

BEFORE THE WORLD TRADE ORGANIZATION

**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)



**Comments of the United Mexican States on United States’
Responses to Panel’s Questions 60 and 61**

Geneva

17 October 2014

60. To both Parties: In its response to Panel question no. 59, the United States clarified that "the determination provided for under section 216.91(a)(4)(iii) [of the 2013 Final Rule, i.e. that a fishery is causing "regular and significant dolphin mortality or serious injury of dolphins"] only applies to those fisheries not otherwise covered by sections 216.91(a)(1)-(3). As purse seine vessels operating outside the ETP are covered by (a)(2), this determination does not apply to purse seine fisheries outside the ETP".^[1] In its comments on this response, Mexico noted that "the United States interprets the statute to authorize small purse seine vessels in the ETP to be made subject to mandatory observer requirements with a determination that they are causing regular and significant mortality (unrelated to tuna-dolphin association), while both large and small purse seine vessels outside the ETP are not subject to such a possibility".^[2]

In light of the above, the Panel understands that (a) large and small purse seine fisheries outside the ETP can never be required to have observers on board because of "regular and significant mortality or serious injuries of dolphins". Rather, observers can only be required in such fisheries where there is "regular and significant association between dolphins and tuna similar to the ETP". Conversely, the Panel understands that non-purse seine fisheries outside the ETP, as well as small purse seine fisheries inside the ETP, can only be required to have observers in board in cases where they are causing "regular and significant mortality or serious injury of dolphins". A determination of "regular and significant association" cannot be made in respect of these fisheries.

- a) Is the Panel's understanding correct? If so, why is the amended tuna measure structured in this way? Why, in other words, can no determination of "regular and significant mortality or serious injury" be made in respect of large and small purse seine vessels outside the ETP, and why can no determination of "regular and significant association of dolphins and tuna" be made with respect to non-purse seine fisheries outside the ETP and small purse seine fisheries inside the ETP? The Panel is aware that small purse seine vessels in the ETP are not allowed to set on dolphins under the AIDCP.
- b) If the Panel's understanding of the above-mentioned provisions is correct, could the fact that no determination of "regular and significant mortality or serious injury" can be made in respect of large and small purse seine vessels outside the ETP, or that no determination of "regular and significant association of dolphins and tuna" can be made with respect to non-purse seine fisheries outside the ETP

^[1] United States' responses to the Panel's questions, para. 295.

^[2] Mexico's comments on the United States' responses to the Panel's questions, para. 198.

and small purse seine fisheries inside the ETP result in non-dolphin-safe tuna fishing?

1. The United States agrees with Mexico that the legal source of the two types of potential “regular and significant” determinations is the statute, at 16 U.S.C. § 1385(d)(1).

2. The United States continues to avoid addressing Mexico’s point that the definition of “dolphin-safe” in the Amended Tuna Measure established a zero tolerance standard, i.e., an absolute guarantee that the specific tuna contained in a specific can was caught in a set or gear deployment in which no dolphin was killed or seriously injured.¹ Instead, the United States continues to suggest the application of a random arbitrary standard – such as the undefined term “regular and significant” – is somehow relevant. Indeed, in its response the United States seems to have proposed yet another standard – the concept of “unparalleled harm,”² as a measuring stick to evaluate whether equivalent conditions should be imposed on tuna products from different ocean regions. The utilization of these ambiguous benchmarks is further proof that the Amended Tuna Measure is arbitrary and not even-handed.

3. The United States claims that “Mexico has not even attempted to demonstrate” that there are tuna-dolphin associations or dolphin mortalities outside the ETP.³ To the contrary, Mexico has submitted substantial evidence of associations between dolphins and tuna outside the ETP, and evidence of mortality and serious injury outside the ETP – including recent eyewitness reports of a marine biologist of associations between tuna and large herds of dolphins in the Indian Ocean, and estimates that 60,000 dolphins per year are killed in gillnet fisheries in that region.⁴ It is particularly strange that the United States argues that Mexico’s evidence does not meet the United States’ “regular and significant” standard, when the United States does not dispute that the term “regular and significant” is undefined. Under any reasonable interpretation, 60,000 dolphin mortalities every year are “regular and significant”.

4. The United States is also wrong to claim that there is no evidence that there is a correlation between harm to dolphins from non-purse seine fishing methods and an association between tuna and dolphins.⁵ For example, Mexico has presented uncontested evidence that dolphins are attracted to longlines to eat the fish on the hooks, and that this attraction results in dolphin mortalities and serious injuries.⁶ Mexico has also submitted evidence that many thousands of dolphins die in gillnets, indicating that dolphins are “associated” with that the tuna

¹ See discussion of this issue in Mexico’s responses to the panel’s questions, paras. 40-75.

² United States’ responses to the Panel’s additional questions, paras. 7 and 11.

³ United States’ responses to the Panel’s additional questions, para. 19.

⁴ Mexico’s responses to the Panel’s questions 60 and 61, para. 46.

⁵ United States’ responses to the Panel’s additional questions, para. 11.

⁶ See, e.g., Mexico’s first written submission, paras. 133 – 137.

caught with that fishing method.⁷ The United States cannot reasonably deny the role that association plays in dolphin mortalities outside the ETP. In fact, through its arguments the United States has confirmed that the entire concept of tuna-dolphin association and dolphin mortalities under the Amended Tuna Measure is intended to be limited exclusively to large purse seine fishing in the ETP.

5. In light of the foregoing evidence, if the Panel finds merit in the ambiguous “regular and significant” benchmarks, it is irrational to exclude outright non-purse-seine fishing methods from the determination of “regular and significant association between dolphins and tuna” and to exclude purse seine fishing from the determination of “regular and significant mortality or serious injury of dolphins”. From the perspectives of Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, these outright exclusions are further evidence of the absence of a “rational connection” between the reasons given for the detrimental impact/discriminatory treatment and the objective of the measure. Thus, it is further proof that the Amended Tuna Measure is arbitrary and not even-handed.

6. Mexico re-affirms that the failure of the Commerce Department to even undertake to analyze tuna-dolphin associations and dolphin mortalities and serious injuries in other ocean regions, except in the context of this dispute, is further proof that the Amended Tuna Measure is not even-handed.⁸

7. With respect to the Panel’s question (b) about whether the above-noted differences “result in non-dolphin-safe tuna fishing,” to the extent that the differences prevent trained and independent observers from being present on tuna fishing vessels outside the ETP, the differences will increase the likelihood of non-dolphin-safe tuna being mislabelled as dolphin-safe. Because the other major tuna fishing methods (with the exception of pole-and-line fishing) inherently involve non-dolphin-safe tuna fishing, such tuna fishing will exist irrespective of the above-noted differences.

61. To the parties: At para. 71 of Mexico's first written submission, reference is made to "technical training required by the guidelines that the Parties [to the IADCP] establish". Do these guidelines exist? Could the parties please provide a copy of these guidelines to the Panel? The Panel also invites both parties to comment on these guidelines to the extent they wish to do so.

8. The United States, as did Mexico, provided a copy of the AIDCP guidelines for technical training. The United States highlights that the guidelines are “brief,” apparently intending to imply that the training is minimal.⁹ But Mexico submitted the actual “field manual” for

⁷ See, e.g., Mexico’s first written submission, paras. 128 – 131.

⁸ With regard to the United States’ description of the coverage of sections 216.91(a)(1)-(3) and 216.01(a)(4), Mexico notes that, as it has previously explained, the AIDCP’s dolphin-safe certification program is only available for tuna products containing tuna caught by vessels with an observer and for which there is a comprehensive tracking and verification system, and therefore tuna caught by small purse seine vessels in the ETP is not eligible for the AIDCP dolphin-safe label. Mexico’s responses to the Panel’s questions, para. 24.

⁹ United States’ responses to the Panel’s additional questions, para. 23.

observers prepared by the AIDCP, which confirms that the training and guidelines for observers are extensive. Mexico also submitted a set of 159 slides used for captain training for captains operating large purse seine vessels in the ETP.¹⁰

9. Mexico notes that Commerce Department itself provides training for captains who will fish in the ETP. The NOAA website states:

Captain Training Workshop

To be eligible for an Eastern Tropical Pacific Owner Permit, an operator must attend a Captain's Training Workshop. Operator permits are issued annually. Additional training is not required unless regulations are modified substantially, the operator no longer demonstrates proficiency, or the operator does not obtain a previous calendar year permit. Workshops are conducted by NOAA Fisheries, Protected Resources Division. Workshop dates to be determined.¹¹

Those training materials do not appear to be publically available.

10. The Commerce Department does not appear to have its own training program for AIDCP observers, as there are no U.S.-trained observers working in the ETP.

11. As has been discussed during these proceedings, the Commerce Department designated certain U.S. domestic tuna fisheries as having observers who are “qualified and authorized” to validate captains’ statements that tuna is dolphin-safe within the meaning of the Amended Tuna Measure. One of those fisheries is the “American Samoa Pelagic Longline” fishery. The Commerce Department’s “Observer Manual” for this fishery is published at http://www.fpir.noaa.gov/OBS/obs_observer_manual_forms.html.¹² It can be seen that the U.S. manual has a chapter (Chapter 12) on marine mammals.¹³ The Commerce Department has indicated that the training program for observers for this fishery, with regard to monitoring for dolphin interactions, is comparable to that of the AIDCP, and Mexico has no reason to doubt that.¹⁴

¹⁰ Exhibit MEX-167.

¹¹ NOAA, Inter-American Tropical Tuna Commission Regional Vessel Register, at http://www.westcoast.fisheries.noaa.gov/fisheries/migratory_species/regional_vessel_register.html (Exhibit MEX-168).

¹² “American Samoa Observer Program Field Manual” (Exhibit MEX-169).

¹³ The U.S. manual includes advice on how U.S. observers should deal with “Interference and Harassment”. The United States emphasized this subject in describing the AIDCP guidelines, apparently in an attempt to imply that it is a unique issue in the ETP. United States’ responses to the Panel’s additional questions, para. 23. It would be unusual for training programs for observers in any ocean region not to include training on how to respond to potential interference.

¹⁴ The U.S. manual includes the following example of a report on an interaction of a longline gear deployment with a dolphin:

12. Mexico's point has been that the WCPFC, the ICCAT and the IOTC – to the extent they have observers – do not provide specialized training to them on dolphin interactions. The limited observer coverage in those fisheries, in combination with the lack of dolphin-related training, undermines the United States' argument that the fact that those RFMOs do not provide reports on dolphin mortalities means there are no such mortalities.

Footnote continued from previous page

Injuries Description - Describe where exactly the hook was located on the animal if the animal was hooked. For example, "...I could just see the eye of the hook protruding at the corner of the right side of the mouth. I could see the welded ring of the tuna hook, so I know it was not one of the circle hooks the boat was using also." Describe where and how any line was entangling the animal when it was captured. How many wraps of line around what part of the animal? Describe any injuries that were sustained during the handling and release of the animal. Also, note any evidence of bleeding from the animal.

"American Samoa Observer Program Field Manual", p. 97 (Exhibit MEX-169). It is difficult to reconcile this example with the insistence of the United States that longline fishing has no indirect effects on dolphins.