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

(WT/DS381)

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

October 18, 2010

1. Mr. Chairman, members of the Panel, and staff of the Secretariat: on behalf of the United States, thank you for your ongoing work in this panel proceeding. I would also like to thank Ms. Chelliah for agreeing to serve on this panel following the passing of Mr. Tiwari.

I. Introduction

2. The measures at issue in this dispute – which I will collectively refer 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.

3. 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. We detail the reasons why in the U.S. first written submission. We will not repeat each of those reasons in today's statement, but instead will focus on the following key points.

4. 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.

5. 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.

6. 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.

Intentionally Setting on Dolphins Adversely Affects Them

7. Before turning to these points, we highlight a point that is central to this dispute: setting on dolphins to catch tuna adversely affects dolphins. As explained in the U.S. first written submission,[1] intentionally setting on dolphins to catch tuna results in both observed and unobserved dolphin mortalities. For example, over 1,100 dolphins were observed to have been killed or seriously injured in 2008 when set upon to catch tuna, and research indicates that indirect or delayed effects of setting on dolphins to catch tuna can result in additional dolphin deaths and reduction in the reproduction rate, even where no dolphins are observed to be killed or seriously injured in a set. Such effects include death by starvation or from predation when dependent calves are separated from their mothers during high-speed chases and acute cardiac

[1]U.S. first written submission, paras. 52-59.

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.[2] 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.[3] 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.[4]

II. Article III:4 of the GATT 1994

8. Turning to the first key point: The U.S. dolphin safe labeling provisions do not discriminate based on origin. Because of this, Mexico cannot support its claims under Articles III:4 and I:1 of the GATT 1994.

9. Beginning with Article III:4, Mexico has acknowledged that U.S. dolphin safe labeling provisions do not, on their face, afford less favorable treatment to imported tuna products,[5] but instead claims that the U.S. provisions do so in fact. Mexico, however, fails to present factual evidence sufficient to establish that the U.S. provisions, which are origin neutral on their face, in fact afford less favorable treatment to imports. Indeed, Mexico does not even claim that the provisions discriminate against imports in general, just certain product of Mexico.

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[2]U.S. first written submission, para. 46.

[3]U.S. first written submission, para. 47.

[4]U.S. first written submission, para. 48-50.

[5]Mexico Written Submission, para. 164.

10. In particular, 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.[6] *Korea – Beef* concerned a measure that on its face afforded different treatment to imported products as compared to like domestic products. The question the Appellate Body, therefore, faced in that dispute was whether such different treatment constituted less favorable treatment. To determine whether such different treatment constituted less favorable treatment, the Appellate Body in that dispute correctly looked to whether the measure altered the conditions of competition for imported products.

11. In this dispute, however, 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. And – for the reasons given in our written submission and outlined in this oral statement – the provisions in fact do *not* afford such different treatment.

12. 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

[6]Mexico Written Submission, para. 163.

disputes, the challenged measures did not on their face distinguish between domestic and imported products, but allegedly discriminated against imports in fact. Therefore, they are more relevant to the facts of this dispute.

13. In the *Mexico – Beverage Tax* report, for example, the panel found that, although on its face the challenged measure did not distinguish between domestic and imported sweeteners, in practice it did. The key fact upon which the panel's finding was based was the fact that domestic sweeteners produced in Mexico at the time the tax was adopted consisted overwhelmingly of cane sugar, whereas almost 100 percent of imported sweeteners consisted of high fructose corn syrup. Thus, in applying a 20 percent tax on the use of non-cane sugar sweeteners (such as high fructose corn syrup) that it did not impose on the use of cane sugar, Mexico was in practice singling out imported sweeteners for higher taxation.[7] The panel concluded that such higher taxation constituted less favorable treatment for imported sweeteners as compared to like domestic products within the meaning of Article III:4 of the GATT 1994.

U.S. Provisions Do Not Single Out Imports

14. 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. For example, Mexico has not presented evidence that the conditions for labeling tuna dolphin safe under the U.S. provisions render nearly all imported tuna products ineligible to use the dolphin safe label.

15. In this regard, the United States imported $538 million worth of fresh and frozen tuna and

[7] Panel Report, *Mexico – Beverage Tax*, para. 8.119.

$613 million worth of canned tuna in 2009,[8] for a total of nearly of $1.2 billion worth of imported tuna and tuna products. The vast majority of these imports contained tuna that was caught by methods other than setting on dolphins and therefore eligible to be labeled dolphin safe. For example, of the over 10,000 entries of canned tuna products in 2009, all but 137 entries were dolphin safe.[9] The amount of U.S. imports of tuna is particularly significant relative to the amount of domestic production. For example, imports of canned tuna comprised 52 percent of the U.S. market for canned tuna products. The remaining 48 percent was domestically produced by U.S. tuna canners.[10] However, two thirds of that domestically produced canned tuna was sourced from foreign vessels.[11] 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.

16. 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[12] 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

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[8] U.S. First Written Submission, para. 90.

[9] NMFS Tuna Tracking & Verification Program Databases, Exhibit US-51.

[10] U.S. First Written Submission, paras. 89-90; NMFS, Fisheries of the United States 2009 (July 2010), p. 67, Exhibit US-52.

[11] NMFS, U.S. Cannery Receipts, 2009, Exhibit US-55.

[12] U.S. First Written Submission, paras. 113-117.

uses techniques other than setting on dolphins to catch tuna,[13] and the tuna caught by these vessels using those techniques are also eligible to use the dolphin safe label. In its statement today, Mexico disagrees with the one-third figure we cite and argues that only a small percentage of its tuna catch is caught using techniques other than setting on dolphins. We based this figure on a review of the Inter-American Tropical Tuna Commission (or IATTC) Purse Seine Vessel Register which can be found in Exhibit US-15. In terms of percentage of Mexican vessels' catch this represents nearly 10 percent of the total tuna catch of Mexican vessels. Therefore we disagree with the figure that Mexico cites, 5%. But our point remains the same: it is not true that Mexican vessels "almost exclusively set on dolphins".

17. Moreover, at the time the U.S. provisions were enacted, U.S. vessels set on dolphins to catch tuna and did not fully discontinue that practice until years later, in the mid-1990s.[14] Thus, at the time the statute was adopted in 1990, there were tuna products that contained tuna caught by U.S. vessels that could not be labeled dolphin safe. It is also important to stress that the Mexican fleet (or more accurately two-thirds of the Mexican fleet) has chosen to set on dolphins to catch tuna, and it is this choice which renders tuna products that contain its tuna ineligible to be labeled dolphin safe under the U.S. provisions. Nothing prevents the Mexican tuna fleet from using methods other than setting on dolphins to catch tuna, in the ETP or elsewhere.

18. 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

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[13] U.S. First Written Submission, paras. 68-69.

[14] U.S. First Written Submission, para. 43.

fact single out imports.[15] 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. Specifically, tuna products may not be labeled dolphin safe if they contain tuna that was caught in a manner that adversely affects dolphins. Setting on dolphins to catch tuna adversely affects dolphins. Thus, by prohibiting the labeling of tuna products as dolphin safe if they were caught by setting on dolphins, the U.S. provisions fulfill two objectives. First, they ensure that when a dolphin safe label appears on tuna products 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. Second, the U.S. provisions help ensure that the U.S. market is not used to encourage fishing fleets to set on dolphins. These provisions thus contribute to dolphin protection.

19. Together these points emphasize that, in prohibiting tuna products from being labeled dolphin safe if they contain tuna that was caught by setting on dolphins, the U.S. provisions are not using the manner in which tuna is caught as a means to distinguish between imported and domestic products and in particular to single out imports as ineligible for the dolphin safe label. Instead, the U.S. provisions establish origin neutral conditions under which tuna products may be labeled dolphin safe, based on whether they contain tuna that was caught in a manner that adversely affects dolphins.

20. In an effort to suggest that the U.S. provisions single out imports as ineligible for the dolphin safe label, 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

[15]Appellate Body Report, *Chile – Alcohol*, paras. 69-71.

products.[16] 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.[17] By comparison, in 1990 Mexico had 52 vessels that fished for tuna in the ETP.[18] And, most of the U.S. and Mexican vessels that fished for tuna in the ETP at that time set on dolphins to catch tuna. Therefore, it would be wrong to suggest that the U.S. provisions used the ocean where the tuna was caught as a means to single out imports for different or less favorable treatment than domestic tuna. Moreover, whether tuna is of domestic origin or imported does not depend on where the tuna was caught. Origin is determined by the flag of the vessel that caught the tuna, or if the tuna is processed, the country in which it was processed.[19] In fact, vessels from a number of countries fish for tuna in the ETP.[20] For example, two U.S. purse

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[16] Mexico First Written Submission, paras. 164-167.

[17]See U.S. Purse Seine Vessels Participating in the ETP, Exhibit US-13 (represents vessels that fish for tuna full time); IATTC, 1990 Annual Report, Exhibit US-54 (represents vessels that fish for tuna full or part time).

[18] IATTC, 1990 Annual Report, Exhibit US-54.

[19]Koru North America v. United States, 701 F. Supp. 229 (Ct. Int'l Tr. 1988), Mexico First Written Submission, Exhibit Mex-51. Rules of origin for fish and fish products are also codified in the U.S. Tariff schedule. *See, e.g.,* Harmonized Tariff Schedule of the United States (2010), General Note 12(b) and 12(n)(v) for North American Free Trade Agreement rule of origin for fish, Exhibit US-56.

[20]U.S. first written submission, para. 44; Exhibits US-15 and US-16.

seine vessels are currently included on the IATTC Active Purse Seine Vessel Register.[21] Tuna caught in the ETP therefore cannot be equated with tuna of Mexican origin. As reviewed in the U.S. first written submission, the documentary evidence necessary to establish that purse seine nets were not set on dolphins to catch the tuna varies depending on whether there is a regular and significant association between tuna and dolphins in the fishery where the tuna was caught.[22] However, the underlying condition that prohibits tuna products from being labeled dolphin safe if dolphins were set upon to catch tuna remains the same.

Conditions of Competition

21. Not only has Mexico failed to establish that the origin neutral conditions under which tuna may be labeled dolphin safe in fact afford less favorable treatment to imported products by singling out imported tuna products, it 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: any tuna, regardless of origin, that is not caught by setting on dolphins or in a set in which dolphins were killed or seriously injured is eligible to be labeled dolphin safe.

22. 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. While the U.S. fleet eventually chose to abandon the practice of setting on dolphins to catch tuna, Mexico's

[21] Active Purse Seine Vessel Register, Exhibit US-15.

[22] U.S. First Written Submission, para. 14.

fleet chose to continue that practice. In both cases, the distinction is not between imported and domestic tuna products, but between tuna caught in a manner that adversely affects dolphins and tuna that is not. Mexico is incorrect to argue that the U.S. provisions alter the conditions under which domestic and imported tuna products compete to the detriment of imported products. Domestic and imported tuna products compete under the same limitations on use of the dolphin safe label, and it is Mexican producers' choices in how to respond to those limitations that render their products ineligible to use the dolphin safe label.

23. 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.[23]

24. In its written submission, Mexico suggests that it would be costly for Mexican vessels to catch tuna using methods other than setting on dolphins, although we note that Mexico is not arguing that its fleet is incapable of doing so. The possibility that Mexico's fleet may incur some costs to switch from setting on dolphins to using other techniques to catch tuna, however, is not evidence that the U.S. provisions afford less favorable treatment to Mexican tuna products. First, Mexico has not substantiated its assertion that switching fishing techniques would involve "considerable financial and other costs",[24] particularly in light of the fact that the same boats and fishing gear that is used to catch tuna by setting on dolphins can be used to catch tuna using other

[23]IATTC, Distribution of Purse Seine Catches in ETP (by set type, for yellowfin and skipjack tuna) 2004-2009, Exhibit US-53.

[24]Mexico Written Submission, para. 167.

techniques.[25] Second, to the extent there are costs associated with adopting alternative techniques to catch tuna those would not be unique to Mexican vessels. They would be borne by any vessel that adopted alternative techniques, including the U.S. fleet when it abandoned setting on dolphins to catch tuna after enactment of the dolphin safe labeling provisions.

25. Third, and more fundamentally, meeting the conditions of any standard are likely to involve some costs on the part of producers and, depending on their circumstances, these costs may be higher for some producers than others. That fact alone, however, would not be a basis to argue that a standard affords less favorable treatment to imported products.

26. In this regard, it is incorrect to assert, as Mexico does in its written submission, that any "measure that increases the cost of imported products in order to participate in a domestic market but does not increase the cost of like domestic products violates the national treatment obligation in Article III:4 of the GATT 1994."[26] When a government adopts a new measure, this often results in additional costs for producers seeking to comply with it and, depending on a number of facts (for example, size or business model) those costs may be higher for some producers than for others. Thus, it is not whether a measure increases costs for some market participants as compared to others that determines whether that measure conforms to Article III:4's national treatment obligation. It is whether the measure: first, treats imported products differently than like domestic products, and second, that different treatment affords less favorable treatment to imported products as compared to like domestic products, for example by altering the conditions under which imported and like domestic products compete. That Mexican vessels may incur

[25]U.S. first written submission, para. 67.

[26]Mexico Written Submission, para. 167.

some costs to adopt fishing practices to catch tuna in a manner that does not adversely affect dolphins is not evidence that the U.S. provisions differentiate between imported and domestic products. Mexico's claim fails on this alone. Furthermore, Mexico has failed to show that the dolphin safe provisions alter, to the detriment of imported tuna products, the conditions under which domestic and imported tuna products compete.

III. Article I:1 of the GATT 1994

27. Turning to Mexico's claims under Article I:1 of the GATT 1994, Mexico has also failed to establish that the U.S. dolphin safe labeling provisions are inconsistent with Article I:1 of the GATT 1994. As an initial matter, this issue was heard and decided over two decades ago. 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.[27] 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."[28] The GATT panel's analysis of this issue was sound and none of the relevant facts have changed in a way that warrants a different conclusion today.

28. Moreover, Mexico's claims under Article I:1 of the GATT 1994 are similar, and in some places identical, to its claims under Article III:4, and fail for the same reason: the U.S. dolphin safe labeling provisions do not discriminate based on origin.

29. Article I:1 of the GATT 1994 requires Members to accord any advantage granted to

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[27] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 3 September. 1991, unadopted, BISD 39S/155, paras. 5.43-5.44.

[28] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 3 September. 1991, unadopted, BISD 39S/155, para.5.44.

products originating in any Member's territory immediately and unconditionally to like products originating in all other Members' territories. Analyzing whether a measure complies with this obligation thus 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.

30. With respect to the first consideration, Mexico wrongly identifies the "advantage" at issue in this dispute. Mexico appears to believe that the advantage Mexican products are being denied is the right to carry the dolphin safe label.[29] That is incorrect. No product (whether of the United States or any other Member) is entitled unconditionally to be labeled dolphin safe under U.S. law. Rather, 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.

31. With respect to the second consideration, Mexico argues the U.S. dolphin safe labeling provisions, while origin neutral on their face, in practice discriminate against Mexican tuna products as compared to imports from other countries. Yet, Mexico has not put forth evidence sufficient to substantiate its claim. In particular, 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.

32. 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

[29] Mexico First Written Submission, para. 182.

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. And, as noted earlier in our statement, setting on dolphins was a technique used by U.S. vessels at the time the U.S. provisions were adopted. In addition, vessels of the United States and other countries that do not currently set on dolphins to catch tuna could choose to do so in the future, but like Mexican tuna products that contain tuna caught in that manner, could not be labeled dolphin safe. Further, nothing prevents Mexico's fleet from expanding its use of techniques other than setting on dolphins to catch tuna, including on account of the costs as discussed earlier in our statement. For example, Ecuador's fleet made the choice in 2010 to catch tuna in the ETP exclusively using techniques other than setting on dolphins,[30] and for years has been using those other techniques to catch tuna and exporting that tuna to the United States with the dolphin safe label.[31] And, we note that Ecuador has also not requested permission for its fleet to set on dolphins for 2011. There is no reason Mexican vessels could not make this same choice, for example to exclusively use other techniques to catch tuna, or to use a mix of techniques and sell the portion of its catch that is not caught by setting on dolphins as dolphin safe in the U.S. market.

33. As in the case with Mexico's argument under Article III:4, Mexican's argument that the U.S. provisions afford less favorable treatment to Mexican tuna and tuna products because the

[30] U.S. First Written Submission, para. 113.

[31] U.S. First Written Submission, para. 113.

Mexican fleets primarily fish for tuna in the ETP should likewise be rejected. The U.S. dolphin safe labeling provisions equally prohibit the labeling of tuna products dolphin safe if they contain tuna caught by setting on dolphins outside the ETP; the location in which the tuna was caught does not change this. It also does not change the origin of the tuna since origin is determined by the flag of the vessel that caught the tuna, or where it is processed.[32] Moreover, Mexico is not the only country to have vessels that fish for tuna in the ETP. Bolivia, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, Spain, the United States, Vanuatu and Venezuela also have purse seine vessels that fish for tuna in the ETP.[33]

34. Thus, it is not the case that conditioning use of the dolphin safe label on the fishing technique used is a proxy for affording imports from some countries an advantage that is not afforded to imports from Mexico. Tuna caught by Mexican vessels can be, and is, caught using techniques other than setting on dolphins and thus tuna products containing it are eligible to be labeled dolphin safe under the U.S. provisions. Conversely, tuna originating in other countries can be, and is, caught by setting on dolphins[34] and thus tuna products containing it are ineligible to be labeled dolphin safe under the U.S. provisions. This only highlights that it is the fishing technique used and whether dolphins were killed or seriously injured when the tuna was caught that determines whether tuna products may be labeled dolphin safe. The origin of the tuna product, or the tuna in that product, is not a factor, either in law or fact.

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[32] *See* Exhibit Mex-51; Exhibit US-54.

[33] U.S. first written submission, para. 68; Active Purse Seine Vessel Register, Exhibit US-15.

[34] U.S. first written submission, para. 44; Exhibit US-50.

35. 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 that dispute, the facts demonstrated that importers of automotive products only imported automotive products from countries where the importer's parent company or an affiliate of the importer was located.[35] Thus, limiting eligibility for the import duty exemption to only certain importers had the effect of limiting eligibility for the import duty exemption to imports from only certain countries. Importantly, in that dispute, there was nothing that exporters of automotive products whose products did not benefit from the import duty exemption could do to qualify.[36]

36. In this case, limiting use of the dolphin safe label to tuna products that do not contain tuna that was caught by setting on dolphins or in a set in which dolphins were killed or seriously injured does not have the effect of limiting eligibility to use the dolphin safe label to imports originating in only certain countries. It is not the origin of the product, but whether that product was caught in a manner that adversely affected dolphins that determines eligibility to use the dolphin safe label. Unlike in *Canada – Autos*, conditioning the use of the dolphin safe label based on the fishing technique used is not a proxy for limiting use of the label to imports from only certain countries. In contrast to the situation in *Canada – Autos*, Mexican fishing vessels

[35] Panel Report, *Canada – Autos*, para. 10.43.

[36] *Id.*, paras. 1045-10.46.

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.

37. 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, as should its contention that any "measure that increases the cost of imported products originating in certain WTO Members in order to participate in a domestic market but does not increase the cost of like products originating in other countries violates the most-favoured-nation obligation in Article I:1"[37]. In particular, complying with any standard is likely to result in some cost for producers and the fact that Mexican vessels may incur some costs to adopt alternative fishing techniques is not evidence that the U.S. provisions accord an advantage to imports from some WTO Members as compared to others.

IV. Article 2.1 of the TBT Agreement

38. Mexico also claims that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.1 of the TBT Agreement. 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

[37]Mexico Written Submission, para. 188.

Mexico's claims under Articles III:4 and I:1 of the GATT 1994, in particular because Mexico has not presented evidence and argument sufficient to support its claim that although origin neutral on their face the U.S. provisions in practice afford less favorable treatment to Mexican tuna products as compared to domestic tuna products or tuna products originating in other countries. Moreover, Article 2.1 applies "in respect of technical regulations" and as my colleague will review in some detail in a moment, the 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

39. 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, I 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 Article 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. As a consequence, Mexico cannot support its claims under Articles 2.2 or 2.4 of the TBT Agreement, even aside from the fact that the U.S. dolphin safe labeling provisions are not technical regulations. I will elaborate on each of these points.

40. 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. It may *also* include or *deal exclusively* with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, processes or production method." 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. This is because the U.S. dolphin safe labeling provisions establish a voluntary labeling scheme and do not require tuna products to be labeled dolphin safe.

41. Voluntary labeling schemes are addressed under the definition of a standard contained in Annex 1 of the TBT Agreement. Like the definition of technical regulation, the definition of a standard also encompasses "labeling requirements," yet that definition makes clear that for a measure to fall within the definition of a standard, compliance with the labeling requirements must not be mandatory.

42. 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."[38] 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.[39] Accordingly, in this dispute, the condition that must be met in order for the labeling of tuna products to conform to the U.S. dolphin safe labeling provisions is that the products do not contain tuna that was caught by setting on dolphins (or in a set in which dolphins were killed or seriously injured). This condition, however, does not determine whether the U.S. provisions are mandatory within the meaning of Annex 1 of the TBT Agreement. Again, if it did, it would turn any standard dealing with labeling requirements into a technical regulation.

43. For example, in my law school, in order to sign up for the course in International Trade Law, it was a "requirement" that you had completed the basic course in International Law. That didn't mean that International Law was mandatory for everyone – lots of law students graduated without taking International Law. International Law was, however, a "requirement" if you wanted to take International Trade Law – in other words, it was a condition for eligibility to take International Trade Law.

44. It is also important to recall that standards convey information about a product. If a product conforms to a particular standard, the user or purchaser of the product can rely on that product having, for example, certain characteristics, or in the case of a labeling requirement, meeting the conditions to be labeled in a particular way. If marketers of products were permitted

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[38]ISO/IEC Guide 2:1991, para. 7.5; *see also New Shorter Oxford English Dictionary* (2003), p. 2557.

[39] *New Shorter Oxford English Dictionary* (2003), p. 2557.

to claim a product conformed to a particular standard when that product did not in fact have the characteristics set out in the standard, or did not meet the conditions to be labeled in a certain way, the utility of that standard would be lost.

45. Thus, the fact that U.S. dolphin safe labeling provisions prohibit tuna products from being labeled dolphin safe if they do not meet the conditions set out in the U.S. provisions, does not convert the U.S. provisions from a standard into a technical regulation. Whether marketers of tuna products want to comply with the U.S. provisions and label their products dolphin safe remains voluntary. 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

46. Turning to the second point I want to focus on with respect to Mexico's claims under the TBT Agreement: even aside from the fact that the U.S. dolphin safe labeling provisions are not technical regulations, they 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. This point would affect both Mexico's claims under Article 2.2 and 2.4 of the TBT Agreement.

1. Article 2.2 of the TBT Agreement

47. 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. In its submission, Mexico argues that the objective of the U.S. provisions of contributing to dolphin protection is not legitimate because the United States should be pursuing other ecosystem concerns. We are frankly surprised that Mexico would argue that a WTO Panel should stand in the shoes of a Member and decide which policy objectives that Member should pursue over others, for example that the United States should forgo dolphin conservation or prevention of deceptive practices in lieu of other ecosystem concerns in the ETP. 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 however focus on dolphins; the objectives of the U.S. provision cannot be "illegitimate" simply because other environmental concerns also merit attention.

48. We also 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 ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. Nor would allowing tuna products containing tuna caught by setting on dolphins to be labeled dolphin safe fulfill the

provisions' objective of contributing to dolphin protection by ensuring that the U.S. market is not used to encourage the technique of setting on dolphins to catch tuna. Again, this is a technique that adversely affects dolphins.

49. Finally, we 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 word "necessary" in Article 2.2 of the TBT Agreement, however, appears in a very different context than the word "necessary" in Article XX of the GATT 1994. In Article XX(b), for example, the question is whether it is necessary for a Member to breach its GATT obligations to protect human, animal or plant life or health. In Article 2.2, the question is whether an otherwise WTO-consistent measure restricts trade more than is necessary to fulfill the measure's objective. The elements that go into answering these respective questions differ and it would not be appropriate to apply the same legal approach to both.

2. Article 2.4 of the TBT Agreement

50. With respect to Mexico's claims under Article 2.4 of the TBT Agreement, even aside from the fact that the measures at issue are not technical regulations, those claims would fail for similar reasons as Mexico's Article 2.2 claims: 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."

51. 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, since those definitions would allow tuna caught in a manner that adversely affects dolphins to be labeled dolphin safe. This would defeat the objective of ensuring consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. It would also defeat the objective of ensuring that the U.S. market is not used to encourage the technique of setting on dolphins to catch tuna. Mexico, therefore, has not established that the so-called "relevant international standard" it identifies – the AIDCP resolutions – would be effective and appropriate in fulfilling the objectives of the U.S. provisions.

52. I note that Mexico's statement today devoted significant time to Mexico's view of a number of factual issues that the Panel need not evaluate to decide the legal issues before it in this dispute. In particular, the respective U.S. and Mexican positions on the Panama Declaration and whether the U.S. made, and kept commitments made, in that connection are not relevant to whether the U.S. provisions are consistent with the WTO obligations at issue in this dispute. The United States has already presented its views in connection with the Panama Declaration in its written submission and will not repeat them here.[40]

53. Further, Mexico's efforts to elaborate the relative ecosystem impacts of various methods

[40]U.S. First Written Submission, paras. 76-79.

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. The U.S. provisions have as their objective ensuring that consumers are not deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and contributing to the dolphin protection. That is, the U.S. provisions focus on dolphins. The fact that they do not also focus on other marine species is irrelevant to whether the U.S. provisions, for example, afford less favorable treatment to imported products or are more trade-restrictive than necessary to fulfill their legitimate objective, which again focuses on dolphins. In addition, as pointed out in the U.S. first written submission, a number of Mexico's factual assertions about relative ecosystem impacts are inaccurate, misleading or over-simplistic.

VII. Amicus Submission

54. A final point for today's statement concerns the amicus curiae submission filed by the Humane Society International and the American University, Washington College of Law, in Washington, DC, and the Chairman's invitation that the parties and third parties to this dispute may offer views in relation to this submission at today's meeting. We have reviewed the submission 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. For example, the submission discusses the adverse impact on dolphins and dolphin populations in the ETP resulting from the practice of setting on dolphins to catch tuna,[41] it explains that fleet capacity in the ETP is the

[41] Amicus Curiae, paras. 36-51.

largest threat to tuna stocks in the ETP rather than particular fishing techniques,[42] as well as reviews the substantial retailer and consumer interest in a dolphin safe label that ensures that consumers are not misled as to whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.[43] We also note the Humane Society International's nearly three decade involvement in the issues surrounding this dispute. We urge the Panel to review and consider the submission in its deliberations on this dispute.

VIII. Conclusion

55. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

[42] Amicus Curiae, paras. 58-61.

[43] Amicus Curiae, paras. 62-70, 106-110.