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)

Comments of the United States on Mexico's Responses to the U.S. Preliminary Ruling Request and to the Arbitrator's Questions on the U.S. Preliminary Ruling Request

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EC – Bananas III (Ecuador) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000
EC – Bananas III (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999
US – 1916 Act (EC) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Anti-Dumping Act of 1916 – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004
US – FSC (Article 22.6 – US)	Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002
US – Upland Cotton (Article 22.6 – US I)	Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement, WT/DS267/ARB/1, 31 August 2009
US – Offset Act (Byrd Amendment) (Mexico) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Mexico – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS234/ARB/MEX, 31 August 2004

Introduction

1. In response to the recommendations and rulings that the Dispute Settlement Body ("DSB") adopted on December 3, 2015, the United States promptly amended the U.S. dolphin safe labeling regulations to bring them into compliance. The United States adopted the 2016 Interim Final Rule ("2016 IFR") on March 22, 2016, thereby amending the U.S. dolphin safe labeling measure. As the United States has explained,[1] the new rule directly responds to the concerns of the Appellate Body in its report under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. There is no dispute between the parties that the U.S. dolphin safe labeling measure that was the subject of the December 2015 DSB recommendations and rulings has been amended. Nor is there any dispute between the parties that the 2016 IFR is a measure taken to comply. There does not even appear to be any disagreement that the measure that was in effect on the day that the matter under Article 22 of the DSU was referred to the Arbitrator was the U.S. dolphin safe labeling measure as amended by the 2016 IFR, and that the measure in effect was no longer the measure that had been the subject of the December 2015 DSB recommendations and rulings.

3. Yet Mexico urges the Arbitrator to ignore these simple facts. Mexico urges the Arbitrator to disregard the measure that was in effect when the matter was referred to the Arbitrator. Instead, Mexico asks the Arbitrator to proceed as though the earlier measure remains in effect and unamended.

4. Mexico's proposed approach is incorrect. It has no support in the text of the covered agreements, is contrary to the interpretations of past arbitrators, and is unlikely to be the approach that Mexico would consider correct were the facts varied slightly.

5. In this submission, the United States responds both to Mexico's response in its Written Submission to the U.S. request for a preliminary ruling and to Mexico's responses to the questions from the Arbitrator concerning the U.S. request for a preliminary ruling.

6. Mexico's responses are based on numerous mischaracterizations and fallacies and contain a number of contradictions.

Mexico Fallacy 1: Arbitrators Have Only One Choice for the Measure to Evaluate

7. Mexico argues that an arbitrator under Article 22.6 of the DSU is never to identify the measure to be used in evaluating the level of nullification and impairment. Instead, arbitrators have a "strict limit" that requires them to look only at a measure that was taken by the end of the reasonable period of time ("RPT") determined under Article 21.3 of the DSU and subject to DSB recommendations and rulings under Article 21.5 of the DSU.[2]

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[1] U.S. First Written Submission, *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* (DS381).

[2] *See, e.g.,* Mexico Written Submission, para. 23, Mexico Responses to Arbitrator Questions, paras. 29, 58. However, Mexico appears to take a contradictory position elsewhere in its responses and argues that "the matter 'at

8. Mexico appears to base its position on a formulation it uses repeatedly in its responses – that the Arbitrator is to determine "the level of nullification and impairment sustained by Mexico as a result of the United States' failure to bring the tuna measure into compliance before the end of the RPT."[3] Yet Mexico never explains the basis for this limitation. It is striking that Mexico does not attempt to justify its proposed approach by referring to the agreed text. Presumably this is because nothing in the text of the DSU supports Mexico's approach. In fact, as the United States has explained, the text of the DSU demonstrates that Mexico's approach is contrary to the DSU. The DSU provides that the level of nullification or impairment is the level attributable to the currently existing measure.

Mexico Fallacy 2: Past Arbitrators Support Mexico's Proposed Approach

9. Instead of relying on the text of the DSU, Mexico relies on past arbitration decisions as support for its approach, arguing that "arbitrators in previous arbitrations have chosen the end of the RPT for implementation of a measure taken to comply as the relevant period of reference. Therefore, the appropriate focus for the purposes of conducting the Article 22.6 assessment in this arbitration is the level of the nullification or impairment caused by the 2013 tuna measure following the expiry of the RPT on July 13, 2013."[4] But Mexico's reliance is misplaced.

10. The arbitrator decisions on which Mexico relies were not determining the period of time to examine to determine the relevant measure, but rather were examining what period of time to use in reviewing trade data.

11. In none of the arbitrator decisions cited by Mexico was the arbitrator confronted with a choice between a measure taken before the end of the RPT and a measure taken subsequent to the RPT and deciding to choose the measure taken before the end of the RPT. Nor were any of these arbitrators examining a situation where the measure had been amended prior to referral of the matter to arbitration but nonetheless conducted its evaluation based only on the previous, unamended measure. In short, none of these decisions supports Mexico's position.

12. To the contrary, past arbitrators have rejected Mexico's interpretation. For example, Mexico cites to *US – FSC* as part of its argument, but fails to reference the fact that the arbitrator

issue' in an Article 22.6 arbitration is whether the suspension of benefits proposed by the complaining Member is equivalent to the level of the nullification or impairment sustained by that Member as a result of the responding Member's failure to bring the measure that has already been determined to be WTO-inconsistent into compliance with the DSB's recommendations and rulings within the RPT." (Mexico Responses to Arbitrator Questions, para. 30 (emphasis in original).) This appears to be a reference to the measure that was the subject of DSB recommendations and rulings in the original proceedings, not the Article 21.5 proceedings.

[3] *See, e.g.,* Mexico Written Submission, para. 42.

[4] Mexico Responses to Arbitrator Questions, para. 14.

in *US – FSC* actually explained that the relevant measure for purposes of that arbitration was the ETI Act, a measure taken after the end of the RPT.[5]

13. Similarly, in *EC – Bananas III (Ecuador)*, the arbitrator found that the basis for the assessment of the level of nullification or impairment was a measure adopted after the end of the RPT.[6]

14. Even more telling is the decision of the arbitrator in *US – Upland Cotton (Article 22.6 – US I)*. There, the arbitrator explained that one of the measures found to be inconsistent in the DSB recommendations and rulings was unchanged by the expiry of the RPT and at the time the matter was referred to arbitration. However, the measure was subsequently repealed, prior to the issuance of the arbitrator's decision. In that case, the arbitrator explained that the complaining Member was "therefore seeking an authorization to take countermeasures by reason of a past period of non-compliance, on the basis of a past measure which has been repealed, and not in relation to a continuing period of non-compliance that would still be in existence today."[7] The arbitrator rejected the complaining Member's request.

15. Mexico asserts that "the reasoning and findings" of the arbitrator in *US – Upland Cotton (Article 22.6 – US I)* "have no application to this arbitration."[8] However, this is incorrect. There are direct parallels between elements of the situation in *US – Upland Cotton (Article 22.6 – US I)* and the current proceeding. The measure that was the subject of the December 2015 DSB recommendations and rulings no longer exists – it has been amended. Yet Mexico seeks an authorization to suspend concessions on the basis of a past measure that no longer exists and not in relation to the situation in existence today.

Mexico Fallacy 3: Suspension of Concessions is Retroactive in Nature

16. Mexico argues that "the issue before the Arbitrator" is "the *quantum* of the countermeasures that Mexico is entitled to implement based on the level of the nullification and impairment caused by the WTO-inconsistent tuna measure since the end of the RPT."[9] This is not correct.

17. By stating that it is seeking a level that includes nullification and impairment "since the end of the RPT," which was July 13, 2013, Mexico appears to be seeking a retroactive remedy. But that is not the nature of Article 22 of the DSU. Nothing in Article 22 provides for a retroactive remedy. Indeed, the arbitrator in *US – Upland Cotton (Article 22.6 – US I)* rejected a similar request for an amount covering a prior period.

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[5] *US – FSC (Article 22.6 – US)*, paras. 2.12-2.13.

[6] *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 14.

[7] *US – Upland Cotton (Article 22.6 – US I)*, para. 3.49.

[8] Mexico Responses to Arbitrator Questions, para. 19.

[9] Mexico Written Submission, para. 38 (underlining added).

18. The fact that the remedy under Article 22 is prospective in nature rather than retroactive is affirmed by the approach taken by past arbitrators. A number of arbitrators have based their decisions on the situation going forward rather than a retroactive application. For example, the *US – Upland Cotton (Article 22.6 – US I)* arbitrator's decision used a formula to vary the level of suspension of concessions in the future from year to year. Similarly, the arbitrator in *US – Offset Act (Byrd Amendment)* used a prospective formula. And the decision by the arbitrator in *US – 1916 Act* was framed in terms of future events.

19. These arbitration decisions also demonstrate that the level of nullification or impairment is not a fixed amount based on a snapshot taken at the end of the RPT, regardless of any intervening developments. Again, this is directly contrary to the approach urged by Mexico.

Mexico Fallacy 4: Refusing to Take Into Account a Measure Taken to Comply Is Needed to Render Article 22 Effective

20. Mexico makes the rather surprising argument that it would undermine the effectiveness of Article 22 if an arbitrator were to take into account a measure taken to comply by a Member concerned. Mexico's approach would appear to stand Article 22 on its head. According to Mexico's approach, Article 22 should be interpreted to discourage a Member concerned from taking measures to comply in response to DSB recommendations and rulings. A Member concerned should not receive any credit in an arbitration for taking a measure to comply, but instead the decision of the arbitrator should be based on an earlier, unmodified, version of the measure.

21. Far from rendering Article 22 ineffective, proceedings where the efforts of a Member concerned to bring its measure into compliance are recognized and reflected in the arbitrator's decision are in keeping with one of the main purposes of Article 22.

22. As the arbitrator in *US – 1916 Act* explained, "a fundamental objective of the suspension of obligations is to induce compliance."[10]

23. Here, the United States engaged seriously with the DSB recommendations and rulings, and responded by promptly taking a measure to comply. But Mexico proposes an approach that would indicate that efforts to come into compliance are not to be recognized or taken into account. Mexico's proposed approach would undermine rather than support a fundamental objective of the suspension of concessions.

Mexico Fallacy 5: Article 22 Is Punitive in Nature

24. In its responses, Mexico complains of the length of time of the proceedings and asserts that "no injustice or prejudice can be said to result if the United States must face the suspension

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[10] *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.7. *See also*, *US – Upland Cotton (Article 22.6 – US I)*, para. 3.43, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

of concessions and other obligations pursuant to Article 22 while the parties await the resolution of the second compliance proceedings."[11] This appears to reflect a desire of Mexico to utilize Article 22 in a punitive fashion.

25. However, past arbitrators have explained that this is incorrect – Article 22 is not punitive in nature. For instance, the arbitrator in *US – 1916 Act* found that "the critically important point that the concept of 'equivalence', as embodied in Article 22.4, means that obligations cannot be suspended in a punitive manner. This means that in suspending certain obligations owed to the United States under the GATT and the Anti-Dumping Agreement, the European Communities cannot exceed the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act."[12]

26. Similarly, the *EC – Bananas III (US)* arbitrator found that the DSB is not to grant authorization beyond what is equivalent to the level of nullification or impairment. "In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature."[13]

27. Yet Mexico seeks authorization to suspend concessions regardless of the current level of nullification or impairment, and based only on a past measure no longer in existence. Mexico seeks a level of suspension of concessions that Mexico itself acknowledges the compliance proceedings could prove is excessive.[14] Mexico's proposed approach would be punitive and is inconsistent with the DSU.

28. Nowhere in its submissions does Mexico acknowledge the simple fact that under Article 22 of the DSU, the mandate of an arbitrator is to determine if the level of suspension sought is equivalent to the level of nullification and impairment, and the DSB is barred from authorizing a level of suspension beyond what is equivalent to the level of nullification or impairment. To the contrary, Mexico explicitly contemplates a scenario in which the DSB grants an authorization that may be inconsistent with the DSU and Mexico would have been acting inconsistently with the DSU for some period of time.[15]

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[11] Mexico Responses to Arbitrator Questions, para. 38. At one point Mexico even appears to attempt to argue that it already has the "right" to suspend concessions, even though there is no DSB authorization ("Mexico's right to suspend concessions or other obligations was triggered when the United States failed to bring its WTO-inconsistent measure into compliance with the DSB's recommendations and rulings before the end of the RPT on 13 July 2013." Mexico's Responses to Arbitrator Questions, para. 22.)

[12] *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.8.

[13] *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

[14] *See, e.g.,* Mexico's Responses to Arbitrator Questions, para. 34. Mexico appears to assert that there are only two possible outcomes from compliance proceedings, but, as explained below, this is not accurate.

[15] Mexico's Responses to Arbitrator Questions, para. 35: "Mexico would no longer be authorized to suspend concessions or other obligations pursuant to Article 22 in the event that the second compliance proceedings were to result in a DSB ruling pursuant to Article 21.5 that the 2016 Interim Final Rule has brought the U.S. tuna measure into compliance with the United States' WTO obligations."

29. Nor does Mexico acknowledge the simple fact that once the DSB has granted authorization for a particular level of suspension, there is no mechanism to modify that level in light of the results of the compliance proceedings.

30. Mexico simply seeks to have the DSB authorize a level of suspension of concessions regardless of the status of the consistency of the U.S. dolphin safe labeling measure and regardless of the requirements of the DSU.

Mexico Fallacy 6: The Point in Time at the End of the RPT Is the Most Accurate Measurement of the Level of Nullification or Impairment

31. Central to Mexico's proposed approach is the concept that the most accurate point in time for purposes of assessing the level of nullification and impairment is the snapshot at the expiry of the RPT. Mexico does not explain the basis for its position and does not examine any alternatives.

32. Yet it is easy enough to see that this is too rigid and would not permit arbitrators to take into account subsequent, relevant developments. Past arbitrators have already rejected Mexico's proposed approach. For example, in *US – FSC*, the arbitrator explained that it needed to take into account the fact that a measure adopted after the expiry of the RPT, the ETI Act, expanded the product coverage of the previous measure.[16] Under Mexico's proposed approach, however, the grant of authorization to the complaining Member could not take this into account.

33. Similarly, Article 21.5 of the DSU provides for two prongs of analysis: (1) the existence of a measure taken to comply, and (2) the consistency of a measure taken to comply with the covered agreements. While this is not the case in this dispute, the second prong makes it clear that as a general matter compliance proceedings could find there are new, additional inconsistencies and therefore potentially additional levels of nullification or impairment. Mexico's proposed approach would mean that a complaining Member would be barred from having an arbitrator take those into account, and thus the level of authorization would not be equivalent to the level of nullification or impairment.

34. Mexico refers frequently to alleged systemic concerns in relation to its proposed approach,[17] yet fails to take into account the very real systemic concerns raised by its proposed approach. It would be surprising if, in an arbitration involving slightly different scenarios, Mexico would urge an arbitrator to follow the approach that Mexico proposes in this proceeding.

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[16] *US – FSC (Article 22.6 – US)*, para. 2.14(b)(iii).

[17] *See, e.g.,* Mexico Responses to Arbitrator Questions, para. 50.

Mexico Fallacy 7: The 2016 IFR Was Not Adopted Before the Matter Was Referred to Arbitration

35. In its responses, Mexico appears to express somewhat conflicting views on the chronology of the 2016 IFR and the referral of the matter to arbitration. At one point, Mexico states: "It is therefore factually incorrect that the 2016 tuna measure was "adopted" or came into force, partially or otherwise, before the United States objected to Mexico's Article 22.2 request and referred the matter to Article 22.6 arbitration."[18] Elsewhere Mexico acknowledges that the 2016 IFR was adopted on the same day the matter was referred to arbitration.[19]

36. Mexico also seems to attach some "procedural" significance to the fact that the 2016 IFR was made effective the day before it was published in the Federal Register, although Mexico never explains what significance this has or why. And Mexico alleges that the 2016 IFR was not made public until March 22, 2016.[20]

37. Mexico however is in error regarding the chronology of events. Under the U.S. domestic legal system, the 2016 IFR was made public and effective by 8:45 am local time on March 22, 2016.[21] Subsequently the United States objected to Mexico's request for authorization, thereby referring the matter to arbitration.

38. As a result, the U.S. dolphin safe labeling measure was amended prior to the referral of the matter to arbitration. Mexico seeks to attach significance to the fact that some of the requirements in the 2016 IFR took effect on May 21, 2016. However, this does not alter the fact that the measure was adopted ("taken") on March 22, 2016 and is in place – no further legal action is required – and has amended the U.S. dolphin safe labeling measure.

Additional Fallacies and Errors

39. Above, the United States has focused on key fallacies in Mexico's responses, and these are sufficient to demonstrate that Mexico's proposed approach is in error and the U.S. request for a preliminary ruling should be granted. The United States has not attempted to address all of the numerous fallacies and errors in Mexico's responses. For example, Mexico refers to so-called "sequencing agreements" without acknowledging that these are not covered agreements and are negotiated among Members for their own purposes.

[18] Mexico Responses to Arbitrator Questions, para. 27.

[19] Mexico Responses to Arbitrator Questions, paras. 51 and 59.

[20] Mexico Responses to Arbitrator Questions, para. 59.

[21] *See*, Federal Register March 22, 2016 Public Inspection Issue and "Understanding Public Inspection," (also found at https://www.federalregister.gov/public-inspection/2016/03/22#regular-filing-national-oceanic-and-atmospheric-administration and https://www.federalregister.gov/reader-aids/using-federalregister-gov/understanding-public-inspection). Exhibit US-83.

40. Mexico goes so far as to assert that the "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding" ("Agreed Procedures") between the United States and Mexico[22] "modified" the "provisions of the DSU." This is of course not accurate. The parties to a dispute cannot "modify" the DSU. The DSU can be amended only by consensus of the Members.

41. Furthermore, Mexico's concerns regarding the Agreed Procedures are misplaced. The Agreed Procedures already recognized that they only covered certain procedural issues and contemplated that there would be procedural issues not properly addressed by them. This is why the United States promptly sought consultations with Mexico under paragraph 10 of the Agreed Procedures to address the procedural issues associated with the 2016 IFR.

42. Mexico also mischaracterizes the U.S. preliminary ruling request. Mexico erroneously states it is "the U.S. request to suspend the Article 22.6 proceedings."[23] That is not the nature of the U.S. request. Instead, the United States was clear in its Written Submission: the United States "respectfully requests the Arbitrator to render a preliminary ruling that the measure at issue for purposes of this proceeding is the tuna measure as amended by the 2016 IFR."[24]

43. Mexico rather startlingly also asserts that the tracking and verification elements of the 2016 IFR are "the most relevant aspects of the 2016 tuna measure." Mexico does not explain how the aspects of the 2016 IFR that directly address the December 2015 DSB recommendations and rulings are not "the most relevant aspects" of the 2016 IFR. Nor does Mexico explain why the tracking and verification elements of the 2016 IFR are relevant even while Mexico concedes the absence of any DSB recommendations and rulings addressing these elements of the U.S. measure.

44. Similarly, Mexico alleges that "the issue of whether the United States has brought the tuna measure's eligibility criteria, certification requirements, and tracking and verification requirements into compliance with the DSB's recommendations and rulings remains unresolved."[25] Mexico has no basis for this rather remarkable assertion. There are no DSB recommendations and rulings that the eligibility criteria, certification requirements, or tracking and verification requirements are inconsistent with U.S. WTO obligations.

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[22] WT/DS381/19.

[23] Presumably on the basis of this mischaracterization, Mexico asserts that other Members "support Mexico's position" in this arbitration. (Mexico Written Submission, para. 29). However, this is an inaccurate portrayal of those Members' remarks. It is clear that those Members were not addressing the issues involved in the U.S. preliminary ruling request. Indeed, a number of them supported the concept of the Article 22.6 and Article 21.5 proceedings moving forward "in parallel" which is consistent with the fact that the determination of the level of nullification and impairment needs to take into account the results of the compliance proceedings under Article 21.5 of the DSU.

[24] U.S. Written Submission, para. 50.

[25] Mexico Written Submission, para. 39.

Conclusion

45. In this proceeding, the Arbitrator is to determine if the level of suspension of concessions or other obligations requested by Mexico is equivalent to the level of nullification and impairment of benefits accruing to Mexico as a result of the U.S. dolphin safe labeling measure. The United States took a measure to comply – the 2016 IFR – that amended the U.S. dolphin safe labeling measure. The previous measure no longer exists, but has been amended. As a result, the measure to be evaluated is the current, existing measure, which includes the amendments made by the 2016 IFR.

46. Mexico's responses continue to seek to have the Arbitrator evaluate a prior measure, no longer in existence, and decide on a level of suspension of concessions that even Mexico concedes would not be equivalent to the level of nullification or impairment. Mexico's proposed approach is inconsistent with the DSU, would have the DSB take action directly contrary to the DSU, and raises a number of serious systemic problems.

47. Accordingly, the United States respectfully maintains its request that the Arbitrator render a preliminary ruling that the measure at issue for purposes of this proceeding is the tuna measure as amended by the 2016 IFR.