

1. Mexico wishes to highlight several issues.
2. First, as we have explained in our written submissions and during the hearing, the panel erred making findings on detrimental impact for each of the elements of the labeling conditions and requirements, and making findings that each individual condition and requirement is or is not inconsistent with WTO provisions. The Appellate Body already found in the original proceedings, and the compliance panel affirmed in paragraph 7.483, that the amended tuna measure as a whole denies equal competitive opportunities and results in detrimental impact, because virtually all Mexican tuna products are denied access to the label while virtually all tuna products of the United States and other countries are granted the label. Mexico believes that the Appellate Body can either modify the report or reverse the findings on the individual conditions and requirements and complete the analysis.
3. Second, the panel's findings that the certification and tracking and verification requirements are not even-handed, and therefore not legitimate regulatory distinctions, are sound. Pursuant to the second step of the Appellate Body's test for application of Article 2.1, the panel was correct to examine each of the three conditions and requirements identified by Mexico. As we have discussed, if just one of the conditions and requirements is not even-handed, the regulatory distinction of the amended tuna measure is not based exclusively on a legitimate regulatory distinction, and the entire measure is therefore inconsistent with Article 2.1
4. The same approach applies to the analysis under GATT Articles 1 and III. A finding of detrimental impact must be based on the measure as a whole – in other words, the fact that the measure denies equal competitive opportunities and results in detrimental impact is the appropriate approach, based on the Appellate Body's jurisprudence. The analysis then shifts to the chapeau of GATT Article XX. If any element of the labeling conditions is arbitrary or unjustifiable, the entire measure does not qualify for the exception in Article XX.

5. There has been a lot of discussion of the concept of calibration. Regardless of what term is used – calibration, metric, risk analysis – Mexico has emphasized that for a measure to be even-handed, the justification for the distinctions must have an objective basis and have a rational relationship to the measure’s objectives. The distinction cannot be justified simply based on the distinction itself. That would make the non-discrimination provisions of the WTO inutile.

6. Mexico has explained that, with respect to the certification and tracking and verification conditions and requirements, the amended tuna measure itself does not allow for calibration. If outside the ETP no one on the vessel is competent to certify whether tuna is dolphin-safe, that is tantamount to having no certification at all. In light of the panel’s findings that there are significant dolphin mortalities caused by other fishing methods outside the ETP, that cannot be reconciled with the objectives of the measure and its definition of dolphin-safe.

7. Similarly, if a certification cannot be matched to the tuna in the can being sold at retail, the objectives the measure cannot be fulfilled. In fact, that would go against the objectives. As the panel correctly found, the purported risk profiles of different fisheries is not relevant in this context. The label cannot provide accurate information to consumers if it has no relation to the tuna in the can.

8. Mexico has acknowledged that with respect to the eligibility condition and requirement, it could be possible to evaluate risks. But such an evaluation must be based on an objective scientific standard or measuring stick, such as PBR. That has not been done under the amended tuna measure.

9. Finally, we would like to remind the division of the overall situation here. As shown in Exhibit MEX-4, there are 6.8 million dolphins in the ETP. As shown in MEX-3, the total number of dolphin mortalities in 2012 was 870. That is statistically zero. In other fisheries, where there are no protections for dolphins, hundreds of thousands of dolphins are dying.

The amended tuna measure does nothing to protect those dolphins. To the contrary, the amended tuna measure rewards tuna products produced in those other fisheries with a competitive advantage in the U.S. market. That makes no sense, and it is inconsistent with contemporary standards of environmental protection. So far and under the US approach the first objective, regarding accurate information to the consumer would never be achieved.

10. The fishing method performed by Mexico is also much more selective since it targets mostly mature tuna in contrasts the fishing practice labeled dolphin safe not only kills dolphins but causes significant levels of bycatch of other species.

11. Thank you.