

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO (DS381/RW)

(AB-2015-6)



Executive Summary of Other Appeal of Mexico

10 June 2015

1. The United States continues to highlight outdated information about the ETP to divert attention from the significant progress in reducing dolphin mortality in the ETP and the tremendous harm to dolphins taking place in other ocean regions, where there are no comparable measures for the protection or sustainability of dolphins. This is a genuine tragedy for the world's environment and also undermines the consumer information objectives that the United States purports to achieve.

2. In these compliance proceedings, Mexico's challenge focuses on the improper granting of access to the dolphin-safe label to products containing tuna caught by the fleets of other countries using fishing methods other than setting on dolphins in an AIDCP-compliant manner and fishing in oceans other than the ETP. These proceedings can be distinguished from the original proceedings on this basis. The difference is highlighted by the fact that, under the amended tuna measure, even if Mexican tuna products were granted the right to use the dolphin-safe label, there would still be a violation of the non-discrimination provisions raised in this dispute. This is because Mexican dolphin-safe tuna products would be losing competitive opportunities to like products from the United States and other countries under circumstances where the dolphin-safe status of those like products cannot be assured.

3. The measure at issue in this dispute is the "amended tuna measure", which comprises: (i) Section 1385 ("Dolphin Protection Consumer Information Act") (DPCIA), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (ii) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule; and (iii) the court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

4. In its argument that the detrimental impact of the amended tuna measure on Mexican tuna and tuna products did not stem exclusively from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement, Mexico identified three aspects of the amended tuna measure — i.e., three "labelling conditions and requirements" evidencing regulatory differences 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 — that are designed and applied in a manner that lacks even-handedness:

- Mexico's AIDCP-compliant fishing method is disqualified as a method for catching dolphin-safe tuna when other fishing methods are qualified for catching dolphin-safe tuna even though they have adverse effects on dolphins that are equal to or greater than Mexico's method (referred to by the Panel as the "eligibility criteria");
- the record-keeping and verification requirements (referred to by the Panel as the "tracking and verification requirements") for tuna caught inside the ETP are comprehensive, reliable and accurate, whereas there are no comparable requirements for tuna caught outside the ETP, which makes the information on the dolphin-safe status of that tuna unreliable and inaccurate; and
- in the ETP, the initial designation of the dolphin-safe status of tuna at the time of capture (referred to by the Panel as the "certification requirements") is reliable and accurate because it is done by an independent, specially-trained, AIDCP-approved observer on board the fishing vessel, whereas outside the ETP, the initial designation is unreliable and inaccurate because it is done by the captain of the vessel, who is not qualified to make the

designation, may not be directly involved in the setting of nets and capturing of fish, and has financial and other incentives not to declare non-dolphin-safe sets.

5. Mexico raised the same three labelling conditions and requirements in its argument that the requirements of the chapeau of Article XX of the GATT 1994 had not been met, therefore, the general exceptions did not apply to the inconsistencies of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994.

6. The Panel concluded that the different certification requirements and the different tracking and verification requirements in the amended tuna measure are inconsistent with Article 2.1 of the TBT Agreement. It also concluded that the different certification requirements and different tracking and verification requirements are inconsistent with Articles I:1 and III:4 of the GATT 1994, and do not meet the requirements of Article XX of the GATT 1994. The Panel also found that the eligibility criteria of the amended tuna measure are consistent with Article 2.1 of the TBT Agreement and that, although they are inconsistent with Articles I:1 and III:4 of the GATT 1994, they are justifiable under Article XX of the GATT 1994.

7. Mexico requests the Appellate Body to reverse certain findings and conclusions of the Panel, with respect to the errors of law and legal interpretation discussed in this submission.

I. THE PANEL ERRED IN FINDING AND CONCLUDING THAT SPECIFIC REQUIREMENTS UNDER THE AMENDED TUNA MEASURE WERE INCONSISTENT WITH WTO PROVISIONS RATHER THAN THE MEASURE AS A WHOLE

8. Notwithstanding that Mexico challenged the amended tuna measure as a whole, and that the Appellate Body in the original proceedings found the original tuna measure as a whole to be WTO-inconsistent, the Panel did not specifically conclude that the amended tuna measure as a whole is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Rather, it concluded that two of the three elements that Mexico identified in its arguments were WTO-inconsistent, while claiming that the other element had purportedly already been found by the Appellate Body in the original proceedings to be even-handed and not WTO-inconsistent.¹ While Mexico agrees with some of the reasoning and findings in the Panel's Report, the Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with those provisions rather than ruling on some of its elements. The Panel's error is reflected, in part, in its finding that the amended tuna measure's modification of the competitive opportunities in the U.S. market to the detriment of Mexican tuna and tuna products comprises two "distinct type[s] of detrimental impact", such that "Mexico's arguments on the different certification and tracking and verification requirements constitute a clear and cognizable claim of detrimental impact *separate from* the detrimental impact identified by Mexico as the result of the eligibility criteria".² In its analysis the Panel confuses the "detrimental impact" of the amended tuna measure that is the focus of the first part of the test under Article 2.1 with the identification of the "relevant" regulatory distinction in the second part of the test, i.e.,

¹ Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 8.2, 8.3.

² Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.105.

the regulatory distinction that accounts for the detrimental impact.³ The Panel should have explicitly found that the amended tuna measure has a detrimental impact on the competitive opportunities for Mexican tuna products in the US market, and that the differences in the labelling conditions and requirements identified by Mexico demonstrate that the measure's relevant regulatory distinction is designed and applied in a manner that lacks even-handedness, such that the detrimental impact does not stem exclusively from a legitimate regulatory distinction. On this basis, the Panel should have concluded that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement.

9. Similarly, the Panel should have found that the amended tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994, and the inconsistencies were not justifiable under Article XX. The Panel's failure to do so is a legal error. As a result of this error, Mexico requests the Appellate Body to modify the conclusions of the Panel in respect of Article 2.1 of the TBT Agreement and Articles I:1, III:4 and XX of the GATT 1994 and conclude that the amended tuna measure is inconsistent with these provisions.

II. THE PANEL ERRED IN ITS FINDINGS REGARDING THE ELIGIBILITY CRITERIA WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE WITH ARTICLE 2.1 OF THE TBT AGREEMENT

10. Mexico argued that it was not even-handed for the amended tuna measure to completely disqualify the dolphin set fishing method from access to the dolphin-safe label, while allowing other fishing methods to be eligible, when it has been established that other fishing methods kill and seriously injure dolphins. In the context of Article 2.1 of the TBT Agreement, the fishing method eligibility criteria are relevant to assessing whether the detrimental impact on Mexican tuna caused by the amended tuna measure stems exclusively from a legitimate regulatory distinction. The eligibility criteria are included in the relevant regulatory distinction (i.e., the difference in labelling conditions and requirements). The Panel had to determine, based on the particular circumstances of this dispute, whether this regulatory distinction is designed and applied in an even-handed manner.

11. The Panel erred in finding that the Appellate Body previously made factual and legal findings on this issue.⁴ Moreover, the Panel in effect applied the arbitrary benchmark for adverse effects on dolphins urged by the United States, rather than the "zero tolerance" benchmark actually incorporated into the amended tuna measure and its objectives. It further erred in finding that the eligibility criteria were applied in an even-handed manner. Instead, it should have found that the eligibility criteria lacked even-handedness and, therefore, by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction. These deficiencies were legal errors.

12. The Panel also acted inconsistently with Article 11 of the DSU in relation to the following factual findings: (i) changing its factual findings regarding unobserved adverse effects for dolphin sets from the original proceedings without any new evidence to support such a change; and (ii) finding that other fishing methods have no unobservable adverse effects and omitting consideration of contrary evidence on the record; (iii) finding that the Appellate Body found that dolphin sets are particularly more harmful to dolphins than other

³ See, e.g., Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.

⁴ Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 7.118-7.126, 7.130.

fishing methods when no such finding was made by the Appellate Body. These factual findings, once corrected, support Mexico's position that the eligibility criteria are applied in a manner that is not even-handed.

13. As a result of this error, Mexico requests that the Appellate Body modify the legal reasoning of the Panel, reverse the Panel's finding that the eligibility criteria are applied in an even-handed manner and find, instead, that by virtue of the lack of even-handedness in the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction and, for this additional reason, the amended tuna measure is inconsistent with Article 2.1.

III. THE PANEL ERRED IN ITS FINDINGS REGARDING INDEPENDENT OBSERVERS UNDER THE CERTIFICATION REQUIREMENTS WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE WITH ARTICLE 2.1 OF THE TBT AGREEMENT

14. In assessing Mexico's arguments that it was not even-handed for the amended tuna measure not to require independent observers to support dolphin-safe certifications outside the ETP, the Panel disagreed with Mexico's arguments that (i) in respect of dolphin-safe certifications specifically, captains in some cases may have an economic conflict of interest, making their certifications less reliable, and (ii) the justification for differing requirements provided by the United States that circumstances in the ETP are unique is in fact contradicted by evidence that tuna associate with dolphins in other ocean regions, in particular the Indian Ocean.

15. In rejecting Mexico's evidence regarding captains' economic self-interest, the Panel found that certifications by vessel captains are generally reliable "in a variety of fishing and environmental areas".⁵ In doing so, the Panel acted inconsistently with Article 11 of the DSU. While Mexico does not suggest that fishing vessel captains are generally unreliable, the evidence on the record establishes that the inherent unreliability of captains' self-certifications specifically respecting the "dolphin-safe" status of the tuna caught by their own vessels means that in some instances the dolphin-safe designation will be inaccurate. This creates gaps in the accuracy of the dolphin-safe label for tuna caught outside the ETP by fishing methods other than AIDCP-compliant setting on dolphins.

16. In finding that dolphin sets are only made in the ETP, the Panel acted inconsistently with Article 11 of the DSU. Mexico presented evidence that the situation in the ETP is not unique or different in any way that could justify different treatment of the ETP purse seine fishery from other fisheries, and in particular presented a recent and comprehensive report on tuna-dolphin association in the Indian Ocean. The Panel rejected Mexico's position, stating that "although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically'."⁶ The failure of the Panel to even mention, let alone address, the evidence Mexico submitted that dolphins associate with tuna and are intentionally set upon in the Indian Ocean was inconsistent with the Panel's obligations under DSU Article 11.

⁵ Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.208.

⁶ Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.242.

17. As a result of this error, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reasons that dolphin sets are made outside of the ETP and captains' self-certifications create gaps in the dolphin-safe designation, that the certification requirements are not applied in an even-handed manner and, therefore, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction, and the amended tuna measure is inconsistent with Article 2.1.

IV. THE PANEL ERRED IN ITS FINDINGS REGARDING THE ELIGIBILITY CRITERIA WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE UNDER THE CHAPEAU OF ARTICLE XX

18. The Panel found that the fishing method eligibility criteria in the amended tuna measure (i.e., the disqualification of the dolphin set and allowance of other methods) are applied in a manner that meets the requirements of the chapeau of Article XX. In making this finding, the Panel erred when it found that the conditions in the countries between which there was arbitrary and unjustifiable discrimination were not the same and it erred when it found that the application of the measure did not result in arbitrary or unjustifiable discrimination. In particular, the Panel erred when it found that the eligibility criteria are directly related to the objective of the amended measure and any discrimination that they (i.e. the eligibility criteria) cause is directly connected to the main goal of the amended tuna measure (i.e. to contribute to the protection of dolphins).

19. As a result of this error, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reason that the eligibility requirements demonstrate that the amended tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail, that the amended tuna measure does not meet the requirements of the chapeau.