BEFORE THE WORLD TRADE ORGANIZATION

U.S. – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

(DS381)

EXECUTIVE SUMMARY

OPENING STATEMENT OF MEXICO AT THE SECOND MEETING WITH THE PANEL

Geneva
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I. INTRODUCTION

1. This dispute concerns U.S. measures that unilaterally impose conditions related to fishing methods in order for tuna products to be labeled "dolphin safe" and thereby enable those products to access major distribution channels in the U.S. market.

2. Despite everything that has happened in the last 20 years, and all the lessons learned in the Eastern Tropical Pacific (ETP), the U.S. continues to pursue unilateral policies put in place in 1990. The Agreement on the International Dolphin Conservation Program (AIDCP) has been highly successful at reducing dolphin mortalities to levels that scientists describe as statistically insignificant. In addition to protecting dolphins, the AIDCP also protects tuna stocks and the overall ecosystem of the ETP by, *inter alia*, reducing bycatch associated with alternative fishing methods including FAD fishing. Notwithstanding Mexico's compliance with the AIDCP, the U.S. measures prohibit the use of a dolphin safe label on 96% of Mexican tuna production while permitting the label to be used on like tuna products from other countries including the U.S. resulting in 96% of Mexican tuna products being effectively denied access to the U.S. market.

3. The U.S. measures are intended to unilaterally and extraterritorially pressure the Mexican tuna fleet to change where it fishes for tuna and/or to change its fishing method to environmentally unsustainable alternative methods. This undermines the environmental objectives of the AIDCP and, if the U.S. changes were implemented, would threaten the economic viability of the Mexican fishing fleet which is an important part of Mexico's economy as a developing country member.

4. Mexico has presented a *prima facie* case with respect to all of its claims and requests that the Panel rule on each of Mexico's claims and avoid the exercise of judicial economy.

II. THE U.S. MEASURES ARE INCONSISTENT WITH ARTICLE I:1 OF THE GATT 1994

5. Tuna products from virtually all other countries, including the two largest exporters Thailand and the Philippines, are allowed to label their products dolphin safe; by contrast, Mexican tuna products are not. Due to the U.S. measures, current imports of Mexican tuna products into the U.S. account for less than one percent of all U.S. imports of tuna products. The "advantage" in this dispute is the right to designate tuna products as dolphin safe. As set out by the Panel in Canada – Autos, the obligation to accord "unconditionally" to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. The U.S. measures make the advantage subject to conditions with respect to the situation or conduct of Mexico (i.e., fishing methods for tuna) and thereby discriminate against tuna products from Mexico in favour of like tuna products from other countries.

6. The facts in this dispute are analogous to those in Belgium – Family Allowances, in which the panel condemned a measure which discriminated against imports depending on the type of family allowance system that was in place in the exporting country. Similarly, in this dispute the U.S. measures discriminate against imports depending on the type of fishing method employed by the exporting country.

III. THE U.S. MEASURES ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

7. The U.S. arguments concerning Article III:4 improperly attempt to transform the discrete facts of particular cases of less favourable treatment into supposed general requirements for all cases of less favourable treatment. Moreover, the arguments regarding less favourable treatment raise profound

systematic implications for the WTO trading system. If embraced, these arguments would empty the concept of *de facto* discrimination of all meaning and undermine the national treatment principle that is one of the fundamental cornerstones of the multilateral trading system.

A. The U.S. Measures Have Modified the Conditions of Competition for Mexican Tuna Products

8. The U.S. measures have severely restricted the ability of Mexican tuna products to be sold in the U.S. The principal U.S. distribution channels will not carry Mexican tuna products because they are prohibited by the U.S. measures from being labeled as dolphin safe. Thus, the U.S. measures modify the conditions of competition to the detriment of imported Mexican tuna products. 96% of Mexico's tuna production is, by virtue of these measures, denied access to the principal distribution channels in the U.S. market.

B. There is no Legal Basis for the Two-Part Test for Proving Less Favourable Treatment Under GATT Article III:4 that is Proposed by the U.S.

9. There is no legal basis for the proposed U.S. test that Mexico must 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". After fulfilling this first step, Mexico must then establish that the treatment accorded to imported tuna products is less favourable than the treatment accorded to domestic tuna products. The only authority that the U.S. cites is the Appellate Body report in *Korea – Beef* and that report does not support the proposed test.

C. It is not Necessary for Mexico to Prove that the Differential Treatment that is Accorded to Imported Products is "Based on Origin"

10. The U.S. argues that it is necessary for Mexico to prove that differential treatment is "based on origin" in order for there to be less favourable treatment under Article III:4. The U.S. misreads *EC – Biotech* and *Dominican Republic – Cigarettes* and there is no legal basis for its assertion.

D. It is not Necessary for Mexico to Prove the U.S. Measures "Single Out Imports for Different Treatment"

11. The U.S. argues that it is necessary for Mexico to demonstrate that what may appear to be origin-neutral criteria in fact single out imports for different treatment. The reports cited by the U.S. (*Mexico – Soft Drinks, Chile – Alcohol,* and *Korea – Alcohol*) do not stand for the proposition that imports must always be singled out for there to be less favourable treatment. While singling out imports is one way to accord less favourable treatment it is not the only way. The issue is not whether a measure singles out imports but rather whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.

E. It is Not Necessary for Mexico to Prove that "Almost All" Imports are Disadvantaged

12. The U.S. argues that Mexico must prove that "almost all" imports receive the less favourable treatment and almost all like domestic products do not. While *de facto* discrimination may be obvious in circumstances where almost all imports receive less favourable treatment and almost all like domestic products do not, there is no legal requirement for Mexico to prove discrimination to this extent.

13. From the perspective of imports, the "almost all" standard posed by the U.S. is inconsistent with the established principle that not all imports must receive less favourable treatment in order for there to be

discrimination: (i) a measure does not have to give rise to less favourable treatment for like imported products in each and every case in order to accord treatment no less favourable; (ii) the possible absence of less favourable treatment of like imported product in some instances does not detract from the fact that there might be less favourable treatment in other instances; and (iii) a Member cannot balance more favourable treatment of imported products in some instances against less favourable treatment of imported products in other instances. From the perspective of like domestic products it is equally clear that not all like domestic products have to be free of the less favourable treatment in order for there to be discrimination.

F. The GATT 1947 Panel Report in *Belgian Family Allowances* Supports Mexico's Discrimination Claims

14. Citing the panel report in *Indonesia – Autos* as authority, the U.S. argues that *Belgian Family Allowances* stands for the proposition that if conferral of an advantage within the meaning of Article I:1 of the GATT is made conditional on any criteria then those criteria must be related to the imported product itself and, on this basis, argues that it does not support Mexico's claims. Mexico disagrees. *Belgian Family Allowances* stands for the proposition that a measure cannot condition an advantage (e.g., access to the principal distribution channels for a product) upon certain actions by the exporting WTO Member. The panel condemned a measure which discriminated against imports depending on the type of family allowance system that was in place in the exporting country. In this dispute, the U.S. measures discriminate against imports depending on the type of fishing method employed by the exporting country. Thus, the facts of the two cases are analogous. Both relate to actions undertaken by the exporting country.

G. The U.S. Measures Afford Protection to Domestic Production

15. Contrary to the argument of the U.S., Mexico does not have to establish that the U.S. provisions reflect any intent to afford protection to domestic production of tuna products. The question of whether a measure affords protection to domestic production is not a question of protectionist intent but, rather, one of application of the measure. For purposes of assessing whether there is less favourable treatment, the legal issue is what the effect of a measure is in the market, not why it is enacted. Under Article III:4, the Appellate Body has specifically ruled that if there is less favourable treatment of the group of like imported products, there is, conversely, protection of the group of like domestic products.

IV. THE U.S. MEASURES ARE INCONSISTENT WITH THE TBT AGREEMENT

A. The U.S. Measures are Technical Regulations

16. The U.S. argues that the principal flaw in Mexico's interpretation of the meaning of "technical regulation" is that it conflates the meaning of the term "labeling requirement" with the phrase "with which compliance is mandatory". This argument is completely without merit. The U.S. misses the key point of Mexico's argument. Simply stated, it is the limitation of "dolphin safe" to a single standard that makes the U.S. measures a technical regulation. The U.S. measures can be contrasted with a situation where there are two *standards* for dolphin safe—the U.S. standard and the international AIDCP standard—and either can be used provided that the requirements of the standard being used are met and the designation of dolphin safe that is being used is identified with the specific standard.

17. The U.S. takes the narrow position that to be a technical regulation, a measure must require that the product be labeled in a certain way in order to be marketed or sold in the domestic market. Mexico agrees that this is one example of a technical regulation. However, it is not the only example. The Appellate Body reports in *EC – Asbestos* and *EC – Sardines* make this clear. The situation in this case is

very similar to that addressed in *EC- Sardines*. In that case, sardines could not be marketed as "preserved sardines" in the EU unless they comprised certain species of fish; in this case tuna products cannot be marketed in the U.S. as "dolphin safe" unless the dolphin set fishing method was not used to catch tuna in the ETP. In both *EC – Sardines* and in this dispute, the products at issue—sardines and tuna products—could be sold in the domestic markets without the designations of "sardines" or "dolphin safe" although the market opportunities were limited, particularly in the circumstances of this dispute.

18. Finally, if the U.S. measures were not considered *a priori* mandatory, they have a mandatory nature in a *de facto* manner. As Mexico has explained in detail, having a dolphin safe label is essential in order to market tuna products in the principal distribution channels in the U.S. market.

B. The U.S. Measures are Inconsistent with Article 2.1 of the TBT Agreement

19. The U.S. measures modify the conditions of competition in the relevant market to the detriment of imported Mexican tuna products in favour of like tuna products from the U.S. and other countries. This is the basis for Mexico's claims that Article 2.1 has been violated.

C. The U.S. Measures are Inconsistent with Article 2.2 of the TBT Agreement

1. The Meaning of "Necessary"

20. The GATT and GATS jurisprudence illuminates the ordinary meaning of "necessary" in three important ways: (i) with regard to the continuum of necessity, (ii) with regard to reasonableness; and (iii) with regard to the importance of the interests and values at stake. All three of these elaborations apply to the meaning of the same term in Article 2.2. Contrary to the argument of the U.S., the fact that the term "necessary" in Articles XX and XIV is used in the context of whether it is necessary to breach a provision of the GATT 1994 or the GATS rather than whether it is "more trade-restrictive than necessary" in Article 2.2 does not render these interpretations inapplicable. Although the subject matter of what is necessary differs between these provisions, the concept of necessity is the same. This follows unavoidably from the appropriate use of the customary rules of treaty interpretation, as mandated by Article 3.2 of the Dispute Settlement Understanding.

2. The U.S. Erroneously Relies on Article 5.6 and Footnote 3 of the SPS Agreement

21. When attempting to interpret the term "necessary," the U.S. erroneously relies on Article 5.6 of the SPS Agreement. The language of Article 5.6 and its associated footnote differs significantly from that of Article 2.2 of the TBT Agreement and, therefore, it is inappropriate to read into Article 2.2 the concept that the measure must fulfil a legitimate objective "at the level that the Member imposing the measure has determined appropriate". Moreover, reading into Article 2.2 this concept is inconsistent with the last phrase in the second sentence of Article 2.2, which reads "*taking account of the risks non-fulfilment would create*". This is because the phrase contemplates a "necessary" measure meeting a lower level of protection than determined by the Member if such a lower level of protection is appropriate in the light of the risks of non-fulfilment of the objective.

3. The Application of Article 2.2 to the Facts of this Dispute

22. According to the U.S. the stated objectives of the U.S. measures relate solely to adverse effects on dolphins that occur when nets are set upon dolphins. Under this approach, the U.S. measures have no objectives concerning adverse effects on dolphins resulting from other fishing methods or occurring in ocean regions other than the ETP. Mexico's position is that Mexico's fishing methods do not adversely affect dolphins and that the fishing methods of other fishing fleets do adversely affects dolphins.

(a) The U.S. Measures do not fulfill their Objectives

23. Mexico continues to question the legitimacy of the objectives of the U.S. measures, in particular the objective to impose unilaterally and extraterritorially the fishing methods preferred by the U.S. as a condition for access to the principal distribution channels in the U.S. tuna products market. It is not "legitimate" for the U.S. to use this means to get foreign tuna fleets to change their fishing methods. Mexico also questions the "zero tolerance" standard that appears to underlie the U.S. measures. However, even assuming *arguendo* that the objectives of the U.S. measures are legitimate, the measures do not fulfill those objectives. The fundamental premise of the U.S. measures has not been substantiated. Thus, it cannot be said that the U.S. measures "ensure that consumers are not mislead or deceived about whether the tuna product contains tuna that was caught in a manner that adversely affects dolphins". Thus, contrary to the stated objectives of the U.S., it cannot be said that the U.S. measures "ensure that tuna products labeled as dolphin safe are in fact dolphin safe" and that the label "accurately conveys to consumers that the product does not contain tuna that was caught in a manner that adversely affects dolphins". Finally, since the U.S. measures essentially block from the principal distribution channels tuna caught only in the ETP, the objective of encouraging foreign fishing fleets not to set upon dolphins applies only to fleets fishing in the ETP. The fishing method of those fleets is governed by the AIDCP and the U.S. measures do not go any further than the AIDCP. Thus, the U.S. measures have no effect on encouraging foreign fishing fleets not to set upon dolphins.

(b) The U.S. Measures are More Trade Restrictive than Necessary to Fulfil a Legitimate Objective Taking into Account of the Risks Non-Fulfilment Would Create

24. To the extent that the U.S. measures fulfill any objectives, taking into account the risks of non-fulfillment, those objectives could be fulfilled using less trade restrictive measures. The risks of non-fulfillment of the objectives is low because there is a very low if non-existent risk of adverse consequences should the objectives not be carried out. This is because all of the objectives of the U.S. measures are already being fulfilled by the AIDCP, at least for the tuna products made from tuna harvested in the ETP. For tuna products produced from tuna harvested outside the ETP, the stated objectives are not being fulfilled. A less trade restrictive way of fulfilling the objectives would be to create dolphin safe *standards* rather than a technical regulation whereby the AIDCP standard could be recognized and a label complying with the AIDCP standard used. At the same time, the different U.S. standard could be recognized and a label complying with that standard used. In this way U.S. consumers will be fully informed of all aspects of dolphin safe fishing methods and they can choose accordingly when purchasing tuna products from U.S. retailers.

D. The U.S. Measures are Inconsistent with Article 2.4 of the TBT Agreement

25. Focusing on the key points, the AIDCP resolution on certifying tuna as dolphin safe addresses the exact same issue as the U.S. dolphin safe measure. The resolution is relevant within the meaning of Article 2.4 and it is effective to meet the objective of informing consumers that dolphins were not adversely affected. The U.S. participated in the creation and adoption of the AIDCP resolution and when it first announced its official label in 1999 it considered the international standard to be relevant. The AIDCP is a group of national governments that acts collectively to set standards for protecting dolphins in the ETP tuna fishery, and which uses the IATTC Secretariat as its administering body. Finally, the U.S. agreed to this standard, and is now trying to avoid it. For purposes of this dispute, the AIDCP dolphin safe standard is the relevant international standard.