

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/RW)



Comments by Mexico on the
United States' Comments on the Interim Report

19 December 2014

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I. GENERAL COMMENTS

1. The purpose of the interim review stage is to make necessary corrections or clarifications where the Panel has misunderstood or misrepresented facts or arguments.¹ It is recognized that a Panel maintains discretion to decide which evidence it chooses to utilize in making findings², and Panels are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.³ Specifically, parties are allowed to make requests “for the panel to review precise aspects of the interim report”. At this stage, the panel’s review process is all but completed; Article 15 only authorizes “precise aspects” of the report to be verified during the interim review.⁴

2. Virtually all of the changes proposed by the United States are efforts to change the substantive findings of the Panel, to enter into debate with the Panel, to have the Panel place special emphasis on U.S. arguments, or to modify the characterization of Mexico’s arguments. Moreover, many of the U.S. comments are in the nature of requests for reconsideration that are not appropriate for this phase of the proceedings. For such proposals of the United States, the Panel should reject the requests for changes to the Interim Report.

3. The following are Mexico’s specific comments on the U.S. comments on the Interim Report.⁵

II. SPECIFIC COMMENTS

A. PARAGRAPH 3.29

4. The United States’ proposed change to this paragraph seeks to change its meaning and emphasis. The original paragraph is completely accurate; tuna caught by U.S. vessels, anywhere in the world, is deemed to be U.S. origin and no Form 370 is required.⁶ The United States, however, has proposed to convert the paragraph into a discussion of tuna products and not tuna. Tuna products are already discussed separately in the Interim Report in paragraph 3.28.

5. The edits proposed by the United States are unnecessary and inappropriate.

B. PARAGRAPH 3.30

6. The content of paragraph 3.30 that the United States requests to change repeats, virtually verbatim, the content of footnote 63 of the United States’ first written submission. That footnote states:

¹ Panel Report, *EC – Asbestos*, footnote 3 to Section VII; Panel Report, *Guatemala – Cement*, para. 7.2.

² Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

³ Appellate Body Report, *Australia – Salmon*, para. 267.

⁴ Appellate Body Report, *EC – Sardines*, para. 301.

⁵ The absence of comments by Mexico on any proposed changes to the Interim Report made by the United States should not be interpreted as indicating Mexico’s agreement with such changes.

⁶ See, e.g., Mexico’s comments on responses of United States, 26 September 2014, para. 108.

See 50 C.F.R. §§ 216.92(a)(1) (Exh. US-2). TTFs are a component of the AIDCP. During any fishing trip in the ETP, large purse seine vessels are required to record on TTFs every purse seine set made and any dolphin mortalities or serious injuries. See *infra* sec. II.B.2.b. As required by the AIDCP, section 216.93(a) requires that separate TTFs be used to record tuna harvested in dolphin safe and non-dolphin safe sets. Subsection (c)(1)(i) provides that a set is “non-dolphin-safe” if a dolphin died or was seriously injured during the set. 50 C.F.R. §§ 216.93(a), (c)(1)(i) (Exh. US-2).

7. The paragraph as originally drafted is completely accurate and supported by the United States’ own submissions. The Panel should reject the attempt by the United States to change the focus of the paragraph.

C. PARAGRAPH 3.32

8. Paragraphs 3.30 to 3.32 generally summarize the Tuna Tracking Form (TTF) system. Both paragraph 3.30 and paragraph 3.31 expressly describe the system as applying to large purse seine vessels in the ETP. Paragraph 3.32 states that the system does not apply outside the ETP. There is no need to clarify that paragraph. The United States’ request would actually make that paragraph confusing. The edits proposed by the United States are unnecessary and inappropriate, and should be rejected.

D. PARAGRAPH 3.33

9. As discussed above, the Interim Report already describes the TTF system as applying to large purse seine vessels in the ETP. The United States’ requested change is unnecessary.

E. PARAGRAPH 3.45

10. The fact that the amended tuna measure incorporates the requirements of the AIDCP into U.S. law is already discussed in the Interim Report in paragraphs 3.30, 3.31, 3.41, and other paragraphs. The United States does not explain why an additional reference to the AIDCP is needed in paragraph 3.45. Moreover, the second sentence of the paragraph is accurate as originally written. The United States’ requested change is unnecessary.

F. PARAGRAPH 7.35

11. In relation to this paragraph, the United States inappropriately requests that the Panel revise its understanding of the Appellate Body’s decision. In fact, the Appellate Body stated as follows:

The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand.⁷

⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

Accordingly, the Panel's original summary of the Appellate Body's finding is fully accurate. The United States' requested change would make the paragraph inaccurate and should be rejected.

G. PARAGRAPH 7.110

12. In relation to paragraph 7.110, the United States seeks to mischaracterize Mexico's argument to suit its own purposes. During the proceedings, Mexico stated as follows:

... the United States argues that Mexico cannot succeed in its argument unless it proves that setting on dolphins is so similar to other fishing methods that all methods must be treated in the same manner and that all other fishing methods "have adverse effects on dolphins that are equal to or greater" than setting on dolphins. This is incorrect. Mexico only needs to establish that other fishing methods also cause mortalities and serious injuries to dolphins. Not only has Mexico established that this is the case, but the United States has conceded the point. As Mexico has explained in its responses to the Panel's questions, a comparison of the relative magnitudes of harm that each fishing method causes dolphins is not relevant to the analysis. The attempts of the United States to mischaracterize Mexico's arguments as based on a "central factual contention" that all other fishing methods cause equal or greater harms to dolphins is wrong and misleading.⁸

13. The United States' requested change to the paragraph would result in misrepresenting Mexico's position. The United States' requested change should be rejected.

H. PARAGRAPH 7.113

14. In relation to paragraph 7.113, the United States inappropriately seeks to completely revise the Panel's findings.

15. In section 7.5.2.2.2, the Panel briefly summarizes the relevant legal arguments of the parties relating to the eligibility criteria. In section 7.5.2.2.2, the Panel explains that, in its view, the issues raised by Mexico concerning the eligibility criteria were resolved by the findings of the Panel and the Appellate Body in the original proceedings, and the Panel reaffirms those findings. The changes requested by the United States seek to have the Panel highlight new evidence submitted by the United States in this compliance proceeding, and thereby abandon the Panel's determination that the factual issue at stake was resolved in the original proceedings.

16. Moreover, the United States uses language that seeks to convert its arguments into findings by the Panel, such as when it proposes to have the Panel state that the United States "presented evidence showing ...".

17. If the Panel were to accept the United States' request to review the United States' evidence, the Panel would also need to review Mexico's evidence, such as the eyewitness accounts of herds of dolphins being chased to catch tuna in the Indian Ocean, the tens (or

⁸ Mexico's comments on responses of United States, 26 September 2014, para. 26.

hundreds) of thousands of dolphins being killed by gillnets, and the massive numbers of dolphins killed or mutilated by longlines.⁹

18. Mexico believes that the more appropriate course would be to reject the changes requested by the United States.

I. PARAGRAPHS 7.117 to 7.119

19. In relation to paragraphs 7.117 to 7.119, the United States blatantly seeks to change a finding of the Panel, requesting that the Panel modify its interpretation of the Appellate Body's decision. Comments on an interim report are not an appropriate vehicle for a party to appeal the Panel's finding, reargue its case, or seek to put words in the mouth of the Panel. Mexico strongly disagrees with the United States' interpretation of the Appellate Body's findings, as well as with the attempt by the United States to incorporate another round of legal argument into its comments. The changes requested by the United States should be rejected.

J. PARAGRAPH 7.137

20. The United States' requested change to paragraph 7.137 would alter the meaning of the paragraph. The original paragraph accurately states that there are independent observer certification requirements for all tuna caught in the ETP by large purse seine vessels and that there are not such requirements for all tuna caught outside the ETP by all types of vessels. The fact that observer requirements could theoretically be imposed in other fishing regions (but have not been during the past 20 years) is not relevant to the Panel's finding in this paragraph. Nor is the recent regulatory change adopting observer certifications in limited circumstances (when an observer is on-board for other reasons) for a few fisheries. As the Panel states in paragraph 7.137, there is not a mandatory independent observer requirement for all tuna except for large purse seine vessels in the ETP.

21. The United States' proposed edit would make the paragraph confusing and change its focus.

K. PARAGRAPH 7.139

22. In relation to paragraph 7.139, the United States again is inappropriately seeking to appeal the Panel's findings. In any event, paragraph 7.139 does not state that tuna from all other countries is not subject to an observer requirement; it states that tuna from other countries is not subject to such a requirement. That statement is totally accurate.

23. Moreover, the United States' proposed edits would convert the Panel's finding on the relevant regulatory distinction into an argument on behalf of the United States concerning the interpretation of the national treatment and most-favored-nation treatment obligations. The change would make the paragraph incoherent.

24. The United States' proposed changes should be rejected.

⁹ Mexico's comments on responses of United States, 26 September 2014, para. 46; Mexico's first written submission, paras. 105, 109, 128-130, 140-149.

L. PARAGRAPH 7.143

25. Mexico disagrees with the attempt by the United States to mischaracterize Mexico’s arguments and to modify the Panel’s findings in paragraph 7.143. The first three sentences of this paragraph accurately summarize Mexico’s argument and should be left as they are. In response to the complaint of the United States about these sentences not having a citation, the Panel could add a footnote citing Mexico’s second written submission, para. 193.

M. PARAGRAPH 7.150

26. Mexico’s comments on paragraph 7.143 apply equally to this comment by the United States. The Panel’s wording in paragraphs 7.143 and 7.150 accurately links the competitive advantage to the lighter burden. The proposed edits of United States would confuse this issue.

N. PARAGRAPH 7.181

27. In its comments on paragraph 7.181, the United States seeks to have additional emphasis placed on its argument that the regulatory distinction derives from the AIDCP and not the amended tuna measure. But this argument of the United States is already addressed in detail in paragraphs 7.160 through 7.167. It is also described in paragraph 7.268. There is no useful purpose to repeating the United States’ argument yet again in paragraph 7.181.

28. In addition, the United States has proposed language that would convert its argumentation into findings of the Panel (e.g., “If the United States eliminated from its measure all reference to observers, it would make no difference at all to the tuna industry of Mexico or any other Member”).¹⁰

29. Finally, the United States seeks to have the Panel mischaracterize Mexico’s position. Tellingly, when describing Mexico’s purported arguments the United States cites its own submissions rather than Mexico’s.¹¹

30. The United States’ proposed changes should be rejected.

O. PARAGRAPH 7.207

31. The United States’ proposal for paragraph 7.207 apparently is intended as an effort to create an inconsistency in the Panel’s findings. In this paragraph, the Panel found that captains do not have the skills to monitor the fate of dolphins. The United States’ proposed change seeks to have the Panel say, in the same paragraph, that captains have the ability to monitor marine mammal bycatch, which would contradict the panel’s finding.

32. As discussed above, the Panel has the discretion to decide which evidence it chooses to utilize in making findings¹², and Panels are not required to accord to factual evidence of the

¹⁰ United States’ comments on interim report, para. 19.

¹¹ In its proposed new footnote 332 supporting its purported summary of Mexico’s argument, the United States cites its own second written submission rather than any submissions of Mexico.

¹² Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

parties the same meaning and weight as do the parties.¹³ The United States’ proposed change should be rejected.

P. PARAGRAPH 7.221 (and related text in paragraph 7.223)

33. The United States seeks to have the Panel add citations to its submissions in new footnotes to paragraph 7.221. The United States does not explain why adding its footnotes would “enhance understanding of the Panel’s reasoning.”

34. If the Panel decides to do so, to maintain balance in the treatment of the parties, Mexico requests that a footnote citing to Mexico’s submissions be added to paragraph 7.223:

Nevertheless, in light of the evidence submitted by Mexico concerning the complexity of certifying the dolphin safe status of tuna catch* - which evidence was not rebutted by the United States - we would find that the United States has not explained sufficiently why it assumes that captains are capable of carrying out an activity that the amended tuna measure itself recognizes as highly complex and for which training and education are required. In the absence of such explanation, we would be compelled to find that while the United States may legitimately draw distinctions between the ETP large purse seine fishery and other fisheries, the lack of explanation concerning the technical capacities of captains means that the different certification requirements cannot be said to be even-handed, and as such to stem exclusively from a legitimate regulatory distinction.

* See Mexico’s first written submission, paras. 70-72; Mexico’s second written submission, para. 168; Mexico’s responses to the Panel’s questions, para. 79; Mexico’s responses to the Panel’s questions 60 and 61, paras. 10-11.

Q. PARAGRAPH 7.268

35. In relation to paragraph 7.268, the United States requests that a new paragraph be added that recites the United States’ argument that it is entitled to choose its appropriate level of protection. However, the section in which this paragraph is contained is entitled “Whether the different tracking and verification requirements modify the conditions of competition in the United States’ market to the detriment of like Mexican tuna and tuna products.” The United States’ legal argument concerning the level of protection does not relate to that subject. The Panel deals with that United States argument regarding the level of protection in paragraphs 7.359 and 7.370, where it addresses arguments in relation to whether the detrimental impact stems exclusively from a legitimate regulatory distinction.

36. The change requested by the United States is inappropriate and should be rejected.

¹³ Appellate Body Report, *Australia – Salmon*, para. 267.

R. PARAGRAPH 7.281

37. The United States has proposed to modify paragraph 7.281 in a manner that would inaccurately describe Mexico's position. In this paragraph, the Interim Report briefly summarizes one of Mexico's arguments, and cites to paragraph 67 of Mexico's second written submission. Paragraph 67 is part of a subsection titled "The Record-keeping Requirements Imposed on Mexican Products are Different than those Imposed on U.S. and other Non-ETP Producers." The first paragraph of that subsection of Mexico's submission states:

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.¹⁴

38. Thus, if the Panel decides to revise paragraph 7.281, it would more accurately reflect Mexico's argument if it stated as follows:

In its second written submission, Mexico raises concerns about the utility of the United States' tracking and verification requirements for tuna caught ~~other than by setting on dolphins~~ outside the ETP.

39. The edit proposed by the United States would not reflect what Mexico actually argued and should be rejected.

S. PARAGRAPH 7.286

40. The new final sentence proposed by the United States for addition to paragraph 7.286 is not supported by the United States' reference to paragraph 243 of its question responses. That paragraph does not discuss distinctions between canneries that receive tuna directly from fishing vessels and those that receive loins already processed by foreign plants. This sentence appears to contain a new version of the United States' argument. It is inappropriate for the United States to seek to have the Panel incorporate new arguments into the report during this stage of the proceeding. The United States' proposed changes should be rejected.

T. PARAGRAPH 7.316

41. The United States seeks to avoid use of the term "tuna laundering" in paragraph 7.316. However, Mexico indeed used the term "laundering" in connection with IUU fishing, quoting

¹⁴ Mexico's second written submission, para. 64 (footnotes omitted).

studies on the subject that were submitted into evidence as exhibits.¹⁵ There is no reason to strike that term.

42. Mexico agrees with the United States that the letters “un” should be added before “regulated” in this paragraph.

U. PARAGRAPH 7.331

43. In its comments on paragraph 7.331, the United States requests that the Panel completely reverse its own finding that the United States failed to show that non-ETP tuna is traceable to a specific well of a vessel or a specific captain's certification. Mexico disagrees with the United States' claim that tuna “can in general, be traced ...” and strongly contested the United States' purported evidence.

44. The United States had a full opportunity to submit evidence and argument on the tracking and verification system applied by canneries not using ETP tuna. Only after the Panel specifically asked the United States how non-ETP tuna is tracked from the point of catch to the point of retail did the United States attempt to address this issue. As discussed in paragraphs 156 to 164 of Mexico's comments on the United States' responses to the Panel's questions, the United States submitted a limited number of documents without explanation of their sources, when they were prepared, or by whom. The Panel found that the content of the documents did not support the United States' claim that canneries can track non-ETP tuna from the well of a vessel through all steps of processing to sale at retail, or that captain's certificates can be precisely traced to such tuna. The United States should not be using this comment procedure to seek reconsideration of the Panel's finding. All of its proposed edits to paragraph 7.331 should be rejected.

V. PARAGRAPH 7.332

45. The United States requested the addition of a citation to the evidence presented by Mexico concerning the accuracy of the tracking and verification system required for ETP and Mexican tuna products. Mexico suggests the following citations:

Mexico's first written submission, paras. 80-93 and 158-160; AIDCP, “Resolution to Adopt the Modified System for Tracking and Verification of Tuna” (Exhibit MEX-36); Norma Oficial Mexicana NOM-001-SAG/PESC-2013 (Exhibit MEX-32); Statement of Mario G. Aguilar, Commissioner of Fisheries and Aquaculture (CONAPESCA) (Exhibit MEX-37); Statement of Mexican Industry (Exhibit MEX-73).

46. Mexico observes that some of this evidence is already discussed in paragraphs 7.272-7.273.

W. PARAGRAPH 7.333

47. The United States inappropriately seeks reconsideration of the Panel's finding in paragraph 7.333. As discussed above, the United States had a full opportunity to submit

¹⁵ See, e.g., Mexico's first written submission, paras. 166 and 169; Mexico's responses to Panel's questions, footnote 102 and para. 132.

evidence and argument on the tracking and verification system applied by canneries not using ETP tuna. Mexico strongly disputed the meaning and relevance of the United States' evidence on this point. The Panel found that the content of the documents submitted as evidence by the United States did not support its claim that canneries can track non-ETP tuna from the well of a vessel through all steps of processing to sale at retail. The United States should not be using the comment procedure to seek reconsideration of the Panel's finding.

X. PARAGRAPH 7.341

48. In relation to paragraph 7.341, the United States again seeks reconsideration of a finding of the Panel and attempts to edit the finding to be more favorable to the United States' position. Mexico disagrees with the suggested change. As found by the Panel in paragraph 7.333, the evidence submitted by the United States specifically showed that captains' certificates are assigned at a production plant. There is no justification for (or evidence supporting) the edit sought by the United States to change the Panel's finding to say that certificates are assigned at the first point of unloading. The change requested by the United States should be rejected.

Y. PARAGRAPH 7.369

49. The United States seeks to add citations to paragraph 7.369 in an effort to convert comments by the Panel into findings on specific statistical evidence constructed by the United States. The United States provides no explanation of how its suggested footnote would "enhance understanding of the Panel's reasoning." Rather, the United States is requesting a gratuitous recognition of statistical claims that have no bearing on the finding contained in this paragraph, which is that the "risk profile" of the ETP large purse seine fishery does not explain or otherwise justify significantly less burdensome tracking and verification mechanisms applied to tuna caught other than by large purse seine vessels in the ETP.

Z. PARAGRAPH 7.424

50. In relation to paragraph 7.424, the United States again seeks to modify the characterization of Mexico's arguments. Mexico indeed argued that the different certification requirements imposed on tuna caught by large purse vessels in the ETP and tuna caught outside the ETP using the same or different fishing methods resulted in a violation of Article I.1 of the GATT 1994.¹⁶ It is inappropriate for the United States to seek to modify the description of Mexico's argument.

AA. PARAGRAPH 7.549

51. As discussed above in relation to paragraphs 7.117-7.119, comments on an interim report are not an appropriate vehicle for a party to appeal the Panel's finding, reargue its case, or seek to put words in the mouth of the Panel. Mexico strongly disagrees with the United States' interpretation of the Appellate Body's findings, as well as with the attempt by the United States to incorporate another round of legal argument into its comments. The changes requested by the United States should be rejected.

¹⁶ See, e.g., Mexico's opening statement para. 80; Mexico's responses to the Panel's questions, paras. 19, 21, and 36-39.

BB. PARAGRAPH 7.555

52. For the same reasons discussed above in relation to paragraphs 7.117-7.119 and 7.549, the changes requested by the United States should be rejected.

CC. PARAGRAPH 7.562

53. The United States has proposed to add new footnotes to paragraph 7.562 in an effort to change the meaning of the paragraph. In this paragraph, the Panel stated that it was convinced by the United States' argument that observers are necessary on ETP large purse seine vessels because of the nature of the fishing technique of dolphin sets, involving the chasing and encirclement of dolphins. Specifically, the Panel discusses its view that there may be no need to have a single person on board a vessel using other fishing methods in other ocean regions whose sole task is to monitor the safety of dolphins. The citations that the United States requests, however, seek to convert the Panel's comment into findings on specific statistics submitted by the United States in support of its claims (i) there are no dolphin sets being made anywhere in the world other than the ETP and (ii) all other methods of tuna fishing cause minimal harm to dolphins. If that were the Panel's intention, it would be expected that the Panel would have carefully reviewed the relevant evidence submitted by both parties, as it has done for other contested factual issues presented in the dispute.

54. The United States' requested change is inappropriate and should be rejected.

DD. PARAGRAPH 7.571

55. The United States proposes to edit paragraph 7.571 to support its position that captains are qualified to monitor the dolphin-safe status of tuna, and in that manner to make the Panel's finding appear to be unsupported. Mexico strongly disputed the United States' claim that non-ETP captains are qualified to monitor the dolphin safe status of tuna. As discussed above, the Panel is not required to give the same weight to evidence or arguments that a party does. The United States request is inappropriate and should be rejected.