

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

(WT/DS381)



**Executive Summary
Other Appellant's Submission by Mexico**

25 January 2012

I. EXECUTIVE SUMMARY

1. In this Other Appeal, Mexico appeals certain issues of law covered in the Panel Report in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (WT/DS381/R)* (“Panel Report”), certain legal interpretations developed by the Panel in this dispute, and the Panel’s failure to make an objective assessment of the matter as required by Article 11 of the DSU. In particular, Mexico appeals Panel’s conclusions that the U.S. measures are not inconsistent with Articles 2.1 and 2.4 of the TBT Agreement and its decision to exercise judicial economy with respect to Mexico’s claims under Articles I:1 and III:4 of the GATT 1994. It also conditionally appeals certain findings of the Panel concerning Article 2.2 of the TBT Agreement.

2. Mexico has been subject for more than two decades to trade restrictions imposed by the United States against Mexican imports of tuna and tuna products, first in the form of an absolute embargo and then through the imposition of the U.S. dolphin-safe labelling provisions.

3. After many years of cooperative work and based on a multilateral and scientific approach, the concerns about the protection of dolphins in tuna fishing operations in the *Eastern Tropical Pacific* “ETP”, that were the rationale behind the adoption of the U.S. dolphin-safe labelling provisions in 1990, have been successfully addressed by a treaty known as the Agreement on the International Dolphin Conservation Program (“AIDCP”).

4. Through a comprehensive program involving the mandatory use of special equipment, crew training, monitoring, tracking, verification, enforcement mechanisms and certification, featuring the use of independent observers aboard tuna fishing vessels, the AIDCP and its predecessor agreements dramatically reduced dolphin mortality in the ETP. The AIDCP, which also contains among its mandates the reduction of wasteful bycatch in fishing operations, has been recognized by the United Nations FAO as an unqualified success.

5. With the adoption and full implementation of the Agreement and its predecessors, the Mexican tuna industry modified its fishing techniques to comply with this multilateral regime that uniquely protects dolphins in tuna fishing operations in the ETP.

6. The U.S. dolphin-safe labelling provisions are consumer information measures that are aimed at protecting dolphins through consumer choices based on the presence or absence of a dolphin-safe label on tuna products. These measures prohibit the use of a dolphin-safe label or analogous claims unless specific requirements are met and, thereby, create an exclusive single standard about the “dolphin-safety” of tuna products. The exclusive single definition of “dolphin-safe” is at the core of Mexico’s challenge. It is what transforms what would otherwise be a standard into a technical regulation.

7. The U.S. dolphin-safe labelling provisions effectively prohibit the use of the international dolphin-safe label provided for in the AIDCP, which applies to tuna fishing in the ETP. The alternative measure suggested by Mexico (allowing the U.S. dolphin-safe label and the *AIDCP Dolphin-Safe* label to *co-exist* on the U.S. market in order to provide fuller and more accurate information to U.S. consumers) will enable Mexico, as a developing country Member, to maintain its natural comparative advantage in fishing for tuna in the ETP and allow the Mexican fishing fleet to obtain a commercial return on the substantial investment it has made in complying with the onerous requirements of the AIDCP.

8. The only impact of the U.S. dolphin-safe labelling measures has been the exclusion of Mexican-branded tuna products from the principal U.S. distribution channels, while competing brands from the United States and other countries have full access to those distribution channels.

9. The U.S. dolphin-safe labelling provisions restrict the access of tuna products (e.g., canned and pouched tuna meat) to the U.S. market because tuna products that are not labelled dolphin-safe cannot access the principal distribution channels in that market. It also imposes special requirements on tuna products made from tuna caught in the ETP. For tuna products made from tuna harvested outside the ETP, the U.S. measures require only that the captain of the vessel certify that nets were not set on dolphins and provide no reporting or enforcement mechanism where dolphins are killed in the capture of the tuna.

10. Mexican fishing fleet catches yellowfin tuna in the ETP primarily by encircling dolphins with purse seine nets and takes extraordinary measures to permit the dolphins to swim away prior to bringing the tuna on board. Even though independent observers verify that no dolphins were killed or injured in the harvesting of the tuna, the Mexican tuna cannot meet the requirements of the U.S. dolphin-safe labelling provisions. . Therefore, Mexican tuna products do not have access to the principal distribution channels in the U.S. market.

11. The U.S. dolphin-safe labelling provisions condition access to the U.S. market in a manner that discriminates *de facto* against Mexican tuna products in favour of like tuna products from the U.S. and other countries. This conditional treatment is inconsistent with the non-discrimination obligations in Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the *GATT 1994*. Moreover, by prohibiting the use of the AIDCP dolphin safe label or analogous claims, the U.S. dolphin-safe labelling provisions perpetuate this discrimination.

II. 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*

12. The Panel incorrectly interpreted and applied Article 2.1 of the TBT Agreement and thereby erred in finding that the U.S. dolphin-safe labelling provisions are not inconsistent with Article 2.1. The Panel also failed to make an objective assessment of the matter before it as required by Article 11 of the *DSU*.

13. The Panel erred in interpreting the phrase “treatment no less favourable” in Article 2.1 of the *TBT Agreement*. The Panel created a “denial of access to an advantage” test for “less favourable treatment”. The Panel’s error arises from its narrow interpretation of “denial” to mean absolute prohibition or bar. This narrow interpretation is apparent in the Panel’s application of its test and in its conclusion.

14. In its interpretation of Article 2.1, the Panel ignored the broader context of the provision including the national treatment and MFN provisions in the other WTO agreements. The Panel erroneously departed from the “conditions of competition” or “equality of competitive opportunities” test for *de facto* discrimination.

15. In addition to this broader context and the object and purpose of the TBT Agreement, the language in the sixth recital of preamble of the TBT Agreement must be used to further clarify the meaning of Article 2.1. While the recital is not substantive and cannot be invoked in the manner of a general exception, the substantive provisions of the TBT Agreement including Article 2.1 must be interpreted in a manner that is consistent with this important context. According to the criteria in the sixth recital, the scope of the prohibition in Article 2.1 does not extend to a measure that modifies the conditions of competition in the relevant market to the detriment of an imported product if:

- a) The measure is necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels the implementing Member considers appropriate;
- b) The measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail;
- c) The measure is not applied in a manner which would constitute a disguised restriction on international trade; and
- d) The measure is otherwise in accordance with the provisions of the *TBT Agreement*.

This interpretation of Article 2.1 enables it to capture the multitude of situations in which discrimination could arise in respect of technical regulations while, at the same time, not prohibiting technical regulations that discriminate in a manner that is consistent with the object and purpose of the *TBT Agreement* as reflected, *inter alia*, in its preamble.

The U.S. dolphin-safe labelling provisions do not meet the criteria in the sixth recital.

16. The Panel made several errors in the interpretation of Article 2.1 of the *TBT Agreement* and in its application to the facts of this dispute. Mexico presents detailed reasons why the Panel's interpretation, reasoning, findings and conclusions regarding Mexico's discrimination claim under Article 2.1 of the *TBT Agreement* should be overturned and why the Appellate Body should, instead, find that the U.S. dolphin-safe labelling provisions are inconsistent with Article 2.1. Mexico also explains why the Panel may also have failed to fulfill its obligation to make an objective assessment of the matter before it as required by Article 11 of the *DSU*.

III. THE PANEL ERRONEOUSLY EXERCISED JUDICIAL ECONOMY

17. Mexico appeals the Panel's decision to exercise judicial economy and decline ruling on Mexico's claims under Articles I:1 and III:4 of the *GATT 1994*. The Panel made an error in exercising judicial economy with respect to these claims, and, in doing so, did not address all of the issues before it that were necessary for the effective resolution of the dispute. Mexico also requests the Appellate Body to complete the legal analysis.

18. In this dispute, Articles I:1 and III:4 of the *GATT 1994* and Article 2.1 of the *TBT Agreement* simultaneously and cumulatively apply to the U.S. dolphin-safe labelling provisions. The Panel exercised false judicial economy.

19. The Panel failed to conduct an objective assessment of the matter before it. Furthermore, in erroneously abstaining from making findings, the Panel did not fulfill its obligation to make

such findings that will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements as required by Article 11 of the DSU.

20. Contrary to Article I:1, the United States has granted an advantage to tuna products of other WTO Members and has not accorded that advantage immediately and unconditionally to like tuna products of all other Members, namely Mexico.

21. Contrary to Article III:4, the U.S. dolphin-safe provisions accord less favourable treatment to imported Mexican tuna compared to that accorded to like U.S. tuna products.

**IV. THE PANEL ERRED IN FINDING THAT THE AIDCP DOLPHIN SAFE
STANDARD IS NOT EFFECTIVE AND APPROPRIATE MEANS TO FULFILL
THE US OBJECTIVES IN TERMS OF ARTICLE 2.4 OF THE TBT AGREEMENT**

22. The Panel erred in finding that the AIDCP standard would be an ineffective and inappropriate means for the fulfilment of the legitimate objectives pursued by the United States.

23. In this dispute, the fact that the U.S. dolphin-safe labelling do not themselves completely fulfill either of the two legitimate objectives of the U.S. dolphin-safe labelling provisions is relevant to the determination of whether the AIDCP standard is “ineffective or inappropriate”.

24. Notwithstanding that the Panel found that the U.S. objectives were not limited to protecting dolphins in the ETP, it did not evaluate whether the AIDCP standard would be effective and appropriate to fulfil the U.S. objectives outside the ETP. The Panel erroneously limited its assessment of the AIDCP dolphin safe definition to the ETP.

25. In light of the Panel’s factual findings, the Panel failed to make an objective assessment in accordance with the obligation of DSU Article 11 of the DSU.

26. The Panel did not address the fact that the U.S. unilateral definition of “dolphin-safe” precludes dolphin sets, but does not provide any other information on the fishing method used to catch the tuna, or the unobserved effects those other methods may have on dolphins in the ETP. Moreover, outside the ETP, the U.S. definition of dolphin-safe does not require that no dolphins have been killed or seriously injured, and therefore provides no information even on the direct, observable effects on dolphins of tuna fishing.

27. With regard to the second objective, the Panel also made an incorrect analysis. It should be noted that, in the context of the Article 2.2 claim, the Panel found that the U.S. dolphin-safe measures did *not* fulfil this objective, and in fact *undermined* it.

28. In sum, the Panel erred in finding that the AIDCP standard would be an ineffective and inappropriate means for the fulfilment of the legitimate objectives pursued by the United States. To the contrary, it would be more effective than the existing U.S. dolphin-safe labelling provisions.

V. CONDITIONAL APPEAL: THE PANEL ERRED IN FINDING THAT THE OBJECTIVES OF THE U.S. DOLPHIN-SAFE PROVISIONS ARE LEGITIMATE OBJECTIVES WITHIN THE MEANING OF ARTICLE 2.2 OF THE *TBT AGREEMENT*

29. Mexico conditionally appeals the Panel’s finding that the second objective of the provisions is legitimate objective within the meaning of Article 2.2. Mexico disagrees with the Panel’s finding that, as applied in the context of the dolphin-safe labelling provisions, the second objective is legitimate.

30. In response to Mexico’s argument that the U.S. objectives were misguided and therefore illegitimate in the circumstances, the Panel then asserted that there is a “well-established principle under the provisions of the GATT 1994 and the covered agreements that Members enjoy the right to determine the legitimate policies they want to pursue.”

31. The legal test applied by the Panel is incorrect. The U.S. objective’s purpose is to coerce another WTO Member to change its practices to comply with the unilateral policy of the United States. Such a coercive objective is a priori trade restrictive. The Panel erred in finding that such an objective was legitimate.

32. In coming to the conclusion that the second objective of the dolphin-safe labelling provisions was legitimate, the Panel did not interpret the meaning of the term “legitimate objective” using the proper approach dictated by Articles 31 and 32 of the Vienna Convention.

33. Article 2.2 and the fifth recital to the preamble to the TBT Agreement refers to ensuring that technical regulations do not create unnecessary obstacles to international trade.

34. The U.S. objective of using the labelling measure to discourage purchases of tuna products made from tuna that is not embargoed raises important questions about the legitimacy of this objective.

35. It is crucial to the effective operation of Article 2.2 and of the TBT Agreement as a whole that the language in the preamble is given meaning. Otherwise, WTO Members could define the objectives of their technical regulations so narrowly and with such high levels of protection that no other alternative measure could fulfil those objectives. This would insulate such measures from challenge under Article 2.2 of the TBT Agreement and would be particularly prejudicial to the interests of developing country Members. For these reasons, Mexico respectfully requests that the Appellate Body overturn the Panel’s finding that the second objective is legitimate and instead find that it is not a legitimate objective within the meaning of Article 2.2.

VI. THE PANEL ERRED IN THE LEGAL ANALYSIS ON WHETHER THE U.S. DOLPHIN SAFE LABELLING PROVISIONS ARE “MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE”

36. If the Appellate Body confirms the Panel’s finding that both objectives of the U.S. measure are legitimate objectives, the Panel erred when it omitted a necessary step in its analysis of whether the U.S. dolphin-safe labelling provisions are more trade restrictive than necessary.

37. Before assessing whether less trade restrictive alternatives existed, the Panel was obliged to assess first whether the U.S. dolphin-safe labelling provisions were indeed capable of fulfilling and, in fact, fulfilled the stated objectives. In *U.S.-COOL*, the Panel correctly reached this conclusion.

38. Thus, it was not only appropriate but also necessary to assess first whether the U.S. measure fulfilled the objectives and, as the Panel recognized in the case at issue, the U.S. measure does not completely fulfill the stated objectives. Upon concluding that the U.S. dolphin-safe provisions did not fulfill the two objectives, the Panel should have found that they were inconsistent with Article 2.2. Its failure to make that finding is a legal error.

VII. CONCLUSIONS

39. Mexico respectfully requests that the Appellate Body:

- a) Reverse the Panel's ruling in paragraph 8.1(a) of the Report that the U.S. dolphin-safe labeling provisions are not inconsistent with Article 2.1 of the TBT Agreement;
- b) If the Appellate Body finds that the Panel's denial of access to an advantage test is a permissible interpretation of Article 2.1, reverse the Panel's finding that Mexican tuna products were not denied access to the advantage and the Panel's ruling in paragraph 8.1(a) of the Report that the U.S. dolphin-safe labeling provisions are not inconsistent with Article 2.1 of the TBT Agreement;
- c) Reverse the Panel's ruling in paragraph 8.2 and Section VII of the Panel Report on its decision to exercise judicial economy, and complete the analysis of Mexico's claims under Articles I:1 and III:4 of the GATT 1994;
- d) Reverse the Panel's finding in paragraph 8.1(c) of the Panel Report that the U.S. dolphin-safe provisions are not inconsistent with Article 2.4 of the TBT Agreement; and
- e) Find that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in relation with subparagraphs (a) to (d) mentioned above.

40. Should as a result of the United States' appeal the Appellate Body reverse the Panel's finding that the U.S. dolphin-safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement, Mexico respectfully requests that the Appellate Body reverse the Panel's finding that the second objective of the U.S. dolphin safe labeling provisions is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.

41. Should as a result of the United States' appeal the Appellate Body reverse the Panel's finding that the U.S. dolphin-safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement and then reject Mexico's conditional appeal that the second objective of the U.S. dolphin-safe provisions is not a legitimate objective, Mexico respectfully requests that the Appellate Body overturn the Panel's legal analysis and for the reasons mentioned in this submission confirm that the U.S. dolphin-safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement.