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

Recourse by the United States to Article 22.6 of the DSU

(DS381)

Closing Oral Statement of
the United States of America

October 26, 2016

1. Mr. Chairman, members of the Arbitrator, Secretariat staff, and interpreters, thank you for your work in this meeting.

2. We have already explained in some detail why the United States has demonstrated that the requested level of nullification or impairment is not WTO consistent, and we will not repeat these points here. Instead, we will make three brief points.

3. First, the arbitrator is faced with a relatively novel set of issues here for a trade dispute. In past arbitrations, the focus on the measure is not regarding the retail sale of a product, where the decisions of individual consumers are directly at issue. In fact, this is the first time that we are aware of that an arbitrator would analyze a consumer choice model as a version of a partial equilibrium model. In light of these issues, it is necessary to recognize that the U.S. market includes the U.S. consumer preferences and decisions of purchasers and other entities in the market that have driven not only the creation of the measure itself, but the continuing impact of that measure in the U.S. market. Accordingly, any determination of the level of nullification or impairment needs to take these market factors into account.

4. Retailers acknowledge that U.S. law does not prohibit them from purchasing Mexican tuna product. But they do not do so anyway. Either because selling such tuna product is not in accordance with the company's own environmental standards, or selling such tuna product is not in accordance with their consumer's preferences. There is no evidence that they will change these long held business practices – or U.S. consumers will change their long held preferences – if the measure is withdrawn.

5. Second, this proceeding is not about the opportunity to advertise the benefits of setting on dolphins consistent with the AIDCP. This proceeding is to determine what level of concessions Mexico should be authorized with respect to U.S. exports as a result of what is a genuine environmental measure. And Mexico's proposed level of close to half a billion dollars annually for a measure that does not require the label to be affixed in order for tuna product to be sold, and for a market in which there is very limited demand for Mexico's product, is simply not reasonable.

6. The truth of the matter is that setting on dolphins is very dangerous for dolphins, a point that previous panels have found. And Mexico has decided, for its own economic reasons, to rely – to a unique extent – on this particular fishing method. But whatever the reasons that Mexico has decided to harvest tuna by chasing and capturing dolphins, those reasons are not to protect dolphins. That is the objective of the measure and Mexico's fishing method runs contrary to that objective.

7. And the DSB recommendations and rulings in this dispute have affirmed that protecting dolphins is a legitimate objective for the measure.

8. Further, as we mentioned yesterday, this is only a labeling measure. Mexico is free to try to persuade U.S. consumers of the supposed benefits of setting on dolphins, and Mexico is free to truthfully advertise its product however it wants. It simply cannot label tuna caught by setting on dolphins as dolphin safe. As a matter of fact, Mexico has not tried to persuade U.S. consumers that its product is superior, and U.S. consumers are not persuaded.

9. Finally, when assessing which party has put forward the best approach for estimating nullification or impairment, we would encourage the Arbitrator to look at the broader picture here. The United States approach predicts a scenario whereby Mexican exports of canned tuna to the United States increase to a degree that is reasonable in light of Mexico's status in the global tuna product market, Mexico's share of other major seafood imports to the United States, and U.S. consumer preferences. Not surprisingly, the U.S. model predicts that Mexican exports will be, as a share of U.S. imports, approximately what they were when access to the U.S. market is unrestricted and approximately what Mexico's import shares of other comparable seafood products are.

10. In contrast, Mexico's model predicts a 2,056% increase in exports, and will have its imports take a market share that is 53 percent of all U.S. imports of canned tuna. This is an unreasonable result. It runs contrary to Mexico's share of U.S. imports historically, and is over 10 times as large as Mexico's import share of any of the top 20 U.S. seafood imports. It is wholly disproportionate to Mexico's share of the global tuna industry and Mexico's demonstrated ability to compete against the top Asian and Ecuadorian producers in the U.S. market, the EU market, and other markets.

11. Here, as past arbitrators have recognized, the analysis is about what would happen in reality with respect to trade between WTO Members. It is not about wishful thinking, although wishful thinking appears to be at the very base of Mexico's approach. This includes the wishful thinking that other tuna suppliers would not respond to market forces in the way that any trading partners would be expected to respond. Instead, Mexico asks the Arbitrator to proceed as though no other suppliers would compete in the U.S. market for any increase in demand resulting from the withdrawal of the dolphin safe labeling measure. Mexico has been trying to erase the distinction between setting on dolphins and not setting on dolphins throughout this dispute. But the simple matter of fact that this is not a dolphin safe fishing method, and the DSB recommendations and rulings reflect this.

12. Thank you.