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

(WT/DS381)

Executive Summary of the

Second Written Submission of the United Mexican States

December 8, 2010

I. INTRODUCTION

1. This dispute concerns U.S. measures that unilaterally impose conditions related to fishing methods in order for tuna products to be labeled "dolphin safe" and thereby enable those products to access major distribution channels in the U.S. market. These conditions conflict with and undermine a highly successful multilateral environmental agreement, the AIDCP, which already addresses concerns about dolphin mortality and injury. Notwithstanding Mexico's compliance with the AIDCP, the conditions imposed by the U.S. measures prohibit the use of a dolphin safe label on imports of Mexican tuna products while permitting the label to be used on like tuna products from other countries including the United States. As a consequence, Mexican tuna products that qualified as dolphin safe under the AIDCP are not allowed to be labeled dolphin safe in the U.S. market and, therefore are not able to access the major distribution channels while tuna products of the United States and other countries are.

2. The U.S. measures are intended to extraterritorially pressure the Mexican tuna fleet to change where it fishes for tuna and/or to change its fishing method to alternative methods that are recognized to cause substantial environmental harm. As its core, the protection of dolphins is what the "dolphin safe" label is all about. However, the U.S. measures are not effective in providing additional protection for dolphins in the ETP and, in fact, provide no protection for dolphins outside the ETP where other fishing methods are used. Thus, the U.S. consumers cannot be sure that tuna that is labeled dolphin safe and sold in the United States is actually dolphin safe.

3. The circumstances that created the need for the U.S. measures have been remedied by the AIDCP and no longer exist. To the extent that the U.S. arguments regarding other circumstances that necessitate the U.S. measures have any merit, the United States should have addressed those circumstances multilaterally. Finally, there are less trade-restrictive alternative measures available to the United States that can achieve the objectives that it seeks.

II. MEASURES AT ISSUE

A. The Measures Must be Assessed Cumulatively

4. In Mexico's view the U.S. measures identified in its panel request and its First Written Submission should be analyzed as a whole. The application of all the measures prohibits in a discriminatory manner the use of a "dolphin safe" label on imports of Mexican tuna products and modifies conditions of competition in the relevant market.

B. Functioning of the U.S. Measures

1. Application Inside of the ETP

5. Under the U.S. measures, for tuna products produced from fish caught in the ETP by large vessels with purse seine nets there must be a certification that (i) the tuna was not caught using the dolphin set method at any time during a particular fishing trip, and (ii) no dolphins have been killed or seriously injured during the set in which the tuna were caught. This certification must be verified by an independent observer who was onboard the vessel during the voyage. The requirement that the tuna must not be caught using the dolphin set method automatically disqualifies Mexican tuna products from using a dolphin safe label even though such tuna is dolphin safe under the AIDCP.

2. Application Outside of the ETP

6. The dolphin safe standard that the United States applies to tuna harvested outside the ETP is that "no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip". Outside the ETP there is no requirement to certify that no dolphins were killed or seriously injured while fishing for tuna.

7. 16 U.S.C. § 1385(d) separates tuna caught outside the ETP into the following categories: (i) caught on the high seas by a vessel engaged in driftnet fishing; (ii) caught using purse seine nets "in a fishery in which the Secretary

has determined that a regular and significant association occurs between dolphins and tuna; (iii) caught using purse seine nets "in any other fishery", and (iv) caught without use of purse seine nets in a fishery "identified by the Secretary as having a regular and significant mortality or serious injury of dolphins". Although not expressly mentioned in the statute, for tuna caught without using purse seine nets in a fishery not identified as having a regular and significant mortality or serious injury of dolphins, no certification at all is required. Also, for vessels using purse seine nets that are smaller than 400 short tons no certification is required.

8. The key point is that, in the 20 years since the law was enacted, the United States has not designated any non-ETP fishery as having a regular and significant association between tuna and dolphins, or regular and significant dolphin mortalities. Thus, with respect to fishing by vessels using purse seine nets, the only relevant category for non-ETP fisheries is the one for "any other fishery."

9. The United States asserts that the standard for alternative labels in section 1385(d)(3)(C) ("no dolphins killed or seriously injured") is being applied cumulatively with the standard for the official label in section 1385(d)(1)(B)(ii) ("no purse seine net was intentionally deployed on or used to encircle dolphins"). That assertion is contradicted by Exhibit US-59, Form 370, and the practices of the U.S. producers of tuna products. In particular, neither Exhibit US-59 nor Form 370 describes a standard for tuna caught in "any other fishery" that includes the "no dolphins killed or seriously injured" requirement, and each of the three major U.S. producers of tuna products define "dolphin safe" as not setting on dolphins, with no mention of dolphins not being killed or seriously injured.

III. FACTS

A. The U.S. Measures Have the Effect of Excluding Mexican Tuna Products from the Major Distribution Channels

10. It is clear that the U.S. dolphin safe labeling measures have altered the conditions of competition for Mexican tuna products. The U.S. measures have created a market distinction for tuna products in the U.S. market where the dolphin safe label has an important commercial value. By virtue of the U.S. measures which prohibit the label on Mexican tuna products, those products are excluded from the major distribution channels.

11. U.S. imports have grown from $259 million in 2000 to $613 million in tuna products in 2009. Mexico's exports have remained minimal throughout this period. In 2009 U.S. imports from Mexico were only $7.5 million (1% of the U.S. market for imported tuna products). This clearly shows an adverse impact of the U.S. measures on Mexican tuna products.

12. Although the United States asserts that imports' share of the U.S. market of tuna products has steadily increased since the U.S. labeling provisions were enacted, in Mexico's view this assertion applies only with respect to tuna caught outside the ETP and/or using a fishing method other than the dolphin set method. For tuna caught in association with dolphins there has not been any significant growth or gains in market share.

13. The United States also asserts that Mexico has vessels under 363 metric tons and therefore tuna harvested by these vessels already meets the conditions to be labeled dolphin safe under the U.S. measures. Yet, those vessels amount to less than 4% of the total catch of the Mexican tuna fleet and these tuna is sold in the domestic market. With respect to the vessels above 363 metric tons that sometime uses other techniques than setting on dolphins; the tuna caught with these techniques cannot be labeled as dolphin safe given that the U.S. measures require that the dolphin set method is not used during an entire voyage.

B. Tuna Fishing and Effects on Dolphins

14. In explaining its justification for the measures at issue, the United States relies on two primary themes: first, that tuna fishing is resulting in the deaths of many thousands of dolphins more than those that are recorded by the independent observers onboard each large purse seine vessel in the ETP, and second, that even the approximately 1,000 deaths observed annually in the ETP are too many (and by implication should be reduced to zero).

1. U.S. Theory of Unobserved Mortalities

15. The entire premise of the U.S. theory of unobserved mortalities is that the populations of two dolphin species that it has unilaterally determined as "depleted" are not growing at the rate that would be expected. To support this assertion, the United States continues to cite the old estimates as though they were conclusive facts, and inexplicably fails to mention that those estimates were superseded by a more recent report by the U.S. Department of Commerce (2008), which not only had the benefit of more recent field research, but also found errors in the underlying data relied upon by earlier reports. The 2008 Report indicates that all three of the officially "depleted" dolphin stocks in the ETP were estimated to be growing at rates considered to be near the 4-8 percent maximum possible for dolphins. This finding contradicts the United States assertion that setting upon dolphins in a manner consistent with the AIDCP is adversely affecting dolphin stocks through unobserved dolphin mortality.

2. Purported U.S. Goal of No Mortality

16. The United States makes the following statement: "[M]exico may be considering 1,239 dolphin deaths as "virtually" none, but with 1,239 dolphin deaths in 2009 it is not accurate to say that dolphin mortality in the purse seine tuna fishery in the ETP has been virtually eliminated." The implication of this assertion is that anything more than zero or a few mortalities is unacceptable.

17. The impact of bycatch on populations is measured in relation to the size of the affected populations. When asked by the Panel if a bycatch of 1000 dolphins per year was significant, in terms of population recovery or conservation, the United States recognized that given the relative size of ETP dolphin populations, the death of 1,000 dolphins annually was not believed to be significant from a population recovery perspective.

18. Finally, it is important to note that, although the U.S. goal in the ETP is no mortality at all, the United States tolerates the deaths of many marine mammals each year in fisheries that are under its own control. Mexico notes that there is no scientific basis for the United States to claim that the death of a marine mammal in a tuna fishery is more harmful than the death of a marine mammal in a monkfish or other non-tuna fishery, or that dolphin mortalities are irrelevant if the tuna is not destined for canning.

C. Unilateral Action by the United States

19. The United States has adopted its own dolphin safe labeling regime which diverges from and undermines the regime adopted and implemented under the AIDCP. For Mexico and other countries, the incentive to create an international binding agreement was to gain commercially meaningful access to the U.S. A fundamental premise of the negotiation was that the United States would change its law to provide that tuna products harvested in the ETP in accordance with the AIDCP would be eligible for the U.S. "dolphin safe" label. Now, twelve years later, under current U.S. legislation, complying with the requirements of the AICDP is still not sufficient to allow Mexico to use the "dolphin-safe" label. Mexico is not aware of any action of any kind by the United States to address this issue in the AIDCP, in an IATTC meeting, or in any other international regional fisheries organization.

D. Effects on Other Species

20. Mexico understands that the United States is claiming that fishing on FADs is the most ecologically responsible manner to harvest tuna. This is the first time that the United States has officially promoted such a

position, which conflicts with the position of the United States when it adopted the IDCPA. Mexico observes that the Western and Central Pacific Fisheries Commission implemented a ban on FAD fishing during August and September 2009, and intended to extend the ban to three months in future years. The U.S. claim of support for increased FAD sets in the ETP cannot be reconciled with its actions in the ICCAT and its concurrence with the FAD limitations imposed by the WCPFC.

E. Association Between Tuna and Dolphins Outside the ETP

21. The United States asserts that there is no regular and significant association between dolphins and tuna outside the ETP and therefore that it is unnecessary for the United States to pay attention to whether dolphins are being killed or seriously injured outside the ETP.

1. No Definition of "Regular and Significant"

22. The United States concedes that there is no definition of "regular and significant". If "regular and significant" means "no mortalities", many fisheries, including the Western and Central Pacific tuna fishery, should be designated. Thus, it is obvious that there is no scientific basis for the decision not to evaluate whether other fisheries have a "regular and significant association" with dolphins or "regular and significant" dolphin mortalities.

2. Other Regional Fisheries Management Organizations

23. The United States greatly overstates the monitoring activities of the non-ETP regional fisheries management organizations. Mexico has produced evidence that no regional fisheries management organization other than the IATTC has had a comprehensive program for many years to monitor bycatch of marine mammals.

a. Indian Ocean Tuna Commission ("IOTC")

24. The IOTC is still in the initial stages establishing programs to monitor bycatch. The October 2010 report of the IOTC Working Party on Ecosystems and Bycatch recognizes that the paucity of data makes any attempt to estimate levels of bycatch very difficult. Thus, it is obvious that the United States cannot justify relying on data from the IOTC as a basis for concluding that marine mammals are unharmed in the Indian Ocean tuna fishery.

b. International Commission for the Conservation of Atlantic Tunas ("ICCAT")

25. The ICCAT also has very limited information on bycatch. It publishes a webpage listing species that have been caught as bycatch, which includes 26 species of dolphins and whales. Of those, 15 are indicated to have been caught in purse seine nets. Thus, the United States cannot justify relying on data from the ICCAT as a basis for concluding that marine mammals are unharmed in the Atlantic tuna fishery – especially knowing that the fishery "interacts" with at least 26 species of marine mammals.

c. Western and Central Pacific Fisheries Commission ("WCPFC")

26. Almost all U.S. purse seine vessels fish for tuna in the Western Central Pacific Ocean. The United States asserts that there independent observers witnessed 1,500 sets made by U.S. vessels and saw few interactions with dolphins, but left unexplained whether the observers were specifically trained to watch for dolphin interactions, where the observed vessels were fishing, whether the vessels were using purse seine nets or longlines, and whether or not the dolphins were killed or seriously injured. To put the issue of bycatch in the WCPO in perspective, it is important to note that there were approximately 100,000 purse seine sets in that fishery in 2009, and there has been limited observer coverage.

27. The WCPFC Secretariat has published an evaluation of the impact of the WCPO fishery based on more extensive data. Several points are apparent from this analysis. First, no data have been publicly available on the overall interaction of this fishery with marine mammals. Second, observers witnessed dolphin and whale sets being made, indicating that there is an association between tuna and marine mammals in at least some parts of the WCPO. Third, the total number of purse seine sets observed over eleven years (33,319) is approximately one third of the total number of purse seine sets currently being made in the WCPO. As the 33,319 observed sets represent about one third of current total sets, the implication is that the WCPO purse seine fishery causes almost 2,200 marine mammal mortalities annually. Because the observers were not trained for dolphin observation, and apparently did not count serious injuries, it is likely that this figure underestimates the total.

28. Mexico is not aware that efforts have been made to analyze the impact this mortality might have on dolphin populations in the WCPO by conducting abundance surveys, evaluate whether dolphin populations in the WCPO are growing at expected rates, or study the indirect effects on the WCPO dolphin populations caused by separation of mothers from calves and stress to dolphins resulting from their interactions with WCPO fishing vessels.

d. Other Regional Fisheries – Conclusions

29. Other regional fisheries management organizations are still in the early stages in monitoring the impact of fishing operations on marine mammals. Accordingly, the evidence of dolphin mortalities in these other fisheries presented by Mexico cannot be refuted by citing to inaction by those fisheries management organizations. Also, there is considerable other evidence available of significant marine mammal associations and mortalities in non-ETP fisheries, both for tuna and other target species. Thus, it is clear that protections for marine mammals are needed globally and that it is arbitrary for the United States to single out the ETP – and Mexico's tuna products industry – for special negative treatment when the AIDCP remains the world's only successful multilateral agreement for the protection of marine mammals, while there is substantial evidence of harm to marine mammals in other fisheries at least comparable to that in the ETP.

IV. LEGAL ARGUMENT

A. General

1. The Need to Address All of Mexico's Claims

30. It is essential to the effective resolution of this dispute that the Panel avoids judicial economy and rules on all of the claims raised by Mexico under the GATT 1994 and the TBT Agreement because of: (i) the nature of the measures at issue; (ii) the fact that this is the first time that such measures have been subject to dispute settlement under the DSU; (iii) the differences in the wording and potential application of the provisions of the GATT 1994 and the TBT Agreement to the measures; and (iv) the importance of the effective discipline of such non-tariff measures to developing country Members such as Mexico.

2. Order in which the Panel Should Address Mexico's Claims

31. It is logical for the Panel first to address Mexico's claims of discrimination under GATT Articles I:1 and III:4 and Article 2.1 of the TBT Agreement. An examination of Mexico's other claims under Articles 2.2 and 2.4 of the TBT Agreement should then follow.

3. The Disciplining of Unilateral Actions by WTO Members

32. The U.S. measures challenged in this dispute *de facto* condition access to the principal U.S. distribution channels for tuna products on compliance with a fishing method that has been unilaterally imposed by the United

States. These measures pressure the Mexican tuna fleet to use alternative fishing methods in the ETP that are very destructive to the marine ecosystem. The obligations in the WTO Agreements must not be interpreted so as to allow a WTO Member to condition access to its domestic market based on compliance with that Member's unilateral policy relating to actions outside its territory including unincorporated process and production methods. The only circumstances where such actions should be permitted are where they can be justified under one of the specific exceptions to the WTO obligations. None of those exceptions have been invoked by the United States nor do any of them apply to the U.S. measures.

4. "Zero Tolerance"

33. The United States justifies its measure by saying, in essence, that a dramatic reduction of dolphin mortality to a number that is already statistically insignificant is not enough. Noting that the TBT agreement gives WTO members the right to set their own standards, the United States defends its right to pursue a policy where no dolphin would die (zero tolerance). The argument by the United States raises an important systemic issue. Members of the WTO are free under both the TBT Agreement and the SPS Agreement to consider various risk factors as they determine where to set their standards for health and safety. But a standard of zero tolerance would be unworkable in the real world

B. Mexico's Discrimination Claims under Articles I and III of the GATT 1994 and Article 2.1 of the TBT Agreement

1. Issues that are Common to Mexico's Discrimination Claims

a. Like Products

34. Both Mexico and the United States agree that the relevant products for the like product analysis are "tuna products". The sole issue that has been raised regarding the like products issue is whether, in the light of the U.S. consumer preferences tuna products that are labeled dolphin safe are "like" tuna products that are not labeled dolphin safe. Mexico has explained why consumer preferences support Mexico's position that the products are like.

35. In addition, for a brief period in January 2003 when the United States changed the definition of dolphin safe, a U.S. distributor of Mexican tuna products was able to import Mexican tuna products with a dolphin safe label to a large U.S. grocery chain. Later, when the dolphin safe label was prohibited for Mexican tuna products, the sales were no longer possible. The ability to sell Mexican tuna products with the dolphin safe label confirms that Mexican AIDCP dolphin safe tuna products and tuna products from the United States and other countries that are dolphin safe under the U.S. measures are "like" from the perspective of U.S. consumers and retailers.

b. Timeframe for Examining the Facts Related to Mexico's de facto Discrimination Claims

36. Mexico's discrimination claims concern *de facto* discrimination. The U.S. measures violate Articles I:1, III:4 and 2.1 because their effect is to adversely modify the conditions of competition in the U.S. marketplace for Mexican tuna products when compared to like tuna products from the United States and other countries. This denial of competitive opportunities is shown by the relevant facts as they existed at the time of the establishment of the Panel.

37. The United States and European Union in its third party submission argue that the facts as they existed when the U.S. measures were first introduced in 1990 are relevant to Mexico's *de facto* discrimination claim. In Mexico's view the Panel must examine the facts as of the date of the Panel's establishment and determine whether there is *de facto* discrimination.

38. The unadopted GATT 1947 panel report in *United States - Tuna (Mexico)* illustrates the importance of the Panel examining the facts as they exist at the time of its establishment. As explained by Mexico, at the time of the GATT 1947 panel, the United States had a trade embargo in place against Mexican tuna. Thus, there was no evidence of the *de facto* discrimination and trade restrictive effects of the challenged measures. The *de facto* discriminatory and trade restrictive effects are clearly occurring today and it is the existence of those effects that gives rise to Mexico's request that the Panel rule upon its claims of *de facto* discrimination in this dispute.

c. The Facially Neutral U.S. Measures De Facto Discriminate

39. Mexico and the United States agree that the U.S. measures are, on their face, origin neutral. They disagree, however, on whether the measures *de facto* discriminate. Basically, the United States argues that the U.S. measures provide that tuna products of any origin that contains tuna that was caught by setting on dolphins may not be labeled dolphin safe and that the use of the dolphin safe label is equally prohibited for U.S. tuna and tuna from other countries if it was caught by setting on dolphins. To support its arguments, the United States refers to the Panel Report in *EC – Biotech* and the Appellate Body Report in *Dominican Republic –Cigarettes.*

40. The basic argument of the United States is that a measure that is "origin neutral" on its face is by definition consistent with the national treatment obligation. The Appellate Body made it clear in *Korea –Beef* that a measure can treat domestic and like imported products differently without violating the national treatment obligation. However, the Appellate Body did not state that a measure that does NOT treat domestic and imported like products differently is, for that reason, consistent with the national treatment obligation. That is precisely the effect of the supposedly "origin neutral" measures at issue in this dispute. Although presented in the context of national treatment, this principle also applies to Mexico's most-favoured-nation discrimination claims.

41. The *EC –Biotech* panel report to which the United States refers does not support its argument. In the Panel's view, Argentina did not provide sufficient evidence of the alleged *de facto* discrimination. In this dispute, the issue of insufficient evidence does not arise because Mexico has provided *prima facie* evidence of the *de facto* discriminatory effect of the U.S. measures. The *Dominican Republic –Cigarettes* Appellate Body Report does not imply that a measure will necessarily be consistent with the national treatment obligation if it has a detrimental effect unrelated to the foreign origin of the product. That ruling must be understood in the context of the facts of that dispute. Those facts are readily distinguishable from the facts in this case. In this dispute the discriminatory effect is not between certain producers and importers but on the group of Mexican tuna products overall compared to the group of like tuna products from the United States and, in the case of Mexico's MFN claims, other countries. Also, the discrimination in this dispute does not depend on the characteristics of individual importers but, rather, on the fishing practices of the fleet that caught the tuna for exportation to the United States in the form of tuna products.

42. Rather, the situation in this dispute is analogous to the facts in one of the seminal GATT 1947 non-discrimination reports, *Belgium – Family Allowances*. In that instance, the Panel found that a Belgian law that levied a charge on foreign goods that were purchased by Belgian public bodies and that originated in countries *whose system of family allowances did not meet specific requirements*, was in violation of the non-discrimination obligations Articles I:1 and possibly III:2. There, as here, the discriminatory treatment related to conditions that the foreign country did not meet.

d. Mexico's Discrimination Claims are not Dependent on Different Treatment for Fisheries within and outside the ETP

43. Mexico raised the difference in regulation in the ETP and non-ETP fisheries to demonstrate that the U.S. measures do not fulfill either the first objective stated by the United States or the objective that is reflected in the design, structure and character of the measures which is the protection of dolphins. While differences in treatment may further exacerbate the discrimination being faced by Mexican tuna products, the factual basis of Mexico's

discrimination claims is that the *prohibition* against the use of the dolphin safe label on most Mexican tuna products denies competitive opportunities to those products compared to like products from the United States and other countries.

e. U.S. Pressure on the Mexican Fleet to Change Fishing Areas and/or Methods

44. The United States argues that Mexico overstates the cost and difficulty of using other techniques to catch tuna and in fact provides no evidence to support its claim that using other techniques would require Mexican vessels to "incur considerable financial and other costs". The European Union understands that there are no technical or legal barriers preventing any of the WTO Members bordering the ETP to fish tuna outside the ETP. Whether or not and to what magnitude costs would be incurred by the Mexican tuna fleet to change fishing areas or methods is immaterial to Mexico's *de facto* discrimination claims.

45. Notwithstanding that there is no evidentiary burden on Mexico to prove the costs associated with changing fishing areas and/or methods, Mexico has done so. These costs include: (i) catching juvenile tuna which is both less commercially viable and environmentally sustainable because of smaller catches and depletion of stocks; (ii) cutting production dramatically or move to another region to fish for different species of tuna, which is more commonly found in association with FADs to avoid destroying the yellowfin fishery close to Mexico; (iii) traveling longer distances; (iv) catching less economically valuable tuna (skipjack), and (v) obtaining licenses which are expensive and, to date, unobtainable.

f. Private Actions

46. The United States is incorrect in asserting that the "limited demand for non dolphin safe tuna is a result of the retailers and consumer preferences for dolphin safe tuna, not the U.S. dolphin safe labeling provisions". On this specific issue, the United States has misconstrued the ruling of the Appellate Body in *Korea –Beef*.

47. The facts of this dispute are different from those in *Korea –Beef;* however, the principles set out in this statement by the Appellate Body are applicable to this dispute. The U.S. measures are restricting the conditions under which the "dolphin safe" label may be used and, therefore, are restricting the nature of the choice that can be made by U.S. consumers. As a direct consequence of the prohibition in the U.S. measures, dolphin safe labels other than those meeting the specific conditions of the U.S. measures cannot be used. Thus, U.S. consumers are denied the option of choosing Mexican tuna products that are labeled with the international AIDCP dolphin safe label. In this way, it is the government intervention in the form of the U.S. measures that adversely affects the conditions of competition.

g. The Relevance of Consumer Preferences and Perceptions

48. Consumer preferences and perceptions are relevant in this dispute to the extent that having a label that displays the words or a symbol signifying "dolphin safe" is required to have access to the major distribution channels for tuna products in the U.S. market. Mexico has presented evidence showing that a significant portion of the final consumers of tuna in the United States identify the term dolphin safe with the notion that "no dolphins were injured or killed in the course of capturing tuna" (AIDCP standard) rather than with the idea that the tuna was caught in a manner that does not adversely affect dolphins (U.S. standard).

49. Although the United States argues that consumers' preferences are identical in all segments of the market, in Mexico´s view there are differences between the preferences of canneries retailers and final consumers. The U.S. canneries do not buy tuna that is caught in the ETP using the dolphin set method due to the regulatory distinctions created by the U.S. measures. In April, 1990 the U.S. canneries announced their policies of not purchasing tuna caught in association with dolphins knowing of the imminent enactment of the DPCIA. The continuation of these policies is in the interests of the canneries. Their major tuna operations are outside the ETP. Therefore, under the U.S.

measures, they are able to apply the dolphin safe label on their tuna products with the only requirement being that the captain of the vessel sign a certification that "no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested."

50. With respect to the preferences of retailers and final consumers, both are identical in the sense that they look for dolphin safe labeled tuna products. The retailers' interest is to sell tuna products which is why they require a dolphin safe label. With respect to final consumers, they look for tuna products that are labeled as "dolphin safe" which to them means that "no dolphins were killed or seriously injured during the capture of tuna".

51. During the discussions of the IDCPA, Senator Ted Stevens recognized that the new U.S. legislation would guarantee U.S. consumers that no dolphins were killed during the harvest of tuna that is labeled as dolphin safe. This was because under the existing U.S. law, dolphins may have been killed but as long as the tuna was not harvested by intentionally encircling dolphins it could be labeled as dolphin safe.

2. Article I:1 of the GATT 1994

a. Advantage

52. The United States argues that the advantage, favour, or privilege at issue in this dispute is not merely the right to label tuna products as dolphin safe and that no Member has the right to unconditionally label its products dolphin safe under the U.S. law. In the view of the United States, the advantage, favour, or privilege is the opportunity to use the dolphin safe label if the conditions on use of the dolphin safe label are met. These arguments conflates the concept of an "advantage, favour or privilege" with the conditions that are imposed on the granting of that advantage, favour or privilege. Mexico has established that the dolphin safe label, whether meeting the U.S. conditions or the international AIDCP standard, has commercial value in the U.S. market in the sense that access to the label enables tuna products to be sold in the principal distribution channels of the U.S. market. It is the application of a dolphin safe label that has value, not the conditions attached to that label.

53. The United States also to the GATT 1947 panel report in *United States - Tuna (Mexico)* in support of its argument. As explained by Mexico, the facts that were before the GATT 1947 panel were very different from those before this panel. At that time, the nature of the "advantage" was not apparent. Today, the right to designate tuna products as dolphin safe is an "advantage" because it provides access to the major distribution channels in the U.S. tuna products market.

b. Shall be Accorded Immediately and Unconditionally

54. In its third party submission and its responses to the question of the Panel, the European Union argues that "the requirement of 'unconditionally' in Article I:1 of the GATT requires the domestic measure to extend the advantage to all goods meeting the *conditions prescribed in the measure*" and that it "requires the grant of the advantage only to those products of all WTO Members that satisfy the same conditions". The European Union bases this interpretation on the report of the panel in *Canada – Autos*.

55. As explained by the panel in *Colombia – Ports of Entry*, the panel in *Canada – Autos* considered that the issue of whether an advantage within the meaning of Article I:1 is accorded "unconditionally" cannot be determined independently of whether it involves discrimination between like products of different countries. Whether conditions attached to an advantage granted in connection with the importation of a product offend Article I:1 depends on whether or not such conditions discriminate. In this dispute, the U.S. measures make the advantage subject to conditions with respect to the situation or conduct of Mexico. These conditions discriminate against tuna products from Mexican in favour of tuna products from other countries. Accordingly, contrary to Article I:1, the United States

has granted an advantage to tuna products of other WTO Members and has not accorded that advantage immediately and unconditionally to like tuna products of all other Members, namely Mexico.

3. Article III:4 of the GATT 1994

56. The United States argues that the fact that one-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and therefore tuna caught by these vessels is eligible to be labeled dolphin safe under the U.S. provisions, is evidence that U.S. provisions do not use origin to distinguish between tuna products that are eligible to be labeled dolphin safe. Mexico has clarified these facts. Thus, even if the United States' interpretation of the applicable law and the test that it proposes is accepted, approximately 96 percent of Mexican tuna could not be labeled as dolphin safe when processed into tuna products and, therefore, could not access the principal distribution channels in the U.S. market. A similar high percentage, if not 100 percent, of U.S. tuna products could be labeled as dolphin safe and could access those channels. These ratios demonstrate that, even under the proposed U.S. test, Mexican tuna products are singled out for less favourable treatment.

57. However, the United States' interpretation of the applicable law and the proposed test is incorrect. It is legally irrelevant that some Mexican tuna products or even tuna products from other WTO Members could be labeled as dolphin safe and access the principal U.S. distribution channels. Such access does not eliminate the *de facto* discrimination that has been caused by the upsetting of the balance of competitive opportunities between Mexican tuna products and like U.S. products. A Member cannot balance more favourable treatment of imported products in some instances against less favourable treatment of imported products in other instances. For these reasons the *de minimis* access that Mexican tuna products may have to the U.S. market is immaterial to Mexico's discrimination claim under Article III:4.

4. Article 2.1 of the *TBT Agreement*

58. Mexico has presented detailed arguments on its claim under Article 2.1 of the TBT Agreement. Mexico addresses all of the points raised in the United States' rebuttal arguments above.

C. Other TBT Agreement Claims

1. The U.S. Measures are a Technical Regulation

59. The position of the United States that the U.S. dolphin safe provisions identified by Mexico in this dispute are "voluntary measures" and therefore do not meet the definition of a technical regulation under Annex 1.1 of the TBT Agreement is without merit. By virtue of the U.S. measures, it is not possible to label tuna products as dolphin safe under more than one standard. In this way, the U.S. measures are mandatory and amount to a technical regulation within the meaning of Annex 1.1.

60. In simple terms, in order to label a tuna product in the U.S. with a dolphin safe label, it is necessary to comply with specific requirements provided in the U.S. measures. These requirements are imposed in negative form (i.e. dolphin safe tuna products offered for sale in the United States must not possess certain characteristics). What makes the U.S. measures in this dispute mandatory is not whether a label is *de jure* required in order to sell tuna products in the U.S. market. Rather, it is the fact that the U.S. measures restrict retailers, consumers and producers to a single choice for labeling tuna products as dolphin safe. There is no available option for U.S. consumers to buy tuna products that have been produced from tuna caught in accordance with the international AIDCP standard for the protection of dolphins and is labeled as dolphin safe under that standard.

61. The situation in this dispute is very similar to that addressed by the Appellate Body in *EC – Sardines*, in which the challenged measure provided that only products prepared from *Sardina pilchardus* could be marketed as

preserved sardines. In other words, only products of that species could have the word "sardines" as part of the name on the container. In this dispute, the US measures cover two different types of tuna based on the fishing method used to harvest them. Much like the European measures in *EC- Sardine*s, the U.S. measures provide that the only products that can have the term dolphin safe or a similar term or symbol are those that meet the U.S. legal provisions.

62. It is also important to note in this regard that the U.S. dolphin safe labeling measure for the ETP is backed by an extensive conformity assessment procedure to ensure that ETP tuna and tuna products made from such tuna comply with the U.S. requirements. The fact that there is such a conformity assessment mechanism reinforces Mexico's position that the measure is a technical regulation and not a standard.

2. Article 2.2

a. The U.S. Measures do Not Fulfill their Stated Objectives

63. The U.S. asserts that the U.S. measures have two objectives: (i) to ensure that consumers are not mislead or deceived about whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins; and (ii) to contribute to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to set upon dolphins. There are several reasons why the U.S. measures do not fulfil these stated objectives.

64. First, the U.S. measures are based on the *assumption* that the fishing method utilized by the Mexican fishing fleet and regulated by the AIDCP adversely affects dolphins, while there is no scientific evidence for that. As noted above, the most recent study of the Department of Commerce indicates that dolphin stocks are recovering. Second, tuna products that are labeled as dolphin safe under the U.S. measures might contain tuna that was caught in a set where dolphins were killed or seriously injured. Finally, the objective of encouraging foreign fishing fleets not to set upon dolphins applies only to fleets fishing in the ETP. The fishing method of those fleets is governed by the AIDCP and the U.S. measures do not go any further than the AIDCP.

b. The Fulfillment of the Objectives using Less Trade Restrictive Measures

65. To the extent that the U.S. measures fulfill any objectives, taking into account the risks of non-fulfillment, those objectives could be fulfilled using less trade restrictive measures. A less trade restrictive way of fulfilling the objectives would be to create dolphin safe standards rather than a technical regulation whereby the AIDCP standard could be recognized and a label complying with the AIDCP standard used. In this way U.S. consumers will be fully informed of all aspects of dolphin safe fishing methods and they can choose accordingly when purchasing tuna products from U.S. retailers.

3. Article 2.4

66. The U.S. argument that the AIDCP organization is not a "body" within the meaning of Article 2.4 is without merit. National governments are "bodies," and the AIDCP is based on their membership. The AIDCP has its own administration, which is implemented by the Secretariat of the IATTC. The core purpose of the AIDCP organization is to establish standards for tuna fishing to protect marine mammals. There is no support for the U.S. claim that the AIDCP organization is not a "recognized" or "standardizing" body for establishing when tuna caught in the ETP is dolphin safe. The United States is a founding member of the AIDCP. It fully participated in the creation and establishment of the AIDCP's dolphin safe standard. Indeed, the very purpose of that standard was to facilitate access to the U.S. market.

67. Accordingly, the potential problems with applying Article 2.4 to standards in which a Member has not participated raised by the United States do not arise in this dispute. The issue raised in this dispute is whether it is

inconsistent with WTO obligations for a Member to maintain a unilateral technical regulation that conflicts with an international standard to which the Member expressly agreed.

V. CONCLUSIONS

68. On the basis of the foregoing, Mexico respectfully requests that the Panel find that the U.S. measures are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.