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

Recourse to Article 21.5 of the DSU by the United States
Second Recourse to Article 21.5 of the DSU by Mexico

(DS381)

Closing Oral Statement of the United States of America

January 25, 2017

1. On behalf of the United States, we would like to thank the panel members and the Secretariat for their ongoing work in this proceeding. We would also like to thank the interpreters for their work during this meeting.

2. Following the original proceedings in this dispute, the United States took careful note of the findings adopted by the DSB, and the United States revised the measure to directly respond to those findings. The United States appreciates the first compliance panel's recognition that the United States had done so.

3. Following that proceeding, the United States again revised its measure to directly respond to those new findings, which concerned the determination provisions of the measure. The United States trusts that the Panels will also recognize that the United States has directly addressed those findings.

4. Mexico focuses instead on other aspects of the measure, aspects which have been examined previously but have never resulted in DSB findings of a breach of U.S. WTO obligations. This is now the second set of compliance proceedings. The issues should be getting narrower, but Mexico continues to seek to re-open factual issues it has already lost in DSU Article 11 appeals or argue for new legal analyses that are not reflected in the DSB recommendations.

5. Throughout this dispute Mexico has sought to re-formulate the U.S. measure and then to argue that the measure, as Mexico has formulated it, is WTO inconsistent.

6. But these proceedings are not about some hypothetical measure formulated by Mexico. These proceedings are about the actual U.S. measure. And that actual measure is not about

sustainability, but about saving individual dolphins from harm. And that is done through a labeling standard.

7. It is helpful to take a step back and consider what that means. By definition, a product standard works so that some products meet it and others are excluded. There is nothing new or surprising about that.

8. Mexico tries to argue that the labeling requirements should be revised here or tweaked there. But one can always argue that the lines drawn by a standard should be slightly different. That does not make the standard discriminatory.

9. Mexico continues to fundamentally misunderstand the U.S. measure. Mexico approaches it as though it is a measure about whether harvesting tuna has ever been associated with harms to dolphins. For example, Mexico argues that a fishing method should be ineligible for the label if dolphins were ever harmed in the use of that method.

10. Similarly, Mexico argues that there could have been some unobserved harm to dolphins at some point in the use of some fishing methods, implying that those fishing methods should be ineligible for the label. Mexico's argument about using a PBR metric similarly is based on a different objective from the actual objectives of the measure.

11. But that is not what the measure is about. The measure is about labeling particular cans of tuna in terms of whether dolphins were actually harmed when catching that tuna. It is not about more general population effects on dolphins from tuna fishing operations.

12. Mexico's approach is to speak in broad terms and generalities and supposition. But the

U.S. measure is based on specific evidence that relates to the real world and particular fisheries.

13. Examining that evidence shows that the regulatory distinctions flow from the real differences in the risks posed in particular fisheries to dolphins.

14. We would further note that the measure is designed and applied to produce accurate labels through its eligibility criteria, certification requirements, and tracking and verification requirements. And Mexico has introduced no evidence that proves that the NOAA regime produces less accurate labels than the AIDCP regime.

15. Overall, it is important not to lose sight of the issue of regulatory space that the EU raised this morning. Again, this is not, ultimately, a hyper-technical analysis trying to determine whether the measure has small faults. Members have more leeway that that, surely.

16. Rather, as the EU correctly noted, the comparison being made in the calibration analysis is whether there is a "broad correspondence" between the measure and the risk. And this is entirely consistent with the Appellate Body's own approach. As we have noted, the Appellate Body has indicated that simply because a particular regulatory distinction is not tailored to the risk – and therefore results in arbitrary or unjustifiable discrimination – does not mean that the measure itself is not calibrated to the risk. Rather, the ultimate determination as to consistency should be based on a "comprehensive" analysis that "reconcil[es]" any different intermediate conclusions that may be drawn as to particular regulatory distinctions.[1]

[1] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.335.

17. Again, this does not appear to be such a different analysis than what the minority panelist called for when the panelist stated that the question is whether the measure reflects a "fair response" to the evidence. We consider that the U.S. measure is such a "fair response."

18. Thank you.