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)

Opening Oral Statement of
the United States of America

August 19, 2014

I. INTRODUCTION

1. Mr. Chairman and members of the Panel: on behalf of the United States, thank you for your ongoing work in this panel proceeding.

2. The United States considers the resolution of this compliance proceeding to be quite straightforward. Mexico's claims fail for the simple fact that the amended dolphin safe labeling requirements are fundamentally non-discriminatory.

3. Mexico disagrees. It argues here – as it did in the original proceeding – that the prohibition of marketing as dolphin safe any tuna product containing tuna caught by setting on dolphins discriminates against Mexican producers. But that eligibility condition applies to tuna product from all ocean areas, regardless of vessel flag, or processor nationality. And Mexico puts forward no evidence that the standard inappropriately singles out Mexican tuna producers. Of course, Mexican tuna product is permitted to be sold, and, in fact, is sold in the United States. What is not permitted is that such product be marketed to the U.S. consumer as "dolphin safe," when it is so clearly not.

4. As the original panel correctly noted, the choice of whether to produce tuna product that is eligible for the label or not is left to the vessels and processers that produce the tuna product.[1] The fact that industries in different Members have made different choices in this regard is not surprising – each industry will act in accordance with its own economic interests. But the mere fact that the Mexican industry has decided that continuing to set on dolphins is in its economic interest, while the U.S. and other industries have decided that it is not, does not render the measure inconsistent with the covered agreements.

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[1] *See US – Tuna II (Mexico) (Panel)*, paras. 7.333-334.

5. In the original proceeding, the panel correctly concluded that the eligibility condition regarding setting on dolphins was not discriminatory. And the Appellate Body did not disagree. Instead, the Appellate Body found fault with the fact that the *other* eligibility condition – the condition concerning whether a dolphin was killed or seriously injured in the set in which the tuna was caught – applied only to tuna caught in the Eastern Tropical Pacific Ocean (ETP). While the United States was disappointed in this result, *we did accept it*, and issued the 2013 Final Rule to amend U.S. law. The condition regarding whether a dolphin has been killed or seriously injured now applies to all fisheries, just as the setting on dolphin condition does.

6. We consider that, for purposes of Mexico's claim under Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement), the analysis should focus on whether the 2013 Final Rule brings the United States into compliance with Article 2.1 in light of the Dispute Settlement Body (DSB) recommendations and rulings. The DSB recommendations and rulings provide specific guidance on what constitutes compliance with Article 2.1 in this dispute, and the path provided by those recommendations and rulings should be followed in this proceeding.

7. Mexico urges the Panel to conduct a very different Article 2.1 analysis than the one envisioned by the United States. In Mexico's view, the Panel need not focus on the 2013 Final Rule and the DSB recommendations and rulings – indeed, Mexico considers neither to be particularly relevant to this proceeding. Instead, Mexico urges the Panel to conduct a lengthy re-evaluation of the facts and unchanged aspects of the measure that the original panel already examined, as well as to examine other unchanged aspects of the measure that Mexico declined to challenge in the original proceeding.

8. But this open-ended approach is not consistent with the terms of reference of an Article 21.5 proceeding. In *US – Shrimp*, for example, the compliance panel rejected Malaysia's effort

to challenge unchanged aspects of the measure, and instead concentrated on the precise issue of whether the United States had sufficiently addressed the Appellate Body's concerns regarding the application of the challenged measure.[2] On appeal, the Appellate Body confirmed that the compliance panel was correct to limit its examination to whether the application of the challenged measure is justified under the chapeau of Article XX of the *General Agreement on Tariffs and Trade 1994* (GATT 1994),[3] and proceeded with a focused examination of its own on that precise issue.[4]

9. As was the case in *US – Shrimp*, here the Appellate Body has identified a precise concern with the original measure. And like *US – Shrimp*, the question in the compliance proceeding is a narrow one – has the United States sufficiently addressed the Appellate Body's criticisms such that it could be said to have brought its measure into compliance.

10. And we do not consider the question to be a close one. The DSB recommendations and rulings are clear – the detrimental impact to Mexican tuna product caused by the original measure "reflect[ed] discrimination" because the eligibility condition relating to whether a dolphin had been killed or seriously injured was not "even-handed."[5] The 2013 Final Rule *directly addressed* this concern, and the matter should end there. Mexico errs in repeatedly suggesting that the Panel ignore, undermine, or contradict the DSB recommendations and rulings.

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[2] *See US – Shrimp (Panel)*, paras. 5.39-5.41.

[3] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 98-99.

[4] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 111-152.

[5] *US – Tuna II (Mexico) (AB)*, paras. 289-92, 297.

11. We also consider that the DSB recommendations and rulings provide clear guidance as to whether the amended measure is consistent with the GATT 1994. That is to say, even if the Panel were to find the amended measure to be inconsistent with either Article I:1 or III:4 (and we do not consider that this should be the case), the DSB recommendations and rulings provide a clear path as to why the amended measure is justified under Article XX. Those DSB recommendations and rulings clearly establish that the "dolphin protection" objective falls within the scope of both subparagraphs (b) and (g), and also provide a basis as to why the amended measure satisfies both the "necessary" and "relating to" standards. Of course, the DSB recommendations and rulings provide the justification under the chapeau for denying the label to Mexican tuna product resulting from setting on dolphins – setting on dolphins is indeed a "particularly harmful" practice.[6]

II. LEGAL ARGUMENT

A. Mexico's Claim under Article 2.1 of the TBT Agreement Fails

1. Mexico's Article 2.1 Claim Fails as It Falls Outside the Panel's Terms of Reference

12. Mexico's Article 2.1 claim falls outside the Panel's terms of reference.

13. Indeed, Mexico's Article 2.1 claim is highly unusual – if not unique – in that Mexico's does not dispute that the *new* aspects of the amended measure address the DSB recommendations and rulings. Of course, any disagreement Mexico did have with any aspect contained in the 2013

[6] *US – Tuna II (Mexico) (AB)*, paras. 289, 297.

Final Rule would clearly fall within the Panel's terms of reference.[7] But this is *not* Mexico's claim.

14. Mexico's Article 2.1 claim consists entirely of a challenge to aspects of the amended measure that are *unchanged* from the original one, and which were not found to be WTO-inconsistent in the original proceeding. And while a compliance panel has authority to address claims against aspects of the measure that are unchanged from the original measure, that authority is not limitless, as Mexico wrongly presumes.

15. One possible situation where a compliance panel may consider an unchanged aspect of a measure is where the original panel exercised judicial economy with respect to a claim. However, this situation does not arise with respect to Mexico's Article 2.1 claim.

16. Accordingly, Mexico must seek an alternative route. Relying on *US – Zeroing (Article 21.5 – EC)*, Mexico now argues that its Article 2.1 claim falls within the Panel's terms of reference because the unchanged aspects of the amended measure at issue are "inseparable" from something that clearly falls within the Panel's terms of reference – the U.S. measure taken to comply.[8]

17. Mexico's argument is misplaced. First, to be clear, it is the 2013 Final Rule that is the measure taken to comply, not the entire amended measure. Indeed, if the latter was the case, the Appellate Body's ultimate conclusion in *US – Zeroing (Article 21.5 – EC)* that it could not

[7] U.S. Second Written 21.5 Submission, para. 48 (citing *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 88).

[8] Mexico's Second Written 21.5 Submission, para. 97.

complete the analysis would make no sense whatsoever.[9] One would expect that any aspect of a measure is "inseparable" from the measure containing that aspect. Here, the requirements relating to record-keeping, verification, and observer coverage mandated for large purse seine vessels operating in the ETP by the *Agreement on the International Dolphin Conservation Program* (AIDCP) are clearly "separable" from the 2013 Final Rule. Indeed, the 2013 Final Rule amends U.S. law with regard to tuna caught by all vessels *other* than those ETP vessels operating pursuant to the requirements of the AIDCP.

18. Finally, it is certainly unfair for a complainant to intentionally stagger its argument in a particular claim over the two proceedings, as Mexico has done here. In the original proceeding, Mexico was explicit that its discrimination claims were limited to the question of whether the denial of eligibility for tuna product produced by setting on dolphins constituted a breach or not.[10] But Mexico now argues that the United States has failed to come into compliance with the DSB recommendations and rulings that the original proceeding produced for reasons that have nothing to do with what it argued previously, or that is contained in those recommendations and rulings. In short, Mexico urges the Panel to fault the United States for failing to come into compliance with an entirely different set of recommendations and rulings from the one the DSB actually adopted – a proposition that is blatantly unfair, and unnecessarily extends this dispute. Indeed, Mexico's approach presents precisely the type of situation that the Appellate Body has cautioned against. Mexico should not have an unfair "second chance" to make its case.[11]

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[9] *See, e.g.*, *US – Zeroing (Article 21.5 – EC) (AB)*, para. 353.

[10] *See US – Tuna II (Mexico) (Panel)*, para. 7.255 (quoting Mexico's Second Written Submission in Original Proceeding, para. 150); *see also id*. para. 7.280 (citing Mexico's Response to Original Panel Question No. 145, para. 124).

[11] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210.

2. Mexico's Article 2.1 Claim Fails on the Merits

19. In any event, Mexico's Article 2.1 claim fails on the merits. Mexico has failed to prove that the regulatory distinctions that account for any detrimental impact are not "even-handed." Mexico has thus failed to prove the detrimental impact "reflects discrimination."

20. As to those relevant regulatory distinctions, it is *uncontested* by the parties that the eligibility condition regarding whether a dolphin was killed or seriously injured in the harvesting of the tuna is even-handed. And while Mexico disputes that the eligibility condition regarding setting on dolphins is even-handed, Mexico fails to prove its assertions in this regard.

21. As should be clear, that prohibition applies to all fisheries as well. And the fact that Mexican vessels continue to set on dolphins – and thus produce tuna product ineligible for the label – does not mean that the regulatory distinction is not even-handed. If that was the case, all Mexico would need to prove is that a detrimental impact exists, rendering the second step of the analysis meaningless.[12] Not surprisingly, neither the original panel nor the Appellate Body accepted Mexico's argument that this eligibility condition proved the original measure discriminatory, and one should resist Mexico's efforts to undermine the DSB recommendations and rulings in this regard.

22. The fact is that it is entirely appropriate for the United States to draw a distinction between setting on dolphins, which is *inherently* dangerous to dolphins, and other fishing methods. The science supports the U.S. approach in this regard, and directly contradicts

[12] *See* U.S. Second Written 21.5 Submission, para. 70.

Mexico's approach.[13] Mexico has simply failed to prove what it asserts – that *all* other fishing techniques "have adverse effects on dolphins that are equal to or greater" than setting on dolphins.[14]

23. As such, Mexico is forced to rely heavily on its fall back argument that because the AIDCP requires different requirements for record-keeping, verification, and observer coverage of large purse seine vessels operating in the ETP than the amended measure requires of other vessels, the amended measure is not even-handed. But these "differences" do not cause the detrimental impact the Appellate Body found to exist, and, as such, no analysis of either aspect sheds light on whether *that* detrimental impact "reflects discrimination."[15]

24. Moreover, Mexico fails to allege, much less prove, that these aspects, standing alone, cause a detrimental impact on Mexican tuna product exports to the United States. Does compliance with these AIDCP-mandated requirements reduce sales of Mexican tuna product in the United States compared to the product from other Members? Does it depress the sale price compared to such other products? Mexico does not say. Indeed, Mexico makes no claim that complying with the AIDCP-mandated requirements has *any impact* on Mexican tuna products sold in the United States *at all* – detrimental or otherwise.

25. Mexico argues something different, however. Simply put, Mexico alleges that the fact that its competitors operating outside the ETP do not have to comply with AIDCP-equivalent requirements means that these competitors have more opportunity than Mexican producers to

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[13] *See* U.S. First Written 21.5 Submission, paras. 79-84, 89-101, 110-67.

[14] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 13.

[15] *US – Tuna II (Mexico) (AB)*, paras. 231, 233-235.

illegally market non-dolphin safe tuna product as dolphin safe. In Mexico's view, this greater opportunity to defraud U.S. consumers means that "Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labeled as dolphin-safe."[16]

26. But Mexico puts forth *zero* evidence to support its claim. In particular, there is no evidence that non-dolphin safe tuna product produced outside the ETP is being illegally marketed in the United States as dolphin safe. Nor has Mexico put forward any evidence that even if one could find any illegal marketing, this unfortunate occurrence would be happening at a higher rate than for tuna product containing ETP tuna.

27. Finally, we would note that Mexico's argument turns reality upside down. The fact of the matter is that there is little to no economic benefit for tuna vessels operating outside the ETP to interact with, much less harm, dolphins in their pursuit of tuna. The longline boats of the Western Central Pacific do not herd dolphins with speed boats before unspooling their hooks, and the Western Central Pacific purse seiners do not employ helicopters to direct them to where the dolphins are or to herd and chase them. Where a dolphin interacts with the fishing gear in the Western Central Pacific it is *by accident* virtually every time. The *only* place in the world where it is economically beneficial to a tuna vessel to intentionally interact with dolphins on a widespread commercial basis *is the ETP*. And it is only there that purse seiners hunt for and chase millions of dolphins with speedboats and helicopters every year. If a motivation exists to describe tuna product as something it is not, it exists more in the ETP than anywhere else. Not surprisingly, the record-keeping and observer requirements only exist *in the ETP*.

[16] Mexico's Second Written 21.5 Submission, para. 117.

28. Mexico fails to prove that the United States has not come into compliance with Article 2.1 of the TBT Agreement.

B. Mexico's Claims Under Articles I:1 and III:4 of the GATT 1994 Fail

29. Mexico also fails to establish that the amended dolphin safe labeling measure is inconsistent with Article I:1 or Article III:4 of the GATT 1994. Simply put, Mexico contends that a technical regulation that imposes a standard that at least one exporting Member does not meet and at least one other Member does meet is *per se* discriminatory under the GATT, inconsistent with Articles I:1 or III:4, or (in this case) both, notwithstanding that neither of the two (very different) texts support such a reading.[17]

30. Under Mexico's theory, it is simply irrelevant whether the standard is entirely legitimate – or, for that matter, entirely illegitimate – the result is the same. Given the huge diversity of production methods, environmental, health, labor standards, and the like that exist throughout the WTO Membership it seems difficult to believe that *any* technical regulation could survive such a test. Surely there will always be at least one Member whose producers do not meet a foreign standard, such as for lead paint or organic produce. It is undeniable that such a legal theory jeopardizes a wide range of legitimate regulations, and seriously undermines Members' ability to regulate in the public interest.[18]

31. Moreover, Mexico wrongly assumes the results in *EC – Seal Products* control the result in this dispute. Indeed, none of the Appellate Body reports in disputes arising under the non-

[17] *See* U.S. Second Written 21.5 Submission, paras. 131, 139; Mexico's Second Written 21.5 Submission, paras. 203, 220-21.

[18] U.S. First Written 21.5 Submission, paras. 307-08; U.S. Second Written 21.5 Submission, para. 142.

discrimination provisions of the GATT 1994 present facts even remotely analogous to the ones present here, and, as such, the application of the law to these facts will necessarily differ. As discussed previously, Mexico only challenges one eligibility condition – no setting on dolphins – as being GATT inconsistent.[19] And that condition applies to tuna product from all ocean areas, regardless of vessel flag or processor nationality.

32. But the measure at issue in these other WTO disputes either explicitly discriminated based on product origin, or discrimination was revealed in the measure's design and operation. Thus, in *EC – Seal Products* the market access advantage was facially neutral but was subject to eligibility conditions that related to *immutable* characteristics of the producers, such as racial and cultural identity.[20] Virtually all of the products of Greenland qualified for access under the measure, while the vast majority of products from the complainants did not, nor could they ever. Indeed, that panel found that the exceptions to the seal products ban had been *designed* with the seal hunts of Greenland and certain EU members in mind.[21] The same simply cannot be said here.

33. The advantage of access to the "advantage" of the dolphin safe label, subject to origin-neutral requirements, is "immediately and unconditionally" accorded to all Members, including Mexico, as required by Article I:1.[22] And Mexican tuna product is not accorded less favorable treatment than the products of the United States, as required by Article III:4.[23]

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[19] *See* U.S. Second Written 21.5 Submission, paras. 131, 139, 147.

[20] *See* U.S. First Written 21.5 Submission, para. 287; *EC – Seal Products (Panel)*, para. 7.20.

[21] *See EC – Seal Products (Panel)*, para. 7.168.

[22] U.S. First Written 21.5 Submission, paras. 282-89; U.S. Second Written 21.5 Submission, paras. 132-33.

[23] U.S. First Written 21.5 Submission, paras. 295-301; U.S. Second Written 21.5 Submission, para. 140-41.

34. Finally, Mexico is simply wrong to allege that this "unilateral action" intentionally puts pressure on Mexico to change its practices through the amended measure. Such an allegation is *directly contrary* to the findings of the original panel.[24] Moreover, Mexico's argument assumes that the AIDCP labeling regime is sufficient to fulfill the measure's objective at the U.S. chosen level of protection. But the Appellate Body has already found that the AIDCP label *does not* achieve the U.S. chosen level of protection. Mexico is asserting that the United States *must* accept the AIDCP label as sufficient to protect dolphins, but Mexico gives no reason why this should be the case, and the argument contradicts the principle that Members can choose their own levels of protection.[25]

35. Mexico fails to prove its claims under Articles I:1 and III:4 of the GATT 1994.

C. The Amended Dolphin Safe Labeling Measure Is Justified Under Article XX of the GATT 1994

36. In any case, the amended measure is justified under Article XX and therefore is not inconsistent with the GATT 1994.

37. The Appellate Body, in *EC – Seal Products*, *US – Gasoline*, and other disputes, has made it clear that the focus under Article XX will be on the aspects of a measure that give rise to the finding of an inconsistency with the GATT 1994.[26] As already noted, Mexico only challenges one eligibility condition – no setting on dolphins – as being GATT inconsistent.[27] Consequently,

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[24] *US – Tuna II (Mexico) (Panel)*, para. 7.440; U.S. Second Written 21.5 Submission, para. 136 (citing same).

[25] U.S. Second Written 21.5 Submission, para. 138.

[26] *See* U.S. Second Written 21.5 Submission, para. 148 (citing *EC – Seal Products (AB)*, para. 5.185; *US – Gasoline (AB)*, at 13-14); *see also Thailand – Cigarettes (Philippines) (AB)*, para. 177; *Brazil – Retreaded Tyres (Panel)*, para. 7.106.

[27] *See* U.S. Second Written 21.5 Submission, paras. 131, 139, 147.

this would be the only aspect of the measure that could be relevant to the Panel's analysis under the Article XX subparagraphs.

1. The Amended Dolphin Safe Labeling Measure Satisfies the Conditions of Article XX(b)

38. The amended dolphin safe labeling measure satisfies both prongs of the Article XX(b) standard, namely: its objective falls within the scope of "to protect . . . animal life or health," and it is "necessary" to the achievement of that objective.

39. The original panel already found, and the Appellate Body affirmed, that "contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins" was an objective of the original measure.[28] Mexico's efforts to de-emphasize the "dolphin protection" objective of the amended measure cannot stand. Indeed, as we have explained, in making such an argument Mexico is forced to inappropriately muddle this analysis with the separate one of whether the amended measure is "necessary."[29] Again, the DSB recommendations and rulings are clear – the measure "relate[s] to genuine concerns in relation to the protection of the life or health of dolphins" and is "intended to protect animal life or health."[30]

40. Likewise, the recommendations and rulings provide a clear pathway for the Panel to conduct its examination of whether the amended measure is "necessary" for the protection of life and health of dolphins. The Appellate Body, relying on the original panel's findings, found that

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[28] *US – Tuna II (Mexico) (AB)*, para. 302 (citing *US – Tuna II (Panel)*, paras. 7.401, 7.413, 7.425).

[29] *See* U.S. Second Written 21.5 Submission, paras. 155-57.

[30] *See* U.S. Second Written 21.5 Submission, paras. 153-54; *see also* U.S. First Written 21.5 Submission, para. 319.

the measure "fully address[ed] the adverse effects on dolphins resulting from setting on dolphins" both inside and outside the ETP.[31] That eligibility condition remains unchanged – it still relies on captain statements – and still stands. Where the Appellate Body found fault was with the other condition, which, in the Appellate Body's view, did not fully address "mortality . . . arising from fishing methods other than setting on dolphins outside the ETP."[32] The 2013 Final Rule corrects this, and, as such, the amended measure makes an even higher contribution to the dolphin protection objective than the original measure did.[33]

41. Finally, the DSB recommendations and rulings clearly establish that neither of Mexico's two alternatives prove the amended measure not to be "necessary." This could not be clearer than with regard to Mexico's second alternative, which is identical to the alternative that the Appellate Body has already rejected for purposes of Article 2.2 as it would allow more tuna "harvested in conditions that adversely affect dolphins," *i.e.*, tuna caught by setting on dolphins, to be labeled dolphin safe.[34] The Panel should follow the DSB recommendations and rulings and reject Mexico's second alternative.

42. Likewise, the Panel should reject Mexico's first alternative, which suffers from any number of defects. Indeed, it is so vague that the United States does not even understand what Mexico is actually proposing as to what the programs would consist of, how expensive it would be to implement such programs, and who would pay for them.[35] Moreover, the proposal is not

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[31] *US – Tuna II (Mexico) (AB)*, para. 297; *US – Tuna II (Mexico) (Panel)*, para. 5.599.

[32] *See* U.S. Second Written 21.5 Submission, para. 160 n.310; *US – Tuna II (Mexico) (AB)*, para. 297.

[33] *See* U.S. First Written 21.5 Submission, para. 322; U.S. Second Written 21.5 Submission, para. 160.

[34] *See US – Tuna II (Mexico) (AB)*, paras. 330-31.

[35] *See* U.S. Second Written 21.5 Submission, para. 172.

less WTO-inconsistent (under Mexico's theory),[36] not less trade restrictive,[37] and not reasonably available.[38] Mexico's first proposal wholly fails to accomplish its declared task.

43. The amended measure qualifies under subparagraph (b).

2. The Amended Dolphin Safe Labeling Measure Also Satisfies the Standard of Article XX(g)

44. The amended measure is also justified under the standard of Article XX(g). As the DSB recommendations and rulings already acknowledge, the original measure pursued the objective of "dolphin protection" and, in fact, contributed to that objective, those recommendations and rulings apply equally in the context of Article XX(g) as to Article XX(b). Dolphins are clearly an "exhaustible natural resource."[39] And it is clear from the finding of the DSB that the amended measure is aimed at "conserv[ing]" dolphins, *i.e.*, preserving and protecting them from harm, by ensuring that the U.S. market is not used to encourage fishing for tuna using methods that are harmful to dolphins.[40]

45. It is also clear that the original measure contributed to that objective and that the amended measure makes an even greater contribution – one that easily satisfies the "relating to" standard of a "close and genuine relationship of ends and means."[41] The Appellate Body recently reaffirmed this standard in *China – Rare Earths*, stating that a measure that "merely incidentally or inadvertently" aimed at or contributed to a conservation objective did not satisfy

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[36] *See* U.S. Second Written 21.5 Submission, para. 174

[37] *See* U.S. Second Written 21.5 Submission, paras. 176-76.

[38] *See* U.S. Second Written 21.5 Submission, paras. 177-78.

[39] U.S. Second Written 21.5 Submission, para. 183; U.S. First Written 21.5 Submission, para. 326.

[40] U.S. Second Written 21.5 Submission, paras. 184-86.

[41] U.S. Second Written 21.5 Submission, para. 187; U.S. First Written 21.5 Submission, para. 327.

the "relating to" requirement.[42] In contrast, the Appellate Body and panel agreed that the original measure reflected "genuine concerns" about "the protection of the life or health of dolphins," and was "intended to protect animal life or health or the environment" and actually contributed to that objective.[43]

46. Furthermore, these eligibility conditions are not only comparable – they are indeed *identical* – for all domestic and imported products.[44]

3. The Amended Dolphin Safe Labeling Measure Is Applied Consistently with the Article XX Chapeau

47. Finally, the amended measure meets the standard of the Article XX chapeau.

48. First, the amended measure is not applied in a way that gives rise to "discrimination" under the chapeau *at all*, because it draws no distinctions "between countries where the same conditions prevail." The setting-on-dolphins eligibility condition is completely neutral as to nationality: all tuna product containing tuna caught by setting on dolphins is ineligible for the label. There are no carve-outs or exceptions for particular Members' products, and Mexico has presented no evidence that the measure is applied in a discriminatory manner.

49. Again, it is striking how different the facts are here from the facts of other disputes where a chapeau analysis was conducted, such as in *US – Gasoline*, *Brazil – Retreaded Tyres*, and *EC – Seal Products*. In contrast to those disputes, the measure here does not discriminate between countries where the relevant conditions are "the same."

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[42] *China – Rare Earths (AB)*, para. 5.90; *see also id.*, paras. 7.407, 7.429-30, 7.446-48, 7.462, 7.483.

[43] *See US – Tuna II (Mexico) (AB)*, paras. 297, 303; *US – Tuna II (Mexico) (Panel)*, paras. 7.437-38.

[44] U.S. Second Written 21.5 Submission, paras. 188-91; U.S. First Written 21.5 Submission, para. 328.

50. Even if one were to consider that the relevant "conditions" are the choices made by a country's tuna fishing fleet, there is no arbitrary or unjustifiable discrimination here. The harm to dolphins posed by different fishing methods is central to the objective of the amended measure and thus is clearly "relevant" for purposes of the chapeau.[45] The United States has demonstrated that setting on dolphins is *uniquely* dangerous to dolphins, in terms of observed and unobserved harms.[46] Consequently, the conditions in countries whose vessels routinely set on dolphins are *not the same* for purposes of the chapeau, as the conditions in countries whose vessels employ other methods of fishing for tuna.[47] The strong implication of Mexico's argument that the United States must adapt its measure to Mexican producers' economic interest in continuing to set on dolphins – rather than the science – is simply wrong.[48]

51. Mexico also argues that the amended measure draws distinctions with respect to record-keeping and observer certifications that make it inconsistent with the chapeau. This argument also fails. First, it is irrelevant. By Mexico's own admission, the circumstances that supposedly bring about the discrimination under the chapeau are the same as those that brought about the asserted GATT inconsistency, *i.e.*, the setting-on-dolphins eligibility condition.[49] Consequently, that condition is the only aspect of the measure relevant to the Article XX analysis. But even if the difference between what the AIDCP parties have agreed to and what other Members have agreed to outside the ETP were relevant, there is no genuine relationship between them and any supposed disadvantage to Mexican tuna product, since the amended measure's additional

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[45] *See* U.S. Second Written 21.5 Submission, para. 199; *EC – Seal Products (AB)*, paras. 5.317, 5.300.

[46] *See* U.S. Second Written 21.5 Submission, para. 201.

[47] *See* U.S. Second Written 21.5 Submission, paras. 200-02.

[48] *See* U.S. Second Written 21.5 Submission, paras. 203-05.

[49] U.S. Second Written 21.5 Submission, para. 208.

requirements for the ETP stem entirely from the AIDCP.[50] Of course, these differences are not between countries where the relevant conditions are "the same." The AIDCP parties have agreed to impose *unique* requirements on themselves because of the catastrophic harm their vessels had done to dolphins in the ETP since the 1950s.[51] It should come as no surprise then that the members of regional fisheries management organizations (RFMOs) for other fisheries have not made that same commitment.

52. Furthermore, even if discrimination under the chapeau were found, any discrimination is not arbitrary or unjustifiable, because the distinctions drawn by the amended measure are "compatible with" and, indeed, "related to" the objective of the measure covered by Article XX, namely dolphin protection.[52]

53. The eligibility criterion relating to setting on dolphins directly relates to dolphin protection. The evidence shows that setting on dolphins is vastly more dangerous to dolphins than other tuna fishing methods.[53] And it is the *only* fishing method that intentionally targets dolphins and, therefore, the *only* fishing method where the risks to dolphins are an *intrinsic* part of fishing operations. Indeed, Mexico does not even appear to contest that prohibiting tuna product containing tuna caught by setting on dolphins from being labeled dolphin safe relates to dolphin protection.

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[50] U.S. Second Written 21.5 Submission, para. 209.

[51] U.S. Second Written 21.5 Submission, para. 210.

[52] *See* U.S. First Written 21.5 Submission, paras. 334-36; U.S. Second Written 21.5 Submission, paras. 213-23; *see also EC – Seal Products (AB)*, paras. 5.306, 5.318.

[53] *See* U.S. First Written 21.5 Submission, paras. 89-101, 110-61, 338-40; U.S. Second Written 21.5 Submission, para. 213.

54. To the extent that the record-keeping and observer requirements are relevant to the Article XX analysis (and we do not think they are), the distinctions drawn by the amended measure are not "arbitrary and unjustifiable." As the DSB found in the original proceeding, captain's certifications *do* contribute to dolphin protection.[54] The United States, along with other countries and international organizations, relies on captain's statements for a wide range of purposes,[55] which is essential in regulating the enormous and highly mobile global fishing industry. The fact that the AIDCP parties have chosen to impose *additional* record-keeping and observer requirements on themselves, in light of the unique harm to dolphins in the ETP, does not mean that the long-standing reliance on captain statements is illegitimate.

55. The amended dolphin safe labeling measure imposes eligibility conditions that manifestly relate to its objective. One condition relates to dolphin mortality and serious injury, and another relates to fishing methods that, based on all the available scientific evidence, is *not* dolphin safe. All other methods of tuna fishing are potentially eligible for the label (except large-scale high seas driftnet fishing), and, unlike under the original *US – Shrimp* measure, individual canneries and vessel operators can ensure that their product is eligible for the label based on their own purchasing and fishing choices.[56] Furthermore, the amended measure *does* allow for the use of alternative dolphin safe labels, provided they have at least as high standards for dolphin protection as the official label.[57] What Mexico argues is that the United States must allow use of

[54] *See* U.S. Second Written 21.5 Submission, para. 215; *US – Tuna II (Mexico) (AB)*, paras. 327, 296.

[55] *See* U.S. Second Written 21.5 Submission, paras. 126, 215.

[56] *See US – Shrimp (AB)*, para. 165.

[57] *See US – Tuna II (Mexico) (Panel)*, paras. 2.27-30.

a dolphin safe label that the DSB has already found is *not* comparable in effectiveness to the official label.[58] There is no legal support for this position.

56. Mexico's final argument is that the United States discriminated arbitrarily by not working through the AIDCP to "address its remaining concerns" about dolphin protection.[59] This seems to be an attempt to analogize this dispute to the original *US – Shrimp* proceeding, and, as such, it utterly fails.

57. First, nothing in the covered agreements requires Members to adopt whatever level of protection is contained in any relevant international agreement. To the contrary, Members may select their own level of protection with respect to the objectives covered by Article XX.[60] Second, there is no command in the dolphin safe labeling measure, as there was in the *US – Shrimp* measure, to engage in multilateral negotiations. Third, even if there were, the United States has actually been negotiating this issue with Mexico and the other IATTC members, through the AIDCP process, for decades.[61] The fact that there has not yet been a convergence on one agreed-upon level of protection does not render the U.S. conduct inconsistent with the chapeau. Ironically, what Mexico is proposing is that the United States is required to adopt just such a "rigid and unbending" requirement as the DSB condemned in *US – Shrimp*, namely imposing the unique AIDCP-equivalent record-keeping and observer requirements on all Members producing dolphin safe tuna for the U.S. tuna product market, regardless of the

[58] *See* U.S. Second Written 21.5 Submission, para. 180; *US – Tuna II (Mexico) (AB)*, para. 329.

[59] *See* Mexico's Second Written 21.5 Submission, paras. 337-39.

[60] U.S. Second Written 21.5 Submission, para. 220.

[61] *See* U.S. Second Written 21.5 Submission, para. 221.

circumstances of the fishery or Member. Mexico's approach inverts *US – Shrimp* and directly contradicts the DSB's support for respecting different national and multilateral arrangements.[62]

58. The United States respectfully requests the Panel to reject Mexico's claims that the United States has not brought its measures into compliance with the covered agreements.

[62] *See* U.S. Second Written 21.5 Submission, para. 222; *US – Shrimp (Art. 21.5 – Malaysia) (AB)*, para. 122.