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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(WT/DS381)

EXECUTIVE SUMMARY
Second Written Submission of the United Mexican States

1 July 2014

I. INTRODUCTION

1. In this submission, Mexico responds to the arguments raised by the United States and further supplements the legal and factual basis for its claims that the Amended Tuna Measure is inconsistent with Articles 2.1 of the TBT Agreement, I:1 and III:4 of the GATT 1994 and, in the case of the violations of the GATT 1994, cannot be saved by the general exceptions in Article XX.

2. Mexican tuna products continue to be denied the dolphin-safe label, while tuna products from tuna fisheries other than the ETP can be easily labelled dolphin-safe when supported only by an unverified copy of a simple statement from a ship's captain claiming that the tuna is dolphin-safe, with no comparable tracking requirements to verify the source of the tuna and its dolphin-safe status, and without accounting for the substantial adverse impact that the fishing methods used to catch the tuna have on dolphins in non-ETP fisheries. The balance of competitive opportunities between Mexican tuna products and like products from the United States and other countries is being upset on the premise that these other products are dolphin-safe when, in fact, this status cannot be proven. As a consequence, it is highly likely that tuna products containing tuna caught outside the ETP under circumstances causing adverse effects to dolphins are entering the U.S. market inaccurately labeled as dolphin-safe.

3. The United States has mischaracterized and disregarded Mexico's arguments and evidence. For example, throughout its submission, the United States repeatedly states that "setting on dolphins is *particularly* harmful to dolphins" (italics original), citing paragraph 289 of the Appellate Body Report. This statement mischaracterizes the Appellate Body's statement and quotes it out of context.

II. RESPONSE TO U.S. DESCRIPTION OF THE RELEVANT FACTS

4. The United States argues that tuna imported from non-ETP locations is unlikely to be non-dolphin-safe because some of the examples Mexico provided related to fishing in the waters of countries that export relatively little tuna to the United States, such as India and Sri Lanka. In support of this argument, the United States relies on customs import statistics and a confidential database of data on vessel flags and gear types purportedly derived from Form 370s and information reported by U.S. canneries when receiving tuna from U.S.-flag vessels. The United States also claims that Mexico has not identified any evidence of dolphin mortalities caused by vessels of the nations that are the principal exporters of tuna products to the United States.

5. In particular, the United States asserts that vessels flagged to Thailand, the Philippines, Vietnam, Ecuador, Indonesia and the United States catch the tuna contained in over 96 percent of the U.S. market for canned tuna. In support of this statement, the United States cites statistics on imports of canned and pouched tuna products. But the processing of whole tuna into loins (which are then packed into canned or pouched tuna products) is considered under U.S. law to be a "substantial transformation" that changes the country of origin of the fish to the country where the processing takes place. Accordingly, the country of origin of a tuna product is the country in which the processing took place, not the country of the vessel that caught the tuna. The fact that tuna products have Thai origin, therefore, provides no indication of which nation's vessels caught the tuna. This is verified by the fact that Thailand's tuna fishing fleet is capable of providing only an extremely small portion of the tuna used in Thai-processed tuna products.

Thailand imports 800,000 to 900,000 tons of frozen tuna annually to supply its canning industry, and that the leading sources are Taiwan, the United States, South Korea, Vanuatu, Japan, and ASEAN countries. Further, it is undisputed that as Mexico previously demonstrated, tuna processors in Thailand obtain 80 percent of their supply from tuna trading companies, who (i) purchase tuna from third parties and (ii) regularly consolidate catches of tuna from different vessels on carrier ships, making it especially difficult, if not impossible, to trace the original sources of the tuna.

6. The problem of accuracy is not limited to Thailand. IUU fishing is a global phenomenon. For example, the European Union recently issued warnings to a number of countries, including South Korea and Vanuatu (both major suppliers to Thailand) about their failure to keep up with international obligations to fight illegal fishing.

7. Thus, the claim of the United States that all Thai-origin tuna products contain tuna caught by Thai-flagged vessels is self-evidently and blatantly incorrect. The United States lacks information on the sources of the tuna used in Thai tuna products, as well as in tuna products imported from other countries that are not members of the AIDCP, including Vietnam, the Philippines, and Indonesia. The lack of such information extends to tuna loins imported from Thailand for use in the U.S. canneries of Bumblebee and Chicken of the Sea, as the origin of the loins would be reported as Thai even though the tuna was caught, for example, by a Taiwanese- or Sri Lankan-flagged vessel. This blatant inaccuracy in the U.S. information calls into doubt much, if not all, of the U.S. data on the sources of tuna in non-ETP tuna products and the gear types used to capture that tuna.

8. Mexico has previously established that many dolphins have been killed in the WCPO by vessels fishing for tuna with purse seine nets. In addition, Mexico has established that other fishing methods that are used globally, especially longline fishing, gillnet fishing and trawl fishing, are highly destructive to dolphins, with both direct and indirect effects.

9. In particular, Mexico has established that U.S.-flag vessels set purse seine nets on dolphins in the WCPO without self-reporting such events, and that U.S. longline vessels kill and injure dolphins, both in the area of Hawaii and in the Atlantic.

10. According to a report on Vietnam presented to the WCPFC, Vietnam's fleet fishes for tuna using longlines, purse seine nets, gillnets and hand lines; Vietnam lacks a reliable count of its tuna fishing vessels; Vietnam lacks a reliable method to track the quantity of tuna landings; and Vietnam has not established an observer program. In addition, Mexico submitted evidence that Philippine tuna purse seine vessels have killed thousands of dolphins, that Philippine fishers use gillnets to catch dolphins, and that Philippine "group seine operations" are eligible for exemption from the WCPFC's general prohibition on transshipments at sea. Taiwan has by far the largest tuna fishing fleet in the WCPO, and is the largest supplier of tuna to Thailand and other countries. Mexico has established that Taiwanese vessels use gillnets to catch tuna, and that the Taiwanese longline fleet kills dolphins.

11. The evidence clearly demonstrates that there are significant risks to dolphins in tuna fisheries outside the ETP, resulting from the use of a number of different fishing methods. The United States has not explained why these other fishing methods – including the use of purse seine nets outside the ETP, longlines, gillnets, trawls and high seas driftnets – should be considered to be inherently dolphin-safe. As Mexico described in its first written submission, the

association of tuna and dolphins has been observed and documented in ocean regions other than the ETP. The fact that thousands of dolphins are being killed in purse seine nets outside the ETP suggests that vessels are regularly intentionally setting on dolphins outside the ETP, even when claiming to be FAD fishing. On the other hand, if the thousands of dolphins are being killed because of "accidents", as the United States alleges, the association between dolphins and purse seine fishing outside the ETP must be especially strong.

12. Longline fishing attracts dolphins – which are drawn to the bait on the hooks – meaning that dolphins "associate" with longline fishing. Mexico also has shown that even when dolphins do not die immediately from an interaction with longlines, they are at risk of serious mutilation and other harm. Mexico also has established that gillnet fishing kills hundreds of thousands of dolphins annually, and that this fishing method is used by some of the nations that are the largest suppliers of the tuna used in the production of tuna products. Mexico also has shown that trawl fishing kills and injures dolphins.

13. The United States claims that a captain's self-certification is sufficient to verify compliance with the requirements for dolphin-safe tuna products. But the record-keeping and inspections at processing facilities – which is only required for processing facilities in the United States and in the ETP, but not elsewhere – cannot improve the accuracy of captains' certificates. Nor can certifications by importers and exporters, who of course are not present on the vessels when the tuna are caught. In fact, the U.S. assertion that captain statements are a "core implementation tool" to verify compliance with all applicable fishing rules is contradicted by the widespread IUU fishing that certain nations, including the European Union as discussed above, are attempting to combat. Indeed, President Obama recently announced a new initiative to focus the resources of the U.S. government in discouraging IUU fishing.

14. With regard to record-keeping, the United States agrees that detailed record-keeping requirements exist only for the tuna caught by large purse seine vessels operating in the ETP pursuant to the AIDCP. The United States also agrees that those requirements apply to tuna products imported from an AIDCP country. The United States also expressly agrees that the Amended Tuna Measure does not impose any new record-keeping or verification requirements for non-U.S. processors. It is therefore undisputed that with regard to record-keeping, the Amended Tuna Measure imposes different requirements on tuna products from the ETP than it does on tuna products from other regions.

15. Also, importantly, the United States has confirmed that no U.S.-flagged large purse seine vessels currently operate in the ETP. Thus, no tuna products containing U.S.-caught tuna are subject to the extensive tracking and record-keeping requirements for ETP tuna contained in 50 CFR sections 216.92 and 216.93. When the U.S. authorities perform their "verification" of U.S. canneries, they can only check whether a cannery maintains records of the documentation that it receives; there is no way to check the validity of the documentation. The United States does not perform any verification of non-U.S. canneries, and acknowledged during the comment period for its new regulations that the U.S. government lacks the authority or legal capacity to do so outside of U.S. territory.

16. The evidence presented by Mexico of dolphin mortalities and injuries in tuna fisheries outside the ETP, and mortalities and injuries caused by other fishing methods, is both substantial

and uncontested. Certainly Mexico's evidence also supports a presumption that there are genuine concerns about harm to dolphins occurring outside the ETP.

17. Currently the value of tuna caught by a purse seine vessel during a typical voyage would range from approximately US$1.4 million to US$2.2 million for skipjack tuna, and US$2.7 million to US$4 million for yellowfin tuna. Because under the U.S. measure the dolphin set method may not be used even one time during a voyage, there is an extremely strong disincentive for a captain to self-report a dolphin set. In the unlikely event that a U.S. vessel is caught in a misrepresentation – such as in the Freitas case – the penalty is only US$11,000 per violation, which is *de minimis* in relation to the value of the catch. Non-U.S. vessels, of course, are not subject to any penalty at all because they are not within U.S. jurisdiction. Accordingly, the U.S. fines for setting on dolphins do not create a deterrent. Yet, tuna products containing tuna caught in that manner, as a practical matter, can be labeled dolphin-safe if harvested outside the ETP, because there are no independent observers to monitor the fishing practices.

III. LEGAL ARGUMENT

A. The Panel has Jurisdiction under Article 21.5 of the DSU to Rule on Mexico's Claim under Article 2.1 of the TBT Agreement

18. The arguments raised by the United States that the Panel does not have jurisdiction to consider Mexico's claim that the Amended Tuna Measure is inconsistent with Article 2.1 of the TBT Agreement unnecessarily complicate a very simple situation. The Panel clearly has jurisdiction to rule on Mexico's Article 2.1 claim. In making its arguments, the United States conflates Mexico's Article 2.1 "claim" with Mexico's "arguments" in support of that claim.

19. Mexico disagrees that the labelling conditions and requirements are "unchanged" from the original Tuna Measure. In addition to the specific changes to the provisions of the measure, Mexico's claim relates to the Amended Tuna Measure in its totality, which, as the measure "taken to comply", is "in principle, a new and different measure". In the alternative, to the extent that the Panel finds that any labelling conditions or requirements are unchanged, the Appellate Body has held that a claim previously raised in the original proceedings may be re-asserted against an unchanged "aspect" of the measure "taken to comply" if the claim was not resolved on the merits in the original proceeding, such that the DSB made no findings in respect of the claim. Further, in *US – Zeroing (Article 21.5 – EC)*, the Appellate Body clarified that "new claims against inseparable aspects of a measure taken to comply, which are unchanged from the original measure" are within a panel's terms of reference under Article 21.5, even if such claims could have been raised, but were not raised, in the original proceedings. Contrary to the allegations of the United States, Mexico's claim under Article 2.1 of the TBT Agreement in respect of the Amended Tuna Measure in no way "jeopardize[s] the principles of fundamental fairness and due process."

B. The Amended Tuna Measure is Inconsistent with Article 2.1 of the TBT Agreement

20. There is no merit to the United States' argument that the Amended Tuna Measure does not violate Article 2.1 because the detrimental impact on imported Mexican tuna products stems exclusively from a legitimate regulatory distinction. Given the Appellate Body's recent ruling in *EC – Seal Products*, Mexico limits its submission to the approach of the Appellate Body.

21. Contrary to the arguments of the United States, the relevant regulatory distinction encompasses the three labelling conditions and requirements identified by Mexico in the present proceeding. If a regulatory distinction constitutes a means of "arbitrary discrimination" it is not even-handed and therefore not a legitimate distinction. In such circumstances, the detrimental impact cannot be said to stem exclusively from a legitimate regulatory distinction. The meaning of "arbitrary discrimination" in the chapeau of Article XX provides context for the meaning of the term in Article 2.1. In *US – Shrimp*, the Appellate Body found that where the elements of a measure are "contrary to the spirit, if not the letter, of Article X:3", which establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations, the measure is applied in a manner that amounts to arbitrary discrimination within the meaning of the chapeau. The evaluation of impartial administration pursuant to Article X:3(a) of the GATT and the evaluation of even-handedness pursuant to Article 2.1 of the TBT Agreement both depend upon an examination of the manner in which the law or regulation in question is applied. Moreover, as the Appellate Body held in *EC – Seal Products*, one of the most important factors in the assessment of arbitrary or unjustifiable discrimination under the chapeau to Article XX is the question of "whether the discrimination can be reconciled with, or is rationally related to," the relevant policy objective. Accordingly, the analysis of impartial administration under Article X:3(a) and the analysis of a rational connection under the chapeau to Article XX can be used as tools to assess even-handedness within the meaning of Article 2.1.

22. ***Disqualification/Qualification of Fishing Methods***. The United States has not rebutted Mexico's *prima facie* case that the labelling conditions and requirements imposed by the Amended Tuna Measure differed depending on the fishing method used to catch tuna and that this regulatory difference – which effectively disqualifies the fishing method used by the majority of the Mexican tuna fishing fleet from catching tuna eligible for the U.S. dolphin-safe label, while effectively qualifying other fishing methods that are known to cause harm to dolphins – was not even-handed.

23. The United States argues that "Mexico is unable to prove that certain other fishing techniques have adverse effects on dolphins that are equal to or greater than what setting on dolphins has on dolphins," but this merely highlights that the benchmark used by the United States for qualifying or disqualifying a fishing method is entirely unclear. The changing and inconsistent justifications given by the United States provide strong evidence of arbitrariness. Although the United States also argues that there is "significant scientific evidence" underlying the distinction between fishing methods, the United States has not filed any scientific evidence to support the regulatory difference. Moreover, the Amended Tuna Measure does not allow for a further scientific assessment of the adverse impact on dolphin stocks in the ETP, and the National Marine Fisheries Service has never undertaken to evaluate the risks to dolphins in other ocean regions. Finally, the United States attempts to distinguish setting on dolphins from other fishing methods by arguing that "setting on dolphins is the only fishing technique that specifically targets dolphins", "is inherently harmful to dolphins" and "this harm is not replicated in other fishing methods," while the harm caused by gillnets is "merely by accident." This argument emphasizes the absence of a rational connection between the difference in labelling conditions and requirements under the Amended Tuna Measure and the objectives of that measure. Whether or not the operators of the vessel claim mortalities or serious injury were an "accident" is not relevant.

24. ***Record-keeping and Verification Requirements***. The United States has not rebutted Mexico's *prima facie* case that, under the Amended Tuna Measure, the dolphin-safe labelling conditions and requirements related to record keeping, tracking and verification differ depending on the geographic area in which tuna are caught, and that this difference is not even-handed. While the Amended Tuna Measure requires a comprehensive and independently-verified record-keeping and tracking system for the dolphin-safe status of tuna caught within the ETP, it requires neither an independent verification of the dolphin-safe status of products containing tuna caught outside the ETP nor an effective means of tracking such status while it is stored onboard fishing vessels, consolidated with the tuna caught by other fishing vessels, unloaded at port, brokered through intermediaries, transshipped, partially processed into loins, processed into finished tuna products, and imported into the United States.

25. The accuracy of the dolphin-safe status of tuna products under the Amended Tuna Measure is central to the assessment of whether the measure is "even-handed". As Mexico explained in its first written submission, there are insufficient requirements and procedures under the Amended Tuna Measure to provide the necessary audit trail for tracking the tuna. As a consequence, accurate information is not being provided on the dolphin-safe status of tuna products that contain tuna caught outside the ETP. Considering that U.S. consumers are provided with accurate information regarding the dolphin-safe status of products containing tuna caught within the ETP, but with information that is inherently unverifiable, unreliable, and inaccurate regarding the dolphin-safe status of products containing tuna caught outside the ETP, the labelling conditions and requirements related to record-keeping and verification lack even-handedness and constitute a means of arbitrary or unjustified discrimination. Tuna products derived from tuna caught outside the ETP under non-dolphin-safe circumstances are highly likely if not certain to enter the U.S. market inaccurately labelled as dolphin-safe. Such tuna products are granted an illegitimate competitive advantage over otherwise equivalent products containing non-dolphin-safe tuna caught in the ETP. Consistent with the Appellate Body's analysis in *EC – Seal Products* in the context of the chapeau of Article XX, which found that a *prima facie* case was established on the basis that seal products derived from "commercial" hunts could potentially enter the European market inaccurately classified under the IC Exception, Mexico is only required to demonstrate that, under the circumstances related to the design and application of the Amended Tuna Measure's labelling conditions and requirements, tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe. The burden then shifts to the United States to sufficiently explain how such instances can be prevented in the application of the Amended Tuna Measure's labelling conditions and requirements. While Mexico has exceeded the standard required to establish a *prima facie* case, the United States has entirely failed to provide any explanation, much less any evidence, and has therefore failed to meet its burden.

26. ***Mandatory Independent Observer Requirements***. The United States has not rebutted Mexico's *prima facie* case that the absence of a mandatory independent observer requirement for tuna fishing outside the ETP meant that the detrimental impact of the Amended Tuna Measure on imports of Mexican tuna products did not stem exclusively from a legitimate regulatory distinction and, instead, reflects discrimination against a group of imported products. If the initial dolphin-safe designation is inaccurate at the point when the tuna is harvested, the entire audit trail for the tuna products will be tainted.

27. The United States argues that it is permitted to make such an arbitrary distinction because it in fact reflects a "calibration" of the relative threats posed to dolphins by different tuna fishing methods. This "calibration" argument, which implies that it is acceptable to provide unreliable information to U.S. consumers in respect of tuna caught outside the ETP, is totally inconsistent with the primary objective of the measure, which is contingent on accurate information, and cannot be reconciled with the relevant policy objective. The United States cannot justify self-certification by reference to other regulatory contexts, because it is impossible to confirm or verify the accuracy of a dolphin-safe certification by way of a post-entry audit. It is a practical reality of tuna fishing activities that, by the time tuna arrives within U.S. territory, authorities have no means of verifying the accuracy of a captain's dolphin-safe certification. The tuna in question is caught and certified by the captain on the high seas, thousands of kilometers from shore, and far from the oversight of objective and independent authorities. As the Appellate Body held in *EC – Seal Products* and *US – Shrimp*, effective verification and auditing mechanisms are centrally important to whether a measure can be applied in a manner that constitutes a means of arbitrary discrimination. Further, the panels in *Argentina – Hides and Leather* and *Thailand – Cigarettes (Philippines)* held, in the context of Article X:3(a) of the GATT 1994, that where a legal instrument provides for a private industry party to participate in the administration of regulations which affect the party's own commercial interests, this will give rise, in the absence of adequate safeguards, to an "inherent danger" that the party will administer the laws or regulations in a manner that is self-interested, i.e., aligned with its own commercial interests, and therefore lacking impartiality. This is exactly the situation with the Amended Tuna Measure's labelling conditions and requirements related to captains' self-certifications of the "dolphin-safe" status of the tuna caught by their own fishing vessels, and there are no safeguards to address it.

C. The Amended Tuna Measure is Inconsistent with Articles I:1 and III:4 of the GATT 1994

28. The United States has not rebutted Mexico's *prima facie* case that the Amended Tuna Measure is inconsistent with Articles I:1 and III:4. The United States' defence consists of relaying on certain findings of the original Panel under Article 2.1 of the TBT Agreement that were overturned by the Appellate Body and by relying on an interpretation of Articles I:1 and III:4 that was expressly rejected by the Appellate Body in *EC – Seal Products*.

29. In *EC – Seal Products*, the Appellate Body held that Article I:1 prohibits conditions to the granting of an advantage – including regulatory distinctions drawn between like imported products – that "have a detrimental impact on the competitive opportunities for like imported products from *any* Member". The Appellate Body affirmed that a finding of detrimental impact is sufficient on its own to demonstrate a violation of either or both Article I:1, or and Article III:4, and no further analysis of whether the detrimental impact stems exclusively from a legitimate regulatory distinction (i.e., a "discrimination analysis") is required under these provisions. Nothing in the Amended Tuna Measure has reduced or minimized the detrimental impact on imported Mexican tuna products caused by the regulatory distinction imposed in the original Tuna Measure. Rather, the regulatory distinction remains substantially the same, and tuna products of Mexican origin continue to be effectively excluded from the U.S. market.

D. The Inconsistencies with Articles I:1 and III:4 cannot be Saved by Article XX of the GATT 1994

30. The United States has invoked the general exceptions under Articles XX(b) and (g) of the GATT 1994. Neither applies to the measure at issue.

31. The Panel in the original proceedings identified two objectives of the Amended Tuna Measure – the "consumer information objective" (the primary objective) and the "dolphin protection objective" (the secondary objective) – and found a direct correlation between these two objectives. The primary "consumer information objective" bears no relationship with the exceptions set out under subparagraphs (b) and (g) considering that it is unsuccessful in providing accurate information to U.S. consumers about whether tuna products contain tuna that was caught in a manner that adversely affected dolphins. The secondary "dolphin protection objective" is dependent upon the achievement of the primary objective. Since the measure fails to fulfil its primary objective, it cannot fulfil its secondary objective.

32. Article XX(b) requires the measure at issue to be "necessary" to achieve the objective that it pursues. Due to the above-noted inaccuracies, the Amended Tuna Measure fails to address the harm caused to dolphins as a result of tuna fishing methods outside the ETP and, therefore, it does not contribute to the objectives that it pursues and it is not "necessary". Moreover, there are less trade-restrictive alternative measures that are reasonably available to the United States that can achieve the objectives that it pursues. First, establishing independent, qualified observer and tuna tracking systems outside the ETP that are equivalent to those maintained under the AIDCP would balance the Amended Tuna Measure's dolphin-safe conditions and requirements. This would reduce the *de facto* discrimination against Mexican tuna products and would therefore be less trade-restrictive. Second, the measure could be revised to permit the co-existence of labelling schemes that are each required under U.S. law to provide consumers with full and accurate information regarding: the fishing method used to catch the tuna contained in the product; the risks of bycatch related to that fishing method; the sustainability of the fishing method; and the measures taken to protect dolphins and the type of tracking and verification system that backs up the protection scheme. This alternative would provide more reasonable opportunities for Mexican tuna products to access the major commercial distribution channels of the U.S. market and, thus, it would be less trade restrictive. Both alternatives would provide more accurate information to U.S. consumers and would be reasonably available.

33. Article XX(g) does not apply because the Amended Tuna Measure does not relate to the "conservation" of dolphins. It is not intended, designed, or applied as a measure necessary to conserve dolphin stocks in the course of tuna fishing operations in the ETP or to promote recovery of dolphin stocks. The above-noted information inaccuracies further undermine any conservation effect that the measure might have. Thus, the measure does not bear a "substantial relationship" to the goal of conservation, such that it is not "merely incidentally or inadvertently aimed at" conservation, as contemplated by the Appellate Body in *US – Gasoline* and the panel in *China – Rare Earths*. Further, the measure is not "made effective in conjunction with restrictions on domestic production or consumption". The United States has failed to identify any such "restrictions on domestic production or consumption", as none can be said to exist.

34. If the Panel finds that subparagraphs (a) and/or (g) could apply, the Amended Tuna Measure does not meet the requirements of the chapeau to Article XX because the measure is

designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Consistent with the analysis established by the Appellate Body in *EC – Seal Products*, the conditions prevailing in the different countries "that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue" are relevantly "the same" within the meaning of the chapeau of Article XX. The adverse effects on dolphins caused by commercial tuna fishing are the same for all countries that are engaged in commercial tuna fishing and, as a consequence, for all countries that use the tuna harvested by such commercial tuna fishing in the production of finished tuna products. Because of these widespread effects, every country producing tuna products produces at least some tuna products which contain tuna that was caught in a manner that caused adverse effects on dolphins.

35. The measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination because the differing labelling conditions and requirements for tuna caught in the ETP and tuna caught outside the ETP are designed and applied in a manner that lacks even-handedness and constitutes a means of arbitrary or unjustifiable discrimination, resulting in regulatory differences that modify the conditions of competition in the U.S. market to the detriment of tuna products from Mexico *vis-à-vis* like products of U.S. origin and like products originating in other countries. While all countries produce tuna products that contain tuna that was caught in a manner that adversely affects dolphins, the Amended Tuna Measure's differing labelling conditions and requirements are designed and applied in a manner that *de facto* precludes only Mexican tuna products from using the dolphin-safe label. This constitutes clearly differential treatment of like products from countries in which the same conditions prevail. This necessarily results in "arbitrary and unjustifiable discrimination" within the meaning of the chapeau to Article XX. Moreover, this discrimination cannot be reconciled with, or rationally related to, the Amended Tuna Measure's objectives. Finally, the unilateral action of the United States in designing and applying the Amended Tuna Measure's labelling conditions and requirements in a manner that contradicts and undermines the dolphin-safe labelling regime under the AIDCP – which was multilaterally negotiated and agreed between the United States, Mexico, and other IATTC member countries specifically for the purpose of establishing a dolphin-safe labeling regime to protect dolphins and other marine species in the ETP from harmful tuna fishing practices – results in arbitrary or unjustifiable discrimination. Had the United States first tried to address its remaining concerns within the AIDCP and been rebuffed, the legal issue in this dispute might be different. But the United States did not even try. It simply acted on its own in applying an extraterritorial measure.

IV. CONCLUSIONS

36. On the basis of the foregoing, Mexico respectfully requests that the Panel find that the U.S. measures are inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Mexico further requests that the Panel find that the general exceptions in Article XX of the GATT 1994 do not apply to the violations of Articles I:1 and III:4.