

**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 Appellee Submission of Mexico

23 June 2015

1. The foundation of the United States' appeal is its insistence that the amended tuna measure is "calibrated" to risks of harm to dolphins outside the Eastern Tropical Pacific (ETP) large purse seine fishery. But it has been established – both in the original proceedings and in the compliance proceedings – that dolphins are at significant risk in tuna fisheries outside the ETP, from a variety of different fishing methods. Moreover, the United States does not contest the Panel's factual findings that vessel captains outside the ETP are not sufficiently trained to make reliable dolphin-safe certifications, and that the amended tuna measure does not require tracking and verification systems outside the ETP that can reliably ensure that a certification is legitimately matched to the tuna with which it is associated. In essence, therefore, the United States' position is that consumers do not need to know with any certainty whether non-ETP tuna products bearing the dolphin-safe label actually contain tuna that was caught without killing or seriously injuring a dolphin, or in a manner that does not adversely affect dolphins. There is no legitimate legal or policy justification for that position. The United States must apply the same standard to non-ETP tuna products as it does to ETP tuna products, including those from Mexico.

2. Mexico's AIDCP-compliant tuna fishing method protects dolphins, tuna fisheries stocks and the oceanic environment in a manner that is vastly superior to the alternative tuna fishing methods that are being promoted by the amended tuna measure. Nonetheless, Mexico acknowledges the rights of WTO Members to establish their own levels of protection. In this light, the findings of the Panel and the claims raised in Mexico's other appeal hold the United States to the standard that it has set for itself. Due to its gaps, deficiencies, lack of even-handedness and arbitrariness, the amended tuna measure is modifying the conditions of competition in the U.S. market to the detriment of Mexican tuna products in a WTO-inconsistent manner. The measure does not ensure that accurate information is provided to U.S. consumers and, accordingly, it does not meet the strict standard that the United States has set for itself or accomplish the measure's stated objectives.

I. MEASURE AS A WHOLE

3. The Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with the WTO provisions in question rather than making separate findings and conclusions in respect of specific requirements of the measure. The eligibility criteria, the certification requirements and the tracking and verification requirements relate to elements of the legal tests necessary to establish the WTO-inconsistency of the amended tuna measure as a whole. Specifically, they relate to the second part of the legal test in Article 2.1 of the TBT Agreement and to the legal test under the chapeau of Article XX of the GATT 1994. Mexico did not challenge these requirements independently as three separate measures and did not have to establish an independent *prima facie* case for each. This error of the Panel is replicated in the arguments of the United States.

II. ERRONEOUS ARGUMENTS THAT FORM THE FOUNDATION OF THE APPEAL

A. Modification of Conditions of Competition & Detrimental Impact

4. In the original proceedings, the Appellate Body found in the context of Article 2.1 that the tuna measure modified the conditions of competition in the U.S. market to the detriment of Mexican tuna products. The Appellate Body stated that the detrimental impact

of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a dolphin-safe label, whereas most tuna products from the United States and other countries that are sold in the U.S. market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a dolphin-safe label. The aspect of the measure that causes the detrimental impact is 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. This detrimental impact is caused by the measure itself and therefore has a genuine relationship with the measure.

5. This is unchanged in the amended tuna measure and, therefore, the measure continues to deny competitive opportunities to Mexican tuna products. This conclusion under the first part of the legal test under Article 2.1 is sufficient, in the circumstances of this dispute, to establish that the amended tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994.

6. The amended measure's labelling conditions and requirements operate together to modify the conditions of competition to the detriment of imported Mexican tuna products. The detrimental impact involves not only the denial of the dolphin-safe label to Mexican tuna products, but also — at the same time — the granting of the label to tuna products from the United States and other countries that potentially may contain tuna caught in a manner that adversely affects dolphins, and therefore is not dolphin-safe. Like in *EC – Seal Products*, it is the combined operation of the prohibitive and permissive aspects of the measure that leads to the *de facto* discrimination in question. By focusing on the fact that the label is denied to Mexican tuna products, the United States is missing the important permissive aspects of the amended tuna measure which, in addition to their contribution to the detrimental impact, result in inaccurate labelling information being passed to U.S. consumers due to their deficiencies and gaps.

B. “Calibration” to Risks to Dolphins

7. The United States argues that the certification requirements and tracking and verification requirements are “calibrated” to the risks to dolphins from different fishing methods in different fisheries and, for that reason, are even-handed under Article 2.1 and do not impose arbitrary or unjustifiable discrimination on Mexican products under the chapeau of GATT Article XX. These arguments are flawed.

8. 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” that can override the even-handedness and arbitrary discrimination tests. Moreover, it is insufficient simply to assert, as the United States does, that a distinction reflects a Member’s chosen level of protection in order to establish even-handedness or a lack of arbitrariness.

9. Tuna is either “dolphin-safe” or it is not. Eligibility for the dolphin-safe label cannot be viewed as a relative assessment. The United States’ argument implies that the label means “probably dolphin-safe” or “might be dolphin-safe”, rather than “dolphin-safe”. A “zero tolerance” benchmark is incorporated in the design, architecture, revealing structure, operation, and application of the measure. The measure’s objectives are in no way qualified to allow some level of “acceptable” mortality or serious injury or any “margin of error”;

rather, the objectives are asserted in terms that are absolute in the goal of avoiding misleading consumers about whether the tuna they purchase was caught in a manner that adversely affects dolphins. Complete precision is required for both the certification process and the tracking and verification of tuna. Under these circumstances, a purported comparison of the magnitude or nature of dolphin harms caused by different fishing methods is not relevant.

10. Even if “calibration” were somehow permitted, in light of the adverse effects on dolphins from almost all fishing methods in all fisheries, the purported differences between the ETP and other tuna fisheries cited by the United States could not justify a difference in the regulatory requirements, such that untrained captains are allowed to make certifications and tuna cannot be accurately tracked back to the vessel well in which it was stored after capture.

C. Absence of a Rational Connection to the Objective

11. The Panel correctly interpreted and applied the law. Although the rational connection is “one of the most important factors” in assessing whether there is arbitrary or unjustifiable discrimination under Article XX and therefore even-handedness under Article 2.1, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment. Contrary to the U.S. “single factor” argument, the Panel provided the United States with the opportunity to explain why other factors establish that the measure is even-handed and not arbitrary and the United States was unable to do so.

D. Amended Tuna Measure Not the AIDCP

12. The United States incorrectly suggests that the tracking, verification and observer requirements imposed with respect to Mexican tuna products are exclusively the result of the AIDCP, and would exist without the amended tuna measure. To the contrary, the amended tuna measure expressly incorporates the AIDCP and other requirements for the purpose of conditioning access to the U.S. dolphin-safe label in the U.S. market. Moreover, the measure establishes requirements that apply to tuna caught in fisheries outside the scope of the AIDCP. The United States also repeatedly and incorrectly refers to the differences in the certification requirements and the tracking and verification requirements between the “AIDCP and NOAA” regimes. The relevant comparison is between the different ways in which the amended tuna measure conditions access to the dolphin-safe label under the different labelling conditions and requirements 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.

E. Unnecessary to Prove Mislabelling

13. For the purposes of establishing a lack of even-handedness under the second part of the legal test in Article 2.1 and arbitrary discrimination under the chapeau of Article XX, the Appellate Body made clear in *EC – Seal Products* that Mexico is only required to establish a *prima facie* case that, under the circumstances related to the design and application of the Amended Tuna Measure’s labelling conditions and requirements, tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe. The burden then shifts to the United States to

sufficiently explain how such instances can be prevented in the application of the Amended Tuna Measure's labelling conditions and requirements. Mexico has met its burden. That burden shifted to the United States, which was unable to rebut Mexico's *prima facie* case.

III. ARTICLE 2.1 – CERTIFICATION REQUIREMENTS

A. Detrimental Impact

14. As explained above, there was no need for the Panel to make an independent finding with respect to the certification requirements because the amended tuna measure as a whole has a detrimental impact on Mexican imports. Thus, even if the United States is correct in its arguments, they have no bearing on the first part of the legal test under Article 2.1. In the context of analyzing the denial of competitive opportunities, it is not necessary to demonstrate actual trade effects. If the Appellate Body finds that the differences in costs and burdens are relevant to the determination, it is sufficient that the Panel found that it is clear that the difference between having observers on-board large purse seine vessels in the ETP and not having observers on-board other vessels imposes a lighter burden on tuna products made from tuna caught other than by large purse seine vessels in the ETP, as observer coverage involves the expenditure of significant resources. The detailed cost and burden analysis put forward by the United States is not necessary in the circumstances of this dispute. Finally, there is a genuine relationship between the measure, which contains all of the prohibitive and permissive requirements, and the detrimental impact.

B. Whether Detrimental Impact Stems Exclusively from a Legitimate Regulatory Distinction

1. Lack of Even-Handedness

15. The Panel was correct to consider that the different certification requirements are designed in a manner that "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure" (i.e., because "captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured in a set or other gear deployment"), and to find, on this basis, that the "the different certification requirements are not even-handed," such that the detrimental impact cannot be said to stem exclusively from a legitimate regulatory distinction.¹ The Panel provided the United States with an opportunity to justify the regulatory distinction, and the United States was unable to do so. Thus, there are no additional relevant factors that could outweigh the Panel's finding. As explained above, the U.S. arguments regarding "calibration" and the "AIDCP rather than the measure" have no merit.

¹ Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.233.

2. The Panel’s Findings Regarding the Determination Provisions Further Support Mexico’s Case

16. Mexico agrees with the United States that Mexico did not argue that the determination provisions themselves directly result in detrimental impact. There was no need for Mexico to do so. In determining whether the regulatory distinctions of the measure are even-handed, the Panel was required to assess the design, architecture, revealing structure, operation, and application of the measure, and the determination provisions are an integral part of the amended tuna measure. There was considerable evidence in the record to support the Panel’s findings. Moreover, the Panel was fully justified to apply the same logical deductions to tuna fishing outside the ETP that the United States applies to tuna fishing inside the ETP. It was both reasonable and appropriate for the Panel to conclude that dolphin association with fishing methods other than purse seine nets could be harmful to dolphins, and that purse seine fishing could cause dolphin mortalities even if an ocean region did not feature tuna-dolphin association similar to the ETP. The design of the determination provisions is completely at odds with the objective of the amended tuna measure, and the Panel was correct in unanimously finding that the regulatory distinction is arbitrary.

IV. ARTICLE 2.1 - TRACKING AND VERIFICATION REQUIREMENTS

A. Detimental Impact

17. The above points regarding the detrimental impact associated with the certification requirements apply equally to the detrimental impact associated with the tracking and verification requirements.

B. The Panel Correctly Found that the Detimental Impact Does Not Stem Exclusively from a Legitimate Regulatory Distinction

18. Contrary to the arguments of the United States, the Panel was correct that Mexico had established *prima facie* that there is no rational connection between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure. The Panel correctly ruled that Mexico could establish a *prima facie* case that tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe on the basis of evidence and arguments going to the design, architecture, and revealing structure of the amended tuna measure. The Panel made a number of factual findings in its assessment of the different tracking and verification requirements which demonstrate “major gaps in coverage” that could potentially contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery. These factual findings, together with the Panel’s overall findings are sufficient to support the Panel’s legitimate regulatory distinction analysis and its conclusion in the second step of the Article 2.1 legal test. However, in the event that the Appellate Body finds that the Panel erred in declining to make a definitive finding on the question of whether the different labelling conditions and requirements may permit non-dolphin-safe tuna harvested in fisheries outside the ETP to be inaccurately and unjustifiably granted the competitive advantage of the dolphin-safe label in the U.S. market, Mexico respectfully requests that the Appellate Body complete the analysis using the applicable standard of proof, as correctly found by the Panel, and the Panel’s findings of fact.

19. Contrary to the arguments of the United States, the Panel committed no error in resolving the legitimate regulatory distinction analysis on the basis of the rational connection. There are no additional relevant factors in the present dispute that could outweigh the Panel's finding that the relevant regulatory distinction is designed and applied in a manner that permits inaccurate labelling. This is because incorrect labelling results in inaccurate and misleading information being provided to consumers who choose to purchase and consume tuna products which they believe have been produced in a dolphin-safe manner, which directly contradicts the objectives of the amended tuna measure.

20. For the same reasons discussed above for the certification requirements, the Panel committed no error as alleged by the United States in finding that the different tracking and verification requirements evidence that the detrimental impact caused by the amended tuna measure cannot be explained or justified on the basis of "calibration" to different risk profiles in different fisheries. In addition, tuna is either dolphin-safe or non-dolphin-safe at the point of capture. After the tuna has been harvested and stored aboard a fishing vessel, the risk profile of harm to dolphins is no longer a relevant consideration with respect to that tuna. It is only this post-harvest tuna — the storage, transportation and processing of which poses no risk of harm to dolphins — to which the different tracking and verification requirements apply. Therefore, there is no nexus or relationship at all between the tracking and verification of the dolphin-safe status of harvested tuna and the allegedly different risk profiles of harm to dolphins from different fishing methods in different areas of the ocean.

21. Finally, Mexico's claims are concerned with the amended tuna measure's differential regulatory treatment under the different labelling conditions and requirements that condition access to the competitive advantage of the "dolphin-safe" label in the U.S. market. The Panel expressly explained that it is the design and structure of the amended tuna measure, and not the AIDCP, that sets up the relevant regulatory distinction in two sets of rules that condition access to the dolphin safe label under a single regulatory framework. The AIDCP is not relevant to the determination of consistency with Article 2.1.

V. ARTICLES I:1 AND III:4 OF THE GATT 1994

22. The amended tuna measure conditions the extension of an advantage – namely, the "dolphin-safe" label – in a manner that modifies the conditions of competition between like imported tuna products in the U.S. market to the detriment of Mexican tuna products and therefore violates Article I:1. Moreover, the measure has a detrimental impact on the conditions of competition in the U.S. market to the detriment of Mexican tuna products *vis-à-vis* U.S. tuna products and therefore violates Article III:4. There is no merit to the United States' arguments that the Panel erred in finding that these provisions were violated.

VI. CHAPEAU OF ARTICLE XX OF THE GATT 1994

23. The Panel correctly set out the three elements of the legal test under the chapeau of Article XX and correctly concluded that, in the circumstances of this dispute, it was appropriate for it to rely on the reasoning and findings that it developed in the context of Article 2.1 in the course of its analysis under the chapeau of Article XX.

**A. The Amended Tuna Measure Discriminates between Countries
in which the Same Conditions Prevail**

24. Contrary to the United States' arguments, it is clear from the Panel's reasoning under Article XX, read in conjunction with its reasoning under Article 2.1, that the Panel conducted an analysis of whether discrimination exists and it found that it does exist. Similar to *EU – Seal Products*, the causes of discrimination found to exist under Articles I:1 and III:4 are the same as those to be examined under the chapeau. Moreover, the Panel correctly found that this discrimination occurs between countries where the same conditions prevail. The same conditions exist in Mexico, the United States and other countries because dolphins may be killed or seriously injured by all fishing methods in all oceans, and accordingly accurate certification and tracking and verification is necessary regardless of the particular fishery in which tuna is caught.

**B. The Amended Tuna Measure is Applied in a Manner that
Constitutes a Means of Arbitrary or Unjustifiable
Discrimination**

25. Contrary to the United States' arguments, it is sufficient that the Panel elaborated upon the relationship between the chapeau of Article XX and Article 2.1 and explained why it was appropriate, in the circumstances of this dispute, to rely on the reasoning it had developed in the context of Article 2.1 in the course of its analysis under the chapeau of Article XX.

26. The Panel did not err, as the United States alleges, by merely applying a "single-factor" test to determine arbitrary or unjustifiable discrimination under the chapeau. Mexico acknowledges that, in principle, the chapeau analysis is not necessarily a single-factor test. In the present dispute, however, there are no additional relevant factors that could outweigh the Panel's finding that the different certification requirements and different tracking and verification requirements are applied in a manner that is arbitrarily or unjustifiably discriminatory because they permit inaccurate information to be passed to consumers with respect to the dolphin-safe status of the tuna in the products which consumers choose to purchase, contrary to the policy objective of conserving dolphins through informed consumer choice. The Panel also did not err in finding that the determination provisions are arbitrary.

27. For the same reasons explained above, the Panel also did not err in rejecting the United States' argument that the differences in the requirements are "calibrated" to the risks to dolphins arising from different fishing methods in different ocean areas and rejecting the argument that the differences reflect the fact that the parties to the AIDCP agreed to unique requirements.