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

(WT/DS381)

EXECUTIVE SUMMARY OF THE SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

December 8, 2010

I. Introduction

1. The U.S. dolphin safe labeling provisions establish origin-neutral conditions under which tuna products may voluntarily be labeled dolphin safe. These conditions ensure that when a dolphin safe label appears on a tuna product that it does not contain tuna that was caught in a manner harmful to dolphins. It is well-documented, and virtually uncontested by Mexico, that setting on dolphins to catch tuna adversely affects dolphins. These well-documented adverse effects lie at the core of why the U.S. provisions condition the labeling of tuna products "dolphin safe" on such products not containing tuna caught by setting on dolphins.

2. The Panel should reject Mexico's claims that the U.S. dolphin safe labeling provisions are inconsistent with Articles I:1 or III:4 of the GATT 1994 and Articles 2.1, 2.2 or 2.4 of the TBT Agreement.

II. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with Article III:4 of the GATT 1994

3. To establish its Article III:4 claim, Mexico must first establish that the U.S. dolphin safe labeling provisions accord different treatment to imported and domestic tuna products and that any such different treatment is based on origin. Then, if it establishes that the U.S. provisions accord any different treatment to imported and domestic tuna products, it must establish that the treatment accorded imported tuna products is less favorable than the treatment accorded domestic tuna products. Mexico may establish that the U.S. dolphin safe labeling provisions accord different treatment to imported products based on origin either by demonstrating that the U.S. provisions on their face accord such different treatment or by demonstrating that the U.S. provisions – while origin-neutral on their face – in fact accord such different treatment. As elaborated below, Mexico has not established, either in law or in fact, that U.S. dolphin safe labeling provisions accord different treatment, let alone less favorable treatment, to imported tuna products.

4. First, Mexico has failed to show that the U.S. provisions accord any different treatment to Mexican tuna products than the treatment accorded domestic products. Mexico's legal analysis skips the threshold issue of different treatment and jumps immediately to the issue of whether the treatment the U.S. provisions accord alters the conditions of competition to the detriment of imported products. Second, in order to establish that a measure accords less favorable treatment within the meaning of Article III:4, it must be shown that any different treatment accorded to imported products is based on origin and that any different treatment is less favorable. Simply offering evidence that some imported products are accorded different treatment than some like domestic products is insufficient to support an Article III:4 claim.

5. In other disputes where a party has claimed that a facially origin neutral measure in fact discriminates based on origin, the complaining party has presented substantial evidence that what may appear to be origin-neutral criteria in fact single out imports for different treatment. In this dispute, Mexico has not adduced similar evidence to show that the U.S. dolphin safe labeling provisions – although origin neutral on their face – in fact use the manner or the place in which the tuna was caught to single out imports. In fact, as reviewed below, the evidence on the record leads to the opposite conclusion.

6. First, approximately 84 percent of the U.S. market for canned tuna products is accounted for by a combination of imported tuna products and domestic tuna products that contain imported tuna. Of the $1.2 billion of U.S. imports of tuna and tuna products, the vast majority contained tuna that was caught by methods other than setting on dolphins and are eligible to be labeled dolphin safe. Second, one-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and therefore tuna products that contain tuna caught by these vessels are eligible to be labeled dolphin safe. The remaining two-thirds of Mexico's purse seine fleet also opportunistically uses techniques other than setting on dolphins to catch tuna. In fact during the first meeting with the Panel, Mexico acknowledged that 20 percent of its fleet's catch is caught by techniques other than setting on dolphins. Tuna caught by those vessels using those techniques are also eligible to use the dolphin safe label. It is therefore incorrect that Mexican vessels "almost exclusively set on dolphins" to catch tuna. It is also important to emphasize that Mexican vessels have a choice of whether to set on dolphins to catch tuna or to use other techniques to catch tuna. Mexico's large purse seine could also catch tuna using other techniques and do so in the ETP. Third, at the time the U.S. dolphin safe labeling provisions were enacted, there were 46 U.S. purse seine vessels along with 52 Mexican vessels that fished for tuna in the ETP. Most of the 46 U.S. purse seine vessels authorized to fish for tuna in the ETP that year set on dolphins to catch tuna and did not fully discontinue the practice until years later. Thus, at that time the U.S. dolphin safe labeling provisions were enacted, tuna products that contained tuna caught by U.S. vessels were not eligible to be labeled dolphin safe.

7. Mexico focuses on the fact that its fleet fishes for tuna in the ETP to argue that the U.S. provisions discriminate against Mexican tuna products. This argument should be rejected. First, the United States imports significant amounts of tuna products that contain tuna caught in the ETP and are labeled dolphin safe. For example, in 2009 the United States imported $48 million worth of canned tuna products (i.e., tuna in airtight containers) from Ecuador that contained tuna caught using purse seine nets in the ETP. All of these imports were eligible to be labeled dolphin safe. Second, tuna caught in the ETP cannot be equated with tuna of Mexican origin. The ETP is not a Mexican fishery, but is a geographic region that encompasses a fishery where Mexican vessels fish for tuna along with vessels from many other countries. Further, the origin of tuna is not determined by where it was caught but the flag of the vessel that caught it. Tuna caught in the ETP could be of Mexican origin or of an origin of any country that has vessels fishing for tuna in the ETP.

8. In addition to failing to establish that the U.S. dolphin safe labeling provisions use the conditions under which tuna products may be labeled dolphin safe as a means to single out imports for different and less favorable treatment, Mexico has also failed to establish that the U.S. provisions reflect any intent to afford protection to domestic production of tuna products. Article III:1 of the GATT 1994 provides relevant context for Article III:4 and sets forth that "the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures." Yet, when directly asked by the Panel for any evidence that the U.S. provisions were introduced with the objective of disturbing competition between imported and non-imported tuna or affording protection to U.S. tuna products, Mexico had no evidence to offer. Looking at the design, structure and characteristics of the provisions, also reveals that the U.S. dolphin safe labeling provisions do not reflect any intent to afford protection to domestic production or discriminate against Mexican tuna products. Further, unlike in *Chile – Alcohol* there is a clear relationship between the

objectives of the U.S. dolphin safe labeling provisions and the conditions under which tuna products may be labeled dolphin safe.

9. Mexico argues that the U.S. dolphin safe labeling provisions "impose more liberal conditions for use of the labeling standard in all fisheries other than the ETP because, in those fisheries, no certification is required that no dolphin[s] were killed or seriously injured and independent observers are not required." Mexico claims that "at least the same amount or more dolphins are being killed outside the ETP in alternative fishing operations" as inside the ETP as a result of fishing operations there. Mexico further claims that fisheries outside the ETP are "U.S. fisheries" while the ETP is a Mexican fishery and therefore that the different conditions that apply with respect to those fisheries supports its claim that the U.S. provisions discriminate against Mexican tuna products. Mexico's arguments should be rejected.

10. First, to the extent there are any differences in documentation to substantiate dolphin safe claims they are calibrated to the risk that dolphins will be killed or seriously injured when tuna is caught and are not evidence that the U.S. dolphin safe labeling provisions discriminate against Mexican tuna products. Second, the so-called available scientific evidence Mexico cites to support its assertion that the extent of dolphin mortality as a result of tuna fishing operations outside the ETP are the same or greater outside the ETP do not in fact support that assertion. Third, to the extent Mexico's claim relies on the different standards applied under the U.S. dolphin safe labeling provisions as compared to those under the Marine Mammal Protection Act, such arguments are inapposite. The issue before the Panel is whether the U.S. dolphin safe labeling provisions accord imported tuna products less favorable treatment. Comparing how fisheries are managed under the MMPA as compared to how tuna products may be labeled dolphin safe under the U.S. dolphin safe labeling provisions does not shed light on that issue.

11. Mexico has also not shown that the U.S. measures have modified the conditions of competition to the detriment of imported tuna products. Unlike in *Korea – Beef*, the U.S. dolphin safe labeling provisions do not limit the marketing opportunities for imported tuna products. Imported tuna products comprise a substantial share of the U.S. market for tuna products, and the U.S. provisions do not impose any choice on marketers of tuna products in terms of selling tuna products in the United States. The limited demand for non-dolphin safe tuna products is a result of retailer and consumer preferences for dolphin safe tuna products, not the U.S. dolphin safe labeling provisions.

12. Mexico offers several arguments that purport to show the dolphin safe labeling provisions modify the conditions of competition to the detriment of Mexican tuna products. These should be rejected. Countries other than Mexico, including the United States, are similarly close to the ETP, including those areas of the ETP where setting on dolphins to catch tuna occurs. Evidence submitted by Mexico shows that Mexico would not have to travel long distances, change its target species, or significantly alter the duration of its trips in order to seize the opportunity to fish without setting on dolphins in its own backyard. Mexico has not substantiated its assertion that switching fishing techniques would involve "considerable financial and other costs," particularly in light of the fact that the same boats and fishing gear that is used to catch tuna by setting on dolphins can be used to catch tuna using other techniques. To the extent there are costs associated with adopting alternative techniques to catch tuna those would not be unique to Mexican vessels. Furthermore, producers often

must shoulder additional costs in conjunction with compliance with a government measure, and such costs are not evidence that the U.S. measures are consistent with Article III:4.

13. Mexico states that if its vessels were to expand its fishing for yellowfin tuna in a manner other than by setting on dolphins, they would catch juvenile tuna rather than the mature tuna it currently catches and exhaust the tuna stocks. However, this argument assumes that expanded fishing operations by these vessels would be done in contravention of fisheries management measures maintained under the auspices of the multilateral IATTC.

14. Mexico asserts that the U.S. dolphin safe labeling provisions benefit U.S. producers because they "exclude[] Mexican brands from competing in the U.S. market" and allow U.S. canneries to "avoid having to ensure that tuna they purchase from non-ETP sources was captured without killing or seriously injuring dolphins." There is no basis for Mexico's assertion. First, the U.S. provisions do not exclude Mexican brand tuna products from the U.S. market. Second, U.S. canneries use an alternative dolphin safe label on their tuna products and are therefore subject to the condition in section 1385(d)(3) that tuna labeled dolphin safe must not contain tuna caught in a set in which dolphins were killed or seriously injured. Third, there is no benefit to U.S. canneries of avoiding having to ensure that the tuna they purchase is not caught in a set in which dolphins were killed or seriously injured. Fourth, U.S. canneries supported the DPCIA because consumers were concerned about dolphins being harmed when tuna was caught and wanted assurances that tuna products did not contain tuna that was caught in a manner harmful to dolphins.

15. When the DPCIA was enacted, the United States had 46 U.S. purse seine vessels that fished for tuna in the ETP of which 31 were doing so full-time. Both Mexican and U.S. vessels fished in the ETP by setting on dolphins at the time. Therefore, to the extent that the conditions of competition were altered by the U.S. dolphin safe labeling provisions, they were not changed to the detriment of imports.

16. In sum, the U.S. dolphin safe labeling provisions accord no less favorable treatment to Mexican tuna or tuna products than that accorded to tuna and tuna products of the United States. Therefore, the U.S. provisions are not inconsistent with Article III:4 of the GATT 1994.

III. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent with Article I:1 of the GATT 1994

17. Mexico has also failed to establish that the U.S. dolphin safe labeling provisions are inconsistent with Article I:1 of the GATT 1994. Mexico both wrongly identifies the advantage at issue in this dispute and fails to establish that the U.S. dolphin safe labeling provisions accord an advantage to imported tuna products of other countries that they fail to accord to imported tuna products of Mexico.

18. The issue of whether the U.S. provisions fail to accord such an advantage was heard and decided two decades ago when a 1991 panel under the GATT 1947 rejected Mexico's claims that the U.S. dolphin safe labeling provisions were inconsistent with Article I:1 of the GATT 1993. The legal

and factual conclusions of the panel in *US – Tuna Dolphin I* were well reasoned and sound, and nothing in the intervening time has changed to support a different conclusion.

19. Mexico appears to believe that the advantage Mexican products are being denied is the right to carry the dolphin safe label. That is incorrect. No product (whether of the United States or any other Member) is entitled unconditionally to be labeled dolphin safe under U.S. law. Rather, the advantage at issue in this dispute is the opportunity under U.S. law to label tuna dolphin safe if certain conditions are met.

20. Mexico also appears to believe that a measure may be found inconsistent with Article I:1 of the GATT 1994 simply by virtue of the fact that imported products from some countries qualify for an advantage while others do not. This is not a correct reading of Article I:1 of the GATT 1994. As prior reports have expressed, whether conditions attached to an advantage granted by a measure are inconsistent with Article I:1 depends upon whether or not such conditions discriminate with respect to the origin of products. Conditions that are origin-neutral are not inconsistent with the obligation in Article I:1 that any advantage granted to imported products originating in any Member shall immediately and unconditionally be granted to like products originating in any other Member.

21. Mexico argues the U.S. dolphin safe labeling provisions, while origin neutral on their face, in practice discriminate against Mexican tuna products as compared to imports from other countries. Yet, Mexico has not put forth evidence sufficient to substantiate its claim. In particular, Mexico has not established that the conditions the U.S. provisions establish for labeling tuna products dolphin safe – which Mexico acknowledges are origin neutral on their face – in fact act as a proxy to single out imports from some countries over others as eligible to be labeled dolphin safe. To the contrary, the information on record in this dispute demonstrates that the U.S. provisions do not fail to accord an advantage to Mexican tuna products that they accord to imported tuna products originating in other countries.

22. As reviewed in connection with Mexico's claims under Article III:4 of the GATT 1994, one-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and as Mexico acknowledged during the first meeting with the Panel, approximately 20 percent of Mexican tuna catch is caught by techniques other than setting on dolphins. Additionally, the technique of setting on dolphins to catch tuna is not unique to the Mexican fishing fleet. The fishing fleets of Colombia, El Salvador, Guatemala, Nicaragua, Panama, and Venezuela also have vessels that set on dolphins, among other techniques, to catch tuna in the ETP. Setting on dolphins was a technique used by U.S. vessels at the time the U.S. provisions were adopted. These facts are evidence that U.S. provisions do not use the manner in which the tuna was caught as a proxy to distinguish between tuna products that are eligible to be labeled dolphin safe and those that are not based on origin. It is the manner in which the tuna was caught not origin that determines whether tuna products containing it may be labeled dolphin safe.

23. Further, nothing prevents Mexico's fleet from expanding its use of techniques other than setting on dolphins to catch tuna, including on account of the costs as noted above. To the extent Mexico relies on the same arguments it made in the Article III:4 context to prove that the U.S. labeling provisions discriminate against Mexican, because they call for different documentation to substantiate dolphin

safe claims, those arguments are without merit for the same reasons as discussed above. As in the case with Mexico's argument under Article III:4, Mexico's argument that the U.S. provisions discriminate against Mexican tuna products because the Mexican fleets primarily fish for tuna in the ETP should likewise be rejected in the context of Mexico's Article I:1 claim.

24. In this case, unlike in *Canada – Autos*, limiting the use of the dolphin safe label to tuna products that do not contain tuna that was caught by setting on dolphins or in a set in which dolphins were killed or seriously injured does not have the effect of limiting eligibility to use the dolphin safe label to imports originating in only certain countries. It is not the origin of the product, but whether that product was caught in a manner that adversely affected dolphins that determines eligibility to use the dolphin safe label. In contrast to the situation in *Canada – Autos*, Mexican fishing vessels can choose to meet the conditions that would make products containing their tuna eligible for the dolphin safe label.

25. In sum, the U.S. measures do not accord an advantage, favour, or privilege to tuna or tuna products originating in any other country that is not also accorded to Mexico. Therefore, the U.S. provisions are not inconsistent with Article I:1 of the GATT 1994.

IV. The U.S. Dolphin Safe Labeling Provisions Are Not Technical Regulations

26. Mexico has failed to establish that the U.S. dolphin safe labeling provisions constitute technical regulations within the meaning of Annex 1 of the TBT Agreement. In particular, Mexico has failed to establish that compliance with the U.S. dolphin safe labeling provisions is mandatory. A labeling requirement with which compliance is mandatory is a measure that establishes conditions under which a product may be labeled in a certain way *and* requires the product to be labeled in that way in order to be marketed.

27. The principal flaw in Mexico's interpretation of the definition of technical regulation in Annex 1 of the TBT Agreement is that it conflates the meaning of the term "labeling requirement" with the phrase "with which compliance is mandatory." In doing so, Mexico would render the phrase "with which compliance is mandatory" and the phrase "with which compliance is not mandatory" in the definition of a technical regulation and the definition of a standard, respectively, without effect. Mexico's approach is inconsistent with the fundamental rule of treaty interpretation that an interpretation of the terms of a treaty is to be preferred that gives full effect and meaning to each of its terms.

28. Applying the correct interpretation of a technical regulation to the facts of this dispute reveals that compliance with the U.S. dolphin safe labeling provisions is not mandatory within the meaning of Annex 1 of the TBT Agreement. While the U.S. dolphin safe labeling provisions set out conditions under which tuna products may be labeled dolphin safe, they do not require tuna products to be labeled dolphin safe to be marketed. In fact, tuna products that are not labeled dolphin safe are readily available on the U.S. market.

29. Mexico advances that one way to distinguish between a labeling requirement that is voluntary and one that is mandatory is whether the label contemplated in the labeling requirement is the only

label that may be used in the market. There is no basis for Mexico's theory. First, it is not based on the text of the TBT Agreement. Second, Mexico's theory conflates the meaning of the term a "labeling requirement" with the meaning of the phrase "with which compliance is mandatory" and renders the latter without effect. Mexico also argues that "the fact [the U.S.] measures established surveillance and enforcement procedures" is an additional point supporting its position that the U.S. dolphin safe labeling provisions are mandatory. The information collected by the United States and the surveillance activities it undertakes to ensure that tuna products labeled dolphin safe are in fact dolphin safe are simply mechanisms that support the underlying labeling requirement established in the U.S. dolphin safe labeling provisions. They do not change the fact that the U.S. provisions do not require tuna products to be labeled in a certain way to be marketed in the United States and therefore compliance with the labeling requirements set out in the U.S. provisions is not mandatory within the meaning of Annex 1 of the TBT Agreement.

30. The U.S. dolphin safe labeling provisions are not like the measures in *EC - Asbestos* or *EC – Sardines*, which concerned measures that fell within the scope of the first sentence of the definition of a technical regulation; neither concerned labeling requirements.

31. Mexico's alternative argument that the U.S. provisions are *de facto* mandatory should be rejected. Contrary to Mexico's assertions, a labeling requirement cannot be "*de facto*" mandatory simply based on private actors' preference for products labeled in a certain way. Some form of government action must make it compulsory or obligatory that for products to be marketed they must be labeled in a certain way in order for compliance with a labeling requirement to be mandatory. In this dispute, Mexico identifies no government action that makes compliance with the U.S. dolphin safe labeling provisions mandatory.

32. For the forgoing reasons, Mexico has failed to establish that the U.S. dolphin safe labeling provisions are technical regulations within the meaning of Annex 1 of the TBT Agreement and accordingly has failed to establish that the U.S. dolphin safe labeling provisions are subject to Article 2 of the TBT Agreement. As a consequence, the U.S. dolphin safe labeling provisions cannot be found inconsistent with Article 2.1, 2.2 or 2.4 of the TBT Agreement, and the Panel should therefore reject Mexico's claims under those articles.

V. The U.S. Dolphin Safe Labeling Provisions Are Not Inconsistent With Articles 2.1, 2.2 or 2.4 of the TBT Agreement

33. Despite textual and contextual differences between Articles I:1 and III:4 of the GATT 1994 and Article 2.2 of the TBT Agreement, Mexico relies solely on the arguments it makes regarding the consistency of the U.S. dolphin safe labeling provisions with Articles I:1 and III:4 of the GATT 1994 for its arguments under TBT Article 2.1. The United States has articulated why Mexico's arguments under Articles I:1 and III:4 of the GATT 1994 fail, and Mexico's arguments under TBT Article 2.1 fail for the same reasons.

34. To establish a breach of Article 2.2 of the TBT Agreement, a complaining party must establish that the measure at issue is "more trade-restrictive than necessary to fulfil a legitimate objective." A measure is "more trade-restrictive than necessary to fulfill a legitimate objective" if (1) there is a

reasonably available alternative measure (2) that measure fulfills the objectives of the measure at the level that the Member imposing the measure has determined is appropriate and (3) is significantly less trade-restrictive. Mexico has not established any of these elements with respect to the U.S. dolphin safe labeling provisions.

35. It would not be appropriate to apply the same interpretive approach panels and the Appellate Body have undertaken in connection with the word "necessary" as it appears in Article XX of the GATT 1994 in analyzing whether a measure is "more trade restrictive than necessary"within the meaning of Article 2.2 of the TBT Agreement.

36. Applying the proper interpretation of Article 2.2 of the TBT Agreement to the facts of this dispute, it is clear the U.S. dolphin safe labeling provisions are no more trade-restrictive than necessary to fulfill their legitimate objectives. The U.S. dolphin safe labeling provisions fulfil the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins by establishing conditions under which tuna products may be labeled dolphin safe that are based on whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins. The U.S. provisions also fulfil the objective of protecting dolphins by ensuring that the U.S. market is not used to encourage setting on dolphins to catch tuna. As the practice of setting on dolphins to catch tuna decreases, the associated adverse effects on dolphins decrease as well.

37. With respect to the situation Mexico describes where a tuna product might contain tuna caught in a set in which a dolphin was killed yet still be labeled dolphin safe, this does not support Mexico's contention that the U.S. dolphin safe labeling provisions fail to full their objective of ensuring consumers are not misled or deceived about whether the product contains tuna that was caught in a manner that adversely affects dolphins. First, it is a hypothetical situation. Second, Mexico has presented no evidence that such a hypothetical actually exists. In fact, the likelihood of any such products being on the U.S. market is low.

38. Rather than demonstrating that the U.S. dolphin safe labeling provisions do not fulfill their objectives of ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, the documentation to support dolphin safe claims reflect that the U.S. provisions took a balanced approach that weighed the risk of products containing tuna caught in a manner that adversely affects dolphins against the burden of ensuring that by conditioning use of dolphin safe labeling on an observer's statement that no dolphins were killed or seriously injured. Such an approach that weighs costs and benefits is consistent with well-established approaches to the introduction of government measures. It is also consistent with the TBT Agreement.

39. Mexico has failed to establish that there is a reasonably available alternative measure that fulfills the provisions' objectives that is significantly less trade-restrictive. Neither the AIDCP nor the AIDCP resolutions are alternatives that would fulfill the objectives of the U.S. dolphin safe labeling provisions. The AIDCP is an agreement that seeks to reduce observed dolphin mortalities and serious injuries *when dolphins are set upon to catch tuna*. Thus, the AIDCP is not a substitute for provisions that seek to protect dolphins by discouraging the practice of setting on them to catch tuna. In addition, application of the procedures called for under the AIDCP would not fulfill the objective of ensuring

that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, since those procedures do not address the labeling of tuna products or dolphin safe claims on tuna products.

40. Use of the definition of "dolphin safe" referred to in the AIDCP resolutions would also not fulfill the objective of the U.S. dolphin safe labeling provisions. First, that definition – if used as a basis for the conditions under which tuna products may be labeled dolphin safe – would not ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins because it would allow tuna products to be labeled dolphin safe if dolphins were set upon to catch the tuna. Second, these definitions – if used as a basis for the conditions under which tuna products may be labeled dolphin safe – would not contribute to the protection of dolphins by ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna, since they would permit tuna products to be labeled dolphin safe that were caught by setting on dolphins.

41. The Panel should also reject Mexico's claims that U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement, because Mexico has not demonstrated that the U.S. dolphin safe labeling provisions restrict trade, much less that they restrict trade more than necessary within the meaning of Article 2.2 of the TBT Agreement.

42. Mexico claims that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.4 of the TBT Agreement because they are not based on relevant international standards. However, to substantiate an Article 2.4 claim, the complaining party must establish that (1) there is a relevant international standard; (2) that standard would not be an ineffective or inappropriate in fulfilling the legitimate objective of the measure; and (3) the measure at issue is not based on that standard. Mexico has not established, however, that the AIDCP resolutions Mexico identifies – resolution on tuna tracking and dolphin safe certification – are relevant international standards within the meaning of Article 2.4 of the TBT Agreement or that they would not be ineffective and inappropriate to fulfill the objectives of the U.S. dolphin safe labeling provisions.

43. First, Mexico has not made any showing that the AIDCP resolutions meet the definition of a standard set out in Annex 1 of the TBT Agreement. In particular, Mexico has not established that the AIDCP resolutions provide for rules, guidelines or characteristics for products or related process and production methods or for an aspect covered under the second sentence such as a labeling requirement, or that the definition of dolphin safe referred to in the AIDCP resolutions is for "common and repeated use." It has also not established that the AIDCP resolutions were adopted by a recognized body. The definition of dolphin safe in the AIDCP resolutions a definition for purposes of those resolutions. Neither resolution purports to establish a definition of "dolphin safe" for general application outside the context of the AIDCP resolutions. To construe the definition of "dolphin safe" in the AIDCP resolutions as standards for "common and repeated use" would vastly expand the scope of the term standard in the TBT Agreement and have serious implications with respect to Members' rights and obligations under any intergovernmental resolution or agreement. The AIDCP resolutions were adopted by the parties to the AIDCP, and Mexico has not established that the parties to the AIDCP constitute a body as that term is defined for purposes of the TBT Agreement nor that the parties to the AIDCP could be considered to have recognized activities in standardization.

44. The AIDCP resolutions are also not "international" within the meaning of Article 2.4 of the TBT Agreement. In particular, the AIDCP resolutions were not adopted by a body whose membership is open to the relevant bodies of at least all Members and therefore do not qualify as "international" for purposes of Article 2.4 of the TBT Agreement. Further, the definition of "dolphin safe" in the AIDCP resolutions are not "relevant." For example, that definition does not relate or pertain to the objectives of the U.S. dolphin safe labeling provisions aimed at ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and ensuring the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna and thereby contribute to dolphin protection.

45. Mexico has also not put forth any evidence or argument that the definition of "dolphin safe" in the AIDCP resolutions would not be ineffective or inappropriate to fulfill the objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. For this reason alone, Mexico has failed to establish a *prima facie* case under Article 2.4 of the TBT Agreement. With respect to the objective of the U.S. dolphin safe labeling provisions of ensuring that the U.S. market is not used to encourage the practice of setting on dolphins to catch tuna and thereby contributing to the protection of dolphins, Mexico has also not established that the definition of dolphin safe in the AIDCP resolutions would not be ineffective or inappropriate in fulfilling that objective. If the U.S. dolphin safe labeling provisions were based on the definition of dolphin safe in the resolutions then tuna products that contain tuna caught by setting on dolphins could be labeled dolphin safe, and consumers would no longer know whether tuna products labeled "dolphin safe" contain tuna that was caught by setting on dolphins and their purchases of tuna products that contain tuna caught by setting on dolphins could serve to encourage a practice that adversely affects dolphins. Basing the U.S. provisions on the definition of "dolphin safe" in the AIDCP resolutions would therefore not be effective or appropriate in fulfilling the objective of the U.S. provisions of contributing to dolphin protection.

VI. Conclusion

46. For the reasons stated above, the panel should reject Mexico's claims that the U.S. dolphin safe labeling provisions 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.