported products as compared to like domestic products, particularly where there is evidence that the basis for the different treatment is not in fact origin."<sup>477</sup> Finally, although the United States agrees with Mexico that the measure at issue restricts the option of selling tuna products labelled "dolphin-safe" that contain tuna caught by setting on dolphins, it argues that this is not evidence that the US measure "establishes competitive conditions that are less favourable for imported products".<sup>478</sup> Instead, the United States submits that "any change the U.S. measure introduced regarding the conditions under which tuna products compete is not one that modified the conditions of competition to the detriment of imported tuna products originating in some countries as compared to others", since "all tuna products compete under the same conditions", irrespective of their origin.<sup>479</sup>

224. In finding that Mexico had failed to demonstrate that the US "dolphin-safe" labelling provisions afford "less favourable treatment" to Mexican tuna products within the meaning of Article 2.1 of the *TBT Agreement*, the Panel reasoned, *inter alia*, 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".<sup>480</sup> The Panel added that it appears 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

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<sup>474</sup>Mexico's other appellant's submission, para. 175.

<sup>475</sup>United States' appellee's submission, para. 84.

<sup>476</sup>United States' appellee's submission, para. 87 (referring to Mexico's other appellant's submission, para. 174).

<sup>477</sup>United States' appellee's submission, para. 88.

<sup>478</sup>United States' appellee's submission, para. 97.

<sup>479</sup>United States' appellee's submission, para. 98.

<sup>480</sup>Panel Report, para. 7.377.

circumstances unrelated to the foreign origin of the product", including the choices made by Mexico's own fishing fleet and canners.<sup>481</sup>

225. In its analysis, the Panel appears to juxtapose factors that "are related to the nationality of the product" with other factors such as "fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices." In so doing, the Panel seems to have assumed, incorrectly in our view, that regulatory distinctions that are based on different "fishing methods" or "geographical location" rather than national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the *TBT Agreement*. The Panel's approach is difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2.1 even when it is origin-neutral on its face. As the Appellate Body explained in *US – Clove Cigarettes*, in making a determination of whether a measure is *de facto* inconsistent with Article 2.1, "a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed."<sup>482</sup> The Panel failed to conduct such an analysis in the present case. Contrary to the Panel, we consider that in an analysis of "less favourable treatment" under Article 2.1, *any* adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure may potentially be relevant.<sup>483</sup>

226. Mexico also faults the Panel for failing to find that the US measure is "discriminatory" in that it uses a market access restriction to "pressure" Mexico and the Mexican fleet to adopt essentially the same "dolphin-safe" regime as in force in the United States, thereby *per se* targeting the origin of the tuna products.<sup>484</sup> As noted, technical regulations inherently establish distinctions between products according to their characteristics or their related processes and production methods. Thus, Article 2.1 should not be read to mean that any distinction would *per se* accord "less favourable treatment" within the meaning of that provision. At the same time, we have noted that any adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a technical regulation may potentially be relevant for an assessment of "less favourable treatment". It may thus have been pertinent for the Panel to consider, along with other factors, the question of whether the US measure had the effect of exerting pressure on Mexico to modify its practices. This alone, however, would not be sufficient to establish a breach of Article 2.1.

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<sup>481</sup>Panel Report, para. 7.378.

<sup>482</sup>Appellate Body Report, *US – Clove Cigarettes*, para. 182.

<sup>483</sup>Appellate Body Report, *US – Clove Cigarettes*, footnote 372 to para. 179.

<sup>484</sup>Mexico's other appellant's submission, paras. 178 and 179 (referring to Appellate Body Report, *US – Shrimp*, para. 164).

227. In sum, we consider that the Panel applied an incorrect approach to assessing whether the measure at issue is inconsistent with Article 2.1 of the *TBT Agreement*.

D. *Whether the US Measure Is Inconsistent with Article 2.1 of the TBT Agreement*

228. Based on our interpretation of Article 2.1 of the *TBT Agreement* set out above, we now consider whether the US "dolphin-safe" labelling provisions are inconsistent with this provision, as Mexico contends.

229. As noted above, Article 2.1 of the *TBT Agreement* consists of three elements each of which must be demonstrated in order to establish inconsistency with this provision, namely: (i) that the measure at issue constitutes a technical regulation within the meaning of Annex 1.1; (ii) that the imported products must be "like" the domestic product and the products of other origins; and (iii) that the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries.<sup>485</sup>

230. Earlier in our analysis, we found that the Panel did not err in characterizing the measure at issue as a technical regulation within the meaning of Annex 1.1. We further note that the United States has not appealed the Panel's finding 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*.<sup>486</sup> This brings us to the question of whether, in the light of the findings of fact made by the Panel and uncontested facts on the record, it can be concluded that Mexico has established that the US "dolphin-safe" labelling provisions accord "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries.

231. Our analysis of this issue proceeds in two parts. First, we will assess whether the measure at issue modifies the conditions of competition in the US market to the detriment of Mexican tuna products as compared to US tuna products or tuna products originating in any other Member.<sup>487</sup> Second, we will review whether any detrimental impact reflects discrimination against the Mexican tuna products.

232. Our analysis will scrutinize, in particular, whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the US measure is even-handed in the manner in which

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<sup>485</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 87.

<sup>486</sup> See Panel Report, para. 7.251.

<sup>487</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 180. See also para. 215.



it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean.<sup>488</sup>

1. Whether the Measure Modifies the Conditions of Competition in the US Market to the Detriment of Mexican Tuna Products

233. The Panel found that the "dolphin-safe" label has "significant commercial value on the US market for tuna products".<sup>489</sup> The Panel further found that Mexico had presented evidence concerning retailers' and final consumers' preferences regarding tuna products, which, in the Panel's view, confirmed the value of the "dolphin-safe" label on the US market.<sup>490</sup> On this basis, the Panel agreed with Mexico that access to the "dolphin-safe" label constitutes an "advantage" on the US market.<sup>491</sup> These findings have not been appealed.

234. The Panel further found that: (i) "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"<sup>492</sup>; (ii) "at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins" and is "therefore fishing for tuna that would not be eligible to be contained in a 'dolphin-safe' tuna product under the US dolphin-safe labelling provisions"<sup>493</sup>; (iii) "the US fleet currently does not practice setting on dolphins in the ETP"<sup>494</sup>; (iv) "as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions", while "most tuna caught by US vessels is potentially eligible for the label".<sup>495</sup>

235. In our view, the factual findings by the Panel clearly establish that the lack of access to the "dolphin-safe" label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.

236. Mexico and the United States disagree as to whether any detrimental impact on Mexican tuna products results from the measure itself rather than from the actions of private parties. In assessing whether there is a genuine relationship between the measure at issue and an adverse impact on competitive opportunities for imported products, the relevant question is whether governmental action

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<sup>488</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

<sup>489</sup> Panel Report, para. 7.289.

<sup>490</sup> Panel Report, para. 7.290 (referring to Panel Exhibit MEX-58 (BCI)).

<sup>491</sup> Panel Report, para. 7.291.

<sup>492</sup> Panel Report, para. 7.310.

<sup>493</sup> Panel Report, para. 7.314.

<sup>494</sup> Panel Report, para. 7.316.

<sup>495</sup> Panel Report, para. 7.317. See also paras. 7.344, 7.357, and 7.533.

"affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".<sup>496</sup> In *Korea – Various Measures on Beef*, the Appellate Body reasoned that:

... the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.<sup>497</sup>  
(original emphasis)

237. The relevant question is thus whether the *governmental* intervention "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".<sup>498</sup> In this regard, we recall that it is the measure at issue that establishes the requirements under which a product can be labelled "dolphin-safe" in the United States. As noted by the Panel:

... access to the label is controlled by compliance 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.<sup>499</sup>

238. Moreover, while the Panel agreed 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", it noted that:

... 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.<sup>500</sup>

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<sup>496</sup>Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.

<sup>497</sup>Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

<sup>498</sup>Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.

<sup>499</sup>Panel Report, para. 7.285.

<sup>500</sup>Panel Report, para. 7.287.

239. These findings by the Panel suggest that it is the governmental action in the form of adoption and application of the US "dolphin-safe" labelling provisions that has modified the conditions of competition in the market to the detriment of Mexican tuna products, and that the detrimental impact in this case hence flows from the measure at issue. Moreover, it is well established that WTO rules protect competitive opportunities, not trade flows.<sup>501</sup> It follows that, even if Mexican tuna products might not achieve a wide penetration of the US market in the absence of the measure at issue due to consumer objections to the method of setting on dolphins, this does not change the fact that it is the measure at issue, rather than private actors, that denies most Mexican tuna products access to a "dolphin-safe" label in the US market. The fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the *TBT Agreement*, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products.<sup>502</sup>

240. In the light of the above, we consider that it is the measure at issue that modifies the competitive conditions in the US market to the detriment of Mexican tuna products. We turn next to the issue of whether this detrimental impact reflects discrimination.

## 2. Whether the Detrimental Impact Reflects Discrimination

241. Mexico's claim of discrimination may be summarized as follows:

The U.S. dolphin-safe labelling provisions are discriminatory. Imports of tuna products produced from tuna harvested outside the ETP – in other words, virtually all of the tuna products currently sold in the U.S. market – can be labelled as dolphin-safe under relaxed compliance standards even though there are no protections for dolphins outside the ETP. Meanwhile, tuna products from Mexican producers – who have taken extensive and demonstratively highly successful measures to protect dolphins – are prohibited from using the label.<sup>503</sup>

242. The Panel found that the US measure pursues the following objectives: (i) "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 (ii) "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".<sup>504</sup> The Panel accepted these objectives as legitimate within the meaning

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<sup>501</sup>Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 469 (referring to Appellate Body Report, *EC – Bananas III*, para. 252, in turn referring to GATT Panel Report, *US – Superfund*, para. 5.1.9).

<sup>502</sup>See Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

<sup>503</sup>Mexico's other appellant's submission, para. 129.

<sup>504</sup>Panel Report, para. 7.401.

of Article 2.2 of the *TBT Agreement*.<sup>505</sup> The Panel further noted that "as described by the United States itself, its measures seek to address a range of adverse effects of fishing techniques on dolphins", including "situations in which dolphins are killed or seriously injured."<sup>506</sup>

243. The Panel made factual findings and reviewed a fair amount of evidence and arguments in the context of its analysis under Article 2.2 that are relevant to the issue of whether the detrimental impact to Mexican tuna products reflects discrimination and thus are pertinent to our assessment of the measure at issue under Article 2.1. We begin by reviewing the uncontested facts on the record of the Panel proceedings, and factual findings by the Panel that are not challenged on appeal, before turning to other findings made by the Panel which are subject to claims brought by the United States under Article 11 of the DSU.

(a) Uncontested Findings by the Panel

244. First, regarding the issue of dolphin mortality as a result of setting on dolphins in the ETP, the Panel found that:

[i]t 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\*, 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.<sup>507</sup>

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\* [original footnote 635] Mexico's first written submission, para. 50.

245. The Panel also noted that "both parties recognize that setting on dolphins may adversely affect dolphins".<sup>508</sup> It stated that the "number of dolphins killed in the ETP before the adoption of the controls established by the AIDCP, and the ensuing degradation of dolphin stocks in this area, are well-documented", adding that "Mexico does not deny that dolphins may be killed or seriously injured during purse-seine net fishing manoeuvres."<sup>509</sup> The Panel further stated:

We also agree with the United States that the existence of the DMLs ["dolphin mortality limits"] established by the AIDCP shows that

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<sup>505</sup>Panel Report, para. 7.444. As we explain in the following section of our Report, a panel adjudicating a claim under Article 2.2 of the *TBT Agreement* is required to objectively ascertain a measure's objective. A panel must also determine whether the objective of the measure is "legitimate".

<sup>506</sup>Panel Report, para. 7.550.

<sup>507</sup>Panel Report, para. 7.438.

<sup>508</sup>Panel Report, para. 7.493 (referring to Mexico's second written submission to the Panel; and United States' first written submission to the Panel, para. 52).

<sup>509</sup>Panel Report, para. 7.493 (referring to Mexico's oral statement at the first Panel meeting).

setting on dolphins, even in controlled conditions, may result in some dolphin mortality.\* 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.\*\* 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.\*\*\* These limits have remained the same in recent years.\*\*\*\*<sup>510</sup>

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\* [original footnote 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.

\*\* [original footnote 687] Exhibit US-24, p. 50; Exhibit US-66, p. 3.

\*\*\* [original footnote 688] Exhibit MEX-11, Article V.

\*\*\*\* [original footnote 689] Panel Exhibit US-50, p. 1.

246. The Panel further remarked 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."<sup>511</sup> Nonetheless, the Panel determined "that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect".<sup>512</sup> The Panel also found that the United States had put forward sufficient evidence to raise a presumption "that the method of setting on dolphins 'has the capacity' of resulting in observed and unobserved adverse effects on dolphins".<sup>513</sup>

247. With respect to *dolphin mortality* arising from tuna fishing *outside the ETP*, the Panel noted that "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."<sup>514</sup> The Panel explained that its analysis of the existence of dolphin bycatch during tuna fishing operations *outside* the ETP was therefore "based on the evidence contained in a limited amount of *ad hoc* studies".<sup>515</sup> While the Panel noted that there are "no records of consistent or widespread fishing effort on

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<sup>510</sup>Panel Report, para. 7.493.

<sup>511</sup>Panel Report, para. 7.504.

<sup>512</sup>Panel Report, para. 7.504.

<sup>513</sup>Panel Report, para. 7.737. See also Panel Report, para. 7.560 ("as we have accepted earlier, setting on dolphins may result in observed and unobserved harmful effects on dolphins"). In response to questioning at the oral hearing, Mexico indicated that it did not contest this finding by the Panel.

<sup>514</sup>Panel Report, para. 7.518 (referring to Panel Exhibit MEX-02, *supra*, footnote 118 ("suggesting more research 'on behaviour of tuna and dolphins' in the ETP"); Panel Exhibit MEX-05, *supra*, footnote 115, p. vii ("recommending research globally"); and M.A. Donahue and E.F. Edwards, "An annotated bibliography of available literature regarding cetacean interactions with tuna purse-seine fisheries outside of the eastern tropical Pacific Ocean", Southwest Fisheries Science Center, NOAA Administrative Report LJ-96-20 (1996) (Panel Exhibit US-10), p. 38 ("stating that 'data collection by 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"). (Panel Report, footnote 726 to para. 7.518) In contrast, the Panel noted that detailed information was available regarding dolphin mortalities resulting from tuna-fishing activities in the ETP. (Panel Report, para. 7.519)

<sup>515</sup>Panel Report, para. 7.519.

tuna-dolphin associations anywhere other than in the ETP", it found, as a matter of fact, that there were "clear indications that the use of certain tuna fishing techniques *other* than setting on dolphins may also cause harm to dolphins".<sup>516</sup> This finding by the Panel is uncontested.<sup>517</sup>

248. Regarding the tuna-dolphin association outside the ETP, the Panel found that the limited evidence before it suggested "that the association between schools of tunas and dolphins does not occur outside the ETP as *frequently* as it does within the ETP."<sup>518</sup> The Panel further found that, "although there are indications that intentional setting on dolphins occurs outside the ETP", there are "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP".<sup>519</sup> The Panel noted, however, that "even assuming that the United States' contention that certain environmental conditions in the ETP (such as the intensity of the tuna-dolphin association) are unique" is correct, the evidence submitted to the Panel suggests that "the *risks* faced by dolphin populations in the ETP are *not*."<sup>520</sup> The Panel further found, and the participants do not contest, that where "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."<sup>521</sup> Again, these facts are uncontested.<sup>522</sup>

249. Regarding the use of fishing methods *other than setting on dolphins*, the Panel further noted that:

... 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 [by the Panel]). 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". 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. 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

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<sup>516</sup>Panel Report, para. 7.520 (referring to Panel Exhibit US-10, *supra*, footnote 514, p. 38; and Panel Exhibit MEX-02, *supra*, footnote 118, pp. 37 and 98). (original emphasis)

<sup>517</sup>Mexico's and United States' responses to questioning at the oral hearing.

<sup>518</sup>Panel Report, para. 7.520. (original emphasis)

<sup>519</sup>Panel Report, para. 7.520.

<sup>520</sup>Panel Report, para. 7.552. (original emphasis)

<sup>521</sup>Panel Report, para. 7.532.

<sup>522</sup>Mexico and the United States confirmed this in response to questioning at the oral hearing.

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 or regular and significant mortality has been made for any fishery outside the ETP, which means that under the DPCIA provisions that are currently applicable [to] *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.<sup>523</sup> (original emphasis; footnotes omitted)

250. At the oral hearing, the United States accepted 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".<sup>524</sup> The United States also confirmed that it did not contest the Panel's finding, in paragraph 7.544 of the Panel Report, that:

... 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.<sup>525</sup>

251. In sum, the participants do not contest the following findings by the Panel. First, setting on dolphins within the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed and unobserved effects on dolphins.<sup>526</sup> Further, the use of certain fishing techniques other than setting on dolphins causes harm to dolphins.<sup>527</sup> With respect to tuna fishing outside the ETP, the participants do not contest that the vast majority of tuna caught in the western Pacific Ocean is caught with FADs, trolls, or gillnets, and that US and foreign vessels use these fishing techniques.<sup>528</sup> It is also uncontested that the tuna-dolphin association does not occur outside the ETP as frequently as it does within the ETP, and that there are no records of consistent and widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP.<sup>529</sup> Finally, the participants do not contest that, as currently applied, the US measure does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the

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<sup>523</sup>Panel Report, para. 7.534.

<sup>524</sup>Panel Report, para. 7.534. (original emphasis)

<sup>525</sup>Panel Report, para. 7.544.

<sup>526</sup>Panel Report, paras. 7.438 and 7.493 (referring to Mexico's second written submission to the Panel; and United States' first written submission to the Panel, para. 52). Mexico confirmed that it did not contest this fact in response to questioning at the oral hearing.

<sup>527</sup>Panel Report, para. 7.520.

<sup>528</sup>Panel Report, para. 7.534.

<sup>529</sup>Panel Report, para. 7.520.

ETP<sup>530</sup>, and that tuna caught in this area would be eligible for the US official label, even if dolphins have in fact been killed or seriously injured during the trip.<sup>531</sup>

252. In addition to the findings listed above, the Panel made several other findings which have been appealed by the United States under Article 11 of the DSU. We address them below to the extent they are relevant to our analysis of whether the US "dolphin-safe" labelling provisions reflect discrimination.

(b) Findings by the Panel subject to the United States' Appeal under Article 11 of the DSU

253. As noted, the United States challenges several aspects of the Panel's analysis under Article 2.2 as inconsistent with the Panel's duty, pursuant to 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." We will examine these claims here to the extent that they are relevant to our determination of whether the measure accords "less favourable treatment" to Mexican tuna products. In particular, the United States challenges the Panel's findings with respect to the relative harm to dolphins from different fishing methods as internally contradictory and inconsistent with the evidence before it. The United States also takes issue with the Panel's appreciation and weighing of the evidence regarding the adverse effects on dolphins from tuna fishing and the depletion status of dolphin stocks outside the ETP, as well as the unobserved adverse effects from setting on dolphins and the depletion of dolphin stocks inside the ETP.

254. As the Appellate Body has pointed out on several occasions, Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."<sup>532</sup> At the same time, panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>533</sup> In this respect, "the Appellate Body will not 'interfere lightly' with a panel's fact-finding authority, and will not 'base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding'."<sup>534</sup> Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the initial trier of facts. As the initial trier of facts, a panel must provide "reasoned and adequate explanations

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<sup>530</sup>Panel Report, para. 7.544. We note that the measure at issue does address driftnet fishing in the high seas.

<sup>531</sup>Panel Report, para. 7.532.

<sup>532</sup>Appellate Body Report, *Philippines – Distilled Spirits*, para. 135 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133).

<sup>533</sup>Appellate Body Report, *Australia – Salmon*, para. 267.

<sup>534</sup>Appellate Body Report, *Philippines – Distilled Spirits*, para. 136 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).



and coherent reasoning"<sup>535</sup>, and must base its finding on a sufficient evidentiary basis.<sup>536</sup> Moreover, a participant claiming that a panel disregarded certain evidence must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment.<sup>537</sup>

255. With these parameters in mind, we turn to review the particular findings by the Panel that the United States has challenged under Article 11 of the DSU.

256. The United States alleges, first, that the Panel acted inconsistently with Article 11 of the DSU by making contradictory findings. The United States argues that "the Panel's conclusion that the risk to dolphins from other fishing techniques is not lower than the risk from setting on dolphins"<sup>538</sup> contradicts the Panel's findings that: (i) "certain fishing techniques seem to pose greater risks to dolphins than others"; and (ii) "setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries".<sup>539</sup> This contradiction itself, says the United States, constitutes a violation of Article 11 of the DSU.

257. The United States does not provide a reference for the alleged Panel finding that "the risk to dolphins from other fishing techniques is not lower than the risk from setting on dolphins".<sup>540</sup> From the context of the submission, we understand this allegation to relate to paragraphs 7.562 and 7.617 of the Panel Report, which the United States mentions in paragraph 93 of its appellant's submission. Paragraph 7.562 of the Panel Report reads, in relevant part, as follows:

... 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.<sup>541</sup>

258. The Panel stated that it was not "persuaded" that risks arising from fishing methods other than setting on dolphins to catch tuna outside the ETP "are demonstrated to be lower than the similar threats faced by dolphins in the ETP".<sup>542</sup> As we understand the Panel, the "similar threats" it is

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<sup>535</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

<sup>536</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 881 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 338).

<sup>537</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>538</sup> United States' appellant's submission, para. 94.

<sup>539</sup> United States' appellant's submission, para. 94 (quoting Panel Report, para. 7.438).

<sup>540</sup> United States' appellant's submission, para. 94.

<sup>541</sup> Panel Report, para. 7.562.

<sup>542</sup> Panel Report, para. 7.562.

referring to in this excerpt are threats faced by dolphins in the ETP from the use of fishing methods *other* than setting on dolphins. We see no contradiction between this statement by the Panel and the Panel's earlier findings that "certain fishing techniques seem to pose greater risks to dolphins than others" and that "setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries".<sup>543</sup>

259. Paragraph 7.617 of the Panel Report in turn contains the following finding made by the Panel:

... 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.<sup>544</sup>

260. We do not see a contradiction between this finding and the Panel's earlier finding, in paragraph 7.438 of the Panel Report, that "the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries". We note that the latter statement is qualified by the statement "especially when used without applying certain fishing gear and procedures designed to reduce dolphin bycatch", and it is made in the context of the Panel's discussion of the risks of setting on dolphins "*before* the adoption of the controls established by the AIDCP [Agreement on the International Dolphin Conservation Program]".<sup>545</sup> The Panel thus distinguished between the *unregulated* practice of setting on dolphins and setting on dolphins under the conditions of the AIDCP. Therefore, we see no contradiction between, on the one hand, the Panel's finding that the *unregulated* use of setting on dolphins to catch tuna poses greater risks to dolphins than other tuna fishing methods and, on the other hand, the Panel's statement that it was not persuaded 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*".<sup>546</sup>

261. The United States further asserts that the Panel found that "harm to dolphins resulting from setting on tuna [sic] is equivalent to that resulting from other fishing methods".<sup>547</sup> The United States alleges that this finding is inconsistent with evidence before the Panel suggesting that setting on dolphins to catch tuna poses greater risks to dolphins than other techniques. In particular, the United States points to its arguments before the Panel that there is a regular and significant tuna-dolphin association in the ETP but not in other oceans, and that dolphin populations in the ETP are

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<sup>543</sup>United States' appellant's submission, para. 94 (quoting Panel Report, para. 7.438).

<sup>544</sup>Panel Report, para. 7.617.

<sup>545</sup>Panel Report, para. 7.438. (emphasis added)

<sup>546</sup>Panel Report, para. 7.617. (emphasis added)

<sup>547</sup>United States' appellant's submission, para. 96.

depleted with abundance levels at less than 30 per cent of the levels they were at before the practice of setting on dolphins began, and that "outside the ETP, dolphin populations have not been depleted on account of their exploitation to catch tuna and do not remain depleted on account of any such exploitation".<sup>548</sup> The United States argues that there was no evidence before the Panel suggesting that the tuna-dolphin association outside the ETP is similar to that within the ETP, and alleges that the Panel failed to address evidence to the effect that the levels of the tuna-dolphin association in the ETP are unique, as well as evidence relating to the fishing methods used to catch tuna based on exploiting that association, and "what that means in terms of risks to dolphins".<sup>549</sup>

262. We note that the United States does not provide a specific reference for the said finding by the Panel. The structure of the submission suggests that the reference to "the Panel's finding" in paragraphs 95-99 of the United States' appellant's submission may be to the Panel's conclusions set out in paragraph 93 of the United States' submission, namely, the Panel's conclusions in paragraphs 7.562 and 7.617 of the Panel Report. With respect to the first finding, we do not see that the Panel found that harm to dolphins resulting from setting on them is equivalent to harm resulting from other fishing methods. Instead, as noted above, the Panel stated that it was not "persuaded" that the risks arising from fishing methods other than setting on dolphins to catch tuna outside the ETP "are demonstrated to be lower than the *similar threats* faced by dolphins in the ETP", which we understand as referring to threats from fishing methods *other* than setting on dolphins in the ETP.<sup>550</sup> With respect to the second finding, we note that the Panel explicitly referred to the "evidence presented to" it.<sup>551</sup> This evidence included "examples of observed dolphin mortalities in the western central Pacific ..., 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)."<sup>552</sup> In the light of this evidence, we do not see that the Panel exceeded its discretion when it stated that it was not "persuaded" 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".<sup>553</sup>

263. The United States argues that the Panel erred in finding, on the one hand, that the quantity and the quality of the evidence of the risks faced by dolphin populations outside the ETP is less comprehensive than that of the evidence about dolphin mortality resulting from tuna fishing within the ETP, and in finding, on the other hand, based on the evidence before it, that "significant dolphin

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<sup>548</sup>United States' appellant's submission, para. 96 (quoting United States' second written submission to the Panel, para. 43).

<sup>549</sup>United States' appellant's submission, para. 99.

<sup>550</sup>Panel Report, para. 7.562. (emphasis added)

<sup>551</sup>Panel Report, para. 7.617.

<sup>552</sup>Panel Report, para. 7.523.

<sup>553</sup>Panel Report, para. 7.617.

mortality also arises outside the ETP from the use of other techniques than setting on dolphins".<sup>554</sup> The United States alleges that the Panel leapt from what it acknowledges to be minimal evidence that there may be some harm to dolphins outside the ETP to concluding that "significant dolphin mortality" occurs and that the Panel thus merely assumed that dolphin mortality stemming from tuna fishing existed outside the ETP.<sup>555</sup>

264. In its analysis, the Panel acknowledged that, due in particular to the AIDCP On-Board Observers Program and the AIDCP System for Tracking and Verifying Tuna, detailed information is available concerning dolphin mortalities resulting from tuna fishing in the ETP, and that, by contrast, evidence relating to dolphin bycatch outside the ETP is contained in a "limited amount of *ad-hoc* studies".<sup>556</sup> Nonetheless, the Panel engaged with the available evidence and found, based on a review of numerous pieces of evidence listed in footnotes 733 to 743, that "there are clear indications that the use of certain tuna fishing techniques *other* than setting on dolphins may also cause harm to dolphins."<sup>557</sup>

265. The Panel also addressed the United States' argument that observer programmes outside the ETP exist and that they have not reported significant mortalities. The Panel reviewed evidence submitted by the United States in this respect and concluded that it was "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 [in the preceding paragraphs of the Panel Report]".<sup>558</sup> The Panel stated that "[r]ather, 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 [Western Central Pacific Ocean]".<sup>559</sup> Subsequently, the Panel concluded that:

... 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.<sup>560</sup>

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<sup>554</sup>United States' appellant's submission, para. 101 (referring to Panel Report, paras. 7.612 and 7.613).

<sup>555</sup>United States' appellant's submission, paras. 101 and 102.

<sup>556</sup>Panel Report, para. 7.519. See also para. 7.530.

<sup>557</sup>Panel Report, para. 7.520. (original emphasis)

<sup>558</sup>Panel Report, para. 7.529.

<sup>559</sup>Panel Report, para. 7.529.

<sup>560</sup>Panel Report, para. 7.531.

266. We recall, again, that the evidence before the Panel included "examples of observed dolphin mortalities in the western central Pacific, 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)."<sup>561</sup> We do not see that the Panel acted inconsistently with Article 11 of the DSU by interpreting this as "strong evidence that regular and significant mortality and serious injury of dolphins also exists outside the ETP".<sup>562</sup>

267. The United States further alleges that the evidence cited by the Panel regarding harm to dolphins caused by tuna fishing outside the ETP does not support the Panel's finding of significant dolphin mortality outside the ETP. The United States argues that, in the Panel's analysis of the harm from tuna fishing practices other than setting on dolphins outside the ETP, the Panel erroneously relied on evidence which refers to fishing in general and which does not relate particularly to tuna fishing.<sup>563</sup> The United States asserts that "[s]ources that refer to harms to dolphins from fishing operations other than tuna fishing operations cannot be relied upon to support the Panel's conclusion."<sup>564</sup>

268. Contrary to what the United States suggests, the Panel did not refer to sources that relate to harm to dolphins from fishing operations "other than tuna fishing operations". Some of the evidence taken into account by the Panel refers to tuna fishing along with fishing for other species, some refers to fishing in general, and some refers specifically to fishing for tuna. In any event, as we see it, what is decisive is whether the evidence relied on by the Panel addresses the conditions of fishing for tuna, and not whether, in addition to that, the evidence also addresses fishing for other species.<sup>565</sup>

269. Furthermore, the United States argues that many of the sources on which the Panel relies as evincing harm to dolphins outside the ETP refer to driftnet fishing, a fishing technique that disqualifies tuna products caught on the high seas from being labelled "dolphin-safe" under the measure at issue. The United States argues that the possibility that dolphins may be harmed in driftnet fishing does not support the conclusion that there is significant harm to dolphins outside the ETP that is unaddressed under the measure at issue.<sup>566</sup>

270. We note that while the measure at issue stipulates that tuna caught using driftnets on the high seas is not eligible for a "dolphin-safe" label, it grants access to the label to tuna products containing

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<sup>561</sup>Panel Report, para. 7.523.

<sup>562</sup>Panel Report, para. 7.543.

<sup>563</sup>United States' appellant's submission, para. 103 (referring to Panel Report, paras. 7.520-7.523).

<sup>564</sup>United States' appellant's submission, para. 103.

<sup>565</sup>We note in this respect that "albacore", to which the Panel refers on several occasions, is a sub-species of tuna.

<sup>566</sup>United States' appellant's submission, para. 104.

tuna caught with driftnets in exclusive economic zones. Insofar as such tuna products are eligible for a "dolphin-safe" label, the Panel's reliance on sources relating to driftnet fishing was not "mistaken".

271. Furthermore, the United States takes issue with the value attached by the Panel to a report by the Secretariat of the Pacific Community submitted to the Panel by Mexico as Panel Exhibit MEX-98. The United States argues that the Panel erred in ascribing little value to this report, based on the consideration that the authors of the study considered that further analysis was required, given that the evidence serving as the basis for the Panel's finding of significant harm to dolphins outside the ETP from tuna-fishing operations similarly noted the need for further study.<sup>567</sup>

272. This argument by the United States appears to be directed mainly at the weight that the Panel ascribed to the evidence before it. The Appellate Body has consistently recognized that panels enjoy a margin of discretion in their assessment of the facts.<sup>568</sup> This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings<sup>569</sup>, and to determine how much weight to attach to the various items of evidence placed before it by the parties.<sup>570</sup> A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.<sup>571</sup>

273. The United States further asserts that the Panel acted inconsistently with Article 11 of the DSU by failing to "fully consider" two studies submitted by the United States "reporting the unobserved impact on dolphins from being chased and encircled to catch tuna in the ETP".<sup>572</sup> The United States also takes issue with the Panel's statement that other studies "question" the conclusions suggested by those studies.<sup>573</sup> The United States submits that in fact they did not, and could not have done so, as the other studies referred to by the Panel largely pre-date the studies submitted by the United States, and one of the studies cited by the Panel as "questioning" the conclusion that there are unobserved harms from setting on dolphins was in fact among the studies that the Panel had previously found *did* suggest that there was such harm.<sup>574</sup>

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<sup>567</sup>United States' appellant's submission, para. 106.

<sup>568</sup>Appellate Body Reports, *China – Raw Materials*, para. 341; Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *EC – Hormones*, para. 132; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Japan – Apples*, para. 222; Appellate Body Report, *Korea – Dairy*, paras. 137 and 138; Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>569</sup>Appellate Body Report, *EC – Hormones*, para. 135.

<sup>570</sup>Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>571</sup>Appellate Body Report, *Australia – Salmon*, para. 267; Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.

<sup>572</sup>United States' appellant's submission, para. 108 (referring to Panel Exhibits US-21 and US-22, *supra*, footnote 58).

<sup>573</sup>United States' appellant's submission, para. 109 (referring to Panel Report, para. 7.500).

<sup>574</sup>United States' appellant's submission, para. 109 (referring to Panel Exhibit US-21, *supra*, footnote 58).

274. While an existing study may not directly or explicitly "question" a subsequent study, the conclusions contained in an existing study may well contradict the conclusions contained in a subsequent study. We understand the Panel's statement in paragraph 7.500 that "other studies question these conclusions" in this sense and therefore see no error in that statement. In any event, we note that the Panel did rely on the two studies referred to by the United States in its discussion of unobserved adverse effects from setting on dolphins<sup>575</sup>, and ultimately found "that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect".<sup>576</sup> Moreover, a panel does not err simply because it does not "fully consider" particular exhibits in the record, in particular if these exhibits merely contain facts and arguments that the panel has already discussed.

275. The United States also takes issue with the Panel's statement that dolphin populations near Ghana and Togo are "severely depleted", because there is "no indication in the source cited that the dolphin stocks off the coast of Ghana and Togo are depleted because of tuna fishing activities."<sup>577</sup>

276. Contrary to what the United States suggests, the Panel did not state that "dolphin stocks off the coast of Ghana and Togo are depleted because of tuna fishing activities".<sup>578</sup> In any event, to the extent that this statement was made by the Panel in the context of the Panel's assessment of adverse effects of fishing activities, including fishing for tuna, on dolphins, it may suggest that tuna fishing contributes to the depletion of dolphins in that region. Thus, we do not consider that the Panel's statement would constitute an incorrect reflection of the content of the study.<sup>579</sup>

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<sup>575</sup>Panel Report, footnote 690 to para. 7.495.

<sup>576</sup>Panel Report, para. 7.504.

<sup>577</sup>United States' appellant's submission, para. 111.

<sup>578</sup>United States' appellant's submission, para. 111. See also Panel Report, para. 7.553: [T]he 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".

<sup>579</sup>Panel Exhibit MEX-05 states, at the beginning of the relevant section with respect to dolphin bycatch, that:

The largest catches, by far, are the result of deployment of large meshed drift gillnets targeting tuna, sharks, billfish, manta rays, and dolphins.

(Panel Exhibit MEX-05, *supra*, footnote 115, p. 11)

The relevant excerpt in the same section of this study reads as follows:

In West Africa, bycatch threatens the continued existence of Atlantic humpback dolphins. While bycatch of humpback dolphins is well documented in other West African countries, bycatch monitoring of coastal fisheries in Ghana and Togo has failed to yield a single record because of the severely depleted population. Research is needed to establish the range, distribution, natural history, taxonomy, abundance, and fishery interactions of Atlantic humpback dolphins. A high priority area for dedicated field investigations is Ghana's Volta River region and western Togo.

(Panel Exhibit MEX-05, *supra*, footnote 115, p. 11 (footnote omitted))

277. The United States challenges the Panel's statement relating to serious depletion of the population of Irrawaddy dolphins in parts of Thailand and the Philippines for the same reason. The Panel noted that "the study reports that the Irrawaddy dolphin populations are seriously depleted in parts of Thailand and the Philippines."<sup>580</sup>

278. We note that the United States does not explain the allegation that the Panel "implies" that the relevant dolphin stocks are depleted on account of tuna-fishing activities. The Panel may well have regarded tuna fishing activities as one among several causes of dolphin depletion in the region. In any event, however, in the light of the evidence referenced by the Panel, we see no error in the Panel's statement that "the study reports that the Irrawaddy dolphin populations are seriously depleted in parts of Thailand and the Philippines." We therefore find no error in the Panel's assessment of the evidence in this respect.

279. The United States also alleges that the Panel "neglected to consider" evidence adduced by the United States demonstrating that dolphin populations in the ETP are depleted, and that the most likely reason for recovery rates below the expected rates was the continued tuna purse seine fishing in the ETP, even under the AIDCP guidelines.<sup>581</sup> In particular, the United States refers to information contained in Panel Exhibits US-4, US-20, US-21, US-27, and US-28.

280. We note that the Panel referenced, in paragraph 7.438, the very Panel exhibits that the United States alleges the Panel "neglected to consider". We therefore see no merit in the allegation that the Panel acted inconsistently with the obligation to objectively assess the evidence before it. In any event, we recall, also with respect to this allegation of error, that the Appellate Body has consistently held that the Panel's margin of discretion in its assessment of the facts includes the discretion to decide which evidence it chooses to utilize in making its findings<sup>582</sup>, and to determine how much weight to attach to the various items of evidence placed before it by the parties.<sup>583</sup> We do not see that the Panel exceeded this margin here.

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<sup>580</sup>Panel Report, para. 7.554. While the source given by the Panel (Panel Exhibit MEX-05, p. 27) refers to fisheries in general and not to tuna fishing, it is clear from the context in which it appears that tuna-fishing activities are a major concern in the region. On the previous page, the report states as follows:

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.

(Panel Exhibit MEX-05, *supra*, footnote 115, p. 26)

<sup>581</sup>United States' appellant's submission, para. 113 (referring to Panel Exhibits US-4, US-20, US-21, US-27, and US-28, *supra*, footnotes 60 and 62).

<sup>582</sup>Appellate Body Report, *EC – Hormones*, para. 135.

<sup>583</sup>Appellate Body Report, *Korea – Dairy*, para. 137.



281. For all these reasons, we find that the Panel acted consistently with its duties under Article 11 of the DSU in its analysis of the arguments and evidence before it. The Panel's factual findings therefore stand and can assist us in determining whether the US "dolphin-safe" labelling provisions are even-handed in the manner in which they address the risks to dolphins arising from different fishing methods in different areas of the ocean.

(c) Whether the Measure Is Calibrated

282. The United States argued before the Panel that to the extent that there are any differences in criteria that must be satisfied in order to substantiate "dolphin-safe" claims, they are "calibrated" to the risk that dolphins may be killed or seriously injured when tuna is caught.<sup>584</sup> In this regard, the United States emphasized the uniqueness of the ETP in terms of the phenomenon of tuna-dolphin association, which is used widely and on a commercial basis to catch tuna, and causes observed and unobserved mortalities that, in the United States' view, are not comparable to dolphin mortalities outside the ETP.<sup>585</sup> The United States further alleged that there is a clear relationship between the objectives of the measure and the conditions under which tuna products may be labelled "dolphin-safe".<sup>586</sup> This clear relationship, the United States argued, does not support the conclusion that the "dolphin-safe" labelling provisions are inconsistent with Article 2.1 of the *TBT Agreement*.<sup>587</sup>

283. As an initial matter, we note that, in *Japan – Apples*, the Appellate Body pointed out that "[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof."<sup>588</sup> Although the burden of proof to show that the US "dolphin-safe" labelling provisions are inconsistent with Article 2.1 of the *TBT Agreement* is on Mexico as the complainant, it was for the United States to support its assertion that the US "dolphin-safe" labelling provisions are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean.<sup>589</sup>

284. In the light of the findings of fact made by the Panel, we concluded earlier that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a "dolphin-safe" label, whereas most tuna products from the United States and other countries that are

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<sup>584</sup>Panel Report, paras. 7.258, 7.546, and 7.559.

<sup>585</sup>Panel Report, para. 7.559.

<sup>586</sup>Panel Report, para. 4.158.

<sup>587</sup>Panel Report, para. 7.258 (referring to United States' response to Panel Question 150).

<sup>588</sup>Appellate Body Report, *Japan – Apples*, para. 157 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p.14, DSR 1997:1, 323 at 335; and Appellate Body Report, *EC – Hormones*, para. 98).

<sup>589</sup>Panel Report, para. 7.546 (referring to United States' second written submission to the Panel, paras. 39-47).

sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a "dolphin-safe" label. The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand. The question before us is thus whether the United States has demonstrated that *this* difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.

285. The Panel stated that it was "not persuaded" that "the United States has demonstrated that the requirements of the US dolphin-safe labelling provisions are 'calibrated' to the likelihood of injury".<sup>590</sup> The Panel also stated that it was "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."<sup>591</sup> We note that the Panel made these statements in the context of its analysis under Article 2.2 of the *TBT Agreement*. In particular, the Panel was examining the extent to which the distinctions contained in the US "dolphin-safe" labelling provisions:

... 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".<sup>592</sup>

286. The question examined by the Panel was thus different from the question of whether the detrimental impact of the US "dolphin-safe" labelling provisions on Mexican tuna products stems exclusively from a legitimate regulatory distinction. The Panel's findings with respect to the calibration of the measure at issue for the purposes of its analysis under Article 2.2 are thus not necessarily dispositive of the question whether the measure is calibrated for the purposes of Article 2.1. In particular, it would appear that in answering the question of whether the measure gives accurate information to consumers, *all* distinctions drawn by the measure are potentially relevant. By contrast, in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries. Bearing the different scope of these enquiries in mind, we need to examine carefully to what extent the Panel's findings under Article 2.2 bear on the question of whether the difference in labelling conditions for tuna products containing tuna caught by setting on

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<sup>590</sup>Panel Report, para. 7.559.

<sup>591</sup>Panel Report, para. 7.561.

<sup>592</sup>Panel Report, para. 7.490. The Panel found that the distinctions were drawn in a way that created a "genuine risk that consumers may be misled about whether that tuna was caught by using a technique that does not adversely affect dolphins." (Panel Report, para. 7.562)

dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions.

287. The United States has presented extensive evidence and arguments, and the Panel has made uncontested findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins. The Panel further found that these adverse effects are fully addressed in the measure at issue, since the measure denies access to the label to products containing tuna caught by setting on dolphins.<sup>593</sup> The measure at issue thus addresses the adverse effects on dolphins resulting from the use of the fishing method that Mexico's fleet predominantly employs by disqualifying all tuna products containing tuna harvested with that method from access to the "dolphin-safe" label.

288. The Panel also found, and the United States did not contest, that there are "clear indications that the use of certain tuna fishing techniques *other* than setting on dolphins may also cause harm to dolphins".<sup>594</sup> The United States argued, however, that these adverse effects are "not comparable" to and are "fundamentally different" from the adverse effects resulting from setting on dolphins, and that the situation in the ETP is unique.<sup>595</sup> The Panel agreed with the United States that "certain fishing techniques seem to pose greater risks to dolphins than others."<sup>596</sup> However, it also stated that "even assuming that ... certain environmental conditions in the ETP (such as the intensity of tuna-dolphin association) are unique, the evidence submitted to the Panel suggests that the *risks* faced by dolphin populations in the ETP are *not*."<sup>597</sup> It further stated that it was "not persuaded" 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."<sup>598</sup> The United States has challenged these findings under Article 11 of the DSU. However, as explained above, we found no error in the Panel's analysis that would amount to an error of law under Article 11.<sup>599</sup>

289. It appears, then, that the Panel accepted the United States' argument that the fishing technique of setting on dolphins is particularly harmful to dolphins. However, the Panel did not agree with the United States, based on the evidence that Mexico had placed before it, that the risks to dolphins from

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<sup>593</sup>Panel Report, para. 7.505.

<sup>594</sup>Panel Report, para. 7.520 (referring to Panel Exhibit MEX-02, *supra*, footnote 118, pp. 37 and 98). (original emphasis)

<sup>595</sup>Panel Report, paras. 7.258, 7.512, and 7.559.

<sup>596</sup>Panel Report, para. 7.438.

<sup>597</sup>Panel Report, para. 7.552. (original emphasis)

<sup>598</sup>Panel Report, para. 7.617.

<sup>599</sup>These findings by the Panel therefore stand.

other fishing techniques are insignificant<sup>600</sup> and do not under some circumstances rise to the same level as the risks from setting on dolphins.<sup>601</sup> These factual findings are the basis for the Panel's concerns about the way in which the measure at issue addresses the potential adverse effects on dolphins from the use of fishing techniques other than setting on dolphins outside the ETP. As the Panel noted, where "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".<sup>602</sup>

290. The Panel emphasized 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.<sup>603</sup>

291. The Panel concluded that:

... 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.<sup>604</sup>

292. From the Panel's findings, it thus appears that the measure at issue does not address adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers.<sup>605</sup> The Panel noted that the only requirement currently applicable to purse seine vessels fishing outside the ETP is to provide a certification by the captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip. This requirement, however, does not address risks from other fishing methods, such as FADs. As the Panel stated, risks to dolphins resulting from fishing methods other than setting on dolphins "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."<sup>606</sup>

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<sup>600</sup>Panel Report, paras. 7.529, 7.531, and 7.562.

<sup>601</sup>Panel Report, para. 7.562.

<sup>602</sup>Panel Report, para. 7.532.

<sup>603</sup>Panel Report, para. 7.534. (original emphasis) We note that the measure at issue does address driftnet fishing in the high seas.

<sup>604</sup>Panel Report, para. 7.621.

<sup>605</sup>Panel Report, para. 7.534 and footnote 767 thereto.

<sup>606</sup>Panel Report, para. 7.561.

293. Before the Panel and on appeal, the United States has argued that the US "dolphin-safe" labelling provisions reflect the fact that the lower likelihood that a dolphin may be killed or seriously injured in a fishery outside the ETP must be balanced against the additional burden imposed by conditioning the use of a "dolphin-safe" label on a certification based on an independent observer's statement.<sup>607</sup> The United States further argues that the imposition of a condition that an observer certify that no dolphins were killed or seriously injured on a particular fishing trip outside the ETP "would have significant monetary and infrastructure implications for most nations whose vessels fish for tuna outside the ETP and export to the United States".<sup>608</sup> We understand the United States to suggest that, at least in part due to such costs, it does not impose a certification requirement with respect to fisheries outside the ETP.

294. The Panel found these arguments unpersuasive. It noted that this argument was inconsistent with the United States' own explanation that the measure at issue already imposes a requirement that no dolphins be killed or seriously injured if an alternative label is used.<sup>609</sup> The Panel stated:

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.<sup>610</sup>

295. The Panel further noted 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 a requirement to certify that no dolphin has been killed or seriously injured on the trip on which the tuna was caught.<sup>611</sup>

296. We see no error in the Panel's assessment. In addition, we note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its "dolphin-safe" labelling provisions to the

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<sup>607</sup>United States' appellant's submission, para. 116.

<sup>608</sup>United States' appellant's submission, para. 116.

<sup>609</sup>Panel Report, para. 7.541.

<sup>610</sup>Panel Report, para. 7.541.

<sup>611</sup>Panel Report, para. 7.543.

risks that the Panel found were posed by fishing techniques other than setting on dolphins.<sup>612</sup> We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.<sup>613</sup>

297. In the light of the above, we conclude that the United States has not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. It follows from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does "not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP".<sup>614</sup> In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.

3. Conclusion under Article 2.1 of the TBT Agreement

298. In the light of uncontested facts and factual findings made by the Panel, we consider that Mexico has established a *prima facie* case that the US "dolphin-safe" labelling provisions modify the conditions of competition in the US market to the detriment of Mexican tuna products and are not even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean. We consider further that the United States has not met its burden of rebutting this *prima facie* case. Since we are not persuaded that the Panel acted inconsistently with Article 11 of the DSU in reviewing the evidence and arguments before it, we accept the Panel's conclusions that the use of certain tuna fishing methods other than setting on

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<sup>612</sup>We note, however, that such a requirement may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury.

<sup>613</sup>See DPCIA, subsection 1385(d)(1)(D):

(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.* (emphasis added)

<sup>614</sup>Panel Report, para. 7.544. We note that the measure at issue does address driftnet fishing in the high seas.

dolphins "outside the ETP may produce and has produced significant levels of dolphin bycatch"<sup>615</sup> and that "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."<sup>616</sup> Thus, in our view, the United States has not justified as non-discriminatory under Article 2.1 the different requirements that it applies to tuna caught by setting on dolphins inside the ETP and tuna caught by other fishing methods outside the ETP for access to the US "dolphin-safe" label. The United States has thus not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction.

299. For these reasons, we *reverse* the Panel's finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labelling provisions are not inconsistent with Article 2.1 of the *TBT Agreement*. We *find*, instead, that the US "dolphin-safe" labelling provisions provide "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and are therefore inconsistent with Article 2.1 of the *TBT Agreement*.

E. *Mexico's Claims under Article 11 of the DSU*

300. We note that Mexico also advances an appeal under Article 11 of the DSU in relation to the Panel's assessment of Mexico's claims under Article 2.1 of the *TBT Agreement*. In particular, Mexico alleges that Panel acted inconsistently with Article 11 of the DSU by failing to consider evidence put forward by Mexico that it was impossible for the Mexican tuna industry to change its fishing practices to adapt to the US "dolphin-safe" labelling provisions.<sup>617</sup> Mexico further contends that the Panel acted inconsistently with Article 11 of the DSU in finding that it was not clear that the AIDCP label had value to retailers and that retailers had similar perceptions to canneries.<sup>618</sup> We have already found that the Panel erred in finding that Mexico failed to establish that the measure at issue is inconsistent with the United States' obligations under Article 2.1 of the *TBT Agreement*. Therefore, in order to resolve this dispute, we need not determine whether, in assessing Mexico's claims under that provision, the Panel also failed to satisfy its obligations under Article 11 of the DSU.

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<sup>615</sup>Panel Report, para. 7.531.

<sup>616</sup>Panel Report, para. 7.621.

<sup>617</sup>Mexico's other appellant's submission, para. 149.

<sup>618</sup>Mexico's other appellant's submission, paras. 163 and 164 (referring to Panel Report, paras. 7.568, 2.1(c), 4.24, 7.13, and 7.23; and Declaration of John F. Turner, filed as exhibit to Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, in *Earth Island Institute v. Evans*, Case No. C-99-3892-TEH (Panel Exhibit MEX-34), MEX-58 (BCI), and MEX-100 (BCI)).

## VII. Article 2.2 of the *TBT Agreement*

301. We turn next to the United States' appeal of the Panel's finding that the measure at issue is more trade restrictive than necessary to fulfil the legitimate objectives pursued by the United States, and that, therefore, the measure is inconsistent with Article 2.2 of the *TBT Agreement*. The United States alleges that the Panel erred in its application of Article 2.2 of the *TBT Agreement* and failed to make an objective assessment of the matter before it as required pursuant to Article 11 of the DSU. Mexico raises a conditional other appeal with respect to the Panel's finding under Article 2.2 of the *TBT Agreement*.

### A. *The Panel's Findings*

302. The Panel concluded that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*, because it is more trade restrictive than necessary to fulfil the legitimate objectives pursued by the United States, taking account of the risks non-fulfilment would create. This conclusion is based on a number of intermediate findings by the Panel. First, the Panel assessed the United States' objectives based on the description of those objectives by both parties, as well as on the basis of the design, structure, and characteristics of the measure at issue, and found the objectives to be the following:

- (a) "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins"<sup>619</sup> (the "consumer information objective"); and
- (b) "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"<sup>620</sup> (the "dolphin protection objective").

303. The Panel then ascertained whether these objectives are "legitimate" within the meaning of Article 2.2 of the *TBT Agreement*. The Panel noted that the elaboration of legitimate objectives is the prerogative of the Member establishing a measure. The Panel also recalled the Appellate Body's finding in *US – Gambling* that a panel is not bound by a Member's characterization of the objectives of its own measures, but that a panel must make such characterization in an independent and objective fashion, based on the evidence in the record.<sup>621</sup> The Panel also recalled the Appellate Body's finding in *EC – Sardines* that there must be an examination and a determination on the legitimacy of the

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<sup>619</sup>Panel Report, paras. 7.401 and 7.413.

<sup>620</sup>Panel Report, paras. 7.401 and 7.425.

<sup>621</sup>Panel Report, para. 7.405 (referring to Appellate Body Report, *US – Gambling*, para. 304).



objectives of the measures.<sup>622</sup> The Panel considered the list of legitimate objectives in Article 2.2 and found that the consumer information objective falls within the broader goal of preventing deceptive practices, and that the dolphin protection objective may be understood as intended to protect animal life or health or the environment.<sup>623</sup> Accordingly, the Panel found "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*.<sup>624</sup>

304. The Panel then assessed whether the measure at issue is more trade restrictive than necessary to achieve the United States' objectives. The Panel stated that, in order to do so, it would assess "the manner in which and the extent to which the measures at issue fulfil their objectives, taking into account [the] 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."<sup>625</sup> The Panel further stated that, "[t]o 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."<sup>626</sup>

305. Turning to the measure at issue, the Panel assessed whether the US "dolphin-safe" labelling provisions fulfil the consumer information objective and whether, as Mexico claimed, this objective could also be fulfilled by allowing the AIDCP label to coexist with the US "dolphin-safe" label in the US market. The Panel found that the measure at issue could only partially fulfil the consumer information objective, because, *inter alia*, under the US "dolphin-safe" label, consumers might be misled into thinking that a tuna product did not involve injury or killing of dolphins, even though this may in fact have been the case.<sup>627</sup> The Panel considered that allowing compliance with the "dolphin-safe" labelling requirements of the AIDCP in conjunction with the existing US "dolphin-safe" label would be a less trade restrictive alternative that would achieve a level of protection equivalent to that of the measure at issue. Accordingly, the Panel concluded that the measure at issue is more trade restrictive than necessary to fulfil the consumer information objective.<sup>628</sup>

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<sup>622</sup>Panel Report, para. 7.436 (quoting Appellate Body Report, *EC – Sardines*, para. 286).

<sup>623</sup>Panel Report, para. 7.437.

<sup>624</sup>Panel Report, para. 7.444.

<sup>625</sup>Panel Report, para. 7.465.

<sup>626</sup>Panel Report, para. 7.465.

<sup>627</sup>Panel Report, paras. 7.563 and 7.564.

<sup>628</sup>Panel Report, paras. 7.577 and 7.578.

306. The Panel subsequently considered whether the measure at issue fulfils the dolphin protection objective and whether this objective could also be fulfilled by allowing the AIDCP label to coexist with the US "dolphin-safe" label in the US market. The Panel concluded that the measure at issue could "at best, only partially fulfil [its] stated objective of protecting dolphins". The Panel reasoned that, although the measure was capable of protecting dolphins within the ETP, in other fisheries the measure was "capable of achieving [its] objective only in relation to the practices of setting on dolphins and using high seas driftnets", and "in relation to all other fishing techniques used outside the ETP" the measure is "not able to contribute to the protection of dolphins".<sup>629</sup>

307. The Panel noted that significant dolphin mortality arises outside the ETP from the use of fishing techniques other than setting on dolphins.<sup>630</sup> The Panel considered that, "in some cases, the risks arising from setting on dolphins under controlled circumstances may be lower than the risks arising from other fishing techniques applied without controlling for dolphin mortality or other adverse impacts."<sup>631</sup> The Panel considered that "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."<sup>632</sup> Thus, the Panel found that "Mexico's alternative would achieve a level of protection equal to that achieved by the US dolphin-safe provisions outside the ETP".<sup>633</sup> Recalling its earlier conclusion that Mexico's alternative "is less trade-restrictive than the US dolphin-safe provisions", the Panel found that Mexico had identified a reasonably available less trade-restrictive alternative that would achieve the dolphin protection objective at the same level as the measure at issue.<sup>634</sup>

308. Consequently, in relation to both the consumer information objective and the dolphin protection objective, the Panel found the measure at issue to be more trade restrictive than necessary to fulfil its legitimate objectives and thus inconsistent with Article 2.2 of the *TBT Agreement*.<sup>635</sup>

#### B. *The United States' Appeal*

309. On appeal, the United States requests the Appellate Body to reverse this finding. The United States claims that the Panel erred in its application of Article 2.2 of the *TBT Agreement* when it found that the US "dolphin-safe" labelling provisions are more trade restrictive than necessary to fulfil their legitimate objectives. The United States also alleges that, in assessing the evidence relating

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<sup>629</sup>Panel Report, para. 7.599.

<sup>630</sup>Panel Report, para. 7.613.

<sup>631</sup>Panel Report, para. 7.615.

<sup>632</sup>Panel Report, para. 7.618.

<sup>633</sup>Panel Report, para. 7.618.

<sup>634</sup>Panel Report, para. 7.619.

<sup>635</sup>Panel Report, para. 7.620.

to the extent to which the United States' measure fulfils the United States' objectives, the Panel failed to make an objective assessment of the matter before it as required under Article 11 of the DSU. In addition, the United States raises a claim under Article 11 of the DSU with respect to the Panel's finding that the alternative measure proposed by Mexico would be a less trade-restrictive alternative.

310. In response, Mexico argues that the Appellate Body should uphold the Panel's finding that the US "dolphin-safe" labelling provisions are more trade restrictive than necessary to fulfil their legitimate objectives and are therefore inconsistent with Article 2.2 of the *TBT Agreement*. According to Mexico, the Panel's finding is correct because the United States' objectives can be fulfilled with a less trade-restrictive alternative measure, namely, allowing the AIDCP label and the US "dolphin-safe" label to coexist in the US market.

1. Article 2.2 of the *TBT Agreement*

311. We begin by considering the text of Article 2.2 of the *TBT Agreement*, which provides:

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.

312. The first sentence of Article 2.2 requires WTO 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. The second sentence explains that "[f]or 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". We will address the different elements set out in the text of Article 2.2 in turn below, in particular the meaning of the terms "legitimate objective" and "fulfilment", as well as of the phrases "not ... more trade-restrictive than necessary" and "taking account of the risks non-fulfilment would create".

313. Considering, first, the meaning of the term "legitimate objective" in the sense of Article 2.2 of the *TBT Agreement*, we note that the word "objective" describes a "thing aimed at or sought; a target,

a goal, an aim".<sup>636</sup> The word "legitimate", in turn, is defined as "lawful; justifiable; proper".<sup>637</sup> Taken together, this suggests that a "legitimate objective" is an aim or target that is lawful, justifiable, or proper. Furthermore, the use of the words "*inter alia*" in Article 2.2 suggests that the provision does not set out a closed list of legitimate objectives, but rather lists several examples of legitimate objectives. We consider that those objectives expressly listed provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2. In addition, we note that the sixth and seventh recitals of the preamble of the *TBT Agreement* specifically recognize several objectives, which to a large extent overlap with the objectives listed in Article 2.2. Furthermore, we consider that objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the *TBT Agreement*.

314. Accordingly, in adjudicating a claim under Article 2.2 of the *TBT Agreement*, a panel must assess what a Member seeks to achieve by means of a technical regulation. In doing so, it may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure. A panel is not bound by a Member's characterization of the objectives it pursues through the measure, but must independently and objectively assess them.<sup>638</sup> Subsequently, the analysis must turn to the question of whether a particular objective is legitimate, pursuant to the parameters set out above.

315. Next, we consider the meaning of the word "fulfil" in the context of the phrase "fulfil a legitimate objective" in Article 2.2 of the *TBT Agreement*. We note, first, that the word "fulfil" is defined as "provide fully with what is wished for".<sup>639</sup> Read in isolation, the word "fulfil" appears to describe complete achievement of something. But, in Article 2.2, it is used in the phrase "to fulfil a legitimate objective" and, as described above, the word "objective" means "a target, goal, or aim". As we see it, it is inherent in the notion of an "objective" that such a "goal, or aim" may be something that is pursued and achieved to a greater or lesser degree. Accordingly, we consider that the question of whether a technical regulation "fulfils" an objective is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective.

316. We see support for this reading of the term "fulfil a legitimate objective" in the sixth recital of the preamble of the *TBT Agreement*, which provides relevant context for the interpretation of

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<sup>636</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1970.

<sup>637</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1577.

<sup>638</sup>See Appellate Body Report, *US – Gambling*, para. 304.

<sup>639</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1053.

Article 2.2. It recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives "at the levels it considers appropriate", subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the *TBT Agreement*. As we see it, a WTO Member, by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective.

317. A panel adjudicating a claim under Article 2.2 of the *TBT Agreement* must seek to ascertain to what degree, or if at all<sup>640</sup>, the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member. The degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure. As in other situations, such as, for instance, when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue.<sup>641</sup>

318. We turn next to the terms "unnecessary obstacles to international trade" in the first sentence and "not ... more trade-restrictive than necessary" in the second sentence of Article 2.2 of the *TBT Agreement*. Both the first and second sentence of Article 2.2 refer to the notion of "necessity". These sentences are linked by the terms "[f]or this purpose", which suggests that the second sentence qualifies the terms of the first sentence and elaborates on the scope and meaning of the obligation contained in that sentence. The Appellate Body has previously noted that the word "necessary" refers to a range of degrees of necessity, depending on the connection in which it is used.<sup>642</sup> In the context of Article 2.2, the assessment of "necessity" involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create. We consider, therefore, that all these factors

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<sup>640</sup>This may involve an assessment of whether the measure at issue is capable of achieving the legitimate objective.

<sup>641</sup>Appellate Body Report, *China – Publications and Audiovisual Products*, para. 252.

<sup>642</sup>The Appellate Body further noted that: "[a]t one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to.'" (Appellate Body Report, *Korea – Various Measures on Beef*, para. 161)

provide the basis for the determination of what is to be considered "necessary" in the sense of Article 2.2 in a particular case.<sup>643</sup>

319. What has to be assessed for "necessity" is the trade-restrictiveness of the measure at issue. We recall that the Appellate Body has understood the word "restriction" as something that restricts someone or something, a limitation on action, a limiting condition or regulation. Accordingly, it found, in the context of Article XI:2(a) of the GATT 1994, that the word "restriction" refers generally to something that has a limiting effect.<sup>644</sup> As used in Article 2.2 in conjunction with the word "trade", the term means something having a limiting effect on trade. We recall that Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to "unnecessary obstacles" to trade and thus allows for some trade-restrictiveness; more specifically, Article 2.2 stipulates that technical regulations shall not be "more trade-restrictive than necessary to fulfil a legitimate objective". Article 2.2 is thus concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.

320. The use of the comparative "more ... than" in the second sentence of Article 2.2 suggests that the existence of an "unnecessary obstacle[] to international trade" in the first sentence may be established on the basis of a comparative analysis of the above-mentioned factors. In most cases, this would involve a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available *and* less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create.<sup>645</sup> The Appellate Body has clarified that a comparison with reasonably available alternative measures is a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary.

321. Article 2.2 of the *TBT Agreement* further stipulates that the risks non-fulfilment of the objective would create shall be taken into account, and that, 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". As we see it, the obligation to consider "the risks non-fulfilment would create" suggests that the comparison of the challenged measure with a possible

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<sup>643</sup>Similarly, in the context of Article XX of the GATT 1994 and Article XIV of the GATS, "necessity" is determined on the basis of "weighing and balancing" a number of factors. (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178; Appellate Body Report, *US – Gambling*, paras. 306-308)

<sup>644</sup>The Appellate Body addressed this question in the context of Article XI:2(a) of the GATT 1994 in Appellate Body Reports, *China – Raw Materials*, para. 319.

<sup>645</sup>Similarly, the Appellate Body has held that in order to establish "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS, a comparison of a measure found to be inconsistent and reasonably available less trade-restrictive alternatives should be undertaken. (See, for instance, Appellate Body Report, *Korea – Various Measures on Beef*, para. 166)

alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. This suggests a further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is "necessary" or, alternatively, whether a possible alternative measure, which is less trade restrictive, would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and would be reasonably available.<sup>646</sup>

322. In sum, we consider that an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the *TBT Agreement* involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken.<sup>647</sup> In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.

323. With respect to the burden of proof in showing that a technical regulation is inconsistent with Article 2.2, the complainant must prove its claim that the challenged measure creates an unnecessary obstacle to international trade.<sup>648</sup> In order to make a *prima facie* case, the complainant must present evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objectives, taking account of the risks non-fulfilment would create. In making its *prima facie* case, a complainant may also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. It is then for the respondent to rebut the complainant's *prima facie* case, by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued and by demonstrating, for example, that the alternative measure identified by the

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<sup>646</sup>See also Appellate Body Report, *US – Gambling*, para. 307.

<sup>647</sup>We can identify at least two instances where a comparison of the challenged measure and possible alternative measures may not be required. For example, it would seem to us that if a measure is not trade restrictive, then it may not be inconsistent with Article 2.2. Conversely, if a measure is trade restrictive and makes *no* contribution to the achievement of the legitimate objective, then it may be inconsistent with Article 2.2.

<sup>648</sup>Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335. See also Appellate Body Report, *EC – Sardines*, paras. 277-280.

complainant is not, in fact, "reasonably available", is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective.

2. The Panel's Application of Article 2.2

324. We turn next to the review of the Panel's application of Article 2.2 of the *TBT Agreement*. The United States alleges that the Panel erred in finding that the "coexistence" of the US "dolphin-safe" label and the AIDCP label provides a reasonably available, less trade-restrictive means of achieving the objectives pursued by the United States at its chosen level. According to the United States, allowing the AIDCP label to coexist with the US "dolphin-safe" label would not address risks to dolphins outside the ETP, since by its terms it only applies to tuna caught inside the ETP. The United States further points out that the AIDCP label allows the practice of setting on dolphins to catch tuna, which is harmful to dolphins, and would therefore frustrate the dolphin protection objective.<sup>649</sup> Moreover, in the United States' view, coexistence of the two labels would be confusing for consumers, because the AIDCP and the US official "dolphin-safe" label are virtually identical, and consumers would have difficulty appreciating the difference in what each label signifies so as to make an informed decision about the tuna they buy.<sup>650</sup> Finally, the United States alleges that the Panel erred by implying that the United States is required to fulfil its objective to the same level inside and outside the ETP, regardless of the costs, and that this approach does not respect "well-established approaches to policymaking", such as weighing costs and benefits, which are also consistent with the *TBT Agreement*.<sup>651</sup>

325. In reviewing the Panel's application of Article 2.2 to the facts of this case, we recall its finding that the objectives at issue are, first, "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins"<sup>652</sup>; and, second, "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".<sup>653</sup>

326. Before the Panel, Mexico argued 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."<sup>654</sup> It was for the Panel, therefore, in assessing Mexico's claim that the US "dolphin-safe" labelling provisions "are more trade-restrictive than necessary" within the meaning of Article 2.2, to examine, *inter alia*, the contribution that the US measure makes to the achievement of its objectives; the

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<sup>649</sup>United States' appellant's submission, para. 121.

<sup>650</sup>United States' appellant's submission, para. 124.

<sup>651</sup>United States' appellant's submission, para. 115.

<sup>652</sup>Panel Report, paras. 7.413 and 7.401.

<sup>653</sup>Panel Report, paras. 7.425 and 7.401.

<sup>654</sup>Panel Report, para. 7.566 (referring to Mexico's response to Panel Question 134, para. 52).



trade-restrictiveness of the US "dolphin-safe" labelling provisions; whether Mexico had identified a "reasonably available" and less trade-restrictive alternative measure, and to compare the degree of the US measure's contribution with that of the alternative measure, which is reasonably available and less trade restrictive, taking account of the risks non-fulfilment would create.

327. With respect to the degree to which the measure at issue contributes to the United States' consumer information objective, we recall the Panel's finding that the measure at issue "can only *partially* ensure that consumers are informed about whether tuna was caught by using a method that adversely affects dolphins".<sup>655</sup> This conclusion is based on the Panel's finding that fishing methods other than setting on dolphins or high-sea driftnet fishing outside the ETP may cause adverse effects on dolphins, and that to the extent tuna caught under such circumstances may be labelled "dolphin-safe" pursuant to the US "dolphin-safe" labelling provisions, consumers may be misled about whether tuna was caught using a technique that does not adversely affect dolphins.<sup>656</sup> Similarly, regarding the question of the degree to which the measure at issue contributes to the United States' dolphin protection objective, the Panel found that the US "dolphin-safe" labelling 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. The Panel further found that, in other fisheries, the measure at issue is capable of achieving its objective only in relation to the fishing practices of setting on dolphins and of using high seas driftnets, and that, in relation to all other fishing techniques used outside the ETP, the measure at issue is not able to contribute to the protection of dolphins. Accordingly, the Panel concluded that US "dolphin-safe" labelling provisions "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".<sup>657</sup>

328. The Panel then considered the extent to which the proposed alternative measure would fulfil the United States' objectives and concluded, first, with respect to the consumer information objective, that "the extent to which consumers would be misled as to the implications of the manner in which tuna was caught would not be greater if the AIDCP label were allowed to co-exist with the US dolphin-safe provisions".<sup>658</sup> Second, with respect to the dolphin protection objective, the Panel found that "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

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<sup>655</sup>Panel Report, para. 7.563. (original emphasis)

<sup>656</sup>Panel Report, para. 7.562.

<sup>657</sup>Panel Report, para. 7.599.

<sup>658</sup>Panel Report, para. 7.573.

of protection in this respect."<sup>659</sup> It appears to us, however, that the Panel's analysis of whether Mexico had demonstrated that the US "dolphin-safe" labelling provisions are "more trade-restrictive than necessary" within the meaning of Article 2.2 was based, at least in part, on an improper comparison. With respect to the dolphin protection objective, the Panel contrasted the AIDCP labelling requirements with the US "dolphin-safe" labelling provisions, stating that "allowing compliance" with the former "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".<sup>660</sup> Similarly, with respect to the consumer information objective, the Panel noted, *inter alia*, that, "under the US measures", it is possible that tuna caught during a trip where dolphins were in fact killed or injured may be labelled "dolphin-safe".<sup>661</sup> The Panel compared that to the scenario "under the AIDCP", where "a label would only be granted if no dolphins [were] killed, but where certain unobserved adverse effects could nonetheless have been caused to dolphins".<sup>662</sup> This comparison, however, fails to take into account that the alternative measure identified by Mexico is *not* the AIDCP regime, as such, but rather the *coexistence* of the AIDCP rules with the US measure.

329. In any event, it would appear that, in respect of the conditions for labelling as "dolphin-safe" tuna products containing tuna harvested *outside* the ETP, there is no difference between the measure at issue and the alternative measure identified by Mexico, namely, the coexistence of the US "dolphin-safe" labelling provisions with the AIDCP rules. We recall that the geographic scope of application of the AIDCP rules is limited to the ETP. Thus, the conditions for fishing outside the ETP would be identical under the alternative measure proposed by Mexico, since only those set out in the US measure would apply. Therefore, for fishing activities *outside* the ETP, the degree to which the United States' objectives are achieved under the alternative measure would not be higher or lower than that achieved by the US measure, it would be the same. *Inside* the ETP, however, the measure at issue and the alternative measure set out different requirements. Under the alternative measure identified by Mexico, tuna that is caught by setting on dolphins would be eligible for a "dolphin-safe" label if the prerequisites of the AIDCP label have been complied with. By contrast, the measure at issue prohibits setting on dolphins, and thus tuna harvested in the ETP would only be eligible for a "dolphin-safe" label if it was caught by methods other than setting on dolphins.

330. It would seem, therefore, that the Panel's comparison of the degree to which the alternative measure identified by Mexico contributes to the United States' objectives should have focused on the conditions inside the ETP. In particular, for tuna harvested inside the ETP, the Panel should have

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<sup>659</sup>Panel Report, para. 7.612.

<sup>660</sup>Panel Report, para. 7.612.

<sup>661</sup>Panel Report, para. 7.573.

<sup>662</sup>Panel Report, para. 7.573.

examined whether the labelling of tuna products complying with the requirements of the AIDCP label would achieve the United States' objectives to an equivalent degree as the measure at issue. We note, in this regard, the Panel's finding, undisputed by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins<sup>663</sup>, even under the restrictions contained in the AIDCP rules.<sup>664</sup> Since under the proposed alternative measure tuna caught in the ETP by setting on dolphins would be eligible for the "dolphin-safe" label, it would appear, therefore, that the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled "dolphin-safe".<sup>665</sup> We disagree therefore with the Panel's findings that the proposed alternative measure would achieve the United States' objectives "to the same extent" as the existing US "dolphin-safe" labelling provisions, and that the extent to which consumers would be misled as to the implications of the manner in which tuna was caught "would not be greater" under the alternative measure proposed by Mexico.

331. For these reasons, we find that the Panel's comparison and analysis is flawed and cannot stand. Therefore, the Panel erred in concluding, in paragraphs 7.620 and 8.1(b) of the Panel Report, that it has been demonstrated that the measure at issue is more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking account of the risks non-fulfilment would create.

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<sup>663</sup>In particular, the Panel considered cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress. (See Panel Report, paras. 7.491-7.506)

<sup>664</sup>Panel Report, para. 7.504. The Panel stated that:

... 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. 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. (footnotes omitted)

<sup>665</sup>We also note in this regard the Panel's finding in the context of Mexico's claim under Article 2.4 of the *TBT Agreement*. In particular, the Panel stated:

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. (Panel Report, para. 7.729); [and]

[T]he 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.

(Panel Report, para. 7.731)

Accordingly, we *reverse* the Panel's findings that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*.

332. The United States has raised an additional claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the evidence relating to the extent to which the US measure fulfils a legitimate objective. In particular, the United States takes issue with the Panel's finding that the risks to dolphins outside the ETP from fishing methods other than setting on dolphins "are not lower than similar risks faced by dolphins in the ETP"<sup>666</sup>, and the finding that the Panel was not persuaded 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."<sup>667</sup>

333. We have concluded that the Panel erred in finding that it has been demonstrated that the US measure is more trade restrictive than necessary within the meaning of Article 2.2 of the *TBT Agreement*. Having reversed this finding, we do not find it necessary to address the United States' additional claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU.<sup>668</sup>

C. *Other Appeal by Mexico*

334. Mexico raises two claims in its conditional appeal with respect to the Panel's finding under Article 2.2 of the *TBT Agreement*. Each of these claims is conditional upon the Appellate Body reversing the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*. First, Mexico requests that we reverse the Panel's intermediate finding that the United States' objective of 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 is a legitimate objective, and that we find, instead, that it is not a legitimate objective within the meaning of Article 2.2.<sup>669</sup> In the alternative, Mexico requests that we find the measure at issue to be inconsistent with Article 2.2 based on the Panel's earlier finding that the US measure did not entirely fulfil the United States' objectives.<sup>670</sup>

335. With respect to its first claim, Mexico submits that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective. Mexico maintains that the list of examples of legitimate objectives in Article 2.2 of the *TBT Agreement* informs the interpretation of

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<sup>666</sup>United States' appellant's submission, para. 93 (referring to Panel Report, para. 7.562).

<sup>667</sup>United States' appellant's submission, para. 93 (referring to Panel Report, para. 7.617).

<sup>668</sup>See also Appellate Body Report, *US – Upland Cotton*, para. 695.

<sup>669</sup>Mexico's other appellant's submission, para. 278.

<sup>670</sup>Mexico's other appellant's submission, para. 284.

the term "legitimate objective" in that provision and points out that none of the listed objectives include language similar to "by ensuring that the US market is not used to encourage" or other language reflecting a "coercive and trade-restrictive objective".<sup>671</sup> However, for Mexico, the United States' dolphin protection objective is a "coercive objective" because its purpose is to "coerce" another WTO Member to change its practices to comply with a unilateral policy of the United States. Moreover, Mexico alleges that the dolphin protection objective is unnecessary, and constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. Mexico asserts that the situation in *US – Gasoline* is "closely analogous" to the situation in the present case, where the United States has disregarded a multilateral agreement that addresses the same subject matter as the measure at issue.<sup>672</sup>

336. We have reversed the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*. Thus, the condition of Mexico's other appeal with respect to the Panel's findings under Article 2.2 is fulfilled and, accordingly, we consider Mexico's arguments with respect to the Panel's findings under Article 2.2 of the *TBT Agreement*.

337. At the outset, we recall that the United States' dolphin protection objective is phrased as follows: "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".<sup>673</sup> Mexico does not claim that "contributing to the protection of dolphins" is an illegitimate objective; instead, Mexico argues that it is illegitimate to pursue this objective "by ensuring that the US market is not used to encourage" certain fishing practices. It thus appears to us that Mexico does not take issue with the United States' dolphin protection objective *per se*, but with the means used in pursuance of this objective.

338. Article 2.2 of the *TBT Agreement* recognizes that a technical regulation shall not create "unnecessary obstacles" to international trade. The provision thus envisages that some trade-restrictiveness may arise from a technical regulation. However, the technical regulation would not be inconsistent with Article 2.2 unless it is found to constitute an "unnecessary obstacle[] to international trade". Hence, the mere fact that a WTO Member adopts a measure that entails a burden on trade in order to pursue a particular objective cannot *per se* provide a sufficient basis to conclude that the objective that is being pursued is not a "legitimate objective" within the meaning of Article 2.2.

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<sup>671</sup>Mexico's other appellant's submission, para. 271.

<sup>672</sup>Mexico's other appellant's submission, para. 275 (referring to Appellate Body Report, *US – Gasoline*, p. 25, DSR 1996:1, 3, at 23).

<sup>673</sup>Panel Report, paras. 7.401 and 7.425.

339. We note Mexico's argument that the United States' dolphin protection objective is unnecessary, and constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade<sup>674</sup>, and is therefore inconsistent with the sixth recital of the preamble of the *TBT Agreement*.<sup>675</sup> According to the sixth recital, what must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade is a *measure*, and not the objective pursued by the technical regulation.

340. We now turn to Mexico's second ground of appeal. Mexico alleges that the Panel erred in proceeding to examine whether there was a less trade-restrictive alternative measure after it had found that the measure at issue could, at best, only partially fulfil the two United States' objectives. For Mexico, it is not possible to find that there is a less trade-restrictive alternative measure that fulfils the objectives when the measure at issue itself does not fulfil the objectives. In addition, it would be impossible to take "account of the risks non-fulfilment would create" if, in fact, non-fulfilment already exists with the measure at issue. Mexico argues that, upon concluding that the US "dolphin-safe" labelling provisions did not fulfil the two United States' objectives, the Panel's analysis should have ended and it should have found that the US "dolphin-safe" labelling provisions were inconsistent with Article 2.2.<sup>676</sup>

341. Mexico's allegation of error is based on its contention that it is not possible to find that there is a less trade-restrictive alternative measure that fulfils the United States' objectives when the measure at issue itself does not fulfil the objectives.<sup>677</sup> We note, however, that the Panel found, with respect to the United States' consumer information objective, that the measure at issue "can only *partially* ensure that consumers are informed about whether tuna was caught by using a method that adversely affects dolphins".<sup>678</sup> Similarly, with respect to the United States' dolphin protection objective, the Panel found that the US "dolphin-safe" labelling provisions "may, at best, only partially fulfil their stated objective".<sup>679</sup> The Panel did not find that the US "dolphin-safe" labelling provisions do not fulfil their objectives or are not "capable" of fulfilling the United States' objectives<sup>680</sup>, but that the US measure did fulfil the United States' objectives to a certain extent. We have stated above that

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<sup>674</sup>Mexico's other appellant's submission, para. 272.

<sup>675</sup>Mexico submits that the situation in the present dispute is similar to the factual situation in *US – Shrimp*, in that the US "dolphin-safe" labelling provisions have created a "rigid and unbending standard", and that the purpose of the measure at issue is to "unilaterally and extraterritorially impose U.S. fishing method requirements" as a condition for access to the principal distribution channels in the US tuna products market. (Mexico's appellee's submission, paras. 178-186)

<sup>676</sup>Mexico's other appellant's submission, paras. 279-284.

<sup>677</sup>Mexico's other appellant's submission, para. 282.

<sup>678</sup>Panel Report, para. 7.563. (original emphasis)

<sup>679</sup>Panel Report, para. 7.599.

<sup>680</sup>Mexico's other appellant's submission, para. 282.

the question of whether a technical regulation "fulfils" an objective is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective. An assessment of the necessity of a measure's trade-restrictiveness under Article 2.2 therefore focuses on the extent to which a measure contributes to the objective pursued.

342. In sum, therefore, we reject Mexico's claim that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective and we also reject Mexico's request to find the measure at issue inconsistent with Article 2.2 of the *TBT Agreement* based on the Panel's finding that the measure did not entirely fulfil its objectives.

### **VIII. Article 2.4 of the *TBT Agreement***

#### *A. Introduction*

343. The United States and Mexico each appeal different elements of the Panel's findings under Article 2.4 of the *TBT Agreement*. The United States appeals the Panel's finding that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*.<sup>681</sup> In particular, the United States appeals the Panel's intermediate finding that the AIDCP constitutes an "international standardizing organization" for the purposes of Article 2.4 of the *TBT Agreement*.<sup>682</sup> Mexico appeals the Panel's conclusion that Mexico failed to demonstrate that the AIDCP standard<sup>683</sup> is an effective and appropriate means to fulfil the objectives pursued by the United States.<sup>684</sup>

344. The Panel interpreted the term "international standard" in Article 2.4 of the *TBT Agreement* to mean a "standard that is adopted by an international standardizing/standards organization and made available to the public".<sup>685</sup> The Panel in turn interpreted the term "international standardizing organization" to refer to "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."<sup>686</sup>

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<sup>681</sup>Panel Report, para. 7.707.

<sup>682</sup>Panel Report, para. 7.693.

<sup>683</sup>In our discussion, we use the term "AIDCP standard" to describe what the Panel referred to as the "AIDCP dolphin-safe definition and certification", the AIDCP "dolphin-safe definition", the "AIDCP standard", and the "AIDCP dolphin-safe standard". The question of what the Panel found to be the AIDCP standard was contested among the parties on appeal. Our use of the term "AIDCP standard" is without prejudice to the substantive issue of whether the term "AIDCP standard" refers merely to the AIDCP "dolphin-safe" definition or to the "system" for the tracking and "dolphin-safe" certification of tuna and tuna products established under the AIDCP. (See Mexico's other appellant's submission, paras. 237 and 238; and United States' appellee's submission, para. 120. For the Panel's findings, see Panel Report, paras. 7.673-7.677)

<sup>684</sup>Panel Report, para. 7.740.

<sup>685</sup>Panel Report, para. 7.663.

<sup>686</sup>Panel Report, para. 7.680.

The Panel found that the "AIDCP dolphin-safe definition and certification" constitute a "standard"<sup>687</sup>, that the AIDCP is an "international standardizing organization"<sup>688</sup>, and that the AIDCP standard was made available to the public.<sup>689</sup>

345. The Panel further found that the AIDCP standard is "relevant" for the purpose of the US "dolphin-safe" labelling provisions<sup>690</sup> and that the United States failed to base its "dolphin-safe" labelling provisions on the AIDCP standard.<sup>691</sup> However, the Panel concluded that Mexico had "failed to demonstrate that the [AIDCP standard] is an effective and appropriate means to fulfil the US objectives at the United States' chosen level of protection".<sup>692</sup>

346. The United States appeals the Panel's conclusion that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard", and in particular the Panel's intermediate finding that the AIDCP is an "international standardizing organization".<sup>693</sup> The United States argues that the parties to the AIDCP are parties to an international agreement, not to a body or an organization, that the AIDCP does not have "recognized activities in standardization", and that the AIDCP is not "international" within the meaning of the *TBT Agreement* because its membership was not, and is not, open to all WTO Members.<sup>694</sup> Mexico responds that the Panel properly addressed and rejected the United States' arguments, and requests the Appellate Body to uphold the Panel's finding that the AIDCP standard is a "relevant international standard" within the meaning of Article 2.4.<sup>695</sup>

347. Mexico appeals the Panel's finding that Mexico failed to demonstrate that the AIDCP standard is an effective and appropriate means to fulfil the legitimate objectives pursued by the United States.<sup>696</sup> Mexico argues that the Panel erred in not evaluating whether the AIDCP standard would be effective and appropriate in fulfilling the United States' objectives outside the ETP.<sup>697</sup> Mexico further submits that the Panel correctly identified, but then misapplied, the legal test for assessing whether the AIDCP standard would be effective and appropriate for the fulfilment of the objectives pursued by the United States.<sup>698</sup> The United States responds that, once the Panel had found that the AIDCP standard was ineffective or inappropriate for achieving the United States' objectives within the ETP, there was no need for it to consider the hypothetical application of the AIDCP

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<sup>687</sup>Panel Report, para. 7.677.

<sup>688</sup>Panel Report, para. 7.693.

<sup>689</sup>Panel Report, para. 7.695.

<sup>690</sup>Panel Report, para. 7.707.

<sup>691</sup>Panel Report, para. 7.716.

<sup>692</sup>Panel Report, para. 7.740.

<sup>693</sup>United States' appellant's submission, para. 136.

<sup>694</sup>United States' appellant's submission, para. 137.

<sup>695</sup>Mexico's appellee's submission, para. 226.

<sup>696</sup>Mexico's other appellant's submission, para. 260.

<sup>697</sup>Mexico's other appellant's submission, para. 250.

<sup>698</sup>Mexico's other appellant's submission, paras. 233 and 251.



standard outside the ETP.<sup>699</sup> The United States further claims that Mexico does not challenge the Panel's finding that the AIDCP standard would not meet all of the United States' objectives, and that the Panel's conclusion that Mexico had failed to demonstrate that the AIDCP standard is an effective and appropriate means to fulfil the United States' objectives must therefore stand.<sup>700</sup>

348. Before turning to our analysis, we note that the United States' appeal requires us to decide what constitutes an "international standard" for the purposes of the *TBT Agreement*. This question is important because, by virtue of Article 2.4, if a standard is found to constitute a "relevant international standard", WTO Members are required to use it, or its relevant parts, as a basis for their technical regulations, except when such standard would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the Member in question.<sup>701</sup> Moreover, pursuant to Article 2.5 of the *TBT Agreement*, technical regulations that are in accordance with relevant international standards are rebuttably presumed not to create unnecessary obstacles to international trade.

B. *The United States' Appeal*

1. The Meaning of the Term "International Standard"

349. The text of Article 2.4 of the *TBT Agreement* reads as follows:

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.

350. The composite term "international standard" is not defined in Annex 1 of the *TBT Agreement*. However, Annex 1.2 to the *TBT Agreement* defines a "standard" as follows:

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

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<sup>699</sup>United States' appellee's submission, para. 126.

<sup>700</sup>United States' appellee's submission, para. 134.

<sup>701</sup>This point is emphasized by the United States and by a number of third participants. (See United States' appellant's submission, paras. 144-146; Brazil's third participant's submission, para. 47; European Union's third participant's submission, para. 84; and Japan's third participant's submission, para. 28)

requirements as they apply to a product, process or production method.

*Explanatory note*

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.

351. Moreover, Annex 1.4 to the *TBT Agreement* defines an "international body or system" as follows:

Body or system whose membership is open to the relevant bodies of at least all Members.

352. The *TBT Agreement* thus establishes the characteristics of a *standard* and of an *international body*. The Explanatory Note to Annex 1.2 states that "[s]tandards prepared by the international standardization community are based on consensus."

353. The introductory clause of Annex 1 to the *TBT Agreement* provides that terms used in the *TBT Agreement* that are also "presented" in the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities<sup>702</sup> (the "ISO/IEC Guide 2: 1991") "shall ... have the same meaning as given in the definitions in the said Guide". The term "international standard" is defined in the ISO/IEC Guide 2: 1991 as a "standard that is adopted by an international standardizing/standards organization and made available to the public."<sup>703</sup> This definition suggests that it is primarily the characteristics of the entity approving a standard that lends the standard its "international" character. By contrast, the subject matter of a standard would not appear to be material to the determination of whether the standard is "international". The definition of "international standard" in the ISO/IEC Guide 2: 1991 and the Explanatory Note to the definition of "standard" in the *TBT Agreement* also suggest that there may be additional procedural conditions that have to be met for a standard to be considered "international" for the purposes of the *TBT Agreement*. Since the United States' appeal is limited to the characteristics of the entity approving an "international" standard, we do not need to address in this appeal the question of whether, in order to

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<sup>702</sup>International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, sixth edition (1991).

<sup>703</sup>ISO/IEC Guide 2: 1991, 3.2.1. See also Panel Report, para. 7.663.

constitute an "international standard", a standard must also be "based on consensus". Nor do we have to address whether it has to be "made available to the public".<sup>704</sup>

354. The introductory clause of Annex 1 to the *TBT Agreement* also stipulates that: "[f]or the purpose of this Agreement, however, the following definitions shall apply". The use of the word "however" indicates that the definitions contained in Annex 1 to the *TBT Agreement* prevail to the extent that they depart from the definitions set out in the ISO/IEC Guide 2: 1991.<sup>705</sup> A panel must therefore carefully scrutinize to what extent the definitions in Annex 1 to the *TBT Agreement* depart from the definitions in the ISO/IEC Guide 2: 1991.

355. With respect to the type of entity approving an "international" standard, the ISO/IEC Guide 2: 1991 refers to an "organization", whereas Annex 1.2 to the *TBT Agreement* stipulates that a "standard" is to be approved by a "body". According to the ISO/IEC Guide 2: 1991, a "body" is a "legal or administrative entity that has specific tasks and composition", whereas an "organization" is a "body that is based on the membership of other bodies or individuals and has an established constitution and its own administration".<sup>706</sup> The answer to the question of whether an "international" standard has to be approved by a "body" or an "organization" thus determines whether the entity can be a "legal or administrative entity that has specific tasks and composition", or whether the entity must *also* be "based on the membership of other bodies or individuals" and must have "an established constitution and its own administration".

356. Annex 1.2 to the *TBT Agreement* refers to a "body", not to an "organization", and Annex 1.4 defines an "international body or system", but not an "international organization". This suggests that, for the purposes of the *TBT Agreement*, "international" standards are adopted by "bodies", which may, but need not necessarily, be "organizations". This is also supported by the context provided by other provisions of the *TBT Agreement*. For example, Articles 2.6, 10.1.4, 11.2, 12.5, and 12.6, as well as Annexes 3.G and 3.H to the *TBT Agreement* envisage that international standards are prepared by "international standardizing *bodies*".<sup>707</sup> Since the definitions in Annex 1 to the *TBT Agreement* prevail over the definitions in the ISO/IEC Guide 2: 1991, we find that, in order to constitute an "international standard", a standard has to be adopted by an "international standardizing *body*" for the purposes of the *TBT Agreement*.

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<sup>704</sup>We note that the Panel in this dispute analyzed whether the AIDCP standard had been adopted by consensus. (Panel Report, para. 7.676) The Panel also examined whether the AIDCP standard had been "made available to the public". (Panel Report, para. 7.695)

<sup>705</sup>See Appellate Body Report, *EC – Sardines*, paras. 224 and 225.

<sup>706</sup>ISO/IEC Guide 2: 1991, 4.1 and 4.2. See also Panel Report, para. 7.679.

<sup>707</sup>Emphasis added.

357. With respect to other necessary features of a body that can approve an "international" standard, the ISO/IEC Guide 2: 1991 stipulates that it must be a "standardizing/standards" organization. A "standardizing body" is defined as a "body that has recognized activities in standardization", whereas a "standards body" is a "standardizing body recognized at national, regional or international level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public."<sup>708</sup> Annex 1.2 to the *TBT Agreement* provides that a "standard" must be approved by a "recognized body". As we see it, the definition of "standardizing body" in the ISO/IEC Guide 2: 1991 does not conflict with the definition in the *TBT Agreement*. Instead, the definition in the ISO/IEC Guide 2: 1991 adds to and complements the definition in the *TBT Agreement*, specifying that a body must be "recognized" with respect to its "activities in standardization".

358. With regard to the requirement that only a document approved by an "international" standardizing body can be an "international" standard, the ISO/IEC Guide 2: 1991 stipulates that a standardizing organization is "international" if its "membership is open to the relevant national body from every country", whereas Annex 1.5 to the *TBT Agreement* defines an "international body" as a body "whose membership is open to the relevant bodies of at least all Members".

359. We consider, therefore, that a required element of the definition of an "international" standard for the purposes of the *TBT Agreement* is the approval of the standard by an "international standardizing body", that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members.<sup>709</sup> As we see it, the different components of this definition inform each other. The interpretation of the term "international standardizing body" is therefore a holistic exercise in which the components of the definition are to be considered together.

360. As noted above, the ISO/IEC Guide 2: 1991 defines a "body" as a "legal or administrative entity that has specific tasks and composition". With respect to the specific tasks, the definition specifies that an international standardizing body must have "activities in standardization". "Activity" is defined in the dictionary as the "state of being active".<sup>710</sup> The term "activity" thus may refer to an instance of action, as well as a state. As a result, the use of the plural "activities" does not necessarily imply that a body is, or has been, involved in the development of more than one standard. As we see it, a body simply has to be "active" in standardization in order to have "activities in standardization".

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<sup>708</sup>ISO/IEC Guide 2: 1991, 4.3 and 4.4. A Note specifies that "a standards body may also have other principal functions." (*Ibid.*)

<sup>709</sup>As noted above, we do not address any additional procedural conditions that may apply for a standard to be "international" within the meaning of the *TBT Agreement*.

<sup>710</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, p. 23.

The word "standardization" is defined in the ISO/IEC Guide 2: 1991 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".<sup>711</sup> With respect to the "provisions" that are established through standardization, we recall that the definition of a standard in the *TBT Agreement* refers to a "document ... that provides ... rules, guidelines or characteristics for products or related processes and production methods" and "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method".

361. Moreover, the definition of "international standardizing body" provides that the body's activities in standardization must be "recognized". The term "recognize" is defined as "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration".<sup>712</sup> These definitions fall along a spectrum that ranges from a factual end (acknowledgement of the existence of something) to a normative end (acknowledgement of the validity or legality of something). In interpreting "recognized activities in standardization", we will therefore bear in mind both the factual and the normative dimension of the concept of "recognition".

362. The definition of a "standards body" in the ISO/IEC Guide 2: 1991 sheds light on the question of what it means for a body to have "recognized activities in standardization". We recall that a "standards body" is a "standardizing body recognized at national, regional or international level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public."<sup>713</sup> By implication, a "standardizing body", that is, a body with "recognized activities in standardization", does not need to have standardization as its principal function, or even as one of its principal functions.<sup>714</sup> At the same time, we note that the factual dimension of the concept of "recognition" would appear to require, at a minimum, that WTO Members are aware, or have reason to expect, that the international body in question is engaged in standardization activities.

363. With respect to the question of who has to recognize a body's activities in standardization, we note that Articles 2.6, 11.2, and 12.6 of the *TBT Agreement* contemplate that "Members" participate in international standardizing activities. Article 12.5, Annex 3.G, and Annex 1.4 to the *TBT Agreement*,

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<sup>711</sup>ISO/IEC Guide 2: 1991, 1.1.

<sup>712</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. II, p. 2489. See also Panel Report, para. 7.686.

<sup>713</sup>ISO/IEC Guide 2: 1991, 4.4.

<sup>714</sup>We recall that the definition of "standards body" in the ISO/IEC Guide 2: 1991 is accompanied by a Note that specifies that "a standards body may also have other principal functions." (ISO/IEC Guide 2: 1991, 4.4)

in turn, foresee the involvement of the "relevant bodies" or "standardizing bodies" of Members in the development of international standards.<sup>715</sup> We further note that, under the *SPS Agreement*, "relevant international organizations" are identified by the SPS Committee, which is composed of all WTO Members.<sup>716</sup> This context suggests that, in examining whether an international body has "recognized activities in standardization", evidence of recognition by WTO Members as well as evidence of recognition by national standardizing bodies would be relevant.

364. With respect to the composition of the body, the definition specifies that membership in an international standardizing body must be "open to the relevant bodies of at least all Members". The term "open" is defined as "accessible or available without hindrance", "not confined or limited to a few; generally accessible or available".<sup>717</sup> Thus, a body will be open if membership to the body is not restricted. It will not be open if membership is *a priori* limited to the relevant bodies of only some WTO Members.

365. We also note that the *TBT Agreement* distinguishes international bodies, "whose membership is open to the relevant bodies of at least all Members", and regional bodies, "whose membership is open to the relevant bodies of only some of the Members".<sup>718</sup> The *TBT Agreement* thus explicitly stipulates that not all transnational standardizing bodies are "international" for the purposes of the *TBT Agreement*.

366. We further note, as did the Panel, that both the United States and Mexico have referred in their arguments to the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement (the "TBT Committee Decision").<sup>719</sup> This Decision sets out principles and procedures that standardizing bodies should observe when developing international standards.

367. Before the Panel, the United States relied on the TBT Committee Decision in support of its interpretation of the term "international standard" as a standard that is, *inter alia*, adopted by a body

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<sup>715</sup>In addition, Article 10.1.4 of the *TBT Agreement* refers to "membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies".

<sup>716</sup>See *SPS Agreement*, Annex A.3(d).

<sup>717</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. II, p. 2007.

<sup>718</sup>*TBT Agreement*, Annexes 1.4 and 1.5.

<sup>719</sup>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, in WTO document G/TBT/1/Rev.10, Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, 9 June 2011, pp. 46-48. This document is a revised version of G/TBT/1/Rev.9. The text of the Decision is identical in both documents. (See also Panel Report, para. 7.665)

whose membership is open to the relevant bodies of at least all WTO Members.<sup>720</sup> The United States argued that the principles enshrined in the Decision "reflect Members' shared views *inter alia* that ... international standardizing bodies 'should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members'".<sup>721</sup> The United States also acknowledged a suggestion by Canada that a body may be "recognized" because it develops standards or engages in standardizing activities "in accordance with certain recognized principles, for example, those in the Committee Decision".<sup>722</sup> The United States considered this view as one possible interpretation of the term "recognized body".<sup>723</sup> Mexico claimed that the "AIDCP system operates in conformity with" the TBT Committee Decision.<sup>724</sup>

368. Before the Panel, several third parties argued that the Panel should interpret the concept of an "international standardizing organization" in the light of the TBT Committee Decision. Canada submitted that the evaluation of whether a body constitutes a "recognized body" should take place "in accordance with the six principles for the development of international standards espoused in the TBT Committee's Decision on Principles for the Development of International Standards, Guides and Recommendations."<sup>725</sup> Similarly, Japan argued that the Panel should "take into account" and "draw on the guidance provided by" the principles contained in the TBT Committee Decision.<sup>726</sup> Moreover, referring to the Decision, New Zealand noted that "[t]he TBT Committee has provided a clear indication of the type of bodies that it considers to be international standardizing bodies and the principles that such bodies should embrace."<sup>727</sup> Argentina and Brazil similarly relied on the principles enunciated in the TBT Committee Decision in their submissions, particularly with respect to the question whether the AIDCP is "open" to the relevant bodies of at least all Members.<sup>728</sup>

369. On appeal, the United States as well as Brazil and Japan reiterate their view that the TBT Committee Decision should inform the interpretation of the concept "international standardizing organization".<sup>729</sup> Japan emphasizes that the Appellate Body's interpretation of Article 2.4 "should

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<sup>720</sup>Panel Report, para. 7.642. See also United States' response to Panel Question 59, para. 136.

<sup>721</sup>United States' response to Panel Question 59, para. 136.

<sup>722</sup>Panel Report, para. 7.648.

<sup>723</sup>Panel Report, para. 7.648. See also United States' response to Panel Question 62, paras. 139 and 140.

<sup>724</sup>Panel Report, para. 7.645.

<sup>725</sup>Panel Report, para. 5.92.

<sup>726</sup>Panel Report, paras. 5.144 and 5.145.

<sup>727</sup>Panel Report, para. 5.179.

<sup>728</sup>Panel Report, paras. 5.25-5.30 (Argentina) and para. 5.75 (Brazil).

<sup>729</sup>United States' appellant's submission, paras. 139 and 146; Brazil's third participant's submission, paras. 50 and 55.

apply" the principles of the Decision, and that "no purported international standard should be recognized as such if these six principles were disregarded in its elaboration."<sup>730</sup>

370. The TBT Committee Decision sets out several principles that WTO Members have decided "should be observed" when international standards, guides, and recommendations are elaborated "to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries".<sup>731</sup> The Panel considered it "appropriate to take into account the principles contained in this decision where they may inform [its] 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'."<sup>732</sup> The Panel did not explicitly comment on the legal status of the TBT Committee Decision. However, it noted the statement of the panel in *EC – Sardines* that the TBT Committee 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".<sup>733</sup>

371. Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are to "clarify" the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". This raises the question on what basis we can take into account the TBT Committee Decision in the interpretation and application of Article 2.4 of the *TBT Agreement*. In particular, the issue is whether the Decision can qualify as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*<sup>734</sup> (the "*Vienna Convention*"). In this respect, we note that the Decision was adopted by the TBT Committee in the context of the Second Triennial Review of the Operation and Implementation of the *TBT Agreement*, which took place in the year 2000.<sup>735</sup> It was thus adopted subsequent to the

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<sup>730</sup>Japan's third participant's submission, paras. 21 and 23.

<sup>731</sup>TBT Committee Decision, para. 1.

<sup>732</sup>Panel Report, para. 7.665.

<sup>733</sup>Panel Report, para. 7.665 (quoting Panel Report, *EC – Sardines*, para. 7.91).

<sup>734</sup>*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>735</sup>Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, in WTO Document G/TBT/9, 13 November 2000.



conclusion of the *TBT Agreement*. We further note that the membership of the TBT Committee comprises all WTO Members and that the Decision was adopted by consensus.<sup>736</sup>

372. With respect to the question of whether the terms and content of the Decision express an agreement between Members on the interpretation or application of a provision of WTO law, we note that the title of the Decision expressly refers to "Principles for the Development of International Standards, Guides and Recommendations *with Relation to Articles 2, 5 and Annex 3 of the Agreement*".<sup>737</sup> We further note that the TBT Committee undertook the activities leading up to the adoption of the Decision "[w]ith a view to developing a better understanding of international standards within the Agreement"<sup>738</sup> and decided to develop the principles contained in the Decision, *inter alia*, "to ensure the effective application of the Agreement" and to "clarify and strengthen the concept of international standards under the Agreement".<sup>739</sup> We therefore consider that the TBT Committee Decision can be considered as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention*. The extent to which this Decision will inform the interpretation and application of a term or provision of the *TBT Agreement* in a specific case, however, will depend on the degree to which it "bears specifically"<sup>740</sup> on the interpretation and application of the respective term or provision. In the present dispute, we consider that the TBT Committee Decision bears directly on the interpretation of the term "open" in Annex 1.4 to the *TBT Agreement*, as well as on the interpretation and application of the concept of "recognized activities in standardization".

373. The TBT Committee Decision clarifies the temporal scope of the requirement that a body be "open". It states, in relevant part:

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<sup>736</sup>See also Brazil's third participant's submission, para. 55, noting with reference to the Decision: "WTO Members agreed that participation in the formulation of international standards should be available to all those who wish to engage therein."; and Japan's third participant's submission, para. 23: "The 2000 Decision reflects a consensus observation that if the TBT Agreement is to accord special status to the international standards, guidelines and recommendations made by some organizations, then the membership of these organizations must, for instance, be open on a non-discriminatory basis to relevant bodies of at least all WTO Members—including non-discriminatory and impartial access to participation at the policy development level, and at every stage of standards development."

<sup>737</sup>Emphasis Added. In the deliberations leading up to the adoption of the Decision, the TBT Committee noted: "that international standards, guides and recommendations were important elements of the Agreement and played a significant role in its implementation. Articles 2.4, 2.5, 5.4, and Paragraph F of Annex 3 of the Agreement placed an emphasis on the use of international standards, guides and recommendations as a basis for domestic standards, technical regulations and conformity assessment procedures, with the objective of reducing trade barriers. Articles 2.6, 5.5, and Paragraph G of Annex 3 emphasized the importance of Members' participation in international standardization activities, with a view to harmonizing technical regulations, conformity assessment procedures and standards on as wide a basis as possible." (G/TBT/9, *supra*, footnote 735, para. 17)

<sup>738</sup>G/TBT/9, *supra*, footnote 735, para. 18.

<sup>739</sup>G/TBT/9, *supra*, footnote 735, para. 20; G/TBT/1/Rev.10, p. 12.

<sup>740</sup>See Appellate Body Report, *US – Clove Cigarettes*, para. 265 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390).

Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would include openness without discrimination with respect to the participation at the policy development level and at every stage of standards development ...<sup>741</sup>

374. Thus, in order for a standardizing body to be considered "international" for the purposes of the *TBT Agreement*, it is not sufficient for the body to be open, or have been open, at a particular point in time. Rather, the body must be open "at every stage of standards development".

375. Moreover, the TBT Committee Decision clarifies that a standardizing body must be open "on a non-discriminatory basis". Thus, provisions for accession that *de jure* or *de facto* disadvantage the relevant bodies of some Members as compared to other Members would tend to indicate that a body is not an "international" standardizing body for the purposes of the *TBT Agreement*.

376. In addition, the TBT Committee Decision assists in the determination of whether an international body has "recognized activities in standardization". As an initial matter, we note that the TBT Committee Decision establishes principles and procedures that WTO Members have decided "should be observed" in the development of international standards. Evidence that an international body has followed the principles and procedures of the TBT Committee Decision in developing a standard would therefore be relevant for a determination of whether the body's activities in standardization are "recognized" by WTO Members. More specifically, we recall that the word "recognize" is defined as "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration"<sup>742</sup> and that the concept of "recognition" has a factual and a normative dimension. From a factual perspective, we note that the standardizing activities of a body that disseminates information about its standardization activities, as envisaged by the transparency procedures of the TBT Committee Decision, would presumably be acknowledged to exist, accorded notice or attention, and treated worthy of consideration by all WTO Members that make a good faith effort to follow international standardization activities. In terms of the normative connotation of the concept of "recognition", we observe that, to the extent that a standardizing body complies with the principles and procedures that

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<sup>741</sup>TBT Committee Decision, para. 6.

<sup>742</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. II, p. 2489. See also Panel Report, para. 7.686.

WTO Members have decided "should be observed" in the development of international standards, it would be easier to find that the body has "recognized activities in standardization".<sup>743</sup>

377. We further note that the objectives expressed in the TBT Committee Decision with respect to the development of international standards are similar to the objectives that the *Code of Good Practice for the Preparation, Adoption and Application of Standards* contained in Annex 3 to the *TBT Agreement* pursues with respect to standards adopted by local, national, and regional governmental and non-governmental standardizing bodies. Pursuant to Article 4.2 of the *TBT Agreement*, "[s]tandardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement." As we see it, this provision lends contextual support to our interpretation that evidence of a body's compliance with procedural and substantive safeguards formulated by WTO Members would be relevant for the question of whether its standardizing activities are "recognized" for the purposes of the *TBT Agreement*.

378. In sum, the TBT Committee Decision clarifies the temporal scope of the requirement that an international standardizing body be open to the relevant bodies of at least all WTO Members, and specifies that the body should be open on a non-discriminatory basis. By setting out principles and procedures that WTO Members have decided "should be observed" by international standardizing bodies, the TBT Committee Decision also assists in the determination of whether an international body's activities in standardization are "recognized" by WTO Members.

379. Finally, we consider how the object and purpose of the *TBT Agreement* informs the interpretation of the term "international standardizing body". We note that the *TBT Agreement* explicitly encourages the development of international standards. Thus, the preamble of the *TBT Agreement* states, in relevant part: "*Recognizing* the important contribution that international standards ... can make ... by improving efficiency of production and facilitating the conduct of international trade; *Desiring* therefore to encourage the development of such international standards". Moreover, contrary to the *SPS Agreement*, which defines "international standards, guidelines and recommendations" by reference to specific organizations<sup>744</sup>, the *TBT Agreement* does not contain a list of international standardizing organizations. This suggests that the *TBT Agreement* also aims to encourage the development of international standards by bodies that were not already engaged in

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<sup>743</sup>With regard to the importance of the normative dimension, we note the European Union's view that "recognition gives documents issued by [international standardizing organizations] the necessary *legitimacy* to justify their potentially far-reaching effects under Article 2.4 of the *TBT Agreement*." (European Union's third participant's submission, para. 85) (original emphasis)

<sup>744</sup>*SPS Agreement*, Annex A.3(a)-(c). The *SPS Agreement* also refers to standards developed by other "relevant international organizations open for membership to all Members, as identified by the Committee". (*SPS Agreement*, Annex A.3(d)) However, the SPS Committee has not identified any such organizations.

standardizing activities at the time of the adoption of the *TBT Agreement*. At the same time, other elements of the *TBT Agreement*, as well as the TBT Committee Decision, reflect the intent of WTO Members to ensure that the development of international standards take place transparently and with wide participation.<sup>745</sup> The obligations and privileges associated with international standards pursuant to Articles 2.4 and 2.5 of the *TBT Agreement* further underscore the imperative that international standardizing bodies ensure representative participation and transparency in the development of international standards. In analyzing whether an entity is an "international standardizing body", a panel needs to balance these considerations.

380. We now turn to review the Panel's interpretation of the term "international standardizing organization".

(a) The Panel's Interpretation of the Term "International"

381. The United States takes issue with the Panel's interpretation of the term "international" in Article 2.4. The United States submits that the Panel's conclusion was based on an "incorrect understanding of what is required for an organization to be 'open'".<sup>746</sup> The United States points out that both Annex 1 to the *TBT Agreement* and the ISO/IEC Guide 2: 1991 refer to the openness of a body in the present tense ("a body that is open"). On this basis, the United States argues that the organization must be open to all Members during the period during which the standard in question was developed and it must remain open thereafter. Mexico does not disagree with the United States'

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<sup>745</sup>See *TBT Agreement*, Article 2.6: "With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations."; and Article 12.5: "Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies ... are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members". See also *TBT Agreement*, Annex 3.G. We note that WTO Members see representative participation and the observance of due process in the development of international standards as essential to the achievement of the trade facilitating objectives of the *TBT Agreement*. As the Second Triennial Review of the Operation and Implementation of the *TBT Agreement* has noted:

Adverse trade effects might arise from standards emanating from international bodies as defined in the Agreement which had no procedures for soliciting input from a wide range of interests. Bodies operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all Members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent unnecessary obstacles to trade.

(G/TBT/9, *supra*, footnote 735, para. 20)

<sup>746</sup>United States' appellant's submission, para. 138.

interpretation, but argues that the AIDCP was open when the AIDCP definition of "dolphin-safe" was developed.<sup>747</sup>

382. As noted above, we are of the view that the TBT Committee Decision clarifies the temporal scope of the requirement that a body be "open" to the relevant bodies of at least all WTO Members. Specifically, the body must be open "at every stage of standards development".

383. The United States further argues that the fact that all States whose vessels fished for tuna in the Agreement area during the signature period were eligible to join the AIDCP, and that there were no prohibitions of fishing in the Agreement area at the time, does not mean that the AIDCP was open to all Members, since Members who may have an interest in the AIDCP's activities other than fishing (such as consumer or conservation interests) were ineligible to become parties to the AIDCP. Mexico responds that it is presumably understandable that any State or regional organization that has interest in the AIDCP regulation of tuna fishing techniques can accede today by a simple invitation of the rest of Members.

384. We agree with the United States that an international standardizing body must not privilege any particular interests in the development of international standards. In this respect, we note that the TBT Committee Decision states, under the heading "Impartiality and Consensus", that:

All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s.<sup>748</sup>

385. With respect to the Panel's finding that the AIDCP remains open to all Members on a non-discriminatory basis since any State or regional economic integration organization can be invited to accede to the Agreement on the basis of a decision by the parties, the United States asserts that a body in which Members may participate by invitation only is not a body that is open. The United States stresses that becoming a party to the AIDCP is not an option available to at least all Members; it is an option available only to those Members invited. For the United States, it follows therefore that not all Members have the ability to participate in review or revision of the definitions at issue. Mexico responds that being invited to accede to the AIDCP is a "formality".<sup>749</sup>

386. The question whether a body is "open" if all WTO Members or their relevant bodies can accede pursuant to an invitation has to be decided on a case-by-case basis. It is conceivable that an

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<sup>747</sup>Mexico's appellee's submission, para. 207.

<sup>748</sup>TBT Committee Decision, para. 8.

<sup>749</sup>Mexico's appellee's submission, para. 208.

invitation might indeed be a "formality". In our view, this would be the case if the invitation occurred automatically once a Member or its relevant body has expressed interest in joining a standardizing body. A panel must therefore carefully scrutinize the provisions, procedures, and practices governing accession to a standardizing body before concluding that it is "open to the relevant bodies of at least all Members".

(b) The Panel's Interpretation of the Concept of "Recognized Activities in Standardization"

387. The United States also takes issues with the Panel's interpretation of the concept of "recognized activities in standardization". We recall the Panel's finding 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."<sup>750</sup> The Panel added that "such recognition may also be inferred from the recognition of the resulting standard, i.e. when its existence, legality and validity has been acknowledged."<sup>751</sup>

388. On appeal, the United States submits that the first criterion articulated by the Panel for assessing whether activities are "recognized" is flawed. According to the United States, by suggesting that participation in standardizing activities is evidence of the recognition of those activities, the Panel effectively reads the term "recognized" out of the definition. The United States suggests that, if the act of creating a standard was at the same time an act of recognition by the creators, there would be no need to specify that standardization activity need to be recognized, since the existence of a standard would, in itself, establish that recognition occurred.

389. Mexico agrees with the Panel that participation by countries in the development of a standard is sufficient evidence of their recognition. Mexico further submits that the elaboration of the "dolphin-safe" definition was one of the main reasons for many Members to participate in the AIDCP. Mexico suggests that this is a "clear signal of acknowledgement".<sup>752</sup>

390. We see no reason why participation in a body's standardizing activities could not constitute evidence suggesting that a body is engaged in "recognized" activities. In our view, the United States' concern that this interpretation "effectively read[s] the term 'recognized' out of the definition"<sup>753</sup> of an "international standard" may have arisen because the Panel was silent on *who* must recognize a body's standardizing activities for the purposes of the *TBT Agreement*. We have already noted above that, in examining whether an international body has recognized activities in standardization, evidence of

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<sup>750</sup>Panel Report, para. 7.686.

<sup>751</sup>Panel Report, para. 7.686.

<sup>752</sup>Mexico's appellee's submission, para. 216.

<sup>753</sup>United States' appellant's submission, para. 151.

recognition by WTO Members, as well as evidence of recognition by national standardizing bodies, would be relevant. As we see it, the recognition of those who participate in the development of a standard would not necessarily be sufficient to find that a body has recognized activities in standardization, since the obligations and privileges associated with international standards pursuant to the *TBT Agreement* apply with respect to *all* WTO Members, not merely those who participated in the development of the respective standard. Nevertheless, it seems to us that the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body's activities in standardization are "recognized".

391. The United States agrees with the Panel that recognition of standardizing activity may occur "through acknowledgment of a body's standards", but alleges that the Panel did not properly apply this concept.<sup>754</sup> In response, Mexico notes that the fact that the United States does not allow the use of the AIDCP "dolphin-safe" label does not mean that the AIDCP does not have "standardizing activities" or that the AIDCP "dolphin-safe" label is not currently being used.

392. We agree with the Panel that recognition of a body's standardization activities may "be inferred from the recognition of the resulting standard, i.e. when its existence, legality and validity [have] been acknowledged".<sup>755</sup> While we regard the recognition of a body's standards by WTO Members and national standardizing bodies as highly pertinent evidence that a body has recognized activities in standardization, we do not consider that only a body whose standards are widely used can have recognized activities in standardization for the purposes of the *TBT Agreement*.

393. The United States further submits that, in any event, recognition of a single standard would not amount to recognition of a body's "standardizing activities". For the United States, the plural "activities" implies that the body has been involved in the development of more than one standard. Restricting the concept of "recognized activities in standardization" to bodies with a track record of developing standards would also ensure that Members were aware whether a standard being developed in a particular body would trigger the corresponding obligations in the *TBT Agreement*.<sup>756</sup>

394. We disagree with this argument. As noted above, the term "activity" may refer to an instance of action, as well as a state. Moreover, we find it difficult to see why an international organization that develops a single standard could not have "recognized activities in standardization" if other evidence suggests that the body's standardization activities are recognized, for example, if a large number of WTO Members participate in the development of the standard, acknowledge the validity

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<sup>754</sup>United States' appellant's submission, para. 152.

<sup>755</sup>Panel Report, para. 7.686.

<sup>756</sup>United States' appellant's submission, para. 154.

and legality of the standard, or the body follows the principles contained in the TBT Committee Decision.

(c) The Panel's Interpretation of the Term "Organization"

395. As we understand it, the United States' appeal of the Panel's finding that the AIDCP is an "organization" is not directed at the Panel's interpretation of that term, but is limited to the Panel's application of the term to the facts of the case, as well as the factual basis for the Panel's conclusion. In any event, we recall that, for the purposes of the *TBT Agreement*, international standards need to be adopted by "international standardizing *bodies*", which may, but need not necessarily, be "international standardizing organizations". The Panel thus erred in finding that it had to consider whether the AIDCP standard was adopted by an "organization", rather than by a "body".

2. Whether the Panel Erred in Finding that the AIDCP Standard Is A "Relevant International Standard" within the Meaning of Article 2.4 of the *TBT Agreement*

396. We now proceed to evaluate whether the Panel erred in finding that the AIDCP standard is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*. As noted, the Panel's finding is based on its intermediate conclusions that the AIDCP "dolphin-safe" definition and certification constitute a standard<sup>757</sup>, that the AIDCP is an "international standardizing organization"<sup>758</sup>, and that the AIDCP standard was made available to the public.<sup>759</sup>

397. We begin by considering whether the Panel erred in concluding that the AIDCP is "international", that is, that membership in the AIDCP is open to the relevant bodies of at least all Members.

398. Mexico suggests that being invited to accede to the AIDCP is a "formality".<sup>760</sup> Mexico also states that "[n]o additional countries or regional economic integration organizations have expressed interest in joining the AIDCP" and that "it is common that during the AIDCP meetings, Parties to the Agreement invite observer countries that regularly attend such meetings with the intention in the future to become Parties."<sup>761</sup> We have stated above that, in order to show that an invitation to accede to the AIDCP is a "formality", Mexico would have to prove that the issuance of an invitation occurs automatically once a WTO Member has expressed interest in joining. This Mexico has not shown. It is uncontested that the parties to the AIDCP have to take the decision to issue an invitation by

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<sup>757</sup>Panel Report, para. 7.677.

<sup>758</sup>Panel Report, para. 7.693.

<sup>759</sup>Panel Report, para. 7.695.

<sup>760</sup>Mexico's appellee's submission, para. 208.

<sup>761</sup>Mexico's appellee's submission, para. 209.



consensus.<sup>762</sup> Overall, we are not persuaded that being invited to join the AIDCP is a mere "formality". In the light of the provisions for accession to the AIDCP, it therefore appears that the AIDCP is not an "international" body for the purposes of the *TBT Agreement*.

399. In the light of the above, we conclude that the Panel erred in finding, in paragraph 7.693 of the Panel Report, that the AIDCP is "open to the relevant body of every country and is therefore an international standardizing organization" for the purposes of the *TBT Agreement*. Instead, we find that the AIDCP is not open to the relevant bodies of at least all Members and thus not an "international standardizing body" for purposes of the *TBT Agreement*.<sup>763</sup> It follows that the Panel also erred in finding, in paragraph 7.707 of the Panel Report, that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of the *TBT Agreement*.

C. *Mexico's Appeal*

400. Mexico appeals the Panel's finding, in paragraph 7.740 of the Panel Report, that Mexico failed to demonstrate that the AIDCP standard is an effective and appropriate means to fulfil the United States' objectives at the United States' chosen level of protection. Since we have found that the Panel erred in finding that the AIDCP standard is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*, we do not need to address this issue.

D. *Conclusion*

401. In the light of the above, we *reverse* the Panel's finding, in paragraph 7.693 of the Panel Report, 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*. We also *reverse* the Panel's finding, in paragraph 7.707 of the Panel Report, that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of the *TBT Agreement*. In the light of this, the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the measure at issue is not inconsistent with Article 2.4 of the *TBT Agreement* stands.

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<sup>762</sup>As pointed out by the United States at the oral hearing, Mexico itself has encountered difficulties in joining another fisheries management organization, the Western and Central Pacific Fisheries Commission (WCPFC). (See Panel Report, footnote 505 to para. 7.327)

<sup>763</sup>Having found that the AIDCP is not "international" for the purposes of the *TBT Agreement*, we do not need to address the question of whether the AIDCP is a "body" and has "recognized activities in standardization".

## IX. Mexico's Claims under Articles I:1 and III:4 of the GATT 1994

402. Mexico submits that the Panel erred in exercising judicial economy with respect to Mexico's claims under Articles I and III of the GATT 1994, thereby acting inconsistently with its obligations under Article 11 of the DSU, and requests the Appellate Body to complete the legal analysis by ruling on these claims.<sup>764</sup> The United States counters that the Panel "addressed 'all aspects of Mexico's claims, including non-discrimination aspects under Article 2.1, and other aspects under Article[s] 2.2 and 2.4', such that it was not 'necessary for it to consider separately and additionally Mexico's claims under Articles I:1 and III:4 of the GATT 1994.'"<sup>765</sup> The United States further submits that Mexico has not explained why the use of judicial economy by the Panel is a failure to assist the DSB in making recommendations and rulings that would help settle the dispute.<sup>766</sup>

403. We recall that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."<sup>767</sup> Consequently, "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."<sup>768</sup> Nonetheless, the Appellate Body also cautioned that:

[t]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members."<sup>769</sup> (footnotes omitted)

404. Accordingly, "panels may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'."<sup>770</sup>

405. To us, it seems that the Panel's decision to exercise judicial economy rested upon the assumption that the obligations under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 are substantially the same. This assumption is, in our view, incorrect. In fact, as we have found above, the scope and content of these provisions is not the same. Moreover, in our view,

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<sup>764</sup>Mexico's other appellant's submission, paras. 206 and 211.

<sup>765</sup>United States' appellee's submission, para. 110 (quoting Panel Report, para. 7.748).

<sup>766</sup>United States' appellee's submission, para. 112.

<sup>767</sup>Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. (original emphasis)

<sup>768</sup>Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340.

<sup>769</sup>Appellate Body Report, *Australia – Salmon*, para. 223.

<sup>770</sup>Appellate Body Report, *US – Upland Cotton*, para. 732.

the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a "technical regulation" within the meaning of the *TBT Agreement*. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the *TBT Agreement*. By failing to do so, the Panel engaged, in our view, in an exercise of "false judicial economy" and acted inconsistently with its obligations under Article 11 of the DSU.<sup>771</sup>

406. In response to questioning at the oral hearing in this appeal, Mexico explained that it was not requesting that we complete the legal analysis by ruling on Mexico's claims under the GATT 1994 if we were to find the US measure to be *inconsistent* with Article 2.1 of the *TBT Agreement*. As we have found the US "dolphin-safe" labelling provisions to be inconsistent with Article 2.1, we consider it not necessary for us to complete the legal analysis in this case. Accordingly, we make no finding in relation to Mexico's separate claims that the US "dolphin-safe" labelling provisions are inconsistent with Article I:1 and Article III:4 of the GATT 1994.

## **X. Findings and Conclusions**

407. For the reasons set out in this Report, the Appellate Body:

- (a) finds that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*;
- (b) finds that the Panel erred in its interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the *TBT Agreement*; reverses the Panel's finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labelling provisions are not inconsistent with Article 2.1 of the *TBT Agreement*; and finds instead that the US "dolphin-safe" labelling provisions are inconsistent with Article 2.1 of the *TBT Agreement*;
- (c) finds that the Panel erred in concluding, in paragraphs 7.620 and 8.1(b) of the Panel Report, that it has been demonstrated that the measure at issue is more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking account of the risks non-fulfilment would create; and therefore reverses the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*;

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<sup>771</sup>Appellate Body Report, *Australia – Salmon*, para. 223.

- (d) rejects Mexico's claim that the Panel erred in finding that the United States' objective of "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" is a legitimate objective within the meaning of Article 2.2 of the *TBT Agreement*;
- (e) rejects Mexico's request to find the measure at issue inconsistent with Article 2.2 of the *TBT Agreement* based on the Panel's finding that the measure did not entirely fulfil its objectives;
- (f) reverses the Panel's finding, in paragraph 7.707 of the Panel Report, that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*. In the light of this, the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the measure at issue is not inconsistent with Article 2.4 of the *TBT Agreement* stands; and
- (g) finds that the Panel acted inconsistently with Article 11 of the DSU in deciding to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.

408. The Appellate Body *recommends* that the DSB request the United States to bring its measure, found in the Panel Report, as modified by this Report, to be inconsistent with the *TBT Agreement*, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 1st day of May 2012 by:

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Yuejiao Zhang  
Presiding Member

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Ujal Singh Bhatia  
Member

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Thomas R. Graham  
Member



ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS381/10**  
24 January 2012

(12-0452)

Original: English

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

Notification of an Appeal by the United States under Article 16.4 and Article 17  
of the Understanding on Rules and Procedures Governing the  
Settlement of Disputes (DSU), and under Rule 20(1)  
of the Working Procedures for Appellate Review

The following notification, dated 20 January 2012, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/R) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body relating to the Panel's findings and legal conclusion that the U.S. dolphin safe labeling provisions<sup>1</sup> constitute technical regulations within the meaning of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"). This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including:

- (a) the Panel's interpretation and application of the term "with which compliance is mandatory" in the definition of a technical regulation in Annex 1.1 of the TBT Agreement<sup>2</sup>; and

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<sup>1</sup>See Panel Report, para. 2.2. The U.S. dolphin safe labeling provisions include the Dolphin Protection Consumer Information Act ("DPCIA"), regulations promulgated in accordance with the DPCIA, as codified in Title 50, Section 216 of the Federal Regulations, and the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

<sup>2</sup>See Panel Report, paras. 7.100-7.111.

- (b) the Panel's finding that U.S. dolphin safe labeling provisions are mandatory within the meaning of Annex 1.1 of the TBT Agreement.<sup>3</sup>

As a result of the foregoing errors, the United States requests the Appellate Body also to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

2. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that the U.S. measures may only partially ensure that consumers are informed about whether tuna was caught by using a method that adversely affects dolphins.<sup>4</sup> The Panel drew this conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation, including:

- (a) the Panel's conclusion that Mexico has demonstrated that the use of fishing techniques other than setting on dolphins outside of the Eastern Tropical Pacific ("ETP") may produce and has produced significant levels of dolphin bycatch<sup>5</sup>;
- (b) the Panel's finding that the U.S. provisions do not allow the consumer to accurately distinguish between tuna caught in a manner that adversely affects dolphins and other tuna<sup>6</sup>;
- (c) that the threats faced by dolphins outside the ETP are not demonstrated to be lower than similar threats faced by dolphins in the ETP<sup>7</sup>;
- (d) that the differences with respect to the depletion status of the dolphin stocks at issue inside and outside of the ETP are not sufficient to justify the differences in certification requirements under the U.S. provisions<sup>8</sup>; and
- (e) that the requirements applicable in different fisheries under the U.S. provisions are not calibrated to the likelihood of dolphins being killed or seriously injured.<sup>9</sup>

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

3. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that the U.S. measures may only partially fulfill their stated objective of contributing to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.<sup>10</sup> The Panel drew this conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation, including:

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<sup>3</sup>See Panel Report, paras. 7.113-7.145.

<sup>4</sup>See Panel Report, paras. 7.592, 7.599.

<sup>5</sup>See Panel Report, paras. 7.517-7.531.

<sup>6</sup>See Panel Report, paras. 7.542-7.545.

<sup>7</sup>See Panel Report, para. 7.562.

<sup>8</sup>See Panel Report, paras. 7.550.

<sup>9</sup>See Panel Report, paras. 7.559-7.561.

<sup>10</sup>See Panel Report, paras. 7.592, 7.599.



- (a) the Panel's conclusions and findings as set forth in paragraphs 2(a)-(e) above<sup>11</sup>; and
- (b) that the U.S. provisions do not calibrate the dolphin safe certification requirements to the likelihood of interaction and harmful effects to dolphins.<sup>12</sup>

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

4. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States seeks review by the Appellate Body of the Panel's legal conclusion Mexico identified a reasonably available, less trade-restrictive alternative that would achieve a level of protection equivalent to that achieved by the U.S. provisions.<sup>13</sup> This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including:

- (a) the conclusion that the extent to which consumer would be misled or deceived would be no greater under the proposed alternative than under the U.S. measures<sup>14</sup>;
- (b) that the proposed alternative would not create greater risks to dolphins in the ETP than the U.S. provisions, and would fulfill the U.S. objectives at a level equivalent to the U.S. provisions<sup>15</sup>;
- (c) that significant dolphin mortality arises outside of the ETP from fishing techniques other than setting on dolphins<sup>16</sup>;
- (d) that the U.S. provisions do not address adverse impacts from fishing techniques other than setting on dolphins outside the ETP<sup>17</sup>; and
- (e) that at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are facing risks at least equivalent to those currently faced by dolphin populations in the ETP under Agreement on International Dolphin Conservation Program ("AIDCP") monitoring.<sup>18</sup>

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

5. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to fulfill their legitimate objectives, taking account of the risks non-fulfilment would create. This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including:

- (a) the Panel's conclusions as set forth in paragraph 4; and

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<sup>11</sup>See Panel Report, para. 7.590.

<sup>12</sup>See Panel Report, para. 7.600.

<sup>13</sup>See Panel Report, para. 7.578.

<sup>14</sup>See Panel Report, paras. 7.573-7.574, 7.577, 7.618-7.619.

<sup>15</sup>See Panel Report, para. 7.614, 7.617.

<sup>16</sup>See Panel Report, para. 7.613.

<sup>17</sup>See Panel Report, para. 7.613.

<sup>18</sup>See Panel Report, para. 7.617.

- (b) that the proposed alternative would be less trade-restrictive than the U.S. provisions, in that it would allow greater competitive opportunities on the U.S. market to products with access to the AIDCP label.<sup>19</sup>

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

6. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that Mexico had identified an alternative that is less trade restrictive than the U.S. provisions. The Panel drew this conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation, including that the proposed alternative would allow greater competitive opportunities on the U.S. market to products with access to the AIDCP label.<sup>20</sup> As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

7. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States seeks review by the Appellate Body of the Panel's finding that the AIDCP dolphin safe definition and certification constitute a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including the Panel's finding that the AIDCP is an international standardizing organization for the purpose of Article 2.4 of the TBT Agreement.<sup>21</sup> The United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that there are "institutional links" between the AIDCP and the Inter-American Tropical Tuna Commission.<sup>22</sup>

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<sup>19</sup>See Panel Report, para. 7.568.

<sup>20</sup>See Panel Report, para. 7.568.

<sup>21</sup>See Panel Report, paras. 7.678-7.693.

<sup>22</sup>See Panel Report, para. 7.684.

ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS381/11**  
27 January 2012

(12-0568)

Original: English

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

Notification of an Other Appeal by Mexico  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 25 January 2012, from the Delegation of Mexico, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23(1) of the *Working Procedures for Appellate Review*, the United Mexican States ("Mexico") hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/R) ("Panel Report"), certain legal interpretations developed by the Panel in this dispute, and the Panel's failure to make an objective assessment of the matter as required by Article 11 of the DSU.

2. Pursuant to Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

**I. APPEAL OF THE PANEL'S CONCLUSION THAT THE U.S. DOLPHIN SAFE LABELLING PROVISIONS ARE NOT INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT AND THE PANEL'S FAILURE TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER BEFORE IT AS REQUIRED BY ARTICLE 11 OF THE DSU**

3. Mexico seeks review by the Appellate Body of the Panel's findings that the U.S. dolphin-safe labeling provisions are not inconsistent with Article 2.1 of the TBT Agreement. This conclusion is in error and is based on erroneous findings on issues of law, related interpretations and the Panel's failure to make an objective assessment of the matter before it as required by Article 11 of the DSU, including:

- (a) the Panel erred in the interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the TBT Agreement by applying what Mexico's refers to as a "denial of access to an advantage" test<sup>1</sup>;
- (b) the Panel erred in the interpretation and application of Article 2.1 of the TBT Agreement by ignoring the context of this provision including the preamble to the TBT Agreement and certain provisions in other WTO Agreements.<sup>2</sup> The Panel also erred in its findings and conclusions in respect of linking the less favourable treatment to the foreign origin of the product and the actions of private actors;
- (c) the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU with respect to the arguments and evidence put forward by Mexico in support of its claim that Mexican tuna products are being denied competitive opportunities by the U.S. dolphin safe labelling provisions<sup>3</sup>; and
- (d) If the Appellate Body finds that the Panel's denial of access to an advantage test is a permissible interpretation of Article 2.1, the Panel failed to make an objective assessment of the matter before it and thereby acted inconsistently with Article 11 of the DSU. The Panel failed to consider and take into account evidence put forward by Mexico that it was impossible for the Mexican tuna industry to change its fishing practices to adapt to the U.S. measures.<sup>4</sup>

As a result of the foregoing errors, Mexico requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(a) of the Panel Report.

**II. APPEAL OF THE PANEL'S DECISION TO EXERCISE JUDICIAL ECONOMY WITH RESPECT TO MEXICO'S CLAIMS UNDER ARTICLES I:1 AND III:4 OF THE GATT 1994 AND THE PANEL'S FAILURE TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER BEFORE IT AS REQUIRED BY ARTICLE 11 OF THE DSU**

5. Mexico seeks review by the Appellate Body of the Panel's decision to exercise judicial economy and decline ruling on Mexico's discriminations claims under Articles I:1 and III:4 of the GATT 1994.<sup>5</sup> Mexico addresses the following errors in the Panel's decision to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994:

- (a) the Panel exercised false judicial economy by not addressing all the issues before it that were necessary for the effective resolution of the dispute. After finding no violation of Article 2.1 of the TBT Agreement, the Panel should have continued its analysis of the more general provisions contained in the GATT 1994; and
- (b) the Panel failed to examine Mexico's claims under the GATT 1994 led to its failure to conduct an objective assessment of the matter before it as required by Article 11 of the DSU.

6. As a result of the foregoing errors, Mexico requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.2 and Section VII of the Panel Report and complete the analysis of Mexico's claims under Articles I:1 and III:4 of the GATT 1994.

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<sup>1</sup>See Panel Report, paras. 7.191-7.378, in particular, 7.269-7.284, 7.304-7.311, 7.333, 7.334, 7.345-7.350, 7.361-7.368, 7.374-7.378.

<sup>2</sup>See Panel Report, paras. 7.268-7.278.

<sup>3</sup>See Panel Report, paras. 7.365-7.368 and 7.374-7.378.

<sup>4</sup>See Panel Report, paras. 7.310, 7.323, 7.334, 7.343-7.344, 7.349.

<sup>5</sup>See Panel Report, paras. 7.741-7.748 and 8.2.

**III. APPEAL OF THE PANEL'S CONCLUSION THAT THE U.S. DOLPHIN SAFE LABELLING PROVISIONS ARE NOT INCONSISTENT WITH ARTICLE 2.4 OF THE TBT AGREEMENT**

7. Mexico seeks review by the Appellate Body of the Panel's findings that the U.S. dolphin-safe labeling provisions are not inconsistent with Article 2.4 of the TBT Agreement.<sup>6</sup> This conclusion is in error and is based on erroneous findings on issues of law, related interpretations and the Panel's failure to make an objective assessment of the matter before it as required by Article 11 of the DSU, including:

- (a) the Panel erred in not evaluating whether the AIDCP standard would be effective and appropriate in fulfilling the U.S. objectives in fisheries outside the ETP. In doing so, the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU; and
- (b) the Panel applied an incorrect legal test in evaluating whether the AIDCP standard would be effective and appropriate to fulfill the U.S. objectives.<sup>7</sup>

8. As a result of the foregoing errors, Mexico requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(c) of the Panel Report.

**IV. CONDITIONAL APPEAL OF THE PANEL'S FINDING THAT THE SECOND OBJECTIVE OF THE U.S. DOLPHIN SAFE LABELLING PROVISIONS IS A LEGITIMATE OBJECTIVE WITHIN THE MEANING OF ARTICLE 2.2 OF THE TBT AGREEMENT**

9. This appeal is conditional on the Appellate Body's reversal of the Panel's finding that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement.

10. Mexico seeks review by the Appellate Body of the Panel's finding that the second objective of the U.S. dolphin safe labeling provisions is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.<sup>8</sup> The Appellate Body does not need to review this legal interpretation and conclusion if the condition to this appeal is not met.

**V. CONDITIONAL APPEAL OF THE PANEL'S ERRORS IN THE LEGAL ANALYSIS ON WHETHER THE U.S. DOLPHIN SAFE LABELLING PROVISIONS ARE "MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE"**

11. This appeal is conditional on the Appellate Body's reversal of the Panel's finding that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement and the rejection of Mexico's conditional appeal that the second objective of the U.S. dolphin-safe provisions is not a legitimate objective.

12. Mexico seeks review by the Appellate Body of the Panel's legal errors in its analysis on whether the U.S. dolphin safe labelling provisions are more trade restrictive than necessary to fulfill the legitimate objective.<sup>9</sup> In particular, the Panel erred in continuing its analysis under Article 2.2 of the TBT Agreement after it had concluded that the U.S. measures fulfill their objectives "only partially".<sup>10</sup> The Appellate Body does not need to review these errors if the condition to this appeal is not met.

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<sup>6</sup>See Panel Report, paras. 8.1(c) and 7.717-7.740.

<sup>7</sup>See Panel Report, paras. 7.717-7.740.

<sup>8</sup>See Panel Report, paras. 7.400-7.444.

<sup>9</sup>Panel Report, paras. 7.445-7.623.

<sup>10</sup>See, e.g., Panel Report, paras. 7.563 and 7.599.