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

**(WT/DS381)**

## EXECUTIVE SUMMARY OF OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

**October 28, 2010**

## I. Introduction

1. The measures at issue in this dispute – collectively referred to as the U.S. dolphin safe labeling provisions – establish conditions under which tuna products may voluntarily be labeled dolphin safe. These conditions ensure that when a dolphin safe label appears on a tuna product in the United States it accurately conveys to consumers that the product does not contain tuna that was caught in a manner that adversely affects dolphins.

2. Mexico alleges that the U.S. dolphin safe labeling provisions are inconsistent with U.S. obligations under the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and the *Agreement on Technical Barriers to Trade* (TBT Agreement). The Panel should reject Mexico's claims.

3. First, Mexico has not adduced evidence sufficient to demonstrate that the U.S. dolphin safe labeling provisions afford less favorable treatment to Mexican tuna products as compared U.S. tuna products or tuna products of any other country. This is not surprising as the U.S. dolphin safe labeling provisions do not discriminate based on origin. Mexico, therefore, has not established that the U.S. provisions are inconsistent with Articles I:1 or III:4 of the GATT 1994.

4. Second, the U.S. dolphin safe labeling provisions establish a voluntary labeling scheme. Because the U.S. provisions do not set out labeling requirements with which compliance is mandatory, they do not meet the definition of a technical regulation under the TBT Agreement and, therefore, are not subject to Articles 2.1, 2.2, or 2.4 of the TBT Agreement.

5. Third, even if the U.S. dolphin safe labeling provisions were considered technical regulations, they fulfill legitimate objectives that could not be fulfilled if the provisions permitted tuna caught by setting on dolphins to be labeled dolphin safe. Therefore, even aside from the fact that they are not considered technical regulations, the U.S. provisions would not breach Articles 2.1, 2.2 or 2.4 of the TBT Agreement.

6. Before turning to these points, we highlight a point that is central to this dispute: setting on dolphins to catch tuna adversely affects dolphins. Intentionally setting on dolphins to catch tuna results in both observed and unobserved dolphin mortalities. The effects on dolphins caused by this fishing technique include death by starvation or from predation when dependent calves are separated from their mothers during high-speed chases and acute cardiac and muscle damage caused by the exertion of avoiding pursuing speedboats and helicopters for prolonged periods. At least 5 million dolphins were killed from 1959 to 1976 in the Eastern Tropical Pacific Ocean (or ETP) as a result of being chased and encircled to catch tuna. Despite conservation measures adopted since that time, populations of two primary species of dolphins in the ETP remain depleted, at only 19 and 35 percent of their pre-1959 levels. Moreover, there are no clear signs that these depleted dolphin populations are recovering, and the best available science tells us that setting on dolphins to catch tuna is the most probable reason that these populations remain depleted and show no clear signs of recovery.

## II. Article III:4 of the GATT 1994

7. Mexico has acknowledged that U.S. dolphin safe labeling provisions do not, on their face, afford less favorable treatment to imported tuna products, but instead claims that the U.S. provisions do so in fact.

8. Mexico has failed to show that the U.S. provisions use the manner in which tuna is caught as a means in fact to single out imports for treatment that is different than the treatment afforded domestic products, let alone treatment that is less favorable. In this regard, Mexico wrongly

identifies the Appellate Body report in *Korea – Beef* as setting out the legal approach the Panel should take in analyzing Mexico's claim under Article III:4.

9. In this dispute, the U.S. dolphin safe labeling provisions on their face afford the same treatment to imported and domestic tuna products. There is no reason to evaluate whether those provisions cause a change in the conditions of competition to the detriment of imported products without first examining whether those provisions in fact afford treatment that is different for imported and domestic products.

10. Indeed, rather than the *Korea – Beef* report, the United States suggests that the Panel may find it instructive to consider the panel report in *Mexico – Beverage Tax* as well as the reports in the *Korea – Alcohol, Chile – Alcohol*, and *Dominican Republic – Cigarettes* disputes. In those disputes, the challenged measures did not on their face distinguish between domestic and imported products, but allegedly discriminated against imports in fact.

11. In this dispute, Mexico has not adduced similar evidence to show that the U.S. dolphin safe labeling provisions – although origin neutral on their face – in fact use the manner in which the tuna was caught to single out imports. It is not credible to argue that the U.S. conditions for labeling tuna dolphin safe act as a proxy to distinguish between domestic and imported tuna products, when most imported products contain tuna that was caught by methods other than setting on dolphins and are eligible for, and in fact, use a dolphin safe label.

12. While Mexico asserts that its fleet "almost exclusively" sets on dolphins to catch tuna, this is incorrect. One-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and therefore tuna caught by these vessels is eligible to use the dolphin safe label. The remaining two-thirds of Mexico's purse seine fleet also opportunistically uses techniques other than setting on dolphins to catch tuna, and the tuna caught by these vessels using those techniques are also eligible to use the dolphin safe label.

13. We also recall that the Appellate Body has found that the absence of a clear relationship between the stated objectives of a measure and distinctions it draws between like products can be a factor in determining whether those distinctions – which are on their face origin neutral – in fact single out imports. In this dispute, however, there is a clear relationship between the objectives of the U.S. dolphin safe labeling provisions and the conditions under which tuna products may be labeled dolphin safe.

14. Mexico also contends that because the Mexican fishing fleet primarily fishes for tuna in the ETP, the U.S. provisions afford less favorable treatment to Mexican tuna and tuna products. This is also incorrect. First of all, it is the choice of fishing method and whether any dolphins were killed or seriously injured, not the place where the tuna was caught, that determines whether tuna products are eligible to be labeled dolphin safe. Second, even if where the tuna was caught determined eligibility to label tuna as dolphin safe, there were 46 U.S. purse seine vessels, of which 31 were full-time, that fished for tuna in the ETP in the year the statute was enacted in 1990. By comparison, in 1990 Mexico had 52 vessels that fished for tuna in the ETP. Further, vessels from a number of countries fish for tuna in the ETP. Tuna caught in the ETP therefore cannot be equated with tuna of Mexican origin.

15. Mexico has also failed to show that the U.S. provisions modify the conditions under which domestic and imported tuna and tuna products compete. The U.S. provisions allow domestic and imported tuna products the same opportunities to compete in the U.S. market.

16. In this regard, the U.S. provisions provide producers a choice. They can set on dolphins to catch tuna, in which case they cannot label tuna products containing that tuna dolphin safe, or they

can use other methods and ensure that no dolphins are killed or seriously injured in the set, in which case they are eligible to label tuna products containing that tuna dolphin safe.

17. Mexico appears to suggest that its proximity to the ETP gives it a competitive advantage relative to the U.S. and other countries in terms of fishing for tuna by setting on dolphins. Other countries, including the United States, are similarly close to the ETP, including those areas of the ETP where setting on dolphins to catch tuna occurs.

18. The possibility that Mexico's fleet may incur some costs to switch from setting on dolphins to using other techniques to catch tuna is not evidence that the U.S. provisions afford less favorable treatment to Mexican tuna products.

## III. Article I:1 of the GATT 1994

19. Mexico has also failed to establish that the U.S. dolphin safe labeling provisions are inconsistent with Article I:1 of the GATT 1994. In examining whether the U.S. dolphin safe labeling provisions were inconsistent with Article I:1, a 1991 panel under the GATT 1947 rejected Mexico's claims. In particular, the panel found the U.S. provisions "applied to all countries whose vessels fished in the [ETP] and thus did not distinguish between products originating in Mexico and products originating in other countries."

20. Analyzing whether a measure complies with Article I:1 of the GATT 1994 involves among other things consideration of (1) whether the measure accords an advantage to products originating in any Member and (2) whether that advantage is accorded immediately and unconditionally to products originating in any other Member.

21. With respect to the first consideration, Mexico wrongly identifies the "advantage" at issue in this dispute. The U.S. provisions grant the advantage of the opportunity to use the dolphin safe label to products that meet the conditions for using the dolphin safe label. With respect to the second consideration, Mexico has not established that the conditions the U.S. provisions establish for labeling tuna products dolphin safe – while origin neutral on their face – in fact act as a proxy to single out imports from some countries over others as eligible to be labeled dolphin safe.

22. In this regard, one-third of Mexico's purse seine fleet exclusively uses techniques other than setting on dolphins to catch tuna and the remaining two-thirds of Mexico's fleet also opportunistically uses techniques other than setting on dolphins to catch tuna. Additionally, the technique of setting on dolphins to catch tuna is not unique to the Mexican fishing fleet. The fishing fleets of Colombia, El Salvador, Guatemala, Nicaragua, Panama, and Venezuela also have vessels that set on dolphins, among other techniques, to catch tuna in the ETP.

23. As in the case with Mexico's argument under Article III:4, Mexico's argument that the U.S. provisions afford less favorable treatment to Mexican tuna and tuna products because the Mexican fleets primarily fish for tuna in the ETP should be rejected.

24. In this connection, it may be helpful for the panel to consider another dispute where complainants argued that a measure that was origin neutral on its face in practice discriminated against imports from certain countries as compared to others. In *Canada – Autos*, for example, the Panel found that limiting eligibility for an import duty exemption to certain importers in practice discriminated against imports originating in certain countries and therefore breached Article I:1 of the GATT 1994. In contrast to the situation in *Canada – Autos*, Mexican fishing vessels can choose to meet the conditions that would make products containing their tuna eligible for the dolphin safe label. The fact that a significant portion of Mexico's fleet has chosen not to do so, cannot be attributed to the U.S. provisions or any failure of those provisions to afford Mexican tuna products

an advantage they accord to like products originating in other countries.

25. Mexico's arguments that it would be costly for Mexican vessels to adopt alternative fishing techniques should be reject for the same reasons as they should be under Mexico's Article III:4 claim.

## IV. Article 2.1 of the TBT Agreement

26. Mexico relies on the same evidence and argument to support its claim that the U.S. provisions afford less favorable treatment to Mexican tuna products as compared to domestic tuna products and tuna products originating in other countries in breach of Article 2.1 as it does in respect of its GATT 1994 Article III:4 and I:1 claims. As already reviewed in today's statement, and in the U.S. first written submission, the Panel should reject Mexico's claims under Articles III:4 and I:1 of the GATT 1994. Moreover, U.S. dolphin safe labeling provisions are not technical regulations and therefore cannot breach Article 2.1.

## V. U.S. Dolphin Safe Labeling Provisions Are Not Technical Regulations under Articles 2.1, 2.2 or 2.4 of the TBT Agreement

27. With respect to Mexico's claims under the TBT Agreement, there are several reasons why the Panel should reject Mexico's claims, and we detail those reasons in the U.S. first written submission. Today, we will focus on the two primary reasons. One, the U.S. dolphin safe labeling provisions are not technical regulations and therefore are not subject to Article 2 of the TBT Agreement. As a consequence, they cannot be inconsistent with Articles 2.1, 2.2 or 2.4 of the TBT Agreement. Two, the U.S. dolphin safe labeling provisions fulfill a legitimate objective that cannot be fulfilled by allowing tuna products that contain tuna caught by setting on dolphins to be labeled dolphin safe.

28. First, the U.S. dolphin safe labeling provisions are not subject to Article 2 of the TBT Agreement. Article 2 of the TBT Agreement concerns "technical regulations." The U.S. dolphin safe labeling provisions, however, are not "technical regulations." Annex 1 of the TBT Agreement defines a technical regulation as a "document that lays down product characteristics or their related processes or production methods ... with which compliance is mandatory." As elaborated in the U.S. first written submission, under this definition two requirements must be met for a measure to be a technical regulation: (1) the measure must be either a document that lays down product characteristics or their related processes or production methods, or a document that deals exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, processes or production method; and (2) compliance with the aforementioned product characteristics, labeling requirements, etc. must be mandatory. The U.S. dolphin safe labeling provisions do not meet the second element of this definition.

29. In this regard, it is useful to consider what "labeling requirements" as the term is used in Annex 1 of the TBT Agreement means. It does not mean that labeling is required in order that the product can be sold; if it did that would render the phrase "with which compliance is not mandatory" in the definition of a standard *inutile*. Instead, ISO/IEC Guide 2:1991 defines "requirement" as "a provision that conveys criteria to be fulfilled." Thus, in the context of Annex 1 "labeling requirements" means criteria or conditions that must be met in order for the labeling of a product to conform with the standard or technical regulation.

30. Marketers of tuna products are free to choose whether to participate in the U.S. labeling scheme and regardless of that choice continue to sell their products in the United States. Compliance with the U.S. dolphin safe labeling provisions is, thus, not mandatory within the meaning of Annex 1 of the TBT Agreement.

## VI. U.S. Provisions Are Not Inconsistent with Articles 2.2 or 2.4 of the TBT Agreement

31. The objectives of the U.S. dolphin safe labeling provisions are (1) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and (2) contributing to the protection of dolphins. The prevention of deceptive practices and the protection of animal life or health are expressly identified as legitimate objectives in Article 2.2 of the TBT Agreement, and the objectives of the U.S. dolphin safe labeling provisions squarely fall within these two objectives. As we explained in the U.S. first written submission, the United States is concerned about the ETP as a whole and has a number of programs and measures in place to address conservation and management of marine resources in the ETP that go beyond dolphin conservation. The U.S. dolphin safe labeling provisions cannot be "illegitimate" simply because other environmental concerns also merit attention.

32. With regard to Mexico's claims under Article 2.2, we disagree with Mexico's contention that the objectives of the U.S. dolphin safe labeling provisions could be fulfilled in the absence of the U.S. provisions, in particular because the AIDCP and measures implemented pursuant to it fulfill those objectives. While the AIDCP has made an important contribution to dolphin conservation in the ETP, setting on dolphins to catch tuna continues to adversely affect dolphins. If the U.S. provisions permitted tuna products containing tuna caught by setting on dolphins to be labeled dolphin safe, the U.S. provisions would no longer fulfill the provisions' objectives.

33. We also note that Mexico's presentation of its Article 2.2 claims appears to be based not on the text of Article 2.2 but instead on application of the legal approach used in deciding whether a measure is "necessary" within the meaning of Article XX of the GATT 1994. The elements that go into answering these respective questions differ and it would not be appropriate to apply the same legal approach to both.

34. With regard to Mexico's claims under Article 2.4, Mexico cannot establish that allowing tuna caught by setting on dolphins to be labeled dolphin safe would be effective and appropriate in fulfilling the objectives of those provisions, even assuming for the sake of argument that the definition of "dolphin safe" in the AIDCP resolutions constituted a "relevant international standard."

35. Under the AIDCP resolutions – which Mexico wrongly cites as "relevant international standards" – tuna caught by setting on dolphins may be considered dolphin safe, notwithstanding the evidence that setting on dolphins to catch tuna adversely affects dolphins. Allowing tuna products to be labeled dolphin safe based on the AIDCP resolution definitions would therefore not be effective or appropriate in fulfilling the objective of the U.S. dolphin safe labeling provisions.

36. Further, Mexico's efforts to elaborate the relative ecosystem impacts of various methods to catch tuna are also not relevant to whether the U.S. provisions are consistent with its WTO obligations. The fact that methods of catching tuna other than setting on dolphins impact the ecosystem does not mitigate the fact that setting on dolphins to catch tuna adversely affects dolphins.

## VII. Amicus Submission

37. We have reviewed the submission filed by the Humane Society International and the American University, Washington College of Law and believe that it contains a number of pieces of relevant and useful information that could assist the Panel in understanding the issues in this dispute.