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

(WT/DS381)

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

December 22, 2010

I. Introduction

1. Mexico is essentially asking the Panel to find that Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Articles 2.1, 2.2 and 2.4 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") require the United States to allow tuna products that contain tuna caught by setting on dolphins to be labeled dolphin safe. Setting on dolphins to catch tuna, however, is not safe for dolphins. It is for this reason that the U.S. voluntary dolphin safe labeling provisions do not permit tuna products that contain tuna caught by setting on dolphins to be labeled dolphin safe.

2. With respect to GATT 1994 Article III:4, Mexico fails to present any evidence that the U.S. provisions afford any different treatment to imported tuna products as compared to domestic tuna products. With respect to Article I:1, Mexico fails to present any evidence that the U.S. provisions afford any different treatment to Mexican products as compared to tuna products from other countries.

3. Mexico has also failed to establish that the U.S. provisions set out labeling requirements with which compliance is mandatory and has therefore failed to establish that the U.S. provisions are even technical regulations subject to Articles 2.1, 2.2 and 2.4 of the TBT Agreement. It also has not established the other elements necessary to demonstrate a breach of those articles.

II. Setting on Dolphins Adversely Affects Dolphins

4. The United States has provided ample evidence in its earlier submissions that setting on dolphins has significant adverse effects on individual dolphins. Dependent nursing dolphin calves are often separated from their mothers during the high-speed chases. Without their mothers, these young dolphins often starve to death or are killed by predators. Dolphins may also suffer other harms, some of them cumulative, that may not be observed at the time of the set but manifest at some point later. And these conclusions are uncontested by Mexico.

5. There is clear evidence that these adverse effects result in unobserved mortality and serious injury of dolphins in the ETP and are attributable to the practice of setting on dolphins to catch tuna. For example, Mexico does not refute evidence that dolphin mortality is at least 14% greater than observed dolphin mortality due to dependent calves that are separated from their mothers.

6. In terms of the effects on dolphin populations, the United States has also offered substantial evidence that setting on dolphins is adversely affecting dolphins stocks. Mexico is wrong when it argues that dolphin stocks are growing at rates that indicate population recovery. The most recent assessment model was published in 2007. That report shows median annual growth rates at 1.7 and 1.4 percent, respectively, for offshore spotted and eastern spinner dolphin stocks in the ETP.

III. ETP Is Unique

7. The ETP is the only ocean in the world where there is a regular and significant tuna-dolphin association that is commercially exploited on a wide scale commercial basis to catch tuna. And, it is the only ocean in the world for which the best available science indicates that the most probable reason dolphin populations have remained depleted for over 20 years and show no clear signs of recovery is because of that fishing method.

8. Mexico's assertions that there is substantial evidence of tuna-dolphin associations and harm to

marine mammals in other fisheries at least comparable to that in the ETP are simply unfounded. The additional information Mexico cites in its second written submission does not support that dolphin mortality outside the ETP is comparable to dolphin mortality inside the ETP or that tuna and dolphins associate outside the ETP in any way comparable to the way they do in the ETP.

IV. Access to U.S. Market

9. Mexico asserts that the U.S. dolphin safe labeling provisions "*de facto*" condition access to principal U.S. distribution channels for tuna products on those products containing tuna caught using a "fishing method unilaterally imposed by the United States." There is no basis for Mexico's assertion. The U.S. dolphin safe labeling provisions do not require tuna products to be labeled dolphin safe to be exported to or sold in the U.S. market and in fact tuna products that are not labeled dolphin safe are sold in the United States.

10. Further, under the U.S. provisions, there is no reason Mexico could not sell tuna products in the United States that contain tuna caught by that portion of its fleet that does not set on dolphins with a dolphin safe label. In fact, at one point in time, Mexico did exactly this.

11. Mexico appears to equate the U.S. provisions as "pressure" amounting to a requirement. There is no basis for this. Further, it is retailers' and consumers' preference for dolphin safe tuna, not the U.S. provisions, that affects the demand in the United States for tuna products that contain tuna caught by setting on dolphins. Mexico's arguments that the U.S. provisions created consumers' preference for dolphin safe tuna products are unsupported and ignore the history leading up to enactment of the U.S. dolphin safe labeling provisions.

V. Article III:4 of GATT 1994

12. Regarding Mexico's claims under Article III:4, Mexico misconstrues the U.S. argument. The United States is not arguing that simply because a measure is origin neutral on its face, it is consistent with the obligation under Article IIII:4 to provide national treatment. Instead, what we have explained in our previous submissions is that in order to establish that a measure affords less favorable treatment to imported products – either on its face or in fact – it must be shown that the treatment afforded imported products is different than the treatment afforded like domestic products and that any such different treatment is less favorable. Article III:4 does not prohibit different treatment of products based on factors unrelated to the foreign origin of the product. As Article III:1 makes clear, the general principle under Article III is that measures shall not be applied so as to afford protection to domestic production.

13. Thus, in this dispute where Mexico concedes that the U.S. dolphin safe labeling provisions do not on their face afford less favorable treatment to imported products, Mexico must show that the U.S. provisions use what appears to be an origin neutral condition, for example, fishing technique, to single out imported tuna products for treatment that is different and less favorable than treatment accorded domestic tuna products.

14. Mexico fails to acknowledge the significance of the findings in *EC – Biotech* and *Dominican Republic – Cigarettes*. In particular, Mexico misses the key point made by the panel and Appellate Body in those reports: establishing that a measure affords less favorable treatment to imported products than

to like domestic products requires showing that any different treatment afforded some imported products as compared to some like domestic products is attributable to the foreign origin of the imported products.

15. As noted, Mexico has failed to establish that the facially origin-neutral conditions under which tuna products may be labeled dolphin safe in fact accord different treatment to imported tuna products.

16. First, no tuna product may be labeled dolphin safe if it contains tuna caught by setting on dolphins. It is true that Mexico sets on dolphins to catch tuna, and that tuna products containing that tuna cannot be labeled dolphin safe. But those facts do not establish that the U.S. dolphin safe labeling provisions use fishing technique as a proxy to treat imported tuna products differently (or less favorably) than domestic tuna products.

17. Second, Mexico has expressly stated that its national treatment and most-favored nation claims are not based on any differences in documentation to support dolphin safe claims.

18. Third, in our previous submissions, the United States reviewed the type of evidence put forth in other disputes where seemingly origin-neutral criteria were in fact used to afford different treatment to imported products. For example, in the *Mexico – Soft Drinks* dispute, the facts demonstrated that "almost 100 per cent" of imported products were subject to a higher tax rate than like domestic products. In the *Chile – Alcohol* dispute, the facts showed that 95 percent of imports were subject to the higher tax rate. In this dispute, the vast majority of imported tuna products do not contain tuna that was caught by setting on dolphins and are eligible to be labeled dolphin safe.

19. Mexico has also failed to show that the U.S. provisions modify the conditions of competition to the detriment of imported products. First, to establish that a measure has modified the conditions of competition to the detriment of imported products it is insufficient to show that the measure introduced some change in the market; instead, it must be shown that the change the measure introduced modified the conditions of competition as between imported products and like domestic products.

20. Further, the U.S. measures do not affect the ability of Mexican tuna products to be marketed in the United States. That many retailers choose not to stock non-dolphin safe tuna, and that there is limited demand for non-dolphin safe tuna products generally, is a result of retailer and consumer preferences for dolphin safe tuna products, not the U.S. dolphin safe labeling provisions.

21. Second, Mexico is wrong that the impact of the U.S. provisions on Mexican tuna products differed from their impact on domestic tuna products. For example, at the time the U.S. provisions were enacted 46 U.S. purse seine vessels fished for tuna in the ETP as compared to 52 Mexican purse seine vessels, and both primarily set on dolphins to catch tuna.

VI. Article I:1 of GATT 1994

22. With respect to its claim under Article I:1, first, Mexico appears to be conflating its Article III:4 and Article I:1 claims. In particular, Mexico assumes that the "conditions of competition" analysis that panels and the Appellate Body have taken in examining whether a measure affords "less favorable treatment" under Article III:4 is equally applicable to examining whether a measure fails to accord an

advantage under Article I:1. This is not the case.

23. Second, Mexico has failed to put forward any evidence of the advantage the U.S. provisions allegedly accord tuna products originating in other countries that the U.S. provisions allegedly fail to accord Mexican tuna products. It has also not explained why, if the U.S. provisions "pressure" Mexico's fishing fleet to change its fishing practices or location, the U.S. provisions do not similarly pressure fishing fleets of other countries to change fishing methods or location.

24. The sole basis for Mexico's claim under Article I:1 is that Mexican tuna products contain tuna caught by setting on dolphins in the ETP, while tuna products originating in other countries contain tuna caught using alternative methods in other oceans. However, evidence submitted by the United States shows that vessels of many countries fish for tuna in the ETP both by setting on dolphins and by using other methods, and that the origin of tuna is determined by the flag of the vessel that caught it, not where it was caught.

25. In this regard, Mexico misunderstands the reports in *Canada – Autos* and *Colombia – Ports*. Those reports very clearly state – even in the passages Mexico quotes – that Article I:1 permits Members to grant an advantage subject to conditions, provided such conditions are not based on origin. Contrary to Mexico's assertion, the facts in this dispute are not analogous to those in *Belgian Family Allowances*: the conduct of the government of Mexico, including the laws it has adopted, has nothing to do with whether tuna products may be labeled dolphin safe.

26. We also recall that the GATT 1947 panel in *United States – Tuna Dolphin I* already considered and decided whether the U.S. dolphin safe labeling provisions discriminate against Mexican tuna products by conditioning the use of a dolphin safe label on tuna products not containing tuna caught by setting on dolphins.

VII. Additional Points Raised by Mexico

27. Mexico has not identified how the text of Article I:1 or III:4 of the GATT 1994 prohibit the type of "pressure" Mexico claims the U.S. provisions exert on its fishing fleet. Evaluating whether or not a measure might amount to "extra-territorial regulation" is neither useful nor relevant to analyzing whether a measure is or is not consistent with these obligations.

28. Moreover, Mexico's assertion that the WTO Agreement prohibits a Member from conditioning access to its market on products having been produced in a particular way, if true, would have significant implications that go way beyond the issues in this dispute.

29. Mexico asserts, without any reference to provisions of the WTO Agreement or other relevant sources, that the Panel should only consider facts as proposed at the time the Panel was established when assessing if the U.S. provisions violate Articles I:1 and III:4 of the GATT 1994. Mexico's argument should be rejected. There is no reason that the panel should ignore the evidence and analysis that is clearly relevant to this dispute.

VIII. TBT Claims

30. ***Technical Regulation***. Regarding Mexico's claims under the TBT Agreement, Mexico has not established that the U.S. dolphin safe labeling provisions are technical regulations and therefore that the U.S. provisions are even subject to the TBT provisions that Mexico alleges they breach.

31. Mexico continues to focus on the notion that because the U.S. provisions make it unlawful to label tuna products dolphin safe if they contain tuna caught by setting on dolphins, compliance with the U.S. provisions is mandatory. Mexico's argument however conflates the meaning of the term "labeling requirement" with the meaning of the phrase "with which compliance is mandatory." The term "labeling requirement" appears in both the definition of a standard and the definition of a technical regulation, with the difference between a labeling requirement that is a standard and a labeling requirement that is a technical regulation being that compliance with the former is not mandatory while compliance with the latter is. Thus, to establish that a labeling requirement is a technical regulation, compliance with the conditions under which a product may be labeled in a certain way must be mandatory.

32. Compliance with a labeling requirement is mandatory where the measure not only sets out the conditions under which a product may be labeled in a particular way, but also requires the product to be labeled in that way to be imported, sold or otherwise placed on a market. Were it otherwise, as Mexico suggests, this would render either the term "labeling requirement" or the phrase "with which compliance is not mandatory" in the definition of a standard without effect. It would also render the phrase "with which compliance is mandatory" in the definition of a technical regulation without effect.

33. Mexico's arguments that compliance with the U.S. dolphin safe labeling provisions is mandatory because they "restrict retailers, consumers and producers to a single choice for labeling tuna products dolphin safe" finds no basis in the text of the TBT Agreement. Allowing products to be labeled in a certain way that do not meet those conditions would defeat the purpose of the labeling requirement.

34. ***Articles 2.2 and 2.4 of the TBT Agreement***. Setting aside that Mexico has not established that the U.S. dolphin safe labeling provisions are technical regulations, Mexico has also not established the basic elements necessary to substantiate its claims under Articles 2.2 and 2.4 of the TBT Agreement. For example, with respect to its claim under Article 2.2 of the TBT Agreement, Mexico has not identified a reasonably available alternative measure that would fulfill the objectives of the U.S. provisions. There are a number of additional flaws in Mexico's arguments under Article 2.2 and 2.4.

35. First, Mexico's assertion that the U.S. dolphin safe labeling provisions are based on the "assumption" that setting on dolphins to catch tuna adversely affects dolphins flatly contradicts the evidence before this Panel as reviewed earlier in our statement. By conditioning the labeling of tuna products on such products not containing tuna caught by setting on dolphins, the U.S. provisions fulfill their objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner harmful to dolphins.

36. Second, the hypothetical situation that Mexico describes under which a tuna product might be sold as dolphin safe that contains tuna caught in a set in which a dolphin was killed or seriously injured is not evidence that the U.S. provisions fail to fulfil their objective. Mexico's argument ignores the reality that in adopting measures to fulfil legitimate objectives it is appropriate for Members to consider the costs of such measures in light of their benefits. Indeed, this is a means by which Members can help ensure that their measures are not more trade-restrictive than necessary to fulfil their legitimate objectives.