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

(AB-2012-2/DS381)

EXECUTIVE SUMMARY

Appellee Submission of Mexico

7 February 2012

I. EXECUTIVE SUMMARY

1. This appeal offers the Appellate Body the opportunity to clarify several important of points of law for the benefit of all WTO Members.

2. The Panel correctly held that there is a less trade-restrictive alternative measure reasonably available to the United States that can achieve the objectives that it seeks, which is to allow Mexican tuna products to display the AIDCP dolphin safe label, and allow consumers to decide for themselves whether the AIDCP standard or domestic U.S. technical regulation, or both, are meaningful to them. These findings of the Panel are based on the correct legal tests and are well-supported by the evidence.

II. BACKGROUND INFORMATION

3. In the "Factual Background" section of its Appellant Submission, the United States sets forth a partial description of the facts, with the same characterizations of the evidence it argued to the Panel, without referencing the Panel's own findings on those issues or acknowledging that many of its factual claims were vigorously disputed. The Appellate Body is, of course, bound by the factual findings of the Panel. The Parties cannot alter the facts as found by the Panel, or place new facts into the record, in this appeal.

A. The AIDCP Has Been Highly Successful

4. Dolphin mortalities in the ETP in 1986 were estimated at 133,000. Under the terms of the 1992 La Jolla Agreement, the maximum number of permitted dolphin deaths was to decline each year for seven years, with a goal of reducing dolphin deaths in the fishery to less than 5,000 by 1999. That target was actually achieved in 1993, the first year of the agreement's application, when mortality was reduced to 3,601. The level has remained below 5,000 in every year thereafter, and currently is approximately 1,200 per year.

5. The success of the AIDCP is also reflected in recent actions in which the United States participated.

B. The Absence of Protections for Dolphins Outside the ETP

6. Evidence showed at the Panel stage that the other major regional tuna fisheries management organizations are all in the early stages of considering how to monitor the impact of fishing operations on marine mammals and other non-target species. They use independent observers to a very limited extent, and collect little or no data on bycatch.

7. There is considerable evidence that regardless of the fishing method used, thousands of dolphins are being killed in these other regions annually.

III. LEGAL ARGUMENT

A. The Panel Correctly Found That The U.S. Labelling Provisions Are A Technical Regulation

8. The foundation for the U.S. arguments that the U.S. labeling measures are not a "technical regulation" is the position that there is only one meaning for the phrase "with which compliance is mandatory" in the definition of "technical regulation" in Annex 1.1 of the *TBT Agreement*. In the context of a consumer information label, that meaning is that the label must be placed on a product in order for it to be sold on the market.

9. This is not the only meaning. The phrase "with which compliance is mandatory" also encompasses a situation where the label is limited to a single exclusive standard. What makes the U.S. labelling provisions mandatory is not whether a label is *de jure* required in order to sell tuna products in the U.S. market. Rather, it is the fact that the U.S. labelling provisions restrict retailers, consumers and producers to a single choice for labelling tuna products as dolphin safe. There is no available option for U.S. consumers to buy tuna products that have been produced from tuna caught in accordance with the AIDCP standard for the protection of dolphins and is labelled as dolphin safe under that standard.

10. There is no basis for the U.S. argument that the Panel's interpretation of the phrase "with which compliance is mandatory" renders the difference between technical regulations and standards meaningless because it conflates the meaning of "labelling requirements" with "mandatory". If competing standards were permitted to co-exist in the U.S. market, the AIDCP standard and U.S. standard would each represent different claims but would be protected by their respective "labelling requirements". The prohibition against using a label based on any standard other than the U.S. standard is a measure that is separate from and in addition to the "labelling requirements". It is this measure (i.e., the prohibition) that transforms what would otherwise be a standard into a technical regulation. Thus, the "labelling requirements" under the two labels exist independently from the prohibition that makes the U.S. labelling measures "mandatory". There is no conflation of these concepts.

11. Both the Appellate Body and the Panel refer to the regulation of the "characteristics of products" in a binding or compulsory manner and *not* to the regulation of the sale, importation, distribution or marketing of the product. This exposes a fundamental flaw in the interpretation of the United States and the dissenter.

12. The United States argues that the Panel's exclusivity test is not based on the text of the *TBT Agreement*. The United States is incorrect. Under the definitions in the ISO/IEC Guide 2, a "mandatory standard" is one which is made compulsory by, *inter alia*, an "exclusive reference" in a regulation. An "exclusive reference (to standards)" is a reference that states that the only way to meet the relevant requirements of a technical regulation is to comply with the standard(s) referred to. Taken together along with explanations in ISO documents, a "mandatory standard" is one where a regulation references a specified standard to the exclusion of others, and a "voluntary standard" is one where the referenced standard is only one solution, but other

standards are available (e.g., they can be chosen from a list). Applying these definitions to the facts of this dispute, the "standard" set out in the U.S. labelling provisions is a "mandatory standard" within the meaning of ISO/IEC Guide 2 because it references a specified standard to the exclusion of others. It does not permit other standards such as the AIDCP standard. By virtue of the Explanatory Note in Annex 1.2, it is, therefore, a "technical regulation" within the meaning of the *TBT Agreement*.

13. In the event that the Appellate Body disagrees with the Panel's conclusions regarding the *de jure* mandatory nature of the measures, Mexico requests that the Appellate Body affirm the Panel's conclusion on the basis that the measures are *de facto* mandatory. The labelling scheme is *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin safe designation.

B. The Panel Correctly Found that The U.S. Measures Are Inconsistent With Article 2.2

14. Contrary to the arguments of the United States, the Panel's finding that the U.S. labelling measures are inconsistent with Article 2.2 is factually and legally sound. The United States does not challenge the analytical approach set forth by the Panel. Rather, it argues that the Panel failed to properly assess the evidence before it in its analysis of: (i) the extent to which the U.S. measures fulfill their legitimate objectives; and (ii) whether the proposed alternative is a reasonably available, less trade-restrictive alternative that would fulfill the objectives at the same level as the U.S. measures. These arguments have no merit.

15. On the specific issue of whether the U.S. measures are more trade-restrictive than necessary, the United States argues that the Panel did not correctly take into account the level at which the United States seeks to achieve its objectives.

16. Essentially, the United States is arguing that the Panel incorrectly interpreted and applied the reference in the sixth recital of the preamble to the *TBT Agreement* to a Member not being prevented from taking measures necessary to protect animal life or health "at the level it considers appropriate". In making this argument, the United States omits the important qualification in the recital. This right of a WTO Member is "subject to the requirement that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade". In the light of the deference Article 2.2 confers on a WTO Member to define the objectives of its measures and take measures at the levels it considers appropriate, it is crucial that this qualifying language in the preamble be given meaning. Otherwise the discipline in Article 2.2 will be meaningless. Members could define their objectives and levels of protection in such a way that any trade-restrictive effects could not be challenged as "unnecessary" because the only measure that would fit the requirements of the provision is their own measure. There could not be an alternative less trade-restrictive measure.

17. The U.S. arguments regarding the level at which it seeks to achieve its objectives suffers from another flaw. Under the guise of the phrase "at the level it considers appropriate", the United States is trying to change the two objectives of the measures which it identified and

which the Panel accepted in making its factual findings. In addition to being an impermissible attempt at altering a factual finding of the Panel, this underscores the "arbitrary" nature of the U.S. measures and the fact that they are a "disguised restriction on international trade". The United States is attempting to do indirectly (i.e., blocking *de facto* Mexican tuna products from the principal distribution channels) what it cannot do directly (i.e., imposing an embargo on Mexican tuna products which was found to be inconsistent with GATT Article IX by GATT 1947 panel).

18. The United States challenges various factual findings of the Panel under Article 11 of the DSU. The Appellate Body has established a high legal threshold in order to successfully demonstrate a panel's breach of its duty under this provision. The Panel clearly fulfilled its obligations under the Article. It considered all of the evidence presented by the United States and Mexico on the matters under appeal by the United States, determined its credibility and weight, made factual findings on the basis of that evidence, and explained its reasoning in a comprehensive and coherent manner.

19. While Mexico rebuts all of the U.S. arguments, the following illustrates some of them:

- The factual core of the U.S. appeal is its claim that there is a much greater risk to dolphins in the ETP tuna fishery than in any other ocean region. In the ETP there are comprehensive protections for dolphins and there are independent observers on board every large purse seine vessel who are specifically charged with monitoring compliance with those protections and with carefully monitoring and recording any harm to a dolphin. As evidenced in the factual findings in the Panel Report, there are no such protections and there is no monitoring in any ocean region other than the ETP, but there are a number of reports of substantial harm to dolphins and other marine mammals in those other regions.

- The United States argues that "[t]he Panel's conclusion that the risks to dolphins from other fishing techniques is not lower than the risk from setting on dolphins contradicts the Panel's earlier finding in the context of determining the legitimacy of the U.S. measure." In support of this argument, however, the United States relies on a selective quotation that omits important information.

- Mexico submitted substantial evidence demonstrating that the fishing methods established under the AIDCP have been extremely successful in limiting dolphin mortalities to levels considered acceptable in fisheries subject to U.S. territorial jurisdiction. Mexico agrees that there remain high risks to dolphins in *other* ocean regions where nets are being set on dolphins.

- The United States argues that the Panel erred based on the allegation that "the Panel consistently implies that the U.S. is required to fulfill its objectives to the same level inside and outside the ETP, regardless of the costs. The Panel appropriately took into account the U.S. factual claims and the Panel's findings are further supported by the fact that the United States never conducted an evaluation of the risks to dolphins in other ocean regions or submitted evidence

on the costs of having observers. Although not mentioned in the U.S. Appellant Submission, the Panel specifically addressed the U.S. argument that it was entitled to consider costs in light of their benefits, that the risks to dolphins outside the ETP were relatively low, and that it was not appropriate to require observer coverage outside the ETP. The Panel correctly identified the inconsistencies between the manner in which the United States described its own measures and the objectives of those measures.

20. In summary, the purpose of the U.S labelling provisions is to unilaterally and extraterritorially impose U.S. fishing method requirements as a condition for access to the principal distribution channels in the U.S. tuna products market, and in that manner to pressure foreign tuna fleets to change their fishing methods. The U.S. measures are maintained for the specific purpose of discouraging consumers from purchasing Mexican tuna products, even when those products are accurately labelled dolphin-safe in compliance with the AIDCP standard and the tuna products themselves are not embargoed under U.S. law. In this way, the United States has undermined its own commitment in the AIDCP to allow imports of tuna products from countries and fishers that protect dolphins. Using the labelling requirement as a discriminatory trade barrier in this manner should not be viewed as permitted by Article 2.2; rather, it represents an unjustifiable discrimination and therefore is an unnecessary obstacle to international trade.

C. The AIDCP Standard Is A Relevant International Standard Within The Meaning Of Article 2.4

1. The AIDCP Definition of "Dolphin Safe" is a Standard

21. The United States did not appeal the Panel's conclusion that the dolphin-safe definition established by the AIDCP resolutions mentioned above, constitute a "standard" for the purposes of Article 2.4 of the *TBT Agreement*. In this regard, the Panel concluded that: "…the dolphin safe definition in the AIDCP tuna tracking and verification resolution cross-referenced in the AIDCP dolphin safe certification resolution provides, for common and repeated use, rules, guidelines or characteristics for tuna fishing and tuna products, and thus constitutes a "standard" for the purposes of Article 2.4 of the *TBT Agreement*."

2. The AIDCP Standard Was Approved By An International Standards Organization

22. The US claims that the Panel's conclusion that the AIDCP is an international standardizing/standards organization is flawed because: (1) the AIDCP is not "international" within the meaning of the *TBT Agreement* because its membership was not and is not open to all WTO Members; (2) the AIDCP does not have recognized activities in standardization; and (3) the parties to the AIDCP are parties to an international agreement, not a body or organization. These arguments were properly addressed by the Panel and rejected.

23. As the Panel correctly recognized the AIDCP membership is open to the relevant bodies at least of all WTO Members. The Panel based its conclusion on the following key issues: (i) the text of the AIDCP, particularly Articles XXVI and XXIV, provides that the AIDCP is open to accession to new States or regional economic integration organization; (ii) AIDCP was also open for signature from 1998 to 1999; and (iii) remains open to accession to any States or regional economic integration organization that is invited to accede to the Agreement on the basis of the parties' decision.

24. In this appeal, the United States asserts that "…the AIDCP was not open when the dolphin safe definition was developed, and the AIDCP is not open today" This assertion is not correct. First, the definition of dolphin safe under the AIDCP was based in the definition initially developed in the Panama Declaration in 1995, declaration which eventually evolves into the AIDCP, as the Panel recognized in its report. When the AIDCP was enacted, the Members were well aware of the dolphin safe definition agreed in the Panama Declaration. The dolphin-safe definition established in the resolutions of the AIDCP was elaborated during the period of signature of the AIDCP as the United States well recognizes. For these reasons, the AIDCP was open when the definition of dolphin safe was developed.

25. Second, the AIDCP remains open today to any State or regional economic integration organization that is invited to accede to the Agreement. Article XXXIV of the AIDCP allows that any Member could be invited to accede to the AIDCP. A Member that may want to accede usually will bear an interest in relation to the subject matter of the AIDCP regulation. Contrary to the US position, today all Members have the ability to participate in the activities of the AIDCP, but perhaps not all Members have an interest to do it. The term "invitation" provided in Article XXXIV of the AIDCP is a formality that does not amount to an exclusive organization closed to other Members.

26. The Panel concluded that the AIDCP was in accordance with the principle of openness provided in Section C of the TBT decision on *Principles and Procedures for the Development of International Standards, Guides and Recommendations*, as the AIDCP was open to signature on a non-discriminatory basis.

27. Contrary to the arguments of the United States, Mexico has demonstrated the recognition by the United States of the AIDCP standardizing activities, as a founding and fully participating member of the AIDCP. Therefore, the Panel correctly determined that it is clear that the participation in the development of the standards activities of the countries that are parties to the Agreement is sufficient evidence of their recognition.

28. The core purpose of the AIDCP – which is composed of the member central governments acting collectively, and is administered by the Secretariat of the IATTC – is to establish standards for tuna fishing to protect marine mammals. There is no support for the U.S. claim that the AIDCP organization is not a "recognized" or "standardizing" body for establishing when tuna is dolphin safe.

29. The Panel found in a sound and coherent manner the acknowledgement from the United States to the existence, legality and validity of the AIDCP dolphin safe definition on the basis of the court's findings referring to the Panama Declaration

30. Finally, the AIDCP's main role is to establish rules and procedures related to the interaction between fishing and dolphins. Thus, its members have issued a number of other standards. Indeed, with regard to the protection of dolphins in the ETP, the AIDCP is the exclusive organization with recognized activities in standardization, having as main function to establish procedures to be followed by the commercial fleets of the individual nations that are members of the AIDCP. Therefore, the AIDCP is the only recognized body, to develop the standards relating to the protection of dolphins in the ETP.

31. Therefore, the Panel made correct conclusions that the AIDCP has "recognized activities in standardization" and constitutes a "standardizing body".

32. Finally, correctly found the parties of the AIDCP acting within the institutional framework of the IATTC constitute an "organization" for the purposes of the application of Article 2.4 of the *TBT Agreement*.

IV. CONCLUSION

33. On the basis of the foregoing, Mexico respectfully requests that the Appellate Body reject the US appeal on its entirety and to uphold the Panel findings and recommendations.