

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(WT/DS381/RW)



Comments of the United Mexican States on the Interim Report

12 December 2014

I. INTRODUCTION

1. Mexico would like to thank the Panel and the Secretariat for their work to date and for the analysis contained in the Interim Report.

2. Pursuant to Article 15.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Panel’s Working Procedures, Mexico sets out substantive and general comments to make necessary corrections or clarifications where the Panel appears to have misunderstood or mis-described facts or arguments.¹ These comments include Mexico’s suggestions to edit or adjust the specific paragraphs identified in this submission. Additionally, Mexico has identified minor typographical errors which are listed in the final section.

II. PARAGRAPH 7.14

3. In the first sentence of this paragraph, the Interim Report states that the United States modified its “implementing regulation.” Mexico therefore suggests that the word “legislative” in the second sentence be replaced with “regulatory,” especially because the United States did not modify its legislation. Mexico also recommends removing the word “a” in that sentence. The sentence would then read as follows:

The United States takes the view that this ~~regulatory~~~~a legislative~~ change is sufficient to bring its measure into conformity with the rulings and recommendations of the DSB.

III. PARAGRAPHS 7.103-7.104

4. Paragraph 7.104 inaccurately states Mexico’s arguments regarding the detrimental impact that arises from the eligibility criteria. It states that: “Whereas the latter [i.e., “the eligibility criteria”] is responsible for the fact that most Mexican tuna products are ineligible to receive the label, the former [i.e., “the different certification and tracking and verification requirements”], on Mexico’s argument, provides a “competitive advantage” to non-Mexican tuna products, and so detrimentally modifies the conditions of competition”.

5. As made clear in Mexico’s submissions, the detrimental impact from the eligibility criteria is a combination of both 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”.² Mexico argued that “the absence of sufficient fishing method qualification ... for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be

¹ Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, Footnote 3; Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as reversed by the Appellate Body Report, WT/DS60/AB/R, para. 6.2.

² See Mexico’s first written submission, paras. 235-236.

inaccurately labelled as dolphin-safe”.³ Mexico’s argument that “[a] detrimental impact can be viewed from two perspectives: the denial of a competitive advantage on products (i.e., imported Mexican tuna products), or the conferral of a competitive advantage on other like products (i.e., tuna products from the United States and other countries)” applies to all three of the labelling conditions and requirements identified by Mexico, including the eligibility criteria.⁴

6. Mexico requests that paragraphs 7.103 and 7.104 be revised as follows:

7.103. ... Mexico explained that:

[T]he absence of sufficient fishing method qualification, record-keeping, verification and observer requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labelled as dolphin safe.²¹³

7.104. This passage clearly identifies a distinct type of detrimental impact that, in Mexico’s view, is caused by the different eligibility, certification and tracking and verification requirements, ~~as opposed to the eligibility criteria. Whereas the latter is responsible for the fact that most Mexican tuna products are ineligible to receive the label, the former, These requirements~~, on Mexico’s argument, provides a “competitive advantage” to non-Mexican tuna products, and so detrimentally modifies the conditions of competition. In our view, this is a clear and cognizable claim of detrimental impact ~~separate from the detrimental impact identified by Mexico as the result of the eligibility criteria.~~

IV. PARAGRAPH 7.110

7. The last sentence of this paragraph cites paragraph 263 of Mexico’s first written submission, but reproduces only half of the “assumptions” argument that was presented by Mexico in that paragraph. The other half of the argument is equally important to Mexico’s position that the eligibility requirement is not even-handed. Mexico requests that the second half of that argument be added as follows:

7.110. ... Second, Mexico maintains that the distinction is not even handed because it “assumes that setting on dolphins in an AIDCP-compliant matter has adverse effects on dolphins that justify disqualification, and this assumption is permanent and will not change, even if evidence establishes that dolphin stocks are not being adversely affected. ... At the same time, the Amended Tuna Measure assumes that catching tuna using other fishing methods does not have adverse effects on dolphins. However, the evidence

³ Mexico’s second written submission, para. 117.

⁴ Ibid. See also Mexico’s responses to the Panel’s questions, para. 36.

presented by Mexico in section III of this submission contradicts this assumption and proves that other fishing methods have substantial adverse effects on dolphins that are equal to or greater than those of setting on dolphins in an AIDCP-compliant manner.²²⁶

V. PARAGRAPH 7.156

8. In paragraph 7.156, the adjective “vehemently” is used to describe how the United States rejected certain arguments advanced by Mexico. In Mexico’s view, the use of this adjective is unnecessary in this context. Accordingly, Mexico requests that the Panel remove it, as follows:

7.156. The United States ~~vehemently~~ rejects these allegations. In its view, ...

VI. PARAGRAPH 7.176

9. In paragraph 7.176 the Panel attributes to Mexico the term “fraudulent” in the context of describing captains’ statements that improperly or inaccurately certify non-dolphin safe tuna as “dolphin safe”. Mexico did not use the terms “fraud”, “defraud” or “fraudulent” in this context in its submissions. Accordingly, Mexico requests that the Panel remove this term as it relates to Mexico’s position, and replace it as follows with the terms “improper” and “inaccurate”, which Mexico has used in its submissions in this context:

7.176. According to Mexico, the risk that captains will make ~~fraudulent~~ improper or ~~otherwise incorrect~~ inaccurate statements is heightened by the fact that ...

VII. PARAGRAPHS 7.220 TO 7.222

10. Mexico observes that in paragraphs 7.220 to 7.222, the Panel appears to accept the United States’ argument that outside the ETP, dolphins are not set on intentionally and interaction is “accidental.” Mexico respectfully disagrees. Mexico requests that the Panel, at a minimum, acknowledge that Mexico presented evidence that nets are intentionally set on dolphins outside the ETP (including the chasing of dolphin herds in the Indian Ocean), and that interactions of other methods of fishing with dolphins – especially those that attract dolphins – are not “accidental.” Mexico therefore requests that the Panel add the following new text as a footnote to paragraph 7.221:

* Mexico disputes that the situation in the ETP is unique and also argues that where other fishing methods attract dolphins and/or are known to kill dolphins, whether the vessel operators claim the mortalities are an “accident” is not relevant. Rather, the relevant consideration is whether vessel operators proactively seek to avoid harming dolphins Mexico’s comments on responses of United States, para 46, second written submission, paras. 49, 142.

VIII. PARAGRAPH 7.305

11. Paragraph 7.305 states that Mexico argued that the risks associated with trans-shipping only arise in the context of tuna fishing industries that are not vertically integrated. In fact,

Mexico demonstrated that its major tuna producers are vertically integrated, in a context in which both the fishing and processing operations are subject to continuous oversight by AIDCP and national government authorities who are focused specifically on enforcing rules to maintain precise tracking of lots of tuna from the moment of capture through to the production of cans of tuna product.⁵

12. As discussed in the following paragraphs of the Interim Report, Mexico also demonstrated that most major tuna products companies in other countries are not vertically integrated, that in those circumstances tuna can pass through the hands of two or more parties before reaching a cannery, and that in the absence of continuous oversight of the tuna from the moment that it is caught, the dolphin safe status of such tuna cannot be assured to consumers. To be more precise in describing Mexico’s argument, Mexico requests that the Panel revise the first sentence of paragraph 7.305 as follows:

According to Mexico, the risks associated with trans-shipping, including “tuna laundering,” ~~only arise~~ are much greater in the context of tuna fishing industries that are not vertically integrated – that is to say, where producers of tuna products do not have their own fishing fleets that deliver tuna directly to their processing plans, and where the tuna is not subject to continuous oversight and tracking.

IX. PARAGRAPHS 7.337 TO 7.339

13. Mexico suggests that the discussion in paragraphs 7.337 through 7.339 address the fact that not only U.S. canneries, but also U.S. importers, cannot look behind the documents. Also, Mexico suggests that the language be clarified to draw a clearer distinction between tracking procedures for tuna caught by large purse seine vessels in the ETP and tracking procedures for other tuna.

14. In this regard, Mexico recommends that the first sentence of paragraph 7.337 be revised as follows:

For tuna caught other than by large purse seine vessels in the ETP,

Mexico also recommends that a new sentence be added at the end of this paragraph that states:

Similarly, the United States relies on US importers of tuna products for information about the movement of tuna prior to arrival at a US port, and is not able to track the movement and dolphin safe status of tuna from the time of catch up to the point of delivery to a non-US cannery and subsequent shipment to the United States.*

* Mexico’s Comments on Responses of the United States, paras. 139 and 155. The US authorities do not conduct dolphin safe audits of non-US canneries. NMFS, List of US Canneries Participating (Exhibit MEX-152).

15. Mexico recommends that the second and third sentences of paragraph 7.338 be clarified with the following revisions:

⁵ Mexico’s first written submission, paras. 159-60.

As we understand it, in the ETP every step of the catch and canning process for tuna caught by large purse seine vessels is prescribed and can be monitored by national and regional agencies. In contrast, for all other vessels it appears that the United States has

16. To maintain consistency, Mexico also recommends that the last two sentences of paragraph 7.339 be revised as follows:

As we understand it, the United States essentially relies upon the canneries themselves and other importers to ensure that the requirements of the amended tuna measure However, as we have explained above, we have seen no evidence suggesting that canneries in fact do this, and, as we understand the measure, canneries and other importers are not *legally required* to conduct such checks.

X. PARAGRAPH 7.547

17. The second sentence of paragraph 7.547 includes a statement that the fishing method of setting on dolphins is “considered to be the most ferocious method”. Mexico is concerned that this statement could be construed as criticism of the AIDCP, which would be both inappropriate and contradict evidence on the record, such as the decision by the United Nations Food and Agricultural Association in 2005 to award to the AIDCP the Margarita Lizárraga Medal on the basis that the AIDCP “has been an unqualified success and has diligently applied the relevant principles set forth in the Code [of Conduct for Responsible Fisheries], in particular those aspects relating to the precautionary approach and to the utilization of fishing gear and techniques which minimize the catch of non-target species.”⁶

18. Mexico observes that in the original proceedings the Panel found that the risks to dolphins from other fishing techniques in some circumstances rise to the same level as the risks from setting on dolphins, and that the Appellate Body specifically affirmed that finding.⁷ Mexico also notes, as it previously explained in paragraph 10 of Mexico’s second written submission, that the Appellate Body interpreted the Panel’s findings as follows:

We do not see a contradiction between this finding and the Panel's earlier finding, in paragraph 7.438 of the Panel Report, that “the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries”. We note that the latter statement is qualified by the statement “especially when used without applying certain fishing gear and procedures designed to reduce dolphin bycatch”, and it is made in the context of the Panel's discussion of the risks of setting on dolphins “*before* the adoption of the controls established by the AIDCP [Agreement on the International Dolphin Conservation Program]”. The Panel thus distinguished between the *unregulated* practice of setting on dolphins and setting on dolphins under the conditions of the AIDCP.

⁶ Exhibit MEX-1.

⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.

Therefore, we see no contradiction between, on the one hand, the Panel's finding that the *unregulated* use of setting on dolphins to catch tuna poses greater risks to dolphins than other tuna fishing methods and, on the other hand, the Panel's statement that it was not persuaded that “at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP *under* AIDCP monitoring.”⁸ (emphasis original; footnotes omitted)

Mexico requests that the Panel revise its characterization of the fishing method of setting on dolphins to be consistent with its previous findings and the Appellate Body’s decision.

19. Mexico further submits that the words “most ferocious” – a term not found in the United States’ submissions or in any evidence submitted to the Panel – is inappropriate for gratuitous use in a WTO panel report. This characterization is incorrect based on the relevant evidence – such as the evidence that longline fishers shoot dolphins with guns, the mutilation of dolphins caused by longlines, and the tens (if not hundreds) of thousands of dolphins drowned annually by gillnets.⁹

20. For these reasons, Mexico suggests that the Panel revise the sentence in question to make it consistent with its prior findings, as follows:

... accordingly it is *the fishing method* of setting on dolphins – considered, when unregulated, to be particularly harmful to dolphins because it necessarily entails the chasing of dolphins to find and catch tuna – that is regulated differently and more tightly than other fishing methods.

21. In making this suggestion, Mexico emphasizes that it does not agree with the Panel’s conclusion that the fishing method of setting on dolphins should be regulated differently than other methods.

XI. PARAGRAPHS 7.549 AND 7551

22. In paragraph 7.551, the Interim Report states that the Panel is applying the factual findings from the original proceedings, described in paragraphs 7.549 and 7.550, to the present case. In paragraph 7.549, the Interim Report states that in the original proceedings, “the panel found that setting on dolphin causes kinds of unobservable harms that are not caused by other methods of fishing.” The Interim Report cites to paragraph 246 of the Appellate Body report in support of that statement. Paragraph 246 of the Appellate Body report states as follows:

The Panel further remarked that “there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality.’ Nonetheless, the Panel determined “that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect”.

⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 260.

⁹ See, e.g., Mexico’s first written submission, paras. 128-131, 138-149; Mexico’s second written submission, para. 90; Mexico’s comments on responses of United States, para. 46.

The Panel also found that the United States had put forward sufficient evidence to raise a presumption “that the method of setting on dolphins ‘has the capacity’ of resulting in observed and unobserved adverse effects on dolphins.” (footnotes omitted)

23. Mexico requests that the Panel revise the first sentence of paragraph 7.551 to be consistent with the Panel’s original findings by making the following revision:

In the original proceedings, the panel found that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist regarding unobserved effects of setting on dolphins ~~causes kinds of unobserved harms that are not caused by other methods of tuna fishing.~~

24. Mexico disagrees with the conclusion of these paragraphs, but acknowledges that comments on the interim report should not seek to change the findings of a panel.

XII. TYPOGRAPHICAL ERRORS

25. Mexico has identified some typographical errors and suggestions for formatting corrections in the document, which are described below.

- Paragraph 1.1: DSU was defined in the first sentence, so in the last sentence it does not need to be defined again “... in accordance with Article 21.5 of the ~~Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)~~”, the abbreviation was made on the first sentence of this paragraph.
- Paragraph 1.10: DSB was defined in para. 1.1, so in the last sentence of para. 1.10 it does not need to be defined again: “...the ~~Dispute Settlement Body~~ (“DSB”) ...”.
- Footnote 10: The apostrophe is missing at the end of “United States”.
- Paragraph 3.1: In the short-form citation of *Hogarth* in parentheses in the first sentence, there should be quotations marks (“*Hogarth*”).
- Footnote 38: The comma after “para” should be replaced by a period.
- Paragraph 3.41: TTF was defined in para. 3.30 and does not need to be defined again: “... captain-certified ~~Tuna Tracking Forms~~(TTFs), ...”.
- Paragraph 3.43: “i.e.” is not italicized elsewhere in the report.
- Paragraph 7.11: Remove extra period at end of first sentence.
- Paragraph 7.16: Dispute Settlement Body was previously defined as DSB: “... of the ~~Dispute Settlement Body~~DSB”.
- Paragraph 7.64: Remove extra period at end of paragraph.
- Paragraph 7.97: The third bullet in this paragraph contains an incorrect quotation. The cited language refers to “the different requirements” and not “the different fishing requirements”, and therefore the word “fishing” should be deleted.

- Footnote 111: Double quotation marks should be used around the word “measure” in the final sentence.
- Paragraph 7.149: Remove stray period after the word “claim” in the first sentence.
- Footnote 294: The comma after “paras” should be replaced by a period.
- Footnote 368: An “s” should be added after “para”.
- Paragraph 7.214: Remove stray period at the beginning of the first sentence.
- Paragraph 7.226: “EPT” should be “ETP” in the last sentence.
- Paragraph 7.227: In the quotation of Mexico’s submission, in the first quoted paragraph the word “association” should replace “mortality” after “unrelated to tuna-dolphin”. In the second paragraph of the quotation, the word “large” after “in any fisheries other than” should be eliminated, as it was not in the paragraph that is quoted.
- Paragraphs 7.229 and 7.230: “DPCAI” should be replaced with “DPCIA”.
- Paragraph 7.231: Following are corrections to match the quotation to the citation to Mexico’s submission:

In its comments on the the United States’ response, Mexico argued that “[t]he United States is also wrong to claim that there is no evidence that there is a correlation between harm to dolphins from non-purse seine fishing methods and an association between tuna and dolphins”. In Mexico’s view:

Mexico has presented uncontested evidence that dolphins are attracted to longlines to eat the fish on the hooks, and that this attraction results in dolphin mortalities and serious injuries. Mexico has also submitted evidence that many thousands of dolphins die in gillnets, indicating that dolphins are “associated” with that the tuna caught with ~~the~~ that fishing method. The United States cannot reasonably deny the role that association plays in dolphin mortalities outside the ETP.

- Paragraph 7.234: The words “regulatory di” should be removed from the first sentence.
- Paragraph 7.240: Remove “indeed” at end of paragraph.
- Paragraph 7.271: Remove “t” after “Before” in second sentence, and “I” at end of the paragraph.
- Paragraph 7.279: The abbreviation “TTVP” should be used instead of “TTPV”.
- Footnote 421: It appears that the reference should be made to paragraph 53 instead of 54.
- Paragraph 7.281: The word “loins” should replace “loans”, and “onboard” should replace “aboard”. See Mexico’s second written submission, para. 145.
- Footnote 429: The reference to question 34 should be 43.

- Paragraph 7.287: the word “canned” should be added in the last sentence after “captains’ certifications to”. See United States’ response to Panel question No. 44, para. 244.
- Paragraph 7.289: To conform the quotation to the cited United States’ response to question 43, para. 248, Mexico suggests the following revision:
“Of course, NOAA does not verify the dolphin safe certification on every can of tuna imported into the United States. However, the detailed records kept by importers and canneries, and the fact that ~~the~~ dolphin safe certifications have been translated into and provided in many ~~different~~ languages by vessels of different nationalities, demonstrates that ~~the~~ U.S. and foreign canneries and fishing vessels that supply tuna product for the U.S. market are conscious of and take steps to comply with the U.S. measure”.
- Footnote 459: The referenced quotation is in paragraph 166 rather than 167.
- Paragraph 7.323: In the referenced quotation from Exhibit MEX-131, the word “scale” should appear after “by small and medium”.
- Paragraph 7.326: The abbreviation “NMFS” should be used in place of “NMSF”.
- Paragraph 7.345: The referenced information is from Exhibit US-152. Mexico suggests the following revisions to make the listing more consistent with that exhibit:
 5. The quantity of product (including species and its processed state) to be transshipped
 6. The state of fish (fresh or frozen) ~~to be transshipped~~
 7. The quantity of by-product to be transshipped,
 8. The geographic location ~~to be transshipped~~ of the highly migratory fish stock catches
 9. The date and location ~~of the highly migratory fish stock catches~~ of the transshipment
 10. If applicable, the name and signature of the WCPFC observer ~~of the transshipment~~
- Paragraph 7.373: In the last sentence, it appears that the word “verification” should be used in place of “certification,” to be consistent with “tracking and verification” as used earlier in the same sentence and throughout subsection 7.5.2.5.2.2 of the report.
- Footnote 578: The first exhibit cited should be “MEX-89-A” rather than MEX-98-A”.
- Footnote 511: Closing quotation mark is missing after “ ... Large-Scale Fishing Vessels”.
- Paragraph 7.341: In the first sentence, add an “s” to “condition” to make it plural.

- Paragraph 7.350: Add letter “e” at end of “Committe” in first sentence.
- Footnote 513: Remove extra period at end of sentence.
- Footnote 551: The “s” should be removed from “paras.”
- Paragraph 7.404: In final sentence, remove word “it” after appropriate: “... it is appropriate ~~it~~ to have regard ...”.
- Paragraph 7.429: In the second sentence, the word “is” should replace the word “it” before “used to produce tuna”, in order to match the quotation to the cited text from Mexico’s second written submission.
- Paragraph 7.437: Remove extra period at end of first sentence.
- Paragraph 7.457: Remove letter “t” after “establish” in first sentence.
- Paragraph 7.484: In the first sentence, the word “that” should be removed, so that the sentence reads: “Moreover, Article XX(g) requires ~~that~~ the regulating Member to show that its measure is ...”
- Paragraph 7.487: In the first sentence, “is” should be changed to “are”.
- Footnote 652: The comma after “para” should be replaced by a period.
- Footnote 660: A number is missing from the citation: “paras. 7.485-7.486”.
- Paragraph 7.503: In the third sentence of this paragraph, add an “s” to the word “sytems” (i.e., “systems”), and remove the words “we think they”, so that the sentence reads: “Whatever may be the shortcoming of one system of certification or tracking and verification *vis-à-vis* another, it seems clear to us that, considered in themselves, systems designed to identify, track, and, indirectly, to reduce dolphin mortality and injury, ~~we think they~~ clearly “relate” to conservation.”
- Footnote 670: A period should be added at the end of the citation.
- A space is missing between the word “para.” or “paras.” and the cited numbers in footnotes 198, 549, 589, and 631.