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 SECOND SUBSTANTIVE MEETING OF THE PANEL

December 16, 2010

1. Mr. Chairman and members of the Panel: on behalf of the United States, thank you for this additional opportunity to present the views of the United States in this dispute and for your continued work on this matter.

I. Introduction

2. In this dispute, 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. There is well-established and substantial evidence – much of which is uncontested by Mexico – that setting on dolphins to catch tuna is harmful 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.

3. Mexico's claims are based on flawed interpretations of the relevant legal provisions and are unsubstantiated by the evidence on record in this dispute. With respect to its claims under Article III:4 of the GATT 1994, 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.

Likewise with respect to its claims under Article I:1 of the GATT, 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. Mexico's position that the U.S. provisions may breach Article III:4 or I:1 without such evidence is incorrect.

4. With respect to Mexico's claims under the TBT Agreement, Mexico has 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.

5. We will return to each of Mexico's legal claims further on in our statement today, along with some key facts relevant to this dispute. But, before turning to those, we highlight what has been a difficulty from the outset of these proceedings: what to make of the many "facts" Mexico has presented yet failed to relate to its legal arguments. In some instances Mexico itself indicates that such facts are irrelevant. For example, Mexico explains that the points it raises regarding certifications to support dolphin safe claims for tuna caught inside and outside the Eastern Tropical Pacific (ETP) are not relevant to its claims that the U.S. provisions discriminate against Mexican tuna products.[1] It also explains that any costs associated with adopting alternative fishing techniques are immaterial to its claims that the U.S. provisions modify the conditions of competition for tuna products.[2] Mexico further concedes that its discussions of bycatch in the ETP and its views about the relative eco-system impacts of various fishing methods are only

[1]Mexico Second Written Submission, para. 149.

[2]Mexico Second Written Submission, para. 152.

indirectly relevant to this dispute.[3]

6. In other instances, it is not at all clear to what end Mexico has placed certain "facts" on the record and how these "facts" relate to its legal arguments in this dispute. As the complaining party, it is Mexico's burden to put forth evidence and argument to substantiate its legal claims. This includes explaining how the facts it presents relate to its legal arguments.[4] Where Mexico has not done so, it is neither the job of the United States nor of the Panel to make Mexico's case for it.[5]

II. Setting on Dolphins Adversely Affects Dolphins

7. The United States has provided ample evidence in its earlier submissions that setting on dolphins has significant adverse effects on individual dolphins.[6] For example, as dolphins are chased by speedboats and helicopters, dolphins swim at top speed to avoid being caught in the nets. 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

---

[3]Mexico Answers to the First Set of Questions from the Panel, para. 62.

[4]*Appellate Body Report, Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, para. 191, WT/DS276/AB/R, adopted 27 September 2004; Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft -Recourse by Brazil to Article 21.5 of the DSU*, para. 50, WT/DS70/AB/RW, adopted 20 August 1999.

[5] *See e.g.,* Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* , paras. 149-156, WT/DS285/AB/R, adopted 20 April 2005; Appellate Body Report, *Canada – Wheat (AB)*, para. 191; *Appellate Body Report, Japan - Measures Affecting Agricultural Products*, paras. 125-131, WT/DS76/AB/R, adopted 19 March 1999; *Canada - Aircraft (AB 21.5)*, para. 50.

[6]U.S. First Written Submission, paras. 46-59.

observed at the time of the set but manifest at some point later. Examples of such harms include damage to cardiac muscles that may lead to cardiac arrests, other muscle and organ damage, failed or impaired reproduction, compromised immune function, and increased predation rates.[7] And these conclusions are uncontested by Mexico.

8. 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.[8]

9. I will review the effect of setting on dolphin on dolphin populations in a moment, but before that I want to emphasize the effects I just reviewed alone are sufficient to establish that setting on dolphins to catch tuna is harmful to dolphins.

Population Growth Rates

10. 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. As reviewed in previous submissions, the best available science indicates that the practice of setting on dolphins to catch tuna in the ETP is the most probable reason that, 20 years since adoption of

---

[7]U.S. First Written Submission, paras. 52-59; U.S. Answers to the First Set of Questions from the Panel, (Question 34), paras. 78-84); Reilly et al. 2005. Report of the scientific research program under the International Dolphin Conservation Program Act. NOAA-TM-NMFS-SWFSC-372. Exhibit US-19.

[8]Archer, F., T. Gerrodette, S. Chivers, and A. Jackson. 2004. Annual estimates of missing calves in the pantropical spotted dolphin bycatch of the eastern tropical Pacific tuna purse-seine fishery. Fishery Bulletin 102:233-244. Exhibit US-27; *see also* U.S. Answers to the First Set of Questions from the Panel (Question 34), para. 80; U.S. First Written Submission, para. 55.

conservation measures, these dolphin populations remain depleted at less than 30 percent of historic abundance and have shown no clear signs of recovery.[9]

11. Mexico is wrong when it argues that dolphin stocks are growing at rates that indicate population recovery. Mexico bases this argument on a 2008 report containing abundance estimates through 2006 and characterizes this report as an "assessment model."[10] First, the 2008 report is not an assessment model. The most recent assessment model was published in 2007.[11] 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.[12] As even the authors of the 2008 report acknowledged, "the rate at which these two dolphin populations are growing should be estimated using assessment models, which can condition based on realistic population dynamics."[13]

12. Second, the authors of the 2008 report cautioned against interpreting the estimates contained in the report as evidence that dolphin populations are beginning to recover, citing three primary caveats. The first caveat is that the range of possible growth rates is greater than in previous estimates, indicating greater uncertainty as to the true population abundance of ETP

---

[9]U.S. Answers to the First Set of Questions from the Panel (Question 35), paras. 86-88; U.S First Written Submission, paras. 47-51.

[10]Mexico Second Written Submission, para. 50.

[11]This assessment model is Wade, P.R., G.M. Watters, T. Gerrodette, and S.B. Reilly. 2007. Depletion of spotted and spinner dolphins in the eastern tropical pacific: modeling hypotheses for their lack of recovery. Marine Ecology Progress Series 343:1-14, Exhibit US-21.

[12]Wade et alia p. 7, Exhibit US-21.

[13]Gerrodette, T., G. Watters, W. Perryman, and L. Ballance. 2008. Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003. NOAA Tech. Memo. NMFS-SWFSC-422. p.13. Exhibit Mex-33 and Exhibit US-20.

dolphin stocks and their respective estimated growth rates.[14] The second is that the results indicated possible abundances for northeastern offshore spotted dolphins and eastern spinner dolphins that are equal to or less than previous estimates, which would indicate these populations are not increasing or that they may be declining. In other words, the 2008 report indicates even given that the point abundance estimates for some stocks appear to be higher than in the past it is possible that dolphin populations are actually declining.[15] The third caveat is that the estimated increase in northeastern offshore spotted dolphins is coincident with a decrease in the western/southern stock of spotted dolphin. A likely explanation for these results is that dolphins from the western/southern stock are moving across the stock boundary and being counted as animals belonging to the northeastern offshore stock. This means that any apparent increase in the abundance of the northeastern offshore stock of spotted dolphin is not a real increase in this stock. In fact, this explanation is supported by the estimates in the 2008 report that indicate the overall estimated abundance of offshore spotted dolphins was lower than in previous estimates.[16] Thus, contrary to Mexico's assertions, the 2008 report, when interpreted in the context discussed by the authors, does not provide a clear indication that these dolphin populations are recovering at the expected rates, and the report provides for the possibility they may not be increasing at all.

13. Mexico also raises several incorrect and inaccurate points about the 2007 report and

[14]Gerrodette et alia, Exhibit US-20, p. 12-13.

[15]Gerrodette et alia, Exhibit US-20, p. 12-13.

[16]Gerrodette et alia, Exhibit US-20, p. 12-13.

assessment model cited by the United States.[17] We would be happy to review those points in questions and answers with the Panel.

III. ETP Is Unique

14. In addition to the adverse effects of setting on dolphins to catch tuna, another key fact in this dispute is that the ETP is unique. It 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. It is the only ocean in the world where millions of dolphins are intentionally chased and encircled each year to catch tuna and for which dolphin mortality and serious injury are a regular, foreseeable and expected consequence of that fishing method. 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.

15. 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 and, to the extent Mexico is referring to marine mammals other than dolphins and non-tuna fisheries, those assertions are completely irrelevant to the legal issues in this dispute. In raising this argument, Mexico also forgets that it bears the burden of proof of establishing what it asserts is true. Mexico cannot simply argue that, because other regional fisheries management organizations do not have programs to monitor bycatch of marine mammals comparable to the one Mexico agreed to in the AIDCP, harm to marine mammals in those fisheries is comparable

[17]Mexico Second Written Submission, paras. 48-50, 56-61; U.S. Answers to the First Set of Questions from the Panel (Question 34), paras. 79-85.

to the harm to dolphins in the ETP or that tuna and dolphins associate in those fisheries in a regular and significant way. As reviewed in the U.S. second written submission, dolphin mortalities and the association between tuna and dolphins in the ETP are fundamentally different than dolphin mortalities that may occasionally occur in other fisheries anywhere in the world and to the extent there are any tuna-dolphin associations outside the ETP they are rare, ephemeral and irregular.[18]

16. 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.[19] The conclusions and extrapolations Mexico draws from the report on the Western Central Pacific Ocean are not valid for a number of reasons. For example, that report cites data on total marine mammal mortality over an *eleven year period*.[20] Mexico inexplicably comes to the conclusion that these data represent the number of marine mammal mortalities *per year*.[21]

17. But even if these data did represent marine mammal or even dolphin mortalities per year it would not be accurate to cite this as evidence that dolphin mortality and serious injury outside the ETP is comparable to dolphin mortality and serious injury inside the ETP. To do so would ignore that while approximately 1200 dolphins are *observed* killed in the ETP each year, millions

---

[18]U.S. Second Written Submission, paras. 42, 48-49.

[19]U.S. Second Written Submission, paras. 50-52; U.S. Answers to the First Set of Questions from the Panel (Question 11), paras. 32-34; *id.* (Question 15), paras. 47-50.

[20]Mexico Second Written Submission, paras. 100-102.

[21]Mexico Second Written Submission, para. 103.

are chased and encircled with consequent harm including unobserved dolphin mortality that the best available science suggests is the reason dolphin populations remain depleted and show no clear signs of recovery.

18. In its arguments about other fisheries, Mexico also jumps to the conclusion that because no other fishery in the world has implemented a program "remotely comparable to the AIDCP – especially its requirement that an independent observer be onboard 100% of the fishing trips of every vessel,"[22] this means that other fisheries management organizations and the United States in particular are unconcerned about marine mammal mortalities or other bycatch in those fisheries. This is incorrect. What Mexico's argument completely overlooks is that the reason that the AIDCP includes a 100 percent observer requirement is precisely because of the nature of the problem in the ETP: millions of dolphins are being chased and encircled in the ETP to catch tuna, and dolphin mortality is a regular, expected and foreseen consequence of that fishing method. Ensuring that the AIDCP dolphin mortality limits are met requires observers to document for each set whether dolphins are killed or seriously injured. If anything can be inferred from the absence of a 100 percent observer requirement to monitor marine mammal interactions in other fisheries, it is that in those other fisheries there is not a problem such as the one in the ETP that merits such a requirement.

IV. Access to U.S. Market

19. 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

[22]Mexico First Written Submission, para. 52; Mexico Answers to the First Set of Questions from the Panel (Question 14), para 16.

using a "fishing method unilaterally imposed by the United States."[23] There is no basis for Mexico's assertion. The U.S. dolphin safe labeling provisions set out conditions for voluntarily labeling tuna dolphin safe. They 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. This includes Mexican tuna products that are not labeled dolphin safe and sold in specialty grocery stores and on the Internet[24] and tuna products originating in other countries that are not labeled dolphin safe and are sold in major distribution channels, such as Walmart's Great Value Tuna which is a product of Thailand.[25] The U.S. provisions also do not require vessels to fish for tuna in any particular way to access the U.S. market and in fact tuna products that contain tuna caught by setting on dolphins are sold in the United States. The United States imported, for example, $7.5 million worth of canned tuna products from Mexico in 2009, which according to Mexico all contained tuna caught by setting on dolphins and accordingly were not labeled dolphin safe.

20. 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.[26]

21. Mexico appears to equate the U.S. provisions as "pressure" amounting to a requirement.

---

[23]Mexico Second Written Submission, para. 116; *see also e.g., id.* paras. 1, 152.

[24] U.S. First Written Submission, para. 95.

[25] U.S. First Written Submission, pars. 94-95; *see also* Exhibit US-51; U.S. Written Submission, para. 96; Photo of Great Value Tuna, Exhibit US-73.

[26]*See, e.g.*, Photo of Ocean's Best, Exhibit US-72

There is no basis for this. As noted, there is no restriction on the sale of tuna that is not dolphin safe. It should also be pointed out that Mexico states later in its second written submission that "the U.S. measures have no effect on encouraging foreign fishing fleets not to set on dolphins,"[27] an argument that would appear to directly contradict its argument that the U.S. provisions pressure the Mexican fleet to change its fishing method.

22. 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.[28]

23. In sum, there are simply no facts to support Mexico's assertion that the U.S. provisions "in fact" condition access to the U.S. market on Mexico's fleet adopting certain fishing practices.

V. Introduction to Article I:1, III:4 and 2.1 Claims

24. Turning to Mexico's legal claims, Mexico focuses its second written submission on its claims under Articles I:1 and III:4 of the GATT 1994, and essentially makes no arguments apart from its GATT claims that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.1 of the TBT Agreement. With respect to its claims under Articles I:1 and III:4, as noted at the outset of our statement, Mexico makes no attempt to establish that the U.S. dolphin safe labeling provisions afford any different treatment to imported products than to domestic products based on origin much less treatment that is less favorable. For this reason alone, Mexico's claims fail.

---

[27]Mexico Second Written Submission, para. 206.

[28]U.S. Answers to the First Set of Questions from the Panel (Question 40), paras. 97-101.

A measure that affords the same treatment to imported and like domestic products does not discriminate against imported products and cannot violate Article I:1 or Article III:4 of the GATT 1994.

VI. Article III:4

25. Regarding Mexico's claims under Article III:4 of the GATT 1994, Mexico misconstrues the U.S. argument.[29] 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. The United States recognizes that a measure that is facially neutral may in fact afford less favorable treatment to imported products. 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. In other words, in a national treatment analysis it must be determined what treatment is being afforded imported products as compared to like domestic products. If it is found that a measure affords different treatment based on criteria other than origin (and such criteria are not a proxy for origin), then it cannot be said that the measure is affording different treatment to imported products than like domestic products; instead, such a measure would be distinguishing between different products based on those criteria and not because one set of products happens to be imported. Article III:4 does not prohibit different treatment of products based on factors unrelated to the foreign origin of the product. Indeed, regulation of products is an inherent function of governments and will inevitably result in

[29]Mexico Second Written Submission, para.142.

distinctions among products. Such distinctions only become of concern where they *de jure* or *de facto* discriminate against imported products because they are imported. As Article III:1 of the GATT makes clear, the general principle under Article III is that measures shall not be applied so as to afford protection to domestic production.

26. In a dispute where a complaining party concedes that a measure is origin-neutral on its face but argues that the measure in fact affords less favorable treatment to imported products, that party must show that what appear to be origin-neutral criteria are in fact a proxy to afford less favorable treatment to imported products. 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. Mexico has not established this.

27. Mexico fails to acknowledge the significance of the findings in *EC – Biotech* and *Dominican Republic – Cigarettes*.[30] 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.[31] So, for example, in *EC – Biotech*,

[30]Mexico Second Written Submission, paras. 143-146.

[31] Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para. 96; Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*,

the panel acknowledged that imported products that contained biotech were subject to restrictions that like domestic products that did not contain biotech were not subject to. However, because the basis for that different treatment was not based on origin, but instead whether the products contained biotechnology, the panel concluded that the measure did not afford less favorable treatment to imported products than like domestic products.[32]

28. Likewise, in this dispute, imported tuna products that contain tuna caught by setting on dolphins are not eligible to be labeled dolphin safe while domestic tuna products that do not contain tuna caught by setting on dolphins are eligible to be labeled dolphin safe. However, the basis for that different treatment is not origin; it is whether the tuna product contains tuna caught by setting on dolphins. Contrary to Mexico's assertion,[33] it does not matter from what country a tuna product is imported in terms of eligibility to label that product dolphin safe; it matters whether that tuna product contains tuna that was caught by setting on dolphins.

29. 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. We will not attempt to restate all of our arguments on this point, but would like to highlight and summarize a few issues of note.

30. 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

---

WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006 (*EC – Biotech)*, para. 7.2514-7.2515.

[32]Panel Report, *EC – Biotech*, para. 7.2514.

[33]Mexico Second Written Submission, para. 146.

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. Indeed, the overwhelming majority of tuna products on the U.S. market are imported, and the vast majority of those products do not contain tuna that was caught by setting on dolphins. If fishing technique is a proxy for origin, then it is a poor proxy. Furthermore, while Mexico's large purse seine vessels have chosen to set on dolphins to catch tuna, those fishing vessels can and do also catch tuna in the ETP using other techniques, as do smaller Mexican vessels which comprise one-third of the vessels in Mexico's purse seine fleet.[34]

31. 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.[35] Thus, the fact that in certain narrow circumstances, an observer's certification that no dolphins were killed or seriously injured is not required to support a dolphin safe claim is not relevant to Mexico's claim under Article III:4 of the GATT 1994 (or its claims under Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement). Further, as reviewed in the U.S. Second Written Submission, to the extent there is any difference in the documentation to support dolphin safe claims, any such difference is based on the risk that dolphins may be killed or seriously injured; it is not based on origin.[36] For example, there are clear differences between the ETP purse-seine tuna fishery and a fishery where there is no regular and significant association

[34]U.S. Answers to the First Set of Questions from the Panel (Question 21), para. 57.

[35]Mexico Second Written Submission, para. 149-150.

[36]U.S. Second Written Submission, paras. 39-43, 146.

between tuna and dolphins and no regular and significant dolphin mortality. These differences mean that the risk of dolphin mortality or serious injury is not comparable inside and outside the ETP. It is these differences in risk that justify the different documentation requirements in those narrow circumstances.

32. 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. Mexico has not presented such evidence here.

33. Mexico states that 96 percent of the Mexican tuna catch cannot be used in tuna products labeled dolphin safe and thus that the facts of this dispute are similar to *Mexico – Soft Drinks* and *Chile – Alcohol*.[37] Mexico's argument, however, loses sight of the fact that although a large portion of its fleet has chosen to set on dolphins to catch tuna, its fleet is capable of using, and in fact does use, techniques other than setting on dolphins to catch tuna. It is, thus, not the case that some percentage of the Mexican tuna catch cannot be used in tuna products labeled dolphin safe. One-hundred percent of Mexican tuna could be used in tuna products labeled dolphin safe, provided it meets the same condition that domestic tuna would need to meet to be used in tuna products labeled dolphin safe.

34. Further, as noted in the U.S. Second Written Submission, Mexico has not supported its

[37]Mexico Second Written Submission, para. 188.

assertion that only 4 percent of the total Mexican tuna catch is caught by vessels under 363 metric tons. In addition, Mexico makes the wrong comparison. In *Mexico – Soft Drinks* and *Chile – Alcohol*, the panel and Appellate Body looked at the portion of all imported products that were subject to the higher tax rate as compared to the portion of like domestic products that were subject to that 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. Therefore, the facts of this dispute are not comparable to the facts in the *Soft Drinks* or *Chile – Alcohol* disputes. To the extent Mexico is making an argument that Mexican tuna products are being treated differently or less favorably than tuna products originating in other countries, such arguments would not be relevant to its Article III:4 claim.

Conditions of Competition

35. Notwithstanding that Mexico has not shown that the U.S. provisions afford any different treatment to tuna products that are imported based on origin, Mexico has also failed to show that the U.S. provisions modify the conditions of competition to the detriment of imported products.[38] Again, we will not reiterate all of our arguments on this point, but highlight a few key issues.

36. 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. In this dispute, it is true that the U.S. dolphin safe labeling provisions introduced a change: they

[38] *See, e.g,* U.S. Second Written Submission, paras. 59-64.

established conditions under which tuna products could be labeled dolphin safe that did not exist previously. But, those conditions apply equally to imported and domestic tuna products and thus any change the U.S. provisions introduced regarding the conditions under which tuna products compete is not one that modified the conditions of competition to the detriment of imported products. Under the U.S. provisions, all tuna products compete under the same conditions: tuna products – regardless of origin – that contain tuna caught by setting on dolphins may not be labeled dolphin safe.

37. Further, the U.S. measures do not affect the ability of Mexican tuna products to be marketed in the United States. Retailers can choose to sell both products that do and do not meet the conditions to be labeled dolphin safe and still comply with the law. 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.

38. 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.[39] Furthermore, a measure cannot be considered to modify the conditions of competition to the detriment of imported products simply because there are costs associated with meeting conditions set out in

[39]U.S. Opening Statement at the First Panel Meeting, paras. 20; U.S. Second Written Submission, para. 28..

the measures and those costs may be higher for imported products than like domestic products.[40]

VII. Article I:1

39. With respect to its claim under Article I:1 of the GATT 1994, there are two points that are important to emphasize. 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. Prior panel or Appellate Body reports have not applied a "conditions of competition" analysis in the context of Article I:1. Article I:1 should be interpreted based on its text which refers to according an advantage, privilege or immunity that it grants any Member immediately and unconditionally to all Members.

40. 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. In fact, Mexico has not submitted any evidence about fishing methods, locations, costs, etc. of vessels of countries other than Mexico and the United States. Nor has it submitted any information to substantiate its assertion that the U.S. provisions use the location where tuna is caught or the method by which it was caught to deny Mexican tuna products an advantage they accord tuna products originating in other countries. It has also not explained why, if the U.S. provisions "pressure" Mexico's fishing fleet to change its

[40]U.S. Opening Statement at the First Panel Meeting, paras. 24-26.

fishing practices or location, the U.S. provisions do not similarly pressure fishing fleets of other countries to change fishing methods or location.[41] Or why, if there are costs associated with changing fishing techniques, those costs would not equally be borne by vessels of other countries that change fishing methods. Or why, if U.S. industry support for the U.S. provisions is relevant at all, it would be evidence that the U.S. provisions accord an advantage to tuna products of other countries that they do not accord to Mexican tuna products.[42]

41. 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.[43] Mexico has not contested these facts nor explained why the U.S. provisions discriminate against Mexican tuna products vis-a-vis tuna products originating in other countries. Is it Mexico's position, for example, that prior to 2010 when Ecuadorian vessels were authorized to set on dolphins to catch tuna, the U.S. provisions failed to accord Ecuadorian tuna products an advantage that the U.S. provisions afforded tuna products originating in other countries? And, is it Mexico's position that because Ecuadorian vessels have elected not to set on dolphins in 2011 that the U.S. provisions no longer fail to accord that advantage to Ecuadorian tuna products? Or is it Mexico's position that the U.S.

[41]Mexico Second Written Submission, paras. 151-154.

[42]Mexico Second Written Submission, para. 165.

[43] U.S. First Written Submission, para. 114; U.S. Second Written Submission, para. 31.

provisions never failed to accord Ecuadorian tuna products an advantage that it accorded to imports originating in other countries? And if so, why is that?

42. The confusion here results from Mexico's failure to identify any origin-based discrimination stemming either in law or in fact from the U.S. dolphin safe labeling provisions. It is whether tuna products contain tuna caught by setting on dolphins or in a set in which dolphins were killed or seriously injured that determines eligibility to be labeled dolphin safe, not the flag of the vessel that caught the tuna.

43. In this regard, Mexico misunderstands the reports in *Canada – Autos* and *Colombia – Ports*.[44] 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. Here, the U.S. dolphin safe labeling provisions do not accord an advantage to tuna products originating in some Members that they do not also accord to tuna products originating in other Members. Tuna products, regardless of the country from which they originate, are subject to the same conditions on being labeled dolphins safe. Mexico is wrong when it states that the U.S. provisions condition eligibility to use a dolphin safe label on the "situation or conduct of Mexico."[45] Use of a dolphin safe label is conditioned on whether the tuna product contains tuna caught by setting on dolphins or in a set in which dolphins were killed or seriously injured. Contrary to Mexico's assertion,[46] the facts in this dispute are not analogous to those in *Belgian Family Allowances*: the conduct of the government of Mexico, including the

[44]Mexico Second Written Submission, paras. 181-182.

[45]Mexico Second Written Submission, para. 183.

[46]Mexico Second Written Submission, para. 184.

laws it has adopted, has nothing to do with whether tuna products may be labeled dolphin safe. Moreover, as noted earlier, nothing in the U.S. provisions prevents Mexican vessels from continuing to set on dolphins to catch tuna and alternately catching tuna using other methods and using that tuna in tuna products labeled dolphin safe. Indeed, Mexico is fully able to use the dolphin safe label if it meets the same conditions as any other Member.

44. We also recall that the GATT 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. There, the panel decided that such a condition on use of a dolphin safe label did not discriminate on origin and was therefore not inconsistent with Article I:1 of the GATT 1994.[47] The same is true today.

VIII. Additional Points Raised by Mexico

45. We will now address two additional points Mexico raises for the first time in its Second Written Submission. The first is Mexico's argument that the "mere fact" that U.S. dolphin safe provisions pressure Mexican vessels to change fishing methods or locations "is evidence itself of the *de facto* discriminatory effect of the U.S. measures."[48] Mexico equates such pressure with unilateral extraterritorial regulation and asserts without citation or explanation that such pressure is *a priori* inconsistent with the national treatment and most-favored nation obligations. Beyond the fact that Mexico's position, as noted earlier, on whether such pressure in fact exists is

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

[48]Mexico Second Written Submission, paras. 148, 152.

contradictory at best, there is no basis for Mexico's argument.

46. First, as a factual matter and as already reviewed, the U.S. provisions do not condition access to the U.S. market on Mexican vessels adopting certain fishing practices. Second, whether the U.S. provisions are consistent with Article I:1 or III:4 of the GATT 1994 must be judged based on the text of those provisions. Mexico has not identified how the text of those provisions prohibit the type of "pressure" Mexico claims the U.S. provisions exert on its fishing fleet. Article I:1 and III:4 of the GATT prohibit, respectively, measures that afford less favorable treatment to imported products as compared to like domestic products and measures that fail to accord an advantage to imported products originating in some Members as compared to others. 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.

47. To the extent Mexico is relying on paragraphs 116-118 of its second written submission to support its theory regarding what Articles I:1 and III:4 prohibit (Mexico does not actually indicate to what legal claims, if any, these paragraphs apply), Mexico fails to support any of the assertions it makes in those paragraphs. 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. It is a position that is not in keeping with, for example, the TBT Agreement, which permits Members to adopt technical regulations including mandatory labeling requirements as they apply to a product, process or production method.[49]

[49] TBT Agreement, Article 2 (permitting Members to adopt technical regulations provided certain obligations are met); *id.* Annex 1 (defining a technical regulation as including

48. The second point is that 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 resorts to this argument for two reasons. First, the facts at the time of the enactment of the U.S. provisions strongly support the conclusion that those provisions did not change the conditions of competition to the detriment of imports.[50] Second, the facts that the panel in *United States – Tuna Dolphin I* analyzed to conclude that there was no evidence of *de facto* discrimination by U.S. dolphin safe labeling provisions have not changed in any way that would lead this Panel to a different conclusion. 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.

IX. TBT Claims

Technical Regulation

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

50. In arguing to the contrary, 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

---

mandatory labeling requirements as they apply to a product, process or production method).

[50]See U.S. Second Written Submission, paras. 63-64.

however conflates the meaning of the term "labeling requirement" with the meaning of the phrase "with which compliance is mandatory." The term "labeling requirement" in Annex 1 of the TBT Agreement means the criteria or conditions that a product must meet to be labeled in a particular way and has a meaning that is distinct from 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, in seeking to establish that a labeling requirement constitutes a technical regulation, it is insufficient to simply show that the measure establishes conditions under which a product may be labeled in a certain way. Or said another way, it is insufficient to simply show that the labeling requirement prohibits the labeling of products in a certain way that do not meet certain conditions. Instead, 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.

51. As explained in the U.S. Second Written Submission, 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.[51] 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

[51]U.S. Second Written Submission, para. 89-95.

"with which compliance is mandatory" in the definition of a technical regulation without effect. Such an interpretation would not be consistent with the principle of treaty interpretation that an interpretation of the terms of a treaty is to be preferred that gives full effect and meaning to each of its terms, and should be rejected.

52. When the correct interpretation of the term "technical regulation" is applied with respect to the U.S. dolphin safe labeling provisions it is clear that the U.S. provisions are not technical regulations. While the U.S. dolphin safe labeling provisions set out conditions under which tuna products may be labeled dolphin safe, they do not require tuna products to be labeled dolphin safe to be marketed in the United States. In fact, tuna products that are not labeled dolphin safe are readily available on the U.S. market. The U.S. dolphin safe labeling provisions therefore establish labeling requirements with which compliance is not mandatory.

53. 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.[52] It also ignores that the definition of a labeling requirement is the conditions under which a product may be labeled in a certain way. Allowing products to be labeled in a certain way that do not meet those conditions would defeat the purpose of the labeling requirement. Thus, the fact that the U.S. dolphin safe labeling provisions would not permit tuna products that contain tuna caught by setting on dolphins to be bear an AIDCP "dolphin safe" logo does not make compliance with them mandatory. It makes them labeling requirements – in other words, provisions that set out

[52]Mexico Second Written Submission, para. 196.

conditions under which tuna products may be labeled dolphin safe whether using the AIDCP "dolphin safe" logo or any other dolphin safe logo or term or symbol that falsely conveys that the tuna product does not contain tuna that was caught in a manner that adversely affects dolphins.

Articles 2.2 and 2.4 of the TBT Agreement

54. 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. In fact, it continues to deny that one of the objectives of the U.S. measures even concerns ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins and therefore presents no evidence that any alternatives it raises would fulfill this objective. This failure also pervades Mexico's claims under Article 2.4 where it fails to even address whether the so-called AIDCP standard would be effective and appropriate to fulfil this objective. There are a number of additional flaws in Mexico's arguments under Article 2.2 and 2.4 of the TBT Agreement, each of which are addressed in the U.S. Second Written Submission.[53] For today's statement, we focus on two points.

55. 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[54] flatly contradicts

[53]U.S. Second Written Submission, paras. 119-190.

[54]Mexico Second Written Submission, para. 204.

the evidence before this Panel as reviewed earlier in our statement. Even setting aside the debate about whether dolphin populations are growing and at what rate, it remains uncontested by Mexico that setting on dolphins adversely affects dolphins. Therefore, contrary to Mexico's assertion,[55] 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.

56. 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 has not even established that such a hypothetical situation actually exists and, as reviewed, in the U.S. Second Written Submission the likelihood that such a situation would exist is extremely low.[56] Further, 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.[57] 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. Thus, where the risk of a tuna product containing tuna caught in a set in which a dolphin was killed or seriously injured is low, the U.S. provisions do not condition dolphin safe claims on the provision of an observer's statement that no dolphins were killed or seriously injured. This low risk is balanced

[55]Mexico Second Written Submission, para. 204.

[56]U.S. Second Written Submission, paras. 143-147.

[57]U.S. Second Written Submission, paras. 45, 151-152.

against the cost that conditioning dolphin safe claims on an observers statement would impose on vessels in fisheries that are not already subject to a 100 percent observer requirement like the one that applies with respect to the ETP purse-seine tuna fishery on account of obligations under the AIDCP.

X. Conclusion

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