

***United States – Measures Concerning the Importation, Marketing
and Sale of Tuna and Tuna Products:***

Recourse to Article 21.5 of the DSU by Mexico (DS381)

Comments of the United States of America
on Mexico's Responses
to the Panel's Additional Questions

October 17, 2014

TABLE OF ACRONYMS

Acronym	Full Name
AIDCP	Agreement on the International Dolphin Conservation Program
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
ETP	Eastern Tropical Pacific Ocean
IATTC	Inter-American Tropical Tuna Commission
NOAA	National Oceanic and Atmospheric Administration
TBT Agreement	Agreement on Technical Barriers to Trade
U.S.C.	United States Code
WTO	World Trade Organization

TABLE OF REPORTS

Short Title	Full Citation
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005

RESPONSES TO THE PANEL'S ADDITIONAL QUESTIONS

60. *To both Parties:* In its response to Panel question no. 59, the United States clarified that "the determination provided for under section 216.91(a)(4)(iii) [of the 2013 Final Rule, i.e. that a fishery is causing "regular and significant dolphin mortality or serious injury of dolphins"] only applies to those fisheries not otherwise covered by sections 216.91(a)(1)-(3). As purse seine vessels operating outside the ETP are covered by (a)(2), this determination does not apply to purse seine fisheries outside the ETP".¹ In its comments on this response, Mexico noted that "the United States interprets the statute to authorize small purse seine vessels in the ETP to be made subject to mandatory observer requirements with a determination that they are causing regular and significant mortality (unrelated to tuna-dolphin association), while both large and small purse seine vessels outside the ETP are not subject to such a possibility".²

In light of the above, the Panel understands that (a) large and small purse seine fisheries outside the ETP can never be required to have observers on board because of "regular and significant mortality or serious injuries of dolphins". Rather, observers can only be required in such fisheries where there is "regular and significant association between dolphins and tuna similar to the ETP". Conversely, the Panel understands that non-purse seine fisheries outside the ETP, as well as small purse seine fisheries inside the ETP, can only be required to have observers in board in cases where they are causing "regular and significant mortality or serious injury of dolphins". A determination of "regular and significant association" cannot be made in respect of these fisheries.

- a. Is the Panel's understanding correct? If so, why is the amended tuna measure structured in this way? Why, in other words, can no determination of "regular and significant mortality or serious injury" be made in respect of large and small purse seine vessels outside the ETP, and why can no determination of "regular and significant association of dolphins and tuna" be made with respect to non-purse seine fisheries outside the ETP and small purse seine fisheries inside the ETP? The Panel is aware that small purse seine vessels in the ETP are not allowed to set on dolphins under the AIDCP.
- b. If the Panel's understanding of the above-mentioned provisions is correct, could the fact that no determination of "regular and significant mortality or serious injury" can be made in respect of large and small purse seine vessels outside the ETP, or that no determination of "regular and significant association of dolphins and tuna" can be made with respect to non-purse seine fisheries outside the ETP and small purse seine fisheries inside the ETP result in non-dolphin safe tuna fishing?

¹ United States' responses to the Panel's questions, para. 295.

² Mexico's comments on the United States' responses to the Panel's questions, para. 198.

1. The United States notes that Mexico has once again confirmed that it makes no claim under Article 2.1 of the *Agreement on Technical Barriers to Trade* (“TBT Agreement”) or Articles I:1 or III:4 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) with regard to sections 216.91(a)(2)(i) and 216.91(a)(4)(iii). Mexico had not made any such argument in its first and second submissions to the Panel, or in its opening or closing statements at the panel meeting. And now, in its latest submission, Mexico once again confirms that those provisions “have no bearing” on Mexico’s arguments with regard to its claims.³

2. Mexico only mentions the two provisions in response to the inquiries of the Panel. But even then Mexico only makes conclusory statements that the two provisions are “arbitrary” without explaining why.⁴

3. As the United States has explained, the two determinations provided for in sections 216.91(a)(2)(i) and 216.91(a)(4)(iii) have a sound basis and are not arbitrary.⁵ Moreover, the two provisions authorize NOAA to require an observer statement for *any fishery* where NOAA determines that there is a basis to do so.⁶

4. Further, Mexico has failed to explain how these conclusory characterizations fit within its legal argument. Thus, for purposes of its Article 2.1 claim, Mexico makes no argument that any difference between sections 216.91(a)(2)(i) and 216.91(a)(4)(iii), or the fact that the NOAA has made no determinations pursuant to either provision,⁷ has resulted in a detrimental impact on the conditions of competition for Mexican non-dolphin safe tuna product sold in the United States, or is otherwise not “even-handed.” This is true even though Mexico argues that it is Mexico – as the complainant – that has the burden of establishing a *prima facie* case with respect to all the elements of its Article 2.1 claim.⁸ Likewise, Mexico makes no argument that either provision is

³ Mexico’s Response to Question 60, para. 4.

⁴ See Mexico’s Response to Question 60, para. 6. Also, Mexico now remarks that the amended measure is “arbitrary” because it does not provide for an additional determination as to whether an association exists between dolphins and a particular fishing method (as opposed to tuna). In this regard, Mexico alleges that “dolphins strongly associate with longline fishing.” *Id.*, para. 7. This new argument, of course, misunderstands the amended measure, which is not conditioned on an association between dolphins and a fishing method.

⁵ See, e.g., U.S. Response to Question 60, paras. 1-19.

⁶ See, e.g., U.S. Response to Question 60, para. 14. As explained previously, the term “fishery” is defined by location, gear type (or fishing method) and target species; for example, the Hawaii deep-set longline tuna fishery. See, e.g., U.S. Response to Question 21, para. 135; see also Mexico’s Response to Question 52, para. 140 (“Thus, a fishery typically would be designated as a specific region in which vessels using specific types of gear are fishing for a specific species of sea life.”) (citing FAO, Fisheries Glossary (Exhibit MEX-132)).

⁷ But see *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997, 41,000 (Exh. MEX-7) (stating that NOAA “has no credible reports” that would provide a basis for either determination in any fishery (other than the large purse seine fishery of the ETP)).

⁸ See, e.g., Mexico’s Response to Question 58, paras. 157-158 (discussing Mexico’s burden of proof regarding its Article 2.1 claim); see also Mexico’s Response to Question 5, para. 7 (“The relevant legal test for the purposes of Article 2.1 of the TBT Agreement focuses on ‘even-handedness.’”); Mexico’s Response to Question 56, para. 141 (“Mexico’s position is that, for the Amended Tuna Measure to be even-handed, it must require observers

relevant to its claims under Article I:1 or III:4 of the GATT 1994. Again, Mexico in fact argues the *contrary* position. In Mexico’s view, the Panel should not analyze whether the verification and observer requirements prove the amended measure discriminatory based on any comparison between fisheries.⁹

5. As the United States has discussed previously,¹⁰ a complainant must itself prove all the elements of its *prima facie* case through the evidence and arguments that it provides to the panel,¹¹ and a panel commits reversible error if it assumes any part of the complainant’s burden of proof.¹²

61. To the parties: At para. 71 of Mexico's first written submission, reference is made to "technical training required by the guidelines that the Parties [to the IADCP] establish". Do these guidelines exist? Could the parties please provide a copy of these guidelines to the Panel? The Panel also invites both parties to comment on these guidelines to the extent they wish to do so.

6. Mexico appears to make two points in response to the Panel’s question: 1) there is significant training for AIDCP observers as well as captains of large purse seine vessels operating in the ETP;¹³ and 2) that the AIDCP’s training and requirements are unique – “[n]o other RFMO has requirements for observers or training programs that are even remotely similar” to the AIDCP.¹⁴

7. While Mexico is correct that training does exist for AIDCP observers and the captains of large ETP purse seine vessels, Mexico is incorrect to have argued in this proceeding that the AIDCP requirements (including training) are required for purposes of the AIDCP “dolphin safe” label.¹⁵

and a tracking/verification system for all tuna products to be eligible to be labelled dolphin-safe, without regard as to whether the tuna is sourced from within or without the ETP.”).

⁹ See, e.g., Mexico’s Response to Question 11, para. 52. The United States, of course, strongly disagrees with Mexico’s allegation in paragraph 9 that the amended measure “allows” inaccurate labeling of non-ETP tuna products. See, e.g., U.S. Second Written 21.5 Submission, paras. 101-106.

¹⁰ See U.S. Response to Question 21, para. 135; U.S. Response to Question 60, para. 16.

¹¹ See *US – Gambling (AB)*, para. 140 (“A *prima facie* case must be based on ‘evidence and legal argument’ put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency.”) (emphasis in original).

¹² *US – Gambling (AB)*, paras. 154-155 (reversing the panel’s finding “where no *prima facie* case of inconsistency had been made out by Antigua”).

¹³ Mexico’s Response to Question 61, paras. 10-11.

¹⁴ Mexico’s Response to Question 61, paras. 10-11.

¹⁵ See Mexico’s Closing Oral 21.5 Statement, para. 3 (“The AIDCP measures were created for the specific purpose of facilitating an appropriate and accurate dolphin-safe labelling regime to encourage the protection of

8. The AIDCP parties did not adopt the non-binding “Procedures for AIDCP Dolphin Safe Certification System” until 2001. Yet observers began being placed on large ETP purse seine vessels in significant numbers in 1972 and 100 percent observer coverage was achieved for the U.S. fleet in 1989 and all ETP large purse seine fleets in 1995. The 1999 AIDCP affirmed this already existing commitment to 100 percent observer coverage. Nothing in the AIDCP indicates that this commitment to observers (or any of the other requirements) has anything to do with a future AIDCP dolphin safe label scheme. Rather, the objective of the AIDCP is the same as that of the La Jolla Agreement of 1992 and the Panama Declaration of 1995 – the protection of dolphins from the harms caused by large purse seine vessels chasing and capturing in order to harvest tuna in the ETP.¹⁶ Indeed, the AIDCP Director, in response to Mexico’s questioning of why the large ETP purse seine vessels have 100 percent observer coverage, noted that “the current 100% coverage was primarily for the monitoring required by the AIDCP and for obtaining an accurate count of dolphin mortality.”¹⁷

9. In this regard, it is not at all surprising that the AIDCP requirements (as they relate to observers, training, equipment, etc.) are not “remotely similar” to the requirements imposed on all other vessels (whether operating inside or outside the ETP) as Mexico alleges. *Only* large ETP purse seine vessels are *capable and permitted* to chase and capture dolphins in order to harvest tuna.¹⁸ Other vessels, such as small ETP purse seine vessels, all vessels operating in the IOTC and WCPFC, and all U.S. vessels not subject to the requirements of the AIDCP, are not permitted to intentionally chase and capture *even a single dolphin*, much less the 300-400 dolphins that are set upon in a typical ETP dolphin set.¹⁹ Moreover, non-ETP purse seine vessels (of any size) are not capable of exploiting a tuna-dolphin association similar to the one that occurs in the ETP – that ETP association is unique.

10. Given the unparalleled harm caused by large ETP purse seine vessels by chasing and capturing dolphins by the millions each year, it, of course, makes perfect sense that the AIDCP

dolphins.”); Mexico’s Comments on U.S. Response to Question 5, para. 27 (“The AIDCP requirements are simply one example of how dolphin-safe labelling can be accomplished.”); Mexico’s Comments on U.S. Response to Question 40, para. 145 (“With regard to the U.S. comment that the IATTC does not provide such training for captains of non-purse-seine vessels, Mexico notes that the AIDCP dolphin-safe certification system does not cover tuna caught by such vessels.”).

¹⁶ See AIDCP, Preamble (Exh. MEX-30).

¹⁷ AIDCP, Minutes of 18th Meeting of the Parties, sec. 9 (Exh. US-243) (“Mexico asked about observer coverage in other oceans, and whether 100% coverage was necessary for the scientific study of the stocks, noting that the IATTC covered 30% of the costs of the AIDCP, since this was considered sufficient for scientific estimates. Dr. Compeán said that the level of coverage needed depended on the objective of the study, and for some purposes a lower level was sufficient, but the current 100% coverage was primarily for the monitoring required by the AIDCP and for obtaining an accurate count of dolphin mortality.”).

¹⁸ See U.S. Response to Question 7, para. 49.

¹⁹ See WCPFC Resolution 2011-03 (Exh. US-11) (prohibiting setting on cetaceans in the western and central Pacific Ocean); IOTC Resolution 13/04 (Exh. US-12) (prohibiting the setting on cetaceans in the Indian Ocean); 16 U.S.C. § 1372(a)(1)-(2) (Exh. US-37) (prohibiting U.S. vessels from setting on marine mammals anywhere in the world, subject to limited exceptions).

parties have imposed different requirements on large purse seine vessels operating in the ETP than is imposed on all other vessels, including all other vessels operating in the ETP.

11. What does not make sense, however, is Mexico's claim that the United States discriminates against Mexican non-dolphin safe tuna product sold in the United States by not imposing AIDCP-equivalent verification and observer requirements on all tuna produced in a fishery where at least one dolphin has been killed or seriously injured.²⁰ Mexico has put forward no evidence that the verification and observer requirements imposed on Mexican large purse seine vessels in the ETP provides less favorable treatment to Mexican non-dolphin safe tuna product sold in the United States, for example. Moreover, Mexico's position disregards the relevant science and facts demonstrating legitimate differences between tuna caught by large purse seine vessels chasing and capturing dolphins in the ETP and other tuna.

²⁰ See Mexico's Response to Question 11, para. 52.