

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

(WT/DS381)



**Executive Summary of the
First Written Submission of the United Mexican States**

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I. INTRODUCTION

1. For over twenty years, yellowfin tuna caught by the Mexican fishing fleet in the Eastern Tropical Pacific (“ETP”) have been denied effective access to the U.S. market by virtue of various GATT and WTO inconsistent measures. Sales of Mexican yellowfin tuna in the U.S. market have been severely restricted. Initially, the exclusion took the form of an absolute embargo on the importation of Mexican tuna and tuna products. Notwithstanding that the embargo was lifted, the United States found a new way to prevent Mexican tuna from competing in the U.S. market.
2. The essence of the current dispute relates to the prohibition of the use of a U.S. dolphin safe label on imports of tuna products from Mexico, while such a label is permitted to be used on tuna products from other countries, including the United States.
3. Even though Mexico has maintained a sound and environmentally sustainable method for fishing for tuna and participated in all multilateral initiatives to protect dolphins while fishing for tuna, Mexican tuna products are prohibited by the U.S. measures from using a dolphin safe label, while tuna caught in other fisheries that have not adopted comparable measures to protect dolphins are able to benefit from a dolphin safe label.
4. The U.S. measures are inconsistent with the fundamental obligations of non-discrimination contained in articles I:1 and III:4 of the GATT, because they grant other foreign tuna and tuna products an advantage in the U.S. marketplace that has not been accorded immediately and unconditionally to Mexican tuna and tuna products, and accord Mexican tuna and tuna products treatment less favorable than that accorded to U.S. tuna and tuna products in the U.S. marketplace.
5. Furthermore, the U.S. measures are inconsistent with Articles 2.1, 2.2, and 2.4 of the Agreement on Technical Barriers to Trade (“TBT Agreement”) because they create unnecessary obstacles to international trade, are not based on the relevant international standard, discriminate against Mexican tuna products and tuna, and address objectives that can be addressed in a less trade-restrictive manner.

II. SUMMARY OF FACTS AND BACKGROUND INFORMATION

A. Tuna Fishing

1. Tuna And Dolphins

6. In the ETP, there is a natural association between tuna and dolphins. This means that schools of tuna tend to aggregate and swim – to “associate” – near certain species of dolphins in ocean waters. However, the association between tuna and dolphins is not unique to the ETP. Scientific research indicates that there are associations of tuna with dolphins in other oceans of the world, including the Eastern and Western Atlantic, the Indian Ocean, the Central and Western Pacific, and the Gulf of Mexico.

a. Tuna Fishing And Dolphins Mortality In The ETP

7. Because the association between dolphins and tuna has long been observed in the ETP, fishermen locate schools of underwater tuna by finding and chasing dolphins on the oceans surface and intentionally encircling them with purse seine nets to harvest the tuna underneath. In the early years of fishing by setting on dolphins there was considerable incidental dolphin mortality.
8. When the United States enacted legislation imposing restrictions on fishing in the ETP, the U.S. vessels soon began to fish for tuna elsewhere, outside the ETP. In the case of Mexico, there was no reason for the Mexican fleet to relocate outside its natural and traditional fishing area within the ETP. However, the problem was not ignored by the Mexican fleet. Eventually, multilateral action was taken by the United States, Mexico, and other countries in the region to reduce overall dolphin mortality by establishing an international dolphin conservation program.
9. There is scientific evidence proving that outside the ETP, fishing results in the killing of many dolphins and other cetaceans (i.e. bycatch), and no measures have been taken in those other regions even

remotely comparable to those taken for the ETP. Also, despite the fact that dolphins (and other several species) are affected from fishery bycatch in other oceans, the United States has chosen to regulate fishing methods to protect dolphins exclusively with respect to tuna caught in the ETP.

b. Fishing Methods

10. The most popular fishing method alternative to the method of setting purse-seine nets around dolphins is “Fish Aggregating Devices,” or “FADs.” This method consists in casting shadows that attract tuna and other fish species. The FAD sets attract and kill more immature tuna as well as a variety of other bycatch, including sea turtles, sharks and other threatened and endangered species.

11. In contrast, because only mature yellowfin tuna are able to swim fast enough to “associate” with dolphins, the method of fishing by setting on dolphins produces a large catch of mature tuna appealing to the marketplace and little by-catch.

12. Furthermore, when using the dolphin set method, it is possible to virtually eliminate dolphin mortalities if certain procedures recommended or required by the AIDCP are observed. Therefore, the dolphin set method, when administered under the AIDCP, is the most environmentally sound method for harvesting tuna.

B. Efforts to Protect Dolphins

1. Multilateral Efforts

13. The international effort to provide for appropriate conservation of stocks of tuna, dolphins and other species in the fisheries of the ETP had its origins in the Convention for the Establishment of an Inter-American Tropical Tuna Commission (“IATTC”). In 1976, the IATTC broadened its responsibilities to include the treatment of problems arising from the tuna-dolphin relationship in the ETP, which led to the creation of a program that would later be known as the International Dolphin Conservation Program.

14. The multilateral endeavors of the IATTC were later encompassed in a series of multilateral agreements that were negotiated in the wake of the “tuna-dolphin” controversy in the ETP, namely, the La Jolla Agreement (1992), The Panama Declaration (1995), and the Agreement on the International Dolphin Conservation Program (1998). Both Mexico and the United States are parties to all of these agreements.

15. The latter of them, the Agreement on the International Dolphin Conservation Program (“AIDCP”) comprises the most recent and comprehensive program to protect dolphins while fishing for tuna. The AIDCP, which has been awarded by the United Nations Food and Agriculture Organization, is an unqualified success and has enormously reduced dolphin mortality to statistically insignificant levels while promoting sustainable fishing practices. It was put into force on 15 February 1999.

16. Through this comprehensive program of monitoring, tracking, verification, and certification –with its emphasis on having independent observers on board tuna fishing vessels– and former international programs, the participating countries have succeeded in dramatically reducing incidental dolphin mortality to insignificant levels in the ETP.

2. Actions Of The United States

17. The principal U.S. law relating to the overall issue of the protection of dolphins and other marine mammals is the Marine Mammal Protection Act of 1972, as amended (the “MMPA”).

18. In 1988, the United States amended provisions of the MMPA to prohibit the import into the United States of any marine product, and any fish or fish product harvested where there was not a program comparable to that of the United States in minimizing the incidental taking of marine mammals. Pursuant to these amendments, in August 1990 the United States imposed an import embargo on imports of tuna from Mexico (and other countries) for failure to achieve comparability with U.S. tuna harvesting standards that prohibited setting on dolphins. Mexico challenged this embargo in dispute settlement proceedings under the General Agreement on Tariffs and Trade (“GATT”) and prevailed, but the panel was never adopted.

19. In addition to the direct ban on imports, in 1990 the United States enacted legislation that established a standard for labeling tuna products as “dolphin safe.” That law, known as the Dolphin Protection Consumer Information Act of 1990 (“DPCIA”), amended the MMPA.

20. According to this standard, with respect to tuna harvested by a vessel using purse-seine nets in the ETP, the DPCIA provided that the product could not be labeled “dolphin safe” if caught on a trip involving intentional deployment on, or encirclement of, dolphins. Accordingly, Mexican tuna and tuna products harvested while setting on dolphins are denied the “dolphin safe” label in the U.S. marketplace, even if no mortality or serious injury of a marine mammal was observed.

21. Later, in 1997, in order to comply with the commitments of the Panama Declaration, the U.S. Congress enacted the International Dolphin Conservation Program Act (“IDCPA”), which became effective on February 15, 1999. The IDCPA amended the MMPA so that a country would be permitted to export tuna fished from the ETP to the United States if it provided documentary evidence that (a) it participates in the IDCP and is a member of the IATTC; (b) it meets its obligations under the IDCP and the IATTC; and (c) it does not exceed specified dolphin mortality limits.

22. In the 1995 Panama Declaration it was also agreed that the definition of “dolphin safe” would be changed from “no encirclement of dolphins” to “no dolphin mortality or serious injury. Thus, the legislation also authorized a change in the “dolphin safe” labeling standard, but not immediately or automatically, but contingent on the outcome of studies it required the Department of Commerce (“DOC”) to perform of “whether the intentional deployment on or encirclement of dolphin with purse-seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean.” Thus, the standard would be changed in accordance with the U.S. international obligation unless there was clear evidence that the method of fishing was actually having a significant adverse impact on dolphin stocks.

23. On May 1999 and December 2002, the DOC published, respectively, its initial and final findings pursuant to the IDCPA. In both findings, the DOC determined that there was insufficient evidence to conclude that intentional encirclement of dolphins with purse-seine nets was having a significant adverse effect on “depleted dolphin stocks in the ETP”.

24. Certain NGOs, challenged both the Initial and Final Findings. In both cases, the District Court held that the DOC abused its discretion when it triggered a change in the dolphin safe label standard on the ground that it lacked sufficient evidence of no significant adverse impacts, and in both cases, the Court of Appeals for the Ninth Circuit affirmed the District Court’s Decision. The last ruling of the Ninth Circuit, in 2007, is known as the *Hogarth* Ruling

25. Therefore, and despite the international commitment of the United States, the standard remained unchanged.

26. It is instructive to note that despite the evidence that dolphins and other marine mammals are killed in fisheries in the U.S. domestic waters, the United States has not adopted requirements for the dolphin safe label for tuna or other fish caught in those fisheries remotely comparable to the standards applied by the U.S. regulations for the ETP.

C. The Mexican Fishing Fleet

27. Between 1980 and 1987, Mexico developed a fleet of 85,000 tons of carrying capacity, along with an associated infrastructure and employment base. A number of coastal communities were effectively built and sustained on the comparative advantage given by the strength of the tuna resource along Mexico’s coast, and the markets for that resource around the world.

28. Aware of the importance of protecting dolphins while fishing tuna, the Mexican fleet invested large amounts of money in the dolphin protection efforts such as training of captains and crews, development of fishing gear less harmful to dolphins, research and monitoring programs, limiting its fishing operations to daylight, and carrying an independent observer in every fishing trip of the Mexican fleet. Those efforts contributed to the reduction of dolphin mortality to insignificant levels in the ETP.

D. Adverse Effects of the Measure

29. The U.S. measures have direct and indirect adverse effects. The direct adverse effect relates to tuna products imported, distributed and sold in the U.S. market. The U.S. distribution and retail networks for tuna products are acutely aware of the dolphin safe issue and the fact that they will encounter actions such as boycotts, promoted by certain economically interested NGOs, if they carry tuna that is not designated as dolphin safe. Large U.S. grocery chains have indicated that they will be unable to carry any Mexican tuna products unless the tuna products bear a U.S. government approved dolphin safe label. The indirect adverse is that the three major processors of tuna brands sold in the United States – StarKist, Bumblebee, and Chicken of the Sea – refuse to purchase tuna caught in the ETP including Mexican tuna because tuna products containing such tuna cannot be labeled as dolphin safe.

III. SUBJECT PRODUCTS

30. The subject products are tuna and tuna products.

31. “Tuna” include all species of tuna purchased by canneries for processing into tuna products including Yellowfin, Albacore, and Skipjack, and “tuna products” are defined in Section 1385(c)(5) of the DPCIA as “a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days”.

IV. SPECIFIC MEASURES AT ISSUE

32. Although several U.S. statutes, regulations and court decisions are involved, the most pertinent measures are: the *United States Code*, Title 16, Section 1385 (“Dolphin Protection Consumer Information Act”); the *Code of Federal Regulations*, Title 50, Section 216.91 (“Dolphin-safe labeling standards”) and Section 216.92 (“Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels”); and the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

33. As it stands, because of the *Hogarth* ruling and the underlying statute and regulations, Mexican tuna products containing tuna harvested by vessels using purse-seine nets in the ETP are entitled to use the “dolphin safe” label only if an AIDCP observer was on board the vessel, and both the observer and the captain of the vessel certify “that no tuna were caught on the trip in which such tuna were harvested using a purse-seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught ...”.

34. In contrast, if tuna products contain tuna harvested outside the ETP by a vessel using purse-seine nets, those products are eligible for the “dolphin safe” label simply if the captain of the vessel executes a written statement certifying that “no purse-seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested.” There is no requirement of an observer. There is no requirement of participation in an international program similar to the AIDCP. Moreover, there is no requirement of an attestation that no dolphins were killed or seriously injured during the tuna fishing.

V. LEGAL ARGUMENT

35. The U.S. measures are inconsistent with Articles III:4 and I:1 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

A. GATT 1994

1. Mexico’s Claim Under Article III:4 of GATT 1994

36. The U.S. measures are laws, regulations and requirements affecting the internal sale, offering for sale, purchase, distribution and use of Mexican tuna products and tuna imported into the United States and accord less favourable treatment to Mexican tuna products and tuna than that accorded to the like products

of U.S. origin and, therefore, are inconsistent with Article III:4 of GATT 1994. Accordingly, they afford protection to the production of like U.S. tuna products and tuna.

a. Like Products

37. In *EC – Asbestos*, the Appellate Body stated that “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products”. Accordingly, the Mexican and U.S. tuna and tuna products are like product within the meaning of Article III:4 because Mexican and U.S. tuna products directly compete against each other in the U.S. wholesale, distribution and retail market and Mexican and U.S. tuna directly compete against each other in the U.S. cannery market.

38. In *EC – Asbestos*, the Appellate Body also observed that the *Report of the Working Party on Border Tax Adjustments* outlined an approach for analyzing “likeness” that has been followed and developed since by several panels and the Appellate Body. The approach consists of employing four general criteria outlined in the report. The Appellate Body stated that the panel must examine the evidence relating to each of those four criteria and, then, weigh all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as “like”. Accordingly Mexico analyses the four criteria as follows:

(i) the properties, nature and quality of the product: The physical properties of Mexican tuna products are identical to those of U.S. tuna products insofar as products from both WTO Members comprise tuna meat in a retail-ready package. The physical properties of Mexican tuna are identical to those of U.S. tuna insofar as they are a marine fish that is purchased by canneries for processing into tuna products.

(ii) the end-uses of the products: The end-uses of Mexican tuna products and Mexican tuna are identical to U.S. tuna products and tuna because tuna products from both Mexico and the United States are destined for consumption by final consumers, and tuna from both Mexico and the United States are destined for processing into tuna products at a cannery.

(iii) consumers' tastes and habits: But for the regulatory distinction that is at the core of this dispute (i.e., dolphin safe), consumers' tastes and habits respecting Mexican tuna products and tuna are identical to U.S. tuna products and tuna.

(iv) the tariff classification of the products: The Mexican and U.S. tuna products and tuna are categorized under the same tariff classifications.

b. Law, Regulation, Or Requirement Affecting Their Internal Sale, Offering for Sale, Purchase, Transportation, Distribution, Or Use

39. The U.S. measures are set out in U.S. legislation and regulations as interpreted and applied by the U.S. judiciary. Mandatory criteria have been established for the use of labels that contain the term “dolphin safe” or any other term or symbol that claims or suggests that the tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins. Thus, the U.S. measures clearly amount to a law, regulation or requirement within the meaning of Article III:4.

40. With regards to the term “affecting” used in Article III:4, the U.S. measures “affect” the internal sale, offering for sale, purchase, transportation, distribution, or use of tuna and tuna products because the participants – processors, wholesalers, retailers and consumers – in the U.S. tuna and tuna product market, are highly sensitive to issues related to dolphin mortality, and most of them will not purchase, offer for sale, distribute or use tuna products and tuna that are not designated as dolphin safe or cannot be designated as dolphin safe after processing.

c. Less Favourable Treatment

41. A measure accords less favourable treatment to imported products if it modifies the conditions of competition in the relevant market to the detriment of imported products, or, in other words, if it gives domestic like products a competitive advantage in the market over imported like products.

42. The less favourable treatment at issue is of a *de facto* rather than *de jure* character because the U.S. measures do not, on their face, discriminate on the basis of the foreign country that is the source of particular tuna and tuna products but rather, they discriminate on the basis of where the tuna is harvested and the fishing method. This has the effect of favouring U.S. tuna and tuna products over like Mexican tuna and tuna products because the fishing fleets of the two countries harvest tuna in different ocean fisheries using different fishing methods.

43. The *de facto* less favourable treatment in this dispute occurs as follows:

- Reflecting the longstanding fishing practice of the Mexican fishery, Mexican tuna are almost exclusively caught in the ETP using purse-seine nets that are set upon dolphins. This is the most environmentally responsible way to fish for tuna in the Mexican fleet's traditional tuna fishing grounds. By virtue of the U.S. measures Mexican tuna products can never be designated as dolphin safe even though the Mexican fleet complies with the stringent dolphin safe requirements of the AIDCP.
- In contrast, the U.S. fleet fishes outside of the ETP using other fishing methods such as purse-seine nets that are set upon FADs. Under the U.S. measures, U.S. tuna products that contain this tuna can be designated as dolphin safe even where marine mammal mortalities might, and historically have been shown to occur and where other principles of bycatch reduction might be compromised. Accordingly, by virtue of government intervention in the form of the U.S. measures, Mexican tuna products cannot be designated as dolphin safe while U.S. tuna products can.
- It is an established feature of the U.S. tuna product market that participants in the market are sensitive to issues related to dolphin mortality and will make decisions on whether or not to purchase, offer for sale, distribute or use tuna products on the basis of whether they are designated as dolphin safe. Accordingly, most U.S. market participants will not purchase, offer for sale, distribute or use Mexican tuna products but will purchase, offer for sale, distribute or use U.S. tuna products.
- Although the U.S. measures apply to the labeling of tuna products, they have an indirect discriminatory effect on Mexican tuna. By virtue of the U.S. measures, tuna products containing Mexican tuna cannot be designated as dolphin safe. As a consequence, fish canneries located in U.S. territory (e.g., Samoa) or producing tuna destined for the U.S. market will not accept Mexican tuna for processing into tuna products. These canneries will, however, accept U.S. tuna that can be designated dolphin safe once processed.

44. This *de facto* less favourable treatment between Mexican tuna products and like U.S. tuna products modifies the conditions of competition in the relevant market – i.e., the U.S. tuna products market – to the detriment of imported Mexican tuna products. Similarly, the *de facto* discrimination between Mexican tuna and like U.S. tuna modifies the conditions of competition in the U.S. cannery market to the detriment of Mexican tuna. In this way, the U.S. measures affecting these like products provide less favourable treatment and thus violate the national treatment obligation in Article III:4 of the GATT 1994.

2. Mexico's Claim Under Article I:1 Of GATT 1994

45. The U.S. measures are also an advantage, favour or privilege granted by the United States to tuna products and tuna originating in certain WTO Members that has not been accorded immediately and unconditionally to the like products originating in Mexico and, therefore, are inconsistent with Article I:1 of GATT 1994.

46. In the circumstances of this dispute, to determine whether there is a violation of Article I:1, three questions must be answered: (i) are the imported products concerned “like” products; (ii) does the measure at issue confer an advantage, favour or privilege on products originating in any other country; and (iii) was the advantage, favour or privilege granted “immediately and unconditionally” to the like product originating in the territories of all other Members?

a. Like Products

47. For the same reasons explained when analyzing “likeness” under Article III:4, tuna and tuna products, irrespective of which country they originate, are like products within the meaning of Article I:1 of GATT 1994.

b. Advantage, Favour Or Privilege On A Product Originating in Other WTO Members

48. The advantage, favour or privilege in this dispute is the right to designate tuna products as dolphin safe. Having a dolphin safe designation provides a significant commercial advantage and is clearly an “advantage”, “favour” or “privilege”.

49. This advantage, favour or privilege is conferred upon tuna products and tuna originating in those countries whose tuna fishing fleets do not fish in the ETP and those countries whose fishing fleets fish in the ETP but use a different fishing method than the Mexican fleet.

c. Accorded Immediately And Unconditionally to the Like Product Originating in the Territories Of All Other Members

50. The U.S. measures do not, on their face, discriminate on the basis of the foreign country that is the source of particular tuna and tuna products, but rather they discriminate on the basis of where the tuna is harvested and the fishing method. This has the effect of favouring tuna and tuna products from some countries over others. Accordingly, the discrimination is *de facto* rather than *de jure* in character, and occurs as follows:

- Reflecting the longstanding fishing practice of the Mexican fishery, Mexican tuna are almost exclusively caught in the ETP using purse-seine nets that are set upon dolphins. This is the most environmentally responsible way to fish for tuna in the Mexican fleet’s traditional tuna fishing grounds. By virtue of the U.S. measures, Mexican tuna products can never be designated as dolphin safe even though the Mexican fleet complies with the stringent dolphin safe requirements of the AIDCP.
- In contrast, the fleets of other countries fish outside of the ETP using other fishing methods such as purse-seine nets that are set upon FADs. They also fish in the ETP using methods different from that used by the Mexican tuna fleet. Under the U.S. measures, tuna products that contain tuna originating from these countries’ fleets can be designated as dolphin safe and a dolphin safe label can be affixed to those products. Accordingly, by virtue of government intervention in the form of the U.S. measures, Mexican tuna products cannot be designated as dolphin safe while tuna products originating in other countries can.
- It is an established feature of the U.S. tuna product market that participants in the market are sensitive to issues related to dolphin mortality and will make decisions on whether or not to purchase, offer for sale, distribute or use tuna products on the basis of whether they are designated as dolphin safe. Thus, most U.S. market participants will not purchase, offer for sale, distribute or use Mexican tuna products but will purchase, offer for sale, distribute or use tuna products originating in other countries.
- Although the U.S. measures apply to the labeling of tuna products, they have an indirect discriminatory effect on Mexican tuna. By virtue of the U.S. measures, tuna products containing Mexican tuna cannot be designated as dolphin safe. As a consequence, fish

canneries located in other WTO members will not accept Mexican tuna for processing into tuna products. These canneries will, however, accept tuna in other countries that can be designated dolphin safe once processed.

51. This *de facto* discrimination between Mexican tuna products and like tuna products originating in other countries modifies the conditions of competition in the U.S. tuna products market to the detriment of imported products originating in a WTO Member, namely tuna products originating in Mexico. Similarly, the *de facto* discrimination between Mexican tuna and like tuna originating in other countries modifies the conditions of competition in the U.S. cannery market to the detriment of tuna originating in Mexico. In this way, the U.S. measures violate the most-favoured-nation obligation in Article I:1 of the GATT 1994.

3. Conclusions

52. On the basis of the foregoing, the U.S. measures are inconsistent with Articles III:4 and I:1 of the GATT 1994. Moreover, on the basis of the relevant facts, none of the general exceptions in the GATT 1994 apply to the U.S. measures.

B. Claims Under The TBT Agreement

53. The U.S. measures are a technical regulation that is inconsistent with Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

1. The U.S. Measures Constitute A Technical Regulation

54. The U.S. measures constitute a technical regulation within the meaning of the TBT Agreement, pursuant to its Annex 1.1. In this instance, the “document” comprises the statutory and regulatory provisions that make up the labeling provisions. Also, the document meets the three criteria in order to fall within the definition of a technical regulation, as follows:

(i) *It applies to an identifiable product or group of products:* The identifiable group of products to which the document applies, is “tuna product”, as defined by Section 1385(c)(5).

(ii) *It lays down one or more characteristics of the product:* The U.S. measures govern the conditions under which a tuna product can be labeled as “dolphin safe”. This requirement is a product characteristic of the tuna product that is laid down by the U.S. measures.

(iii) *Compliance with the product characteristics is mandatory:* Under the DPCIA, it is unlawful to include on the label of any tuna product offered for sale in the United States the term “dolphin safe” or any analogous term or symbol if the product contains tuna harvested in the ETP by a large purse-seine vessel using a purse-seine net intentionally deployed on or to encircle dolphins. This prohibition against the use of the “dolphin safe” label remains in force even when the international standards of the AIDCP are met. Accordingly, the regulation is mandatory. Furthermore, even if the labeling scheme were not to be considered *a priori* mandatory, it is *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin safe designation.

2. The Measures Are Inconsistent With Article 2.2

55. The U.S. measures are a technical regulation that creates an unnecessary obstacle to international trade, because its objective is not legitimate or, in the alternative, it is more trade-restrictive than necessary to fulfill a legitimate objective taking account of the risks non-fulfillment would create. Thus, they are inconsistent with article 2.2 of the TBT Agreement.

a. The Measures Do Not Fulfill A Legitimate Objective

56. The evidence indicates that the U.S. measures do not protect animal life or health or the environment in the general sense. Rather, the measures fulfil the opposite of these legitimate objectives by: (i) promoting the use of alternative fishing methods that result in enormously higher bycatch and therefore wasteful depletion of ocean sealife; and (ii) by undermining the economic incentive for countries and

fishing fleets to participate in a very successful multilateral environmental agreement. The objective of the U.S. measures is narrower than the protection of animal life or health or the environment, it is to preserve dolphin stocks in the course of tuna fishing operations in the ETP. In Mexico's view, measures that trade off the life or health of different animal species and which undermine broader environmental objectives that are enshrined in a successful multilateral environmental agreement cannot be found to "fulfil a legitimate objective" within the meaning of Article 2.2 of the TBT Agreement.

57. In the alternative, even if such measures could in principle be found to fulfil a legitimate objective, the U.S. measures do not fulfil their stated objective of preserving dolphin stocks in the ETP, for the following reasons:

- The protection of dolphins in the ETP tuna fishery and the consequent preservation of dolphin stocks are governed by the highly successful AIDCP. The U.S. measures do not add to that protection, and all they accomplish is to block imports of tuna products and tuna from the signatory countries and, thereby, protect the U.S. tuna industry and undermine the viability of the AIDCP.
- The Hogarth court ruling goes against the requirements of the AIDCP and against the determination of the U.S. administration, which supported the view that the legitimate environmental objective at issue – the preservation of dolphin stocks – is fulfilled by the standard for dolphin safe labeling agreed in the Panama Declaration.
- The statutory condition, unilaterally adopted by the United States – requiring that a determination be made by the DOC based on a vague standard, without consultation with the IATTC, and subject to reversal by courts without scientific expertise was designed primarily to fulfil the objective of satisfying domestic political interests.

b. The U.S. Measures Are More Trade-Restrictive Than Necessary Taking Account Of the Risks Non-Fulfillment Would Create

58. In the alternative, if the U.S. measures are found to fulfil a legitimate objective, the U.S. measures are more trade-restrictive than necessary to fulfil that legitimate objective taking into account the risks non-fulfillment would create.

59. The preservation of dolphin stocks in the ETP tuna fishery is an important objective. According to available scientific and technical information, that objective is being fulfilled by the AIDCP. The U.S. measures do not further contribute to the achievement of this objective. In the absence of the U.S. measures, the preservation of dolphin stocks in the ETP tuna fishery will continue to be accomplished by the requirements and procedures of the AIDCP. Since the U.S. measures are not necessary, the fact they deny competitive opportunities to Mexican tuna products and tuna and thereby create trade restrictions means that they are more trade-restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement.

3. The U.S. Measures Are Inconsistent With Article 2.4

60. The U.S. Measures are inconsistent with article 2.4, because U.S. dolphin safe labeling measures are not based on an existing relevant international standard, and the relevant international standard is an effective and appropriate means for the fulfillment of the legitimate objectives pursued.

a. AIDCP Standard

61. On June 20, 2001, the Parties to the AIDCP adopted the "Resolution to Adopt the Modified System for Tracking and Verification of Tuna" and "the Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification." Both resolutions define dolphin safe tuna, as tuna captured in sets in which there is no mortality or serious injury of dolphins.

b. The AIDCP Standard Is A Relevant International Standard

(i) International Standard

62. The AIDCP Standard is a standard for purposes of Annex 1.2 of the TBT Agreement because it provides for common and repeated use rules expressly dealing with the characterization of tuna as dolphin safe and non-dolphin safe, compliance with the standard is not mandatory, and it was prepared and approved by the AIDCP member governments, which constitute a recognized body.

(ii) Relevant

63. The AIDCP standard is “relevant” within the meaning of Article 2.4 because it is used to determine when tuna and tuna product can be certified as dolphin safe and bear a dolphin safe label, and thus, it serves the exact same purpose as the U.S. dolphin safe label measures.

c. The United States Failed To Base Its Regulation On The Relevant International Standard

64. The United States failed to base its regulation on the relevant international standard because it rejected its application in favour of a unilateral standard, a setting of nets on dolphins standard. Also, the U.S. dolphin safe labeling measures stipulate rules for labeling tuna that directly contradict the guidelines contained in the AIDCP.

d. The Relevant International Standard Does Not Constitute An Ineffective Or Inappropriate Means For The Fulfillment Of The Legitimate Objectives Pursued

65. The U.S. measures do not pursue a legitimate objective. However, in the event the Panel concludes that the measures pursue a legitimate objective, the AIDCP Standard is an effective and appropriate means for the fulfillment of a legitimate objective.

66. It is an effective means for achieving the pursued objective of protecting dolphins because with this standard, dolphin mortality in the ETP has decreased 99%, and even United States agreed to the standard itself. It is also an appropriate means for achieving the pursued objective of protecting dolphins, because not only it has been effective in decreasing the dolphin mortality, but also it allows the best method of fishing for tuna.

4. The U.S. Measures Are Inconsistent With Article 2.1

67. The U.S. measures are inconsistent with Article 2.1 of the TBT Agreement, which imposes national treatment and most-favoured-nation treatment obligations on technical regulations. As discussed above, Mexico argues that the U.S. measures are a technical regulation.

68. For the same reasons set out for Mexico’s claim under GATT Article III:4, the U.S. measures do not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products of national origin.

69. For the same reasons set out for Mexico’s claim under GATT Article I:1, the U.S. measures do not accord products imported from Mexico treatment no less favourable than that accorded to like products originating in any other country.

VI. CONCLUSIONS

70. 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.