



**HUMANE SOCIETY
INTERNATIONAL**

May 29, 2009

Via Electronic Submission
USTR-2008-0038

The Honorable Ron Kirk
United States Trade Representative
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: *WTO Dispute Settlement Proceeding Regarding United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Comments of Humane Society International*

Dear Ambassador Kirk:

On behalf of Humane Society International (HSI), we hereby submit these comments in response to the notice in the Federal Register entitled *WTO Dispute Settlement Proceeding Regarding United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*. 74 Fed. Reg. 18433 (April 22, 2009).

HSI is the international arm of The Humane Society of the United States (HSUS). Together, The HSUS and HSI represent one of the largest animal protection organizations in the world with a constituency of over 11 million people and a significant global presence. HSI works closely with policymakers in a number of international organizations and national governments, conducting briefings and helping to draft legislation, regulations, policy statements, international treaties, free trade agreements, and resolutions affecting animals.

HSI actively participates in discussions of international trade policy at the World Trade Organization (WTO) addressing such issues as equitable development, humane and sustainable agriculture, environmental conservation, and wildlife and habitat protection. In addition, as a member of the Trade and Environment Policy Advisory Committee in the United States, HSI advises the United States Trade Representative (USTR) and the United States Environmental Protection Agency (EPA) on trade and environment issues. HSI also implements a number of trade capacity building and technical assistance programs in developing WTO Member countries to support sustainable economic development, including humane agricultural practices and habitat and wildlife protection policies.

Background

For reasons still unknown, schools of adult yellowfin tuna in the Eastern Tropical Pacific (ETP) Ocean frequently swim beneath large groups of dolphins. Since 1959, tuna fishermen have used this association to target tuna schools. Once the crew of a large fishing vessel locates a group of dolphins, they lower small speedboats equipped with purse seine nets (nets that close at the top) and chase the dolphins until they are exhausted and can be herded into a tight bunch. The chase may last anywhere from 20 minutes to two hours before the fishermen finally drop a purse seine net into the water, encircling the dolphins and the tuna school beneath.

The dolphins are traumatized by the chase and engine noise, and disoriented by the net. Terrified into shock, many are unable or unwilling to escape. Historically, these dolphins were hauled aboard and later discarded, dead or dying, back into the water. Before the enactment of the U.S. Marine Mammal Protection Act (MMPA) in 1972, which included provisions for reducing bycatch to near zero levels, as many as half a million dolphins died every year in this carnage.¹

By the late 1980s, U.S. consumer pressure led to the additional development of the "Dolphin Safe" label, which was adopted by the major U.S. tuna companies in 1990. The "Dolphin Safe" label promised consumers that the tuna had been caught without deliberately setting nets on dolphins. By June 1, 1994, the entire U.S. tuna fleet was dolphin-safe.

In 1997, the U.S. Congress passed the International Dolphin Conservation Act.² This Act required the U.S. Department of Commerce to undertake studies to determine whether intentional setting on dolphins during tuna fishing has a significant adverse impact on any depleted dolphin stocks in the ETP.³ If the studies found no significant adverse impact, a less stringent standard would go into effect in the U.S.⁴ The weaker standard is what is currently in force under the Agreement on the International Dolphin Conservation Program (AIDCP). The major difference between the U.S. standard and the AIDCP standard is that under the latter, fishing boats can intentionally chase, encircle, and traumatize dolphins in purse seine nets and still label tuna caught in this manner "Dolphin Safe" — as long as an on-board observer does not report seeing any dolphins die or sustain serious injury. The U.S. standard, by contrast, prohibits use of the label where there is intentional setting on dolphins.

Despite evidence of a continued decline in dolphin populations in the ETP, the Commerce Department announced a "no significant adverse impact" finding on December 31, 2002. The findings of Commerce's studies were the subject of years of litigation, and were eventually rejected and vacated by the Ninth Circuit Court of Appeals, which found that the agency findings

¹ According to NOAA, "[t]he number of dolphins killed since the fishery began in the late 1950s is estimated to be over 6 million animals, the highest known for any fishery." See *The Tuna Dolphin Issue*, Southwest Fisheries Science Center, NOAA Fisheries Service, *available at*: <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408>.

² See 16 USC § 1385(g); S. 39, 105th Cong. (1997) (leg. hist.); 143 Cong. Rec. 379-401 (1997) (leg. hist.); 143 Cong. Rec. S.8299-8311 (daily ed. July 30, 1997) (statements of Snowe and Stevens) (leg. hist.).

³ *Id.*

⁴ The AIDCP is an international agreement among fishing nations that entered into force in 1999.

erroneously determined the purse seine fishery was not adversely impacting ETP dolphins, were influenced to some degree by political considerations, and did not reflect Congressional intent to produce meaningful scientific results.⁵ In particular, the Circuit Court upheld the District Court's findings that the population of certain ETP dolphin stocks remained severely depleted despite reports of lower dolphin mortality.⁶ Of two explanations offered, changes to the ecosystem and indirect effects from fishery, the court concluded that the best available scientific data show that the combined effects of the latter – including the separation of calves from their mothers, delayed stress effects, and under-reporting of mortality – can “explain the dolphins’ failure to recover, particularly given the intensity of the fishery.”⁷

Because the court vacated Commerce’s findings, the weaker standard never went into effect and U.S. law continues to prohibit any tuna fished in a manner that involves intentional setting on dolphins from qualifying for the “Dolphin-Safe” label under U.S. law.⁸ U.S. law does not, however, place any restrictions on the type of tuna that can be exported to the U.S. Thus, even if a country chooses not to meet the criteria of the U.S. label, it can still export to the U.S. market.

The HSUS/HSI’s Interest in the Present WTO Dispute

The HSUS/HSI have long objected to a weakening of the U.S. Dolphin Safe label on scientific grounds; namely, that intentional setting on dolphins during tuna fishing leads to depletion of dolphin populations. Recent studies indicate that not only do dolphins die as a result of being caught in the net, but their populations are at risk from serious physiological damage caused by traumatic chasing and encirclement, which can lead to reduced reproductive rates or shortened life spans.⁹ This is evidenced by the fact that dolphin populations in the ETP have not fully

⁵ See *Earth Island Institute et al. v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007), amended 494 F.3d 757 (9th Cir. 2007); at paras. 53-59, 66 in web version, available at: <http://bulk.resource.org/courts.gov/c/F3/484/484.F3d.1123.04-17018.html>.

⁶ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37, upheld by *Earth Island Institute et al. v. Hogarth*, 484 F.3d 1123; at para. 63 in web version, available at: <http://bulk.resource.org/courts.gov/c/F3/484/484.F3d.1123.04-17018.html>.

⁷ *Earth Island Inst. v. Donald Evans*, 2004 WL 1774221, at *37. The District Court’s opinion elaborates in great detail on these indirect effects from fishery on dolphin populations. First, it discusses how even though exact data were not available, evidence in Commerce’s study showed that dolphin calf mortality due to mother-calf separation during the chase “could be large.” *Id.* at *26. Second, it discusses the fact that chasing and encirclement of dolphins causes stress, even in short chases, and that available evidence supports a finding that such stress could result in delayed mortality. *Id.* at *31-32. Third, the court opinion highlights the problems with under-reporting of dolphin mortality, either because the death was not observed, or because the observer failed to properly report the dolphin death. *Id.* at *35. From 1993 to 2001, for instance, there were “3,193 reported uses of illegal explosives, 484 reports of night sets, and 94 reports of interference with observers.” *Id.* at *33 (compiled from IRP annual reports). These incidents underscore why reported bycatch figures are likely understated.

⁸ For further background, please see *The Dolphin Safe Label*, HSI Website, available at: http://www.hsus.org/hsi/policy_and_trade/treaties/the_dolphin_safe_label/.

⁹ See, e.g., Cramer, Perryman, Gerrodette, *Declines in reproductive output in two dolphin populations depleted by the yellowfin tuna purse-seine fishery*, Marine Ecology Progress Series, Vol. 369: 273–285, at 282, October 13, 2008 (“However, the effect of dolphin sets on both measures of reproduction for NEPS dolphins demonstrates that the practice of setting on dolphins has population-level effects beyond the direct kill recorded by observers on fishing vessels. The decline in proportion with calves and increased length at disassociation with number of dolphin sets could be caused by stress (Myrick & Perkins 1995, Curry 1999, Reilly et al. 2005), increased predation

recovered from the unsustainable fishing methods used in earlier years.¹⁰ Thus, simply because a dolphin is not dead or severely injured upon observer inspection does not mean that the dolphin and its potential offspring will not suffer thereafter, with consequences for the dolphin populations as a whole.

While the levels of dolphin mortality have lessened under the AIDCP standard, that standard is still wholly insufficient to protect these animals. Indeed, dolphins continue to die needlessly in the ETP under the AIDCP because fishing vessels from countries such as Mexico are still setting nets on dolphins. “Reported” dolphin mortality in the ETP in 2008, for example, was over one thousand dolphins in a single year.¹¹ Actual dolphin mortality in 2008 was likely significantly larger due to a number of factors discussed above, including observer error and failure to report. Millions more dolphins are chased, traumatized and injured by encirclement each year.¹²

For these reasons, it is imperative that the U.S. not weaken its label despite Mexico’s claims that U.S. laws and regulations are inconsistent with the WTO. Mexico’s allegations are misplaced. This is not a case about trade barriers, but rather consumer choice. The U.S. label is a voluntary mechanism that countries can opt to abide by, or not. There is nothing stopping Mexico or any other country from exporting tuna to the U.S. Indeed, since 1990, the year the U.S. Dolphin-Safe label went into effect, Mexican exports of tuna have totaled approximately \$180 million according to statistics from the National Marine Fisheries Service (NMFS).¹³ In 2008 alone, Mexico exported nearly \$14 million in tuna to the U.S. If Mexican companies wish to gain a bigger share of the U.S. market by complying with the requirements for a “Dolphin Safe” label, they are welcome to do so in the same way that hundreds of other companies from around the world, like StarKist, Bumblebee and Chicken of the Sea, have abandoned dolphin deadly fishing methods to respond to consumer demand for dolphin safe tuna.¹⁴

Our organization urges USTR to vigorously defend against Mexico’s unfounded challenge at the WTO to protect consumer choice and the thousands of dolphins whose lives and well-beings depend on dolphin safe fishing methods.

(Perryman & Foster 1980), separation of mothers and calves (Archer et al. 2001, Weihs 2004, Edwards 2006), or induced abortion (Perrin et al. 2003, Chivers unpubl. data) resulting from the chase and encirclement procedure.”)

¹⁰ See, e.g., Cramer, Perryman, Gerrodette, *Declines in reproductive output in two dolphin populations depleted by the yellowfin tuna purse-seine fishery* at 282 (“Assessment models (Wade et al. 2007) estimate that NEPS dolphins are at 19% and ES dolphins at 29% of their pre-1959 abundance levels, the year that the yellowfin tuna purse-seine fishery began setting on dolphin schools. Given these reduced population sizes and the current low level of reported dolphin bycatch, recovery of both populations would be expected, but has not yet occurred (Gerrodette & Forcada 2005).”)

¹¹ See *Annual AIDCP Report* (2008), attached hereto as Exhibit I.

¹² See *Report of the Scientific Research Program under the International Dolphin Conservation Program Act*, Prepared by the Southwest Fisheries Science Center NOAA Fisheries National Oceanic and Atmospheric Administration, at 6- 7 (September 17, 2002).

¹³ See *National Marine Fisheries Service, Fisheries Statistics and Economics Division*, Imports of Tuna from 1989-year to date 2009, attached hereto as Exhibit II.

¹⁴ See Earth Island Institute, List of Approved “Dolphin Safe” companies, *available at*: <http://www.earthisland.org/dolphinSafeTuna/DolphinSafeCanners.html>.

We can provide additional information as needed.

Sincerely,

A handwritten signature in cursive script that reads "Marta Prado".

Marta Prado
Executive Director, International Trade and Development

CC: Daniel Brinza, Assistant USTR for Monitoring and Enforcement
Amy Karpel, Associate General Counsel
Mark Linscott, Assistant USTR for Environment and Natural Resources
Alice Mattice, Director for Trade and Environment Policy Planning