BEFORE THE WORLD TRADE ORGANIZATION

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

(AB-2012-2/ DS381)

OPENING STATEMENT OF MEXICO

Geneva
15 March 2012

*****(COURTESY TRANSLATION)*****

I. INTRODUCTION

1. Mr. President and members of the Division, on behalf of the Mexican delegation, it is our privilege to appear before you today to present the views of Mexico on the issues that have been raised in this appeal.

2. We have dealt with the problem at stake in this case for several decades already, and it is about time that there is a clear-cut solution to it.

3. In one way or another, the U.S. dolphin safe measures have blocked Mexican tuna products from the U.S. market for over 20 years. By finding in Mexico's favor, the Appellate Body can resolve this dispute in a manner that respects the overall eco-system and sustainable fishing practices, while at the same time discouraging arbitrary and discriminatory trade barriers supporting other international efforts to protect the environment.

4. The unacceptable levels of dolphin mortality in the Eastern Tropical Pacific (ETP) in the 1960's, 70's and 80's, principally at the hands of the U.S. fleet, were a tragedy that required extraordinary concerted action by the fishing nations of the ETP. Mexico, the U.S. and the other fishing nations of the ETP responded with a multilateral program, starting with the La Jolla Agreement and the Panama Declaration and culminating with the AIDCP, that was an extraordinary success. By 1997---fifteen years ago--- the level of dolphin mortality in the ETP had been reduced by more than 99%, to a level that scientists have judged to be biologically negligible to dolphin populations. And the number of dolphin mortalities has remained at this low level every year since 1997.

5. The multilateral environmental agreement, known as the Agreement on the International Dolphin Conservation Program (AIDCP), has been praised by the leading environmental groups, UN's FAO, among others. Then Vice President Al Gore, a Nobel Prize winner for his work on the global environment, led President Clinton administration effort to allow Mexican tuna products with the AIDCP dolphin-safe label to enter the United States. President Bush Administration also sought to allow Mexican tuna products with the AIDCP dolphin-safe label to enter the U.S. Changes that were blocked by the U.S. courts.

*****(END COURTESY TRANSLATION)*****

6. It would not be an overstatement to say that where tuna fishing and dolphin protection is concerned, everything has changed since the 1990's---except the unilateral U.S. dolphin-safe policy. The U.S. measures have been unnecessary and are completely arbitrary. Responsible fishing nations are now moving on to address the challenge of depleted tuna stocks and unacceptable levels of bycatch that results from FAD fishing in the ETP and other oceans. Ironically, although the U.S. has expressed concerns about FAD fishing bycatch, the U.S. continues its policy of trying to force Mexico to adopt FAD fishing in the ETP.

7. This appeal concerns consumer information measures, namely the dolphin-safe label and associated requirements, that are aimed at protecting dolphins through consumer choices based on the presence or absence of a dolphin-safe label on tuna products. In this case, such measures have been manipulated by government action so that they condition access for imported products to the U.S. market on the foreign producer altering its fishing behaviour in order to comply with a unilaterally determined policy of the U.S. government.

8. The challenged measures create an exclusive single standard to inform U.S. consumers about the "dolphin-safety" of tuna products. They do this in a way that intentionally shapes the information that is made available to consumers so that they interfere with the free operation of consumer choice and thereby restrict and discriminate against tuna products imported from Mexico. The information provided under the challenged measures is limited, inaccurate and misleading. Moreover, it creates a false impression that the absence of a dolphin safe label means that the tuna contained in Mexican tuna products are not caught in a dolphin safe manner. Furthermore, it does not allow the U.S. consumer to be informed of any of the dolphin-safe measures that have been taken in the context of the AIDCP.

9. Mexico's proposed alternative measure allows for the communication of full and accurate information on dolphin safety to U.S. consumers. This will place consumers in a better position to use their purchasing power to influence the way tuna fisheries and canneries operate and will also eliminate the discriminatory and trade-restrictive effects of the measures.

II. KEY FACTS

10. As described in the written submissions, there are several methods used by fishermen to locate and harvest schools of tuna.

11. Fishing on "artificial fish aggregating devices" (FADs), the predominant method used by the United States and other fishing nations, is highly destructive to the marine ecosystem, and threatens to destroy the tuna fisheries themselves. The FAD through its shadow congregates a great deal and diversity of sea life, which in the fishing process is killed and thrown dead back to the sea. Thus, a number of important environmental conservation NGOs are currently

campaigning to restrict or even ban FAD fishing. Yet tuna harvested with FADs is sold in the U.S. market as dolphin-safe.

12. In the ocean region that is most accessible to the Mexican tuna fleet in the ETP, large yellowfin tuna frequently swim beneath herds of dolphins. In the 1960s, the U.S. fleet pioneered the technique of locating tuna by encircling herds of dolphins with their nets, and later other nations' fleets adopted this practice. Through the 1980s, however, there were insufficient protections for the dolphins themselves.

13. In 1986, when there was a strong presence of the U.S. fleet, dolphin mortalities in the ETP were estimated at 133,000. Through the concerted efforts of all of the governments and the fleets who were fishing in the ETP. By 1993, the very first year of operation of the La Jolla Agreement, the predecessor of the AIDCP, incidental mortalities were reduced from 15,000 in 1992 to less than 3,600 in 1993. Since then, the level of mortalities has been sustained at approximately 1,200 per year for all fleets operating in the ETP. These low levels have been kept for the past 15 years. For context, the total estimated population of the three main dolphin stocks in the ETP is estimated to be greater than 6.5 million. The U.S. agrees that the observed dolphin mortality in the ETP is not significant from a population recovery perspective.[1]

14. It is important to understand how the gear and procedures mandated under the AIDCP work in practice. These protections are described in detail in Mexico's written submissions.

[1] Panel Report, para. 7.557.

15. It is notable that the AIDCP, reflecting multilateral scientific opinion, states that the parties to the treaty (including of course the U.S.) are "convinced that the scientific evidence demonstrates that the technique of fishing for tuna in association with dolphins, in compliance with the regulations and procedures established under the La Jolla Agreement and reflected in the Declaration of Panama has provided **an effective method for the protection of dolphins** and rational use of tuna resources in the eastern Pacific Ocean."

16. No other ocean region in which there is tuna fishing has any such protections for dolphins. In fact, no other ocean region has any protections at all for dolphins. Nonetheless, tuna caught in any of those *other* regions is eligible to be labelled dolphin safe only on the basis of a non-verifiable captain's certification that he did not "intentionally" set nets around dolphins during the fishing voyage in which the tuna was caught.

17. It is particularly relevant that the U.S. was a principal architect of the AIDCP. In that multilateral forum, the United States agreed that the AIDCP met its objectives and encouraged other nations to enter into that binding treaty, committing to lift its embargo and change its definition of dolphin safe. Indeed, the U.S. actually implemented the change in the definition in 2002, until a court required it to cancel the change.

18. This case is about the sale of tuna products, and not tuna. The Mexican industry is not interested in selling raw tuna to U.S. producers, but rather seeks to sell its own brands.

19. The current U.S. measures have perverse effects. They punish Mexico and the Mexican industry, notwithstanding Mexico's full compliance with the AIDCP and the extensive and

successful actions taken by the Mexican fleet to reduce dolphin mortalities to biologically insignificant levels. Meanwhile, the U.S. measures reward U.S. tuna producers and those from other countries who do nothing to protect dolphins, and actually encourage a method of fishing that is depredatory to both tuna and other species of sea life.

III. THE U.S. MEASURES ARE ARBITRARY

20. The challenged measures *arbitrarily and unjustifiably* discriminate between countries where the same conditions prevail within the meaning of the sixth preamble to the TBT Agreement. As will be later explained, this inconsistency with the preamble supports the Panel's finding that the U.S. measures are inconsistent with Article 2.2. It also supports Mexico's appeal that the measures are inconsistent with Article 2.1.

21. The meaning of arbitrary includes "unpredictable", "inconsistent", "random", "rigidity and inflexibility in the application of a measure", and "rationale bears no relationship to the objective of the measure". The meaning of unjustifiable discrimination includes an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members. It also includes situations where the discrimination is difficult to reconcile with the declared policy objective of the measure.[2]

22. The following facts demonstrate that the measures are arbitrary and unjustifiable:

[2] See Panel Report, *U.S. - Shrimp* (para. 5.124), Appellate Body Report, *U.S. - Shrimp* (para. 177, 141, 144, 165), Appellate Body Report, *Brazil - Tyres* (paras. 231-233, 247).

First, similar to *US - Shrimp*, the U.S. measures require all exporting Members, including Mexico, if they wish to exercise their WTO rights, to adopt the U.S. policy. They create a rigid and unbending regulation. There is no possibility to consider the special circumstances of the ocean region in which the Mexican fleet operates (including the devastating effects on the ecosystem that would result from shifting to use of FADs), the extensive measures to protect dolphins that have been taken by Mexico and the Mexican fishing fleet, or other changing conditions.[3]

Second, contrary to both of the measures' objectives, they deny the use of the dolphin safe label on Mexican tuna products on the basis they are caught using methods that have an adverse effect on dolphins yet, at the same time, provide *inaccurate and misleading* information to U.S. consumers with respect to the dolphin safe character of tuna caught outside of the ETP. They allow the dolphin safe label to be used on tuna products that contain tuna caught outside the ETP in a manner that results in the death of or serious injury to a significant number of dolphins. Dolphins may have been killed but as long as the captain certifies that the tuna was not harvested by intentionally encircling dolphins it can be labeled as dolphin safe. This is significant because all U.S. tuna products and the great majority of imported tuna products are labeled under this misleading measures.

Third, they prohibit the use of the dolphin safe label on tuna products caught in accordance with the strict dolphin safe requirements of the AIDCP and thereby prevent U.S. consumers from being informed of any of the dolphin-safe measures that have been taken under the programme.[4] In this way, they also prevent Mexico from communicating to U.S. consumers that the fishing methods that consumers were concerned about in the 1980s and 1990s have been eliminated and the dolphin mortalities they were concerned about no longer occur.

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3 Appellee Submission of Mexico, paras. 177-186.

4 Panel Report, para. 7.506.

Fourth, by granting access to the dolphin-safe label to tuna caught by using fishing techniques that adversely affect dolphins outside the ETP while at the same time denying it to tuna caught in the controlled conditions of the AIDCP in the ETP, they not only fail to discourage such harmful fishing techniques but may actually have the *opposite* effect. Under the measures virtually all tuna caught outside the ETP using a method other than setting on dolphins may be labeled dolphin-safe. Fisheries using these other techniques have no incentive to adapt their fishing gear and practices to address dolphin protection concerns. They will be discouraged from setting on dolphins in the ETP under the regulated conditions of the AIDCP and encouraged to relocate instead to other fisheries in which dolphin populations are less closely monitored and where incidental killing of dolphins is not monitored.[5]

Finally, the court decision that prompted this dispute concerned dolphin recovery studies in the ETP made by the U.S. Department of Commerce. The measures only allowed the dolphin populations to be evaluated once. They do not allow the opportunity for U.S. officials to consider the current circumstances regarding dolphin recovery in determining whether to accept the AIDCP dolphin safe label in the U.S. market. In other words, even if the U.S. were to agree that the two dolphin stock populations at issue were recovering at their maximum possible rates, the U.S. law does not permit the label to be changed.

23. The U.S. has totally ignored a multilateral process based on an international agreement -- one they helped create, one that has worked, and one that could address effectively any remaining concerns the United States may have about the recovery of dolphin populations from tuna fishing in the ETP.

[5] Panel Report, para. 7.598.

IV. THE PANEL CORRECTLY FOUND THAT THE U.S. MEASURES ARE A "TECHNICAL REGULATION" WITHIN THE MEANING OF ANNEX 1.1 OF THE TBT AGREEMENT

24. Mexico has presented detailed submissions on the meaning of "technical regulation". The U.S.'s principal criticism of the Panel's determination that the U.S. dolphin safe measures are a "technical regulation" is that the Panel erased the distinction between labeling requirements that are standards and those that are technical regulations.[6] The reasoning in the Panel report and in Mexico's Appellee Submission clearly establishes that this is not the case.

25. A simplified way to examine this issue is to view the AIDCP dolphin safe label and its associated labeling requirements as a "standard". The use of this standard in the U.S. market is prohibited by a technical regulation. Standards do not *regulate* and cannot themselves prohibit other standards. The act of prohibiting is an act of *regulation* that can be achieved through a technical regulation. If the U.S. dolphin safe measures did not prohibit the use of other standards, they would not regulate and would amount to a "standard" that co-exists with other standards including the AIDCP standard.

26. Mexico shares Brazil's concern that if the U.S. "market access" criterion is accepted as the relevant benchmark for distinguishing between mandatory and voluntary requirements, it will create a significant loophole in the implementation of the TBT Agreement.[7] Mexico also agrees with the legal points made by Japan in its submission and, in particular, its comment that accepting the U.S. interpretation "would be far too narrow, would be inconsistent with prior

6 U.S. Appellant Submission, para. 27.

7 Third Participant Submission of Brazil, paras. 20-21.

cases, and would leave many potentially trade-distorting measures outside the scope of the TBT Agreement".[8]

27. In the alternative, if the Appellate Body accepts the U.S. interpretation of the phrase "with which compliance is mandatory", it is Mexico's position that under that interpretation the U.S. measures are *de facto* mandatory and on that basis are a "technical regulation".

V. THE PANEL'S FINDINGS ON ARTICLE 2.2 OF THE TBT AGREEMENT ARE CORRECT

28. The Panel was correct in finding that the U.S. measures are inconsistent with Article 2.2 because they are more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create.

29. The U.S. does not appeal any of the Panel's legal analysis or reasons related to its conclusion that the measures are inconsistent with Article 2.2. Its appeal is limited to alleged factual errors. It is based on its contention that the panel failed to comply with Article 11 of the DSU. In fact, the Panel made an objective assessment of the evidence before it and concluded that the US measures only *partially* fulfil their objectives and are more trade restrictive than necessary to fulfil those objectives.[9] The Panel weighed the evidence and made appropriate factual findings. As the Appellate Body has stated, "A panel does not commit a reversible error simply because it declines to accord to the evidence the weight that one of the parties believes

[8] Third Participant Submission of Japan, paras. 13-20.

[9] Panel Report, paras. 7.563, 7.599, 7.618 and 7.619.

should be accorded to it"[10]. In this case, the Panel provided "reasoned and adequate explanations and coherent reasoning"[11] in relation to the evidence presented by the U.S. and Mexico on the adverse effects of dolphins inside and outside the ETP.

30. There is no basis to overturn the Panel's finding of inconsistency with Article 2.2 on the basis of the alleged factual errors.

VI. THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF ARTICLE 2.1 OF THE TBT AGREEMENT AND FAILED TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER BEFORE IT AS REQUIRED BY ARTICLE 11 OF THE DSU

31. Mexico has presented detailed submissions on the inconsistency of the U.S. measures with Article 2.1.

32. The Panel departed from approximately 50 years of GATT and WTO jurisprudence on how to assess whether there is less favourable treatment. If the Panel's reasoning is accepted, it will create a substantial loophole in national treatment and most-favoured-nation treatment obligations. The implication of the Panel's reasoning is that as long as there is *some* way for a WTO Member to comply with market access conditions, irrespective of the costs and consequences of compliance, such conditions cannot be found to deny competitive opportunities to that Member's products. Such an outcome is absurd.

[10] Appellate Body Report, *US – Tyres (China)*, para 321.

[11] Appellate Body Report, *US – Large Civil Aircraft*, para 721.

33. The Panel's reasoning goes against existing WTO jurisprudence that less favourable treatment is not eliminated simply because there are alternative ways to comply with a measure or because an exporter could alter its product to comply.[12]

34. The Panel asks that Mexico's industry change its fishing method to an alternative, namely fishing on FADs, which has completely unacceptable adverse effects on the marine ecosystem. Alternatively, it asks that Mexico's industry move to another fishery, outside the regulated ETP, irrespective of the feasibility or cost of such a change. Alternatively, it asks that Mexico's tuna processors source their tuna from a fleet other than their own integrated fleets. All of these outcomes would eliminate Mexico's natural competitive advantage and reduce the profitability of Mexico's tuna industry. Such an outcome is unacceptable for any WTO Member, in particular one that is a developing country.

35. The U.S. argument that treatment no less favourable should be interpreted in a manner that prohibits only origin-based discrimination is equally problematic.[13] Mexico presented detailed submissions on this issue before the Panel.[14] Before the Panel Mexico refuted thoroughly the U.S. effort "to transform the discrete facts of particular cases of less favourable

[12] See authorities summarized in footnote 565 of the Panel Report. See also the Panel Report in *Chile – Alcohol* (para.7.143) "Chile also contends that there is not even de facto discrimination here because the imported product could easily be diluted to take advantage of the lower available tax rates. We do not find this persuasive. Exporters should not be required to alter important characteristics of their products and, indeed, change their generic name in order to compete equally with the domestic product."

[13] See Other Appellant Submission of Mexico, paras. 170-179.

[14] See Opening Oral Statement of Mexico at the Second Meeting with the Panel, paras. 23, 24, and 30-48 (esp. para. 42 on *Korea - Beef*).

treatment into supposed general requirements for all cases of less favourable treatment" by arguing that "origin-neutral" measures do not violate the national treatment obligation.

36. The U.S. and the EU have added nothing on appeal to the "origin-neutral" argument that the United States did not already argue, and Mexico did not already refute, before the panel. The authorities cited by the U.S. and the EU do not support their argument that discrimination must be origin-based on its face in order to be prohibited.

37. As is made clear in the Appellate Body report *in Korea-Beef*, "treatment no less favourable" means "according conditions of competition no less favourable to the imported domestic product than to the like domestic product."[15] Period. There is no threshold requirement of establishing first that a measure is not "origin-neutral" before going on next to examine its competitive effects.

38. The arguments made by the United States raise profound systemic implications for the WTO trading system. If embraced, these arguments would empty the concept of *de facto* discrimination of all meaning and undermine the most-favoured-nation and national treatment principles that are fundamental cornerstones of the multilateral trading system.

VII. FALSE JUDICIAL ECONOMY

39. Mexico raised discrimination claims under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the *GATT 1994*. Although all three articles deal with non-discrimination obligations, each of them is different in scope and application. For example, the scope of Article

[15] *Korea – Beef*, para. 135.

2.1 of the *TBT Agreement* is more specific in its coverage than more general Article I:1 of the *GATT 1994.*[16] These differences must be taken into account.

40. WTO obligations exist simultaneously and harmoniously under different WTO agreements and apply cumulatively. In this dispute, Articles I:I and III:4 of the *GATT 1994* and Article 2.1 of the *TBT Agreement* simultaneously apply to the U.S. measure and should be read cumulatively. By declining to rule on Mexico's claims under *GATT* Articles I:1 and III:4, the Panel exercised false judicial economy and only partially resolved this dispute.

VIII. ARTICLE 2.4 OF THE TBT AGREEMENT

41. With regard to Mexico's Article 2.4 claim, it is undisputed that the U.S. measures are not based on the AIDCP standard, and that the standard is "relevant." The fact that this standard has yet been implemented in other ocean regions does not justify the Panel's decision not to make such an evaluation. Applying the AIDCP standard to tuna products from outside the ETP – the source of over 90% of the tuna products on the U.S. market – would be more effective than the current U.S. measures.

42. Also, the AIDCP is an international standardizing body. The core purpose of the AIDCP is to establish standards for tuna fishing to protect marine mammals. If the AIDCP is not a standardizing body, as the U.S. argues, then certainly the U.S. Congress is not a standardizing body either, and therefore the U.S. measures themselves cannot be a standard.

[16] Appellate Body Report, *EC – Asbestos*, para. 80. The Appellate Body stated: "the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994." (emphasis original)

IX. CONCLUSIONS

43. This concludes our opening statement. We would be pleased to respond to any questions you may have.

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