

**BEFORE THE
WORLD TRADE ORGANIZATION
DISPUTE SETTLEMENT BODY**

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

(WT/DS381)

Written Submission of Non-Party Amici Curiae

**HUMANE SOCIETY INTERNATIONAL
AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW,
PROGRAM ON INTERNATIONAL AND COMPARATIVE ENVIRONMENTAL LAW**

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DISPUTES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
<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
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
<i>EC – Biotech</i>	Panel Report, <i>European Communities – Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006
<i>EC– Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R, adopted 29 May 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
<i>U.S. – Hot Rolled Lead and Bismuth Carbon Steel Products</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted June 7, 2000
<i>U.S. – 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
<i>U.S. – Tuna (Mexico)</i>	<i>United States – Restrictions on Imports of Tuna</i> , circulated on 3 September 1991, DS21/R - 39S/155, not adopted
<i>U.S. – Tuna (EEC)</i>	<i>United States – Restrictions on Imports of Tuna</i> , circulated on 16 June 1994, DS29/R, not adopted

I. OUR INTEREST

1. Humane Society International (HSI) operates as the international arm of The Humane Society of the United States (HSUS). Founded in 1954, The HSUS is the largest animal protection organization in the United States, and in conjunction with HSI, maintains a constituency of over 11 million. As the international arm of The HSUS, HSI works to promote the protection of all animals around the world by participating in programmatic activities in developing countries, advocating for the effective enforcement of international environmental treaties, and furthering humane and sustainable international trade policy.
2. HSI actively participates in discussions of international trade policy at the World Trade Organization (WTO), addressing such issues as equitable development, humane and sustainable agriculture, environmental conservation, and wildlife and habitat protection. HSI has also submitted non-party amicus submissions to the WTO. In addition, as a member of the Trade and Environment Policy Advisory Committee (TEPAC) in the United States, HSI advises the United States Trade Representative (USTR) and the U.S. Environmental Protection Agency (EPA) on international trade policy. HSI also implements a number of trade capacity building and technical assistance programs in developing WTO Member countries to support sustainable economic development, including humane agricultural practices and habitat protection policies.
3. As a leading animal protection organization that has been closely involved in this issue for nearly three decades, HSI believes our perspective can add to that of the parties in a way that will be “pertinent and useful”¹ to the panel’s deliberations and recommendations in this dispute.² Specifically:
 - Leading up to passage of the U.S. Dolphin Safe label, The HSUS was instrumental in educating the American public about the dolphins targeted and killed as a method for catching tuna in the Eastern Tropical Pacific (ETP).
 - Further advocacy efforts with members of Congress, retailers, and restaurants, coupled with consumer pressure, led to the development of the U.S. Dolphin Safe label.

¹ See *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R at para. 42 (adopted June 7, 2000) (“We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so.”)

² With respect to *amicus curiae* briefs, the panel has the “discretionary authority either to accept and consider or to reject any information submitted to it” ... “or make some other appropriate disposition thereof.” See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998 at paras. 104 and 108 (“US-Shrimp”). See also *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report, WT/DS293, 29 September 2006 at para. 7.11.

- The HSUS has been a co-plaintiff in all lawsuits regarding attempts to weaken the standards of this label, which were held from 1999 to 2007.
 - HSI has on staff Senior Scientist Dr. Naomi Rose who coordinates HSI's marine mammal programs, and has provided technical advice and input for The HSUS and HSI campaign to protect dolphins caught in nets in tuna fishing operations in the ETP since 1995. An affidavit from Dr. Rose addressing key issues in this dispute is attached as an Exhibit to this brief.
 - The HSUS and HSI have also participated regularly in the Inter-Governmental meetings (precursor to the AIDCP) and the meetings of the Agreement on the International Dolphin Conservation Program (AIDCP) since it entered into force in February 1999.
 - The HSUS and HSI also serve as official non-governmental representatives on the AIDCP's International Review Panel.
4. American University's Washington College of Law (WCL) is one of the world's leading institutions in the study of international law. With its Program on International and Comparative Environmental Law, WCL engages in a number of pedagogical and practical activities through its professors and students. Relevant to this submission, WCL retains on staff practitioners-in-residence such as William Snape, who has been long involved in the tuna-dolphin matter and has represented many clients pertaining to it. WCL professors regularly write on matters pertaining to the WTO, grant legal graduate degrees with specialization in international trade and environment, and supervise law students in public interest externships relating to marine mammal conservation, international trade and related subjects. Professor Snape is a member of TEPAC, a staff member at WCL where he is also faculty liaison to the Environmental Law Society, and a current legal advisor to many U.S. non-governmental organizations interested in this dispute.
 5. HSI and WCL reviewed the U.S. submission in this dispute and support the positions taken therein. This amicus brief is intended to complement the U.S. submission by offering additional details on certain factual issues, and by providing the perspective of entities that have been on the frontlines of this issue for nearly three decades. HSI and WCL respectfully request that you accept and consider this submission and draw upon our expertise and historical knowledge as necessary.

II. EXECUTIVE SUMMARY

The U.S. Dolphin Safe Label is about choice.

6. In the ETP, there is a regular and significant association of tuna and dolphins that does not take place anywhere else in the world. Fishermen in the ETP have long exploited this association by intentionally targeting, or "setting on," dolphins to catch the tuna that swim beneath. This has resulted in the deaths of millions of dolphins, and the depletion of certain dolphin populations.

7. Consumer awareness of this fishing method led to boycotts of tuna products in the 1980s, and prompted private companies like StarKist to adopt “dolphin safe” policies – meaning no tuna fishing “in association with dolphins.” Other companies followed StarKist’s lead, but company policies were not harmonized, and there were no safeguards to ensure that the policies would remain in place and protect consumer interests.
8. As a result, and in combination with the objective of protecting dolphins, Congress passed the U.S. Dolphin Safe Labeling law (16 U.S.C. § 1385) in 1990. The law allowed companies fishing in the ETP to choose to use a Dolphin Safe Label if they did not intentionally set on dolphins. The label is entirely voluntary and applies equally to all sources of tuna. It does not mandate that tuna products be labeled dolphin safe, nor does it prevent trade in tuna products that do not meet the criteria. Indeed, Mexico exports millions of dollars worth of tuna to the U.S. each year that does not qualify for the U.S. Dolphin Safe label.
9. The label is about choice: consumers choose to be informed about their tuna products, and tuna fishing companies/countries can choose to meet the criteria of the U.S. Dolphin Safe Label and respond to consumer demand, or they can choose not to use the label but still continue to sell their product in the United States.

The U.S. Dolphin Safe Label is based on science.

10. In the mid 1990s, the U.S. Congress amended the Dolphin Safe labeling law. It provided that the Dolphin Safe label could be used on tuna products resulting from intentional dolphin sets as long as the U.S. Department of Commerce found, on the basis of scientific studies, that intentional dolphin sets were not having a significant adverse impact on dolphin populations. Depending on the results of the studies, the U.S. Dolphin Safe label would change to allow for intentional dolphin sets as long as there was no observed dolphin mortality.
11. Commerce conducted the studies, but its findings of “no significant adverse impact” were vacated by U.S. Courts. In 2007, the U.S. Court of Appeals for the 9th Circuit held that Commerce’s findings were erroneous, and that in fact, dolphin stocks remained severely depleted despite improvements in dolphin mortality rates. The Court also found science supported findings that the chase and encirclement process led to longer term effects on lifespan and reproduction that impeded the recovery of dolphin populations. As a result, the U.S. definition of Dolphin Safe did not change, and continues to prohibit use of the label on tuna products harvested by intentional setting on dolphins.
12. The following facts further support the science behind U.S. definition of the label:
 - Although observed dolphin mortality has been reduced under the AIDCP from historical levels, almost 15,000 dolphins have died in the ETP as a result of intentional targeting since the AIDCP went into effect in 1999.
 - Observed dolphin mortality in the ETP is likely understated due to factors such as observer error and failure to report.

- Even dolphins that manage to escape the nets are likely to be chased again, sometimes up to three times in one day. The stress of the chase has been found to result in delayed mortality, and have adverse consequences on reproductive rates.
 - There are no recent conclusive studies demonstrating that dolphin stocks in the ETP have recovered.
13. To detract from these facts, Mexico argues that intentional setting on dolphins is better for the ecosystem and protects valuable juvenile tuna stocks. These issues are not relevant to this dispute, and ignore evidence to the contrary, such as the fact that staff from the Inter-American Tropical Tuna Commission (IATTC) themselves point to tuna fleet capacity as the biggest threat to tuna stocks.

The U.S. Dolphin Safe Label is not inconsistent with World Trade Organization (WTO) Agreements.

14. This brief responds to legal and factual claims raised by Mexico in its request for consultations and request for a panel, as well as information gleaned from HSI and WCL's review of the U.S. submission. In particular, Mexico argues that the U.S. measures are inconsistent with Articles I:1 and III:4 of the General Agreement on Tariffs and Trade (GATT), and Articles 2.1, 2.2 and 2.4 of the Technical Barriers to Trade (TBT) Agreement. Mexico's claims are without merit.
15. The U.S. Dolphin Safe label does not discriminate against tuna products from any country. All countries fishing in the ETP can choose to meet the criteria for the label. Moreover, U.S. law has identical criteria for all other fisheries outside of the ETP where there is a regular and significant association of tuna and dolphins. The U.S. applies the Dolphin Safe label to its own boats and fishermen. Notably, Mexican companies have availed themselves of the U.S. label in the past. That they have chosen not to meet the criteria for the label today is not discrimination – *de jure* or *de facto* – it is choice.
16. Because the U.S. label is voluntary, it does not meet the criteria for a “technical regulation” under the TBT Agreement. Nevertheless, it is not inconsistent with cited provisions of the TBT Agreement as it is non-discriminatory, not more trade restrictive than necessary, and fulfills the legitimate objectives of consumer protection and dolphin conservation in a manner that cannot be achieved by the AIDCP definition.
17. In sum, for all the reasons stated herein, we respectfully urge the panel to find the U.S. measures are not inconsistent with cited provisions of the GATT and TBT Agreement.

III. PROCEDURAL BACKGROUND AND STATUS OF U.S. LAW

18. Before the enactment of the U.S. Marine Mammal Protection Act (MMPA) in 1972 (and subsequent amendments), which included provisions for reducing cetacean bycatch to near zero levels, as many as half a million dolphins died every year in the ETP as a result of dolphin sets (fishing method used to chase and encircle dolphins with a large net that purses at the top, capturing both tuna and dolphins together). According to the U.S. National Oceanic and Atmospheric Administration (NOAA), “[t]he number of dolphins

killed since the fishery began in the late 1950s is estimated to be over 6 million animals, the highest known for any fishery.”³

19. In the late 1980s, footage of dolphins drowning in purse seine nets in the ETP was filmed by Sam LaBudde, who was working undercover on a Panamanian fishing vessel.⁴ The footage was aired on national television, prompting widespread consumer boycotts of canned-tuna, and leading private companies like StarKist and BumbleBee to adopt dolphin safe policies not to purchase tuna caught in association with dolphins.⁵ Erik Bloemendaal, spokesman for StarKist, said the footage “crystallized the issue for consumers. They told us they don’t want us to kill dolphins.”⁶
20. This consumer pressure also led Congress to impose an embargo on imports of tuna from countries that intentionally set on dolphins in 1990 (this was later repealed). Congress also enacted the Dolphin Protection Consumer Information Act (DPCIA) – 16 U.S.C § 1385 – which was a voluntary label that allowed for use of a “Dolphin Safe” label if certain criteria were met, *i.e.*, no intentional setting on dolphins for tuna harvested in the ETP. Congress explained its intentions in enacting the DPCIA:

The Congress finds that-

Dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the Eastern Tropical Pacific and high seas driftnet fishing in other parts of the world;

It is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and

³ See *The Tuna Dolphin Issue*, Southwest Fisheries Science Center, NOAA Fisheries Service, available at: <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408> (emphasis added); attached as Exhibit 1.

⁴ See *A Filmmaker Crusades to Make Seas Safe for Gentle Dolphins*, PEOPLE MAGAZINE, Vol. 34, No. 5 (August 6, 1990) available at: <http://www.people.com/people/archive/article/0,,20118400,00.html> (explaining how Sam LaBudde was on board a Panamanian purse seiner and filmed the death of numerous dolphins that drowned in the net or were crushed by the power block used to haul in the nets.); attached as Exhibit 2. LaBudde’s film showed how the dead or dying dolphins were thrown back into the water, while the tuna was kept on board. *Id.*

⁵ See, e.g., StarKist Dolphin Safe Policy, available at: <http://www.starkist.com/template.asp?section=aboutUs/index.html>; attached as Exhibit 3. The policy also states: “StarKist continues its practice of refusing to purchase tuna caught with gill or drift nets, which are known to be dangerous to many forms of marine life. StarKist condemns the use of these indiscriminate fishing methods that trap dolphins, whales, and other marine life along with the intended catch of fish.” *Id.* See also Bumblebee Dolphin Safe Policy, available at: <http://www.bumblebee.com/FAQ/#2>; attached as Exhibit 3.

⁶ See *A Filmmaker Crusades to Make Seas Safe for Gentle Dolphins*, PEOPLE MAGAZINE, Vol. 34, No. 5 (August 6, 1990) available at: <http://www.people.com/people/archive/article/0,,20118400,00.html> (explaining how Sam LaBudde was on board a Panamanian purse seiner and filmed the death of numerous dolphins that drowned in the net or were crushed by the power block used to haul in the nets.); attached as Exhibit 2. LaBudde’s film showed how the dead or dying dolphins were thrown back into the water, while the tuna was kept on board. *Id.*

Consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.⁷

21. The U.S. embargo and U.S. label were challenged under the GATT in two disputes in the early 1990s.⁸ The GATT panels found the U.S. embargo to be inconsistent with GATT obligations. Only the first GATT dispute also included a claim by Mexico that the U.S. Dolphin Safe label was inconsistent with GATT obligations. The panel ruled against Mexico, explaining in relevant part:

5.42 ...The Panel noted that the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the "Dolphin Safe" label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the "Dolphin Safe" label. The labeling provisions therefore did not make the right to sell tuna or tuna products, nor the access to a government conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods. The only issue before the Panel was therefore whether the provisions of the DPCIA governing the right of access to the label met the requirements of Article I:1.

5.43 The Panel noted that the DPCIA is based inter alia on a finding that dolphins are frequently killed in the course of tuna-fishing operations in the ETP through the use of purse-seine nets intentionally deployed to encircle dolphins. The DPCIA therefore accords the right to use the label "Dolphin Safe" for tuna harvested in the ETP only if such tuna is accompanied by documentary evidence showing that it was not harvested with purse-seine nets intentionally deployed to encircle dolphins. The Panel examined whether this requirement applied to tuna from the ETP was consistent with Article I:1. According to the information presented to the Panel, the harvesting of tuna by intentionally encircling dolphins with purse-seine nets was practised only in the ETP because of the particular nature of the association between dolphins and tuna observed only in that area. By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.

⁷ 16 U.S.C § 1385.

⁸ See *United States — Restrictions on Imports of Tuna*, circulated on 3 September 1991 (not adopted); *United States — Restrictions on Imports of Tuna*, circulated on 16 June 1994 (not adopted).

5.44 The Panel found for these reasons that the tuna products labelling provisions of the DPCIA relating to tuna caught in the ETP were not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.⁹

22. The U.S. was also involved in discussions within the IATTC in the early 1990s. In 1992, some IATTC Members signed a voluntary agreement (The International Dolphin Conservation Program, effective January 1993, also known as the “La Jolla Agreement”) that sought to maintain dolphin kill levels below a “dolphin mortality limit” (DML) and find an ecologically sound means of capturing large yellowfin tunas. In 1995, the La Jolla Agreement was formalized by adoption of a binding agreement called the Panama Declaration, which established annual species/stock specific dolphin mortality limits.¹⁰
23. The Panama Declaration also called for countries to enter into a new multilateral agreement called the The Agreement on the International Dolphin Conservation Program (AIDCP) (entry into force in February 1999). The U.S. signed onto this agreement.
24. In 1997, Congress enacted the International Dolphin Conservation Program Act (IDCPA) to implement portions of the Panama Declaration. The new law eliminated the embargo on tuna products from nations that could show that they were members of the AIDCP, abided by the requirements of the AIDCP, and did not exceed pre-determined dolphin mortality limits.¹¹
25. With respect to the Dolphin Safe label, hearings were held to determine whether and how to change the U.S. Dolphin Safe label. Senator Boxer testified that a change to the label that only aimed to mitigate observed dolphin death would not assuage consumer concerns about the chase and encirclement process:

In 1990, the American people spoke. They wanted to end the deaths of tens of thousands of dolphins every year associated with tuna fishing and called for an end to tuna caught by chasing and capturing dolphins.

Our definition of dolphin safe became law for all the right reasons in 1990. Those reasons are still valid today:

- (1) For the consumers, who were opposed to the encirclement of dolphins with purse seine nets and wanted guarantees that the tuna they consume did not result in the harassment, capture and killing of dolphins;

⁹ See *United States — Restrictions on Imports of Tuna*, circulated on 3 September 1991 at paras. 5.41-5.43 (not adopted) (emphasis added).

¹⁰ See *The Tuna Dolphin Issue*, Southwest Fisheries Science Center, NOAA Fisheries Service, available at: <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408> (emphasis added); attached as Exhibit I.

¹¹ 16 U.S.C. § 1371(a)(2)(B).

- (2) For the U.S. tuna companies, who wanted a uniform definition that would not undercut their voluntary efforts to remain dolphin-safe;
- (3) For the dolphins, to avoid harassment, injury and deaths by encirclement; and
- (4) For truth in labeling.

I urge the members of this subcommittee to watch the videos on the practice of encircling dolphins. There is no scientific evidence proving it is not harmful. No one can tell me that the stress of relentless high speed chasing, and the encircling and netting is a dolphin safe practice. It isn't. It would be misleading to call it dolphin safe. It would be consumer fraud. You can't tell me that the American people, and the millions of school children who pressed for an end to the harassment and injury and death of dolphins, will stand by and let us call that dolphin safe.¹²

26. Ultimately, the 1997 U.S. legislation amended 16 U.S.C § 1385 to provide that any change from the existing definition of Dolphin Safe would turn on the scientific question of whether “the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the [ETP].”¹³ The change would allow use of the Dolphin Safe label if it could be shown that the tuna were harvested without observed dolphin mortality. By comparison, the existing U.S. definition permitted use of the label when it could be shown there was no intentional setting on dolphins. Congress determined to let the science determine what was “dolphin safe.”
27. Pursuant to 16 U.S.C § 1385, the U.S. Department of Commerce was commissioned to undertake scientific studies to determine whether the less stringent definition (which ultimately became the AIDCP definition) would be sufficient to meet Congressional goals of consumer protection and dolphin conservation. Thus, the new definition did not go into effect immediately, but rather was contingent upon completion of scientific reports.
28. On December 31, 2002, the Commerce Department announced a "no significant adverse impact" finding.¹⁴ The findings of Commerce's studies were the subject of years of litigation,¹⁵ and were eventually rejected and vacated by the Ninth Circuit Court of Appeals, which found, *inter alia*, that the agency findings erroneously determined the

¹² See *International Dolphin Conservation Program Act*, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess (April 30, 1996) (Statement of Senator Barbara Boxer); relevant pages attached as Exhibit 4.

¹³ See 16 USC § 1385(g); S. 39, 105th Cong. (1997) (leg. hist.); 143 Cong. Rec. 379-401 (1997) (leg. hist.); 143 Cong. Rec. S.8299-8311 (daily ed. July 30, 1997) (statements of Snowe and Stevens) (leg. hist.).

¹⁴ 68 Fed. Reg. 2010-11 (Jan. 15, 2003.)

¹⁵ See *Construction and Application of International Dolphin Conservation Program Act (IDCPA)*, American Law Reports, 38 A.L.R. Fed. 2d. 295 (2009) (reviewing all U.S. litigation over the IDCPA).

purse seine fishery was not adversely impacting ETP dolphins.¹⁶ In particular, the Circuit Court upheld the District Court's findings that the population of certain ETP dolphin stocks remained severely depleted despite reports of lower dolphin mortality.¹⁷ Of two explanations offered, changes to the ecosystem and indirect effects from fishery, the Circuit Court concluded that the best available scientific data showed that the combined effects of the latter – including the separation of calves from their mothers, delayed stress effects, and under-reporting of mortality – could “explain the dolphins’ failure to recover, particularly given the intensity of the fishery.”¹⁸ Because the Circuit Court vacated Commerce's findings, the AIDCP definition never went into effect in the U.S.¹⁹

29. Under current U.S. law, the U.S. Dolphin Safe Label can be used on tuna products harvested in the ETP when it can be shown, by certified statement of the vessel's captain, that there was an observer on board who provided certification that the tuna was not harvested with purse-seine nets intentionally set on dolphins and that no dolphins were killed or seriously injured when the tuna were caught.²⁰
30. **Importantly, U.S. law applies identical requirements for use of the Dolphin Safe label for all fisheries where there is a regular and significant association between tuna and dolphins, and therefore a direct risk of significant dolphin mortality or serious injury,** (compare 16 U.S.C. § 1385(d)(1)(B)(i) with 16 U.S.C. § 1385(d)(1)(C)).²¹

¹⁶ See *Earth Island Institute et al. v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007), amended 494 F.3d 757 (9th Cir. 2007); at paras. 53-59, 66 in web version, available at: <http://bulk.resource.org/courts.gov/c/F3/484/484.F3d.1123.04-17018.html> (emphasis added).

¹⁷ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37, upheld by *Earth Island Institute et al. v. Hogarth*, 484 F.3d 1123; at para. 63 in web version, available at: <http://bulk.resource.org/courts.gov/c/F3/484/484.F3d.1123.04-17018.html>.

¹⁸ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37 (emphasis added).

¹⁹ Another Circuit Court, however, found against U.S. environmental plaintiffs and upheld the U.S. decision to lift the tuna embargo against Mexico. See *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003).

²⁰ 16 U.S.C. § 1385(d)(1)(C) and 16 U.S.C. § 1385 (d)(2).

²¹ The U.S. submission provides a full overview of what the law requires, and we do not repeat that here. However, it is notable to point out that the other provisions contained in 16 U.S.C. § 1385 are entirely consistent with U.S. goals of consumer protection and dolphin conservation. For example, the law bans the use of the Dolphin Safe label entirely for vessels engaged in driftnet fishing on the high seas, and only allows use of the Dolphin Safe label in other circumstances where it can be shown that tuna were not harvested using methods that could result in significant dolphin mortality or serious injury. That certain subsections of the law, *i.e.*, ((B)(ii) and (D)), are not subject to the same requirements as tuna harvested in fisheries where there is a regular association of tuna and dolphins is not surprising as there is no or *de minimis* risk of intentional setting on dolphins in those fisheries.

IV. FACTUAL BACKGROUND

A. Tuna Fishing in the Eastern Tropical Pacific

31. For reasons still unknown, schools of adult yellowfin tuna in the ETP Ocean frequently swim beneath herds of dolphins that can number in the hundreds or even thousands,²² including the pantropical spotted dolphin, the spinner dolphin, and common dolphins.²³ Fishermen began using the tuna-dolphin association to target tuna schools in the ETP in the 1950's. It was at this time that "the twin technological developments of synthetic netting that would not rot in tropical water and a hydraulically driven power-block to haul the net made it possible to deploy very large purse-seine nets around entire schools of tuna, and thus to catch many tons of fish at a time."²⁴

B. The Regular and Significant Association of Tuna and Dolphins, and the Intentional Targeting of Dolphins, in the ETP Is Singular.

32. The regular and significant association of tuna and dolphins in the ETP is singular, leading to different circumstances for dolphin bycatch than in other fisheries. NOAA explains:

The bycatch of dolphins in the eastern tropical Pacific (ETP) purse-seine tuna fishery stands apart from marine mammal bycatch in other fisheries, not only in scale but in the way the dolphins interact with the fishery. Marine mammals interact with most fishing gear only incidentally, but in the ETP tuna fishery the dolphins are an intrinsic part of the fishing operation. The fishermen intentionally capture both tuna and dolphins together, then release the dolphins from the net. Further, unlike most other fisheries, the vast majority of dolphins captured by the ETP tuna fishery are released alive; thus, an individual dolphin may be chased, captured and released many times during its lifetime.²⁵

33. Outside of the ETP, the best available information (including scientific literature collected by the National Marine Fisheries Service (NMFS)) shows that there is not "any large, sustained or widespread practice of setting purse seine nets around cetaceans for

²² "The Costa Rican spinner is found in large, close knit groups of 1,000 or more animals in coastal waters less than 90 miles (150 KM) off the western coast of Central America; the eastern spinner is a more oceanic species found in deep waters off the coast of Mexico and the west coast of Central America, often travelling in large herds of thousands or more, sometimes in the company of spotted dolphins; the whitebelly spinner is distributed even further offshore from Mexico, Central America, and the Pacific region of northern South America, travelling in herds of 1,000 or more." See American Cetacean Society Fact Sheet, Dec. 2004.

<http://www.acsonline.org/factpack/spinnerDolphin/spinner-dolphin.pdf>; attached as Exhibit 5.

²³ See Southwest Fisheries Science Center, The Tuna Dolphin Issue, NOAA Fisheries Service, available at: <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408>; attached as Exhibit 1.

²⁴ See Southwest Fisheries Science Center, The Tuna Dolphin Issue, NOAA Fisheries Service, available at: <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408>; attached as Exhibit 1.

²⁵ See *The Tuna Dolphin Issue*, Southwest Fisheries Science Center, NOAA Fisheries Service, available at: <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408> (emphasis added); attached as Exhibit 1.

the purpose of catching tuna in any oceanic area other than in the ETP.”²⁶ While individual reports of a tuna-dolphin association (and the use thereof for tuna fishing) exist, these reports are scarce, inconclusive and sometimes based on third-hand knowledge. “At present, the best that can be said is that the few data available do not indicate a large-scale practice of setting on cetaceans for the purpose of catching tuna outside the ETP.”²⁷

34. HSI’s Senior Scientist Dr. Naomi Rose, who coordinates HSI’s marine mammal programs and has provided technical advice and input for The HSUS and HSI campaign to protect dolphins caught in nets in tuna fishing operations in the ETP since 1995, states the following in an attached affidavit:

Based on my knowledge and experience, the regular and significant association of tuna and dolphins in the ETP is not found in other fisheries. There may be other fisheries where tuna swim beneath dolphins, but to my knowledge, the association is not regular and significant, nor is it exploited as a fishing method as in the ETP in any consistent manner.²⁸

35. U.S. law provides that if the Secretary of Commerce determines there is a “regular and significant association between dolphins and tuna” outside of the ETP, tuna products from such fishery would be ineligible for the Dolphin Safe label unless the same conditions as those applicable in the ETP are met. 16 U.S.C. § 1385(d)(B)(i). To date, the Secretary has not made any such finding.

C. Adverse Impacts on Dolphin Populations from Tuna Purse Seine Fishing in the Eastern Tropical Pacific

1) Dolphin Mortality in the ETP Undermines Consumer Protection and Dolphin Conservation Objectives

36. The AIDCP states that priority objectives include “eliminating dolphin mortality in the purse seine tuna fishery in the eastern Pacific Ocean and {sic} seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins,” and “to progressively reduce the incidental dolphin mortalities in the tuna fishery of the eastern Pacific Ocean to levels approaching zero.”²⁹ However, the AIDCP requirements³⁰ have

²⁶ See Meghan A. Donahue and Elizabeth F. Edwards, National Marine Fisheries Service (Administrative Report LF-96-20), *An Annotated Bibliography Of Available Literature Regarding Cetacean Interactions With Tuna Purse-Seine Fisheries Outside Of The Eastern Tropical Pacific Ocean* at Abstract, (November 1996) <http://www.acsonline.org/factpack/spinnerDolphin/spinner-dolphin.pdf>; attached as Exhibit 6.

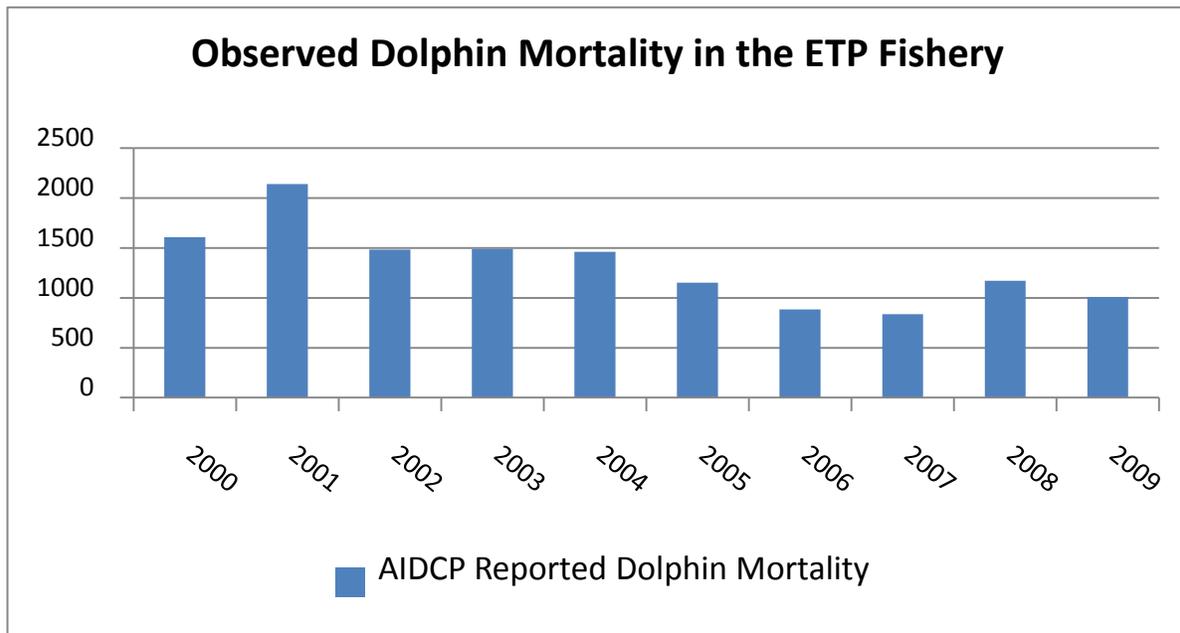
²⁷ See Meghan A. Donahue and Elizabeth F. Edwards, National Marine Fisheries Service (Administrative Report LF-96-20), *An Annotated Bibliography Of Available Literature Regarding Cetacean Interactions With Tuna Purse-Seine Fisheries Outside Of The Eastern Tropical Pacific Ocean* at Abstract, (November 1996); attached as Exhibit 6.

²⁸ See Affidavit of HSI Senior Scientist, Dr. Naomi Rose; attached as Exhibit 7.

²⁹ AIDCP (Amended 2009), <http://www.iattc.org/PDFFiles2/AIDCP-amended-Oct-2009.pdf>.

³⁰ The AIDCP sets dolphin mortality limits (DMLs) of up to 5,000 dolphins per year. This figure has not changed or decreased over time.

in fact consistently led to high levels of observed dolphin mortality (for reasons explained below, such as observer error and failure to report, reported dolphin mortality is likely significantly understated). Indeed, since the AIDCP went into effect in early 1999, **14,577 dolphins** have reportedly died in the ETP tuna fishery as a result of intentional targeting.³¹ “Reported” dolphin mortality in the ETP in 2009, for example, was over one thousand dolphins in a single year.³²



37. While dolphin mortality levels have improved over historical levels (pre-AIDCP), they have not been eliminated or progressively reduced to levels approaching zero despite the fact that the AIDCP has been in force for a decade.

2) *Reported Dolphin Mortality is Likely Understated*

38. In fact, actual dolphin mortality is likely significantly larger due to a number of factors, including observer error, failure to report, or because the death was not observed. This conclusion was reached by the U.S. District Court in *Earth Island Inst. v. Donald Evans*, which discussed the problems with under-reporting of dolphin mortality, either because the death was not observed, or because the observer failed to properly report the dolphin death.³³ For example, in 2008, IATTC member governments investigated numerous

³¹ See IATTC 2008 Annual Report at Table 3c, available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2007ENG.pdf>; attached as Exhibit 8.. See 2009 Mortality Caused by DML Vessels, International Review Panel (IRP) Document IRP-48-05, available at: <http://www.iattc.org/PDFFiles2/IRP-48-05-LMD-DMLs-2009.pdf>; see 2008 Mortality Caused by DML Vessels, International Review Panel (IRP) Document IRP-47-06, available at: 2008: <http://www.iattc.org/PDFFiles2/IRP-47-06-LMD-DMLs-2008-2009.pdf>; attached as Exhibit 9.

³² See 2009 Mortality Caused by DML Vessels, International Review Panel (IRP) Document IRP-48-05, available at: <http://www.iattc.org/PDFFiles2/IRP-48-05-LMD-DMLs-2009.pdf> attached as Exhibit 9.

³³ See *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *35, upheld by *Earth Island Institute et al. v. Hogarth*, 484 F.3d 1123; at para. 63 in web version, available at: <http://bulk.resource.org/courts.gov/c/F3/484/484.F3d.1123.04-17018.html>

reported infractions such as observer harassment, sets or chases using explosives, and night sets.³⁴ Additionally, dolphin mortality figures do not include the millions more dolphins per year that are chased, stressed and injured by encirclement, with adverse consequences on reproductive levels and lifespan (as explained in more detail below).³⁵

39. While there is incidental bycatch of dolphins and other cetaceans in other fisheries, there is no conclusive evidence of a consistent pattern of intentional bycatch in those fisheries as is the case in the ETP.

3) *Dolphin Sets Result in Thousands More Dolphin Deaths than Other Methods*

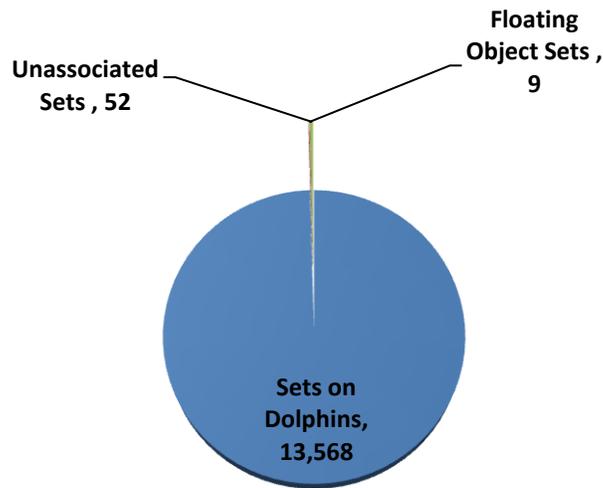
40. Intentionally setting on dolphins to catch tuna results in thousands more dolphin deaths per year when compared to other tuna fishing methods that are not associated with setting on dolphins, such as sets using floating objects or fish aggregating devices (FADs). The most recent data available to compare dolphin mortality across tuna fishing sets (dolphin sets, unassociated sets, and FADs) can be found in the IATTC's 2007 Annual Report. That shows that since the AIDCP went into effect in 1999, dolphin sets were responsible for over 99% of dolphin mortalities.³⁶

³⁴ See *Report on the International Dolphin Conservation Program*, Document MOP-21-05 (June 5, 2009) at pp. 19-22 available at: <http://www.iattc.org/Meetings2009/Meetings2009ENG.htm>; attached as Exhibit 10. The Court in *Earth Island Inst. v. Donald Evans* made similar findings, such as the fact that between 1993 and 2001, for instance, there were “3,193 reported uses of illegal explosives, 484 reports of night sets, and 94 reports of interference with observers.” *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *33 (compiled from IRP annual reports).

³⁵ See *Report of the Scientific Research Program under the International Dolphin Conservation Program Act*, Prepared by the Southwest Fisheries Science Center NOAA Fisheries National Oceanic and Atmospheric Administration, at 6- 7 (September 17, 2002) available at: http://www.earthisland.org/immmp/secret_report.pdf; relevant pages attached as Exhibit 10.

³⁶ See *2008 Annual Report of the IATTC* at Table 3c, available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2008.pdf> (showing tables of “all estimated bycatches of animals other than tunas and billfishes in the EPO on fishing trips with observers aboard, in numbers of individuals”); attached as Exhibit 8. The category for “marine mammals” in the table is comprised solely of dolphins. This can be shown when the numbers are compared with those reported in Table 5, estimated dolphin mortality for the years 1979-2008.

Reported Dolphin Mortality by Type of Set (1999-2008)³⁷



4) The Chase and Encirclement of Dolphins in the ETP is a Stressor on the Animals, with Adverse Implications on Reproduction and Lifespan.

41. Dolphin sets involve the crew of a large fishing vessel first locating a group of dolphins. “This method of fishing is known as “setting” because the fishermen use explosives, chase boats, and helicopters to drive the dolphins into the center of large nets, which then close like a purse around all that is trapped inside.”³⁸ The chase may last anywhere from twenty minutes to two hours before the fishermen finally drop a purse seine net into the water, encircling the dolphins and the tuna school beneath. “The tuna-dolphin bond is so strong that the tuna stay with the dolphins during this process, and tuna and dolphins are captured together in the net.”³⁹
42. One source explains the chase (using speedboats in particular⁴⁰) as follows:⁴¹

Once a dolphin herd has been located, the seiner launches its speedboats, which race into position outside the fleeing animals and then move ahead and turn them

³⁷ See 2008 Annual Report of the IATTC at Table 3c, available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2008.pdf> (showing tables of “all estimated bycatches of animals other than tunas and billfishes in the EPO on fishing trips with observers aboard, in numbers of individuals”); attached as Exhibit 8. The category for “marine mammals” in the table is comprised solely of dolphins. This can be shown when the numbers are compared with those reported in Table 5, estimated dolphin mortality for the years 1979-2008.

³⁸ See *Earth Island Institute v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007).

³⁹ See Southwest Fisheries Science Center, The Tuna Dolphin Issue, NOAA Fisheries Service, available at: <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408>; attached as Exhibit 1.

⁴⁰ As noted, the chase may also involve helicopters or explosives.

⁴¹ See *Dolphins and the Tuna Industry*, National Academy Press, at p. 49 (Washington, DC 1992), available at: http://www.nap.edu/openbook.php?record_id=1983&page=49; relevant pages attached as Exhibit 12.

while the seiner follows. The entire entourage changes the dolphin's swimming path into an inward bending arc. Both the speedboats and the churning vessel leave strong wakes and produce much underwater noise, which are thought to turn the dolphins (Norris et al., 1978). Shortly, the arc becomes a circle with the vessels now curving around in the second turn of the set. The average duration of the chase is one-half hour (M. Hall, personal commun., 1991).

The dolphins sometimes attempt to cut across ahead of the bows of the fast-moving seiner and to escape out through the relatively clear water ahead of the vessel. At the slightest hint that they might attempt this, the speedboats are dispatched ahead of the seiner to race in tight noisy circles in the clear water, beating it to a froth, in attempts to force the dolphins back into the wake spiral.

43. The intensity of the chase, deep wakes, and jarring sound of the boat engines leaves many dolphins disoriented and unable to escape.⁴² Those that do escape are likely to be chased and encircled again – sometimes up to three times in one day.⁴³ This is significant considering that dolphin herds in the ETP can number in the hundreds or thousands, demonstrating the sheer number of dolphins that can be involved in the chase and encirclement process in just one day.⁴⁴ Over the course of one year, there are thousands of intentional sets on dolphins. In 2008, for example, the AIDCP Executive Report noted there were 9,246 intentional sets on dolphins.⁴⁵
44. A 2002 report from NOAA explained that for northeastern offshore spotted dolphins, for example, “there are over 5,000 dolphin sets per year, resulting in 6.8 million dolphins chased per year and 2.0 million dolphins captured (encircled in purse seine nets) per year

⁴² See *Dolphins and the Tuna Industry*, National Academy Press, at p. 50 (Washington, DC 1992), available at: http://www.nap.edu/openbook.php?record_id=1983&page=49 (explaining how the dolphins’ echolocation “cannot easily penetrate the wake bubbles and that this sensory deficit may contribute to the mammal’s spiral course”); relevant pages attached as Exhibit 12.

⁴³ “The chase by helicopters and speed boats, capture in purse seine nets, and release of dolphins is a traumatic, hours-long process, and some schools of dolphins are chased and caught as often as three times in a single day.” See Earth Island Institute, International Marine Mammal Project, available at: <http://www.earthisland.org/immp/QandAdolphinSafe.html>; attached as Exhibit 13.

⁴⁴ Indeed, because dolphins travel in such large herds in the ETP, the AIDCP published technical guidelines advising that herds of 2,000 or more dolphins should not be set upon because of the risks of high mortality. See *Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds*, AIDCP 7th Meeting of the Parties (Manzanillo, MX, 24 June 2002) available at: <http://www.iattc.org/PDFFiles/MOP%207%20Large%20herd%20guidelines%20Jun%202002.pdf> ; attached as Exhibit 14.

⁴⁵ See *Executive Report on the Functioning of the AIDCP in 2008*, available at: <http://www.iattc.org/PDFFiles2/2008-AIDCP-Executive-Report.pdf> ; attached as Exhibit 15.

(numbers are means for 1998-2000).”⁴⁶ Similar findings were made for eastern spinner dolphins and coastal spotted dolphins (relative to their population size).⁴⁷

45. Even when dolphins are chased and captured but manage to escape, evidence shows the animals are under great stress during the chase and encirclement process, which can result in shortened life spans or reduced reproductive rates.⁴⁸ “However, the effect of dolphin sets on both measures of reproduction for NEPS dolphins demonstrates that the practice of setting on dolphins has population-level effects beyond the direct kill recorded by observers on fishing vessels. The decline in proportion with calves and increased length at disassociation with number of dolphin sets could be caused by stress (Myrick & Perkins 1995, Curry 1999, Reilly et al. 2005), increased predation (Perryman & Foster 1980), separation of mothers and calves (Archer et al. 2001, Weihs 2004, Edwards 2006), or induced abortion (Perrin et al. 2003, Chivers unpubl. data) resulting from the chase and encirclement procedure.”⁴⁹
46. The District Court in *Earth Island Inst. v. Donald Evans* also discusses how even though exact data were not available, evidence in Commerce’s study showed that dolphin calf mortality due to mother-calf separation during the chase “could be large.”⁵⁰ It also discusses the fact that chasing and encirclement of dolphins causes stress, even in short chases, and that available evidence supports a finding that such stress could result in delayed mortality.⁵¹
47. Thus, science supports the conclusion that even if a dolphin is not reported dead or does not appear to be seriously injured⁵² during or following the chase and encirclement process, this does not mean that the dolphin and its potential offspring will not be

⁴⁶ See *Report of the Scientific Research Program under the International Dolphin Conservation Program Act*, Prepared by the Southwest Fisheries Science Center NOAA Fisheries National Oceanic and Atmospheric Administration, at 6- 7 (September 17, 2002) (emphasis added) ; attached as Exhibit 11.

⁴⁷ See *Report of the Scientific Research Program under the International Dolphin Conservation Program Act*, Prepared by the Southwest Fisheries Science Center NOAA Fisheries National Oceanic and Atmospheric Administration, at 6- 7 (September 17, 2002) ; attached as Exhibit 11.

⁴⁸ See *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *31-32, upheld by *Earth Island Institute et al. v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007), amended 494 F.3d 757 (9th Cir. 2007).

⁴⁹ Cramer, Perryman, Gerrodette, *Declines in reproductive output in two dolphin populations depleted by the yellowfin tuna purse-seine fishery*, Marine Ecology Progress Series, Vol. 369: 273–285, at 282, October 13, 2008; attached as Exhibit 16. See also *Report of the Scientific Research Program under the International Dolphin Conservation Program Act*, Prepared by the Southwest Fisheries Science Center NOAA Fisheries National Oceanic and Atmospheric Administration, at 6- 7 (September 17, 2002) (“A review of scientific literature on stress in mammals indicated that tuna purse seine operations involve well recognized stressors in other wild animals, and it is plausible that stress from chase and capture could compromise the health of at least some of the dolphins involved...In the aggregate, the findings [of stress studies] support the possibility that purse seine fishing involving dolphins may have a negative impact on the health of some individuals.”) (emphasis added); attached as Exhibit 11.

⁵⁰ *Earth Island Inst. v. Donald Evans* , 2004 WL 1774221, at *26.

⁵¹ *Earth Island Inst. v. Donald Evans* , 2004 WL 1774221, at *31-32.

⁵² What constitutes “seriously injured” versus “injured” is relevant as this is a subjective finding by the observer and may contribute to underreporting of dolphin mortality.

adversely affected or die thereafter, with consequences for dolphin populations as a whole.

5) *Dolphin Populations in the ETP Have Not Recovered.*

48. U.S. law never changed to reflect the AIDCP definition because the Courts vacated Commerce’s findings of no significant adverse impact on dolphin populations in the ETP. During years of domestic litigation, extensive scientific evidence was studied and analyzed.⁵³ The Courts’ findings were based on studies conducted by Commerce, as well as outside sources.⁵⁴
49. Specifically, in analyzing whether science supported a finding that dolphin sets were having an adverse impact on dolphin populations in the ETP, the courts came to the following conclusions:
- i. Of two explanations offered, changes to the ecosystem and indirect effects from fishery, the best available scientific data show that the combined effects of the latter – including the separation of calves from their mothers, delayed stress effects, and under-reporting of mortality – can “explain the dolphins’ failure to recover, particularly given the intensity of the fishery.”⁵⁵
 - ii. Even though exact data were not available, evidence in Commerce’s study showed that dolphin calf mortality due to mother-calf separation during dolphin chasing “could be large.”⁵⁶
 - iii. Chasing and encirclement of dolphins causes stress, even in short chases, and available evidence supports a finding that such stress could result in shortened life spans or reduced reproductive rates.⁵⁷ Thus, simply because a dolphin is

⁵³ See *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37, upheld by *Earth Island Institute et al. v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007), amended 494 F.3d 757 (9th Cir. 2007); at paras. 53-59, 63, 66 in web version, available at: <http://bulk.resource.org/courts.gov/c/F3/484/484.F3d.1123.04-17018.html>.

⁵⁴ See, e.g., Cramer, Perryman, Gerrodette, *Declines in reproductive output in two dolphin populations depleted by the yellowfin tuna purse-seine fishery*, Marine Ecology Progress Series, Vol. 369: 273–285, at 282, October 13, 2008 (“Assessment models (Wade et al. 2007) estimate that NEPS dolphins are at 19% and ES dolphins at 29% of their pre-1959 abundance levels, the year that the yellowfin tuna purse-seine fishery began setting on dolphin schools. Given these reduced population sizes and the current low level of reported dolphin bycatch, recovery of both populations would be expected, but has not yet occurred (Gerrodette & Forcada 2005)”); attached as Exhibit 16.

⁵⁵ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37.

⁵⁶ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *26.

⁵⁷ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *31-32. See also e.g., Cramer, Perryman, Gerrodette, *Declines in reproductive output in two dolphin populations depleted by the yellowfin tuna purse-seine fishery*, Marine Ecology Progress Series, Vol. 369: 273–285, at 282, October 13, 2008 (“However, the effect of dolphin sets on both measures of reproduction for NEPS dolphins demonstrates that the practice of setting on dolphins has population-level effects beyond the direct kill recorded by observers on fishing vessels. The decline in proportion with calves and increased length at disassociation with number of dolphin sets could be caused by stress (Myrick & Perkins 1995, Curry 1999, Reilly et al. 2005), increased predation (Perryman & Foster 1980), separation of mothers and calves (Archer et al. 2001, Weihs 2004, Edwards 2006), or induced abortion (Perrin et al. 2003, Chivers unpubl. data) resulting from the chase and encirclement procedure.”); attached as Exhibit 16.

not dead or severely injured upon observer inspection does not mean that the dolphin and its potential offspring will not suffer thereafter, with consequences for the dolphin populations as a whole.

- iv. There is under-reporting of dolphin mortality, either because the death was not observed, or because the observer failed to properly report the dolphin death.⁵⁸

50. ***More recent studies do not change this conclusion.*** First, preliminary findings in studies published by NMFS scientists Larese and Chivers in 2008 and 2009 on spinner dolphin reproduction and age distribution “indicate a negative relationship between fishing effort and pregnancy rates.”⁵⁹ Second, “NMFS has also published a paper (Cramer *et al.* 2008) that argues, on the basis of aerial photogrammetric measurements of dolphin herds, that the reproductive output of spinner dolphins has declined over time.”⁶⁰
51. Third, in April 2008, NMFS updated prior reports on dolphin abundance with studies conducted in 2003 and 2006.⁶¹ This report found that estimates of population growth rate for two depleted dolphin stocks indicate these populations may be beginning to recover, although one dolphin species appears to be in decline.⁶² The report does not reach any concrete conclusions as to whether certain species are in fact recovering, the level of recovery, or whether such recovery will last. It also does not address how long it will take for recovery to healthy population levels, and whether such recovery is possible with continued chasing and netting of dolphins. Finally, the report states that additional studies are needed to truly assess recovery.⁶³

D. Incidental Bycatch of Non-Dolphin Species in the ETP

52. Incidental bycatch is common to all fisheries. There are different ways of dealing with bycatch, such as through site-specific management and improvements in fishing gear.⁶⁴ These methods can reduce incidental bycatch, although it is unlikely to be eliminated.

⁵⁸ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *35.

⁵⁹ See *Work Plan*, IDCP Scientific Advisory Board, 7th Meeting, La Jolla, CA, Document SAB-07-03 (October 30, 2009) available at: <http://www.iattc.org/Meetings2009/AIDCPMeetingOct09ENG.htm>; attached as Exhibit 17.

⁶⁰ See *Work Plan*, IDCP Scientific Advisory Board, 7th Meeting, La Jolla, CA, Document SAB-07-03 (October 30, 2009) available at: <http://www.iattc.org/Meetings2009/AIDCPMeetingOct09ENG.htm>; attached as Exhibit 17.

⁶¹ See *Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003*, NOAA-TM-NMFS-SWFSC-422 (April 2008) at page 1, available at: <http://swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-422.pdf>; attached as Exhibit 18.

⁶² See *Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003*, NOAA-TM-NMFS-SWFSC-422 (April 2008) at page 1, available at: <http://swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-422.pdf>; attached as Exhibit 18.

⁶³ See *Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003*, NOAA-TM-NMFS-SWFSC-422 (April 2008) at page 12-13, available at: <http://swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-422.pdf>; attached as Exhibit 18.

⁶⁴ See e.g., Letter to IATTC Commissioners from Earth Island Institute, Humane Society International and Animal Welfare Institute (April 16, 2008); (encouraging the IATTC to follow the program adopted by the Western and Central Pacific Tuna Commission that would allow for experimental time and area closures to reduce bycatch from purse seine fishing on FADs.); attached as Exhibit 19.

Common dictionary definitions of “bycatch” state that “bycatch” is “the portion of a commercial fishing catch that consists of marine animals caught unintentionally.”⁶⁵ By contrast, intentional bycatch is only common to the ETP in any large-scale scientifically-supported manner. Unlike incidental bycatch, intentional targeting guarantees mortality and/or serious injury, and intentional bycatch *can be* eliminated.

53. HSI’s Senior Scientist Naomi Rose further explains:

In the ETP, dolphins are deliberately targeted. This is different from incidental bycatch where animals are caught in fishing gear (e.g., nets, lines) by accident. In the ETP, the dolphins are an integral part of the fishing process. This guarantees they will be “taken” (as defined in the MMPA); tens of thousands of dolphins *will* be harassed, some will be harmed, and some killed. By contrast, in other fisheries where dolphins and other species are not intentionally targeted, there is only a varying probability (depending on the fishery) that some will be harassed, harmed or killed. Many fishing sets (of nets or lines) in these latter fisheries will result in zero “take”.

I am not aware of any other fishery in the world where a non-target animal is intentionally taken with the frequency and scale seen in the ETP. Not only did millions of dolphins die in the ETP historically as a result of intentional targeting, but tens of thousands more continue to be chased and harassed (and occasionally injured and killed) with scientifically proven implications, including impacts on life span and reproductive output. Many dolphins are taken multiple times during their lives – even during a single day.⁶⁶

54. The distinction between incidental bycatch and intentional targeting is important context for Mexico’s claims that while other fishing methods, such as FADs, can reduce dolphin mortality in the ETP, they lead to increased incidental bycatch of other species that is minimized when dolphin sets are used. IATTC data document captures of dolphin and non-dolphin species as a result of dolphin sets, floating object sets, and unassociated sets.⁶⁷ According to the IATTC 2008 Annual Report, when an animal is “captured” it may suffer one of three fates: “(1) they can be retained on board for utilization (catches); (2) they can be discarded dead or likely to die (bycatches); or (3) they can be released alive (releases).”⁶⁸ This is important because when reporting captures of billfishes (Table 3b) and non-tuna species such as marine mammals, sea turtles and sharks (Table 3c), the IATTC describes the tables as reporting “captures.” *This means that the figures do not necessarily represent mortality. Rather, the figures in these tables include species that are released alive and/or used for commercial purposes after capture.* Thus, while the

⁶⁵ See e.g., Merriam-Webster Online Dictionary (2010), Merriam-Webster Online (accessed March 26, 2010) available at: <http://www.merriam-webster.com/dictionary/bycatch> (Definition of bycatch) (emphasis added).

⁶⁶ See Affidavit of HSI’s Senior Scientist Dr. Naomi Rose; attached as Exhibit 7.

⁶⁷ See 2008 Annual Report of the IATTC at Tables 3a, 3b and 3c respectively available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2008.pdf>; attached as Exhibit 8.

⁶⁸ See 2008 Annual Report of the IATTC at page 10, available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2008.pdf>; attached as Exhibit 8.

capture rate for non-dolphin species and billfishes appears higher for sets on FADs than for dolphin sets, it is impossible to know (based on the level of detail in the IATTC report) how many of the animals reported in Tables 3b and c are in fact “bycatch” – i.e., discarded dead or likely to die.

55. Indeed, it is important to point out that the IATTC has resolutions governing bycatch generally, and bycatch of particular species such as sharks and sea turtles.⁶⁹ With respect to sea turtles, for example, the resolutions call for these animals to be released alive. Notably, recent data show that most sea turtles that are caught in purse seine tuna net sets are in fact released alive.⁷⁰ For this reason, the figures in Tables 3b and 3c of the 2008 IATTC Report must be analyzed knowing that they do not necessarily represent mortality.
56. The only figure that can be correlated with mortality is the figure in Table 3c dealing with marine mammal capture. There, the figures in each year are an exact match for dolphin mortality reported in Table 5.
57. There is no dispute that commercial fisheries result in incidental bycatch. However, such bycatch could be addressed through measures such as time and area closures. By contrast, the only way to eliminate dolphin bycatch is to not intentionally set on dolphins (FAD fishing has caused zero dolphin mortalities since 2004, and only 36 dolphin mortalities total between 1993 and 2003 (compared to thousands of dolphin mortalities using dolphin sets)).⁷¹

E. Fleet Capacity Is the Single Largest Threat to Tuna Stocks in the ETP

58. With respect to tuna stocks in particular, the IATTC 2008 Annual Report characterizes the data in Table 3a (tuna stocks) as “bycatch,” not capture. Mexico has long argued that sets on FADs have adverse consequences for juvenile tuna and therefore on tuna stocks overall as juveniles will not have a chance to mature.
59. The single largest threat to tuna stocks in the ETP, however, is in the increase in overall fishing pressure caused by the documented increase in large tuna vessels in the ocean, of which Mexico is a prime offender.⁷² At the June 2008 IATTC Meeting in Panama, the Commission staff “identified the capacity of the purse-seine fleet as the principal problem with respect to the conservation of yellowfin and bigeye tunas and the economic viability

⁶⁹ See <http://www.iattc.org/ResolutionsActiveENG.htm>.

⁷⁰ See *Compliance with IATTC Measures in 2008*, IATTC, Document COM-10-03 (REVISED June 5, 2009) at 3 available at <http://www.iattc.org/Meetings2009/IATTCandAIDCPMeetingJune09ENG.htm>; (showing that in both purse seine sets and FAD sets in 2008, observers did not report any sea turtle deaths, although five turtles were reported to be seriously injured.); attached as Exhibit 20.

⁷¹ See *2008 Annual Report of the IATTC* at Table 3c available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2008.pdf>; attached as Exhibit 8.

⁷² See e.g., Mexico’s estimated fleet capacity in 1999 was: 54 purse seiners, 47,411 cubic meters (IATTC 2000 Annual Report at p. 88) available at: <http://www.iattc.org/AnnualReportsENG.htm>. By 2009, Mexico’s fleet capacity grew to 61 purse seiners, 54,276 cubic meters (IATTC online vessel report) available at: <http://www.iattc.org/VesselRegister/VesselList.aspx?List=AcPS&Lang=ENG>; Attached as Exhibit 21

of the fisheries, and recommended that the Commission examine means to reduce the fleet size as soon as possible⁷³ ETP tuna catch records support the conclusion that as fleet capacity has increased, tuna catch has declined owing to decreased tuna stocks from overfishing. Indeed, tuna catch records show that total yellowfin catch in 2002 was 444,000 metric tonnes; catch of yellowfin in 2007 was only 173,000 metric tonnes, representing only 37% of the average catch between 1992-2006.⁷⁴

60. To address claims that FAD fishing in particular is having an adverse effect on tuna stocks, NGOs recommended that IATTC members regulate the number of FADs or impose science-based time and/or area closures on the use of FADs.⁷⁵ If FAD fishing truly presented a grave threat to tuna stocks, one would expect to see some regulatory measures in place. Yet, in 2008, there were no IATTC resolutions dealing with tuna conservation in the context of FAD fishing in the ETP, and very few unilateral measures to deal with the issue.⁷⁶
61. In June 2009, the IATTC did adopt Resolution C-09-01 at its 80th meeting. However, the Resolution is not primarily aimed at FAD fishing.⁷⁷ The Resolution acknowledges that as fleet capacity increases in the ETP, tuna stocks have declined.⁷⁸ The Resolution sets out a period of closures for 2009, 2010 and 2011, and such closures apply to all purse-seine vessels of IATTC capacity classes 4 to 6 (more than 182 metric tons carrying capacity), and to all longline vessels over 24 meters length overall, that fish for yellowfin, bigeye and skipjack tunas in the ETP.⁷⁹ FAD specific closures were not mentioned, although the

⁷³ See 78th Meeting of the IATTC, Minutes (June 2008) at 4; relevant pages attached as Exhibit 22.

⁷⁴ See IATTC 2008 Fishery Report at 8 and Tables A-1 and A-2, <http://www.iattc.org/PDFFiles2/FisheryStatusReport6ENG.pdf> (catch was up slightly in 2008) ; attached as Exhibit 23. The average catch figures for 1992 – 2006 are only for purse seine and pole-and-line vessels, however, such methods represent the vast majority of the catch. *Id.*

⁷⁵ See e.g., Letter to IATTC Commissioners from Earth Island Institute, Humane Society International and Animal Welfare Institute (April 16, 2008) (encouraging the IATTC to follow the program adopted by the Western and Central Pacific Tuna Commission that would allow for experimental time and area closures to reduce bycatch from purse seine fishing on FADs); attached as Exhibit 19.

⁷⁶ See *Compliance with IATTC Measures in 2008*, IATTC, Document COM-10-03 (REVISED June 5, 2009) at Appendix A available at <http://www.iattc.org/Meetings2009/IATTCandAIDCPMeetingJune09ENG.htm>; attached as Exhibit 20.

⁷⁷ See Resolution on a Multinational Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2009-2011, Resolution C-09-01, available at: <http://www.iattc.org/PDFFiles2/C-09-01-Tuna-conservation-2009-2011.pdf>; attached as Exhibit 24.

⁷⁸ See Resolution on a Multinational Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2009-2011, Resolution C-09-01, available at: <http://www.iattc.org/PDFFiles2/C-09-01-Tuna-conservation-2009-2011.pdf> at 1; attached as Exhibit 24.

⁷⁹ See Resolution on a Multinational Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2009-2011, Resolution C-09-01, available at: <http://www.iattc.org/PDFFiles2/C-09-01-Tuna-conservation-2009-2011.pdf> at 1; attached as Exhibit 24.

Resolution calls for the development of a pilot program for research into FADs used for tuna fishing in the ETP.⁸⁰

F. Consumer Preference and Protection

62. Consumer concern over dolphins being killed in association with tuna fishing in the ETP dates back several decades. In the 1980s, for example,

Biologist Sam LaBudde learned about the dolphin slaughter, [and] he drove across the border to Mexico and managed to get hired by the owner of a Panamanian fishing boat. Once aboard he surreptitiously videotaped the dolphin slaughter. LaBudde's footage provided the first graphic evidence that tuna fishermen were indiscriminately slaughtering dolphins. LaBudde testified before the United States Congress and the footage was shown on national television, provoking outrage across the country. In the months that followed, LaBudde worked with the Earth Island Institute and the Marine Mammal Fund to launch the most successful consumer boycott in U.S. history. By spring of 1990, the three major tuna brands agreed to process only dolphin-safe tuna, resulting in a 95 percent reduction in dolphin kills. Months later LaBudde returned to sea, this time to document open-ocean driftnetting, a destructive fishing method using nets 50 to 60 kilometers long. With this video footage, LaBudde led a campaign that resulted in a 1992 United Nations resolution banning the use of driftnets. Later he also lobbied for the passage of legislation which banned imports of tuna that is not dolphin-safe into the nations of the European Community.⁸¹

63. The film footage and boycotts, combined with letters from schoolchildren and other media exposure of the issue led to adoption of private dolphin safe policies by U.S. tuna-canning companies.⁸² Erik Bloemendaal, spokesman for StarKist, said the footage “crystallized the issue for consumers. They told us they don’t want us to kill dolphins.”⁸³ StarKist Tuna’s parent company, Heinz, was the first to announce a dolphin safe policy in April 1990.⁸⁴ Bumble Bee and Chicken of the Sea immediately followed and adopted their own dolphin safe policies in April 1990.⁸⁵ The dolphin safe policies, which are now

⁸⁰ See Resolution on a Multinational Program for the Conservation of Tuna in the Eastern Pacific Ocean in 2009-2011, Resolution C-09-01, available at: <http://www.iattc.org/PDFFiles2/C-09-01-Tuna-conservation-2009-2011.pdf> at 1; attached as Exhibit 24.

⁸¹ See *Sam LaBudde*, recipient of the Goldman Environmental Prize, North America 1991, available at: <http://www.goldmanprize.org/node/123> (emphasis added); attached as Exhibit 2.

⁸² See *A New Storm Erupts over Saving the Dolphins*, The New York Times (Dec. 8, 1990); attached as Exhibit 2.

⁸³ See *A Filmmaker Crusades to Make Seas Safe for Gentle Dolphins*, PEOPLE MAGAZINE, Vol. 34, No. 5 (August 6, 1990) available at: <http://www.people.com/people/archive/article/0,,20118400,00.html> (explaining how Sam LaBudde was on board a Panamanian purse seiner and filmed the death of numerous dolphins that drowned in the net or were crushed by the power block used to haul in the nets); attached as Exhibit 2. LaBudde’s film showed how the dead or dying dolphins were thrown back into the water, while the tuna was kept on board. *Id.*

⁸⁴ See *Epic Debate Led to Heinz Tuna Plan*, New York Times (Apr. 16, 1990); attached as Exhibit 2.

⁸⁵ See Marketing Materials and Dolphin-Safe Policy of StarKist, Bumblebee and Chicken of the Sea; attached as Exhibit 3.

backed by the U.S. Dolphin Safe label and which remain in effect today,⁸⁶ commit the companies to not purchase any tuna caught in association with dolphins.⁸⁷

64. As laid out earlier, Senator Boxer made clear that consumers' concerns were not just with dolphin death, but with the process of chasing, harassing and encircling dolphins. Indeed, she made clear that this was the purpose of the 1990 law.⁸⁸
65. A 1999 survey conducted by Yale University School of Forestry and Environmental Studies similarly found that four-fifths of responding Americans "indicated a willingness to pay 'a little more for fish' if fishing practices resulted in fewer numbers of marine mammals being harmed or killed" and nearly 90% of respondents "indicated certain fishing practices should be outlawed if they resulted in marine mammals being killed, even if this resulted in 'slight increases in the price of fish.'"⁸⁹ Respondents also distinguished between incidental and intentional bycatch: "Nearly 60% objected to penalizing commercial fishermen who unintentionally harmed marine mammals"⁹⁰
66. The Dolphin Safe label was (and is) available to all countries seeking to use it and respond to consumer demand. The U.S. moved some of its tuna fishing fleet to the Western Pacific, and halted all dolphin sets in the ETP by the mid 1990s.⁹¹ Notably, there were also some Mexican processing and fishing companies using and supporting the U.S. Dolphin Safe label in the mid 1990s. Consider the following statement to Congress of Mr. Francisco Valdez, President of Seafood Emporium Inc. expressing opposition to the proposed redefinition of "Dolphin Safe" tuna:

⁸⁶ See *Submission of Randi Thomas on behalf of the National Fisheries Institute to U.S. Trade Representative*, USTR Docket 2008-0038 (May 30, 2009) ; attached as Exhibit 25.

⁸⁷ See, e.g., StarKist Dolphin Safe Policy, available at: <http://www.starkist.com/template.asp?section=aboutUs/index.html>; attached as Exhibit 3. The policy also states: "StarKist continues its practice of refusing to purchase tuna caught with gill or drift nets, which are known to be dangerous to many forms of marine life. StarKist condemns the use of these indiscriminate fishing methods that trap dolphins, whales, and other marine life along with the intended catch of fish." *Id.* See also Bumblebee Dolphin Safe Policy, available at: <http://www.bumblebee.com/FAQ/#2>; attached as Exhibit 3.

⁸⁸ See *International Dolphin Conservation Program Act*, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess (April 30, 1996) (Statement of Senator Barbara Boxer) ; attached as Exhibit 4. At the time the U.S. law went into effect, less was known about the harmful effects of mercury on human health. Today, however, recent studies have shown that tuna is a major source of mercury exposure. Due to the longer exposure of larger and older tuna that swim beneath dolphins in the ETP, these tuna are likely to have higher mercury concentrations than tuna caught by other means. See *Is our Tuna "Family Safe"? Mercury in America's Favorite Fish*, Defenders of Wildlife, full report available at: http://www.defenders.org/programs_and_policy/habitat_conservation/marine/mercury-tuna/.

⁸⁹ See Kellert, Stephen R., *American Perceptions of Marine Mammals and their Management*, Yale University School of Forestry and Environmental Studies at p. 14 (May 1999) ; attached as Exhibit 26.

⁹⁰ See Kellert, Stephen R., *American Perceptions of Marine Mammals and their Management*, Yale University School of Forestry and Environmental Studies at p. 14 (May 1999) ; attached as Exhibit 26.

⁹¹ See U.S. Submission at pp. 13-14.

My name is Francisco Valdez and I am President of Seafood Emporium Inc. The company imports canned seafood products into the United States from Mexico. *We import canned tuna from processing and fishing companies in Mexico that have dolphin-safe policies that require no tuna to be purchased from vessels that set nets on dolphins at any time during their fishing operations.*

We at Seafood Emporium Inc., along with Mexican tuna companies Productos Pesqueros de Bahia Tortugas, Operadores y Asesores Maritimos, S.A. de C.V., and Gonzalez, Perez y Reyes S.A. de C.V., strongly oppose any weakening of the current U.S. dolphin-safe labeling laws or any legislation weakening the U.S. Marine Mammal Protection Act. *We strongly oppose S.1420 and H.R. 2823 not only because passage of these bills would be an enormous step backward in the progress made to protect dolphins and the marine environment in the Eastern Tropical Pacific, but it would also create consumer confusion and undermine consumer confidence in the steps taken by tuna canners and distributors worldwide who have adopted strict dolphin-safe policies.*

Thanks to these policies, Mexico is expected to export 50,000 tons of Dolphin Safe Tuna to packers all over the world out of the 150,000 tons of tuna expected to be caught in 1996, as well as 1.2 million cases of canned tuna or 5,000 tons more in this first year of Mexican canners working under the Marine Mammal Protection Act.

Passage of S.1420 and H.R. 2823 will undermine the efforts of Mexican tuna canneries that have gone dolphin-safe by allowing companies and fishing owners in Mexico that do not have dolphin-safe policies to flood the U.S. market with their cheap tuna caught on dolphins. There are currently several tuna companies in Mexico that are considering adopting dolphin-safe policies, but are hesitant due to concern that the current U.S. dolphin-safe definition will be weakened.

By allowing tuna caught by net setting on dolphins to be labeled dolphin-safe, you remove the incentive for those Mexican flag tuna seiners that are currently operating dolphin-safe to fish without setting nets on dolphins. Why should they make the effort not to set nets on dolphins when their competition can intentionally set nets on dolphins and call their tuna dolphin-safe?

We fully support the environmental leaders in Congress, especially Senator Boxer and Biden, and Representatives Studds and Miller, who are totally opposed to weakening the current U.S. definition of dolphin-safe. On behalf of the tuna companies in Mexico that have adopted dolphin-safe policies which prohibit the setting of nets on dolphins, I strongly urge President Clinton and the Members of Congress to oppose S.1420 and H.R. 2823 and to co-sponsor S.1460 and H.R. 2856.⁹²

67. Outside of the U.S., consumer pressure has led hundreds of processing and fishing companies, as well as retailers, importers, distributors, agents and brokers to seek

⁹² See Statement of Mr. Francisco Valdez, President of Seafood Emporium Inc. expressing opposition to the proposed redefinition of "Dolphin-Safe" tuna (emphasis added); attached as Exhibit 27.

approval as “dolphin safe” by Earth Island Institute (EII), meaning that they pledge the following:

- 1) No intentional chasing, netting or encirclement of dolphins during an entire tuna fishing trip;
- 2) No use of drift gill nets to catch tuna;
- 3) No accidental killing or serious injury to any dolphins during net sets;
- 4) No mixing of dolphin-safe and dolphin-deadly tuna in individual boat wells (for accidental kill of dolphins), or in processing or storage facilities; and
- 5) Each trip in the Eastern Tropical Pacific Ocean (ETP) by vessels 400 gross tons and above must have an independent observer on board attesting to the compliance with points (1) through (4) above.⁹³

68. HSI and WCL recognize that the measure at issue in this dispute is the U.S. law and regulation; however, there is limited public information about which companies avail themselves of the U.S. label, although public information is available on the EII website. Since the EII dolphin safe criteria are similar to criteria in the U.S. law (*i.e.*, no intentional setting on dolphins), this information is relevant to demonstrating the extent to which companies around the world have pledged not to set on dolphins (among the other EII criteria).

69. Indeed, according to EII, over 90% of the world’s tuna canners (300 companies in 51 nations) pledge not to sell tuna unless it meets the EII criteria.⁹⁴ EII’s website states that “The vast majority of tuna companies around the world -- processors, importers, brokers, and retailers -- have repeatedly made it clear that they are committed to the use of a dolphin safe label that prohibits all chase and capture of dolphins. There is widespread opposition to the use of any weakened unscientific labels. Such use would pose unacceptable risks to dolphins and also risks destroying consumer confidence in the dolphin safe label that has been built over the past eighteen years.”⁹⁵

70. It is also notable that a number of fishing and processing companies in AIDCP Member countries such as Ecuador, El Salvador, Colombia, Costa Rica, Guatemala, and Panama have been approved as dolphin safe under EII criteria.⁹⁶ Moreover, according to the U.S. submission, there are Ecuadorian vessels that fish for tuna in the ETP that qualify for the U.S. Dolphin Safe label by “using techniques other than setting on dolphins to catch tuna...”⁹⁷ This is especially significant considering that Ecuador is a developing country for whom the costs of compliance with U.S. Dolphin Safe and EII criteria do not appear

⁹³ Earth Island Institute (EII) Website, *available at* <http://www.earthisland.org/dolphinSafeTuna/consumer>; attached as Exhibit 28.

⁹⁴ Earth Island Institute (EII) Website, *available at* <http://www.earthisland.org/dolphinSafeTuna/consumer> (emphasis added); attached as Exhibit 28.

⁹⁵ EII 2009 Annual Report, *available at*: <http://www.earthisland.org/dolphinSafeTuna/assets/2009MonitorReport.pdf>; attached as Exhibit 28.

⁹⁶ See EII Website, list of approved tuna processing and fishing companies, *available at*: <http://www.earthisland.org/dolphinSafeTuna/DolphinSafeCanners.html>; attached as Exhibit 28.

⁹⁷ See U.S. Submission at p 15.

to have been an obstacle (Ecuador is defined by the World Bank as a lower-middle income country, versus Mexico which is an upper-middle income economy).⁹⁸

G. Mexico Exports Millions of Dollars of Tuna to the U.S.

71. The U.S. Dolphin Safe label is a voluntary mechanism available to any company that wishes to use the label. It does not prohibit countries from exporting tuna to the United States. Since 1990, the year the U.S. Dolphin Safe label went into effect, Mexican exports of tuna have totaled approximately \$180 million according to statistics from the NMFS.⁹⁹ In 2009 alone, Mexico exported \$13 million of tuna to the U.S.¹⁰⁰

V. LEGAL ISSUES

72. In Mexico's request for consultations and request for establishment of a panel,¹⁰¹ it identified three U.S. measures related to the importation, marketing and sale of tuna and tuna products that form the basis of this dispute:

- *United States Code*, Title 16, Section 1385 ("Dolphin Protection Consumer Information Act");
- *Code of Federal Regulations*, Title 50, Section 216.91 ("Dolphin-safe labeling standards") and Section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels");
- The ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

73. According to Mexico, the "US measures have the effect of prohibiting the labelling of Mexican tuna and tuna products as 'dolphin-safe', even when the tuna has been harvested by means that comply with the multilaterally agreed 'dolphin-safe' standard established by the Inter-American Tropical Tuna Commission, while tuna products from most other countries, including the United States, are allowed to be labelled as 'dolphin-safe'."¹⁰²

⁹⁸ See *The World Bank, Country Groups*, available at:

http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html#Low_income; attached as Exhibit 29.

⁹⁹ See *National Marine Fisheries Service, Fisheries Statistics and Economics Division*, Imports of Tuna from 1990-year to date 2010; attached as Exhibit 30.

¹⁰⁰ See *National Marine Fisheries Service, Fisheries Statistics and Economics Division*, Imports of Tuna from 1990-year to date 2010; attached as Exhibit 30.

¹⁰¹ See Request for Consultations by Mexico, *US-Tuna/Dolphin*, 28 October 2008, DS381/1, G/L/858, G/TBT/D/32; Request for the Establishment of a Panel by Mexico, *US-Tuna/Dolphin*, 10 March 2009, DS381/4. Because Mexico's first submission is not available to the public, our brief focuses on claims Mexico raised in its request for consultations and request for a panel, as well as information gleaned from review of the U.S. submission (which has been made public). Where applicable, we address additional issues that Mexico has raised in other fora, such as AIDCP meetings or in the press, and which may have relevance in this dispute.

¹⁰² See Request for Consultations by Mexico, *US-Tuna/Dolphin*, 28 October 2008, DS381/1, G/L/858, G/TBT/D/32; Request for the Establishment of a Panel by Mexico, *US-Tuna/Dolphin*, 10 March 2009, DS381/4.

74. Mexico alleges that the U.S. measures are inconsistent with its obligations under Articles I and III of the GATT 1994, and Article 2 of the TBT Agreement.¹⁰³

75. These claims are addressed below.¹⁰⁴

A. GATT Articles I:1 and III:4

76. At the heart of Articles I:1 and III:4 is the principle of non-discrimination. These articles require (in their simplest form) that no less favourable treatment be afforded to like domestic and imported products, and among all like imported products. Here, the U.S. measures are consistent with these obligations. They do not discriminate among like products¹⁰⁵ from any source, and are not applied in a manner that affords protection to U.S. production of tuna and tuna products.

1) GATT Article I:1

77. GATT Article I:1 provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,*¹⁰⁶ any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

78. Article I:1 is designed to prevent discrimination among like products “originating in or destined for different countries.”¹⁰⁷ “Article I:1 plainly imposes upon WTO Members the

¹⁰³ See Request for the Establishment of a Panel by Mexico, *US-Tuna/Dolphin*, 10 March 2009, DS381/4. In its request for consultations, Mexico additionally alleged that the U.S. measures were inconsistent with its obligations under Articles 5, 6, and 8 of the TBT Agreement. As these claims are not listed in Mexico’s panel request, we have not addressed them in this brief.

¹⁰⁴ HSI and WCL support the legal analysis contained in the U.S. submission. This amicus brief summarizes those points, and points out additional factual support where appropriate.

¹⁰⁵ This brief does not address the issue of “like product.” The arguments contained herein do not concede that the products are “like products.” Rather, this brief proceeds with an analysis under the relevant articles should the panel determine that the products are “like” based on the arguments of the parties.

¹⁰⁶ * “The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 (b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application. The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.”

¹⁰⁷ See Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R at para. 78 (adopted 19 June 2000).

obligation to treat ‘like products ... equally, irrespective of their origin’.”¹⁰⁸ As the facts demonstrate, the U.S. measures treat all imports of like tuna and tuna prospects equally.

79. First, the U.S. Dolphin Safe label is a voluntary label that can be used by any country if it so chooses. The label does not restrict trade in tuna products; such products can continue to be sold in the U.S. with or without the Dolphin Safe label. In the first Tuna/Dolphin GATT Panel, the same conclusion was reached; namely, that “the labeling restrictions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the ‘Dolphin Safe’ label.”¹⁰⁹ Indeed, while Mexico chooses not to avail itself of the Dolphin Safe label, it continues to sell millions of dollars of tuna to the U.S. every year, illustrating that the label is not a barrier to trade in Mexican tuna products. It is also important to point out that in the mid-1990s, Mexican companies were using the U.S. Dolphin Safe label. This illustrates that they have the capacity to meet the label’s criteria, they have just chosen not to do so in recent years.
80. Second, the Dolphin Safe label applies equally to all vessels fishing in the ETP – regardless of country flag. The law is based on the geographic location of the ETP and its known association of tuna and dolphins, not on country of origin. This is also a conclusion reached by the first GATT panel in *United States- Restrictions on Imports of Tuna*.¹¹⁰
81. Mexican vessels are subject to the same requirements as are applicable to U.S. vessels and vessels from all other countries. The law does not discriminate on its face or otherwise on this point. As discussed, *Mexican companies themselves took advantage of the U.S. Dolphin Safe label* (at least until the mid-1990s). Moreover, over 90% of the world’s companies are certified as dolphin safe by Earth Island Institute (EII) (the requirements of which are nearly identical to U.S. law in that they prohibit intentional setting on dolphins).¹¹¹ Mexico has the exact same opportunity as the U.S. and every other country to avail itself of the Dolphin Safe label. Any advantage that Mexico perceives is available to the U.S. or other countries is not due to the design or application of the law. Rather, it is due to consumer preference for dolphin safe products. The U.S. law safeguards that preference by providing a harmonized definition of “dolphin safe,” thereby preventing consumer fraud.
82. Third, identical requirements apply to all sources fishing outside of the ETP where it is also determined that a “regular and significant” association with dolphins occurs. While no such determination has been made, and there is no conclusive evidence that a similar association occurs elsewhere, the law nevertheless foresees this could be a possibility. This ensures identical criteria apply for *all* sources in *all* fisheries in which intentional dolphin setting is a risk or common practice. There is no “advantage, favour, or privilege” accorded to other WTO Members that is not also available to Mexico.

¹⁰⁸ See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R at para. 89 (adopted 20 April 2004).

¹⁰⁹ See *United States- Restrictions on Imports of Tuna*, circulated on 3 September 1991 at para. 5.42 (not adopted).

¹¹⁰ See *United States- Restrictions on Imports of Tuna*, circulated on 3 September 1991 at para. 5.43 (not adopted).

¹¹¹ <http://www.earthisland.org/dolphinSafeTuna/consumer/>; attached as Exhibit 28.

83. That the U.S. applies different Dolphin Safe labeling criteria to fisheries where there is no regular association of tuna and dolphins, and therefore no risk of fishing methods that exploit that association, is not surprising, nor relevant. “Incidental bycatch” of marine mammals is unfortunately common to all fisheries. Bycatch is not typically intended. International and regional agreements, as well as leading researchers and biologists, continue to try to reduce incidental bycatch through methods such as temporary closures or innovations to fishing gear. By contrast, “intentional bycatch” of marine mammals is only common to the ETP where the association of tuna and dolphins is exploited as a means of catching tuna. Only in the ETP do some countries intentionally set on dolphins, resulting in high levels of dolphin mortality (not to mention long-term adverse effects on dolphin populations) that could have been avoided. Intentional setting on dolphins is never safe, and harm can never be eliminated.¹¹² Drawing a distinction based on this, but not country flag, does not discriminate against imported products.
84. Fourth, there is also no “de facto” discrimination. Mexico has argued that while it is able to sell in the U.S. market, its inability to use the label results in lost market share and the label operates as a de facto embargo discriminating against Mexican products.¹¹³ The circumstances here do not warrant a finding that the U.S. measures constitute “de facto” discrimination.
85. Indeed, many countries that fish in the ETP sell their tuna products in the U.S., including Mexico. Again, any advantage that Mexico perceives is being afforded to the U.S. or other imported like products (by way of importers’ purchasing decisions) is not about discrimination, but rather is a response to consumer preference for tuna products that are “dolphin safe.” Like the U.S. and all other countries whose vessels fish in the ETP, Mexico could choose to use the Dolphin Safe label (as it has done in the past) and sell a dolphin safe product in the U.S. It could change its fishing method (in all or some instances), or it could seek out opportunities outside of the ETP.
86. Instead of choosing to use the Dolphin Safe label and compete with other products that meet consumer preference, however, Mexico is intentionally choosing not to meet the label’s criteria and calling such choice “de facto” discrimination. Mexico does not want to give up on intentional dolphin sets because the largest and most lucrative yellowfin tuna swim beneath the dolphin herds. Mexico does not want to change fishing methods even though to do so would not entail significant costs or changes to fishing gear (e.g., they could use the purse seine nets to fish on logs or FADs). The U.S. law does not single out Mexico, however, and the dolphin safe requirements are no more burdensome for Mexico than they are for the U.S. or any other country fishing in the ETP. The only distinction is that Mexico wants to be able to continue its current fishing practices without disruption, despite science-based findings that such practices are having adverse consequences on dolphin populations.

¹¹² See e.g., Affidavit of HSI Senior Scientist Dr. Naomi Rose; attached as Exhibit 7.

¹¹³ See *Tuna Dolphin Update*, International Centre for Trade and Sustainable Development (ICTSD), Vol. 13, No. 1 (March 2009) available at: <http://ictsd.org/i/news/bridges/44208/>; *US Commerce Department Suspends Changes to ‘Dolphin Safe’ Tuna Label*, International Centre for Trade and Sustainable Development (ICTSD), Vol. 3, No. 1 (January 23, 2009) available at: <http://ictsd.org/i/news/biores/9186/>. Articles attached as Exhibit 31.

87. Other AIDCP Members like the United States, Ecuador, Costa Rica, El Salvador, Guatemala, Panama and Peru have companies that meet the requirements for dolphin safe under the EII criteria (again, there is no public information HSI and WCL are aware of that documents which companies/countries are availing themselves of the U.S. Dolphin Safe label).¹¹⁴ Many of these countries do not have an economic advantage over Mexico that allows them to meet the EII or U.S. Dolphin Safe criteria (*e.g.*, as mentioned earlier, Ecuador is considered to have a lower-middle economy by the World Bank whereas Mexico has an upper-middle economy). There can be no reasonable argument that the costs of compliance for Mexico are unlike the costs of compliance faced by other countries wishing to use EII or U.S. Dolphin Safe criteria – especially since at one time, there were processing and fishing companies in Mexico that met the U.S. Dolphin Safe requirements.
88. Moreover, Mexico’s long standing claims that intentional setting on dolphins is more sustainable – and therefore less costly – from an ecosystem perspective is without relevance in this dispute. The measures at issue are targeted specifically at dolphin conservation and consumer concern over buying products that are falsely labeled as dolphin safe. For these purposes, the U.S. measures apply equally to all countries depending on the fishing method used and the geographic location of the fishery.
89. Claims about bycatch of non-dolphin species are simply a red herring. In any event, and as explained in detail above, “incidental” bycatch of non-dolphin species in the ETP as a result of fishing methods other than dolphin sets can be managed through various mechanisms, including site-specific closures. Additionally, Mexico’s claims that non-dolphin sets – such as sets on FADs – are leading to depletion of tuna stocks are misleading. As mentioned, the IATTC itself has recognized that fleet overcapacity is the single largest threat to tuna stocks. If sets on FADs were such a significant threat to tuna stocks, one would expect to see FAD-specific measures in place to mitigate such a threat. Yet, to date, the IATTC has not taken any FAD-specific measures to address this.
90. In sum, the U.S. measures are not inconsistent with GATT Article I:1 as they allow for free competition of all imported like tuna products in the U.S., whether the Dolphin Safe label is or is not used.

2) GATT Article III:4

91. GATT Article III:4 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party 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.

¹¹⁴ See EII Website, list of approved tuna processing and fishing companies; attached as Exhibit 28.

92. As set forth above in the Section discussing GATT Article I:1, the U.S. Dolphin Safe label does not result in discrimination among domestic or imported like tuna products.¹¹⁵ It is origin neutral, and consistent with GATT Article III:4.¹¹⁶

B. TBT Agreement Article 2 – Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

93. Mexico states in its panel request that the U.S. measures are inconsistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement.¹¹⁷ Before analyzing whether the U.S. measures are contrary to the cited TBT Agreement Articles, it is first necessary to determine whether the U.S. measures are a technical regulation subject to the requirements in those articles.

1. The U.S. Measures Are Not a Technical Regulation

94. Annex 1.1 of the TBT Agreement defines a technical regulation as a:

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

95. In prior disputes, the Appellate Body has explained that a document must meet three criteria in order to fall within the definition of a technical regulation:

The document must apply to an identifiable product or group of products;

The document must lay down one or more characteristics of the product; these product characteristics may be intrinsic, or they may be related to the product; and

Compliance with the product characteristics must be mandatory.¹¹⁸

96. The U.S. measures at issue here do not constitute a technical regulation, and are therefore not subject to the requirements of Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

¹¹⁵ “For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are ‘like products’; that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’; and that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.” See *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WT/DS161/AB/R, at para. 133 (adopted 10 January 2001).

¹¹⁶ To avoid repetition, HSI and WCL did not include legal analysis of Mexico’s claims under GATT Article III:4 as they are sufficiently addressed in the preceding section.

¹¹⁷ See Request for Establishment of a Panel by Mexico, WT/DS381/4 (10 March 2009).

¹¹⁸ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001 at paras. 66-70 (“EC-Asbestos”); *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002 at para. 176 (“EC-Sardines”).

97. HSI and WCL refer the panel to the U.S. submission for a discussion of why these measures do not meet the criteria for a “technical regulation.” In short, a key aspect in this analysis is that the measures are voluntary, not mandatory. The U.S. measures do not require that all tuna products be labeled Dolphin Safe, nor do they require certain information to be contained on a label. In this regard, even tuna products that are not Dolphin Safe are able to freely enter the U.S. market. The measures simply provide a choice for tuna and tuna product companies to engage in certain fishing practices that would enable the addition of a Dolphin Safe label to a given tuna product. If companies choose not to comply with the Dolphin Safe criteria, they cannot use the label, but they are not prohibited from selling or marketing their tuna product in the United States.
98. Assuming *arguendo* that the panel finds the U.S. measures are a technical regulation, they are not contrary to Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

2. *The U.S. Measures Are Not Inconsistent with Article 2.1 of the TBT Agreement*

99. Article 2.1 of the TBT Agreement states:

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

100. The same reasoning as applied above in the sections analyzing GATT Articles I:1 and III:4 applies here. The facts show that the U.S. measures do not accord treatment less favourable – on a “de jure” or “de facto” basis - to the Mexican tuna products as is accorded to like products of national origin and to like products originating in any other country.

3. *The U.S. Measures Are Not Inconsistent with Article 2.2 of the TBT Agreement*

101. Article 2.2 of the TBT Agreement states:

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 fulfill a legitimate objective, taking account of the risks non-fulfillment 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.

102. Mexico states in its panel request that the U.S. measures have the effect of creating unnecessary obstacles to trade.¹¹⁹

a. Legitimate Objective

103. While there is limited jurisprudence on TBT Article 2.2, it seems that the first step should be identification of a “legitimate objective.” This will then inform the rest of the analysis. Although neither the panel nor the Appellate Body in *EC-Sardines* made any findings with respect to Article 2.2, the panel did explain that Article 2.2 lists “examples of objectives which are considered legitimate under the TBT Agreement. As indicated by the phrase ‘inter alia’, this list is illustrative and allows for the possibility that other objectives, which are not explicitly mentioned, may very well be legitimate under the TBT Agreement.”¹²⁰

104. Further, in discussing the phrase “legitimate objective pursued” in the context of Article 2.4, the panel in *EC-Sardines* said that “‘legitimate objectives’ referred to in Article 2.4 must be interpreted in the context of Article 2.2....”¹²¹ The panel continued by recalling that the panel in *Canada – Pharmaceuticals* defined the related term “legitimate interest” as “a normative claim calling for protection of interests that are ‘justifiable’ in the sense they are supported by relevant public policies or other social norms.”¹²²

105. Thus, a legitimate objective may be one of those listed in Article 2.2, or another objective calling for protection of justifiable interests supported by relevant public policies or other social norms.

106. Here, Congress explicitly laid out the purpose of the U.S. measures as:

The Congress finds that-

Dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the Eastern Tropical Pacific and high seas driftnet fishing in other parts of the world;

It is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and

Consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.¹²³

¹¹⁹ See Request for Establishment of a Panel by Mexico, WT/DS381/4 (10 March 2009).

¹²⁰ *EC-Sardines*, Panel Report, at para. 7.118 (upheld by the Appellate Body at para. 286).).

¹²¹ *EC-Sardines*, Panel Report, at para. 7.118 (upheld by the Appellate Body at para. 286).

¹²² *EC-Sardines*, Panel Report, at para. 7.121 (not explicitly reviewed by the Appellate Body) (citations omitted).

¹²³ 16 U.S.C. § 1385.

107. The goal of protecting consumers from false labeling on all tuna products – regardless of country of origin – fits squarely within Article 2.2’s explicit list of legitimate objectives, *i.e.*, prevention of deceptive practices. Moreover, consumer deception was accepted by the panel in *EC-Sardines*, and upheld by the Appellate Body, as a legitimate objective.¹²⁴ The protection of dolphins is also a legitimate objective, and again, falls squarely within the illustrative list set forth in Article 2.2 – namely, the protection of animal life or health.
108. In the 1980s, following footage of thousands of dolphin deaths due to intentional setting on dolphins in the ETP, consumer boycotts and public outrage led to the adoption of private dolphin safe labeling policies and ultimately to the U.S. law prohibiting use of the Dolphin Safe label when vessels intentionally set on dolphins. Consumers wanted (and still want) guarantees that their tuna products would not be harvested in association with dolphins.
109. Not only was consumer protection an underpinning of the 1990 U.S. Dolphin Safe labeling law, but it has continued to be a priority for U.S. lawmakers. In 1996, Senator Boxer explained that a primary motivation of the U.S. Dolphin Safe labeling law in 1990 (that still applied at the time of her testimony) was consumer concern not only about observed dolphin deaths immediately following a dolphin set, but also about the chase and encirclement process that harasses and stresses the animals with longer-term effects on health and lifespan. Further, in 2003, when it appeared that the U.S. Dolphin Safe label would be weakened following Commerce’s final scientific study (which was later vacated by the courts), Senators Hollings and Boxer introduced S.203, The Truth in Tuna Labeling Act of 2003.¹²⁵ Senator Hollings explained:

The ‘dolphin safe’ label came about as an entirely voluntary consumer label. It was created in reaction to public outrage about fishing methods specific to the eastern tropical Pacific Ocean, ETP, where dolphins that swim with schools of yellowfin tuna were intentionally encircled by purse seine vessels and killed in fishing operations. Hundreds of thousands of dolphins died as a result of this practice over the years. A massive consumer boycott of tuna was launched. The U.S. tuna industry stepped up to the plate and voluntarily committed to abandon this ‘encirclement practice.’ This commitment is what the 1990 ‘dolphin safe’ labeling provision recognized.

My own interest in this issue has always been threefold: to ensure sound conservation of marine mammals, to provide consumers with the information they need when purchasing tuna, and ensure U.S. tuna fishermen a level playing field on which to compete. This bill is consistent with this philosophy. It sets forth an even-handed measure that gives consumers the straight story.

¹²⁴ *EC-Sardines*, Panel Report, at para. 7.122 (upheld by the Appellate Body).

¹²⁵ See 149 Cong. Rec. S.203-01, The Truth in Tuna Labeling Act of 2003 (Statement of Senator Hollings); attached as Exhibit 32.

But this is a simple provision that we can surely all agree upon. It says if you want to label your tuna ‘dolphin safe,’ you can’t harm dolphins. The American consumer wants and deserves clarity when they purchase tuna.

110. There can be no reasonable question that consumer protection and dolphin conservation are primary intentions of the U.S. Dolphin Safe labeling law, and legitimate objectives in the context of TBT Article 2.2. There can also be no question that the U.S. Dolphin Safe labeling provisions fulfill these “legitimate objectives” by providing consumers truthful information about tuna products, and by ensuring the U.S. market is not used to encourage fishing fleets to set on dolphins and contribute to their deaths or serious injury.¹²⁶

b. More trade restrictive than necessary, taking account of risks of non-fulfillment

111. The U.S. measures are not more trade restrictive than necessary. As an initial matter, it is important to point out that the U.S. measures do not restrict trade. The U.S. Dolphin Safe label is voluntary, and Mexico can and does freely sell its tuna products in the U.S.

112. While the U.S. Dolphin Safe label is not trade restrictive, it does have stricter criteria than the AIDCP definition. This is to ensure consumers that their tuna products are not the result of intentional fishing on dolphins. A less stringent version of the U.S. Dolphin Safe label that would allow for some tuna to be caught in association with dolphins would not provide consumers the assurances they have come to trust since the inception of the Dolphin Safe label. A representative of Mexican processing and fishing companies using the U.S. Dolphin Safe label in the 1990s stated that a weakening of the U.S. Dolphin Safe label to allow for intentional dolphin sets would not only “be an enormous step backward in the progress made to protect dolphins and the marine environment in the Eastern Tropical Pacific, but it would also create consumer confusion and undermine consumer confidence in the steps taken by tuna canners and distributors worldwide who have adopted strict dolphin-safe policies.”¹²⁷

113. Moreover, the AIDCP definition continues to allow dolphins to be chased and killed in the course of tuna fishing despite population levels that have not yet recovered. Available information shows: (1) thousands of dolphins are still killed each year under AIDCP; and (2) the chasing of dolphins leads to negative effects on lifespan and reproduction even if the dolphins are not killed right away. The AIDCP aimed to reduce “dolphin mortality to levels approaching zero” with “a goal of eliminating dolphin mortality.” Since the AIDCP went into effect, dolphin mortality limits (DMLs) have not been progressively lowered and remain at 5,000 dolphins per year (for all vessels combined). Dolphin mortality remains in the thousands, and has even increased in recent years. Finally, thousands of dolphins continue to be chased and encircled with long-term effects on health and lifespan. *In short, the AIDCP definition is not a reasonably available alternative measure that fulfills the U.S. objectives.*

¹²⁶ See also U.S. Submission at pp. 49-51 for more discussion.

¹²⁷ See Statement of Francisco Valdez, Sea Emporium Inc; attached as Exhibit 27.

114. Even if the U.S. Dolphin Safe definition is found to be more trade restrictive than the AIDCP definition, it is necessary to fulfill the legitimate objective of consumer protection and dolphin conservation. The risks of non-fulfillment of the objectives would be to allow for some level of consumer deception and confusion, an option that is not consistent with U.S. public policy or the intent of the U.S. Dolphin Safe law. Moreover, non-fulfillment would lead to additional harm and death to thousands of dolphins. As the U.S. tuna consuming market is one of the largest in the world, using the AIDCP definition instead of the U.S. Dolphin Safe definition would encourage fishing fleets to set on dolphins in order to take advantage of expanded market opportunities. This in turn would lead to consumer confusion, and would undermine the conservation aspirations of the U.S. measures.

115. In sum, the U.S. measures were prepared with legitimate objectives in mind that do not create unnecessary obstacles to trade within the meaning of TBT Article 2.2.

4. *The U.S. Measures Are Not Inconsistent with Article 2.4 of the TBT Agreement*

116. Article 2.4 of the TBT Agreement states:

Where technical regulations are required and relevant 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 fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

117. In this case, the AIDCP definition is an “ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued...”¹²⁸

118. As explained, the U.S. intended for a less stringent dolphin safe definition (akin to what became the AIDCP definition) to go into effect if scientific studies found no significant adverse impact on dolphin populations as a result of dolphin sets. The scientific studies were required to ensure that the U.S. goals of consumer protection and dolphin conservation were not undermined by adoption of a weaker definition (which, unlike the U.S. definition at the time, would have allowed intentional dolphin sets). Consider the legislative history of the 1997 legislation:

Senator Boxer: ...Essentially, the way the compromise works, in 18 months when the preliminary results come in on the study, if – if – the Secretary of Commerce believes that those preliminary results indicate that chasing and setting nets on dolphins is safe for dolphins then the definition of ‘dolphin safe’ will be changed. And if the study does not show that, the bill we are passing today will have no change on the definition. So, yes, this is clearly a compromise. We have won 18 months of the status quo; 18 months when consumers know that the dolphin-safe

¹²⁸ This brief does not address other legal issues that may arise in the context of Article 2.4. HSI and WCL defer to the U.S. submission on these points.

label means just that, and after that, we will live to see the preliminary results of that study.¹²⁹

119. As laid out above, the results of the scientific studies and the ensuing court litigation made clear that, in fact, intentional setting on dolphins was having a significant adverse impact on dolphin populations through dolphin mortality as well as longer term health consequences such as cow-calf separation and delayed stress effects.
120. As a result of these findings, the U.S. Dolphin Safe label never changed. Accepting the weaker dolphin safe definition would have allowed U.S. and foreign vessels/companies to continue to set on dolphins (resulting in serious injury or death) and still qualify for the U.S. label. This would run contrary to the U.S. goals of dolphin conservation. It would also undermine consumer confidence that their tuna is not “falsely labeled as to the effect of the harvesting of the tuna on dolphins.”¹³⁰
121. Despite reduced dolphin mortality in the ETP under the AIDCP definition, dolphin mortality remains at very high levels. In 2009, over 1,000 dolphins were killed in the ETP, while thousands of others were chased and encircled. It is not sufficient to consumers that only 1,000 dolphins are dying today in the ETP versus hundreds of thousands in years past. The issue for consumers is the assurance that their tuna is not caught in association with dolphins. Indeed, this is a primary underlying premise of the Dolphin Safe label and the reason why private companies adopted dolphin safe policies in the early 1990s. The AIDCP definition acknowledges that its purpose is to eliminate dolphin mortality. However, by setting DMLs of 5,000 dolphins per year, this objective has not been realized since its inception in 1999. Combined with scientific studies that intentional setting on dolphins is having a significant impact on dolphin populations, the AIDCP definition is ineffective and inappropriate to achieve the U.S. objectives of consumer protection and dolphin conservation.
122. In conclusion, the U.S. Dolphin Safe definition has more discerning criteria than the AIDCP definition because the latter is ineffective and inappropriate to achieve the legitimate objectives of consumer protection and dolphin conservation under Article 2.4 of the TBT Agreement.

VI. Conclusion

123. For all of the reasons stated herein, the U.S. measures at issue are not inconsistent with GATT Articles I and III and TBT Articles 2.1, 2.2 and 2.4.

¹²⁹ See 143 Cong. Rec. S.8299-8311 at 8303 (daily ed. July 30, 1997) (statement of Senator Boxer) (emphasis added) ; attached as Exhibit 33.

¹³⁰ 16 U.S.C. § 1385.

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<i>The Tuna Dolphin Issue</i> , Southwest Fisheries Science Center, NOAA Fisheries Service	1
<i>Collection of News Articles: A Filmmaker Crusades to Make Seas Safe for Gentle Dolphins</i> , PEOPLE MAGAZINE, Vol. 34, No. 5 (August 6, 1990); <i>Sam LaBudde</i> , recipient of the Goldman Environmental Prize, North America 1991; <i>A New Storm Erupts over Saving the Dolphins</i> , The New York Times (Dec. 8, 1990); <i>Epic Debate Led to Heinz Tuna Plan</i> , New York Times (Apr. 16, 1990)	2
Dolphin Safe Policy: StarKist, Bumblebee and Chicken of the Sea	3
<i>International Dolphin Conservation Program Act</i> , Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Session (April 30, 1996) (Statement of Senator Barbara Boxer)	4
American Cetacean Society Fact Sheet, Dec. 2004	5
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<i>IATTC 2008 Annual Report</i>	8
<i>2009 Mortality Caused by DML Vessels</i> , International Review Panel; <i>2008 Mortality Caused by DML Vessels</i> , International Review Panel	9
<i>Report on the International Dolphin Conservation Program</i> , Document MOP-21-05 (June 5, 2009) at pp. 19-22	10
<i>Report of the Scientific Research Program under the International Dolphin Conservation Program Act</i> , Prepared by the Southwest Fisheries Science Center, NOAA Fisheries, National Oceanic and Atmospheric Administration	11
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<i>Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds</i> , AIDCP 7 th Meeting of the Parties (Manzanillo, MX, 24 June 2002)	14
<i>Executive Report on the Functioning of the AIDCP in 2008</i>	15
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<i>Work Plan</i> , IDCP Scientific Advisory Board, 7 th Meeting, La Jolla, CA, Document SAB-07-03 (October 30, 2009)	17
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Kellert, Stephen R., <i>American Perceptions of Marine Mammals and their Management</i> , Yale University School of Forestry and Environmental Studies at p. 14 (May 1999)	26
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