

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

(AB-2015-6 / DS381)



OPENING STATEMENT OF MEXICO

Geneva

21 September 2015

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.

I. BACKGROUND

2. This has been a long road for Mexico. This dispute has been pending for many years. Mexico successfully challenged the original tuna measure. That measure, among other things, defined dolphin safe differently for the tuna caught in the Eastern Tropical Pacific (ETP) than it did for tuna from elsewhere. It allowed tuna products from outside the ETP to be labelled dolphin-safe even if dolphins were killed during the harvesting of the tuna contained in the product. The original panel found that the risks to dolphins in other tuna fisheries were equivalent to those in the ETP where the Mexican fleet fishes, and the Appellate Body upheld those findings. The Appellate Body accordingly found that the tuna measure was not even-handed, and therefore inconsistent with TBT Article 2.1.

3. At the very end of the reasonable period of time (RPT) in respect of implementation of the recommendations and rulings of the Dispute Settlement Body in 2013, the United States published an amended tuna measure. The amended measure reflects an incomplete approach to compliance. Although some words were changed, the result is the same: the label can still be applied to tuna products containing tuna caught during fishing sets that killed or seriously injured dolphins, and by fishing methods that are known to have such adverse effects on dolphins that they are highly destructive to dolphin populations. This is because although the United States changed the definition of dolphin-safe for non-ETP tuna products to match the one applied to the ETP, it did not adopt any mechanisms to implement and enforce the new definition outside the ETP. As a result, there is no way to verify that the tuna contained in a non-ETP tuna product is actually dolphin-safe. Fishers outside the ETP remain free to kill dolphins while selling their harvest as dolphin-safe, and processors in the United States and in other countries have no responsibility to monitor the fishers' behaviors.

4. Therefore, we are back where we started. Although the Mexican fishing fleet and processing industry are doing more to protect dolphins than any nation outside the ETP, their products are denied the dolphin-safe label, while the products of other countries whose fleets that do nothing to protect dolphins and other marine mammals are free to apply the label to their products without consequences. There remains a denial of national and most-

favoured nation treatment under both TBT Article 2.1 and GATT Articles I and III. The detrimental impact of the discrimination does not stem exclusively from a legitimate regulatory distinction. It is arbitrary and unjustifiable.

5. Although the underlying facts were discussed extensively in the original proceedings and in the parties' submissions in this dispute, Mexico feels it is crucial to emphasize the importance of the history of this matter. More than 25 years ago, fishing for tuna the ETP resulted in many dolphin mortalities. This problem was addressed through international efforts driven by Mexico and the United States, and led to the creation of the International Dolphin Conservation Program (IDCP) and the adoption and implementation in 1993 of the voluntary La Jolla Agreement. In the first year of that Agreement, dolphin mortalities were reduced to a statistically insignificant levels. Later, the Parties adopted the Declaration of Panama, which in turn led to the creation of the AIDCP, which is a binding treaty.

6. Reflecting an authorization provided by the U.S. Congress in the implementing legislation for the AIDCP, the U.S. Department of Commerce changed the definition of dolphin-safe to eliminate the disqualification of dolphin sets in 2003, but only for a few weeks. Opposing interests challenged the Department's decision in court, and the U.S. government decided not to pursue review of an arbitrary judicial decision that overruled the newly-implemented system. As a result, the United States tied itself to circumstances that no longer exist in the ETP, thereby forcing Mexico to pursue a solution in the WTO.

7. The current reality under the AIDCP, as implemented by Mexico and other members, is that every large purse seine vessel must carry an independent scientific observer, who is on the vessel specifically to watch for harm to dolphins and is trained for that purpose. In addition, the tuna is tracked from the moment it is caught and stored in a well on the fishing vessel, through to delivery from the vessel to the production plant, and then to the can in which it will be sold. These requirements are implemented into the U.S. amended tuna measure for tuna products from the ETP.

8. However, the amended tuna measure has no such requirements for non-ETP tuna. No other fishery has anything close to 100 percent coverage by trained observers, even in U.S. jurisdictional waters. In fact, the major tuna fisheries in the West Pacific, the East Atlantic and the Indian Ocean have no programs at all for trained observers to monitor dolphin deaths. Instead, the amended tuna measure relies on captains to self-certify that they did not kill or seriously injure a dolphin, and that they did not set nets on dolphins. The captains are not reliable for that purpose.

9. Moreover, outside the ETP there are no requirements for comprehensive tracking of tuna from the moment it is caught through its sale at retail, as there is for ETP tuna products. There is no way to tell whether the tuna in the can is verifiably associated with any specific dolphin-safe certification.

10. Further, despite the overwhelming evidence in the record that fishing methods such as longlines, gillnets, and trawling routinely kill and seriously injure dolphins, that purse seine nets kill dolphins in other fisheries, and that these fishing methods are known to be destructive to dolphin populations, they remain eligible for the dolphin-safe label, while dolphin sets conducted under the strict rules of the AIDCP do not.

11. The original proceedings established that dolphins in tuna fisheries outside the ETP are at significant risk of harm, and the compliance panel reaffirmed those findings. Under these circumstances, there is no legitimate basis for the different labelling conditions and requirements of the amended tuna measure. The amended tuna measure goes against its own objectives.

II. KEY LEGAL ISSUES

A. There is One Measure, Not Three

12. The legal test established by the Appellate Body for applying Article 2.1 of the TBT Agreement requires a determination whether a detrimental impact on imports stems exclusively from a legitimate regulatory distinction. This is how we know whether or not there is arbitrary or unjustifiable discrimination. In the original proceedings, the Appellate Body found that the lack of access to the label for Mexican tuna products, while other products of other countries have access, has a detrimental impact on the competitive opportunities of Mexican tuna products. It next found that the relevant regulatory distinction was the difference in labelling conditions and requirements for tuna products containing tuna caught by dolphin sets in the ETP, on the one hand, and for tuna products caught by other fishing methods outside the ETP, on the other hand.

13. Under the amended tuna measure, the detrimental impact is the same as before: Mexican tuna products are denied the dolphin-safe label while the products of the United States and other countries have access to the label. In the Article 21.5 proceeding, Mexico argued that the relevant regulatory distinction – in other words, the difference in labeling conditions and requirements – included three particular aspects that support the conclusion that the distinction is not even-handed:

- The disqualification of setting on dolphins in accordance with the AIDCP as a fishing method that can be used to catch tuna in the ETP in a dolphin-safe manner and the qualification of other fishing methods to catch tuna in a dolphin-safe manner;
- The record-keeping and verification requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the different requirements for tuna caught outside the ETP using both the same and different fishing methods; and
- The mandatory independent observer requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the absence of such requirements for tuna caught outside the ETP using the same and different fishing methods.

14. The Panel found that the recordkeeping and observer requirements were not even-handed, and that the eligibility requirement was even-handed. On that basis, the Panel should have concluded that the amended tuna measure as a whole is inconsistent with Article 2.1. Instead, the Panel framed its findings to be that the record-keeping requirements and observer requirements, in and of themselves, are inconsistent with Article 2.1, and that the eligibility requirement, in and of itself, is consistent with Article 2.1

15. This is legally incorrect. It does not follow the Appellate Body's guidance and it is inconsistent with the Panel's terms of reference, which required it to make determinations on the tuna measure as a whole. The Panel should have concluded that the differences in the labelling conditions and requirements demonstrate that the amended tuna 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 therefore discriminates against a group of like products contrary to Article 2.1 of the TBT Agreement.

16. The panel made an analogous error in relation to GATT Articles I and III:4. It found that the certification and tracking and verification conditions and requirements are inconsistent with Articles I and III, but failed to find expressly that the entire amended tuna measure is inconsistent with those provisions.

17. Mexico agrees with New Zealand that in an Article 21.5 proceeding it is essential to examine the measure as a whole, to determine whether the combined effects of the elements of a measure accord less favourable treatment to imported products.¹

¹ Third Participant Submission of New Zealand, para. 6.

18. Mexico is therefore seeking that the Appellate Body correct these legal errors. Because the Panel already found that certification and tracking and verification conditions and requirements are not even-handed, the Appellate Body is able to make the correction without making any new factual findings.

B. The Eligibility Requirement

19. Mexico has also appealed the Panel’s finding that the eligibility requirement of the amended tuna measure is even-handed and not arbitrary or unjustifiable.

20. As it did in the original proceedings, the Panel found that dolphins are killed and seriously injured in other fisheries by other fishing methods, and that in some cases those fishing methods are having effects on dolphin populations. But the Panel nonetheless found that dolphin sets in the ETP could be distinguished on the basis of the nature of “unobservable” harms, which by definition are speculative in nature and cannot be conclusively established. In Mexico’s view, the Panel’s approach to the issue does not correctly apply the applicable legal tests to the evidence before it.

21. In fact, the situation in other fisheries is much like the situation in the ETP in the 1980s. In order to fulfil the U.S. requirements for the dolphin-safe label, the countries and fleets operating in those other fisheries should collect information, implement catch documentation schemes for tracking and verification, train observers to monitor fishing practices, and take affirmative steps to protect dolphins and other marine mammals. Apparently, many do not want to undertake that effort. That does not provide an excuse, however, for the United States to arbitrarily declare that dolphins are not adversely affected in those fisheries, while presuming that dolphins in the ETP are adversely affected. As has been noted, the original panel found that “strong evidence that regular and significant mortality and serious injury of dolphins also exists outside the ETP”.²

22. In evaluating this eligibility issue, it is crucial to examine the object and purpose of the amended measure, as reflected in its design, architecture, revealing structure, operation, and application, and which can only be done by considering the measure as a whole.

23. The amended tuna measure itself requires that consumers be given precise information on whether the tuna contained in the tuna products they are purchasing was harvested during a set or gear deployment in which a dolphin was killed or seriously injured.

² Panel Report, *US – Tuna II (Mexico)*, para. 7.543.

The measure incorporates a zero tolerance standard. The label has to provide accurate information to consumers that the tuna contained in those products was caught in a manner completely consistent with the definition of dolphin-safe. The label is not defined as “*probably* no dolphins were killed or seriously injured, and *probably* no nets were set on dolphins”.

24. Similarly, the objectives of the measure, as determined in the original proceedings, are (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.

25. If the zero tolerance standard is applied, any fishing method that causes dolphin mortalities and serious injuries – and therefore causes adverse effects – must be disqualified, even if no mortalities or injuries were seen in a particular set or gear deployment. If the amended tuna measure incorporates some broader, more liberal standard for determining adverse effects, that standard must be objective and measurable – for example, a standard that measures the impact of the fishery based on relation of dolphin mortalities to the potential biological removal (PBR) figure for the relevant dolphin stocks. It is not even-handed, however, to say that dolphin sets in the ETP are disqualified and other fishing methods are qualified on the basis of a subjective judgment. That is what has happened here.

26. Mexico emphasizes that the United States has expressly denied that the amended tuna measure is based on population effects, or any other objective measurable criteria. It simply states its view that intentionally setting nets around dolphins is bad, even when done with the extensive protections of the AIDCP. The United States is confusing the means with the ends; what matters is the result, irrespective of how the result occurs. Moreover, using a fishing method such as longlines, gillnets, trawls and purse seines that fishers know will kill many dolphins is tantamount to intentionally killing dolphins. We cannot understand why the United States wishes to reward fishermen and tuna product manufacturers for such destructive and irresponsible behavior, and to mislead consumers. Allowing use of the dolphin-safe label in such circumstances runs directly contrary to the language and objectives of the amended tuna measure. It is arbitrary and unjustifiable, and not even-handed.

27. Contrary to the claim of the Panel, the Appellate Body did not resolve the issue of whether other fishing methods should be eligible for the dolphin-safe label. The Appellate

Body did not need to make a detailed comparative analysis of fishing methods because under the original measure, it was permissible for other fishing methods to kill and seriously injure dolphins.

III. COMMENTS ON U.S. ARGUMENTS

28. The main arguments of the United States focus on attempting to analyze each of the labelling conditions and requirements as though they were independent measures. As Mexico has shown, that is not the correct analysis. Mexico did not need to show, nor did the Panel need to make findings, that the certification and tracking and verification conditions and requirements are independent sources of detrimental impact. The issue is whether the measure as a whole has a detrimental impact. Accordingly, the U.S. arguments on that issue are not pertinent.

29. The U.S. arguments regarding “calibration” are also unavailing. The jurisprudence developed by the Appellate Body in interpreting Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 does not include a “calibration test.” There is no basis for adding an additional exception to the obligations of non-discriminatory treatment that already exist. The United States appears to be arguing that there should be degrees of permissible discrimination even if arbitrary or unjustifiable, something that goes against long-established clarifications of non-discrimination provisions by the Appellate Body. Further, as already discussed, there is no “calibration” incorporated into the amended tuna measure itself, and calibration would be inconsistent with the objectives of the measure. Finally, as also already discussed, there can be no justification for calibration when the Panel has made factual findings that other fishing methods are killing and maiming dolphins and those fishing methods are known to result in high levels of dolphin mortality. The United States is wrong to claim that “calibration” – whatever it means by that – justifies the distinction it makes between dolphin sets and other fishing methods.

IV. CONCLUSIONS

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