

2 February 2012

Dispute Settlement Body
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
CH-1211 Geneva 21, Switzerland

Re: *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381)

Honorable Members of the Appellate Body:

The undersigned entities, The Humane Society of the United States (HSUS)/Humane Society International (HSI) and American University's Washington College of Law (WCL) (collectively "Amici"), respectfully request the Appellate Body to accept and consider this *amicus curiae* submission in the matter of *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381).

Founded in 1954, The Humane Society of the United States (HSUS) is the largest animal protection organization in the United States. In conjunction with its international arm, Humane Society International (HSI), HSUS maintains a constituency of over 11 million worldwide. The HSUS/HSI work 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.

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. 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.

HSUS/HSI and WCL submitted an amicus brief to the Panel in this proceeding. The Panel accepted the submission, and relied upon it in the deliberation of certain issues. Although Amici are encouraged by the Panel's acceptance and reliance on the amicus brief, we submit that the Panel report contains both legal and factual errors, some of which pertain to facts asserted by Amici. Specifically, the Panel erred as a matter of law in finding that the U.S. Dolphin Safe Label is a technical regulation subject to the Technical Barriers to Trade Agreement (TBT Agreement). Even if the Appellate Body finds the TBT Agreement is applicable, Amici believe the Panel failed to make an objective assessment of the facts under DSU Article 11 when determining that the U.S. measures are inconsistent with TBT Article 2.2.

In accordance with the legal authority of the Appellate Body to accept and consider any information it considers pertinent and useful from a relevant source in the settlement of a dispute, and with reference to the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, as interpreted by the Appellate Body in *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 paras. 36-42 (adopted June 7, 2000), HSUS/HSI and WCL urge the Appellate Body to accept and consider the enclosed *amicus curiae* submission.

Respectfully submitted,

/s/

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**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
to the Appellate Body**

**THE HUMANE SOCIETY OF THE UNITED STATES &
HUMANE SOCIETY INTERNATIONAL**

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

2 February 2012

DISPUTES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
<i>Brazil - Tyres</i>	Appellate Body Report, <i>Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R (3 December 2007)
<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>U.S. - COOL</i>	Panel Report, <i>United States - Certain country of origin labelling (cool) requirements</i> , WT/DS384/R (18 November 2011)
<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 III</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R (15 September 2011)

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I. STATEMENT OF INTEREST

1. The Humane Society of the United States (HSUS)/Humane Society International (HSI) and American University's Washington College of Law (WCL) submitted an amicus brief in the panel stage of this dispute in support of the U.S. Dolphin Safe label. Our organizations (collectively "Amici") have a strong interest in the outcome of this dispute and its potential implications for the U.S. Dolphin Safe label, as well as other labels involving environmental and animal protection. As detailed below, our organizations are uniquely positioned to provide input to the Appellate Body regarding the Panel's analysis of the factual issues in this dispute.
2. Founded in 1954, The Humane Society of the United States (HSUS) is the largest animal protection organization in the United States. In conjunction with its international arm, Humane Society International (HSI), HSUS maintains a constituency of over 11 million worldwide. The HSUS/HSI work 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.
3. The HSUS/HSI has been one of the leading organizations involved in dolphin protection for nearly three decades. 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.
 - 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.
 - 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 the Trade and Environment Policy Advisory Committee (TEPAC) (which advises the U.S. Trade Representative (USTR) and Environmental Protection Agency (EPA)), 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, including the Center for Biological Diversity.
5. During the panel proceedings in the matter of *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381), Humane Society International (HSI) and American University’s Washington College of Law (WCL) submitted an *amicus curiae* brief in order to add to the perspective of the parties and aid the Panel’s understanding of the issues presented. The Panel invited the parties to submit comments offering their views on the *amicus curiae* brief.¹
6. The United States “requested the Panel to review and consider the submission in its deliberations, in light of the relevant and useful information it contained which it believed could assist the Panel in understanding the issues in this dispute”.² The U.S. also referred to the amicus brief in support of some of its arguments, including that consumer’s believe “setting on” dolphins is unacceptable, and that the ETP is fundamentally different than other oceans and is the only ocean where there is a regular and significant association of tuna and dolphins.³ Mexico argued that the information submitted by Amici should not be part of the record in this dispute.⁴
7. The Panel disagreed with Mexico, and decided to not only accept the *amicus* brief, but to also rely on it in its deliberations “to the extent it deemed it relevant to the examination of the claim before it.”⁵ The Panel explained that based on its broad grant of authority by the Dispute Settlement Understanding (DSU) to shape the processes of fact-finding and legal interpretation, it has the authority to decide whether to consider the information in the *amicus* brief.⁶ The Panel Report included a list of *amicus* exhibits that it relied on

¹ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, Panel Report (15 September 2011) at para. 7.2 (hereinafter *US - Tuna*).

² *US- Tuna*, Panel Report at para. 7.3.

³ *Id.* at para. 7.3 and fn. 166-167.

⁴ *Id.* at para. 7.4.

⁵ *Id.* at para. 7.9.

⁶ *Id.* at para. 7.5 citing *US-Shrimp*, Appellate Body Report at 106-108.

throughout the report.⁷ The Panel also specifically cited to the *amicus* submission when considering consumer support for the label (pages 160 (separate opinion) and 183), the support of the tuna processing companies for the dolphin safe label (page 202), and the percentage of companies around the world that adhere to the dolphin-safe criteria (page 203).

8. Amici are pleased with the Panel’s decision to accept and rely upon our *amicus curiae* brief in its deliberation. The Panel’s decision reflects a growing awareness by the WTO of the contributions that can be made by non-governmental organizations (NGOs) with extensive practical experience and expert knowledge of the complex technical, scientific, and legal issues addressed in disputes. The perspective of Amici can add to that of the parties in such a way as to be pertinent and useful to the deliberations of panels and the Appellate Body. This is especially true where, as here, Amici have been involved in the issue at hand for over three decades.
9. Although Amici are encouraged by the Panel’s acceptance and reliance on the amicus brief, we respectfully submit that the Panel erred in its analysis of certain facts, including facts asserted by Amici. Given that both the U.S. and Mexico have filed notices of appeal in this matter,⁸ Amici would like to take this opportunity to refer the Appellate Body to factual information that runs contrary to some of the Panel’s key conclusions and warrants additional review. Amici request that the Appellate Body use its discretion to accept and consider this amicus brief and draw upon our expertise and historical knowledge as necessary.

II. SUMMARY OF THE ARGUMENTS

10. In the Eastern Tropical Pacific (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 that have not yet fully recovered.⁹ Additionally, by chasing and encircling dolphins before setting nets on them, scientific evidence demonstrates that this method of fishing has unobserved consequences such as delayed mortality, cow-calf separation, and reproductive problems.

⁷ *US- Tuna*, Panel Report at p. xxvi.

⁸ See *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/10, Notification of an Appeal by the United States (24 January 2012) ; *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/11, Notification of an Other Appeal by Mexico (27 January 2012).

⁹ “Depletion” is a legal term defined in the U.S. Marine Mammal Protection Act (MMPA) at 16 U.S.C.A. § 1362 (For the purposes of this chapter - (1) The term "depletion" or "depleted" means any case in which - (A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III of this chapter, determines that a species or population stock is below its optimum sustainable population; (B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 1379 of this title, determines that such species or stock is below its optimum sustainable population; or (C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 [[16 U.S.C. 1531](#) et seq.].)

11. 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.
12. 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. Although attempts were made to weaken the requirements of the label, U.S. courts concluded that science supported a finding that intentional setting on dolphins was adversely impacting dolphins in the ETP. As a result, the label never changed, and it remains the case that tuna products are only eligible to be labeled “dolphin safe” in limited scenarios, such as if the tuna was caught by not intentionally setting on dolphins.
13. The U.S. Dolphin Safe 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 of tuna to the U.S. each year that does not qualify for the U.S. Dolphin Safe label.
14. Mexico advanced a number of claims at the Panel level that the U.S. measures (the Dolphin Safe label - 16 U.S.C. § 1385, U.S. Dolphin Safe regulations – 50 C.F.R. § 216.91, and the U.S. court ruling in *Earth Island Institute v. Hogarth*) are inconsistent with provisions under the General Agreement on Tariffs and Trade (GATT) and the Technical Barriers to Trade (TBT) Agreement.
15. The Panel considered the claims under the TBT Agreement first. It found the U.S. Dolphin Safe label to be a technical regulation subject to the TBT Agreement, and went on to find the U.S. measures were not inconsistent with TBT Articles 2.1 or 2.4, but were inconsistent with TBT Article 2.2. Having found a violation under the TBT Agreement, the Panel declined to analyze Mexico’s claims under GATT due to judicial economy.
16. As set out below, this amicus brief focuses on the Panel’s erroneous conclusions that the U.S. Dolphin Safe label is a technical regulation and that the U.S. measures are inconsistent with TBT Article 2.2.¹⁰

¹⁰ Amici agree with the Panel’s findings under Article 2.1 of the TBT Agreement that Mexican tuna products are not at a disadvantage relative to the United States and other imported tuna products. See *US- Tuna*, Panel Report at para. 7.309 (“To the extent that the requirement of not setting on dolphins is based on a fishing method that may be used by vessels of any nationality operating within the ETP, tuna of any nationality could potentially meet the requirements of dolphin-safe labeling.”). Amici also support the Panel’s finding that tuna from Mexico is not afforded less favorable treatment than tuna from the United States or from any other country. *Id.* at paras. 7.374-7.378 (“it appears to us that the impact of the US dolphin-safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices. In this context, any particular adverse impact felt by Mexican tuna products on the US market is, in our view, primarily the result of ‘factors or circumstances unrelated to the foreign origin of the product,’ including the choices made by Mexico’s own fishing fleet and canners.”)

The U.S. Dolphin Safe Label is Not a Technical Regulation

17. As an initial matter, this dispute was wrongly decided under the TBT Agreement since the U.S. Dolphin Safe Label is not “mandatory” under the definition of technical regulation set out in TBT Annex 1.1. Indeed, even the Panelists themselves disagreed over this key aspect of the Panel’s conclusions, with one Panelist writing a separate opinion finding that the U.S. Dolphin Safe label is not a technical regulation.
18. The Panel majority errs in its legal interpretation of the term “mandatory” as set out in Annex 1.1 of the TBT Agreement. The U.S. Dolphin Safe label is not mandatory. It neither requires the use of the label in order to sell tuna products in the U.S. nor requires a producer who follows its production methods to utilize such label. The fact that the U.S. Dolphin Safe label requires truthfulness in labeling and creates exclusivity in labeling speaks not to whether the label is mandatory, but rather, to whether it is effective. The Panel majority’s reasoning is illogical as it would make any “effective” label “mandatory” for purposes of the TBT Agreement, which would render meaningless the TBT Agreement’s definition of a non-mandatory standard in Annex 1.2.
19. The Appellate Body should reverse the Panel majority’s conclusion on this issue.

The Panel Erred in Finding the U.S. Dolphin Safe Label is Inconsistent with Article 2.2 of the TBT Agreement

20. Even if the Appellate Body finds the Panel majority was correct in determining the U.S. Dolphin Safe label is a technical regulation subject to analysis under the TBT Agreement, the full Panel still erred in its conclusions under TBT Article 2.2.
21. Although the Panel correctly determined that the U.S. objectives of consumer protection and dolphin conservation are legitimate, it erred in finding that the U.S. Dolphin Safe label only partially contributes to those objectives and that the U.S. measure is more trade restrictive than necessary.
22. First, the Panel erred as a matter of law by substituting its judgment for that of the U.S. when analyzing the level of protection sought by the U.S. for its objectives of consumer/dolphin protection. Second, the Panel failed to make an objective assessment of the facts under DSU Article 11 with respect to its finding that the U.S. measures only partially achieve the U.S. objectives. Specifically, the Panel erred by: (1) ignoring evidence that the regular and significant association of tuna and dolphins in the ETP, and the intentional targeting of dolphins in the ETP, is singular; (2) concluding the risk to dolphins outside of the ETP is the same as the risk to dolphins within the ETP; (3) inflating the weight of the evidence about dolphin bycatch outside of the ETP; (4) failing to address

Amici also agree with the Panel’s ultimate decision that pursuant to Article 2.4, the AIDCP standard is neither an appropriate nor effective means to achieve the United States objective of promoting fishing methods that minimize harm to dolphins. *US - Tuna*, Panel Report at para. 7.740. Amici defer to the U.S. submission on arguments related to whether the AIDCP is a recognized standard-setting body.

evidence that intentional targeting is different than incidental bycatch; and (5) failing to adequately consider evidence of the unobserved effects of setting on dolphins.

23. Had the Panel properly assessed the facts, it would have concluded that the U.S. measures wholly fulfill the U.S. objectives of consumer protection and dolphin conservation.

The Panel Erred by Concluding that Mexico has Met its Burden of Proposing a Less Trade-Restrictive, Reasonably Available Alternative to the U.S. Dolphin Safe label.

24. The Panel also erred by concluding that Mexico met its burden of proposing a less trade-restrictive, reasonably available alternative to the U.S. Dolphin Safe label. The Panel mistakenly found that Mexico's proposal for the coexistence of the U.S. Dolphin Safe label and the AIDCP label would provide the same level of protection to consumers and dolphins as just the U.S. Dolphin Safe label alone. Indeed, allowing the labels to coexist would serve to undermine U.S. objectives by creating more consumer confusion/deception, and resulting in more adverse impacts on dolphins since the AIDCP label does allow for intentional setting on dolphins and a certain level of mortality. Mexico provides no information as to how the coexistence of the AIDCP label would work as a practical matter, nor does the Panel make this a relevant inquiry. As Mexico did not demonstrate that its proposed alternative could achieve the same levels of protection as the U.S. label, the Panel's conclusion that Mexico met its burden should therefore be reversed.
25. In sum, Amici respectfully request that the Appellate Body: (1) reverse the Panel's conclusion that the U.S. Dolphin Safe label is a technical regulation; (2) reverse the Panel's conclusion that the U.S. measures are inconsistent with TBT Article 2.2.

III. BACKGROUND AND DESCRIPTION OF THE U.S. DOLPHIN SAFE LABEL¹¹

26. 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 of a million dolphins died every year in the ETP as a result of intentional targeting of dolphins, or 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.”¹²
27. In the late 1980s, footage of dolphins drowning in purse seine nets in the Eastern Tropical Pacific (ETP) aired on national television,¹³ prompting widespread consumer boycotts of

¹¹ For a full recitation of the facts, Amici refer the Appellate Body to the brief we submitted to the Panel, attached hereto as Appendix 1 for ease of reference.

¹² See *Amicus Br.* (Panel Proceedings) at 5, Exh. 1 (*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)).

¹³ See *Amicus Br.* (Panel Proceedings) at 5, Exh. 2 (*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

canned-tuna, and leading private companies like StarKist and BumbleBee to adopt dolphin safe policies not to purchase tuna caught in association with dolphins.¹⁴

28. This consumer pressure 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” mark 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

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.¹⁵

29. The U.S. was also involved in discussions within the Inter American Tropical Tuna Commission (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.¹⁶
30. 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.

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.). LaBudde’s film showed how the dead or dying dolphins were thrown back into the water, while the tuna was kept on board. *Id.*)

¹⁴ See *Amicus Br.* (Panel Proceedings) at 5, Exh. 3 (e.g., StarKist Dolphin Safe Policy, *available at*: <http://www.starkist.com/template.asp?section=aboutUs/index.html>; Bumblebee Dolphin Safe Policy, *available at*: <http://www.bumblebee.com/FAQ/#2>).

¹⁵ 16 U.S.C § 1385.

¹⁶ See *Amicus Br.* (Panel Proceedings) at 7, Exh. 1 (*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)).

31. 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.¹⁷
32. With respect to the Dolphin Safe label, hearings were held to determine whether and how to change the U.S. Dolphin Safe label. Senator Barbara Boxer from California 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, which involved the harassment, capture and killing of dolphins.¹⁸
33. 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].”¹⁹ 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 conclude what was “dolphin safe.”
34. 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)²⁰ 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.
35. On December 31, 2002, the Commerce Department announced a “no significant adverse impact” finding.²¹ The findings of Commerce’s studies were the subject of years of litigation,²² and were eventually rejected and vacated by the Ninth Circuit Court of Appeals, which found, *inter alia*, that the agency findings erroneously determined the purse seine fishery was not adversely impacting ETP dolphins.²³ In particular, the Circuit Court upheld the District Court’s findings that the population of certain ETP dolphin stocks

¹⁷ 16 U.S.C. § 1371(a)(2)(B).

¹⁸ See *Amicus Br.* (Panel Proceedings) at 8, Exh. 4 (*International Dolphin Conservation Program Act*, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess (April 30, 1996) (Statement of Senator Barbara Boxer)).

¹⁹ 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.).

²⁰ *US – Tuna*, Panel Report at para. 7.571.

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

²² 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).

²³ 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).

remained severely depleted despite reports of lower dolphin mortality.²⁴ 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.”²⁵ Because the Circuit Court vacated Commerce’s findings, the AIDCP definition never went into effect in the U.S.²⁶

36. 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.²⁷
37. 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)). 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. THE U.S. DOLPHIN SAFE LABEL IS NOT A TECHNICAL REGULATION

38. The Panel majority erred in its finding that the measure at issue is a technical regulation because compliance with the measure is not mandatory within the meaning of Annex 1.1 of the TBT Agreement.
39. 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,

²⁴ *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>.

²⁵ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37 (emphasis added).

²⁶ 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).

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

packaging, marking or labeling requirements as they apply to a product, process or production method.

40. HSUS/HSI refers the Appellate Body to the U.S. submission for a more in-depth discussion of the ways in which the Panel majority’s conclusion that the measure at issue constitutes a “technical regulation” is erroneous. In short, while the Panel majority set out the correct legal standard to be used, it misinterpreted this standard in its analysis. As a result, the Panel majority erroneously concluded that a labeling scheme with which no tuna product producer is required to comply in order to sell tuna products in the U.S. market is mandatory. This finding is central to the Panel’s ultimate conclusion that the U.S. measure at issue is a technical regulation as defined by the TBT Agreement.

A. The Panel Majority’s Legal Interpretation of Annex 1.1 of the TBT Agreement is in Error

41. The Panel majority began its analysis with the correct legal standard, namely that “compliance . . . is ‘mandatory’ . . . if it thus *prescribes* or *imposes* in a *binding* or *compulsory* fashion . . . that [a] certain product *must* or *must not* possess certain characteristics, terminology, symbols, packaging, marking or labels or that it *must* or *must not* be produced by using certain processes and production methods.”²⁸ The analysis under such standard is quite simple.
42. The measure at issue prescribes neither that tuna products must or must not possess any label nor that tuna products must be produced using certain production methods, because the measure imposes no requirement that producers of tuna products must meet in order to sell products in the U.S. market. Every producer of tuna products still has a choice as to the methods used to catch tuna and as to whether to try to comply with the requirements of the Dolphin Safe label. Producers are free to catch tuna using the prohibited methods and sell their tuna products in the U.S. market still labeled as tuna products but without using the Dolphin Safe label or any confusingly similar marking. Indeed, as pointed out in Amici’s brief to the Panel, Mexico continues to export significant amounts of tuna products to the U.S.—over \$13 million in 2009 alone.²⁹ Likewise, producers who catch tuna without using any of the prohibited methods are free to sell their tuna products in the U.S. market either with or without the Dolphin Safe label—the label is not even mandatory for those producers who choose to comply with its underlying terms. Thus, under the standard correctly identified by the panel majority, compliance with the Dolphin Safe label cannot be said to be mandatory.
43. However, in reaching its conclusion, the Panel majority misinterpreted the key phrase “with which compliance is mandatory.” The Panel majority appears to have mistakenly understood “with which compliance is mandatory” to modify “document” when in fact the

²⁸ *US - Tuna*, Panel Report at para. 7.117 (emphasis in original).

²⁹ See *Amicus Br.* (Panel Proceedings) at Exh. 30 (*National Marine Fisheries Service, Fisheries Statistics and Economics Division*, Imports of Tuna from 1990- year to date 2010).

phrase modifies “product characteristics.”³⁰ Compliance with the “document”—the law at issue—is certainly mandatory, and will be every time, in so far as every law requires compliance with its terms by its very nature. Thus, compliance with the “product characteristics”—the dolphin safe label—must be the proper gauge here; for certain labels—those required to be placed on a product in order for the product to be sold—are mandatory, while other labels—those not required to be placed on a product in order for the product to be sold—are not mandatory.

44. The Panel minority recognized the distinction between document and product characteristics, stating that the “notion of ‘mandatory compliance’ within the meaning of Annex 1.1 implies the obligatory character of *the characteristics* prescribed in the measures, and not simply the legal enforceability of the measures.”³¹ The Panel majority’s failure to recognize this critical distinction is a misreading of the TBT Agreement and, therefore, legal error.
45. Further support for this conclusion can be found in TBT Annex 1.2, which defines a standard as a document...with which compliance is not mandatory. Under the Panel majority’s analysis, all enforceable labels would be mandatory, rendering this provision of the TBT Agreement meaningless. Again, this is legal error.
46. The Panel majority also appears to have conflated the terms “exclusive” and “compulsory,” which have very distinct meanings. Although the Panel majority’s stated standard looks to whether a label is imposed “in a binding and compulsory fashion”³²—and the panel does find that “it is not compulsory to meet these requirements and to bear the label” in order to sell tuna products in the U.S. market³³—the panel actually bases its analysis on the determination that the Dolphin Safe label is imposed “in a binding and exclusive manner.”³⁴
47. Key to the Panel majority’s decision on this point is the fact that the measure sets its stated production methods as the exclusive means for production to be “dolphin safe.” Although exclusivity has never been previously identified in TBT Agreement-related jurisprudence as a relevant consideration for whether a product characteristic is mandatory, the Panel majority has based its conclusion on this basis alone, finding that the measure regulates “in a binding and exclusive manner,” because the measure’s dolphin-safe standard sets itself up as “the *only* standard available to address the issue.”³⁵
48. This is clear error. Exclusivity is necessary to preserve the effectiveness of any label, for if confusingly similar labels are permitted, consumers will be unable to tell the difference between the labels and labels will cease to have any meaning in the marketplace. However, showing exclusivity does not demonstrate compulsoriness. As the Panel minority correctly

³⁰ “First, the measures at issue are legally enforceable and binding under US law (they are issued by the government and include legal sanctions).” *US - Tuna*, Panel Report at para. 7.142.

³¹ *Id.* at para. 7.154 (emphasis in original).

³² *Id.* at para. 7.129.

³³ *Id.* at para. 7.131 (emphasis omitted).

³⁴ *Id.* at para. 7.128.

³⁵ *Id.* at para. 7.144 (emphasis in original).

found, “the limitations placed by the measures on the use of alternative ‘dolphin-safe’ marks or labels . . . should be understood in connection with the overall architecture of the measure, which aims to ensure that any claims made in relation to the impact on dolphins of the catching of the tuna contained in tuna products are consistent with the conditions set out in the measures, and do not mislead consumers. Most importantly, these provisions do not render the ‘labelling requirement’ mandatory In fact, as evidenced by the United States, tuna without the label is marketed within the United States.”³⁶

B. The Panel Majority’s Conclusion is Illogical from a Legal and Policy Perspective

49. The mere fact that a law, such as the measure at issue, mandates that a certain label is the only such label that may be used does not automatically render the use of the label mandatory. A contrary interpretation—which the Panel majority reached in this dispute—would make any effective label “mandatory” for purposes of the TBT Agreement. Such a result would have a far-reaching impact given the vast number of environmental, food safety, and animal protection labels, such as “farm-raised,” “free-range,” “organic,” “cruelty-free,” and “non-GMO,” that are being developed and instituted in the U.S. market to help inform consumer choice. Under the Panel majority’s analysis, any of these labels, if ever effectively regulated by federal law so as to proscribe confusingly similar labels, would be termed “mandatory” even if the underlying product could still be sold without the label. Requiring that a label be non-exclusive in order not to be considered mandatory would rob the label of its effectiveness, for producers not wishing to comply with the labeling scheme could readily undermine the scheme by marketing non-compliant products with confusingly similar labels.
50. For example, consider the kosher certification labels used to demonstrate compliance with Jewish dietary laws. Every producer of certain meat products³⁷ is presented with the choice of whether to process their products so as to follow kosher standards and be able to use the kosher certification label. This choice of whether to try to obtain the kosher labeling is certainly voluntary, for a meat product producer is free to sell meat products either with or without the kosher label. However, should the producer wish to use the kosher label, such producer must comply with the given processing standards in order to be allowed to legally use the label.³⁸ Nonetheless, the kosher label is still considered voluntary, even though the kosher certification requirements are mandatory for use of the label so as to preserve the effectiveness of the label.
51. Although the kosher certification labels in the U.S. are not federally regulated, were the U.S. to pass a law prohibiting the use of the kosher label unless the specific kosher certification requirements are met, the analysis would not change. This new “kosher

³⁶ *US – Tuna*, Panel Report at para. 7.161.

³⁷ Only the meat from certain animals can be considered kosher. Meat from hogs and pigs is never considered kosher. See <http://www.koshernosh.com/what-is.htm>.

³⁸ For example, in order for meat products to be considered kosher, a kosher inspection must be performed while the animal is still alive through the time the finished product leaves the plant. Particular slaughtering techniques must also be used. See <http://www.koshernosh.com/what-is.htm>.

labeling law” would still not be considered “mandatory” for purposes of the TBT Agreement because meat producers would not be required to use the kosher label in order to sell meat products.

52. The fact that the kosher labeling law is legally enforceable and can be used to punish improper use of the label does not make such label “mandatory;”³⁹ neither does the fact that the specific production methods would be the “exclusive” means of producing kosher meat products. The enforcement mechanism and the exclusivity merely help to maintain the sanctity of the label and give consumers peace of mind that the meat product has been produced using the specific processes that the consumer has come to think of as “kosher.” Were the law to contain no enforcement mechanism—essentially allowing producers to use the label even if not in compliance with the established production techniques—the label would soon cease to have any meaning and could not be relied upon by consumers, thereby defeating the purpose of the label’s existence.
53. Likewise, allowing meat product producers to utilize production processes that they consider similar to those required for kosher certification and/or to mark their products with confusingly similar labels would have a devastating impact on the effectiveness of the label for consumers could no longer rely on the label to ascertain which production methods were and were not used. Moreover, allowing non-compliant producers to use confusingly similar labels for their meat products—essentially removing the exclusivity element—would render the labeling requirement wholly ineffective.⁴⁰
54. In sum, the Panel majority erred in finding that the measure at issue is mandatory, for the measure neither requires the use of the Dolphin Safe label in order to sell tuna products in the U.S. nor requires a producer who follows its production methods to utilize such label. The fact that the measure requires truthfulness in labeling and that the measure creates exclusivity in labeling speak not to whether the label is mandatory but to whether the label is effective. *As such, the Appellate Body should reverse the Panel majority’s finding on this issue and conclude that the measure is not mandatory and therefore not a technical regulation for purposes of Annex 1.1 of the TBT Agreement.*
55. In finding that the U.S. Dolphin Safe label is a technical regulation, the Panel went on to analyze Mexico’s claims under TBT Articles 2.1, 2.2 and 2.4. Although the Panel properly

³⁹ As the Panel minority notes, “The fact that operators may be legally accountable for any misleading or false declarations in the event that they choose to advertise compliance with a standard without in fact meeting its requirements does not modify the essentially voluntary nature of such standard.” *US – Tuna*, Panel Report at para. 7.156.

⁴⁰ The Panel minority understood this point: “I note in this respect that governments may want to ensure that whenever a certain product makes a claim in a label, such claim is reflective of the true characteristics of that product or the actual related processes and methods involved in its production. For this reason, governments may enact laws and regulations requiring that *if* a producer claims that its products are in compliance with certain voluntary specifications, i.e. standards, that producer is under a duty to ensure that its products actually meet those standards. For the same reasons (i.e. consumer protection and fair competition), those laws and regulations may require that producers do not use labels or symbols that may induce the public to erroneously believe that the products carrying such labels or symbols comply with the conditions for the use of *other* labels.” *US – Tuna*, Panel Report at para. 7.157 (emphasis in original).

determined that the U.S. measures are not inconsistent with Article 2.1 or 2.4, it erred in finding the measures are inconsistent with TBT Article 2.2. To the extent that the Appellate Body determines that the U.S. Dolphin Safe label is a technical regulation, which Amici disagree with for the reasons outlined above, Amici outline below the reasons why the Panel’s finding under TBT Article 2.2 is also in error.

V. THE PANEL ERRED IN FINDING THE U.S. DOLPHIN SAFE LABEL IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT

56. In considering whether the U.S. Dolphin Safe label is consistent with TBT Article 2.2, the Panel erred as a matter of law and failed to make an objective assessment of the matter before it as required by Article 11 of the WTO Dispute Settlement Understanding (DSU).

57. 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.

58. In analyzing Mexico’s claims under TBT Article 2.2, the Panel first considered whether the “US dolphin safe provisions fulfill a legitimate objective” and next, “whether such provisions were more trade restrictive than necessary to fulfill such objective, taking account of the risks non-fulfilment would create.”⁴¹ As the complainant, Mexico had the burden of proving a violation of TBT Article 2.2 exists. Although the Panel correctly determined that the U.S. objectives of consumer and dolphin protection are legitimate, it erred in finding that the U.S. Dolphin Safe label only partially contributes to those objectives, and that the alternative proposed by Mexico is reasonably available, less-trade restrictive, and able to achieve the U.S.’ desired level of protection.

A. The Panel Correctly Determined that the U.S. Objectives were Legitimate

59. The Panel identified two stated objectives of the U.S. measures: (1) ensuring that consumers are not misled about whether tuna products were derived using fishing techniques that adversely affect dolphins; and (2) ensuring the U.S. market is not used to

⁴¹ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Report, WT/DS381/R (15 September 2011).

encourage foreign fishing fleets from catching tuna in a manner that adversely affects dolphins.⁴²

60. With respect to the objective of consumer protection, the Panel found that the title of the law at issue, the “Dolphin Protection Consumer Information Act” (DPCIA), supports a finding that the measure is intended to protect consumers from untruthful or deceptive information.⁴³ The Panel also found support for a consumer protection objective in the Congressional “Findings” section of the DPCIA, which states that “consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of tuna on dolphins.”⁴⁴
61. In looking at the dolphin protection objective, the Panel again highlighted the “Findings” section of the DPCIA, which the Panel found reflects Congress’ concern about “the harmful effects suffered by these species [dolphins] arising from two sources: tuna fishing operations in the ETP, on one hand; and driftnet fishing in the high seas worldwide, on the other.”⁴⁵ According to the Panel, the structure and design of the DPCIA support the U.S. claim that one objective of the U.S. Dolphin Safe label is dolphin protection.⁴⁶
62. The Panel next analyzed the legitimacy of these objectives measures in the context of TBT Article 2.2., and correctly determined the objectives of the U.S. measures are legitimate. The Panel stated that consumer protection and dolphin protection fall within the illustrative list of legitimate objectives in TBT Article 2.2; namely, the prevention of deceptive practices, and the protection of ... animal or plant life or health, or the environment.⁴⁷
63. Moreover, the Panel explained that there is ample record evidence demonstrating that certain fishing techniques pose “greater risks to dolphins than others” and that it is “undisputed that setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries, especially when used without applying certain fishing gear and procedures designed to reduce dolphin bycatch.”⁴⁸ As consumers are sensitive to these adverse consequences, the Panel found that using the Dolphin Safe label to appeal to consumer preferences and discourage fishing methods that adversely affect dolphins is a legitimate means of protecting dolphins.⁴⁹ Given the preference of consumers for dolphin-safe tuna, the Panel also found that protecting consumers from deceptive advertising is a legitimate objective.⁵⁰
64. Notably, the Panel explained that a measure aimed at protecting animal life or health need not be “directed exclusively to endangered or depleted species or populations, to be

⁴² *US-Tuna*, Panel Report at para. 7.427.

⁴³ *Id.* at para. 7.410.

⁴⁴ *Id.* at para. 7.410.

⁴⁵ *Id.* at para. 7.418.

⁴⁶ *Id.* at para. 7.418.

⁴⁷ *Id.* at para. 7.437.

⁴⁸ *US-Tuna*, Panel Report at para. 7.438.

⁴⁹ *Id.* at para. 7.439.

⁵⁰ *Id.* at para. 7.439.

legitimate.”⁵¹ Because animal life and health is listed in Article 2.2 in general terms, the Panel explained that animal protection does not have to be tied to a “broader conservation objective,” as suggested by Mexico.⁵² *This is a critical recognition by the Panel, as WTO Members should be given the latitude to choose how and which animals to protect, and such protection should not be limited to a certain subclass of animals.* To the extent that this is an issue on appeal, Amici respectfully request the Appellate Body to uphold the Panel’s findings on this issue.

B. The Panel Erred in Finding that the U.S. Measures are More Trade Restrictive than Necessary

65. Having determined that the U.S. objectives of consumer and dolphin protection are legitimate, the Panel turned to whether the U.S. measures are more trade restrictive than necessary to fulfill those objectives, taking into account the risks of non-fulfillment.⁵³ To make this assessment, the Panel looked at the contribution of the U.S. measures to the U.S. objectives, and then compared this to the alternative suggested by Mexico to see if the alternative was a reasonably available, less-trade restrictive means of achieving the same level of protection.

66. As set out below, by concluding that the U.S. measures only partially contribute to the U.S. objectives of consumer and dolphin protection, the Panel failed to make an objective assessment of the facts under DSU Article 11. Additionally, by finding that Mexico’s proposed alternative is a reasonably available, less-trade restrictive option, the Panel erred as a matter of law by misapplying TBT Article 2.2.

1. The Panel erred in concluding the U.S. measures only partially achieve the U.S. objectives of consumer and dolphin protection.

67. In looking at the contribution of the U.S. measures to the objective of consumer protection, the Panel found the U.S. measures only partially contribute to this objective because “consumers could be misled into thinking that a tuna product did not involve injury or killing of a dolphin when this may in fact have been the case (if caught outside the ETP), and also because, to the extent that the measures would guarantee an absence of killing with respect to some tuna (caught in the ETP) but not others (caught outside the ETP), this creates ambiguity as to the meaning of the guarantee provided by the label.”⁵⁴

68. The Panel made similar findings with respect to the U.S. dolphin protection objective, namely:

...the Panel concludes that the US dolphin-safe provisions are capable of protecting dolphins by ensuring that the US market is not used to encourage fishing practices that may kill or seriously

⁵¹ *Id.* at para. 7.439.

⁵² *Id.* at para. 7.437.

⁵³ TBT Article 2.2.

⁵⁴ *US-Tuna*, Panel Report at para. 7.564.

injure dolphins, only within the ETP. In other fisheries, the US measures are capable of achieving their objective only in relation to the practices of setting on dolphins and using high seas driftnets. However, in relation to all other fishing techniques used outside the ETP, the US measures are not able to contribute to the protection of dolphins. Therefore, the Panel concludes that US measures may, at best, only partially fulfil their stated objective of protecting dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.⁵⁵

69. In sum, while the Panel finds that the U.S. measures fulfill their stated objectives in the ETP, and outside of the ETP with respect to intentional setting on dolphins and the use of high seas driftnets, they cannot offer the same guarantees for tuna obtained using other fishing techniques outside of the ETP.⁵⁶
70. Panels have a duty to make an objective assessment of the facts under Article 11 of the DSU. “The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel’s duty to make an objective assessment of the facts.”⁵⁷ In finding the U.S. measures only partially contribute to the U.S. objectives, the Panel has failed to fulfill its duty under Article 11. This is due to several factors, as outlined below: (1) the Panel improperly substitutes its judgment for that of the U.S. in analyzing the level of protection sought and the scope of the U.S. objectives; and (2) the Panel errs in finding that the risk to dolphins outside of the ETP is the same as the risk to dolphins within the ETP.
- a. The Panel mistakenly substitutes its judgment for that of the U.S. with respect to the level of protection pursued.
71. When designing a measure, WTO Members are given discretion to set the level of protection they see fit.⁵⁸ The preamble to the TBT Agreement itself indicates that Members should not be prevented from taking measures to protect animals and the environment, or to prevent consumer deception (among other things) *at the levels they see fit*. Although the U.S. explains that its measures are calibrated to the higher risk of dolphin mortality and injury in the ETP than outside the ETP,⁵⁹ the Panel rejected the U.S. explanation of the intent of its own measures.⁶⁰ Instead, the Panel determined that by focusing on the ETP and not tuna-fishing operations as a whole, the U.S. objectives of

⁵⁵ *Id.* at paras. 7.599-600 (citations omitted).

⁵⁶ *Id.* at para. 7.599.

⁵⁷ See *EC Hormones*, Appellate Body report at para 133.

⁵⁸ This is a well-accepted principle of WTO jurisprudence. See e.g. *Brazil — Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, WT/DS332/AB/R (3 December 2007) at para. 210; *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R (12 March 2001) at para. 168; *United States - Certain country of origin labelling (cool) requirements*, Panel Report, WT/DS384/R (18 November 2011) at para. 7.613

⁵⁹ See e.g., *US-Tuna*, Panel Report at paras. 7.258, 7.559.

⁶⁰ *US-Tuna*, Panel Report at para. 7.559.

consumer and dolphin protection can only be partially met.⁶¹ In other words, the Panel substitutes its own judgment that the U.S. measures *should seek the same level of protection for dolphins in and outside of the ETP* by imposing equal requirements on all tuna products regardless of where/how they were obtained or the level of risk to dolphins.

72. As explained below, this conclusion ignores well-documented evidence of consumer sentiment and Congressional intent that formed the basis of the DPCIA.
73. It is worthwhile to recall the circumstances leading up to the DPCIA, and how they were largely related to consumer opposition *to the intentional setting on dolphins in the ETP*. This is critical because it underscores what prompted the U.S. to adopt the DPCIA in the first place, which in turn, informs why and how the U.S. determined the level of protection needed inside and outside the ETP.
74. As Amici pointed out in their brief during the panel proceedings, consumer concern over dolphins being killed in association with tuna fishing in the ETP dates back several decades. 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.⁶² The footage showed the death of numerous dolphins that drowned in the net or were crushed by the power block used to haul in the nets.⁶³ It also showed how dead or dying dolphins were thrown back into the water, while tuna was kept on board.⁶⁴ This footage did not catalog an anomalous situation though, but rather a persistently cruel practice of exploiting dolphins to catch tuna. As noted above, NOAA reports that over 6 million dolphins were killed in the ETP since the 1950s due to the association of tuna and dolphins – the highest of any fishery on record.⁶⁵
75. La Budde’s 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.⁶⁶ Erik Bloemnendaal, spokesman for StarKist, said the footage “crystallized the issue for consumers. They told us they don’t want us to kill dolphins.”⁶⁷ StarKist Tuna’s parent

⁶¹ *US-Tuna*, Panel Report at paras. 7.562-4 (explaining that consumers could be misled since the US label only guarantees no dolphin mortality or injury in the ETP, but not outside the ETP).

⁶² See Amicus Br. (Panel Proceedings) at 22, Exh. 2 (*e 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>).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Amicus Br. (Panel Proceedings) at 5, Exh. 1 (*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>).

⁶⁶ See Amicus Br. (Panel Proceedings) at 5, Exh. 2, 3 (StarKist Dolphin Safe Policy, available at: <http://www.starkist.com/template.asp?section=aboutUs/index.html>, Bumblebee Dolphin Safe Policy, available at: <http://www.bumblebee.com/FAQ/#2>; *A New Storm Erupts over Saving the Dolphins*, The New York Times (Dec. 8, 1990).)

⁶⁷ See Amicus Br. (Panel Proceedings) at 5, Exh. 2 (*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>).

company, Heinz, was the first to announce a dolphin safe policy in April 1990.⁶⁸ Bumble Bee and Chicken of the Sea immediately followed and adopted their own dolphin safe policies in April 1990.⁶⁹ The dolphin safe policies, which are now backed by the U.S. Dolphin Safe label and which remain in effect today,⁷⁰ commit the companies to not purchase any tuna caught in association with dolphins.⁷¹

76. In 1990, this consumer pressure led Congress to impose an embargo on imports of tuna from countries that intentionally set on dolphins (this was later repealed), and to enact the DPCIA. The language of the DPCIA itself, as well as its legislative history, confirms that the intent of the law was to address the *frequent* killing of dolphins in the ETP, as well as high seas driftnet fishing in other parts of the world. The preamble to the DPCIA states:

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.⁷²

77. At a hearing in 1996 about whether to modify the Dolphin Safe label, Senator Barbara 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:

⁶⁸ See Amicus Br. (Panel Proceedings) at 22, Exh. 2 *Epic Debate Led to Heinz Tuna Plan*, New York Times (Apr. 16, 1990).

⁶⁹ See Amicus Br. (Panel Proceedings) at 22, Exh. 3 (Marketing Materials and Dolphin-Safe Policy of StarKist, Bumblebee and Chicken of the Sea).

⁷⁰ See Amicus Br. (Panel Proceedings) at 23, Exh. 25 (*Submission of Randi Thomas on behalf of the National Fisheries Institute to U.S. Trade Representative*, USTR Docket 2008-0038 (May 30, 2009)).

⁷¹ See Amicus Br. (Panel Proceedings) at 23, Exh. 3 (e.g., StarKist Dolphin Safe Policy, available at: <http://www.starkist.com/template.asp?section=aboutUs/index.html>; Bumblebee Dolphin Safe Policy, available at: <http://www.bumblebee.com/FAQ/#2./>).

⁷² 16 U.S.C. § 1385.

- (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;
- (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.⁷³

78. 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 2003.⁷⁴ 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....

⁷³ See Amicus Br. (Panel Proceedings) at 8, Exh. 4 (*International Dolphin Conservation Program Act*, Hearing before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science, and Transportation, United States Senate, S. Hrg. 104-630 at 35-36, 104th Cong. 2nd Sess (April 30, 1996) (Statement of Senator Barbara Boxer)) (emphasis added).

⁷⁴ See Amicus Br. (Panel Proceedings) at 34, Exh. 32 (149 Cong. Rec. S.203-01, The Truth in Tuna Labeling Act of 2003 (Statement of Senator Hollings)) (emphasis added).

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....

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.

79. This consumer and legislative history highlights the fact that consumer opposition leading up to enactment of the DPCIA was focused on the intentional setting on dolphins.⁷⁵ Consumers wanted guarantees that their tuna products would not be harvested in association with dolphins. The DPCIA responded directly to that concern. Indeed, the Panel acknowledges that under current U.S. law, for tuna harvested within the ETP, consumers are guaranteed that no dolphins were intentionally set upon (causing observed or unobserved consequences), and no dolphins were killed or seriously injured.⁷⁶
80. Given the sheer magnitude of dolphin mortality and injury in the ETP vis-à-vis other fisheries, it would have been illogical for the U.S. to impose the same labeling criteria for all fisheries. This is especially true since the U.S. has other measures beyond the DPCIA that it employs to protect dolphins and other marine mammals.⁷⁷ Yet, this is precisely what the Panel concludes despite overwhelming record evidence that the DPCIA was *intended to address high risk situations for dolphins, such as tuna fishing in the ETP*. Notably, the Panel itself acknowledges that:

...certain fishing techniques seem to pose greater risks to dolphins than others. It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries, especially when used without applying fishing gear and procedures designed to reduce dolphin bycatch. The number of dolphins killed in the ETP before

⁷⁵ It bears noting that the Panel finds that the only record evidence about what consumers think the terms “dolphin safe” mean is derived from an opinion poll submitted by Mexico. Para. 7.481. The Panel relies on this to find that “it is not clear that US consumers understand the term ‘dolphin safe’ to mean the same as what the US dolphin safe provisions define it to mean.” Para. 7.482. The Panel further explains that such discrepancy “may create confusion and undermine the ability of the measure to effectively ensure that consumers are not misled.” Para. 7.482. As the US pointed out during the panel proceedings, the Mexican poll included misleading questions that puts its credibility in question. Para. 7.481. Amici assert that the Panel erred by accepting the results of the poll without further analysis, and by entirely overlooking evidence submitted by Amici and the U.S. on this very point.

⁷⁶ *US – Tuna*, Panel Report at para. 7.505.

⁷⁷ *Id.* at para. 7.442 (citing the U.S. as indicating that its measures are part of a comprehensive policy to protect dolphins). The Panel recognizes that WTO Members may have a number of measures in play that contribute to an objective – “it would be implausible to expect that a single regulatory instrument should serve all the purposes that may be legitimately pursued by Members.” *Id.*

the adoption of controls established by the AIDCP, and the ensuing degradation of the dolphin stocks in this area, are illustrative of the potentially devastating consequences that tuna fishing operations may have on dolphins.⁷⁸

81. It is not the Panel's responsibility to interpret the intent of the DPCIA and to determine the level of protection sought by the U.S. The Panel therefore mistakenly substitutes its judgment for that of the U.S.

b. The Panel errs in finding that the risk to dolphins outside of the ETP is the same as the risk to dolphins within the ETP.

82. As explained below, not only did the Panel substitute its judgment for that of the U.S., it made a series of factual findings that run contrary to the evidence before it when determining that the risk to dolphins outside of the ETP is the same as the risk to dolphins within the ETP. First, the Panel's findings ignore evidence that the regular and significant association of tuna and dolphins, and the intentional targeting of dolphins, is singular. Second, the Panel's findings about the risk to dolphins inside and outside of the ETP contradict its findings in other areas of the report and ignore evidence of the relative risk to dolphins from various tuna fishing methods. Third, the Panel mistakenly amplifies the weight of the evidence about dolphin bycatch outside of the ETP. Fourth, the Panel fails to address evidence that incidental bycatch is different than intentional targeting. Finally, the Panel fails to adequately consider evidence of the unobserved effects of intentional setting on dolphins.

i. The Panel's findings ignore evidence that the regular and significant association of tuna and dolphins in the ETP, and the intentional targeting of dolphins in the ETP, is singular.

83. The Panel erred by ignoring evidence of the singular association of tuna and dolphins in the ETP. Such evidence supports the U.S. choice to treat the ETP differently than other fisheries in terms of eligibility for the Dolphin Safe label. The failure to properly take such evidence into account contributed to the Panel's erroneous conclusion that risks to dolphins outside of the ETP are lower than threats faced by dolphins in the ETP.⁷⁹

84. As Amici pointed out to the Panel, 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.⁸⁰ Indeed, NOAA indicates the following:

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

⁷⁸ *US – Tuna*, Panel Report at para. 7.438 (citations omitted)(emphasis added).

⁷⁹ *Id.* at para. 7.562.

⁸⁰ *See* Amicus Br. (Panel Proceedings) at 10.

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, and 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.⁸¹

85. Amici also provided an affidavit from 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. Her affidavit states the following:

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.⁸²

86. These findings are confirmed by a number of sources, including scientific literature collected by the National Marine Fisheries Service (NMFS), which conclude that there is not “any large, sustained or widespread practice of setting purse seine nets around cetaceans for the purpose of catching tuna in any oceanic area other than in the ETP.”⁸³ 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.”⁸⁴
87. The U.S. also presented evidence on this point to show that since there is no regular association of tuna and dolphin outside of the ETP, there is no basis to infer that the risks to dolphins from repeated chase and encirclement during tuna fishing outside of the ETP is the same.⁸⁵ In response to information supplied by Mexico that claimed to show

⁸¹ See Amicus Br. (Panel Proceedings) at 10, Exh. 1 (*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)).

⁸² See Amicus Br. (Panel Proceedings) at 11, Exh. 7 (Affidavit of HSI Senior Scientist, Dr. Naomi Rose).

⁸³ See Amicus Br. (Panel Proceedings) at 11, Exh. 6 (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>).

⁸⁴ See Amicus Br. (Panel Proceedings) at 11, Exh. 6 (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)).

⁸⁵ US – Tuna, Panel Report at para. 7.512.

associations of tuna and dolphin outside of the ETP, the U.S. pointed out how those sources were anecdotal, unsubstantiated, unrelated to tuna fishing, or otherwise misrepresented.⁸⁶

88. Despite the paucity of evidence put forth by Mexico, and the breadth of evidence submitted by the U.S. and Amici, the Panel concludes that (1) associations of tuna and dolphins occur outside of the ETP, albeit less frequently than in the ETP; and (2) there are indications that intentional setting on dolphins occurs outside of the ETP, albeit on a less consistent and widespread basis. These findings greatly overstate the evidence of the tuna-dolphin association outside of the ETP and any accompanying exploitation of such association. Indeed, if there was credible evidence of a regular and significant association of tuna and dolphins outside of the ETP, U.S. law would require that fishery to abide by the very same requirements as those mandated in the ETP.⁸⁷ It is telling that the Secretary of Commerce has not found this to be the case anywhere else in the world other than the ETP.
89. Moreover, as the U.S. argued, such an association would no doubt be identified by Regional Fisheries Management Organizations (RFMOs).⁸⁸ On this point, the Panel finds that the absence of information (due to observer coverage or otherwise) should not be a basis for assuming a problem does not exist, and rather, the level of information should be increased.⁸⁹ The same is also true of the inverse: the absence of information should not be taken to mean that a problem *does* exist. This is especially significant where, as here, the overwhelming majority of evidence supports a finding that there is no regular and significant association of tuna and dolphin outside of the ETP.
- ii. The Panel’s findings about the risk to dolphins inside and outside of the ETP contradict its findings in other areas of the report and ignore evidence of the relative risk to dolphins from various tuna fishing methods.
90. Although the Panel found that it is undisputed that intentional setting on dolphins may – and in the case of the ETP, has - result in a substantial amount of dolphin mortalities and serious injuries, and that certain fishing techniques pose greater risks to dolphins than others,⁹⁰ it nevertheless concludes the risk to dolphins outside of the ETP is not lower than the risk to dolphins within the ETP.⁹¹ This internal contradiction is a violation of the Panel’s duty to make an objective assessment of the facts.
91. The Panel also ignores evidence that 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

⁸⁶ US – Tuna, Panel Report at para. 7.512.

⁸⁷ 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).

⁸⁸ *Id.* at para. 7.524.

⁸⁹ *Id.* at para. 7.524.

⁹⁰ *Id.* at para. 7.438 (citations omitted)(emphasis added).

⁹¹ *Id.* at para. 7.562.

aggregating devices (FADs).⁹² Amici provided the Panel with data from the IATTC’s 2007 Annual Report that compared dolphin mortality across tuna fishing sets in the ETP (dolphin sets, unassociated sets, and FADs). That report showed that since the AIDCP went into effect in 1999, dolphin sets were responsible for over 99% of dolphin mortalities.⁹³ While this information is specific to the ETP, it is nevertheless demonstrative of the higher risk to dolphins from intentional sets versus other tuna fishing methods – a key point that the Panel should have taken into account when comparing the risks to dolphins in the ETP (where there are intentional sets) and outside of the ETP.

iii. The Panel mistakenly amplifies the weight of the evidence about dolphin bycatch outside of the ETP.

92. Moreover, the Panel explains that evidence is lacking to “evaluate the existence and extent of the threats faced by different species of dolphins in different areas of the globe, especially outside the ETP.”⁹⁴ Rather than focus on the evidence that is available, such as the extensive evidence supplied by Amici and the U.S. on risks to dolphins in the ETP, the Panel instead determines that the lack of evidence outside of the ETP is not necessarily indicative of a lack of a problem.⁹⁵ The Panel even admits that while there is “detailed information about dolphin mortalities resulting from tuna fishing activities *in* the ETP,” “the Panel’s analysis of the existence of dolphin bycatch during tuna fishing operations *outside* of the ETP is based on the evidence contained in a limited amount of *ad hoc* studies.”⁹⁶ Despite the stated discrepancy in the weight and breadth of the evidence, the Panel nevertheless relies on the “limited amount of *ad hoc*” studies in rendering its final conclusion.

93. For example, the Panel had before it information from NOAA that the number of dolphins killed in the ETP since the 1950’s is estimated to be over 6 million animals, the highest known for any fishery.⁹⁷ Not one report that the Panel referenced regarding dolphin bycatch outside of the ETP even comes close to that number.

⁹² Tuna caught during dolphin sets may also be more harmful to humans. 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/.

⁹³ See Amicus Br. (Panel Proceedings) at 13, Exh. 8 (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”) 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.)

⁹⁴ *US - Tuna*, Panel Report at para. 7.518.

⁹⁵ *Id.* at para. 7.518.

⁹⁶ *Id.* at para. 7.518 (italicized emphasis in original)(underlined emphasis added).

⁹⁷ See Amicus Br. (Panel Proceedings) at 4-5, Exh. 1 (*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>).

94. Amici also pointed out to the Panel that even following the entry into force of the AIDCP in 1999, *a priority objective of which was to eliminate dolphin mortality*,⁹⁸ 14,577 dolphins have reportedly died in the ETP tuna fishery as a result of intentional targeting based on information available at the time of the Panel proceedings.⁹⁹ “Reported” dolphin mortality in the ETP in 2009, for example, was *over one thousand dolphins in a single year*.¹⁰⁰
95. 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 and the goal of the AIDCP program was to eliminate dolphin mortality. *Again, this level of “observed” mortality is far more significant than the vast majority of ad hoc studies the Panel relies on.*
96. Additionally, the Panel fails to look at the ad hoc studies in context to determine if they contain truly comparable measurements to assess risks to dolphins from tuna fishing operations inside and outside the ETP. For example, some of the reports do not state the specific threat to dolphins. A report the Panel cites that Mexico provided indicates there is “*some evidence that other pelagic fisheries may also be responsible for some by-catch of common dolphins, although few observer studies of by-catch in these fisheries appear to have been carried out.*”¹⁰¹ While tuna is identified as one of the pelagic fisheries, the report does not separately identify what, if any, share of cetacean bycatch is attributable to tuna fisheries. Dolphin bycatch from other fisheries is obviously not relevant, as the issue in this dispute is the labeling of tuna products.
97. Other reports involve fisheries that have been closed, or where driftnets are used.¹⁰² Given that the DPCIA prohibits tuna caught using high seas driftnets from using the dolphin safe label, these examples are also irrelevant to the extent they are referring to high seas driftnets (which is not always clear).

⁹⁸ *Amicus Br.* (Panel Proceedings) at 11, Exh. 8 (AIDCP (Amended 2009)), <http://www.iattc.org/PDFFiles2/AIDCP-amended-Oct-2009.pdf>. 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.”)

⁹⁹ *See Amicus Br.* (Panel Proceedings) at 12, Exhs. 8 and 9 (*IATTC 2008 Annual Report* at Table 3c, available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2007ENG.pdf>; *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>).

¹⁰⁰ *Amicus Br.* (Panel Proceedings) at 12, Exh. 9 (*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>).

¹⁰¹ *US – Tuna*, Panel Report at para. 7.522, fn 737 (underline emphasis in original) (italicized emphasis added).

¹⁰² *US – Tuna*, Panel Report at fn. 735 (“The case of pelagic driftnets use in tuna and swordfish fisheries is an example of a highly destructive practice that has now been addressed by the EU in the form of the driftnet ban that came into existence in 2002. However, there is ample evidence of problems in other fisheries that have yet to be addressed.”); *Id.* at fn. 737 (“Roughly 1,700 bottlenose dolphins and 1,000 spinner dolphins are incidentally caught in gillnet, driftnet, and purse-seine fisheries in the western central Pacific....”)

98. Finally, the Panel refuses to rely on a report submitted by the U.S. about the small number of cetaceans caught in the purse-seine fishery in the WPCO, stating that the authors of the report concluded that more information is needed to provide overall estimates for the fishery, and therefore, “the information available in this respect is incomplete and this issue warrants further analysis.”¹⁰³ It is a contradiction for the Panel to refuse to rely on information in this report to find there is minimal dolphin bycatch in the WPCO when compared to the ETP because more evidence is needed (despite the fact that the evidence available was systematically collected), but accept other reports suffering from far greater data deficiencies to find there is significant dolphin bycatch in fisheries other than the ETP.¹⁰⁴ The Panel cannot have it both ways.

iv. The Panel fails to address evidence that intentional targeting is different than incidental bycatch.

99. In assessing the risks to dolphins in the ETP and outside of the ETP, the Panel erroneously compares risks from intentional setting on dolphins to risks from incidental bycatch. As Amici pointed out to the Panel, 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.¹⁰⁵ These methods can reduce incidental bycatch, although it is unlikely to be eliminated. Common dictionary definitions of “bycatch” state that “bycatch” is “the portion of a commercial fishing catch that consists of marine animals caught unintentionally.”¹⁰⁶ 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 targeting *can be* eliminated.

100. HSI’s Senior Scientist Naomi Rose further explains in a sworn affidavit attached to Amici’s brief to the Panel:

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

¹⁰³ US – Tuna, Panel Report at para. 7.528.

¹⁰⁴ E.g., US - Tuna, Panel Report at para. 7.518 (citing a report by NOAA detailing the absence of information on tuna-dolphin interactions outside of the ETP, and noting that the absence of data does not signal the absence of dolphin mortality).

¹⁰⁵ See *Amicus Br.* (Panel Proceedings), at 18, Exh. 19 (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.)).

¹⁰⁶ See *Amicus Br.* (Panel Proceedings), at 19 (citing *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).)

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.¹⁰⁷

- v. The Panel fails to adequately consider evidence of the unobserved effects of intentional setting on dolphins.

101. In carrying out its analysis of whether the risks to dolphins in the ETP are greater than those outside of the ETP, the Panel fails to adequately consider timely, well-accepted and court-approved record evidence of the unobserved effects of intentional setting on dolphins.
102. It is important to recall that intentional setting on dolphins often involves a “traumatic, hours-long process” where helicopters and speed boats chase the dolphins, capture them in purse seine nets, and then release them.¹⁰⁸ 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.”¹⁰⁹
103. The intensity of the chase, deep wakes, and jarring sound of the boat engines leaves many dolphins disoriented and unable to escape.¹¹⁰ Those that do escape are likely to be chased and encircled again – sometimes up to three times in one day.¹¹¹ This is significant

¹⁰⁷ See *Amicus Br.* (Panel Proceedings), at 19, Exh. 7 (Affidavit of HSI’s Senior Scientist Dr. Naomi Rose).

¹⁰⁸ See *Amicus Br.* (Panel Proceedings), at 14, Exh. 13 (See Earth Island Institute, International Marine Mammal Project, available at: <http://www.earthisland.org/immp/QandAdolphinSafe.html>).

¹⁰⁹ See *Amicus Br.* (Panel Proceedings), at 15, Exh. 1 (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>).

¹¹⁰ See *Amicus Br.* (Panel Proceedings), at 15, Exh. 12 (*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”).

¹¹¹ See *Amicus Br.* (Panel Proceedings), at 15, Exh. 13 (See Earth Island Institute, International Marine Mammal Project, available at: <http://www.earthisland.org/immp/QandAdolphinSafe.html>).

considering that dolphin pods 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.¹¹² 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.¹¹³ More recent data show that the number of sets on dolphins has *increased* since then – to 10,910 in 2010 to 11,646 in 2011.¹¹⁴

104. 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 (numbers are means for 1998-2000).”¹¹⁵ Similar findings were made for eastern spinner dolphins and coastal spotted dolphins (relative to their population size).¹¹⁶
105. Given the intensity of the chase and encirclement process, Amici provided extensive information to the Panel detailing the unobserved consequences of this fishing method. Much of this information was also part of the record in *Earth Island Institute v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007), and relied upon by the Court to find that dolphins experience great stress when they are chased and encircled, which can result in shortened life spans or reduced reproductive rates.¹¹⁷ Numerous reports support this finding, including the following:

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

¹¹² See *Amicus Br.* (Panel Proceedings), at 15, Exh. 14 (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>).

¹¹³ See *Amicus Br.* (Panel Proceedings), at 15, Exh. 15 (*Executive Report on the Functioning of the AIDCP in 2008*, available at: <http://www.iattc.org/PDFFiles2/2008-AIDCP-Executive-Report.pdf>).

¹¹⁴ See AIDCP Table of Dolphin Sets and Dolphin Mortality (1987-2010), available at: <http://www.iattc.org/PDFFiles2/Dolphin-Mortality-table.pdf>.

¹¹⁵ See *Amicus Br.* (Panel Proceedings), at 15-16, Exh. 11 (*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)).

¹¹⁶ See *Amicus Br.* (Panel Proceedings), at 16, Exh. 11 *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)).

¹¹⁷ 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).

abortion (Perrin et al. 2003, Chivers unpubl. data) resulting from the chase and encirclement procedure.¹¹⁸

106. The unobserved consequences of intentional setting on dolphins in the ETP have also been found to contribute to the depletion of dolphin stocks. “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.’”¹¹⁹
107. Notwithstanding this evidence, as well as substantial evidence submitted by the U.S., the Panel relies on information submitted by Mexico that largely pre-dates the evidence submitted by Amici and the U.S. to find that “there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality.”¹²⁰ Although the Panel concludes that sufficient evidence has been put forward by the U.S. to “raise a presumption that genuine concerns exist in this respect,” such conclusion vastly marginalizes the body of evidence before the Panel on this issue. It is critical that evidence of unobserved consequences be adequately considered in order to make an informed assessment of the risks to dolphins in the ETP versus other fisheries where dolphins are not intentionally targeted.
108. For all of the foregoing reasons, the Panel has failed to make an objective assessment of the facts as required by Article 11 of the DSU. Had the Panel properly assessed the facts, it would have concluded that the U.S. measures wholly contribute to the U.S. objectives.

2. *The Panel erroneously concludes that Mexico has met its burden of proposing a less-trade restrictive, reasonably available alternative.*

109. Because it found that the US measures only partially contribute to the US objectives, the Panel proceeded to evaluate whether the alternative proposed by Mexico would be less trade restrictive and reasonably available.
110. The Panel described its analysis as follows:

...[I]n order to determine whether a measure is more trade restrictive than necessary within the meaning of Article 2.2, we

¹¹⁸ See *Amicus Br.* (Panel Proceedings) at Exh. 16 (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). See also *id.* at Exh. 11 (*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)).

¹¹⁹ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37.

¹²⁰ *US – Tuna*, Panel Report at para. 7.504.

must assess the manner in which and the extent to which the measures at issue fulfill their objectives, taking into account Member's chosen level of protection, and compare with a potential less trade restrictive measure, in order to determine whether such alternative measure would similarly fulfill the objectives pursued by the technical regulation at the Member's chosen level of protection.¹²¹

111. Mexico had the burden of establishing a violation of TBT Article 2.2 by showing that the U.S. measure is more trade restrictive than necessary, and to identify a reasonably available alternative capable of achieving the objective pursued by challenged measure at the same level.¹²² According to the Panel, “an alternative means of achieving the objective that would entail greater ‘risks on non-fulfillment’ would not be a valid alternative, even if it were less trade restrictive.”¹²³
112. Mexico proposed that a less trade restrictive alternative would be the coexistence of the U.S. Dolphin Safe label and the AIDCP label.¹²⁴ According to Mexico, this would help provide more information to consumers, not less, and would not result in any greater risks to dolphins in the ETP.¹²⁵
113. In agreeing with Mexico, the Panel states:

Thus, under both, the US measures and the AIDCP regime, consumers of tuna products would bear a certain level of uncertainty whether dolphins were adversely affected during the catching of the tuna contained in those products. Considering that under the US measures, as we concluded above, it is possible that tuna caught during a trip where dolphins were in fact killed or injured may be labelled dolphin-safe; while under the AIDCP, a label would only be granted where no dolphins was killed, but where certain unobserved adverse effects could nonetheless have been caused to dolphins, we consider that the extent to which consumers would be misled as to the implications of the manner in which the tuna was caught would not be greater if the AIDCP label were allowed to co-exist with the US dolphin-safe provisions, than it currently is under the existing measures.

¹²¹ *Id.* at para. 7.465.

¹²² *Id.* at para. 7.468.

¹²³ *Id.* at para. 7.466-7.

¹²⁴ *Id.* at para. 7.471, 7.566. The AIDCP label may be affixed to the packaging of tuna products that have been certified by the AIDCP program, which requires submission of an independent observer's statement that no dolphin was killed or seriously injured during the sets in which the tuna were caught. In fact, the AIDCP label allows for intentionally setting on dolphins and establishes an annual “dolphin mortality limit” (“DML”), the number of dolphins that may be killed or seriously injured each year as a result of setting on dolphins to catch tuna. *Id.* at paras. 7.571, 573.

¹²⁵ *US – Tuna*, Panel Report at paras. 7.471, 7.602.

In light of all the above, the alternative suggested by Mexico does not seem to create greater risks to dolphins in the ETP than those accepted by the United States under the challenged measures in relation to other fishing techniques used outside the ETP. Thus, we consider that Mexico's alternative would achieve a level of protection equal to that achieved by the US dolphin-safe provisions outside the ETP, as currently applied. As mentioned above in relation to the objective of consumer information, we note that this does not imply, in our view, that the different conditions for compliance with the US and the AIDCP label could not be made clear, to allow the consumer the benefit of full information in this respect.¹²⁶

114. For the reasons set out below, the Panel's conclusions are flawed.
115. First, Mexico provides no details as to how its alternative would have practical effect in the U.S. market. How exactly would the AIDCP label provide more information to consumers? Would it be accompanied by a leaflet explaining what it means? Why would a consumer that cares about purchasing dolphin-safe tuna choose tuna that has been caught in association with dolphins over tuna that has not (assuming that the consumer understood the difference between the U.S. and AIDCP label)? Mexico fails to address these questions, and the Panel mistakenly accepts the proposed alternative in its theoretical state.
116. Second, the Panel errs in finding that the coexistence of the U.S. and AIDCP labels would aid consumers in their purchasing decisions, rather than add to their confusion.¹²⁷ Since the AIDCP label allows for intentional targeting of dolphins, and the U.S. label does not, it is not clear how consumers would benefit from the coexistence of these labels. As explained, consumers have come to know and trust what "dolphin safe" means – indeed, it was consumers that prompted Congress to enact the DPCIA in the first place. Adding another label bearing the "dolphin safe" terminology (but which has a very different meaning) would either create confusion, or it would go unnoticed by consumers (which would mean they would be deceived into buying a product where there was intentional setting on dolphins).

¹²⁶ *Id.* at paras. 7.573, 7.618.

¹²⁷ *Id.* at para. 7.575.

117. Again, this makes no logical sense especially when one looks at the official U.S. and AIDCP labels side by side:



118. Aside from the fine print at the top, the labels are strikingly similar and would therefore create mass confusion/deception if allowed to coexist.¹²⁸ In this way, Mexico's alternative is not a viable alternative that achieves the same levels of consumer protection than the U.S. Dolphin Safe label when used alone.
119. Third, the Panel dismisses as relevant the fact that while dolphin mortality in the ETP has been reduced under the AIDCP program, it still exists.¹²⁹ As Amici pointed out to the Panel, almost 15,000 dolphins have died in the ETP as a direct result of intentional targeting since the AIDCP went into effect in 1999 (this does not even take into account delayed mortality).¹³⁰ Indeed, the AIDCP program allows for up to 5,000 dolphins to be killed in the ETP each year. To say that the reduction in dolphin mortality from the pre-AIDCP era is sufficient to address dolphin protection concerns in the ETP is to trivialize the deaths of thousands of dolphins since then. Given that the U.S. label would not allow for any dolphin deaths in the ETP, Mexico's proposed alternative again falls short.

¹²⁸ Even where other dolphin safe logos are used instead of the US Department of Commerce logo, consumers expect the terminology "dolphin safe" to mean tuna that is not harvested in association with dolphins. Allowing the AIDCP label to coexist with other "dolphin safe" labels, be it the official U.S. label or a private label, simply fails to address consumer concerns and would create widespread confusion and deception.

¹²⁹ *US – Tuna*, Panel Report at para. 7.612 ("On the basis of the above, we conclude that, when conducted under "controlled" circumstances, e.g. in accordance with the requirements of the AIDCP, the adverse effects of setting on dolphins in the form of observed dolphin mortality or serious injury may be considerably reduced. In addition, compliance with the AIDCP dolphin-safe labelling requirements includes a requirement that no dolphin has been killed or seriously injured in sets in which the tuna was caught. Therefore, allowing compliance with the AIDCP labelling requirements to be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US dolphin-safe provisions do and would involve no reduction in the level of protection in this respect.")

¹³⁰ See *Amicus Br.* (Panel Proceedings) at 12, Exhs. 8-9 (*IATTC 2008 Annual Report* at Table 3c, available at: <http://www.iattc.org/PDFFiles2/IATTC-Annual-Report-2007ENG.pdf>; 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>).

120. Fourth, while the Panel acknowledges that the AIDCP label would continue to allow for intentional setting on dolphins, and therefore not protect dolphins from unobserved consequences, it fails to recognize that it is the very fact that the AIDCP allows intentional setting on dolphins that would not assuage consumer's concerns that their tuna not be caught in association with dolphins.
121. Absent a reasonably available less trade restrictive alternative, the Appellate Body should reverse the Panel's findings on this point. Mexico has not met its burden.

VI. CONCLUSION

122. For all of the foregoing reasons, Amici respectfully request the Appellate Body: (1) to reverse the Panel's conclusion that the U.S. Dolphin Safe label is a technical regulation; (2) reverse the Panel's conclusion that the U.S. measures are inconsistent with TBT Article 2.2.